ABBREVIATIONS EXPLAINED.

REPORTS.

A.	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	Allahabad Law Journal.
A. W. N.	...	Allahabad Weekly Notes.
B.	...	Indian Law Reports, Bombay Series.
B. H. C.	...	Bombay High Court Reports.
B. L. R.	...	Bengal Law Reports.
Bom. L. R.	...	Bombay Law Reporter.
Bur L. R.	...	Burma Law Reports.
C.	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	Calcutta Law Journal.
C. L. R.	...	Calcutta Law Reports.
C. W. N.	...	Calcutta Weekly Notes.
C. P. L. R.	...	Central Provinces Law Reports.
Cor.	...	Coryton's Reports.
I. A.	...	Law Reports, Indian Appeals.
Ind. Cas.	...	Indian Cases.
L. B. R.	...	Lower Burma Rulings.
M.	...	Indian Law Reports, Madras Series.
M. H. C.	...	Madras High Court Reports.
M. L. J.	...	Madras Law Journal.
M. L. T.	...	Madras Law Times.
M. W. N.	...	Madras Weekly Notes.
Marsh.	...	Marshall's Reports.
M. I. A.	...	Moore's Indian Appeals.
Moo. P. C. C.	...	Moore's Privy Council Cases.
N. L. R.	...	Nagpur Law Reports.
N. W. P. H.C.	...	North-West Provinces High Court Reports.
O. C.	...	Oudh Cases.
P. R.	...	Punjab Record.
P. L. R.	...	Punjab Law Reporter.
P. W. R.	...	Punjab Weekly Reporter.
S. L. R.	...	Sind Law Reporter.
U. B. R.	...	Upper Burma Rulings.
W. R.	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	Applied.
Appr.	...	Approved.
Cons.	...	Considered.
D. or Distd.	...	Distinguished.
Disc.	...	Discussed.
Diss.	...	Dissented from.
Exp.	...	Explained.
F.	...	Followed.
(F.B.)	...	Full Bench.
Obs.	...	Observed on.
(P.C.)	...	Privy Council.
R. or Reld.	...	Referred to.
Rel. on.	...	Relied on.
(S.B.)	...	Special Bench.

N.B.—I njab Record and the Punjab Law Reporter, the Cases are known by their numbers an y the pages where they are printed ; (*e.g.*) 4 P.R. 1910 would mean Case No. 4, in the Record of 1910. The same explanation applies to the Punjab Law Reporter also. *It ha* e remarked that the Punjab Record and the Punjab Law Reporter have been divided sections, Civil and Criminal.

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S. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir)

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SECTION II.—CIVIL.—VOL. II.

Appeal to Privy Council.

1.—GENERAL.

2.—CASES WHERE APPEALS LIE OR NOT.

3.—PRACTICE AND PROCEDURE.

4.—STAY OF EXECUTION PENDING APPEAL.

5.—MISCELLANEOUS.

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 109 to 112 and O. XLV.

See PRIVY COUNCIL, PRACTICE OF.

——1.—General.

(1)—*Civ. Pro. Code, ss. 596, 598, 599—Appeal to Privy Council—Requirements of law, re-admission of.*—The admission of an appeal to the Privy Council is not a matter as to which the High Court has any discretion, provided the requirements of the law are satisfied. If they are satisfied, an appeal lies under s. 596 as a matter of right. The application for a certificate that these requirements are satisfied is merely preliminary and ancillary to the admission of the appeal. THURAI RAJAH v. JAINILABDEEN ROWTHAN, **18 M. 484.** [*R.*, 3 C. W.N. 24.]

(2)—*Civ. Pro. Code, s. 596—Appeal to Privy Council—Grounds necessary for.*—The mere existence of a point of law cannot by itself be taken as sufficient for giving a right of appeal to the Privy Council in the ordinary course of procedure under the Code. Nor does the fact of the respondent having consented to the issue of a certificate under s. 600 give validity to it in the absence of the necessary requirements for a right to prefer such an appeal. S. 596 of the Code requires that, in order to give such

a right, there must be in dispute, either directly or indirectly, an amount of Rs. 10,000. If the decree affirms the Court below, another condition is affixed, *viz.*, that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the above mark; the requirement of it restricts the right when the higher decree affirms the lower. Under the provisions in ss. 595 and 600 of the Code, an appeal may, however, be granted by the High Court certifying that the case is fit for appeal "otherwise," *i.e.*, when not meeting the conditions of s. 596. These provisions are intended to meet special cases; and to certify that the case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate. BANARSI PRASAD v. KASHI KRISHNA NARAIN, **23 A. 227=28 I.A. 11, P.C.=5 C.W.N. 193.** [*Appr.*, 5 O.C. 168; *R.*, 23 A. 415, 24 A. 236=A.W.N. 1902, 46, 31 C. 305=8 C.W.N. 225.]

(3)—*Civ. Pro. Code, 1882, s. 596—Appeal, when lies to Privy Council.*—When there is no question of law, and when there are two concurrent findings of fact of the Courts below, the decree that was pronounced by the lower Court and affirmed by the High Court must be sustained, and no leave ought to be granted to appeal to the Privy Council. KARUPPANAN SERVAI v. SRINIVASAN CHETTI, **25 M. 215, P.C.=29 I.A. 28=6 C.W.N. 241.**

(4)—*Decree against absent defendant—Pleader having no instructions—Application under s. 108, Civ. Pro. Code, to set aside, dismissal of—High Court's order of remand under s. 562, whether appealable to Privy Council.*—On the

Appeal to Privy Council—continued.

—1.—General—*continued.*

adjourned date of the hearing of this suit, defendant was absent, and on his pleader informing the Court that "he had no instructions to proceed with the case," the Court went on, as in absence, heard evidence for the plaintiff, and gave him a decree for the claim. An application by the defendant to set aside the decree under s. 108 of the Civ. Pro. Code, was disallowed without opportunity given to him to satisfy the Court in terms of s. 108 that he was prevented by any sufficient cause from appearing at the hearing, the theory of the decision being that the applicant had in fact appeared so that the decree could not be regarded as having been passed *ex parte*. The order dismissing the above application was reversed on appeal by the High Court which *held* that the decree was an *ex parte* one and passed an order remanding the case for disposal on the merits. On this order of remand by the High Court being appealed against, the Judicial Committee *held* that the appeal was not maintainable, because there was no final order or decision of an ultimate Court of Appeal within the requirements of s. 595 (*a*) of the Civ. Pro. Code, and the mere fact that the High Court, apparently on the assumption that it was such an order, had certified the sufficiency of the amount and value of the suit, could not render appealable the order not fulfilling the statutory conditions for an appeal to the Privy Council. The Judicial Committee agreed with the High Court that the lower Court was in error in having disposed of the case without considering whether the defendant was prevented by sufficient cause from appearing at the adjourned hearing, and laid down that what was remanded by the order of the High Court was merely the application to set aside the decree, and that it was that application which the first Court should, under the remand, proceed to dispose of, by allowing the defendant to proceed to satisfy the Court of the conditions specified in s. 108, and, then, if that be done by setting aside the decree. RADHA KISHAN v. THE COLLECTOR OF JAUNPUR, **23 A. 220=28 I. A. 28=5 C.W N. 153, P.C.** [*Diss.*, 1 S.L.R. 115, 34 C. 403=11 C.W.N. 329=5 C.L.J. 247=2 M.L.T. 123; *D.*, 17 C.P.L.R. 1, 8 C.W N. 621.]

(5)—*Commission of enquiry re imputation against Native States—Appeal.*—Where a Commission is appointed by the Viceroy for the information of his own mind in order that he may not act in its political and sovereign character, otherwise than in accordance with the dictates of justice and equity, it is not a Court, and, even if it were, no appeal lies from it to His Majesty in Council. *In re the petition of* MAHARAJAH MADHAVA SINGH, **1 A.L.J. 691 P C.=32 C. 1=31 I.A. 239=8 C.W.N. 841=6 Bom. L.R. 768.**

(6)—*Value of suit for purpose of appeal to Her Majesty in Council—Certificate for leave to appeal to Her Majesty in Council—Question of misjoinder of parties and causes of action not sufficient ground for granting.*—The plaintiff instituted 19 suits of a cognate character against certain persons. The value of each suit was below Rs. 10,000, but the aggregate value of all was above that amount. One of these suits was decided against the plaintiff on the ground of multifariousness consisting in misjoinder of parties and causes of action. The plaintiff applied for leave to appeal to Her Majesty in Council. *Held*, that the decree in respect of which the certificate was prayed for did not involve directly or indirectly a claim to property of the value of Rs. 10,000, and that the question of misjoinder of parties and causes of action was not of such importance or difficulty as to justify the Court in certifying that the case was a fit one for appeal to Her Majesty in Council. ABU JAFAR v. PARBHU NATH, **1 O. C. Sup. Vol. 18.**

(7)—*Civ. Pro. Code, 1882, s. 595 (=s. 109, present Code)—Appeal to Privy Council, leave to—Order refusing to vary or discharge report of Registrar—Belchamber Rules and Orders, r. 617—Valuation of appeal in three similar but unconsolidated suits.*—Where a Court, under rr. 615 and 617 of Belchamber's Rules and Orders (2nd Edn.) merely refused to re-open a Registrar's report, *held*, such decision is not a final decree within the meaning of s. 595, Civ. Pro. Code, and it does not impose any peculiar liability on the applicant, and the power of interference given by r. 617 is discretionary and not compulsory. Where an application for leave to appeal to the Privy Council is made in three separate suits, which are not consolidated, though the question to be decided are the same in all of them, it is necessary to show that in each of these suits, the amount or value of the matter in dispute in the appeal to the Privy Council is Rs. 10,000 or upwards. THE ROYAL INSURANCE CO. v. AKHOY COOMAR DUTT, **6 C.W.N. 41.** [*R.*, 75 P.R. 1904=137 P.L R. 1904.]

(8)—*Case below appealable value in original Court—S. 596, Civ. Pro. Code, 1882 (=S. 110, Civ. Pro. Code, 1908), construction of—Special leave to appeal—Substantial question of law—Practice—Application for special leave to be first made to High Court—Civ. Pro. Code, 1882, s. 600 (=O. XLV, r. 3, Civ. Pro. Code, 1908)—Interest subsequent to decree—Value of subject-matter.*—Where the value of the subject-matter of the suit in the Court of first instance is below Rs. 10,000, the appealable value, the conditions prescribed by S. 596, Civ. Pro. Code, are not fulfilled and High Court cannot grant the certificate of leave The word 'and' in the first part of S. 596, Civ. Pro. Code, means 'and,' and not 'or.' [*R.*, 31 C. 305, 13 C. W.N. 1127.] The practice of the Judicial Committee is not to give special leave to appeal in cases which are not otherwise appealable, unless there is some substantial question of law of general interest involved. [*R.*, 10 O C. 308, 10 C.L.J. 336=4 Ind. Cas. 459.] Where

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——1.—General—*continued.*

a party in an Indian case comes for special leave to appeal, the case being under appealable value, and, therefore, not to appeal as of right, he should, in the first instance, apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council; but this rule will not bind the Judicial Committee, although that course has not been taken. As a rule, however, that course ought to be followed. [*R.*, 31 C. 305, 13 C.W.N. 1127.] *Semble*:—Interest falling due subsequent to the date of the decree in the original Court cannot be taken into consideration in determining the value of the subject-matter of the suit in the Court of first instance within the meaning of S. 596, Civ. Pro. Code. MOTICHAND v. GANGA PRASAD SINGH, **24 A. 174, P.C. = 6 C.W.N. 362 = 29 I.A. 40.**

(9)—*Value at variance with value fixed for Court fees—Perpetual injunction—Practice—S. 7, sub-s. 4 (d), Act VII of 1870 (Court Fees)—S. 596, Civ. Pro. Code, 1882 (= S. 110, New Code).*—Notwithstanding the fact that having regard to s. 7 of the Court Fees Act sub-s. 4, the value of a suit for a perpetual injunction was fixed at less than the appealable amount, the petitioner, having regard to the nature of the relief sought, is entitled to show the real value of the subject-matter when he applies for a certificate for leave to appeal to the Privy Council. HARI MOHAN MISSER v. SURENDRA NARAIN SINGH, **31 C. 301.**

(10)—*Valuation of appeal—Right to include claim for mesne profits in ascertaining value of appeal—S. 596, Civ. Pro. Code.*—In an action for ejectment, on the termination of certain leases, the property was valued at Rs. 5,460, but in addition, the plaintiff claimed mesne profits. He obtained a decree for possession and mesne profits in the Court of first instance, and in execution proceedings he put in a claim for mesne profits for over Rs. 30,000. Nothing, however, was done as regards this claim, as there was an appeal, and the execution proceedings were stayed pending the appeal, which was ultimately successful. On plaintiff's application for a certificate that the case is a fit one for appeal to Privy Council, *held*, that the plaintiff is entitled to take into account the claim for mesne profits, with a view to ascertaining whether the value of the matter in dispute reaches the statutory amount of Rs. 10,000 and that the certificate must be granted, as the decree involved, directly or indirectly, some claim or question to, or respecting, property of the value of Rs. 10,000 or upwards, within the meaning of S. 596, Civ. Pro. Code. DALGLEISH v. DAMODAR NARAIN CHOWDHRY, **33 C. 1286.**

(11)—*Several suits dealt with in the same judgment—Aggregate value exceeds Rs. 10,000—S. 596, Civ. Pro. Code.*—Where, although, if each case be taken separately, the value is below Rs. 10,000, yet, if taken collectively, the aggregate reaches that amount, and the cases are all dependent upon the same judgment, the case falls within s. 596 of the Code, and leave to appeal to Privy Council should be granted in each of the cases. DEO NARAIN SINGH v. GUNI SINGH. **34 C. 400.** (4 C.L.R. 125, 8 C. 210, 11 C. 407, *R.*)

(12)—*Permission of appeal to Privy Council—Amendment of decree by way of amplification of its wording—Affirmation—Insufficient time given to produce evidence—Foreclosure proceedings—Defective notice—Substantial question of law—Civ. Pro. Code (Act XIV of 1882), s. 596.*—*Held*, that, where on appeal, the decree of the first Court has been so far amended as to include therein expressly, plaintiff's rights in the *Shamlat Deh* and *Shamlat Patti* with other appurtenant rights as claimed, but has otherwise been confirmed on all points, the decree has been practically affirmed within the meaning of the last clause of s. 596, Civ. Pro. Code—the addition made is simply an amplification of its wording and does not amount to a variation so as to give right of appeal to His Majesty in Council. *Held*, also, that none of the following defects is fatal to the foreclosure proceedings and constitutes a substantial question of law under s. 596, Civ. Pro. Code, that the notice was bound to state the actual area claimed and not merely the 1½ Biswas' share actually entered in the mortgage-deed and that as there were two deeds of mortgage, two separate notices were required, notwithstanding the fact that the second deed was one of further charge only. *Held*, further, that a vague assertion to the effect that sufficient opportunity was not given for producing witnesses cannot be treated as a substantial question of law. DIWAN ABDUL HAKIM v. HARI LAL, **62 P.W. R. 1908.**

(13)—*Privy Council—Leave to appeal—Decisions concurrent—Reasons for decisions divergent—Substantial question of law—Civ. Pro. Code (Act V of 1908), s. 110.*—Where the decrees are concurrent, but the reasons for the decisions are divergent, leave to appeal to His Majesty in Council cannot be granted, unless the applicant shows that some substantial question of law is involved in the appeal. BANGA CHANDRA DHAR v. PUKAI BEPARI, **13 C.L.J. 501.** (25 A. 109, 30 I.A. 35, *R.*)

(14)—*Privy Council—Leave to appeal—Consolidation for pecuniary value—Civ. Pro. Code (Act V of 1908), O. XLV, r. 4.*—Where the fundamental question in the cases, which goes to the root of the matter, is common to all the suits, and the cases are tried together and decided by the same judgment, the suits will be consolidated for the purpose of pecuniary valuation under O. XLV, r. 4 of the Code, though a substantial question of law arises in some of the suits only, and not in the others. BANGA CHANDRA DHAR v. JAGAT KISHORE ACHARYYA CHOWDHURY, **13 C.L.J. 503.** (8 C. 210, *R.*)

***Appeal to Privy Council*—continued.**

——1.—General—*continued.*

(15)—*Privy Council—Leave to appeal—Subject-matter of suit—Value—Foreclosure suit—Principal sum secured less than Rs.10,000—Civ. Pro. Code (Act V of 1908), s. 110.*—In a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and the mortgagor is not sought to be made personally liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property. BENOY LAL ROY CHOWDHURY v. KAMALAPATI BANERJEE, **13 C.L J. 505.**

(16)—*Privy Council—Leave to appeal—'Final Order'—Receiver, order appointing—Fit case—Certificate—Civ. Pro. Code (Act V of 1908), s. 109, cls. 1 & 3.*—A 'final order' within the meaning of cl. (*a*) of s. 109 of the Civ. Pro. Code, 1908, means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order appointing a Receiver is not an order of this description. s. 109, cl. (*c*) of the Civ. Pro. Code, 1908, covers special cases, such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which cannot be peformed without special exercise of that discretion, evinced by a fitting certificate. Where the question in controversy was whether a Receiver should or should not be appointed in respect of the subject-matter of the litigation, and the Courts took divergent views upon the matter, certificate as to the fitness of the case for appeal to His Majesty in Council was refueed. MAHOMED MUSAJI SALEJI v. AHMED MUSAJI SALEJI, **13 C.L.J, 507.** (13 C.L.J. 90, *R.*)

(17)—*Appeal to Privy Council—Security tendered by decree holders to take out execution—Test—Report by Nazir.*—Where a Lower Court on remand admits as sufficient, security tendered to enable the decree-holders to take out execution in a case appealed to the Privy Council, which security it had rejected as insufficient before the case was remanded, it must give specific reason for this act and satisfy itself of the sufficiency of the security or otherwise, using the Nazir's report for its assistance. CHOWDHURY BROJO MOHUN LUTPUTTY v. SOODA MOOYEE DEBEE, **5 W.R. Mis. 42.**

(18 & 19)—*Appeal to Her Majesty in Council—Application for stay of execution before admission of appeal—Civ. Pro. Code, s. 608.*—Under s. 608 of the Civ. Pro. Code, the High Court has no power to stay the execution of a decree in respect of which leave to appeal to Her Majesty in Council has been asked for, and a certificate granted to the petitioner, but the appeal has not yet been admitted. *Per Mahmood, J.*—An order for stay of execution would not be passed under s. 608, even though, at that time, the appeal had been admitted, if, at the time when the application for stay was made, it had not been admitted. KUMAR LAL v. RANI, **A.W.N. 1890, 92.**

***Appeal to Privy Council*—continued.**

——1.—General—*continued.*

(20)—*Practice—Appeal admitted by special leave—Power of the High Court to stay execution—Civ. Pro. Code (Act V of 1908), Sch. I O. XLV, r. 13.*—Where an appeal is admitted by special leave of His Majesty in Council, the High Court has power to stay execution of the decree appealed against. NITYAMONI DASI v. MADHU SUNDAN SEN, **8 A.L J. 449, P.C, = 13 C,L,J. 529 = 13 Bom. L.R. 419.**

(21)—*High Court granting compromise and withdrawal of appeal*—After an appeal from a decree of the High Court by an infant-appellant has been admitted by Her Majesty in Council, the High Court can, if it thinks the compromise beneficial to the infant-appellant, accept a compromise which provides among other things that the appeal to the Privy Council should be withdrawn, and can thereupon strike the appeal off the file. NARAINSAWMY PILLAI v. CUPPUSAWMY PILLAI, **4 M.L J. 112, P.C.**

(22)—*Civ.Pro.Code, 1882, ss. 595, 596 (ss. 109, 110, Civ.Pro.Code, 1908,—Appeal below Rs.10,000—Certificate of fitness—Documents to be looked at—Form of certificate—Judicial discretion.*—If anything of less value than Rs. 10,000, is directly or indirectly involved, it will not give the Court jurisdiction to grant leave to appeal to the Privy Council. The mere existence of a substantial question of law is not sufficient to give the Court jurisdiction where the amount involved is less than Rs. 10,000. (23 A. 227 = 27 I.A. 11 = 5 C.W.N. 193, P.C., *R.*) [*R.*, 24 A. 236 = A.W.N. 1902, 46.] In considering under what section of the Civ. Pro. Code, the certificate of fitness was given by the Court, it is the certificate itself and not the order for the certificate which has to be looked at. In granting a certificate under s. 600, Civ. Pro. Code, the Court must exercise its judicial discretion upon the matter. Unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, the Court must find that leave was not properly given and the appeal must be dimissed. RADHA KRISHN DAS v. KRISHN CHAND, **5 C.W N. 689, P.C. = 28 I.A. 182 = 23 A. 415.**

(23)—Rules regarding Privy Council Appeals, **14 W.R.H.C. Rules, p. 1.**

—Reference to Civil Court of question of apportionment of compensation money—Decree of High Court affirming decision—Appeal to Privy Council—Appealable value—Amount indirectly involved—*See* ACT I OF 1894, 11 C.W.N. 525 = 34 C. 466.

—Deposition of Chief—Appeal—*See* ACT OF STATE, 1 A.L.J. 691, P.C = 32 C. 1 = 31 I.A. 239 = 8 C.W.N. 841 = 6 Bom. L.R. 763.

Appeal to Privy Council—continued.

——1.—General—*concluded.*

—if lies from Governor-General's Agent in Bhopal—*See* ARBITRATION—MISCELLANEOUS, 12 C.W.N. 585, P.C. = 7 C.L.J. 520 = 138 P.L.R. 1908 = 10 Bom. L.R. 581 = 18 M.L.J. 266 = 99 P.W.R. 1908 = 14 Bur. L.R. 146 = 4 M.L.T. 25 = 80 P.R. 1908 = 35 C. 648 = 35 I.A. 83.

—Security from successful party—*See* ATTACHMENT — ATTACHMENT PENDING APPEAL, 3 B.L.R. F.B. 45 = 12 W.R. 16, F.B.

—High Court's certificate to—effect of—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, O. XVII, r. 2; O. XLI, r. 23, 5 C.W.N. 153 = 28 I.A. 28 = 23 A. 220, P.C.

See CIV. PRO. CODE, 1908, O. XX, r. 3, 2 O.C. 235.

—against Punjab Chief Court's order of remand—Such order not a final decree—*See* CIV. PRO. CODE, 1908, O. XLI, r. 23, s. 109, 52 P.R. 1907 = 34 P.L.R. 1908 = 119 P.W.R. 1908.

—Application for leave to, dismissed with costs—Order as to costs how to be enforced—*See* COSTS—SPECIAL CASES, 11 C.W.N. 856 = 34 C. 860.

See COSTS—SPECIAL CASES, 10 C. 106.

—Concurrent findings of fact by lower Courts, not interfered with on—Document termed wajib ul-arz but really not such, produced to prove family custom—*See* CUSTOM, 8 A. 516, P.C.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 15 W.R. 19, P.C. = 6 B.L.R. 190.

—Time from which period of—is to be reckoned—*See* LIMITATION—GENERAL, 13 W.R. 17, P.C.

See LIMITATION ACT, 1908, ss. 4, 5, 12, art. 179, 19 B. 301.

—Suit for damages for more than Rs. 10,000 dismissed on appeal—Amount of damages not assessed by first Court—Special leave to appeal—Value of subject-matter in dispute—*See* PRIVY COUNCIL, PRACTICE OF—GENERAL, 33 C. 893, P.C.

See REVIEW — REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE, 13 B. 330.

—No—lies to His Majesty in Council from the Courts in Kathiawar or from the decision of the Governor of Bombay in Council on appeal—*See* SOVEREIGN POWERS, 10 C.W.N. 361 = 8 Bom. L.R. 129, P.C. = 3 A.L.J. 250 = 33 C. 219 = 3 C.L.J. 395 = 16 M.L.J. 115 = 1 M.L.T. 115.

See STAY OF EXECUTION, 5 C.W.N. 562.

See VALUATION OF SUIT, 5 B.L.R. 305.

—on question of waiver—Question of fact—*See* WAIVER, 11 C.W.N. 739, P.C. = 6 C.L.J. 11 = 9 Bom. L.R 651 = 2 M.L.T. 193 = 17 M.L.J. 353 = 14 Bur. L.R. 1 = 34 C. 709.

Appeal to Privy Council—continued.

——2.—Cases where appeals lie or not.

(1)—*Appeal to the Queen in Council from the decision of a single Judge of the Sudder Court.*—An appeal lies to the Queen in Council from the decision of a single Judge of the Sudder Court, upon the admissibility of a special appeal. The Bombay Act III of 1843, enacts that such refusal is final, yet, not having received the sanction of the Crown: *Held*, that its finality was confined to the Sudder Court, and did not affect the prerogative of the Crown, or deprive the subject of his right of appeal to the Queen in Council. MODEE KAIKHOOSCROW HORMUSJEE v. COOVERBHAEE, **4 W.R. 94, P.C. = 6 M.I.A. 448.** [*R.*, 25 M. 457.]

(2)—*Act XL of 1858, order under—Appointment of guardian — No value—No appeal to Privy Council.*—An appeal from an order under Act XL of 1858 appointing a guardian and manager bears no value, and cannot be carried to Her Majesty in Council. MUSSAMUT PEAREE DAYE v. HURBUNS KOER, **14 W.R. 299.**

(3)—*Order rejecting application for review of judgment—High Court's Charter Act, s. 39.*—Under s. 39 of the High Court's Charter Act, an appeal to the Privy Council lies from an order of the High Court rejecting an application for a review of judgment. The petition of appeal should be presented within six months from the date of the order. NAZEER ALI KHAN v. RAJAH OJOODHYARAM KHAN, **1 W.R. Mis, 13.** [*Appl.*, 12 M.I.A. 107; F., 5 W.R. Mis. 17.]

(4)—*S. 15, High Court's Act, order under—Appeal to Privy Council.*—An appeal will lie to Her Majesty in Council from orders made by the High Court under s. 15 of the High Courts Act. GIRDHAREE SINGH v. HURDAY NARAIN SAHOO, **21 W.R. 263.** [*Diss.*, 30 C. 679.]

(5)—*Letters Patent, 1865, cls. 39, 42—Appeal to Privy Council—Review of judgment—Proceedings to be transmitted to England.*—By the *Full Bench (per Jackson, J.*, dubitante):—An order made by the High Court, on an application to review its judgment in a case of appeal previously heard, is not an "order made on appeal" within the meaning of cl. 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council. [*F.*, 30 C. 679; *R.*, 21 W.R. 263.] In a case where an appeal to the Privy Council has been admitted against a regular decree made in appeal, such proceedings as applications for review of the judgment and the order of the Court thereon ought not to form part of the records to be transmitted to England. RAJA SYED ENAET HOSSEIN v. RANI ROUSHAN JEHAN, **1 B.L.R. 1, F.B. = 10 W.R. 1, F.B.** [*Rel. on*, 2 B.L.R. A.C. 264 = 11 W.R. 145.]

(6)—*Order admitting appeal to Privy Council—Competency of High Court to recall order.*—Where an appeal to the Privy Council has once been admitted, the High Court cannot, by

Appeal to Privy Council—continued.

— 2.—Cases where appeals lie or not—*ctd.*

reason merely of a different view of the law since taken by a Full Bench, recall the order which it has made. *In the matter of the petition of* WOOMATARA DEBEA, **6 W.R. Mis. 120.**

(7)—*Letters Patent, 1865, cls. 15, 39—Appeal to Privy Council.*—Cl. 39, Letters Patent, 1865, does not give a right of appeal from a decree passed by the High Court in the exercise of the original jurisdiction, if an appeal will lie to the High Court under cl. 15; but an appeal lies directly to the Privy Council from the decree passed by the Division Bench of the High Court in exercise of its appellate jurisdiction, whether an appeal lies to the High Court or not. *In the matter of the petition of* THE COURT OF WARDS ON BEHALF OF DARBANGA **7 B L.R. 730=16 W.R. 191.**

(8)—*Letters Patent, 1865, cls. 15 and 40—Appeal to Privy Council from interlocutory orders of single Judge—Appeal to High Court from same.*—By cl. 40 of the amended Letters Patent of the High Court, an appeal cannot be allowed to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, without the High Court in the first instance hearing an appeal from such order and deciding upon it under cl. 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under cl. 15 is given directly to the Privy Council. *Semble:*—The High Court will, in the exercise of the discretion vested in it by cl. 40, Letters Patent, refuse to allow an appeal to the Privy Council on a mere question of practice, such an order for the production for the document. Except where the Code of Civil Procedure with its Amending Acts, allows an appeal from the orders of a single Judge of the High Court, no appeal lies to the High Court, under cl. 15 of the Letters Patent and, the rules of the High Court from an interlocutory order of a Judge in chambers ordering the production of books and papers. SONBAI v. AHMEDBHAI HABDIBHI, **9 B H.C. 398.** (8 B.L.R. 433, *F.*) [*Appl.*, 14 B. 555; *D.*, 12 B.C 129, 1 M. 148; *R.*, 11 A. 375, 11 Bom. L.R. 248.]

(9)—*Civ. Pro. Code, s. 595—Final decree—Leave to appeal to Privy Council.*—Where the decree passed by the High Court is not a final decree within the meaning of s 595, Code of Civil Procedure, leave will not be granted to the parties to appeal to the Privy Council against such decree. TIRUNARAYANA v. GOPALASAMI, **13 M. 349.** [*R.*, 1 O.C. 207, 10 C.L.J. 336.]

(10)—*Concurrent findings of fact—No question of law—S. 596, Civ. Pro. Code, 1882.*—No appeal will lie to the Privy Council, if, upon the concurrent findings of the lower Court and the High Court upon questions of fact, no question of law arises. SUKALBUTTI MANDRANI v. BABULAL MANDAR, **28 C. 190.** (23 C. 918, P.C., *F.*) [*F.*, 59 P.R. 1905=177 P.L.R. 1905; *R.*, 48 P.R. 1904.]

Appeal to Privy Council—continued.

—2.—Cases where appeals lie or not—*ctd.*

(11)—*Malicious prosecution, Suit for—Question involved one of fact.*—The only question involved in an action for malicious prosecution is one of fact. It is quite true that, according to English law, it is for the Judge and not for the jury to determine what is a reasonable and proper cause in an action for malicious prosecution. The jury finds the facts, and the Judge draws the proper inference from the findings of the jury. In that sense, it is a question of law. But, where the case is tried without a jury, there is really nothing but a question of fact, and a question of fact to be determined by one and the same person. MODY v. THE QUEEN INSURANCE COMPANY, **4 C.W.N. 781, P. C.=25 B. 332=2 Bom. L R, 939.** [*R.*, 28 C. 591=6 C.W.N. 159; 30 B. 37=7 Bom. L.R. 655; *Appl.*, 24 M. 549.]

(12)—*Remand order of High Court for retrial on merits—Interlocutory decree not appealable to Privy Council without permission—Civ. Pro. Code, 1882, s. 595, cl. (c), certificate of fitness for appeal to be obtained under.*—In this case, the lower Court rejected the plaintiff's claim on the ground that the genuineness of the alleged mortgage was not proved. The High Court, on appeal, finding the mortgage-deed proved, and the claim not barred, reversed the lower Court's decree and remanded the suit to that Court for trial on the merits and the passing of a new decree. On the question arising whether, from such remand order of the High Court, an appeal lay to the Privy Council, it was *held* that such an appeal was not maintainable as a matter of right, under s. 595 of the Civ. Pro. Code, even though the value of the subject-matter of the suit exceeded Rs. 10,000. The High Court, although it decided that the relationship of mortgagor and mortgagee existed between the parties, and directed the accounts to be taken, left it to the Court below to pass the proper decree according to the result. Whether or not the High Court, whilst directing accounts to be taken, could have passed the final decree, the actual decree as passed was so worded as to reserve the consideration of the proper and final decree to be passed to the Court below, and such a decree could not, in strictness, be regarded otherwise than as an interlocutory decree, and, therefore, not appealable without the permission of the Court. MAHANT ISHVARGAR BUDHGAR v. CAUDASAMA AMARSANG, **8 B. 548.** [*F.*, 13 M. 349; *R.*, 1 O.C. 207, 25 A. 629=A.W.N. 1903, 159, 52 P.R. 1907=34 P.L.R. 1908=119 P.W.R. 1908.]

(13)—*Privy Council Appeal—Final decree, judgment or order—Civ. Pro. Code, Act X of 1877, s. 595, cl. (a).*—An order of the High Court directing execution to proceed, is not a final decree, judgment or order within the meaning of cl. (*a*) of s. 595, Civ. Pro. Code, Act X of 1877. JOGESSUR SAHRI v MUSSAMAT MURACHO KOOER, **1 C.L.R. 354.** [*R.*, 18 C. 469.]

Appeal to Privy Council—continued.

——2.—Cases where appeals lie or not—*ctd.*

(14)—*Suit for possession and mesne profits.*—Where a plaintiff sued for possession of property with *wasilat*, and did not (it being under the rules unnecessary for him to do so) includes the *wasilat* in the valuation of the suit; and the suit was valued at Rs. 5,815, but with the *wasilat* would have been valued at over Rs. 10,000; *Held* that, on appeal from a decree in favour of the plaintiff, there was matter in dispute in excess of Rs. 10,000. ANONYMOUS, **1 Ind. Jur. O S 58**; GOOROO. DASS ROY v. GHOLAM MOWLAH, **Marsh 24 =1 Hay 103.**

(15)—*Interlocutory order — Application for leave to appeal to Privy Council — Civ. Pro. Code*, ss. *594, 595 and 596.*—No leave could or ought to be granted by the High Court for appealing to the Privy Council from an interlocutory order, for instance, an order of the High Court cancelling, on the ground of want of jurisdiction, a District Judge's order in execution-proceedings, transferred to his own file from that of a Subordinate Judge, and remitting the case for the disposal of the execution petition on the merits, with a direction that the record of the case should be returned to the Subordinate Judge. PALAK DHARI RAI v. RADHA PRASAD SINGH, **2 A. 65.**

(16)—*Civ. Pro. Code (X of 1877), ss. 595, 600—Interlocutory order in partnership suit not a final decree or order.*—The order passed by the High Court on appeal, in this suit for accounts, that the plaintiffs cannot be permitted to get their accounts taken in the manner suggested by them, unless they would consent to give the defendants certain credit in their accounts, was held to be not such a final order within the meaning of cl. (*b*) of s 595 of the Civ. Pro. Code, as to entitle the plaintiffs to the certificate of appeal to the Privy Council applied for by them under s. 600 of the Civ. Pro. Code. ABEN SHA SABIT ALI v. CASSIRO BABA SAHEB HOLKAR, **6 B. 260.** [*R.*, 8 B. 548, 1 O.C. 205, 52 P.R. 1907 = 34 P.L.R. 1908 = 119 P.W.R. 1908.]

(17)—*Final decree — Civ. Pro. Code, 1877, s. 595 (a).*—In a suit for filing an award made on a private reference to arbitration, the Court of first instance passed an order directing the filing of the award, but without passing a judgment and decree according to the award. The plaintiff's application to the Court to supply the omission and give judgment accordin to the award and a decree to follow it, was erroneously styled an application for review of judgment, which was granted. On appeal from such order on the ground that the reveiw had been improperly granted the High Court held that the order of the lower Court was not appealable, as it was not passed on review of judgment, but really passed on an application to have judgment and decree passed upon the basis of the award which had been filed in Court. ***Held*** that such order of the High Court was not a final decree such as would authorise an appeal to the Privy Council. RAMADHIN MAHTON v. GANESH, **4 A. 238.**

(18)—*Decree for account—"Final" decree, meaning of — Appeal to Privy Council — Civ. Pro. Code, 1882, ss. 595, 601—Leave to appeal to Privy Council refused by High Court—Application for special leave to appeal · Crown's prerogative right to admit appeal—Practice.*—Where a decree for an account, though not declaring in terms the liability of the defendant, directs accounts to be taken which the defendant had contended ought not to be taken at all, it must be held that it contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. The form of the decree (though the account had not been taken under it) being as if it affirmed the liability of the defendant to pay something on each one of the several claims of the plaintiff, it is a "final" decree within the meaning of s. 595, Civ. Pro. Code (1882) for purposes of appeal to the Privy Council. [*F.*, 17 A. 112=5 M.L.J. 20, P.C., 36 C. 493=12 C.W.N. 1102=2 Ind. Cas. 553, 7 Ind. Cas. 622; *Appl.*, 8 C.L.J. 168=35 C. 618=12 C.W.N. 545; *R.*, 22 C, 928, 4 Bom. L.R. 212, 109 P.L.R. 1903, 10 C. L.J. 336, 21 M.L.J. 1; *D.*, 11 O.C. 169.] Where a party, on the refusal of the High Court to grant the necessary certificate for appealing to the Privy Council, applies to the Privy Council for an exercise of the prerogative right of the Crown to admit an appeal, *held* that the application may be granted in a case where it is found that the Court below has refused the certificate for a reason which, in the opinion of the Privy Council, is an unsound one. *Held*, further, that leave could also be granted on any other ground (if any should appear) besides the one last mentioned. RAHIMBHOY HARIBHOY v. C. A. TURNER, **15 B. 155, P.C. = 18 I.A. 6.**

(19)—*Civ. Pro. Code, ss. 600, 601—Order of High Court refusing certificate to appeal to Privy Council—Remand order by High Court, whether final order for purposes of admission of such appeal.*—Plaintiff's case was that the property in suit was the subject of gift under a will in favour of certain persons who also figured as defendants. The contention of the main defendants amounted to the denial of any such valid gift having been made under a will to the grantors of the plaintiff. The High Court, differing from the Court of first instance, decided that there had been a valid gift as alleged by the plaintiff and remanded the case to that Court under s. 562 of the Code. Leave to appeal to the Privy Council having been applied for, the High Court refused it on the ground that the order objected to was not a final order. On a petition to the Privy Council for special leave to appeal from the High Court's order refusing the certificate, the Judicial Committee granted such leave, on the ground that the order complained of, although

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——2.—Cases where appeals lie or not—*ctd.*

it purported to be an order of remand by the High Court to the first Court, was in effect a final decree for the purposes of appeal to the Privy Council. The decision of the High Court went far to conclude the whole case inasmuch as the will in question was the cardinal point of the suit, and as after the decision of the High Court that could never be disputed again, their order was a final one, even though there might have been other subordinate inquiries to make, and the High Court should not have refused the certificate to appeal, on the sole ground that the order objected to was one of remand which, according to the usual practice, could not be treated as a final order. SAYYED MUZHAR HOSSEIN v. MUSSAMMAT BODHA BIBI, **17 A 112=22 I.A. 1, P.C.** (15 B. 155=18 I.A. 6, *R. & F.*) [*F.*, 22 A. 405, 35 C. 619=12 C.W.N. 545=8 C.L.J. 168; *R.*, 29 C. 758=5 C.W.N. 617, 25 A. 629, 23 A.W.N. 159, 11 O.C. 169, 31 A. 545, 10 C.L.J. 336; *D.*, 18 A. 19=15 A.W.N. 134, F.B., 1 O.C. 206, 52 P.R. 1907=34 P. L. R. 1908=119 P.W.R. 1908, 6 M.L.T. 94=6 A.L.J. 786.]

(20)—*Civ. Pro. Code, 1882, s. 596 (=s. 110, New Code)—Leave to appeal to Privy Council—Decree dismissing appeal to High Court for default of prosecution, if amounts to affirming of Lower Court's decree.*—In a petition for leave to appeal to the Privy Council, the question for determination was whether the decree sought to be appealed from was one affirming the decision of the Court immediately below. The circumstances were as follow:—On the day of the hearing of the appeal by the High Court, the necessary papers had not been translated nor printed owing to the negligence of the appellant, and consequently the appeal could not be supported. The appeal was dismissed thereupon. *Held* that the decree of the High Court was one affirming the decision of the Court immediately below, within the meaning of s. 596, Civ. Pro. Code. BENI RAI v. RAM LAKHAN RAI, **20 A. 367=A.W.N. 1898, 77.**

(21)—*Pleadership examination—Notification that candidate has passed—Cancelment of notification on ground of error—Appeal to Privy Council—Civ. Pro. Code, Ch. XLV.*—Where, owing to a miscalculation in the number of marks, a candidate for the Pleadership Examination was erroneously declared in the Gazette to have passed, and on discovery of the error, the declaration was cancelled in respect of such candidate, and his application to the High Court for inclusion of his name in the list of successful candidates was refused, such refusal was one to which Ch. XLV of the Civ. Pro. Code, did not apply, and in which the High Court was not concerned to give or refuse leave to appeal to the Privy Council. *In the matter of the petition of* SUKHNANDAN LAL, **6 A. 163, F.B.=A.W.N. 1884, 15.**

(22)—*Interlocutory order of High Court—Appeal to Privy Council against such order.*—Under the Civ. Pro. Code, 1877, the High Court has no power to give leave to appeal to the Privy Council from an order of the High Court directing a hearing on the merits that order not being a decree, but an interlocutory order. Nor has it any such power under cl. 31 of the Letters Patent, as its provisions have been, by implication, repealed by the Civ. Pro. Code, 1877 and by Act VI of 1874. TETLEY v. JAI SHANKAR, **1 A. 726.** [*R.*, 52 P.R. 1907=34 P L R. 1908=119 P. W. R. 1908.]

(23)—*Privy Council Appeals Act—Construction.*—The words "Court of highest civil jurisdiction in any Province" in Act II of 1863 have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases; and a Subordinate Court under the Oudh Civil Courts Act (XXXII of 1871) cannot admit an appeal to the Privy Council even where its decision is final. (*Note*)—In the Privy Council Appeals Act of 1874, the words "Court of final appellate jurisdiction" were substituted. HARDEO BUX v. JAWAHER SINGH, **3 C. 522=4 I.A. 178, P C.**

(24)—*Act X of 1877, s. 596—Appeal to Privy Council—Value of subject-matter—Three suits, involving same question of title, against same defendant—Stay of execution—Appeal to Privy Council—Power of High Court—Restitution of possession of property.*—The aggregate value of three suits amounted to more than Rs. 10,000, though the value of each suit was under that sum. As the decree in each case involved indirectly a question of title to property of the amount or value of Rs. 10,000, the Court granted leave to the defendant to appeal to the Privy Council under the second clause of s. 596 of Act X of 1877. [*R.*, 33 C. 927=3 C.L.J. 67, 34 C. 400.] Under s. 608, the Court can stay execution of a decree of the High Court in a suit subsequently taken on appeal to Her Majesty in Council. *Quære*:—Whether the Court is competent to order restitution of possession of property already taken in execution of its own decree pending an appeal to the Privy Council? KHAJAH ASHANULLA v. KAROONAMOYI CHOWDHRY, **4 C.L.R. 125.** [*R.*, 33 C. 927=3 C.L.J. 67, 34 C. 400.]

(25)—*Question of law.*—The substantial question of law, in order to give a right of appeal to the Privy Council, in a case where the appellate Court in India has confirmed the decree of the Court of first instance, is not limited to a question of law arising out of the facts as found by the Court. A question of law arising on the evidence taken in the case, irrespective of the findings thereon, is enough to give a right of appeal. MORAN v. MITTU BIBEE, **2 C. 228.** [*Cons.*, 23 A. 94=A.W.N. 1901, 8; *R.*, 20 B. 699.]

(26)—*Civ. Pro. Code, s. 596—"Affirming" judgment of lower Court—Appeal to the Privy Council*—Where there were questions of law and of fact involved in a case, and the lower Court decided against plaintiff on two issues of fact which it considered sufficient for disposing

***Appeal to Privy Council*—continued.**

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of the case, without trying the remaining issues, and the High Court decided in favour of the plaintiff on these two issues, but decided against him on a further question of fact and finally came to the same conclusion on the facts as the lower Court, though not agreeing with that Court on all its findings and its reasons, *held*, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the lower Court's judgment within the meaning of s. 596 of the Code and that there were moreover substantial points of law entitling the plaintiff to appeal, although such questions of law might not be material for the decision of the case. ASHGAR REZA v. HYDER REZA, **16 C. 287.** [*F.*, 20 B. 699; *Diss*, 48 P R. 1904; *D.*, 21 C. 523, 20 A. 367.] *See also*, GOPINATH BIRHAR v. GOLUCK CHUNDER BOSE, **16 C. 292 (Note).** [*Diss.*, 28 C. 190, 48 P.R. 1904; *R.*, 23 A. 94=A.W.N. 1901, 8.]

(27)—*Order in execution-proceedings—Appeal to Privy Council.*—An order passed by the High Court in the Miscellaneous Department in execution-proceedings, in which the amount or value involved exceeds Rs. 10,000 as well, as any other cases in which the Court shall admit an appeal when the amount or value below Rs. 10,000 is appealable to the Privy Council. MUSSAMMAT VELAETY BEGUM v. RUGGHONATH PERSAD, **B L R. Sup. Vol. 747=2 Ind. Jur. N.S. 263=8 W.R. 147.** [*R.*, 1 C.L R. 354.]

(28)—*Appeal to Privy Council—Civ. Pro. Code, 1882, s. 596—Substantial question of law.—Per Jardine, J.*—Where the High Court in appeal has confirmed the decree of the lower Court, and has taken substantially the same view of the facts, and where, upon the facts as found by both Courts, no question of law arises, leave to appeal to the Privy Council should not be granted. *Per Ranade, J.*—There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance, by the High Court. The substantial question of law referred to in s. 596 of the Civ. Pro. Code, 1882, need not directly arise out of the concurrent findings of fact; but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument. *In re* VISHWAMBHAR PANDIT, **20 B. 699.** (16 C. 287, 2 C. 232, 17 C 247, 18 C. 23, *R.*) [*R.* 23 A 94=A.W.N. 1901, 8.]

(29)—*Civ. Pro. Code, 1882, s. 596 (=s. 110, new Code)—Appeal to Privy Council—Substantial question of law—Non-production of succession certificate before lower Court—Succession Certificate Act (VII of 1889), s. 4.*—The High Court affirmed a decision of the Court below which granted execution of a decree to a representative of the decree-holder without the production of a succession certificate, under s. 4 of Act VII of 1889, upon its being shown to the High Court that such succession certificate had been obtained by the decree-holder before the order appealed from had been passed, and upon the certificate being produced in the High Court before the appeal was determined. The judgment-debtor applied for leave to appeal to Her Majesty in Council against this order. *Held* that the objection, that an application for execution was improperly granted by reason of the non-production of the succession certificate before the lower Court, does not raise a "substantial question of law" within the meaning of s 596, Civ. Pro. Code, so as to admit of an appeal to the Privy Council. SHUJA ALI KHAN v. RAM KUAR, **20 A. 118 =A.W.N. 1897, 220.**

(30)—*Ss.—596, 600, Act XIV of 1882 (Civ. Pro. Code)—Findings of fact of two Courts in effect the same—No point of law involved—Finding of appellate Court not in terms coinciding with that of original Court, not a ground of appeal to Privy Council.*—Where the findings of fact of two Courts (though not concurrent) are in effect the same, and there is no point of law involved, the simple fact that the finding of the appellate Court does not in terms coincide with the finding of the original Court is not enough to give a right of appeal to the Privy Council, though the value of the suit is over the appealable value. THOMPSON v. CALCUTTA TRAMWAYS Co., **21 C. 523.** (16 C. 287, *D.*)

(31)—*Civ. Pro. Code, s. 596—Concurrent finding of fact by lower Courts—Leave to appeal to Privy Council, whether could be granted by High Court.*—Where the question at issue between the parties, which was merely one of fact, had been decided against the defendant-appellant by both the Courts below, no appeal being open to the appellant under s. 569 of the Civ. Pro. Code, unless he could show to the High Court that there was a substantial question of law involved, leave to appeal to the Privy Council should not, in such a case, be granted by the High Court. KUAR NIRBHAI DAS v. RANI KUAR, **16 A. 274, P.C.**

(32)—*Concurrent findings of fact—No question of law.*—An appeal to Privy Council cannot be entertained, if no question of law, either as to the construction of documents or any other point, is raised, and if there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them. TULSHI PERSAD BHAKAT v. BENAYEK MISSER, **23 C. 918. P.C.=23 I.A. 102.** [*F.*, 28 C. 190; *Cited*, 48 P.R. 1904.]

(33)—*Appeal to Privy Council when lies—Value of property.*—If the value of the whole of a certain property is above Rs. 10,000, an appeal lies to the Privy Council in respect of a part of the same property. ONOOROOP CHUNDER MOOKERJEE v PERTAB CHUNDER PAL, **6 W. R. Mis. 4.** [*Appr.*, 10 C.W.N. 564=2 C. L.J. 257.]

(34)—*Under-valuation of property—Special appeal—Appeal to Privy Council.*—Where defendant, having the means of proving the real

Appeal to Privy Council—continued.

——2.—Cases where appeals lie or not—*ctd.*

value of property, makes no objection to plaintiff's under-valuation, and in special appeal herself under-values it, she cannot be heard to represent the real value for the purpose of securing an appeal to Her Majesty in Council. *In the matter of* RANEE BHUGOBUTTY DEBIA, **14 W R. 62.**

(35)—*Leave to appeal to Privy Council—Subject-matter of suit under appealable value—Practice—Decision would govern other suits.*—Where the appeal, though valued at less than Rs. 10,000 involved indirectly questions respecting property of the value of Rs. 10,000, leave to appeal to the Privy Council would be granted. ANANDA CHANDRA BOSE v. BROUGHTON, **9 B.L.R. 423.**

(36)—*Burden of proof as to valuation—S. 39, Charter Act.*—To establish a right of appeal to Privy Council, it is for the party to show that the valuation is such as he states it to be. The High Court refuses, under s. 39 of the Charter, to allow an appeal because the whole property which would be reduced in value in the event of the appeal proving successful, was not worth less than Rs. 10,000 RAJA REEDHNATH SAHEE v. GOPEE SAHOO, **19 W.R. 191.** [*R.*, 6 Bom. L.R. 403.]

(37)—*Value of suit—Civ. Pro. Code, s. 596*—Where the value of the properties in suit with mesne profits exceeds Rs. 10,000, and the plaintiff has, by reason of the defendant having given the properties in two sets in patni to two different persons, been obliged to bring two suits for their recovery, *held*, an appeal lay to the Privy Council. JOOGUL KISHORE v. JOTENDRO MOHUN TAGORE, **8 C. 210.** [*R.*, 3 O. C. 96, 34 C. 400.]

(38)—*Leave to appeal to Privy Council, allowed though amount under appealable value.*—Leave to appeal to the Privy Council was granted, though the amount involved was under the appealable value, on the ground of an important question of law being involved in the case, and on the ground that five other suits, along with which the case had been tried and decided, were appealable as of right BYJNATH v. GRAHAM, **11 C. 740.** [*F.*, 34 C. 400 ; *R.*, 137 P.L.R. 1904=75 P.R. 1904; *D.*, 1 O.C. Suppl., Vol. 18.]

(39)—*Civ. Pro. Code, s. 596—"Vaule of the subject-matter of suit"—Civil Courts Act (Madras Act III of 1873), s. 14.*—Madras Civil Courts Act (III of 1893), s. 14, cannot be permitted to control the construction to be put upon s. 596 of the Code of Civil Procedure, and the test under that section, whether or not an appeal lies to the Privy Council, is to consider what the real market value of the subject-matter in dispute is. PICHAYEE v. SIVAGAMI, **18 M. 237, F. B.** [*F.*, 60 P. R. 1905=150 P. L.R. 1905 ; *K.*, 31 C. 301]

(40)—*Application for leave to appeal to Privy Council—Civ.Pro.Code, s. 596—Aggregate value of two decrees against same property.*—There

Appeal to Privy Council—continued.

——2.—Cases where appeals lie or not—*ctd.*

were two applications praying for certificates of leave to appeal to the Privy Council from decrees passed by the High Court in two first appeals. The petitioner in both the applications was the same person. The property affected by both the decrees was the same and no distinction was, under the circumstances, possible, as to which part of the property was affected by one of the decrees and which part by the other decree. The aggregate value of the two decrees, however, amounted to upwards of rupees ten thousand, and it was held that, under the circumstances, the case was one which should be certified as being a fit one for appeal to the Privy Council, because the decree to be passed by the Privy Council, on such appeal would be one involving directly or indirectly claims or questions to or respecting property exceeding ten thousand rupees in value. *In the matter of the petition of* KHWAJA MUHAMMAD YUSUF, **18 A. 196=A.W.N. 1896, 39.**

(41)—*Final decree passed by Recorder of Rangoon in exercise of original civil jurisdiction—Appeal from—Subject-matter exceeding appealable amount.*—An appeal from such a final decree, where the estate is valued above Rs. 10,000, lies to the Privy Council, and not to the High Court. ESOOF HASSHIM BOOPLY v. FATIMA BIBI, **24 C. 30=1 C.W.N. 8.**

(42)—*Final order passed on appeal by High Court on question relating to execution of decree—Civ. Pro. Code, 1877, ss. 244, 595, 596.*—An order passed on appeal by the High Court on a question raised in execution of a decree under s. 244 of the Civ. Pro. Code, is a "final decree" within the meaning of ss. 2 and 595 of the Code. Therefore, though the subject of a suit in the Court of first instance is below the value of Rs. 10,000, yet, an order of the High Court on a question raised in execution of the decree in such suit would be appealable to the Privy Council, if it involved a claim or question relating to property of a value exceeding Rs. 10,000. RAM KIRPAL SHAKUL v. RUP KUAR, **3 A. 633 F.B.=A.W.N. 1881. 32.** [*D.*, A.W.N. 1886, 286, A.W.N. 1901, 19.]

(43)—*Leave to appeal to Privy Council.*—No appeal lies from the order of Judge of a High Court in the Privy Council Department certifying a case to be fit for appeal to Her Majesty. MOWLA BAKSH v. KISHEN PERTAB, **1 C. 102.** *F*, 11 A. 375, 17 C. 455.]

(44)—*Application for leave to appeal to His Majesty in Council—Decision of High Court, varying the decision of the lower Court—Right to appeal as a matter of right—Variation in judgment, however slight, whether gives right of appeal.*—Where the decree of a lower Court is not wholly affirmed by the judgment of a High Court, but is varied only in one particular, the person against whom such variation is made is entitled as of right to a certificate of appeal to His Majesty in Council. NARPAT SINGH v. KALKA BUX SINGH, **9 Ind. Cas 1080.** [8 C. W.N. 294, 62 P.W.R. 1908 ; *Not F.*, 10 O.C. 65, *F.*]

***Appeal to Privy Council*—continued.**

——2.—Cases where appeal lie or not—*cld.*

(45)—*Suit for restitution of conjugal rights—Action of parties concerning valuation of suit.*—The action of the parties cannot affect the question of jurisdiction. In a suit for restitution of conjugal rights, no appeal lies to the Privy Council as of right, although the suit was valued above Rs. 10,000 and the valuation was relied on by the defendant. MOWLA NEWAZ v. SAJIDUNNISSA BIBI, **18 C. 378.**

(46)—*Appeal from Judicial Commissioner, Oudh—St. 3 & 4, Will 4, c. 41, s. 4.*—An appeal to the Privy Council from the Judicial Commissioner of Oudh was allowed under St. 3 & 4, Will 4, c. 41, s. 4. NOWAB TAJDUN BOHOO v. MIRZA JEHAN, **8 M.I.A. 274, Note.**

(47)—*Dismissal of Moonsiff—Special appeal not entertainable by the Judicial Committee.*—An order of the High Court, Calcutta, under s.26, cl. 2 of Ben. Reg. V of 1831, dismissing a Moonsiff for corruption in the exercise of his functions as Judge, is final, and there is no jurisdiction in the Judicial Committee to admit a special appeal therefrom. *In the matter of* SREE HOHUN GHUTTUCK, **13 M.I.A. 343.**

See CIV. PRO. CODE, 1908, O. XLI, r. 27, s. 110, 21 C. 484.

See CONSOLIDATION OF SUITS, 18 W.R. 21.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 8 W.R. 29.

See JUDGMENT—FORM AND CONTENTS, 9 A. 93, F.B.

See REVIEW — PRACTICE AND PROCEDURE, 18 W.R. 494.

——3.—Practice and Procedure.

(1)—*Petition for leave to appeal to Privy Council—Practice as to contents of petition.*—The substantial question of law which it is proposed to submit to the Privy Council should be stated in the petition. On the Original Side of the High Court, all such petitions should be signed by Counsel, and on the Appellate Side they should be signed by Counsel or pleader. MIRZA ALI AKBAR KHAN BAHADUR v. ABDUL LATIFF SHUSTRI, **12 B.H.C. 8.**

(2)—*Leave to appeal to Privy Council—Misconception of ground—Practice.*—Where the Judicial Committee finds that special leave to appeal to that Board has been granted under a misconception of the case or of the ground of appeal, they will dismiss the appeal without hearing it on the merits. RAMBAL SINGH v. BALBHADDAR SINGH, **25 A. 1=29 I.A. 203, P.C.**

(3)—*Privy Council appeal - Objection that appeal had become incompetent--Final admission—Record, transmission of—Practice.*—After an appeal to His Majesty in Council had been admitted, but before the transmission of transcript record to England, it was objected by the respondent that he had attained the status

***Appeal to Privy Council*—continued.**

——3.—Practice and Procedure—*continued.*

of a Sovereign Prince, so that the suit could not be continued against him in any Municipal Court, and he prayed that the appeal may be declared to have abated. *Held*, that, although the High Court retained jurisdiction over the appeal for interlocutory matters, it would not make the order for abatement, but would transmit the petition with a report upon the truth or otherwise of the allegations made therein, to be dealt with by the Judicial Committee upon the hearing of the appeal. SAMARENDRA CHANDRA DEB v. BIREDRA KISHORE, **10 C.L.J. 830=4 Ind. Cas. 456.**

(4)—*Power of High Court to admit without security-bond—Practice in Bengal.*—In Bengal, the High Court has no authority to receive a petition of appeal to England without the usual security-bond duly registered as provided by Rule No. 8 of the 7th December, 1858. RAJAH SAHEB PERSHAD SEIN v. RAJHA RAJENDRO KISHORE, **7 W.R. 338.**

(5)—*Ss. 603, 610, Civ. Pro. Code, 1882—Security-bond—Surety's right to question the validity of bond.*—A surety, who is not a party to an appeal to Privy Council nor to the proceeding by which the appeal is admitted, is not prevented from questioning the validity of the security-bond in execution-proceedings, notwithstanding the admission of the appeal under s. 603, Civ. Pro. Code. Security-bonds which are found to be invalid cannot be enforced against sureties. GIRANDRA NATH MUKERJEE v. BEJOY GOPAL MUKERJEE, **26 C. 246=3 C.W.N. 84.**

(6)—*Privy Council appeal—Security-bond, extension of time to file—Power of High Court—Sufficient reasons for delay—Computation of time—Date of decree, meaning of—Civ. Pro. Code (Act V of 1908), O. XLV, r. 7.*—The High Court has power to extend the time for depositing costs in Court, but it ought not to do so without some cogent reasons. (11 C.W.N. 1104, 10 C. 557, 14 M. 391, *F.*) Where a petition for filing security-bond out of time stated that the delay was caused by a misapprehension of the appellants about the date of re-opening of the High Court and that, none of the appellants' men being present in Calcutta on that date, the bond was not filed, *held*,—that these were not reasons over which the applicant had no control, and that the delay was not due to a mistake which would be regarded as not unreasonable or caused by negligence; that they were therefore not cogent reasons such as to justify the extension of time. "Date of decree" in O. XLV, r. 7, Civ. Pro. Code, means the date on which the decree is pronounced, and not that on which it is signed. HARENDRA LAL ROY CHOWDHURY v. SM. HARI DASI DEBI, **14 C.W.N. 820=5 Ind. Cas. 844.** (7 C. 547, *F.*)

(7)—*Security for costs in Privy Council appeal — Government promissory note — High Court rules, appellate side, Part II, Ch. IV, Rule XX.*—The market value of Government Securities, given as security for respondent's costs

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in an appeal to Privy Council, must be Rs.4,000 on the date of their deposit. CHUTTERPUT SINGH v. MAHARAJ BAHADUR, **9 C. L. J. 559 =4 Ind. Cas. 64.**

(8)—*Security from decree-holder for costs—Continuance of attachment.*—During the course of a suit for damages, plaintiff applied that security might be required from the defendants under S. 81, Act VIII of 1859, and on their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on appeal by the High Court. He then appealed to the Privy Council, and prayed to the High Court either to continue the attachment, or to require security from the defendants, pending the result of the appeal. *Held*, that the Court was not competent to adopt either course. DITTIA HURRUCKMAN SINGH v. MODHOOSOODUN PYNE, **12 W. R. 16. F.B.**

(9)—*Time—Evidence*—Leave for appeal to the Privy Council can be granted by the High Court, if *prima facie* evidence that subject-matter of the suit is above the value of Rs. 10,000 is offered within 6 months from the passing of the decree appealed against. *In the petition of* KISHEN BUNDHOO ROY and KISHEN CHAND ROY, **6 W. R. Mis. 17.**

(10)—*Privy Council—Application for leave to appeal—Appealable value — Decision indirectly involving amount.*—Defendants, who were co-shares of the plaintiff in the zemindari, having purchased certain holdings from the tenants, the plaintiff sued them for their share of the rent due from one such holding, amounting to Rs. 230. The High Court, reversing the decree of the lower Court, dismissed the suit on the ground that, as there was no contract of tenancy between the parties, there was no relation of landlord and tenant between them. The plaintiff, in applying for leave to appeal to the Privy Council, proved that there were other holdings similarly purchased by the defendants, and that the decision of the High Court would have the effect of depriving him of rents of all such holdings amounting to Rs. 800 a year, which, capitalized, came up to over Rs. 10,000. *Held*, that the decision indirectly involved a claim or question to or respecting property of the value of Rs. 10,000 or upwards, and leave ought to be granted. SRINATH PAL CHOWDHURY v. GRINDRA CHOWDHURY, **14 C. W. N. 651=6 Ind. Cas. 598.**

(11)—*Privy Council — Leave to appeal—Appealable value—Right of party to prove value of subject-matter contrary to valuation in plaint or memo. of appeal—Mesne profits pending suit if to be added.*—The valuation made in conformity with the stamp law does not prevent a party from obtaining leave to appeal, by proving that the real value of the subject-matter does not fall short of the appealable amount. But a defendant, who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him, should

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not be allowed to contest that valuation, on the principle that a party cannot both approbate and reprobate. In a suit for recovery of possession of immoveable property with mesne profits, the subject-matter to be valued would include mesne profits claimable from the institution of the suit to the date of the delivery of possession or until the expiration of three years from the date of the decree with interest. KUMAR BASANTA KUMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **14 C W.N 872=6 Ind. Cas. 792.**

(12)—*Privy Council Appeal—Value of subject-matter of suit in first Court—Possible increase in quantity of land by alluvion—Increase of value after institution of suit—Civ. Pro. Code (Act V of 1908), s. 110, O. XLV, r. 5.*—In estimating the value of the subject-matter of an appeal to the Privy Council, only the lands which existed when the suits was instituted are to be taken into consideration, and not also the lands which possibly may be formed by alluvion in the course of future years. The amount or value of the subject-matter in dispute on appeal is dependent on the amount or value of the subject-matter in the Court of first instance, and the High Court will not take into account the increase in the value of the land in suit in the interval between the institution of the suit and the filing of the application for leave to appeal to the Privy Council. ADMINISTRATOR-GENERAL OF BENGAL v. ASHUTOSH BURDHAN ROY, **5 Ind. Cas. 645.**

(13)—*Civ. Pro. Code, ss. 595, 596—Subject-matter of value below Rs. 10,000—Certificate of fitness for appeal to be looked to—Form of certificate*—Whenever the amount in dispute is less than Rs. 10,000, the High Court can have no jurisdiction to grant leave to appeal to the Privy Council. The mere fact that there is a substantial question of law is not sufficient where the subject-matter of dispute is of value less than Rs. 10,000 to make the case a fit one for leave to appeal. In such cases, for determining whether the High Court has properly granted such leave, the Judicial Committee will consider and act upon the certificate itself and not the order for the certificate; and, unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, the Committee would hold that the leave has not been properly granted. RADHA KRISHN DAS v. RAI KRISHN CHAND, **23 A. 415, P.C.=5 C.W.N. 689=28 I A. 182.** (28 I. A. 11=23 A. 247, *R.*) [*R.*, 24 A. 236=A.W. N. 1902, 46; *F.*, 5 O.C. 168.]

(14)—*Appeal to Privy Council in forma pauperis—Procedure—Semble.*—Although the Courts in India admit a party to appeal to England, in *forma pauperis*, yet the appellant ought to make special application to the Queen-in-Council, for leave to prosecute such appeal in *forma pauperis*. MUNNI RAM AWASTY v. SHEO CHURN AWASTY, **7 W.R. 29 P.C.=4 M.I A. 114.**

(15)—*Application to appeal in* forma pauperis *— Unstamped paper — Procedure — Costs.*— Application to appeal to Privy Council in *forma pauperis* may be made to High Court on unstamped paper accompanied by certificate of Counsel ; security for costs being given, and costs of translation deposited. *In re* JOWAD ALI, **8 W.R. 48.**

(16)—*Application for leave to appeal—Amendment of estimate of costs.*—In applying for permission to appeal to the Privy Council, petitioner has no right to amend the estimate of costs made by the clerk of the Privy Council Department ; and the plea of oversight does not excuse non-compliance with the rules of the Court. *In the matter of* GOUR SURN DASS, **19 W.R. 305.**

(17)—*Appeal to Privy Council—Time—Privy Council Rules.*—Rule (1) of the Privy Council (the first of the rules of 10th April 1838) is imperative and leaves the High Court no discretion in the matter. It says expressly that no appeal shall be allowed unless the petition for this purpose be presented within six calendar months from the date of the decree complained of. A petition of appeal presented on the first day the Court resumed its sittings after the Durga Puja vacation—the six months period expiring during the vacation, was held to be too late and leave could not be given to appeal. TAMVACO v. SKINNER, **1 B L.R. O.C. 39.**

(18)—*Privy Council appeal filed during vacation—Limitation Act (XV of 1877), s. 5 and sch. II, art. 177—Vacation—High Court when closed.*—When an application for leave to appeal to His Majesty in Council was filed in the Privy Council Department of the office of the High Court during the long vacation, when the Court was notified as closed, but the offices were open, the applicant was entitled to the benefit of the second paragraph of s. 5 of the Limitation Act. MAHARAJA RAVANESHWAR PRASAD SINGH v. BAIJ NATH RAM GOENKA, **10 C.L J. 120 = 3 Ind. Cas. 401.**

(19)—*Appeals from Vice—Admiralty Courts—Time for appeal.*—The fifteen days, within which appeals with regard to Vice-Admiralty. Cases are required to be asserted, count from the date of the pronouncement of the decree, and not from that on which it is reduced to writing and signed. [*Rel. on*, 17 C. 66.] And where the parties appeared before the Registrar, without protest for assessment of damages in accordance with an appellate decree of the High Court in a Vice-Admiralty matter, the proceedings before the Registrar were held to be themselves sufficient to prevent an appeal as of right. THE OWNERS OF THE SHIP OF "BRENHILDA" v. THE BRITISH INDIA STEAM NAVIGATION CO., **7 C. 547 = 8. I. A. 139. P.C.** [*Rel. on*, 17 C. 66.]

(20)—*Privy Council appeal filed during vacation—Limitation Act (XV of 1877), s. 5 and sch. II, art. 177—Vacation—High Court when closed.*—The second paragraph of s. 5 of

the Limitation Act, 1877, applies to art. 177. When, therefore, an application for leave to appeal to Her Majesty in Council was filed in the Privy Council Department of the office of the High Court during the long vacation, when the Court was notified as closed, but the offices were open, the applicant was entitled to the benefit of the second paragraph, s.5 of the Limitation Act. RANI VENKATA RAMANIA v. KHERODE MULL, **10 C. L. J. 118 = 3 Ind. Cas. 400.** [*F.*, 10 C.L.J. 120.]

(21)—*Computation of six months allowed for appeal to Privy Council.*—The period of six months allowed for appealing to the Privy Council must be calculated from the date on which the decree was pronounced or dated should be excluded. *In re* RAMANOOGRA NARAIN, **13 W.R.P.C. 17.**

(22)—*Appeal time expiring during High Court's vacation—Procedure.*—If the period for appeal expires while the High Court is closed for a vacation, the petition of appeal may be filed on the first open day. LUCHMUN CHUNDER GIR v. KALEE CHURN SINGH, **12 W.R. 293.**

(23)—*Act IX of 1871, s. 5—Scope of section—Power of High Court to extend time fixed for deposit.*—S. 5 of Act IX of 1871 (=s. 5 of Act XV of 1877) applies only to suits, applications and appeals. It does not apply to a deposit of fees for translation of the records in a Privy Council appeal, for which no application is necessary. The High Court has no power to extend the time fixed for the deposit, when once the time has expired. *In the matter of petition of* LALLA GOPEE CHAND, **2 C. 128.** *But see* SOORJMUKHI KOER, *In re*, **2 C. 272.**

(24)—*S. 603, Civ.Pro.Code—Appeal to Privy Council—Discretion to be exercised for cogent reasons.*—The petitioner instead of depositing the whole amount as required by s. 602, Civ. Pro. Code, applied to the Court at the last stage to extend the time to deposit the balance. The Registrar received the whole amount after the day fixed for it had expired. *Held*, there must be very cogent reasons to exercise the discretion to extend the time, and owing to the absence of such reasons in the present case, the Registrar was ordered to return the deposit and the appeal was not admitted. VENKATACHALAM v. MAHALAKSHMAMMA, **14 M. 392.** [*F.*, 14 M. 391 ; *D.*, 13 M. 510.]

(25)—*Civ. Pro. Code, ss. 600, 602—Extension of time to deposit—Appeal to Privy Council.*—Time for making the deposit, required by s. 602, Civ. Pro. Code, for preferring an appeal to the Privy Council, may be extended for cogent reasons, such as would lead the Court to believe that party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making it, by circumstances, accidental or otherwise, over which he had no control, or

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owing to mistake which the Court would consider not unreasonable or caused by negligence RANGASAYI v. MAHALAKSHMAMMA, **14 M. 391.** (11 I.A. 7 = 10 C. 557, 14 M. 392, *F.*)

(26)—*Appeal to Privy Council—Dismissal—Restoration—Power of High Court.*—The High Court has no power to restore appeals to Her Majesty in Council, dismissed or struck off the file for default in making deposit. *In re* SREEKANT ROY, **7 W.R. 47.**

(27)—*Time expiring during holidays—Extension of time for making deposit—S. 11, Act VI of 1874.*—The Court has power, when the time for making the deposit of costs of appeal expires during holidays, to allow, in the exercise of its discretion the deposit to be made on the reopening day. [*Appr.*, 10 C. 557 = 11 I.A. 7, P.C.] The requirements of s. 11 of Act VI of 1874 = s. 602 of the Civ. Pro. Code, 1882, are not absolutely imperative; they are directory only. The Court has, therefore, a discretion, in a proper case, to extend the time. (*N.B.*)—Act VI of 1874 was repealed by Act X of 1877, Civ. Pro. Code. *In the matter of the petition of* SOORMUKHI KOER, **2 C. 272.** [*D.*, 7 A. 79 = A.W.N. 1884, 303.]

(28)—*Act VI of 1874, s. 11.*—Dismissal of appeal to Privy Council, for default in deposit of security and in transcribing record. Case where an appeal was ordered to be struck off the file on an appellant not appearing to show cause why the proceedings on an appeal should not be stayed, where he had not made any deposit to defray costs of transcribing under s. 11, Act VI of 1874, had taken no steps to prosecute the appeal and not deposited any security for costs. THAKOOR KAPILNATH SAHAI v. THE GOVERNMENT, **1 C. 142.**

(29)—*Letters Patent, s. 15—Permission to appeal to Privy Council—Appeal against such leave—Act VI of 1874, s. 11.*—Where an appeal has been filed under the Letters Patent, s. 15, against the grant of a certificate to an applicant for permission to appeal to Privy Council, the applicant has no reason to contend that the six weeks prescribed in Act VI of 1874, s. 11, will not begin to run till such appeal is finally disposed of. The Court has no jurisdiction to enlarge the time specified in s. 11, Act VI of 1874. FUNEENDRO DEB ROY KUL v. JOGENDRO DEB, **23 W.R. 220.**

(30)—*Appeal to Privy Council—Extension of time for giving security—Civ. Pro. Code, s. 602.*—The term of six months, allowed by s. 602 of the Civ. Pro. Code, for giving the security and making the deposit required therein, is not intended in any rigorous or exact sense, but may be extended for proper reasons. FAZUL-UNNISSA BEGAM v. MULO, **6 A. 250, F. B. = A.W.N. 1884, 71** (11 I.A. 7 = 10 C. 557, *R.*) [*R.*, 15 A. 14; *D.*, 7 A. 79, F.B.]

(31)—*Giving security in appeal—Extension of time—Powers of Court—Civ. Pro. Code (1877), s. 602.*—The words in the Civ. Pro. Code, relating to the time within which security in

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——3.—Practice and Procedure—*continued.*

appeal is to be given, are *directory* only; and although the rule is not to be departed from without cogent reason, the Court, from which the appeal is preferred, can, at its discretion, extend the time. BURJORE AND BHAWANI PERSHAD v. BHAGANA. **10 C. 557. P. C = 11 I.A. 7.** (2 C. 272, *Appr.*) [*F.*, 1 L.B.R. 329, 11 C.W.N. 1104; *R.*, 14 M. 391, 78 P. R. 1909, 15 A. 14 = A.W.N. 1892, 152; *D.*, 7 A. 79 = A.W.N. 1884, 303, F.B.; *Appl.*, 87 P.R. 1908 = 27 P.L.R. 1909 = 153 P.W.R. 1909.]

(32)—*Period of appeal expiring during holidays—Appeal admitted on first day after re-opening—Costs incurred—Objection as to limitation taken when record about to be transmitted—Duty of High Court—Limitation as applied to the admission of Privy Council Appeals.*—Case where it was ruled that an objection as to limitation could not be raised against an application for the admission of an appeal to England after its admission and after the appellant had incurred large costs and when it was ready for transmission to England, but that it should be allowed to go on subject to the orders of the Privy Council. RAJAH RAJ KISHEN SINGH v. HURO SOONDUREE DOSSEE, **15 W.R. 255.** (3 B.L.R.O.C. 126 *D.*)

(33)—*Consolidation of appeals to Privy Council—Extension of time for appeal.*—The High Court can neither consolidate a number of appeals to the Privy Council nor can it admit such appeals where the time for filing them has expired, without the permission of the Privy Council. PRAN NATH ROY CHOWDHRY v. KASHEENATH CHOWDHRY. **2 W.R. Mis. 26.**

(34)—*Petition of appeal to Privy Council—Due diligence.*—On the filing of a petition of appeal to the Privy Council, due diligence must be exhibited in transmitting the appeal to the Privy Council. Otherwise, on the application of the respondent, the High Court has the power to strike the petition off the file. GOBARDHAN BARMONO v. SRIMATI MUNUN BIBI, **3 B.L.R.O.C. 126.** (*On appeal* **5 B. L. R. 76 = 14 W.R. 34**). [*D.*, 15 W.R. 255.]

(35)—*Privy Council, appeal to, after expiry of the prescribed time—Jurisdiction of High Court.*—The High Court has no jurisdiction in a matter where a petition of appeal to the Privy Council was returned, on the ground that it was not accompanied with the sum certified, or a sum probably sufficient to meet the expenses of translating and transcribing the proceedings of the case, and the application was renewed after the time prescribed for the appeal had expired. MUHAMED MUDSUR v. RAM LAL ROY, **6 W.R. Mis. 50.**

(36)—*Restoration of appeal to Privy Council—Discretion of High Court.*—After an appeal to the Privy Council has been dismissed for default or for any reason removed from the file of the High Court, the High Court has the

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——3.—Practice and Procedure—*continued.*

power to restore the appeal and should exercise its discretion in each particular case. RADHA BINODE MISSER v. KRIPA MOYEE DEBEA, **7 W.R. 531.**

(37)—*Dismissal for default of appeal to Privy Council—Jurisdiction of High Court to re-admit it.—Held* that the High Court has no authority to re-admit an appeal to the Privy Council, which has once been dismissed for default. *In the matter of the petition of* MUSSAMUT BOLAKUM, **6 W.R. Mis. 121.**

(38)—*Appeal to Privy Council—Striking off for want of prosecution.*—Where the usual draft notice, which was sent by the Registrar to the attorney of the party that filed his petition of appeal to the Privy Council, and intended for being served on the opposite party, was never returned as approved or otherwise to the Registrar, nor were any steps taken to prosecute the appeal, *held*, the opposite party was entitled to an order striking off the appeal for want of prosecution. MOORAJEE POONJA v. VISRANJEE VISENJEE, **12 C. 658.**

(39)—*Appeal to Privy Council—Delay in prosecuting.*—S. 30 of the Charter of the late Supreme Court is still directory on the High Court with regard to Privy Council appeals. Until a petition of appeal to the Privy Council presented to the High Court is admitted and allowed, a party has no right to appeal to His Majesty in Council. The Court may remove from the files a petition not prosecuted within a reasonable time. GOBAR DHAN BARMONO v. SRIMATI MANI BIBI, **5 B.L.R. 76=14 W R. O.C. 34.** *(On appeal from,* **3 B L R. O.C. 126**). [*R.*, 10 C.L.J. 331; *D.*, 15 W.R. 255.]

(40)—*Privy Council appeal—Review.*—Where an application for review has been rejected and no appeal to the Privy Council was filed against that order, the papers relating to the review are not on the appeal of the case to be sent to England, as they do not form a part of the record. FAKIRUDDIN MOHAMMED ASAN CHOWDHRY v. NAJUMUNNISSA CHOWDHRAIN, **2 B.L.R. A.C. 264=11 W.R. 145.** (1 B.L.R. F.B., *F.*; 3 M.I.A. 1. *R.*)

(41)—*Appeal to Privy Council—Translating documents—Evidence.*—In an appeal to the Privy Council, the appellant must not be put to the expense of translating and transcribing papers and account books, regarding which it is impossible to say that they are material or relevant or even part of the evidence in the case; but the respondent may have the option of translating them at his own expense. *In the petition of* RAJ COOMAR BABOO DEO NUNDUN, **7 W.R. 90.**

(42)—*Superfluous documents — Printing of Privy Council records in India.*—Superfluous documents in record of appeal to Privy Council to be avoided and suitor's money spared. MUSSAMUT HUMEEDA *alias* BEBEE KHAJOO v. MUSSAMUT AMATOOL MEHDEE BEGUM, **17 W.R. 106.**

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(43)—*Application, that limited meaning should be placed on endorsement by Bench Clerk on certificate—Practice.*—Where an application, that a particular limited meaning should be placed on an endorsement by a Bench Clerk on certain exhibits printed in the paper book (relating to a suit), was presented to the High Court, the said Court left the matter to the hands of their Lordships of the Judicial Committee for dealing with the same. RATTAN KOER v. CHOTAY NARAIN SINGH, **21 C. 476.**

(44)—*Translation of records.*—It is not necessary that razeenamahs, safeenamahs, and security-bonds in respect of appeals to the Privy Council should be in English. MEER MAHOMED TUKEE CHOWDHRY v. LUCHMEEPUT SINGH DOOGUR, **7 W. R. 291.**

(45)—*Leave to appeal granted* ex-parte—*Right of respondent.*—If leave to appeal be obtained *ex-parte*, the respondent may, as a matter of course, present a counter-petition to dismiss. SIBNARAIN GHOSE v. HULLODHUR DOSS, **6 M I.A. 207.**

(46)—*Mode of decision—Assumed probabilities and no evidence.*—Where a case turned upon the validity of the bond on which plaintiffs sued, the decision of the High Court in favour of defendant was reversed, as based upon the assumed probabilities of the case instead of the evidence before them, and in forgetfulness of the most startling improbability of all, *viz.*, that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother. RUGHOOBUR DUTT CHOWDRY v. FUTTEH NARAIN CHOWDRY, **18 W.R. 120.**

(47)—*Civ. Pro. Code (Act XIV of 1882), s. 568—Fresh evidence, admission of, by appeal Court, with assent or without objection—Regularity, if may be questioned on further appeal—Question of fact, differing decisions on—Materials not same in both Courts—Interference on appeal by Privy Council—Practice.*—Where the Appellate Court, with the assent of both sides, examined three witnesses and also admitted documentary evidence, and there was nothing to show that the admission was objected to at the time. *Held*, that it was not open to a party, on appeal to the Privy Council, to take exception to the regularity of this procedure. Where, on a pure question of fact, *viz.* the genuineness of a will, two Courts in India differed, but the materials before them were not, owing to the admission of fresh evidence by the Appeal Court, entirely the same, the Judicial Committee could not reverse the appellate judgment, unless satisfied that it was wrong. Not being so satisfied, they dismissed the appeal. JAGARNATH PERSHAD v. HANUMAN PERSHAD. **13 C.W.N. 830. P.C.=10 C.L J. 74=6 M.L.T, 7=11 Bom. L.R. 861=36 C. 833=3 Ind. Cas. 465=19 M. L J. 485.**

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——3.—Practice and Procedure—*continued.*

(48)—*Privy Council appeal—Death of parties—Substitution, application for—Admission, final order for—Record, transmission of—Civ Pro. Code (Act V of 1908), O. XXII.*—After the final order for admission of an appeal to His Majesty in Council has been made by the High Court, and before the transcript of the record has been transmitted to England, the High Court has power to entertain an application for substitution of the legal representatives of parties who have died meanwhile. O. XXII of the Civ. Pro. Code, 1908, has no application to this matter. No question of limitation can consequently arise. Any order for substitution made by the High Court, however, is subject to the rules of the Judicial Committee and such directions as may be given by their Lordships at the hearing of theappeal. The history of the practice in this matter, reviewed. JADUNANDAN KOER v. RAMJIBAN LAL, **10 C.L.J. 331.** [*R.*, 10 C.L.J. 330.]

(49)—*Competency—Power of Local Court to admit appeal—Question of competency left open by a Local Court—Objection at hearing—Dismissal of appeal—Value of appeal—Action for injunction against infringement of trade-mark.*—Where the Local Statutes contemplate that appeals to lie to the Privy Council shall be allowed by the Local Court satisfying itself as to its competency and the Local Court, in its order in one case, expressly left the question of competency open, *Held*, by the Judicial Committee, that the appeal was not competent. E. W. GILLET COMPANY, LIMITED v. LUMSDEN, **10 C.W.N. 7=13 M.L.J. 461. P.C.**

(50)—*Privy Council—Practice—Decision on facts—Genuineness of will*—Onus *on appellant—Failure to discharge—Statement of reasons by the Judicial Committee.*—Where a Division Bench of the High Court, after a prolonged and elaborate enquiry, arrived at the conclusion that it could not believe the evidence of the principal witnesses called before it in support of a will propounded by the appellant before the Privy Council, *Held*, that the *onus* was on the appellant who invited Judges, who had not heard or seen the witnesses, to overrule the decision of Judges who had to show that the decision was erroneous. That in this case that *onus* had not been discharged. Having regard to the intricacy of the case and the elaborate arguments presented, the Judicial Committee thought it desirable to state in outline the salient features of the evidence and the reasons for their conclusion, although it might have sufficed if they had only said that the appellant had not succeeded in discharging the *onus* that lay on him. NOGENDRA NATH MITTER v. KUMUDINI DASI, **13 C.W.N. 782, P.C.=5 M.L.T. 384=3 Ind. Cas. 997.**

(51)—*Privy Council appeal—Special leave, High Court, jurisdiction of—Receiver, application to appoint—Civ. Pro. Code (Act V of 1908), ss. 109, 112 and O. XLV, r. 13.*—Where, after refusal by the High Court to grant leave to appeal to His Majesty in Council, special leave

***Appeal to Privy Council*—continued.**

——3.—Practice and Procedure—*continued.*

has been granted by the Judicial Committee, the High Court has no power to entertain an application for appointment of a Receiver of the property in dispute, under r. 13 of O. XLV, Civ. Pro. Code of 1908. The changes introduced in the Code of 1908 do not in this matter affect the law as it stood under the Code of 1882. TEGA SINGH v. BICHITRU SINGH, 10 C.L.J. 326=1 Ind. Cas. 482. (27 C. 1, *Appl.*)

(52) —*Privy Council appeal—Civ. Pro. Code (Act V of 1908), s. 109, cl. (a)—Remand order—Final order.*—The term "final order" in s. 109, Civ. Pro. Code, 1908, denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order of remand may be a final order within the meaning of this section, if it decides in effect finally the cardinal point in the suit or an issue which goes to the foundation of the suit. Whether a particular order falls in this category must depend upon its contents. When the fundamental question in the case was whether the suit was barred under s. 244 of the Code of 1882, and the first Court held that the suit was so barred, but the lower Appellate Court took a contrary view and remanded the suit for trial on the facts, and this order was subsequently affirmed by the High Court, *Held*, that the order of the High Court was a final order within the meaning of s. 109 of the Code of 1908. SARATMANI DEBI v. BATA KRISHNA BANERJI, **10 C.L.J. 336=4 Ind. Cas. 469.**

(53)—*Dismissal of the appeal—Amendment of the decree under appeal—Absence of petition of appeal by the respondents.*—Their Lordships dismissed the appeal, but amended the decree appealed against, by providing for interest subsequent to the decree, in accordance with the prayer in the petition for special leave to appeal presented by the respondents, who did not lodge their petition of appeal as required under the Judicial Committee Rules, 1908. KASIM AHMED JEWA v. NARAIN CHETTY, **12 Bom. L.R. 646, P.C=12 C.L.J. 231=20 M.L.J. 630=37 C. 623=8 M.L.T. 229=7 Ind. Cas. 814.**

(54)—*Original decree reversed in High Court but restored in Privy Council—Execution of decree.*—A decree of the first Court reversed in the High Court, and restored in appeal to the Privy Council, is re-affirmed in its integrity, and the defendants generally are entitled to execute it, though only one appealed to the Privy Council. LUCHMEEPUT SINGH BAHADOOR v. KHOOBUNNISSA, **14 W.R. 280.**

See BURDEN OF PROOF—CONSIDERATION, 2 B. L. R. 111, P.C.=12 M.I.A. 282=12 W. R. 6, P.C.

—Order of remand only deciding on preliminary points—Material point yet remaining for decision—Order not final—Appeal to Privy Council disallowed—*See* CIV. PRO. CODE, 1908, ss. 2, 109, sch. I, O. XLV, 6 A.L.J. 786=6 M. L.T. 94=31 A. 545=3 Ind. Cas. 967.

***Appeal to Privy Council*—continued.**

——3.—Practice and Procedure—*concluded.*

See LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, ss. 39, 15, 9 C.W.N. 566 =32 C. 963.

—Security for respondent's costs, sufficiency of—*See* RULES OF HIGH COURTS AND SUPREME COURTS—CALCUTTA, 13 C.W.N. 629=9 C L.J. 560=36 C. 653=2 Ind. Cas. 844.

——4.—Stay of execution pending appeal.

(1)—*Stay of execution—Practice—Application for stay of execution.*—Applications for stay of execution ought always to be made, in the first instance at any rate to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Board cannot possess on an interlocutory application. VASUDEVA v. SHADAGOPA, **8 Bom. L.R. 497=4 C.L.J. 101, P.C.=10 C.W.N. 945=16 M.L.J. 299=1 M.L.T. 204=29 M. 379=33 I.A. 132.**

(2)—*S. 4. Reg. XVI of 1797—Issue of execution by Sudder Court—Security from decree-holder pending appeal.*—Within six months of decree and prior to the admission of an appeal therefrom to England, the Sudder Dewanny Court, upon an *ex parte* application, without notice, issued an execution order, putting the decree-holder in possession. This was done without calling for security, as provided by s. 4, Beng. Reg. XVI of 1797. The appellant, on the admission of the appeal, applied to the Sudder Court for security from the party in possession pending the appeal, but that Court held that, as the decree-holder was in possession under an execution order, which could not be appealed from, they had no power to interfere. On petition, the Judicial Committee, in the circumstances, and upon affidavit of waste, made an order, declaring that it was competent to the Sudder Court to require security to be given for protection of the property pending the appeal, notwithstanding execution of the decree had issued, and gave permission to the appellant to apply to the Sudder Court with an intimation of that opinion. MUSSUMAT JARIUT-OOL-BUTOOL v. MUSSUMAT HOSEINEE BEGUM, **10 M.I.A. 196.**

(3)—*S. 4, Reg. XVI of 1797—Appeal to Privy Council. Execution of decree—Taking of security,*—Where an appeal to the Privy Council from a decree of the High Court has been admitted and is still pending, the Court of original jurisdiction which made the decree first appealed from has jurisdiction to issue execution. Such Court, in the exercise of its discretion, where it has notice of the appeal to the Privy Council, should not issue execution without giving the parties against whom execution is sought, an opportunity of applying to the High Court under s. 4, Reg. XVI of 1797. J. P. WISE v. RAJ KISHEN ROY, **6 W. Mis. 84.**

***Appeal to Privy Council*—continued.**

——4.—Stay of execution pending appeal—*continued.*

(4)—*Reg. XVI of 1797, s. 4—Execution of High Court's decree—Appeal to Privy Council—Setting aside execution.*—After execution has once gone out under a decree of the High Court subsequently appealed to Her Majesty in Council, it is beyond the power of the High Court, and not within the scope of s. 4, Reg. XVI of 1797, to set aside the execution. JOYNARAIN PATTUR v. RUSSEEK MOHUN BANNERJEE, **8 W.R. 144.**

(5)—*Special leave—Injunction—Stay of execution proceedings—High Court's jurisdiction—Civ. Pro. Code (Act V of 1908), O. XLV.*—Where, after the refusal by the High Court to grant leave to appeal to His Majesty, special leave has been granted by the Judicial Committee, the High Court has no power to entertain an application for an injunction staying certain proceedings in execution, pending disposal of the appeal by the Privy Council. KUNWAR RAGHUBIR SINGH v. MUSSAMAT MOTI KUNWAR, **7 Ind. Cas. 188.** (27 C. 1, 10 C.L.J. 326, 4 Ind. Cas. 452, *Rel. on.*)

(6)—*Reg. XVI of 1797, s. 4—Power of High Court to take security from respondent in appeal to Privy Council, or to suspend decree.*—The High Court reversed a decree for possession of a zemindari which a plaintiff had obtained, who thereupon appealed to the Privy Council. The High Court could not, therefore, under s. 4, Reg. XVI of 1797, order security to be taken from the defendant, respondent in the appeal to the Privy Council, for the due performance of such orders as the Privy Council may pass in the appeal, or to suspend the decree reversing the decision of the first Court. NIL KISHEN THAKOOR v. BEER CHUNDER THAKOOR GOSSAIN. **2 W.R. Mis. 23.**

(7)—*Reg. XVI of 1797, s. 4—Furnishing security—Powers of Court to attach property*—On an appeal being preferred to the Privy Council, the High Court cannot, on the parties failing to furnish security as referred by s. 4, Reg. XVI of 1797, attach any other property held by the appellant beyond the property in dispute. BABOO KOROO LAL v. KANT LAL, **5 W.R. Mis. 37.**

(8)—*Possession under decree—Appeal to Privy Council—Security.*—A party, who has been formally put in possession of the disputed property in execution of a decree by taking out execution before an appeal to the Privy Council was preferred and admitted, cannot be required by the High Court to furnish security. HURO SOONDAREE DEBIA v. MR. AND MRS. J. STEVENSON, **5 W.R. Mis. 13.**

(9)—*Taking of security*—If an appeal is preferred to the Privy Council, before any execution issues, it is not necessary that security to the extent of the whole sum decreed should, in every instance, be given by the decree-holder. It will suffice if security is taken to the extent of the value of the property seized, and the

Appeal to Privy Council—continued.

——4.—Stay of execution pending appeal —*continued.*

costs, &c., of the appeal to the Privy Council and any other costs which the Privy Council may order the decree-holder to pay. If security is taken for less than the full amount decreed, an order should be made restraining the decree-holder from issuing any process of execution with a view to realising any sum in excess of that for which security shall be given. MUSSAMUT MOLKA v. MUSSAMAT SUMPUT, KOONWAREE, **6 W.R. Mis. 62.**

(10)—*Reg. XVI of 1797, s. 4—Procedure to be adopted on the admission of appeal to the Privy Council.*—All that the Court can do, when an appeal to Her Majesty in Council has been admitted, is to proceed under s. 4, Regulation XVI of 1797, to stay the execution of the decree on the appellant giving security, or to order that the respondent, in executing his decree, shall give security for the due performance of the decree of Her Majesty in Council. *In the matter of the petition of* RAMNATH CHOWDHRY and RUGHOOBUR MOOKEJEE, **6 W.R. Mis. 17.**

(11)—*Appeal to Privy Council—High Court's power to stay execution of Lower Court's decree —Taking of security—Reg. XVI of* 1797, *s.* 4. —The first Appellate Court gave a decree in part for the plaintiff. The plaintiff preferred a second appeal to the High Court, which reversed the Lower Court's decree and remanded the case without making any order as to the costs of the appeal. The plaintiff appealed to the Privy Council against the order of remand. The first Appellate Court however proceeded with the case and dismissed the whole suit. The defendant took out execution for costs due to him under the decree. *Held*, that it was not competent to the High Court under s. 4, Reg. XVI of 1797 to suspend the execution of the decree or to direct the taking of security. *In the matter of the petition of* ONOOROOP CHUNDER MOOKERJEE, **6 W.R. Mis. 45.**

(12)—*High Court taking action on motion to stay execution—Power of Sudder Amin to order execution—Reg. XVI of 1797, s. 4.*—Where the High Court has taken action on an application of an appellant to the Privy Council to stay execution of decree on giving security, the Principal Sudder Ameen has no authority to make an order on an application to execute. Under s. 4, Reg. XVI of 1797, a decree-holder may have a decree executed on application to High Court. DEBEE PERSHAD v. UMURTHNATH CHOWDHRY, **8 W.R. 275.**

(13)—*Security from decree-holder put in possession—Pendency of appeal to Privy Council.*—The High Court can require security from a decree-holder put in possession, pending an appeal to the Privy Council but it may not require security from a decree-holder pending an appeal to the Privy Council, unless some good cause appear. SOORUJ MONEE DAYEE v. SUDANUND MOHAPATTUR, **12 W.R. 296.** [*F.*, 19 M. 140, 30 C. 927=3 C.L.J. 67.

Appeal to Privy Council—continued.

——4.—Stay of execution pending appeal —*continued.*

(14)—*Judgment-debtor retaining property pending appeal to England on sufficient security, Death of—Widow offering life-interest as security — Insufficiency — Funds for prosecuting appeal—Legal necessity—Reversioner.* MUSST. PHOOL KOER v. DABEE PERSHAD, **12 W. R. 187.**

(15)—*Security from decree-holder—S. 4, Reg. XVI of 1797—Practice as to calculation of amount.*—In a Privy Council appeal, the security to be taken from the decree-holder must be regulated by s. 4, Reg. XVI of 1797 The practice with respect to calculation of amount stated. AMEEROONISSA KHATOON v. A. D. DUNNE, **14 W. R. 361.**

(16)—*Security prior to executing High Court's decree under appeal to Privy Council—Application to order security refused—Grounds.*—Application for decree-holder pending decision of appeal to give security refused; *Ainsle, J.*, following the Full Bench Ruling at page 111, 6 W. R. Miscellaneous Rulings, and *Paul, J.*, (whilst declining to follow that ruling), considering the application premature, because merely put on the file of the High Court without the appeal being admitted. BURRA LALL v. THE COURT OF WARDS, **16 W. R. 289.** (6 W. R. Mis. 111, F.B., *R.*)

(17)—*Deposit of security for mesne profits and costs—Security after decree—Refund of deposit.* —The decree-holder (respondent to England) was required immediately to elect between furnishing security and drawing the sum deposited by the appellant on account of *wassilat* and costs, and (upon failure to do so) allowing the appellant to obtain a refund of the deposit upon giving the like security. A party who seeks to obtain security after the decree has been executed must show special circumstances, *e.g.*, waste or improper dealing with the property. JUGGO LALL OOPADHYA v. JANKEE BEBEE, **17 W. R. 521.** [*F.*, 33 C. 927=3 C.L.J. 67.]

(18)—*Civ. Pro. Code, s. 608—Order for security to be furnished by respondent in Privy Council appeal—Liability of third parties giving security for mesne profits—Contract Act, s. 130.*—It is competent to the High Court to make an order under s. 608, Civ. Pro. Code, requiring security from the respondent in a Privy Council appeal for the restitution of the property which has been put into his possession in execution of the decree appealed against and for mesne profits, in case the Privy Council appeal should be decided against him. [*F.*, 33 C. 927=3 C.L.J. 67.] When third parties pledge certain of their properties to secure the claim which the respondent in the above case may have for mesne profits but give no personal guarantee, it is not competent to them to put an end to the security under the provisions of the Contract Act relating to revocation of a surety. NARAYANAN CHETTI v. ARUNACHALAM CHETTI, **19 M. 140.**

Appeal to Privy Council—continued.

——4.—Stay of execution pending appeal—*concluded.*

(19)—*Cross-decrees—Appeal to Privy Council—Procedure.*—Where there is an order of Court to stay execution of a decree obtained by a party who has appealed to the Privy Council from another decree against himself, if the holder of the decree appealed against attempts to execute it, the proper procedure is to bring the order before the Division Court to which the application is made to execute that decree and abide by its order. DWARAKANATH ROY v. WOOMA SOONDUREE DOSSIA, **14 W.R.329.**

(20)—*Power of Civil Court to stay execution—Appeal to Privy Council against decree of High Court, pending.*—A Civil Court has no power to stay execution, in cases where an appeal has been made to the Privy Council against a decree of the High Court. MUTTEALAUMMAL v. CHELLAYAMMAL, **5 M.H.C. 98.**

—Application for leave to, as—*See* PAUPER, L.B.R. 1872—1892, 149.

——5.—Miscellaneous.

(1)—*Death of appellant—Revival of appeal.*—After an appeal to England, and before any petition of appeal was lodged, the appeal abated by the death of the appellant. Appeal revived by the appellant's special administratrix. TROUP AND OTHERS v. THE EAST INDIA CO., **4 W.R. 111, P. C. =7 M.I.A. 104.**

(2)—*By the Master of the Supreme Court from an order of dismissal.*—An order made by the Judges of the Supreme Court of Madras, dismissing the master of that Court from his office, for alleged official misconduct in the taxation of a bill of costs, being made by the Court at its own instance, is not an appealable grievance, within the Madras Charter of Justice of December 1800. An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no Charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; which, on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that orginally referred to them. *In re* MINCHIN, **4 M.I.A. 220.**

(3)—*Privy Council—Appeal—Certificate—High Court—Substantial point of law—Civ. Pro. Code, 1882, s. 596*—S. 596 of the Code of Civil Procedure requires that in order to give a right of appeal to the Privy Council where a point of law is found to exist there must be in dispute either directly or indirectly an amount of Rs. 10,000. If the decree affirms the Court below, another condition is affixed. *viz.*, that the appeal must involve some substantial question of law. BANARSI V. KRISHN, **3 Bom. L.R. 154.**

Appeal to Privy Council—continued.

——5.—Miscellaneous—*continued.*

(5)—*Privy. Council—Appeal—Leave of the High Court—Special leave to appeal—Practice.*—The practice of the Privy Council in advising His Majesty to exercise His prerogative, and to give special leave to appeal, is that it does not do so unless there is some substantial question of law of general interest involved. Where a party approaches the Privy Council for special leave to appeal, the case being under appealable value, and, therefore, not an appeal as of right, he should in the first instance apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council. *In re* MOTICHAND, **4 Bom. L.R. 159.**

(5)—*Privy Council—Leave to appeal—High Court's jurisdiction—Subject-matter of value less than Rs. 10,000—Practice.*—S. 596 of the Code of Civil Procedure does not give the High Court jurisdiction to grant leave to appeal to His Majesty in Council in case where any less value than Rs. 10 000 is directly or indirectly involved. RADHA KRISHN CHAND, v. KRISHNA **3 Bom. L.R. 469.**

(6)—*Appeal—Privy Council—High Court—Leave to appeal.*—It is not competent to a High Court to grant leave to appeal to the Privy Council, upon the ground that "there seems to be a point of law:" this is contrary to the provisions of the Civ. Pro. Code, 1882. KARUPPANAN v. SHRINIVASAN, **4 Bom. L. R. 248.**

(7)—*Decision—Interpretation—Decree affirming the decision of the Court immediately below—Civ. Pro. Code, 1882, s. 596.*—The natural, obvious and *prima facie* meaning of the word, "decision" is the decision of the suit by the Court; and in s. 596 of the Civ. Pro. Code the term bears the same meaning. A decree is to be regarded as affirming the decision of the Court immediately below, when the appellate Court confirms the order passed: the fact that the reasons given by the appellate Court are not the same in respect of some matter of fact makes no difference TASSADUQ v. MANICKCHAND, **5 Bom. L.R. 100.**

(8)—*Privy Council—Leave to appeal*—The High Court granted leave to appeal to the Privy Council, where the case involved a question of law and the point in dispute though not measurable by money, was of considerable importance, *e.g.*, the extent of the control acquired by one who has built a Parsi fire-temple. NAVROJI v. KHARSEDJI, **6 Bom. L.R. 286.**

(9)—*S. 594, Civ. Pro. Code, 1882—Appeal—Privy Council — Certificate to appeal—High Court—Indian Companies Act (VI of 1882)—Memorandum of Association Act (XII of 1895).*—The term 'decree' in s. 594 of the Civ. Pro. Code, 1882, includes an order passed by the High Court under the Memorandum of Association Act, 1895, or under the Companies Act, 1882. The High Court granted leave to appea

***Appeal to Privy Council*—continued.**

——5.—Miscellaneous—*continued*.

to the Privy Council on the grounds that the questions involved might seriously affect the financial and commercial position of the Company in question, and that it was of importance to Indian Companies generally that their rights should be precisely defined in relation to the point that arose in the case. BOMBAY BURMA TRADING CO. v. DORABJI, **5 Bom. L. R. 348=27 B. 415.**

(10)—*Privy Council—Leave to appeal—High Court should record reasons in refusing the leave.*—The High Court should, in refusing a certificate for leave to appeal to the Judicial Committee of the Privy Council, state the grounds on which they refused it. *In re* VENGANAT, **8 Bom. L.R. 374=10 C.W.N. 545=29 M. 194, P.C =4 C.L J. 305=33 I.A. 67.**

(11)—*Leave to appeal to His Majesty in Council—Value of the matter in dispute in appeal—Decree involving some claim or question to, or respecting property of the prescribed value.—S. 596, Civ. Pro. Code, 1882.*—To determine the value prescribed by s. 596 of the Civ. Pro. Code, the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of s. 596 of the Code. DE SILVA v. DE SILVA, **6 Bom. L.R. 403.**

(12 & 13)—*Final decree passed on appeal—High Court—Appeal—Privy Council—S. 595, Civ. Pro. Code, 1882.* An order passed by the High Court, refusing to admit an appeal presented beyond the prescribed period, is not a "decree passed on appeal" under s. 595 *(a)* of the Civ. Pro Code, and is, therefore, not appealable to His Majesty in Council. KARSONDAS v. GANGABAI, **9 Bom. L R. 566=32 B. 108.**

(14)—*Concurrent judgments on fact.*—The Privy Council will not interfere with the concurrent judgments of Original and Appellate Courts, upon matters of fact, in the absence of any contravention of law or procedure, unless very definite and explicit grounds for that interference are assigned. MOUNG SHA HUYEEN v. MOUNG PANNYO, **28 C. 1, P C.=27 I. A. 166=4 C.W N. 808=2 Bom. L.R. 985=7 Sar. 786.** [*D.*, 5 C.W.N. 692.]

(15) — *Appeal from interlocutory orders—Civ. Pro. Code (Act XIV of 1882), s. 108.*—No appeal lies to Her Majesty in Council from an order which is a purely interlocutory order, directing procedure; such appeal only lies if the order is a final order in the sense of s. 595 *(a)* as modified by s 594 of the Civ. Pro. Code. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit, cannot make

***Appeal to Privy Council*—continued.**

——5.—Miscellaneous—*continued*.

appealable an order which does not fulfil the statutory conditions. The application of defendant, under s. 108 of the Civ. Pro. Code, to set aside an *ex-parte* decree was dismissed by the Subordinate Judge. Against that order of dismissal an appeal was taken to the High Court by the defendant. The High Court set aside the order of the Subordinate Judge and ordered that "the case be, and it hereby is, remanded, under s. 562 of the Code of Civil Procedure, to the Court of the said Subordinate Judge to be disposed of on the merits." *Held*, on the construction of this order, that what was remanded was merely the application immediately before the Court, to wit, the application to set aside the decree, and that it was that application which the Subordinate Judge would under the remand, proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in s. 108 and then, if that be done, by setting aside the decree. RAI RADHA KISHEN v. COLLECTOR OF JAUNPUR, **3 Bom. L.R. 78.**

(16)—*Leave to appeal—Interlocutory order—Jurisdiction.*—Leave to appeal to the Privy Council can be given where the order appealed from transferring a case from one Court to another is interlocutory, and raises a question of jurisdiction, MUNICIPAL OFFICER, ADEN v. ABDUL KAREEM, **6 Bom. L. R. 85=28 B. 292.**

(17)—*Privy Council appeal—Security bond for respondents costs—Liability of surety in execution.*—The amount secured by a bond (for the costs in respect of an appeal to the Privy Council) cannot be recovered in the execution department of the Court having charge of the execution of the Privy Council decree. The proper remedy of the decree-holder against the surety is by a seperate suit. RADHA PERSHAD SINGH v. PHULJURI KOER, **12 C. 402.** (2 A. 604; *Diss.*, 7 M. 284. *Appr.*) [*F.*, 15 C. 497, 23 C. 212; *Cons.*, 15 M. 203, 25 M. 409.]

(18)—*Abandonment, on appeal, of a part of amount of claim—Reduction of claim to below prescribed limit of appealable amount.*—Where the defendants, having a *bona fide* intention to appeal in respect of the whole amount decreed, obtained the certificate and admission of their appeal as competent within the Code of Civil Procedure, and afterwards, in the printed case, and at the hearing, withdrew part of their appeal, confining it to an amount below the prescribed limit, the appeal is not thereby rendered incompetent. KALKA SINGH v. PARAS RAM, **22 C. 434, P. C.=22 I. A. 68=5 M.L.J. 14=6 Sar. 545.**

(19)—*Order in Council reversing decree of High Court — Petition for amendment.*—An order in Council which dismissed a suit and reversed a decree of the High Court setting aside a transfer of a testator's estate by the executors, as illegal, named in his will to the Administrator-General, appointing a Receiver

***Appeal to Privy Council*—continued.**

——5.—Miscellaneous—*continued.*

and directing accounts against the executors, should not be amended on petition. ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK, **22 C. 1011, P. C. = 22 I. A. 202 = 5 M.L.J. 157 = 6 Sar. 660.**

(20)—*Appeal to Privy Council—Security for costs of respondent—Execution of Privy Council decree against surety—Civ. Pro. Code, 1877, ss. 253 and 610.*—Under ss. 253 and 610 of the Civ. Pro Code, an order or decree of the Privy Council can be executed against sureties, who, on behalf of the opposite party, have given security, either for costs or for the whole decree-amount, that might become due from such party —*Per Spankie, J., and Straight, J.—Contra.* The words of s. 610 seem simply to provide for the enforcement of decrees or orders of the Privy Council, according to the same method as original decrees are executed by the Court passing them, but they create no liability and establish no specific responsibility, in the surety, such as is created by s. 253. BANS BAHADUR SINGH v MUGHLA BEGAM, **2 A. 604, F B.** [*Diss.*, 12 C. 402, 15 C. 497; *F.*, A.W.N. 1885, 13, 17 A. 99, = A.W.N. 1895, 19; *Cons.*, 15 M. 203; *R.*, 3 A. 809, 13 M, 1, 25 B. 409, 2 Bom. L.R. 203. 31 B. 128; *D.*, 7 M. 284, 32 C. 494 = 9 C.W.N. 372 = 1 C.L.J. 118.]

(21)—*Subject-matter of suit trifling—Refusal of leave to appeal.*—The Supreme Court, in overruling the objections to the jurisdiction of the Court, refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon petition, the Judicial Committee granted leave to appeal, but upon terms of the appellant paying the respondent's costs of the appeal, to enable him to appear to prevent the question being argued *ex parte*. SPOONER v. JUDDOW, **4 M.I.A. 383.**

(22)—*Rules of Ecclesiastical Courts in Doctors' Commons—Quære.* — Whether the rules of Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of appeal, apply to an Ecclesiastical cause in the Supreme Court at Calcutta, so as to deprive a party of the Charter right to appeal within six months from the decree, &c. CASEMENT v. FULTON, **3 M.I.A. 395.**

(23)—*High Court's rules for admitting Privy Council appeals.*—Circulates rules recently passed by the High Court regarding the admission of appeals to Her Majesty in Council. **Civ. Cir. No 27, dated 5th September 1870. 14 W.R. Civ. Cir. 13.**

—Subject-matter not exceeding Rs. 10,000—Certificates granted in connected cases—Same question involved—Leave to appeal—*See* CIV. PRO. Code, 1908, ss. 109, 110, 5 Ind. Cas. 583.

—Interpretation of decree—*Res judicata*—Appeal—*See* CIV. PRO. CODE, 1908, s. 109 (c), O. XLV, r. 3, 8 Ind. Cas. 485.

***Appeal to Privy Council*—concluded.**

——5.—Miscellaneous—*concluded.*

—Poverty, whether sufficient reason for extension of time allowed for the deposit of security for respondent's costs in—*See* CIV. PRO. CODE, 1908, O. XLV, r. 7, 44 P.R. 1910 = 70 P.W.R. 1910 = 6 Ind. Cas. 723 = 118 P. L. R. 1910.

—Order dismissing appeal on default—Effect—Limitation for execution of decree—*See* LIMITATION ACT, 1908, arts. 181, 183, 7 A.L.J. 1001, F.B = 7 Ind. Cas. 926.

Appearance.

—Order directing party to appear in person—Omission to mention section—Effect—Appeal—*See* CIV. PRO. CODE, 1908, O. III, r. 1, O. VII r. 15, O. X, r. 4, 6 A.L.J. 340 = 2 Ind. Cas. 463.

See CIV. PRO. CODE, 1908, O. IX, r. 13, Marsh 32.

—Application for adjournment by pleader, whether an—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 17, 19, 11 C.W.N. 329, F.B. = 5 C.L.J. 247 = 2 M.L.T 123 = 34 C. 403.

—Non-attendance in Court—Appearance by agent—*See* PARTIES TO SUITS—MISCELLANEOUS, Marsh 627.

Appellant.

See CIV. PRO. CODE, 1908, O. XXII, r. 5 12 A. 200.

See CIV. PRO. CODE, 1908, O. XLI, r. 10, 8 A. 203, F.B. = A.W.N. 1886, 310.

—Absence of, procedure to be followed in—*See* DISMISSAL OF SUITS, 7 Bom. L.R. 933.

See LIMITATION ACT, 1908, art. 171, 3 C.L.R. 440.

Appellate Court.

1.—ADDITIONAL EVIDENCE ON APPEAL.
2.—DUTY OF APPELLATE COURT.
3.—OBJECTIONS FIRST TAKEN IN APPEAL.
4.—POWERS OF APPELLATE COURT.
5.—PRACTICE AND PROCEDURE.
6.—REJECTION OR ADMISSION OF EVIDENCE.
7.—MISCELLANEOUS.

See APPEAL.

See APPEAL TO PRIVY COUNCIL.

See CIV. PRO. CODE, 1908, ss. 96 to 112 and O. XLI to XLV.

See PRACTICE AND PROCEDURE.

See PRIVY COUNCIL, PRACTICE OF.

See SPECIAL OR SECOND APPEAL.

——1.—Additional evidence on appeal.

See CIV. PRO. CODE, 1908, O. XLI, r. 27.

See EVIDENCE.

***Appellate Court*—continued.**

——1.—Additional Evidence on appeal—*ctd.*

(1)—*Opportunity given to parties for adducing evidence—Civ. Pro. Code, 1859, s. 353—Sufficiency of evidence.*—When parties have had an opportunity to put in such evidence as they consider sufficient on the material issues of a case, it ought to be held sufficient under s. 353, Civ. Pro. Code, 1859, to enable the appellate Court to pronounce a satisfactory judgment. BEEBEE ZAHRAH v. BHUJWAN DOSS, **16 W.R. 211.**

(2.—Ex-parte *decision of case without considering evidence—Memo of objections not filed—S. 354, Act VIII of 1859.*—The appellate Court cannot decide a case *ex parte* without considering that evidence, because a memorandum of objections under s. 351, Act VIII of 1859, has not been filed. WOOMASH CHUNDER ROY v. JONARDUN HAJRAH, **15 W.R. 235.** [*Diss.*, 1 A. 165 ; *R.*, 5 N.W.P. 114.]

(3)—*Evidence improperly admitted in lower Court.*—The lower appellate Court was not competent to reject the documentary evidence which had been admitted by the Court of first instance merely because it had been admitted after the first hearing of the case or after the date on which it had been ordered to be produced. HANOOMAN SINGH v. FEEL, **3 Agra, 148.**

(4)—*S. 355, Civ. Pro. Code, 1859—Evidence taken in ministerial capacity—Defendant's right to object.*—Lower Court taking evidence under s. 355, Act VIII of 1859, acts in a ministerial capacity ; and defendant may object to the documentary evidence when submitted to appellate Court. RAMJOY SURMAH v. RAJAH PRANKISHEN SINGH ; BARODA DEBIA v. RAJAH PRANKISHEN SINGH and PRONNODA DEBIA v. RAJAH PRANKISHEN SINGH, **2 W. R. 80.**

(5)—*Discretion of lower appellate Court to allow parties to adduce fresh evidence.*—It is within the discretion of a lower appellate Court to allow the parties an opportunity to adduce fresh evidence, if it is satisfied that the interests of justice require that course. MOHUNT DAMOODUR DASS v. RITTO SINGH, **24 W.R. 325.**

(6)—*Evidence, not sufficient for determination of appeal—Additional evidence.*—Where the evidence upon the record is not sufficient to enable the appellate Court to pronounce a judgment upon a regular appeal, the appellate Court may require the Court, against whose decree the appeal is made, to take additional evidence, defining the points to which such evidence is to be confined, in order to enable the appellate Court finally to determine the case. NARASIMHARAV KRISHNARAV v. ANTAJI VIRUPAKSH, **2. B.H.C. 61.**

(7)—*Munsif decreeing plaintiff's claim on defendant's admission and on perusal of document of former suit—Reversal by Judge on appeal—Taking fresh evidence—Course to be pursued on appeal.*—Where a Munsif, without

***Appellate Court*—continued.**

——1.—Additional Evidence on appeal—*ctd.*

framing issues or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant, and upon inspection of a document that was upon the record of a former suit, but the Judge, on appeal, reversed the decree of the Munsif on account of the insufficiency of evidence, the document, in his opinion, not being admissible. It was *held* that the Judge ought not to have reversed the Munsif's decree without first exercising his power of taking fresh evidence under s. 355 of the Code of Civil Procedure. APPA *valad* KASHINATH v. VITHOBA *valad* TUKARAM, **6 B.H.C.A.C. 88.**

(8)—*Kaboolent—Refusal to summon witnesses—Additional evidence.*—When a defendant in a suit in which the genuineness of the kaboleut is disputed appeals from a Deputy Collector who refused to summon certain witnesses, the Judge ought to direct that the witnesses or their evidence should be sent up, the evidence being confined to the rate and time of payment and the rent to which payment had been appropriated. MOHUN MUNDUR v. BRIJ BHOOKUN SINGH, **9 W.R. 127.**

(9)—*Partnership—Supplemental evidence in appeal.*—In a suit to recover money, where certain goods being attached by order of the Court, two other persons claim them as their property and are made defendants, and the lower Court finds that the proof of their partnership has failed : *Held*, in appeal, that plaintiff's case cannot now be supplemented by examining parties or books not produced in the Court below. VELAET ALI KHAN v. MATADEEN, **10 W.R. 402.**

(10)—*Party refusing to produce documents before first Court, whether could be permitted to put them in during appeal.*—During the hearing of the appeal in this case, the High Court ruled that the defendants, the *Shevaks* of the temple, could not be allowed to put in as evidence certain account-books which they had, in the Court of first instance, refused to produce. After succeeding in his resistance to the production of documents, a party cannot be allowed, when the hearing has been finished and his adversary has been perhaps driven to establish his case on a quite different footing, to turn round during the appeal and request that such documents may be admitted. MANSHAR GANISH TAMBEKAR v. LAKSHMIRAM GOVINDRAM, **12 B. 247.**

(11)—*Sale-deed—Collusion—Presumption as to, without inquiry—Possession.*—Where plaintiff has purchased B's right in a 4-anna share of property, the rights and interests in which are sold in execution and purchased by defendant, and B, the vendor, admits the sale to plaintiff —*Held* that the lower appellate Court did wrong in presuming collusion between B and his vendee, and ought not to reject the deed of sale without examining the writer and

Appellate Court—continued.

——1.—Additional evidence on appeal—*ctd.*

witnesses; and that it ought to decide plaintiff's possession at any time under the deed. RAM LALL JHA v. ISSUR CHUNDER DEY, **10 W R. 481.**

(12)—*S. 355, Civ. Pro. Code, 1859—Construction—Right to adduce further evidence.*—The true interpretation of Civ Pro. Code, 1859, s. 355 is that, when a Court sees that, by some inadvertence or mistake, a party has not produced some evidence which he was capable of adducing and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned, and accidental, the Court should allow such further evidence to be taken. GOWHUR ALI KHAN v. MUSSAMUT SAKHEENA KHANUN, **15 W R. 507.**

(13)—*Civ. Pro. Code, 1908, O. IX, r. 13 (=old s. 108), Order under—Appeal against order—Civ. Pro. Code, 1859, s. 355.*—The Court declined, on appeal from an order rejecting an application under s. 119, Act VIII of 1859, to set aside an *ex-parte* decree in order to receive an affidavit which had not been previously tendered, and held that s. 355 was not meant to apply to such a case. SHEPHARD JOHN LESLIE v. WILLIAM OSMAND ALLENDER, **17 W.R. 390.**

(14)—*Ejectment—Admission in appeal of defendant's document denied in lower Court—Substantial error of law.*—In a suit for ejectment, held that the admission in appeal of a pottah on the *ipse dixit* of the defendant after his vakeel had deposed on oath in the first Court that defendant had no documents whatever, is a substantial error in law; and that even if the Subordinate Judge had a right to admit it, he was wrong in deciding the case on it without evidence of its genuineness. SERAJOOL HUQ v. SHAIKH KERAMUTOOLLAH, **19 W.R. 87.**

(15)—*Court satisfied with evidence of party—Court to receive all evidence adduced by party—Appellate Court.*—A Court of first instance ought not, because it is satisfied with the evidence given by one of the parties, prevent him from putting in all the evidence he wishes, so that his case may be brought fairly before the appellate Court. Where a party has been prevented by the first Court from putting in all his evidence, and the evidence on the record is not deemed sufficient by the appellate Court, the latter does wrong in refusing the evidence which was excluded by the first Court. BRIJ SOONDUR ROY v. BIBEE KAIMOONNISSA, **23 W.R. 63.**

(16)—*Taking of additional evidence when required by appellate Court.*—When a lower Court disposes of a case upon the merits as proved by evidence not legally admissible against the defendants and the appellate Court considers it proper to allow the plaintiff to adduce further evidence, it may either take such further evidence itself, or send the case back to the lower Court to take such evidence.

Appellate Court—continued.

——1.—Additional evidence on appeal—*ctd.*

RAMJOY SURMAH MOZOOMDAR v. RAJAH PURAN KISHEN SINGH, **W.R.F.B. 124.**

(17)—*Civ. Pro. Code, 1859, s. 355—Evidence.*—On an appeal to the High Court, that Court, acting under the power conferred by s. 355 of the Code of Civil Procedure, Act VIII of 1859, *ex mero motu*, called for and examined fresh witnesses. *Held*, that such power should be cautiously exercised, and the reasons for exercising it recorded or minuted by the High Court on the proceedings; as, first, the witnesses may be such as the parties to the suit do not wish to call; and, secondly, the new evidence may not be sufficiently extensive to satisfy the ends of justice. SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY, **7 W.R. 10 P.C. = 11 M.I.A. 28.**

(18)—*Fresh evidence—Review—Act VIII of 1859, s. 355.*—The Privy Council should not lightly admit fresh evidence. GOBIND SUNDARI DEBIA v. JAGADAMBA DEBIA, **3 B.L.R. P C. 25.**

(19)—*Examining defendant in appeal on material evidence—Act VIII of 1859, s. 355—Illegal procedure.*—A Judge examining in appeal a defendant who failed to give material evidence which he might have given in the Court below acts erroneously. JUGOBUNDHOO DEB v. GOLUCK CHUNDER HOLDAR, **10 W.R. 228.**

(20)—*Additional evidence—Appellate Court.*—An appellate Court ought not to receive additional evidence not before the Court of first instance without a special reason which should be recorded. JOOG MAYA DEBIA v. RAM CHUNDER CHATERJEE, **10 W.R. 378.**

(21)—*Reasons to be stated for taking fresh evidence—Procedure.*—A lower appellate Court should state fully its reasons for calling for fresh evidence, but in point of law, it is sufficient to state that such reasons exist. SHIB CHUNDER MAHTOON v. KASHEENATH KURMOKAR, **12 W.R. 245.**

(22)—*Recording reasons for reception of further evidence—Condition.*—For their reception of further evidence by an appellate Court, it is not necessary that the reasons for doing so should be recorded. MR. W. CHARDON v. AJEET SINGH, **12 W.R. 52.**

(23 and 24)—*Act VIII of 1859, s. 355—Admission of additional evidence by appellate Court.*—It is irregular for an appellate Court to receive, without very substantial reasons, evidence, however material and important, not produced in the lower Courts. But the High Court declined to set aside a decision based on such evidence, on the ground that the decision of the Court below was justified by sufficient evidence independently of the evidence improperly admitted. MAHARAJA JAGADINDRA BANWARI GOBIND BAHADUR v. BHABATARINI DASI, **5 B.L.R. App. 54 = 14 W.R. 19.**

***Appellate Court*—continued.**

——1.—Additional evidence on appeal—*ctd.*

(25)—*Civ. Pro. Code, 1859, s. 355—Reasons for admitting fresh evidence on appeal.*—The provision of the Code of Civil Procedure (Act VIII of 1859, s. 355) which requires the Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought to be strictly complied with. GUNGA GOBIND MUNDUL v. THE COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS, **7 W.R. 21, P.C. = 11 M.I.A. 345.**

(26)—*Civ. Pro. Code, 1859, s. 359—Recording reasons for additional evidence—Necessity.*—It is the duty of the Court to record its reasons for additional evidence taken under s. 355, Act VIII of 1859, but it is not a condition precedent to the admissibility of the evidence. BANEE PERSHAD v. LALLA JOGESSUR DAS, **11 W.R. 47.**

(27)—*Defendant's evidence imperfectly taken in first Court—Civ. Pro. Code, 1859, s. 355—Judge to examine defendant and record reasons.*—Where the evidence of a defendant in the first Court has been so imperfectly taken that the lower appellate Court can form no decision, the Judge under s. 355, Civ. Pro. Code, 1859, must himself examine the defendant, and record his reasons for so doing. MOHESH CHUNDDR DOSS v. MADHUB CHUNDER SIRDAR, **13 W. R. 85.**

(28)—*Record of reasons for sending for evidence—Procedure.*—A Judge sending for a map or other evidence must record his reason for doing so, and this evidence must be received in the presence of the parties in open Court and afterwards kept in the record. GUNPUT ROY v. RAM DEVUR ROY, **21 W.R. 416.**

(29)—*Discretion as to fresh evidence.*—Although fresh evidence of facts should be rarely required by appellate Court, the matter is within its discretion. SHOOKRAH SHAIKH v. NUND COOMAR BANERJEE, **23 W.R. 246.**

(30)—*Additional evidence, record of, by lower appellate Court—Interference by High Court—Civ. Pro. Code, s. 568.*—Where an appellate Court, though it is not satisfied that the evidence is necessary either under cl. (*a*) or (*b*) of s. 568, still allows additional evidence to be taken, the second appellate Court will interfere; but where this does not appear to be the case, and there is simply an omission on the part of the appellate Court to record its reasons for allowing additional evidence to be taken, the second appellate Court will not interfere. HAFIZ ABDUL KARIM v. SRI KISSEM RAI, **11 C. 139.** [*R.*, 1 O.C. 199.]

(31)—*Record of additional evidence by first appellate Court.—Civ. Pro. Code. 1882, s. 568—Provision directory only—Procedure in second appellate Court*—The provision of s. 568 of the Civ. Pro. Code, as to an appellate Court recording its reasons for admitting additional evidence, is *mandatory or directory merely*, and *not imperative*. The record of additional evidence by a first appellate Court will not make the hearing in the second Court a first appeal, so as to allow the parties to go into facts. GOPAL SINGH v JHAKRI RAI, **18 C. 37.** (7 M. 52, *Not F.*) [*F.*, 24 C. 98.]

***Appellate Court*—continued.**

——1.—Additional evidence on appeal—*ctd.*

(32)—*First Court's refusal to summon witnesses of plaintiff—Additional evidence on appeal—s 355, Civ. Pro. Code, 1859.*—The first Court's refusal to summon five of plaintiff's witnesses, notwithstanding that it postponed the case for 10 days, although fifteen other witnesses were present, is a sufficient reason within Act VIII of 1859, s. 355, for the lower appellate Court to send for and take their evidence. ABELAKH ROY v. GUGGUN BHUGGUT, **22 W.R. 268.**

(33)—*Act VIII of 1859, s. 355—Additional evidence in appellate Court.*—Where the lower appellate Court "considered it necessary, for the purpose of proper decision" to examine certain persons, *held* that it was a sufficient reason within the meaning of s. 355, Act VIII of 1859, for requiring the additional evidence. RADHANATH DHUBI v. RAM GOBIND PAL, **8 B.L.R. A.C. 218.**

(34)—*Rejection of evidence taken by appellate Court in presence of parties—Record of reasons.*—Evidence taken by a lower appellate Court in the presence of parties or their agents should not be rejected on appeal, merely because the Court omitted to record its reasons for admitting it. BHUGWAN CHUNDER GHOSE v. RAJ COOMAR GOOHO, **13 W.R. 303.**

(35)—*Appeal — Practice — Registration — Certificate of sale registered after decree but before appeal.*—The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and put in evidence a sale certificate, dated 20th September, 1865. The claim was disallowed on the ground that the certificate was not registered, though registration of it was compulsory. On the 9th February, 1875, the plaintiff filed an appeal in the High Court against that decree, and on the 26th July, 1875, applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February, 1875 regarding the same property as that to which the certificate of the 20th September, 1865, related. *Held* that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it, or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree. *Quære.*—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of the sale on the 1st February, 1875, ought to have so issued it in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate. *Quære*—Whether the Court of first instance ought to have received the second certificate if it had

***Appellate Court*—continued.**

——1.—Additional evidence on appeal—*ctd.*

been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing. LALBHAI LAKHMIDAS v. NAVAL MIR KAMALUDIN HUSEN KHAN, **12 B.H.C. 247**. [*D.*, 6 B. 139, 10 B. 444; *R.*, 9 B. 472.]

(36)—*Civ. Pro. Code, 1882, s. 142 A—Evidence—Document rejected by first Court as inadmissible—Effect of document continuing on record.*—Where a document produced and tendered in evidence by the defendants was rejected by the first Court with an endorsement showing why it was rejected, but, however, on account of some oversight on the part of some officer of that Court, or by reason of the defendants not having asked for the return of the document, it was allowed to remain on the record, the mere fact of its being found among the papers could not be taken to have avoided the necessity which the defendants were under to tender it in evidence to the lower appellate Court, if they wanted to rely on it. HAR GOBIND v. NONI BAHU, **14 A. 356 = A.W.N. 1892, 42.**

(37)—*Civ. Pro. Code, s. 568—Fresh evidence—Discretion of Appellate Court.*—The Appellate Court might take fresh evidence or direct the lower Court to take it, where the evidence has been taken so imperfectly by the Court of first instance that the Appellate Court cannot pass a satisfactory judgment on the issues raised in the case. SRINIVASACHARIAR v. RANGAMMAL, **18 M. 94.**

(38)—*Civ Pro. Code (XIV of 1882), ss. 562, 568, 569—Exclusion of evidence, by Court of first instance, whether sufficient ground for reversal of decree—Additional evidence, record of.*—Where there has been a trial and adjudication on the evidence taken by the Court of first instance and the issues have been decided and decree passed, on appeal from such decree it is not competent to the appellate Court, to reverse such decree and remand the case for re-trial, simply on the ground of the exclusion, by the lower Court, of certain evidence which the parties had desired to produce S. 562 of the Civ. Pro. Code is inapplicable to such a case. The proper course for the appellate Court to take would be to act either under s. 568 or s. 569 of the Code by itself taking the evidence considered to have been wrongly excluded or directing the lower Court to take it. SESHAN PATTAR v. SESHAN PATTAR, **23 M. 447.** (23 M. 445, *D.*) [*R.*, 30 M. 54 = 16 M.L.J. 479 = 1 M.L.T. 268, F.B.]

(39)—*Reversal of decision on preliminary points—Appeal—Re-trial of suit on merits—Evidence of defendants—Admissibility.*—Where a suit is re-tried on its merits after reversal of decision on a preliminary point, evidence may be received even from defendants who have appeared, and *a fortiori* from one who has not appeared. KOONJ BEHAREE AWESTEE v. TARINEE KANT LAHOREE, **8 W.R. 285.**

***Appellate Court*—continued.**

——1.—Additional evidence on appeal—*cld.*

(40)—*Evidence of payment of rent—Decree in former suit—Remand by Appellate Court—Additional evidence.*—A decree passed in a previous suit, when it declares the rent payable by a ryot, is evidence of the rent still payable by him, unless the landlord pleads that the *jumma*, as settled by the decree, has since been altered and succeeds in proving the plea. In an appeal, a Judge is competent to take additional evidence himself and should not remand a case for such evidence being taken. CHUNDER COOMAR ROY v. ZEEMNUTOOLLAH SIRDAR, **W.R. 1864, Act X, Rul. 95.**

(41)—*Tender of evidence by defendant—Decision by first Court without receiving evidence—Duty of Appellate Court.*—When the Court of first instance decides a case in favour of a defendant without receiving certain evidence tendered by him, the Court of Appeal should allow him the opportunity of adducing that evidence. MOKEEM TANDAL v. NAWAB SYED ALI AHMED, **3 W.R. Act X, Rul. 133.**

(42)—*Defendants taken unawares by issue—Procedure.*—Lower Appellate Court, which considers defendants taken unawares as to an issue in a suit for land, should call for evidence and not dismiss case. PEAREE MOHUN MOOKERJEE v. HURO PERSHAD ROY CHOWDHRY, **23 W.R. 99.**

(43)—*Admissibility of documentary evidence—Objection—Jurisdiction of appellate Court.*—Where no objection was taken as to the admissibility of documentary evidence, in this case a decree, and the plaintiff and the defendant having respectively put in different portions of the proceedings in regard to that decree and having referred to and built up arguments upon those different portions, the appellate Court had no jurisdiction to exclude it. BIRCHANDRAROI MAHAPATTAR v. BANSI DHAR ROY MAHAPATTAR, **3 B L.R A.C. 215.** [*F.*, 8 Ind. Cas. 26.]

—Suit for dissolution of marriage on the ground of adultery—Production of additional evidence in appellate Court—*See* ACT IV OF 1869, ss. 3 (2), 55, 4 A. 306 = A.W.N. 1882, 86.

——2.—Duty of Appellate Court.

(1)—*Judgment, contents of—Judgment upon the facts—Reasons for findings—Relief actually granted.*—It is not sufficient for an Appellate Court merely to state that it is not prepared to say that the decree of the Lower Court was wrong or against the weight of evidence as alleged in the appeal, but it should form its own judgment upon the fact and give its own reasons for its findings. Further, it is not sufficient for an Appellate Court to merely set aside the decree of the Court below, but it should state the relief actually granted. U BEIN v. AVETCHE CHETTY, **L.B.R. 1893—1900, 590.**

(2)—*Method of determining appeal—Civ. Pro. Code, 1882, s. 574.*—It is the duty of the Court of first appeal to consider the pleas in

Appellate Court—continued.

——2.—**Duty of Appellate Court**—*continued.*

appeal before it, to examine the evidence for itself, and to express its own view as to the weight and value of the evidence with special reference to the requirements of s. 574, Civ. Pro. Code. The provisions of that section are imperative and require the Court not only to have present to its mind, but also to state in express terms, the various points in the case, and after going fully into the evidence and after weighing it, to pass a decision on each material point. MAHADEO PRASAD v. SARJU PRASAD, **A.W.N. 1886, 171.** [*R.*, 9 A. 26, 8 A. 576, F.B.]

(3)—*Disposal of appeal—Method of.*—An Appellate Court should not merely run through the grounds of appeal The points for decision should be clearly set out, with the determination of each, and the reasons. Unless the lower appellate Courts do their duty by dealing thoroughly with the cases before them, much trouble and expense are caused to litigants, as the unsuccessful party is sure to take advantage of any omission to come up in revision, and the application has to be admitted, because the lower appellate Court has not made it clear that the case has been properly considered and disposed of. CIVIL REVISION NO. 48 OF 1893, **U.B.R. 1892=1896, Vol. II, 6.**

(4)—*Method of dealing with questions of fact in appeal.*—In dealing with questions of fact which turn entirely upon the evidence given on the trial, the High Court ought not merely to consider whether the lower Court has come to the same conclusion as that to which it should have come, if it had originally heard the witnesses, but, before reversing the decision, it ought to be satisfied that the Court was clearly wrong. OOTUM v. MULLICK GHOLAM HOSSEIN, **2 Hay 359.**

(5)—*Appellate Court need not look at evidence generally—Decision of lower Court only to be considered.*—A Judge of appeal is not an arbitrator required to look at evidence on both sides, and determine which is preferable: he has to deal with the decision of a properly-constituted Court, which, if not shown to be erroneous, ought to be affirmed. SHETABDEE BISWAS v. MOLAMDEE MUNDUL, **25 W.R. 30.**

(6)—*Not bound to meet every argument of lower Court—Remand for meagreness of judgment of lower Court.*—An appellate Court is not bound to meet categorically every argument advanced by the first Court. The meagreness of the lower appellate Court's judgment warrants a remand only when the judgment does not show that the evidence has been considered. KRISHNENDRO ROY CHOWDHRY v. DIGUMBUREE DEBIA, **16 W.R. 18.** [*R.*, 21 W.R. 260.]

(7)—*Necessity for first appellate Court to examine grounds stated by first Court.*—A mere general and sweeping statement of opinion is not a sufficient disposal of an appeal pending before a Court of first appeal. It is the duty

Appellate Court—continued.

——2.—**Duty of Appellate Court**—*continued.*

of the Court to deal with the matter of examining the grounds stated by the first Court, and, if it differed in its conclusion, showing that those grounds were not supported by evidence or that they were insufficient in themselves, or that they were overbalanced by other considerations arising out of the proved or admitted circumstances of the case. RAJA SETH GOKULDAS v. MT. JANKEE, **9 C.P.L.R. 142.** [*R.*, 2 N.L.R. 87].

(8)—*Conditions of interference with first Court's judgment.*—The duty of the appellate Court is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the lower Court is right until the contrary is shown. No doubt the appellate Court may make further enquiries, but such enquiries ought to be made with discretion, and only in those cases in which the appellate Court finds itself unable to do justice to the parties on the evidence and materials as they stood upon the record. TAYUBUNNISSA BIBI v. SHAM KISHORE ROY, **7 B.L.R. 621=15 W.R. 228.**

(9)—*Appeal—Exercise of judicial discretion by lower Court, appellate Court how far bound to interfere with.*—Whenever an appeal against an order based on facts is given from a subordinate to a superior Court, the discretion vested in the former is absorbed in the latter whose duty, therefore, it is to weigh the facts which form the basis upon which the subordinate Court proceeded and arrived at its own independent conclusion. The mere circumstance that the lower Court is vested by law with judicial discretion does not by itself debar the Court, to which a first appeal lies, from reviewing the facts and judging for itself, and this even where the lower Court has acted after proper enquiry and due consideration of the facts put before it, and not capriciously or with prejudice. KIRANI AHMEDULA v. SUBABHAT, **8 B. 28.** [*R.*, 19 B. 790.]

(10)—*Judgment upon finding of facts.*—An appellate Court should, in every case take into consideration the advantage the Court of first instance has had in seeing the witnesses and observing their manner of giving evidence, but it is bound to exercise its own judgment upon the evidence. N.L.C.N. CHAKAPPA CHETTY v. MAUNG SHWE PA, **L.B.R. 1893—1900, 64** (L.B.R. 1872—1892, 314 and 418, *R.*)

(11)—*Caution to be used by a Court of Appeal in reversing a first Court's finding of fact on oral evidence.*—If, in the Court of first instance, there was clear and distinct evidence upon the one side, and possible evidence which the appellant might think to be as clear and distinct upon the other side, nevertheless, if the Judge,

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——2.—Duty of Appellate Court—*continued.*

in his discretion, having the opportunity of seeing the witnesses, and of observing their demeanour, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion on the ground that the Judge has erred in giving credence to the one class of witnesses rather than to other, undertake an almost impossible task. TAN AUNG RI v. RAM CHANDRA DE, **L.B.R. 1872—1892, 314.** (Alice and the Princess Alice, L. R., 2 P. C. 245, *F.*) [*R.*, L. B. R. 1893—1900, 64, 209, L.B.R. 1872—1892, 416.]

(12)—*Lower Burma Courts Act.*—It is improbable that a trader would have lent so large a sum of money on a verbal deposit. Caution to be used by a Court of civil appeal in disturbing a finding of fact by a Court of first instance. BUX ALLY v. LALL MAHOMED, **L.B.R. 1872—1892, 416.** [*R.*, L. B. R. 1893—1900, 209.]

(13)—*Appellate Court—Finding of fact by lower Court.*—A Court of second appeal is bound by a finding of fact of the lower Court. FAKIR LAL GOSWAMI v. W. C. BONNERJI, **4 C.W.N. 324.**

(14)—*Privy Council, practice of—Appeal on questions of fact.*—The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of fact, unless it is clear from the probabilities of the case that the judgment is wrong, however necessary as regards a Court of Appeal far removed from India, would hardly be extended as one equally necessary and applicable with the same strictness to a Court of Appeal in India. SARODA SOONDERY v. TINCOWRY NUNDY, 1 **Hyde 223.**

(15)—*Credibility of witnesses—First Court's decision important.*—In cases turning on the credibility of witnesses, the Appellate Court gives great weight to the decision of the Courts below. WOMESH CHUNDER ROY v. DEENDAYAL PORAMANICK, **2 Hay 12.**

(16)—*Credibility of witness—First Court's opinion entitled to weight.*—On question of credit due to witness, the opinion of Courts which witnessed the demeanour of witness is entitled to the consideration of the Appellate Court. GOPEE NATH MOOKERJEE v. BODDHUMUNTMAL, **25 W. R. 26.**

(17)—*First Court believing testimony of witnesses—Duty of Appellate Court for discrediting them.*—Where credit has been given to witnesses by the Court of first instance, the lower appellate Court must state its reasons for disbelieving them. MUSSAMUT HOYMOBUTTY DOSSEE v. SREEKISHEN NUNDEE, **14 W.R. 58.**

(18)—*High Court, practice of—Appeal on questions of fact—Credibility of witnesses.*—The High Court, sitting in appeal on questions of fact, was guided by the same rules as those of the Privy Council when they sat upon motions

Appellate Court—continued.

——2.—Duty of Appellate Court—*continued.*

for a rule for new trials from the old Supreme Court. The High Court, sitting in appeal, will not disturb a judgment upon a question as to the credibility of witnesses, unless it be manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court was wrong in the conclusion drawn from such evidence. The High Court, sitting in appeal, will look upon the decree of a Judge as to facts in the same light as the verdict of a jury; and, though some of the reasons given for the conclusion arrived at be erroneous, the High Court in appeal will not say that the decree is against the weight of evidence, if sufficient reason for such decree still remain. HEERALALL CHUCKERBUTTY v. MOHESH CHUNDER GHOSAUL, **1 Hyde 105.**

(19)—*Distinct findings—Appellate Court—Conjecture.*—The Appellate Court ought not, upon mere conjecture, to disturb the distinct findings of the Judge of the first Court who had personally examined the witnesses. LAL MAHOMED BEPARI v. SHOILA BEWA, **11 C.L.R. 104.** [*R.*, 7 A. 649, F.B. = A.W.N. 1885, 151.]

(20)—*Reversal of decision on important question of fact—Record of reasons.*—An Appellate Court in reversing a decision on an important question of fact must show distinctly its grounds of action. MUNSOOB BIBEE v. ALI MEAH, **17 W.R. 357.**

(21)—*Appeal on merits—Duty of Appellate Court to form judgment on facts and give reasons.*—When the Legislature gives an appeal on the merits of a case, it is the duty of the Appellate Court to form its own judgment upon the facts and to give its own reasons for its findings. The addition of a new maker to a joint and several promissory note, after issue, is a material alteration which makes it void. U PA v. MYA MYAING, **L.B.R. 1893—1900, 343.** (*Gardner* v. *Walsh*, 8 E. & B. 83, *F.*)

(22)—*Confirming Lower Court's finding—Reasons to be given.*—The Court of appeal must give its own reasons for arriving at the conclusion it does and it is not enough to record what the first Court had found and to add to it in a general way that it sees no reason to differ from that finding. MAN SINGH v. BHUP SINGH, **91 P.R. 1882.** *See*, also, PIR WALI SHAH v. SULTAN, **91 P.R. 1882, Note.** [*R.*, 28 P.R. 1886.]

(23)—*Judgment of Appellate Court.*—An Appellate Court is bound to state the grounds of its concurrence with a Lower Court's finding where it is supported by no satisfactory evidence. KHELLUCK CHUNDER GHOSE v. NUND RAM SEIN, **2 W.R. 7.**

(24)—*Civ. Pro. Code, 1877, s. 551—Judgment to state points for determination and reasons for the conclusion.*—A Court of appeal is bound, in case disposed of under s. 551 of the Code of 1877, to pass a judgment stating the

Appellate Court—continued.

——2.—Duty of Appellate Court—*continued.*

points raised in the appeal and giving its reasons for the findings arrived at. BADRUDDIN v. FATTEH MUHAMMAD, **24 P.R. 1881.** (100 P.R. 1879, *F.*)

(25)—*Reasons for agreeing with lower Court on question of fact.*—Where a case turns on weight of evidence, the Appellate Court is not bound to give reasons for agreeing with lower Court on question of fact. SYUD SHAH EKBAL HOSOEIN v. BUNSEE SAHOO, **25 W.R. 12.**

(26)—*Appellate Court agreeing with the Lower Court—Reasons given by the Lower Court found sufficient—Reference to the same sufficient—Contract to sell—Sale on approval—Contract.*—Where the Appellate Court finds that the points urged in appeal were disposed of by the Court below which has given sufficient reasons to support its decision, it can adopt those reasons as its own by reference to the Lower Court's judgment, without stating those reasons at length, and need not set out every argument urged before the Court and its reasons for overruling it. Where a document runs thus:—"8th March, 1882—Received from M.S. two seers of blue stones to the value of ten thousand rupees on approval for one week at my risk, after which the stones to be either returned or purchased outright by me," it amounts to a contract to sell, though not a complete sale on the 8th March and the contract was to sell all the stones for Rs. 10,000, on approval, and the defendant could only be released by returning the whole when the time allowed for approval expired. POLLARD v. MUHAMMAD SADIK, **28 P.R. 1886.** (91 P.R. 1882, *R.*)

(27)—*Interference with part of decree not appealed.*—An Appellate Court should not interfere with a part of a decree not appealed against. MA TON v. MAUNG LU, **U.B.R. 1892—1896, Vol. II, 7.**

(28)—*Nature of a suit—Plaint—Pleadings.*—In dealing with a suit, the Appellate Court must look, not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was dealt with by the lower Court or Courts. RAJA RUP SINGH v. RANI BAISNI, **7 A. 1, P.C. = 11 I.A. 149 = A.W.N. 1884, 246 = 4 Sar. 533.** [*R.*, 111 P.R. 1900, 2 L.B.R. 4.]

(29)—*Appellate Court, decision by, on different point—Question important to parties not to be ignored.*—An appellate Court should not ignore a question which was treated as most important by both parties to the suit and by first Court and decide the case on a totally different point. LUCKHEE DOSSEE v. MAHOMED AFZUL, **2 W.R. 2.**

(30)—*Express determination of point appealed.*—An appellate Court is bound to expressly determine the point on which the appeal was preferred. HURREHUR MOOKERJEE v. OOMA MOYE DOSSIA, **12 W.R. 525.**

Appellate Court—continued.

——2.—Duty of Appellate Court—*continued.*

(31)—*Suit for share of ancestral property—Appellate Court to try same issue as lower Courts.*—In a suit for a share of ancestral property, where the first Court tries whether the plaintiff ever had joint possession and dismisses the claim as barred by limitation, the Lower Appellate Court is bound to try the same issue. GOPAL CHUNDER CHATTERJEE v. KAJ COOMAREE DEBIA, **4 W.R. 101.**

(32)—*Duty of Judge to consider matters urged before him—Appeal—False statement—Spurious document.*—A Judge is bound to go into all matters raised before him in an appeal, even if appellant appears to have made a false statement, and seeks to palm off a spurious document. JEANUND CHOWDHRY v. SYUD ABDOOL LUTEEF, **15 W.R. 243.**

(33)—*Decree for rent—Under-tenants*—Where a person holds decrees for rent against his under-tenants, he is bound to pay in his turn to his superior holder. And, when the superior holder brings a suit to recover arrears of rent due, it is no answer to say that he has not been able to execute the decrees which he had against the under-tenants. An Appellate Court should not ordinarily travel beyond the record, or take up points which are not the subject of appeal before it. KASHINATH ROY CHOWDHRY v. ROY DWARKANATH CHUCKERBUTTY, **7 W.R. 61.**

(34)—*Decree in favour of respondent—Cross-objections not filed—Duty of Court.*—The Appellate Court must not accept the facts found by the Court of first instance as incontestably proved, in a case where a decree is in favour of the respondent, for the simple reason that no cross-objections to the decree under s. 561 of the Civ. Pro. Code, have been filed by the respondent. BHOGJI v. BAPUJI, **13 B. 75.**

(35)—*Lower Court bound to follow particular law proceeding contrary to it—Rectification of error.*—If a Lower Court, with power under a particular law only, passes an order opposed to the procedure enjoined in that law, it is the duty of the Appellate Court at once to rectify the error of the Court below. HUREE BINDHOO MYTEEBHOOMEE v SOORJO MONEE PAT MAHADAYE, **4 W.R. Act X, Rul. 37.**

(36)—*Decree by lower appellate Court—Satisfaction of decree directed to be made from sale-proceeds—Ascertainment of value of property to be sold—Execution department.*—A lower appellate Judge decreeing a suit in satisfaction of a decree-holder's claim from the proceeds of a house should himself determine and adjudge the value of the house, and not refer that duty to the execution department. LALA MITTERJEET SINGH v. SONATUN DOSS, **15 W.R. 124.**

(37)—*Civ. Pro. Code, 1859, s. 359—Complicated facts—Compliance with section.*—The terms of s. 359, Civ. Pro. Code, 1859, should be complied with by Appellate Courts where the facts of a case are complicated. TATUR KHAMAS v. LOKE NATH, **15 W.R. 181.**

Appellate Court—continued.

——2.—Duty of Appellate Court—*continued.*

(38)—*Appeal—Evidence rejected in part by first Court—Duty of appellate Court to examine.*—A plaintiff obtaining a decree which is appealed against is not bound to bring a complaint because the Court of first instance does not accept a portion of the evidence; but the Appellate Court must examine such portion. OOMABUTTE v. PARUSHNATH PANDEY, **15 W.R. 135.**

(39)—*Presentation of appeal petition on insufficient stamp—Rejection.*—A petition of appeal, if presented on a paper insufficiently stamped, must not be rejected, but the appellant must be required to supply the deficient stamp duty. ANUND MOHUN GHOSE v. DOORGA DOSS DUTT, **W.R. 1864, Mis. 4.**

(40)—*Partial appeal—Determination of the question in appeal.*—Where in an appeal against part of a decree the party in whose favour the decree is made, is made sole respondent, the Appellate Court has only to determine whether, as between appellant and respondent, the order of the first Court is correct. KISHORE SINGH v. POOKHUN SINGH, **10 W.R. 432.**

(41)—*Event happening after the passing of order—Appellate Court, duty of—Decree-holder, purchaser*—Ex parte *decree, setting aside—Sale, reversal—Order setting aside* ex parte *decree, reversed*—A Court of appeal is not only competent, but may, under certain circumstances, be bound to take cognizance of an event, which has happened since the order, questioned on appeal, was passed by the Subordinate Court. When the decree-holder is the purchaser in execution of an *ex parte* decree, upon reversal of the decree, the sale falls through. The fact that, before the judgment-debtor applies for reversal of the sale, the plaintiff succeeds in obtaining another decree of similar character against the defendant, does not validate the title based upon the decree which has been reversed. But this does not apply when the order or reversal of the decree is set aside by a superior Court and the decree is ultimately restored. HAZARI MULL v. JANKI PROSAD, **6 C.L.J. 92.** (27 C. 810, *D.*; 31 C. 499, *R.*) [*F.*, 6 C.L.J. 662, 6 C. L. J. 102.]

(42)—*Appeal barred by law—Power of Appellate Court to interfere—Jurisdiction.*—Where an appeal is barred by law, an Appellate Court cannot interfere in any matter legitimately arising out of the case, unless there is want of jurisdiction. KURUM CHAND KOLEEAH v. HUREE MOHUN GHOSE, **2 W.R. Mis. 45.**

(43)—*Submission of evidence at hearing in open Court—Right of parties.*—The Judge of an Appellate Court should allow the parties or their pleaders to submit the evidence at the hearing in open Court, with every comment and argument they think necessary. LALLA JUGGESSUR SAHOY v. GOPAL LALL, **15 W.R. 54.**

(44)—*Omission by first Court to examine witnesses—Decree dismissing suit—Appellate Court reversing such decree, duty of.*—Where,

Appellate Court—continued.

——2.—Duty of Appellate Court—*concluded.*

after recording that many of the witnesses for the defendants were unnecessary and so refraining from examining them, the Court of first instance has dismissed the suit,—the first Appellate Court, before reversing the decision of the lower Court, discrediting the evidence of the defendants on its record, should afford the defendants an opportunity to supplement the evidence given in the first Court, by the testimony of those witnesses, whom that Court had declared it unnecessary to hear. The lower Appellate Court must proceed with the case, as one in which the first Court had refused to examine the witnesses tendered by the parties. KHUDA BAKHSH v. IMAM ALI SHAH, **9 A. 339=A.W.N. 1887. 61.** [*F.*, 22 B. 253.]

—Event happening after the passing of order challenged in appeal—Duty of—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 6 C.L.J. 102.

See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), 5, 11, 10 (4), O. VII, rr. 1, 2, 4, 5, 6, s. 107 (2), O. XXII, r. 11, 1 L.B.R. 252.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, O. XLI, r. 22, U.B.R. 1902—1903, Vol. II, Civ. Pro. Code, 15.

See CONTRIBUTION, SUITS FOR—MISCELLANEOUS, 11 W.R. 131.

—Evidence—Trying different suits together—*See* EVIDENCE—MISCELLANEOUS, 2 C.L.R. 33.

See JUDGMENT—FORM AND CONTENTS, 49 P.R. 1873.

—Reversal of decree by—*See* JUDGMENT—LANGUAGE OF JUDGMENT, L.B.R. 1872—1892, 653.

See MORTGAGE—REDEMPTION, 6 B.H.C. A.C. 9.

—*Ex parte* decree for plaintiff without hearing all available witnesses—Dismissal of suit by Appellate Court—Its duty to remand the case to lower Court to be re-tried to give opportunity to plaintiff to examine all witnesses—*See* PRACTICE AND PROCEDURE, A.W.N. 1908, 140=5 A.L.J. 468=30 A. 367.

See PRACTICE AND PROCEDURE, 1 L.B.R. 38.

—Suits heard together, evidence in—*See* PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS, Marsh 455=2 W.R.P.C. 19, 9 M.I.A. 287.

See REMAND, 8 W.R. 303.

—Evidence conflicting—*See* WILL—EXECUTION, 21 C. 279.

——3.—Objections first taken in appeal.

(1)—*Tacit admission in lower Court—Recession in appeal.*—Where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards in

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——3.—Objections first taken in appeal—*ctd.*

appeal question this fact and recede from their tacit admission. KANAI LALL KHAN v. SASHI BHUSON BISWAS, **6 C. 777=8 C.L R. 117.**

(2)—*Absence of objection in lower Court—Raising objection in appellate Court.*—A party could not be heard in the appellate Court upon items to which he took no exception in the Lower Court. VENKATA REDDI v. VENKATA-RAMAYYA, **1 M.H.C. 418.** [*Diss.*, 6 B.H.C. A.C. 149, 6 M.H.C. 36.]

(3)—*New question of fact in special appeal.*—A new question of fact cannot be allowed to be raised in the special appeal stage, with a view to form a basis for a presumption which it is desired to plead. HUREE MOHUN DASS .v KOOTESSUR GOPE, **24 W.R. 318.**

(4)—*Objection in special appeal surprising plaintiff.*—An objection not taken early in a suit cannot be allowed in special appeal, where it would be a surprise on plaintiff. BAKER MAHOMED C. SEETUL CHUNDER SIRCAR, **25 W.R. 28.**

(5)—*Civ. Pro. Code, 1882, s. 567—Objections not raised before first Appellate Court—Grounds of second appeal.*—Where the plaintiffs, appellants in a second appeal, had failed to take certain objections before the first Appellate Court, with regard to certain findings of the Court of first instance upon remand, they ought not to be permitted to raise those objections, for the first time, as grounds of their second appeal, because they had failed to raise those objections in proper time under s. 567 of the Civ. Pro. Code. MUHAMMAD ABDUL HAI v. SHEO BISHAL RAI, **10 A. 28=A.W.N. 1887, 234.**

(6)—*Mortgage—Objection to suit not taken in lower Courts, taken for the first time in appeal.*—An objection that the appellant ought to have enforced his rights inthe previous suit—wherein he had been made a party—and, therefore, the present suit was barred,—not having been raised in the Courts below, was not allowed to be taken for the first time in the appeal to the Judicial Committee. KEDAR LAL MARWARI v. BISHEN PERSHAD, **31 C. 332, P.C.=31 I.A. 57=8 C.W.N. 609=8 Sar. 599.**

(7)—*Grounds urged for the first time at hearing, admissibility of.*—In an appeal against a decree in a suit based on *hundis*, the appellant petitioned the appellate Court for the first time to be heard on two additional grounds, *viz*, (1) that the suit did not lie because the presentation of the *hundis* for payment was not proved and (2) that no interest ought to have been allowed. *Held*, neither of the grounds was allowable at the hearing of the appeal. RAM DAS v. MATHURA DAS, **6 P.L.R. 1905.**

(8)—*Second appeal—Grounds advanced for first time in second appeal.*—Where the points urged in the memorandum of second appeal were not raised in the Court of first instance or in the lower appellate Court, *held*, that those

Appellate Court—continued.

—3.—Objections first taken in appeal—*ctd.*

points could not be allowed to be raised for the first time in second appeal. BHADORIN v. LACHMAN SINGH, **A.W.N. 1882, 103.**

(9)—*Appeal—Admissiblity of plea not put forward in first Court.*—An appellate Court ought not to allow the plaintiff to put forward a case in appeal which he had not set up in the Court of first instance. DHARAMRAJ KUNWAR v. SUMERAN SINGH, **21 A. 386=A.W.N. 1899, 133.**

(10)—*Alteration of plea for first time in appeal—Alienation of joint family property—Objection to alienation by co-parcener not party to alienation.*—Four out of five joint owners of an ancestral house united in selling a portion of it to the respondent. The fifth owner the appellant-defendant resisted the vendee's claim to possession on the single ground that the property was separate and belonged not to him or to any of the four vendors, but to one M who had sold it absolutely and exclusively to him. Issue was taken on these pleadings, and both Courts found in favour of the respondent. For the first time, it was pleaded in second appeal that, on the finding that the house was joint property of the appellant and the vendors to the respondent, the sale was bad, as the vendors were incompetent to deal with joint estate without the concurrence of the appellant. *Held*, that even if the appellant should otherwise be allowed to alter radically his defence as maintained hitherto in the suit, he still should not be allowed the benefit of that plea, for, he had himself dealt with the property without the consent or concurrence of his co-sharers, and adversely to their interests in the property, by taking a sale-deed of it himself, and that it would not lie in the mouth of such a person to claim the avoidance of the transfer to the respondent on that ground, and that all the equities were in favour of the respondent. PATI RAM v. AMBA PRASAD, **A.W.N. 1886, 88.**

(11)—*Appeal—Point not taken in lower Courts.*—It is not open to an appellant to raise in second appeal a point which has not been taken either in the Court of first instance and not found against or in the grounds of appeal to the lower Appellate Court. PEDDA OBI v. CHINNA REDDI, **5 M.L.T. 79=2 Ind. Cas. 618.**

(12)—*Objection not taken for want of opportunity—Objection on appeal.*—*Held* that a defendant was entitled to take, in the Appellate Court an objection he had no previous opportunity of taking until the case was heard on appeal. LOWA JHA v. BISSESHUR SINGH, **11 W.R.6.** [*R.*, 13 W.R. 303.]

(13)—*Objection not raised in Lower Courts—Nor raised in grounds of appeal.*—An appellate Court cannot hear an objecton, which is not raised either in the Lower Courts, or urged in the grounds of appeal. JOY TARA DOSSEE CHOWDHRAIN v. ROY CHUNDER GHOSE, **1 W.R. 36.**

Appellate Court—continued.

——3.—Objections first taken in appeal—*ctd.*

(14)—*Civ. Pro. Code, 1882, s. 542. (=O.XLI, r. 2, new Code)—Second appeal—Point not raised in memo of appeal.*—S. 542 was meant to confer upon Courts the power to decide appeals upon grounds other than those set forth by the appellant in the memorandum of appeal, and that power is to be exercised by the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. BANSIDHAR v. SITA RAM, **13 A. 381=A.W.N. 1891, 147.** (A.W.N. 1887, 213, A.W.N. 1889, 78, *R.*)

(15)—*Grounds of appeal, new point not taken in.*—The Court, if an objection that the Lower Court has admitted evidence which was not admissible was not raised as one of the grounds of appeal, will refuse to allow the matter to be gone into. BROHMO DUTT v. DHARMO DAS GHOSE, **26 C. 381=3 C.W.N. 468.** [*Affirmed.* 30 C. 589=7 C.W.N. 441=5 Bom. L.R. 421=30 I.A. 114, P.C.]

(16)—*First Court's refusal to summon witnesses— Right to summon to be insisted upon*—A plaintiff complaining in special appeal of the first Court's refusal to summon witnesses must show that he insisted on his right at every stage of the case, both in the first and Lower Appellate Courts. The plaintiff may, at any stage of a case, before hearing, apply for issue of summons to witnesses irrespective of the number of applications already made; and the Court must comply with such application if any time be left before the hearing. ONOOROOP CHUNDER MOOKERJEE v. HERA MONEE DOSSEE, **11 W.R. 418.** [*Appr.*, 15 W. R. 447.]

(17)—*Right to apply for summons to cite witnesses.*—A party is entitled, at any stage of the case, before the hearing, to apply for a summons to cite witnesses, without reference to the number of such applications which he may have previously made, and it is the duty of the Collector to comply with such application, if any time be left before the hearing of the case. ANURUP CHANDRA MUKHOPADHYA v. HIRAMANI DASI, **3 B L.R. App. 38.**

(18)—*Omission by Court of first instance to examine witnesses—Fact not brought to notice of first appellate Court—Objection if can be taken in second appeal.*—After the examination of some only of the witnesses on the plaintiff's side, the Subordinate Judge gave a decree in his favour. On appeal, the decree was reversed, the District Judge being of opinion that the plaintiff had not sufficiently proved his case. The fact that the lower Court omitted to examine all the witnesses cited by the plaintiff was not brought to the notice of the District Judge when the appeal was heard. The plaintiff preferred a second appeal to the High Court and urged that the evidence excluded by the Court of first instance might be taken. *Held* that it was the duty of the plaintiff to have brought the facts to the notice of the lower

Appellate Court—continued.

——3.—Objections first taken in appeal—*ctd.*

appellate Court, and not having done so, he could not, in second appeal, take the objection in order to have the chance of a second trial. The High Court in these cases refused to set aside the decree, there being, in their opinion, no sufficient reasons therefor. GULAM v. HAJI BADRUDIN, **13 B. 336.** [*F.*, 5 Bom. L.R. 264; *D.*, 3 S.L.R. 106.]

(19)—*Special appeal—Objection not taken in Court below.*—An objection that a judgment of the first Court is erroneous under a Full Bench Ruling of the High Court cannot be taken for the first time in special appeal. NARATTAM DAS CHOWDHRY v. ROSO PYARI CHOWDHRAIN, **3 B. L. R, A. C. 271.**

(20)—*Remand—Sufficient reason for—Not raising question in Lower Court.*—Where there is a sufficient reason for a question not having been raised in the Lower Courts, the case should be remanded with a view to its being determined. BONOMALEE BAZADUR v. KYLASH CHUNDER MOJOOMDUR, **24 W. R. 72.**

(21)—*Point raised for first time in appeal—Admissibility—Practice.*—A point not raised in any of the lower Courts, but raised for the first time in the memo of special appeal, will not be considered by the appellate Court. MAHADAJI v. VYANKJI GOVIND, **I B. 197.** (7 M.H.C. 348, 7 M.H.C. 1, *D.*)

(22)—*Act X of 1859—Procedure—Notice—Admissions—Special appeal—Objection not taken in Court below.*—In a suit for enhancement of rent, a plaintiff must frame his suit, and prove his case in exact conformity with the provisions of the law which enable him to increase his profits, and a Court administering a law like Act X of 1859 is bound to satisfy itself that its decrees are exactly borne out by the provisions of the law. The system of procedure in this country is not such that, if a defendant fails to dispute or contest a point, he thereby admits it. On the contrary, if he allows judgments to go by default, the plaintiff is just as much bound to prove his case. The High Court in this case allowed objections to be taken by a defendant which had not been taken in either of the lower Courts. BHUBAN CHANDRA SHOME v. RAMDAYAL SHAMANTA, **5 B.L.R. App. 62=14 W. R. 55.**

(23)—*Plaint not disclosing cause of action—Objection in special appeal—Duty of Court.*—An objection that the plaint discloses no cause of action may be taken for the first time in special appeal, Where an objection or ground goes to the root of the plaintiff's case, admitting for the sake of argument all the allegations of plaintiff to be true, such an objection or ground may be taken and entertained at any time at which a suit has vitality, and before it has passed through its last stage of review and the functions of the Court regarding it have ceased. If any such objection is overlooked by

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——3.—Objections first taken in appeal—*ctd.*

the counsel of the parties, it will be the duty of the Court to consider it. SHEIKH JAN ALI v. KHONKAR ABDUR RUHMAN, **6 B.L.R. 154 = 14 W.R. 420.**

(24)—*Defect in plaint—Dismissal of suit in appellate Court.*—Where a suit for possession of a share of certain land purchased at a sale in execution of a decree, in which no boundaries or limits of the lands sued for, were given, was dismissed by the lower appellate Court, *held* that such dismissal was improper as the copy of the sale certificate filed with the plaint contained all the necessary particulars, and the objection should not have been entertained at all as it was raised for the first time in the lower appellate Court. AWANDA RAI v. NAIGU RAI, **A.W.N. 1882, 242.**

(25)—*Mixed question of law and fact, whether could be raised by way of objection in second appeal.*—In this case, the plaintiff also contended in second appeal that the defendant who was the son of the mortgagee, purchased without the consent of the Court and that the sale was, for that reason, void. The objection being one involving a mixed question of law and fact and not having been taken in the Courts below, the High Court *held* that it could not be raised for the first time, in second appeal. VASANJI HARIBHAI v. LALLU AKHU, **9 B. 285.** [*F.*, 1 N.L.R. 1.]

(26)—*Question raised before appellate Court, mixed one of law and fact, not raised before first Court.*—It is doubtful whether the appellate Court should allow questions of mixed law and fact, not raised in the first Court, to be raised before it. UMRAO BIBI v. MAHOMED RAJABI. **27 C. 208 = 4 C.W.N. 76.** [*R.*, 1 N.L.R. 1.]

(27)—*Mistake of law—Point not taken in Court below.*—When parties before the Privy Council allege that a mistake has been made on a point of law, if they have not raised the point in the Court below, although it is certainly open to them to raise it before their Lordships, yet their Lordships ought to be satisfied that the Judge below has really made the mistake imputed to him and that the wrong decision complained against is attributable to such mistake. BABOO PUHLWAN SINGH v. MAHARAJAH MOHESHUR BUKSH SINGH AND MAHARAJAH MOHESHUR BUKSH v. MEGBURN SINGH, **16 W.R. 5, P.C. = 9 B.L.R 150.**

(28)—*Legal objection, when can be raised.*—An objection to the plaintiff having no cause of action may be taken at any stage of the suit. (6 B.L.R. App. 73, *Rel. on.*) The House of Lords in England has decided that a legal question may be raised even in the ultimate Court of appeal, which has not previously been taken. CHAMPA KUAR v. MINA MAL, **A.W.N. 1887, 1,**

(29)—*Objections taken for first time in second appeal—Practice.*—An objection based upon a

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——3.—Objections first taken in appeal—*ctd.*

point of law may be raised in second appeal, and the Court must take notice of it, if it does not involve the taking of any additional evidence on matters of disputed facts. GAVDAPPA v. GIRIMALLAPPA, **19 B. 331.** [*R.*, 25 B. 202, 1 N.L.R. 1, 1 S.L.R, 142.]

(30)—*Legal objection first taken in appeal.*—An objection founded on law only may be raised by a party to a suit in the Court of appeal, although it has not been made in the Court below. DINDAYAL PARMANICK v. SURENDRA NATH ROY, **3 B.L.R. A.C. 78, Note = 10 W.R. 77.** [*D.*, 3 B.L.R. 78.]

(31)—*Legal plea, raised for first time in second appeal—Duty of Court.*—A legal plea cannot be allowed to be raised for the first time in second appeal, when it would be necessary for the Court to ascertain many points of facts, before it could properly adjudicate upon such plea. The uniform practice of the Court is to allow legal pleas in second appeals for the first time only when they require no new points of fact for determination, and those pleas can be disposed of on the materials on the record. MAHABIR TIWARI v. JHANGUR, **A.W.N. 1887, 213.** [*R.*, 13 A. 381.]

(32)—*Objection—Special appeal.*—An objection, not taken in cross-appeal before the lower appellate Court, cannot be taken in special appeal. But if the case be remanded for a new trial, such objection may then be taken before the Court of first instance. DURGA RAM ROY v. RAJA NARSING DEB, **2 B.L.R. A.C, 254 = 11 W.R. 134.**

(33)—*Objection in grounds of appeal not urged—Special appeal.*—An objection taken in the grounds of appeal, but not urged, cannot be brought forward in special appeal. NABO KRISTO SIRCAR v. KALA CHAND DOSS, **12 W.R. 470.**

(34)—*Plea of under-valuation in special appeal*—A plea of under-valuation not pressed in the first Court cannot be raised in special appeal, though urged in the Lower Appellate Court. SOORJO KANT BANERJEE v. KRISTO KISHORE PODDAR, **14 W.R. 423.**

(35)—*Objections in appeal*—Pro-forma *defendant.*—In appeal, objections cannot be raised by a *pro-forma* defendant, if he has neglected to raise the same in the regular suit. DEOKEENUNDUN ROY v. KALEE PERSHAD, **W.R. 1864. Mis. 34.**

(36)—*Enhancement, suit for—Objection as to non-joinder of parties.*—In a suit for enhancement, the objection that plaintiff sues without joining his co-sharers with him as parties is not allowed to be taken for the first time in the Lower Appellate Court. GOUR KISHORE DUTT v. SHAIKH AKBUR, **22 W.R. 489.**

(37)—*Suit for* kabooleut *at enhanced rate—Decree for lower rate—Objection—Appellate Court.*—If a suit for a *kabooleut* at an enhanced rate is decreed for a lower rate than that

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claimed, the technical objections that the suit should be dismissed as the plaintiff had failed to prove the specific rate he sued for, if not taken in the Lower Appellate Court, cannot be allowed in special appeal. NIZAMUT ALI v. ROMESH CHURN ROY, **11 W.R. 430.**

(38)—*Omission of performance of ceremonies.*—*Held* that, as no objection to the omission of any of the usual ceremonies of adoption or to the age of the adopted son was taken before the lower Court, its decision was not open to those objections when taken on appeal. KONWER DURYAO SINGH v. KONWER KARUN SINGH, **1 Agra 31.**

(39)—*Special appeal—Issues—Fresh Objection.*—Where the question whether the alienation of property by a father without the son's consent is valid under the Mitakshara Law is not raised in the lower Courts, such invalidity cannot be admitted as a ground of objection in special appeal. When a plaintiff goes to trial in the Courts below on one issue only, he is not entitled, in special appeal, to complain that another matter of evidence has not been considered by the Lower Appellate Court. Where no issue is raised in the lower Courts which could be the foundation for a declaration of right, the non-decision of a claim to such declaration is no ground of special appeal. PURIAG DUTT v. BROJO KOONWAR, **9 W.R. 503.**

(40)—*Issue not raised or tried in lower Court—Appellate Court's decision.*—Where no ground is taken or issue raised on a particular point in the lower Court, the Appellate Court cannot for the first time go into that question. MAHOMED MIRA RAVUTHAR v. SAVVASI VIJIA RAGHUNADHA GOPALAR, **23 M. 227=27 I.A. 17=4 C.W.N. 228=10 M.L.J. 1, P C.=2 Bom. L.R. 640=7 Sar. 661.** [*Expl.*, 6 C L.J. 111; *R.*, 25 M. 244, F.B., 1 C.L.J. 85 10 C.W.N. 209=3 C.L.J. 240. 36 C. 226=13 C.W.N. 18=9 C.L.J. 244=4 M.L.T. 421, 150 P.W.R. 1909, 132 P.R. 1906=11 P.L.R. 1907, 32 M. 242=5 M.L.T. 248; *D.*, 14 C.P.L.R. 42.]

(41)—*Issue as to tender of pottah—Appellate Court.*—The issue whether a pottah is tendered or not, if not raised in the first Court, cannot be raised in the Lower Appellate Court. RADHIKA PROSUNNO CHUNDER v. NEHALEE CHURN DEY, **15 W.R.410.**

(42)—*Raising entirely new issue.*—A plaintiff cannot be allowed in special appeal to raise an entirely new issue on the ground that the Court below has not tried the real point in the case. GOODRI KHAN v. THE COLLECTOR OF GYA, **24 W.R. 480.**

(43)—*Ground raised for the first time in appeal—No reference in peleadings or issues.*—A ground raised for the first time in appeal, not having been referred to in the plaint or pleadings or put in issue between the parties, will not be listened to. TIKA RAM v. THE DEPUTY COMMISSIONER OF BARA BANKI, **26 C. 707 P.C.**

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=26 I.A. 97=3 C.W.N. 573=1 Bom. L.R. 692=1 Sar. 520. [*R.*, 78P.R. 1904.]

(44)—*Objection taken to right of appeal at close of argument.*—The High Court declined to entertain the objection (taken when appellant's argument was closed) that no appeal lay to it on the ground that the amount or value did not exceed Rs. 5,000. CHUNDER NATH MISSER v. SIRDAR KHAN, **18 W.R. 218.**

(45)—*Filing of copy of deposition in Lower Court—No objection raised thereto—Admissibility of it in evidence in Appellate Court.*—Where no objection is raised in the Lower Court to the admissibility of a copy of the deposition of a person who is alive, *held*, it can be admitted in evidence in the Appellate Court. FUKEEROODDEEN MAHOMED AHSUN CHOWDHRY v. KURREEM BUKSH CHOWDHRY, **5 W R. 43.**

(46)—*Suit for possession on invalid mortgage executed during attachment—Objection to validity of attachment—Objection to validity of attachment for the first time in appeal.*—Where, in a suit for possession of property upon a foreclosed mortgage against a purchaser at an execution-sale, it was pleaded in defence that the mortgage having been made during the pendency of an attachment of the property was null and void under s. 240 of the Civ. Pro. Code of 1859, the plaintiff could not, for the first time in appeal, object to the validity of the attachment on the ground of the requirements in s. 239 relating to the intimation of the attachment not having been affirmatively proved to have been complied with. *Quære.*—Whether it is not for the plaintiff in the above suit seeking to oust the defendant from possession to prove the non-compliance with the formalities in question? RAMAKRISHNA DAS SURROWJI v. SURFUNNISA BEGUM, **6 C. 129, P.C=7 I.A. 157=4 Sar. 151.**

(47)—*Plaint acted upon by first Court without objection—Dismissal of suit by Appellate Court.*—A lower Appellate Court does right to dismiss a suit for under-valuation, although the plaint has been admitted and acted on by the first Court without objection by the parties. MEWA LALL v. BEHAREE LALL, **14 W.R. 195.**

(48)—*Hindu widow—Suit for possession and declaration—Appeal—Issues.*—In a suit by a Hindu widow for possession and declaration of title: *Held* that defendant could not be allowed to come in and urge for the first time in appeal that by a family-custom or *kulachar* females were excluded from inheriting. TIKAIT DURGA PRASAD SINGH v. MUSSAMAT DURGA KUNWARI, **9 B.L.R. 306, Note=13 W.R. 10.** [*D.*, 20 W.R. 155.]

(49)—*Suit to recover possession of land—Civil and Revenue Courts—Jurisdiction.*—A suit to recover possession of lands, which the plaintiff alleged, he had leased to the defendant, the manager of an indigo factory, and also of other lands over which he had given a *zuripeshgi* lease, is undoubtedly cognizable by the Civil Courts, and the Revenue Courts have no

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jurisdiction in the matter. Where the defendant made no objection in the lower Courts to the manner in which plaintiff had calculated damages, the question could not be gone into in special appeal. CHARLES MACDONALD v. RAJARAM ROY, **3 B.L.R. App. 28.** (Case No. 362 of 1867, *R.*)

(50)—*Notice—Objections—Special appeal.*—That the service of notice has not been proved is an objection which, if not taken in the Court of first instance, cannot be allowed either in special appeal or in the lower appellate Court, if the case be remanded to that Court. C. J. DUMAINE v. UTTAM SING, **5 B.L.R. App. 44=13 W.R. 462.** [*R.*, 2 M. 346.]

(51)—*Suit for enhanced rent and kabuliát—Exception to notice.*—Where, in a suit for a kubooleat at an enhanced rent, the defendant took no exception to the notice, and his defence was not prejudiced by any informality therein, the Lower Appellate Court, in reversing the first Court's decision on the technical ground that the notice was not properly served is bound to go into the merits. SHAMA SOONDUREE DEBIA v. DEGUMBUREE DEBIA, **21 W.R. 368.**

(52)—*Objection as to informality of notice.*—The informality of a notice of enhancement accepted by a ryot cannot be urged for the first time in special appeal. KASHEENATH DEB v. MOHARANEE SHIBESSUREE DEBIA, **8 W.R. 503.**

(53)—*Suit to contest enhancement—Irrigation expenses.*—*Held* that, in a suit for enhancement, the plea of increased expense on account of irrigation cannot be admitted for the first time in special appeal. KUNCHUN SINGH v. SHEORAJ, **1 Agra Rev. 7.**

(54)—*Suit for enhancement—Suit depending on two grounds—One ground overruled—Revival of such ground.*—A suit for enhancement having been dependent on two grounds, one of which was overruled, while the case was dismissed on the other, it was not open to the defendant, on the overruling of the second ground on appeal by plaintiffs, to revive the first ground. TOREE MAHTOON v. BABOO RAM SAHOY SINGH, **25 W.R. 110.**

(55)—*Defective evidence—Consent—Case may be decided on it—Objection, stage when it should be made.*—Where defendant agrees to treat defective evidence as sufficient, the Judge may decide the case upon it, even though in itself insufficient. Objection to evidence should be made in the first instance, and not delayed till the special appeal. SHEETUL PERSHAD MITTER v. JUNMEJOY MULLICK, **12 W.R. 244.**

(56)—*Objection to quality of evidence.*—Objections to evidence as not being the best, should not be allowed in special appeal, but should be taken at the time when the evidence is offered. AVUDH BEHAREE SINGH v. RAM RAJ TEWAREE, **18 W.R. 105.**

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(57)—*Objection to admissibility of secondary evidence*—A defendant who does not object to the admission of secondary evidence at the time it is admitted cannot be allowed to object to it in special appeal. LOCHUN SINGH v. HET NARAIN SINGH, **24 W.R. 232.**

(58)—*Inadmissible documents—Objection first taken in special appeal.*—Objection taken for the first time in special appeal to the evidence of documents inadmissible as legal evidence, and not bearing on the point to be decided, must be accepted. MUNRAKHUN ROY v. JUGGUT DOSS, **10 W.R. 124.**

(59)—*Deposition admitted without objection in Court below—Special appeal — New point—Limitation.*—A deposition in another suit admitted and used by the first Court without objection, cannot be objected to in special appeal. Where the Lower Appellate Court's judgment is good and sound, the High Court will not allow a new point in special appeal. The limitation prescribed under Act VIII of 1859 is inapplicable to a suit for declaration of right and confirmation of possession. WUZEER JEMADAR v. NOOR ALI, **12 W.R. 33.** (7 W.R. 256, *D.*) [*Cons.*, 21 W.R. 133.]

(60)—*Objection to document, when to be raised.*—An objection to a document filed as evidence must have been pressed at every stage in the lower Courts before it can be admitted as a ground of special appeal. JOYKISHEN MOOKERJEE v. RAJKISHEN MOOKERJEE, **12 W.R. 315.**

(61)—*Objection to genuineness of document taken in first Court, grounds in support of, raisable for first time in appeal.*—Where an objection to the genuineness of a document has been raised by a party in the Court of first instance, it is competent to him to take any ground in the Appellate Court in support of such objection, although the ground, as such, may not have been put forth by him before the first Court. HAIMABATI DASI v. GOVINDA CHANDRA, **2 C.W.N. 695**

(62)—*Objection not taken in Lower Courts—Objection taken in special appeal—Act X of 1859, s. 4.*—Where a plea under s. 4, Act X of 1859, is set aside by the evidence of certain papers not objected to in the lower Courts, they cannot be objected to in special appeal. GODAYI JOARDAR v. G. MEARS, **10 W.R. 50.**

(63)—*Evidence in another suit—Evidence in lower Appellate Court.*—Evidence in another suit, the reading of which was not objected to in the first Court, may be read as evidence by the Lower Appellate Court. RUGHOONATH PERSHAD v. HUREE MOHUNT, **10 W.R. 37.**

(64)—*Objection to evidence first taken in special appeal.*—An objection to evidence not taken in the lower Court against the admissibility as evidence of khusrah butwarra papers cannot be allowed in special appeal. CHADEE SINGH v. BEHAREE TEWAREE, **10 W.R. 90.**

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(65)—*Evidence received by consent—Calculations in the neighbouring village.*—Where both parties to a suit adduce calculations made in neighbouring villages as evidence to establish their respective cases, they cannot afterwards object to them in special appeal. ANAR MOLLAH v. JAMES HILLS, **10 W.R. 139.**

(66)—*Decrees used as evidence by first Court—Objection in special appeal.*—Where certain decrees are used as evidence by the first Court without objection being raised either there or in the Lower Appellate Court, objection is not allowed to be taken in special appeal. MUKDOOMUNNISSA v. NOKHY SINGH, **24 W.R. 296.**

(67)—*Objection to secondary evidence—When to be raised*—An objection to secondary evidence must be raised in the Court of first instance, and cannot be allowed in appeal. KISSEN KAMINEE DASSEE v. RAM CHUNDER MITTER, **12 W.R. 13.**

(68)—*Special appeal—Inadmissibility of evidence—Ground not taken in Court below.*—As the plea as to the inadmissibility of the evidence for want of registration was not specifically taken in the Court below, it could not be allowed in special appeal. GIRISH CHANDRA ROY CHOWDRY v. SRIMATI AMINA KHATUN. **3 B.L.R. App. 125.** [*Not F.*, 2 N.L.R. 121.]

(69)—*Evidence taken by one Judge—Transfer of suit to another Judge who pronounced judgment—Irregular procedure—Objection taken for first time in second appeal.*—Where a case was tried by a Munsif, before whom the entire evidence was taken and nothing remained to be done except giving judgment, and the Munsif instead of giving the judgment himself transferred the suit under the orders of the Judge to the additional Munsif, and that officer pronounced judgment, and it appeared that this objection was raised for the first time in second appeal, *held* that the proceedings were irregular and the procedure was wholly indefensible, that all the proceedings should be set aside and that the case should be re-tried by the Munsif who had succeeded the Munsif who originally tried the case and took the evidence. RAGHUBIR RAI v. THAKUR RAI, **A.W.N. 1887, 13.**

(70)—*Suit for possession of julkur—Plea of* res judicata—*Judicial decision, copy of copy of—Objection—Adverse possession, plea of, not raised in pleadings—Plea raised in appeal.*—In a suit to recover possession of a julkur in which defendant raised the plea of *res judicata*, basing it upon a judicial decision against a predecessor of the plaintiff of which decision defendant filed a copy of a copy. *Held*, that, as plaintiff did not object to the admission of the document as evidence at the proper time, it was too late to raise the objection in the Appellate Court. Plaintiff cannot, for the first time, in the appellate stage, found his title on adverse possession for a long time, where such a case was

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not set forth in the pleadings, and is inconsistent therewith. PROTAB CHUNDER BOROOAH v. THE COLLECTOR OF GOWALPARAH, **22 W.R. 216.**

(71)—*Refusal to take evidence—Ground of appeal.*—The fact that the Court of first instance refuses to take evidence offered, should be made the ground of regular appeal, and it should not be first set up in special appeal. LALLA DEBEEDEEN v. SHEO GHOOLAM SINGH, **2 N.W.P. 206.**

(72)—*Technical objection not taken in Court below.*—This Court will not entertain a technical objection which was not taken in the Court below, where it might have been amended. DHURM DAS PANDEY v. MUSSUMAT SHAMA SOONDRI DEBIAH, **6 W.R. 43, P.C. =3 M.I.A. 229.**

(73)—*Technical objections as to form—Objection not raised in lower Court.*—Objections not raised in lower Court cannot be entertained. *Bona fide* execution proceedings cannot be questioned merely upon technical objections as to form. NARENDRA NATH PAHARI v. BHUPENDRA NARAIN ROY, **23 C. 374.** (18 C. 500, *D.*)

(74)—*Unstamped document—Penalty levied and document admitted in evidence by original Court.*—After the penalty has been levied and a document admitted in evidence, no objection that the plaintiff should be non-suited, as it was founded on a deed of gift insufficiently stamped, can be raised in special appeal. SUDAMA v. KESHO, **102 P.R. 1879.** [*R.*, 116 P.R. 1888, 121 P.R. 1882, 51 P.R. 1904, 126 P.R. 1884, 157 P.R. 1882, 120 P.R. 1894; *F.*, 26 P.R. 1882.]

(75)—*Evidence—Objection as to stamp in special appeal.*—Where a petition has been accepted by both the lower Courts as good and valid evidence of a mortgage, no objection on the score of its not being engrossed on a proper stamp can be permitted in special appeal. DUMA SAHU v. JEONARAIN LAL, **4 B. L. R. A.C. 27, Note=12 W.R. 362.**

(76)—*Objection as to non-registration of document—Document relied on by first Court.*—An objection based on the non-registration of a document relied on in the first Court's judgment, if not raised in the lower Courts, cannot be raised in special appeal. JOY GOPAL MOOJOOMDAR v. THAKO MONEE DABEE, **11 W.R. 381.**

(77)—*Ground of limitation not taken in lower Courts—Whether arguable in second appeal.*—When the appellant neglected to say anything about limitation in the lower Courts, he cannot be allowed to raise the point in second appeal. PO MYA AND MA MYIT v. MA LE, **5 L. B. R. 82=3 Ind. Cas. 711.** (2 L.B.R. 238, *D.*)

(78)—*Unregistered bond not objected to in lower Courts—Inadmissibility in evidence—Costs.*—An unregistered bond, even though not

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specifically objected to in either of the Courts below, is not admissible as evidence, and the lower Court is wrong in giving effect to it. A party omitting to take objection at an earlier stage to the admission of an unregistered bond as evidence, and succeeding on the footing of this objection in special appeal is not entitled to the costs of such appeal. OOMATOOL FATIMA v. GHUNNOO SINGH, **19 W.R. 22.**

(79)—*Objection that document is improperly stamped.*—The plaintiff appealed against a dismissal of his suit to the Judge, who reversed the decision of the Court below, and gave the plaintiff a decree. The defendant thereupon appealed to the High Court on the ground that a document had been admitted in evidence in support of the plaintiff's case, which did not bear a proper stamp. *Held*, that the defendant, having omitted to take the objection before the Judge, could not appeal on this ground. RAMBREM LAL v. ABLUCKH SINGH, **Marsh 267=2 Hay 148.**

(80)—*Copy of copy put in evidence—Objection to admission cannot be taken for first time in appellate Court.*—The lower appellate Court in this case excluded a document on the ground that it was a copy of a copy; but as in the Court of first instance its reception was not at all objected to, it was *held* by the High Court that it was not within the province of the appellate Court to raise or recognize such objection in appeal. CHIMMAJI GOVIND GODBOLE v. DHINKAR DHONDEV GODBOLE, **11 B. 320.** [F., 5 M L.J. 81; R., 24 B. 591, 15 C.P.L.R. 123, 3 L.B.R. 49.]

(81)—*Refusal to examine defendant's witnesses—Irregularity—Objection not raised in lower Courts—Special appeal.*—A Munsiff who, on being satisfied that plaintiff's case cannot be established, refuses to examine defendant's witnesses, commits a great irregularity; but if the point is not raised in the Lower Appellate Court, it cannot be taken in special appeal. GOOROO DOSS AKHOOLEE v. PURANMUNDUL **12 W. R. 363.**

(82)—*Refusal of first Court to examine witnesses—Objection in special appeal.*—Plaintiff failing to mention the first Court's refusal to examine his witnesses in his grounds of appeal to the Lower Appellate Court cannot urge it as a plea in special appeal. OSMAN SINGH v. CHUMMUN MAHTOON, **15 W. R. 87.**

(83)—*Execution of decree—Partial execution.*—A decree cannot be executed for an aliquot portion. (3 B. L. R. 114, 23 W. R. 342, *R.*) But, where the objection on that ground to the execution of a decree was not raised either in the original court or in the lower appellate Court, nor in the grounds of appeal to the High Court, the High Court refused to allow the objection. ROY GOODUR SAHOY v. DHUNNESHUR KOER, **7 C. L. R. 117.**

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(84)—*Execution-sale—Irregularity in publication—Objection first taken in appeal.*—An objection to the validity of an execution-sale of land, on the ground of the omission to state the amount of the revenue on it in the sale proclamation, cannot be taken for the first time before an appellate Court. MACNAUGHTEN v. MAHABIR PERSHAD SINGH, **9 C. 656=11 C.L.R. 494=10, I.A. 25 P.C.=Sar. 417,** [*F.*, P.L.R. 1900, 157; *R*, 7 A. 641, 10 A. 506, 18 C. 188, 20 C. 86 P.C. 29 C. 73, F.B., A.W.N. 1906, 3=28 A. 273=3 A. L. J. 140.]

(85)—*Execution of decree—Non-compliance with formalities required in execution—When objection to be raised.*—An objection to the execution of a decree on the ground that the requisite formalities have not been complied with by the decree-holder should be taken in the lower Courts so as to afford the decree-holder an opportunity to show that they have been complied with. VENKATAPPIAH v. JAGANNADHA RAO, **12 M.L.J. 24.**

(86)—*Special appeal—Objection.*—In this case as the decree-holder's application for execution on the bond without a regular suit was not objected to in the Court below, but assumed by the judgment-debtor as a proper ground on which to apply for execution, the objection was not allowed in special appeal. MUSSAMAT KHEDU v. KALU SAHU, **3 B.L.R. App. 112=12 W.R. 71.**

(87)—*Objection as to misdescription of parties—Point not affecting merits of case.*—The objection as to misdescription of parties, not having been taken in the Courts below, was disallowed, when raised on second appeal, as a point not affecting the merits of the case. PRESIDENT OF THE TALUK BOARD, SIVAGANGA v. NARAYANAN, **16 M. 317.** [*F.* 16 M. 474; *R*, 3 M.L.T, 223, 22 B. 269, F.B. 22 B. 636, 25 B. 142, 4 M.L.T. 209, F. B., 32 M. 371=19 M. L.J. 333; *D.*, 28 M. 551.]

(88)—*Special appeal—Objection of want of certificate of guardian raised for the first time ineffectual.*—In special appeal, the objection that the guardian has not obtained a certificate was raised for the first time, it will not be assumed, for the purpose of reversing the decree, that such is the case. The general presumption is that the proceedings in the Court below have been regularly conducted until their irregularity be shown. THUMMUN v. GOLAB RAO, **2 N.W.P. 89.**

(89)—*Jurisdiction—Objection.*—Where the defendant objected to the jurisdiction in the first Court, but took no objection to the jurisdiction before the lower appellate Court, the High Court considered the objection to the jurisdiction was waived. MOHAMMED HOSSEIN, v. RAJA AKHAYA NARAYAN PAL, **2 B.L.R. App. 42=18 W.R. 37, Note.** [*F.*, 18 W.R. 35; *R.*, 54 P.R. 1883.]

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(90)—*Objection as to jurisdiction in special appeal—Presumption.*—Wherever an objection to the jurisdiction is raised for the first time in the High Court on special appeal, every presumption in favour of the jurisdiction of the Court below should be made. PEAREE LALL v. E.G. ROOKE, **12 W.R. 199=3 B.L.R. 303**; *On special appeal from* E.G.ROOKE v. PEAREE LALL, **11 W.R. 434=3 B.L.R. App., 43.**

(91)—*Jurisdiction—Objection taken in appeal after remand.*—An objection affecting the jurisdiction of the Court may be taken for the first time on appeal after remand. CHOWDHRY WAHID ALI v. MULLICK INAYET ALI *alias* CHAMMAN, **6 B.L.R. 52=14 W.R. 288.** [*R.*, 23 B. 22.]

(92)—*Objection to jurisdiction, taken by plaintiff for first time on second appeal.*—It was urged for the defendant in this case that the objection to the jurisdiction of the Court could not be taken by the plaintiff, or, at any rate, not on second appeal for the first time. *Held* that, as a general rule, an objection to jurisdiction, the invalidity of which is patent on the face of the proceedings, can be taken at *any* stage of the proceedings. Also, as, in this case, the plaintiff had presented his application in the proper Court, he had every right to object to the jurisdiction of the Judge to whom it was transferred for disposal. SHRI SIDHESWAR PANDIT v. SHRI HARIHAR PANDIT, **12 B. 155.** [*Diss.*, 17 M. 309=4 M.L.J. 91; *Not F.*, 5 Ind. Cas. 155=57 M.L.T. 132; *F.*, 9 P.R. 1901=1 P.L.R. 1901; *Appr.*, 16 C. 457. U.B. R. 1902—1903, Vol. II, Execution of Decree 5; *R.*, 13 B. 499, 5 P.R. 1903, Rev. =144 P.L.R. 1903, 2 Ind. Cas. 677, 7 A.L.J. 675; *D.*, 16 B. 731.]

(93)—*Jurisdiction to go into point not taken in lower Courts.*—The second appellate Court has no jurisdiction to go into the point as to which the parties have neither joined issue nor discussed in either of the lower Courts. VENKATASUBRAMANIA VATHIYAR v. SUBRAMANIA IYER, **3 M.L.T. 314.**

(94)—*Court's power to dismiss suit at any stage on point of jurisdiction.*—As a general rule, a Court cannot set aside any order passed by it of its own motion, but this rule does not apply to matters involving questions of jurisdiction, limitation, *res judicata*, etc., which take away jurisdiction. RANCHOD MORAR v. BEZANJI EDULJI, **20 B. 86.**

(95)—*Objection to jurisdiction not raised—Costs.*—Where the objection to jurisdiction was not taken in the first Court or in the grounds of appeal to the High Court, and was raised by the Court itself and not by either of the parties, the order in the above case was set aside without costs. JOY NARAIN SINGH v. MUDHOO SUDEN SINGH, **16 C. 13.**

(96)—*Point not taken in Courts below, taken for first time in second appeal—Costs.*—Where the Subordinate Judge awarded a fourth share

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——3.—Objection first taken in appeal—*ctd.*

to the plaintiff (adopted son), and the defendant (natural son) in his appeal to the District Court did not raise any question about the correctness of that award, but contended in second appeal that, under any circumstances, the plaintiff was entitled only to a fifth share, *held* that, under the circumstances and having regard to the nature of the question, the point might be allowed in the second appeal but that the appellant could not be allowed the costs of the appeal. GIRIAPA v. NINGAPA, **17 B. 100.** [*R.*, 17 B. 303, 27 B. 452.]

(97)—*Deputy Collector determining land suit but stating Revenue Court incompetent to consider question—Appeal—Benami and equitable liability.*—When a Deputy Collector determined a question relating to an interest in land, although he had given an opinion that a Revenue Court was not competent to entertain the question, the appeal was held to lie to the Judge; as this objection however was not raised in the Lower Appellate Court, it was not admitted in special appeal. The Revenue Courts were held not competent to try a question of *benamee* and equitable liability. HURISH CHUNDER ROY v. POORNASOONDUREE DEBEE, **18 W.R. 35.** [*F.*, 18 W.R. 125.]

(98)—*Suit not entertainable in any Court—Act XVIII of 1873, s. 206—Applicability*—The plaintiff's claim, instituted in the Civil Court, to eject the defendant, a *quondam* tenant, and to recover mesne profits, not being entertainable in any suit in any Court, the provisions of s. 206 of Act XVIII of 1873 that the objection that a suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, were held not to be applicable. RAM AUTAR RAI v. MUSSAMMAT TALIMUNDI KUAR, **7 N.W.P. 49.**

(99)—*Second appeal—Point raised neither in pleadings nor before lower Courts.*—Where a point is one that is raised neither in the pleadings nor before either of the lower Courts, and goes exclusively to the jurisdiction of a Court, it cannot be raised on second appeal. AZIZUDDIN HOSSEIN v. RAMANUGRA ROY, **14 C. 605.** (7 A. 170, *Appr.*) [*R.*, 32 M. 425.]

(100)—*Objection as to jurisdiction, first taken in appeal.*—When the objection to the entertainment of a suit is apparent on the face of the plaint and has reference to the jurisdiction of the Court, though it is not taken in the Court of first instance but only in appeal, the Appellate Court must consider it. RAMAYYA v. SUBBARAYUDU, **13 M. 25.**

(101)—*Jurisdiction — Second appeal—Suits Valuation Act, VII of 1889, s. 11*—Where defendant did not object to the valuation of the suit for purposes of jurisdiction in the Court of first instance, *held*, with reference to s. 11 of the Suits Valuation Act, that it was not

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open to the High Court to entertain such objection in second appeal. MUTHUSAMI MUDALIAR v NALLAKULANATHA MUDALIAR, **18 M. 418.** [*R.*, 35 P.R. 1901=47 P.L.R. 1901].

102)—*Qualified admission of claim—Suit for kubooleut—Objection taken first in appeal.*—In a suit for a kubooleut where the defendant in the Courts below pleads, not that the plaintiff is not entitled to a kabooleut, but that he is not entitled to the rates claimed, he cannot, in special appeal, ask for the dismissal of the suit. GHOLAM ALI v. ASGUR ALI, **11 W. R. 105.** (10 W.R. F.B. 14, *R.*)

(103)—*Suit for kabuliat at an enhanced rate—Special appeal—Technical objection.*—Where a suit for a *kabuliat* at an enhanced rate decreed for a lower rate than that claimed, the objection that the suit should be dismissed as plaintiff had failed to prove the specific rate he sued for, if not taken in the lower appellate Court, cannot be allowed in special appeal. NIZAMAT ALI v. RAMESH CHANDRA ROY, **3 B.L.R. A.C. 78=11 W.R, 430.** (10 W. R. 77, *D.*)

(104)—*No tender of patta—Objection raised in appeal—Practice.*—Where, in a suit for a *kabuliat*, no issue was raised whether a patta was tendered before the institution of the suit, and it did not appear that the defendant ever wanted to raise such an issue in the first Court, it was not right for the first appellate Court to raise, at the instance of the defendant, an issue involving the tender of a patta, because such an issue was not necessary for the right determination of the suit upon the merits. RAMANATH RAHIT v. CHAND HARI v. BHUYA, **6 B. L.R. 356=14 W. R. 432.** [*R.*, 2 M. 346.]

(105)—*Civ. Pro. Code (Act VIII of 1859), s. 119—Ex-parte decree—Re-hearing—Appeal—Objection taken for first time in special appeal.*—A plaintiff having taken out execution of an *ex-parte* decree, the defendant applied under s. 119, Act VIII of 1859, to have it set aside and eventually succeeded. After this, the case came on for re-hearing and the suit was dismissed both by the Court of first instance and the appellate Court. The plaintiff then came up in special appeal, contending that sufficient enquiry had not been made before the application for re-hearing was admitted. On appeal before the Judge the plaintiff did not raise the objection that the Munsiff ought not to have entertained the petition of the defendant under s. 119, Civ. Pro. Code, as it had not been presented in time. *Held* that it was too late to raise the objection on special appeal and that it would not be doing justice, which the Court is bound to do in administering the law, to restore an *ex-parte* decree which two Courts had, on subsequent trial on the merits, found should not be renewed ; and that the Munsif's order admitting the case to a re-hearing was not open to appeal. BORA KHASIA v. JATA SIRDAR, **8 B. L. R. 79=15 W. R. 315.**

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—3.—Objections first taken in appeal—*ctd.*

(106)—*Procedure—Appeal—New ground of relief.*—When the ground on which the suit was brought failed, and in appeal a new ground is taken, which was not urged in the plaint, nor at the hearing in the Court of first instance, the appellate Court cannot entertain it. THE SECRETARY OF STATE FOR INDIA v. NUNJA, **5 M. 163.** [*R.*, 20 M. 299, L.B.R. 1893—1900, 518.]

(107)—*Limitation—Plea of—Issue decided against defendant—Objection to finding.*—Where a defendant pleads limitation on the simple fact of possession for 12 years and upwards, and the issue is found against him, he cannot in special appeal object that the finding did not dispose of the issues. KISTO MOHUN KURMOKAR v. NOYAN TARA DOSSEA, **10 W.R. 389.**

(108)—*Objections which are matters of fact—Special appeal.*—Objections which are entirely matters of fact, and which go to the substance of plaintiff's claim, cannot be admitted for the first time in special appeal. BENODE PUTNAIK v. DOYANIDHEE BULLIOR SINGH, **9 W.R. 493.**

(109)—*Plea of limitation raised for first time in second appeal.*—Where the plea of limilation is raised for the first time in second appeal, the Court cannot go into it. SHIVAPA v. DOD NAGAYA, **11 B. 114.** [*Expl.*, 34 C. 941=11 C. W.N. 959=6 C.L.J. 237.]

(110)—*Merger—Plea first taken in special appeal.*—A plea of merger ought not to be raised for the first time in special appeal. H. RUSHTON v. W.L. ATKINSON, **11 W.R. 485.**

(111)—*Act X of 1859, ss. 78, 23, cl. 4—Jurisdiction—Misjoinder—Ejectment — Cancelment of lease—Pleas in special appeal.*—The lessor sued, under Act X of 1859 (s. 23, cl. 4 and s. 78), to recover an alleged balance of rent and cesses due under two leases, and interest, and claimed the ejectment of the lessees from the possession of the properties comprised in both leases, and (by an additional statement of claim) for the amount of arrears due by asamis at the commencement of the leases, basing the latter claim on a stipulation contained in the leases that, whatever arrears should at the date of the execution of the leases be shown to be due from the asamis in a list prepared by the putwari, such arrears should be paid by the lessees, either by instalment or in one payment, as the lessors should think fit, that the lessees should make no objection to the payment of such arrears, and that if the lessees failed to pay such arrears they should pay the expenses of the servants of the lessors who might proceed to the villages for the purpose of realizing the arrears. *Held* that this latter claim was only cognizable by a Civil Court. The Court refused to admit in special appeal the plea that the lessor should have instituted separate suits to recover the

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arrears of rent due on each lease, as it allowed the objection that the leases could not be declared forfeited for the aggregate of the arrears of rent and cesses due on both leases, but that the forfeiture of each was incurred in respect of the arrears due on it, and that the lower Courts should have, therefore, determined and declared in their decrees what was the amount of arrears due in respect of rent and cesses on each lease separately. GULABI SINGH v. NORMAL CHEND, **6 N.W.P. 342.**

(112)—*Civ. Pro. Code, 1877, s. 44—Misjoinder of causes of action—Objection raised for first time in appeal—Maintainability.*—Any objection as to misjoinder of causes of action, if not taken in the Court of first instance, should be considered to have been waived, and should not be allowed to be taken for the first time in appeal. DHONDIBA KRISHNAJI PATEL v. RAMACHANDRA BHAGVAT, **5 B. 554**. [*F.*, 16 A. 130].

(113)—*Objection of misjoinder of causes of action, not raisable for first time in appeal—Civ. Pro. Code, 1882, s. 44.*—An objection that, under the provisions of s. 44, Civ. Pro. Code, the causes of action joined together should not have been so joined unless with the leave of the Court, being an objection of a dilatory character and quite beside the merits, should always be taken in the Court of first instance and not for the first time in appeal after the parties have been put to the expense and trouble of a hearing on the merits. When the party has failed to raise such plea of misjoinder in the first Court, he must be taken to have waived it then. MAULA v. GULZAR SINGH, **16 A. 180= A.W.N. 1894, 11.** (5 B. 554, *F.*)

(114)—*Intervenor—Party to suit—Civ. Pro. Code, 1859, s. 73—Deposition of witnesses taken irregularly—Notes of evidence—Special appeal.*—A plaintiff cannot object in special appeal to an intervenor having been improperly made a party under s. 73, Act VIII of 1859, when he neither took this objection in the first Court nor in the Lower Appellate Court. Nor is the objection that the deposition of the witnesses was not taken in the manner prescribed by the Code of Civil Procedure, but only notes of evidence, one which can be taken in special appeal. SHAIKH LALL MAHOMED v. SHAIKH PEER NUZUR, **18 W. R. 112.**

(115)—*Civ. Pro. Code, 1859, s. 207—Discretion of Court executing joint decree to arrange for execution by decree holder.*—It is entirely in the discretion of the Court executing a joint decree to make arrangements under s. 207, Civ. Pro. Code, 1859, regarding its execution by one of the decree-holders, and to take necessary steps for the protection of the interests of the rest; and if it does not choose to do that, it cannot be pronounced wrong in special appeal. HEERA ROY v. BABOO GUJADHUR PERSHAD NARAIN SINGH, **24 W. R. 286.**

(116)—*Misjoinder of causes of action—Second appeal.*—A plea of misjoinder of causes of

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action should not be allowed to prevail in second appeal, where it is clear that the parties have not been prejudiced by the irregularity. MAGALURI GARUDIAH v. NARAYANA RUNGIAH, **3 M. 359.**

(117)—*Misjoinder — No objection in lower Court—Appeal.*—Where a misjoinder of parties was not objected to by the defendant in the lower Court, the appellate Court should consider the case on the merits. ABDUL KARIM v. MANJI HANSRAJ, **1 B. 295.**

(118)—*Transfer of parties—Consent—Objection in special appeal.*—The defendant assenting to the Court's order making her one of the plaintiffs, and appealing as such cannot object to the transfer in special appeal. RAKHAL DOSS MUNDUL v. PROTAB CHUNDER HAZRAH, **12 W.R. 455.**

(119)—*Judgment-debtor not objecting to want of notice of enquiry.*—Judgment-debtor objecting to what the Ameen had done in enquiry respecting mesne profits, but not to want of notice of enquiry, cannot urge this latter ground in appeal. SHARODA MOYEE BURMONEE v. WOOMA MOYEE BURMONEE, **8 W.R. 9.**

(120)—*Objection taken for first time in appeal—Nature—Effect.*—Where the objection relating to a mid-year sale was taken for the first time in the appellate Court, *held*, that as a defect fatal to the whole proceedings appeared in the notice, the objection was competently raised before the High Court. CHARN MOZUMDAR AHSANULLA KHAN BAHADUR v. HARI, **20 C. 86, P.C.=19 I.A. 191=6 Sar. 252.** (9 C. 656, *D.*)

(121)—*Act V of 1861, s. 42—Suit against Police Officer—Objection under s. 42.*—In a suit against a Police Officer, objection under s. 42, Act V of 1861, if not taken in the Lower Court, cannot be made a ground of appeal. NARAIN DEEN TEWAREE v. RAJAH RAM DASS, **8 W.R. 425.**

(122)—*Plea of want of notice, objection as to.*—The plea of want of notice cannot be taken for the first time in special appeal. THE MUNICIPAL COMMITTEE OF MORADABAD v. CHUTRI SINGH, **I. A. 269.**

(123)—*Objection of want of notice to quit—Second appeal.*—Objection of want of notice to quit may be taken for the first time in second appeal, but the plaintiff must be given an opportunity to meet that defence. ABDULLA v. PAKKERI, **2 M. 346.** [*F.*, 12 M. 353, 18 B. 110; *App.*, 15 B. 407.]

(124)—*Notice to quit — Special appeal.*—Where a tenant denies his landlord's title and persists throughout in a vexatious and aggressive course of conduct towards him, he will not, in a suit for ejectment, be allowed in special appeal to assert that he has not been served with a notice to quit, that objection not having been taken in the Courts below. RAM NUFFER BHATTACHARJEE v. DHOL GOBIND THAKOOR, **1 C.L.R. 421.**

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——3.—Objections first taken in appeal—*ctd.*

(125)—*Ejectment suit—Holding over suffered—Cultivation—Notice to quit.*—In a suit for ejectment, defendant was not allowed to take in special appeal the objection (not taken before) that plaintiff having allowed him to hold over and cultivate could not eject him without sufficient notice to quit. CROWDY v. OMRAO ROY, **18 W.R. 148.**

(126)—*Second appeal—Objection of want of proper notice to quit raised for first time in appeal—Practice.*—In a suit for ejectment, the objection by the tenant of want of a proper notice to quit may be raised for the first time even in second appeal. (2 M. 346, 12 M. 353, L.B.R. 1872—1892, 122, *R.*) In the present case, the objection was not taken in the written statement, nor apparently even in the memorandum of appeal. It was, nevertheless, in fact, dealt with by the appellate Court. *Held* that the High Court in second appeal would allow the defendant to take the objection as to want of notice. VITHU v. DHONDI, **15 B. 407.** [*R.*, 18 B. 110.]

(127)—*Suit by receiver—Error in frame of suit—Objection.*—Where the receiver of an estate, after permission to bring a suit on behalf of the parties interested, sues in his own name, an objection to this error in the frame of the suit, if not taken in the Court below, cannot be raised in appeal. JUGGUNNATH PERSHAD DUTT v. C. S. HOGG, **12 W.R. 117.** [*R.*, 34 C. 305; *D.*, 5 C.L.J. 270.]

(128)—*Objection taken too late in second appeal.*—Where an objection as to the form of a suit could have been, but was not, taken before the first appellate Court, *held*, it was taken too late when the case was before the second appellate Court. AHMAD HOSSEIN KHAN v. NIHAL UD-DIN-KHAN, **9 C. 945, P.C. = 13 C.L.R. 330 = 10 I.A. 45 = 4 Sar. 442.**

(129)—*Objection as to non-joinder—Not objection on merits—Special appeal.*—The objection that plaintiff cannot sue without the co-sharers joining him does not go to the merits of the case and cannot be allowed for the first time in special appeal. NANOO ROY v. JOOMUCK LALL DOSS, **18 W.R. 376 = 12 B.L.R. 292, Note.** [*F.*, 19 W.R. 91, 22 W.R. 489.]

(130)—*Technical plea as to liability of company taken too late.*—Where a decree for *wasilat* was given against the manager of an unregistered Trading Company, and the plea that the Company was not a corporate body, and, therefore, not liable without a disclosure of the names of the parties constituting the Company, was not taken until the execution stage: *Held* that the plea was a technical one, and taken too late to be of any weight in a Court of Equity. MR. D. R. TRIPP v. NURSING CHUNDER MITTER, **W.R. 1864, Mis. 7.**

(131)—*Defect of parties, ground of, in special appeal—Obiter.*—The objection as to the defect of parties after the case had passed through two Courts is not one affecting the merits of the case so as to be a ground of special appeal—*Per Prinsep, J.* BOYDONATH BAG v. GRISH CHUNDER ROY, **3 C. 26.** [*R.*, 159 P.R. 1889.]

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——3.—Objections first taken in appeal—*ctd.*

(132)—*Non-joinder—Objection raised for first time in appeal.*—Where, in a suit by one member of an undivided family, to recover land belonging to the family, the objection to the non-joinder of the other members is not taken at the hearing, it cannot be taken in appeal. PARAMASIVA v. KRISHNA, **14 M. 498 = 1 M.L.J. 782.** [*R.*, 2 N.L.R. 45, 9 C.L.J. 623.]

(133)—*Transfer of Property Act (IV of 1882), s. 85—Suit on mortgage, effect of non-joinder of the necessary parties—Objection as to non-joinder, raisable on appeal.*—The imperative provisions of s. 85 of the Transfer of Property Act compel any person suing on a mortgage to bring into one suit, so far as he had notice of their interests, all the persons interested in the property; and so the omission to join as a party a person who was a necessary party to the suit is a fatal omission by reason of which the suit would be liable to dismissal; and it is the duty of the Court to dismiss a suit brought in contravention of the section, unless it chooses to exercise the discretion vested in it by s. 32 of the Civ. Pro. Code, and to bring upon the record the party omitted from the suit. GHULAM KADIR KHAN v. MUSTAKIM KHAN, **18 A. 109 = A.W.N. 1896. 7.** (13 A. 432, 16 A. 478, 11 A. 537, *R.*) [*Not F.*, 3 Ind. Cas. 291; *R.*, 1 O.C. 53, 5 C.W.N. 423, 3 L.B.R. 241, 12 C.W.N. 911.]

(134)—*Ex-parte decree—Transaction resulting in decree collusive and benamee—Technical objection on the ground of no appeal.*—In a suit for possession by right of foreclosed mortgage, where plaintiff got an *ex-parte* decree against one of the defendants (*A*), and the Lower Appellate Court, finding as a fact, that the mortgage-transaction was *benamee* and collusive, dismissed the claim: *Held* that plaintiff could not in special appeal urge that his suit should not be dismissed as against *A*'s share, on the technical objection that *A* has not appealed. RAM LOOCHIN SOOR v. NITTYA KALEE DEBIA, **12 W.R. 210.**

(135)—*Decree for partition—Acquiescence in proceeding before Commissioner.*—After a complete acquiescence in the proceedings before a Commissioner, appointed in pursuance of a preliminary decree for partition, the defendant was held not entitled to take objection to the appointment of the Commissioner. GYAN CHUNDER SEN v. DURGA CHURN SEN, **7 C. 318 = 8 C.L.R. 415.** [*R.*, 24 C. 725, F.B.]

(136)—*Policy of insurance—Jettison.*—Where the plaintiffs could not recover on a policy for a partial loss, except as for jettison, and that point was not taken in the Court below, the point could not be raised in appeal. MACKINNON v. DUN DAS, **Bourke A.O.C. 155.**

(137)—*Objection to sale of religious office.*—Though the objection, that the sale of a religious office is invalid, is taken for the first time

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——3.—Objection first taken in appeal—*ctd.*

in appeal, it may be considered, where it is of great importance, and goes to the foundation of plaintiff's right of suit. KUPPA v. DORASAMI, **6 M. 76.**

(138)—*Suit for enhanced rates, dismissal of —No claim for arrears at old rates—Complaint against old rate not being granted.*—Where a landlord's claim for arrears of rent at enhanced rates is dismissed by the first Court, and no claim is made for arrears of rent at old rates in appeal to the Judge, he cannot in special appeal object that such arrears were not decreed to him. BEEJOYA GOBIND BURAL v. JANNOBEE BROMONYA, **8 W.R. 252.** (1 Ind. Jur. N. S. 426, *R.*)

(138-*a*)—*Suit for money on bond being asset of factory purchased by plaintiff—Allegation not proved—Objection.*—A plaintiff who obtains a decree in a suit for the recovery of money on a bond alleged to be an asset of a factory purchased by him, where it is objected for the first time in appeal that he had filed no evidence to prove his allegation, ought to have an opportunity of adducing proof. CHUNDER COOMAR ROY v. MOULVIE KUBEEROODDEEN, **10 W. R. 332.**

(139)—*Plea of misconstruction—Special appeal.*—In a suit for enhancement, an entirely new plea of misconstruction of the terms of the lease cannot be admitted in special appeal. SATOORAM MOJOOMDAR v. PREONATH BANERJEE, **10 W.R. 424.**

(140-141)—*Plea of* res judicata *taken for first time in second appeal—Civ. Pro. Code, 1877, ss. 13, 542.*—The plea of *res judicata*, though not taken in the memorandum of appeal, and even when it is not urged in either of the lower Courts, may be entertained by the High Court in second appeal, and may be considered and determined, either upon the record as it stands, or after a remand for findings of fact. MUHAMMAD ISMAIL v. CHATTER SINGH, **4 A. 69, F.B = A.W.N. 1881, 116.** [*R.*, 20 B. 86, A.W.N. 1898, 410, 31 C. 428, 1 S.L.R. 142 ; *D.*, 21 A. 446.] *See also*, KOYLASH NATH CHUND v. MONMOHINEY DOSSEE, **Marsh 276** ; MONMOHINEY DOSSEE v. KOYLASHNATH CHUND, **2 Hay. 154.**

(142)—*Plea of* res judicata, *Waiver and revival of.*—A plea of *res judicata* waived by a defendant in the Court below may be revived in the Appellate Court in answer to the plaintiff's appeal. When the Court proceeds and gives its decision on a waiver of a plea of *res judicata*, its decision is binding as between the parties. MUGNO MOYE DEBYA v. HUR CHUNDER RAOOT, **3 W.R. Act X, Rul. 146.**

(143)—*Practice—Appeal—Allowance of ground of appeal not taken in the lower Courts*—Res judicata.—In this appeal, the High Court allowed to be argued before it a ground of appeal raising a question of *res judicata*, which

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had not been raised in either of the Courts below, and referred issues to the lower Appellate Court to ascertain if such plea were well founded. TEK NARAIN RAI v. DHONDH BAHADUR RAI, **A.W.N. 1898, 104.** [*R.*, 21 A. 446.]

(144)—*Objection to plaintiff's right of suit raised for first time in appeal—Suit cannot be defeated.*—When a decision unfavourable to the defendant has been given in the lower Court and he seeks in appeal to bring forward, for the first time, an objection to the plaintiff's right to sue which he declined to urge in the Court below, he cannot be permitted at that stage of the case to defeat the suit by such an objection. PAREYASAMI v. SULUCKAI TEVAR, **8 M.H.C. 157.**

(145)—*Objection to competency to sue.*—Incompetency to sue is a defect not admitting of cure or palliation, but that plea being of a material preliminary nature and involving the plaintiff's *locus standi* in Court was held to be admissible though pleaded orally for the first time on appeal. RADHA KISHEN v. BUKTAWUR LALL, **1 Agra 1.**

(146)—*S. 242, Contract Act—Denial of plaintiff's partnership rights.*—A plea raised by the defendant that, under s. 242, Contract Act, plaintiff had no right as a partner could not be allowed for the first time in special appeal. BUDDUN SAHU v. RAMPERTAB SAHU, **25 W.R. 511.**

(147)—*Application for removal of obstruction to Magistrate—Reference to Civil Court—Objection to jurisdiction of Civil Court—Presumption.*—Where a party who applies to a Magistrate for the removal of an obstruction, having been referred to the Civil Court, brings a suit there and obtains a decree declaratory of his right of way, and it is objected that the suit is not cognisable in the Civil Court, *held*, that the presumption to be made was that the plaintiff had a right to bring the suit in the Civil Court. TRILOCHUN DOSS v. GUGUN CHUNDER DEY, **24 W.R 413.** [*R.*, 9 M. 463, 2 B. 120, 9 C.W.N. 303.]

(148)—*Agent's right of suit—Questioning right in special appeal.*—An agent's right of suit, if not questioned in the initial stage of a suit, cannot be raised in the special appeal. SOORENDRONATH ROY v. RAGHOOBUR DYAL AWUSTEE, **15 W.R. 392.**

(149)—*Practice—Objection as to plaintiff's right to sue taken for first time in appeal.*—Where the plaintiff admitted the fact of his insolvency, an objection taken by the defendants for the first time in second appeal, that the plaintiff had no right to sue, having taken the benefit of the Insolvency Act, was permitted by the High Court. SADODIN AND ANOTHER v. SPIERS, **3 B. 437.**

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—3.—**Objection first taken in appeal**—*ctd.*

(150)—*Questioning one's own act, objection against—Special appeal—Cause of action.*—Where plaintiff was present at certain Survey Proceedings, which were his own act, he cannot sue for amendment of a thak demarcation; and this objection can be raised by the defendant even in special appeal. SOODUKHINA CHOWDHRAIN v. ISSUR CHUNDER MOJOOMDAR, **12 W.R. 24.**

(151)—*Objection to declaratory decree in second appeal.*—In a suit merely for a declaration of right, where the first Appellate Court orders the plaintiff to pay up the full amount of Court-fees as for a suit for possession (without, however, the suit being amended), and eventually gives him a declaratory decree, an objection by the defendant to the maintainability of a merely declaratory suit, cannot be allowed in special appeal. SARASUTI v. MANNU, **2 A. 134.**

(152)—*Public road — Obstruction—Special damage.*—No one has a right to sue for obstructing a public road without showing that he has suffered some particular inconvenience in consequence of that obstruction. PARBATI CHARAN MUKHOPADHYA v. KALI NATH MUKHOPADHYA, **6 B.L.R. App. 73.**

(153)—*Right of suit by daughter during life-time of insane mother.*—Where a daughter sues for possession of property (left to her by her father), during the life-time of her mother (who was insane), the defendant cannot question in special appeal the plaintiff's right to bring the suit during her mother's life-time, where the objection is not taken in the first instance. KALICOOMAR SIRKAR v. BIRMOMOYE DOSSEE, **1 W.R. 23.** [*R.*, 9 W.R. 190, F.B.]

(154)—*Objection as to plaint disclosing no cause of action raised first in special appeal—Chittahs—Boundary disputes — Possession—Evidence of title.*—An objection that no cause of action is disclosed by the plaint cannot for the first time be raised in special appeal. Chittas are evidence of titles in boundary-disputes, if they are properly accounted for and are properly introduced and verified. Possession is a good title as against every person who cannot establish a better possession. Chittahs are not admissible in evidence when, for want of time, they are ordered to be filed; and they may be rejected or returned after inspection. Object of s. 129, Act VIII of 1859, defined. SOODUKHINA CHOWDHRAIN v. RAJ MOHUN BOSE, **11 W.R. 350.** [*D.*, 11 W.R. 550, 12 W.R. 24.]

(155)—*Second appeal—Plea of non-disclosure of cause of action by plaint—Maintainability of plea.*—Where a defendant has denied the whole claim, the plaintiff must prove it *in toto*; and the defendant can in second appeal contend for the first time that the plaint does not disclose

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a cause of action. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SUKHDEV, **21 A. 341. F.B. = A.W.N. 1899, 151.** [*D.*, 31 P.W.R. 1907.]

(156)—*Second appeal—Objection raised at hearing—Cause of action—Civ. Pro. Code, 1877, s. 542—Per Pearson and Straight, JJ., Spankie, J., dissenting.*—The High Court can, under s. 542 of the Civ. Pro. Code, 1877, entertain and consider at the hearing of a second appeal, the question whether the plaintiff has any cause of action to sue (this being a question of law), though such question has not been raised by the defendant either in the Courts below or in the memorandum of second appeal. LACHMAN PRASAD v. BAHADUR SINGH, **2 A. 884.** [*R.*, U.B.R. 1892—1896, Vol. II, 265, 1 L.B.R. 184.]

(157)—*Decision in special appeal of case on point not raised below.*—A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts. SHIB SUHAYE SINGH v. NURSINGH LALL, **22 W.R. 352.** [*R.*, 24 W.R. 72.]

(158)—*Act XXIII of 1861, s. 11—Separate suit for question provided by section—Validity of jurisdiction.*—Where a question provided for by Act XXIII of 1861, s. 11, is made the subject of a separate suit, *held*, that though the form of proceeding is wrong, there is not a want of jurisdiction which can be made a ground of objection in appeal. PURMESSUREE PERSHAD NARAIN SINGH v. JANKEE KOOER, **19 W.R. 90.** [*F.*, 14 C. 605, 22 C. 483, 18 A. 106; *R.*, 8 C.L.J. 20, 5 C.L.J. 328, 32 M. 425.]

(159)—*Transfer of Property Act (Act IV of 1882), s. 55 (2) — Vendor and purchaser.*—When a purchaser has failed to prove fraud, misrepresentation or concealment on the part of his vendor on which he relied to have the sale set aside, he cannot, in second appeal, set up a new case founded on his right under the covenant for title given him by the Transfer of Property Act, s. 55 (2). MAHOMED v. SITARAMAYYAR, **18 M. 50.**

(160) — *Pleas not taken in Courts below—Alluvial lands — Resumption proceedings.*—Where a defendant has by his answer put his defence upon a certain ground and issues for trial are framed by the Court to meet the case so pleaded, the Judicial Committee, as the final Court of appeal, will not determine the appeal on any other issues or grounds, which have not been taken or considered in the Courts below. Where, in a suit for recovery of possession of alluvial lands, the only point raised by the defendant in the Courts below was one as to the identity of the lands, that is, whether they were included in certain resumption proceedings as appertaining to the plaintiff's estate, it was *held* that the defendant

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could not, in appeal before the Privy Council, raise the question as to whether the lands had been improperly settled by Government with those whom the plaintiff now represented. SRIMATI DASI v. RANI LALANMANI, **2 B.L.R. P.C. 64=11 W.R. P.C. 27=12 M.I. A. 470.** [*F.*, 21 W.R. 59, 15 M. 503.]

(161)—*Transfer of execution proceeedings from Sudder Amin's Court to Sub-Court—Jurisdiction.*—Where the Judge after the Sudder Ameen's Court of Gya ceased to exist, made an order transferring certain proceedings in execution to the Subordinate Judge, *held*, he had no power to do so and that the appellant could take that objection in special appeal. SHAIKH HAMIDOODDEEN v BHADAE SAHOO, **18 W.R. 345.** [*F.*, 15 C. 177.]

(162)—*Transfer of — Issues — Evidence — Objection in Appellate Court.* — Although the transfer by the Judge of a case from the file of the Moonsiff to that of his own Court, and finding decision by the Judge upon issues framed by an evidence taken before the Moonsiff is improper, yet if no objection be taken to such irregularity at the time, it must be presumed that the parties consented to the action of the superior Court, and they will not be allowed to take exception for the first time to the Court's proceedings on appeal. YAKOOB ALI v. LUCHMAN DASS, **6 N.W.P. 80.**

(163)—*Lower Appellate Court's jurisdiction in valuation matters.*—Jurisdiction is not given to Lower Appellate Court in respect of entering on a matter of valuation of its own accord. KALEE COOMAR CHATTERJEE v. KRISTO KISHORE PODDAR, **14 W.R. 196.**

(164)—*Question of institution fee on suit not to be raised in Appellate Court.*— Where no question of valuation for the purpose of determining the amount of institution-fee payable on a suit has been raised either in the Court of first instance or in the grounds of appeal, the Appellate Court is not competent to raise such a question. KALA CHAND SEN v. ANUND KRISTO BOSE, **22 W.R. 433.** [*Diss.*, 7 C. 348.]

(165)—*Court Fees Act (VII of 1870), s. 12—Objection as to deficiency of Court-fees for plaint, not raisable for first time in appeal.*—On the objection raised in this appeal that the suit was barred by limitation by reason of the plaint having been on stamped paper of insufficient value, and the deficiency not having been made good until after the expiry of the period of limitation, it appeared that the deficiency had not been discovered till the case was on appeal before the High Court, and that, as soon as the mistake was discovered, the parties had made good such deficiency. The High Court held that the plea of limitation could not be allowed to be raised at that stage. It was open to the defendant to have raised the objection as to valuation before the decision of the suit by the Court of first instance, and it is not competent to the Appellate Court to allow such plea to be

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raised before it for the first time. Under s. 12 of Act VII of 1870, the decision of the Court of first instance upon a question relating to valuation not affecting the question of category is final. WILAYAT ALI KHAN v. UMARDARAZ ALI KHAN, **19 A. 165=A.W.N. 1897, 33.** [*R.*, 12 C.W.N. 37=6 C.L.J. 351.]

(166)—*Objection as to will being made verbally—Technic.*—Where in a suit to recover certain property, both the lower Courts find that it was left to defendants by way of gift, and the plaintiffs object that, under the Hindu Wills Act, a verbal will of this kind is not legal, *held*, that the plaintiff cannot now throw the defendant's case on a technical ground that the alleged gift was really a will. RADHA BULLUBH CHUCKERBUTTY v. BANEE MADHUB CHUCKERBUTTY, **23 W.R. 230.**

(167)—*Withdrawal of suit improperly permitted—Civ. Pro. Code, 1877, s. 373—Plea taken for first time at hearing of second appeal.*—Where the plea that the plaintiff had been improperly allowed to withdraw his former suit with liberty to bring the present suit, had not been taken in the lower Courts or in the memorandum of second appeal, *held*, that it could not be urged at the hearing of the second appeal. *Quære.*—Whether the words in s. 373 of the Civ. Pro. Code, 1877, "or where there are sufficient grounds" enable a Court to permit a plaintiff to withdraw from his suit, not merely where it must fail by reason of some formal defect, but also on the ground that the defence to the suit was such that he could not have succeeded in his suit had he gone on with it. ZAHUR UNNISSA v. KHUDA YARKHAN, **3 A. 528=A.W.N. 1881, 18.**

(168)—*Objection depending on facts to be found but not found—Special appeal.*—An objection which depends on facts which had to be found and had not been found, cannot be allowed to be taken in special appeal. AZIZUNNISSA KHATUN v. SHASI BHUSHAN BOSE, **2 B.L.R. App. 47=11 W.R. 343.**

(169)—*Second appeal—Question of due diligence.*—The Court can go into the question of due diligence on the part of a judgment-creditor in second appeal. KADUMBINI DABYA v. KOYLASH CHUNDER PAL CHOWDRY, **6 C. 554 =8 C.L.R. 19.**

(170)—*Objection as to invalidity of document, whether can be raised for first time in appeal.*—The Court is bound to take notice, in regular appeal, of the positive invalidity of a document created by a statute (*e.g.*, the Registration Act), even though no objection may have been raised to its admission in the Court below. BASAWA *and* GURBASAWA v. KALKAPA, SHARBANA *and* SIDOJI, **2 B. 489.** [*R.*, 2 A. 554, 2 N.L.R. 121.]

(171)—*Objection as to admissibility of document, not taken in first Court, if allowable subsequently.*—If no objection be taken in the first

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Court as to the admissibility in evidence of a document, such objection cannot be entertained on appeal, the more so, if it appears from the written statement, of the very party objecting, that he has himself relied on it. HRIDOY KRISHNA DAS v. PRASANNA KUMARI CHOWDHURANI, **28 C. 142.** (19 A. 76, P.C., *D.*) [*F.*, 15 C.P.L.R. 123.]

(172)—*Cause of action—Objection in special appeal.*—An objection that the plaint discloses no cause of action, being one which affects the jurisdiction of the Court, may be taken at any time, even in the special appeal stage. PARBATI CHARAN MUKHOPADHYA v. KALI NATH MUKHOPADHYA, **6 B.L.R. App. 73.**

(173)—*Non-existence of cause of action.*—The plea of the non-existence of a cause of action may be raised for the first time on appeal. BASUMAL v. LACHMAN DAS, **11 P.R. 1873.**

(174)—*Fraud—Pleading—Question of fraud not to be raised first in Appellate Court—Practice.*—A question of fraud cannot be allowed to be raised in the Appellate Court when it was not alleged in the written statements and no issue raised regarding it. PANDIT PRAYAG RAJ v. GOUKARAN PERSHAD TEWARI, **6 C. W.N. 787.**

(175)—*Whether fraud can be considered for the first time in appeal.*—In a case where the plaint made no charge of fraud and collusion, and no issue was framed on it, and the Lower Court did not make mention of it, the Court of appeal refused to take it into consideration. JOGENDRA CHANDRA GHOSE v. MAHESH CHANDRA DUTTA, **23 C. 480** [*R.*, 2 N.L.R. 49.]

(176)—*Objection as to plaintiff not being interested in suit.*—The defendant in a suit for possession having objected that plaintiff (H) had parted with his interest, the Court gave effect to the objection and L was treated by defendant as having been substituted as plaintiff, although no specific order for that purpose was to be found in the record. Having been defeated in the lower Courts, defendant objected in special appeal that there was no evidence of the conveyance to L: *Held* that, after what the defendant has done, he is bound to accept L as plaintiff and cannot be allowed now, or in the Lower Appellate Court, to take an objection which does not go to the merits of the suit. HYDER BUKSH v. THE COLLECTOR OF DARJEELING, **24 W. R. 2.**

(177)—*Objection to account not taken in first Court.*—Where no objection is taken before the first Court to an account which is there prepared as agreed to by both parties, it cannot be taken in the Appellate Court. HUREEHUR MOOKERJEE v. RAJKISSEN MOOKERJEE, **23 W.R. 251.**

(178)—*Adoption—Adopted a married man at the time of adoption—Objection as to validity of adoption cannot be taken for first time in second appeal.*—An objection which involves a mixed

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question of law and fact, in respect of which there is no finding in the Courts below, cannot be entertained in second appeal. Consequently, an objection that an adoption is invalid, because the adoptee was a married man at the time of adoption, is not allowable for the first time in second appeal. KANHAYA LAL KURMI v. MT. SATIYA, **1 N.L.R. 1.** (1 W.R. 136, 9 B. 285, 22 C. 483. 27 C. 205, *F.*; 17 B. 303, 19 B. 331, 18 B. 679. 11 C.P.L.R. 56. 11 M. I.A. 475, 12 M. I. A. 475, 14 C. 586, *R.*)

(179)—*Practice—Plea taken for the first time in second appeal—Joint Hindu family—Share in joint family property not alienable without consent of co-parceners or until partition.*—Where in second appeal there was raised for the first time a plea, based upon the findings of fact of the lower Appellate Court, that an alienation of certain joint family property, the subject of the suit, was bad in law as having been made without the consent of one of the co-parceners, the Court refused to allow the plea to be taken, on the ground *inter alia* that the objecting co-parcener had on a previous occasion himself alienated a portion of the joint family property. MOHAN LAL v. MADAN MOHAN LAL, **A. W. N. 1899, 221.** (A.W.N. 1886, 88, *F.*)

(180)—*Appeal—Plea of coercion and public policy to avoid sale-deed—Neither raised by pleadings nor in the grounds of appeal—Whether entertainable.*—*Held*, that an Appellate Court ought not to decide a case on a plea that a deed was void as it was obtained to hush up crime and was, therefore, against public policy, where such a plea was not raised by the pleading or in the grounds of appeal to that Court. BHAGWANTI v. JAGARNATH, **6 A.L J. 636 = 8 Ind. Cas. 510.**

(181)—*Practice—Objection—Waiver.*—Where a party having a good objection, such as an absence of tender before suit, to urge to the prosecution of a suit, omits to do so in the first instance, such omission is fatal to his availing himself of it as an objection on appeal. NAWAB MAHOMED AMUNOODEEN KHAN v. MOOZUFFER HOSSEIN KHAN, **8 B.L.R.P.C. 570 = 14 W.R.P.C. 5.** [*R.*, 20 B. 86.]

—Proceedings before village conciliator—Their nature — Certificate—Computation of limitation—Limitation Act, XV of 1877, art. 144—Onus of proof of objection to jurisdiction of Court—Second appeal—*See* BOM. ACT XVII OF 1879, ss. 46, 47, 48, 13 B. 424.

See MAD. ACT VIII OF 1865, ss. 4, 39, 26 M. 363.

See U.P. ACT XII OF 1881, s. 9, A.W.N. 1884, 45.

See ARBITRATION—MISCELLANEOUS, 11 P.R. 1869.

See ARREST, 8 W.R. 318.

—Objection in special appeal taken for first time at hearing—Arbitrator's procedure—*See* AWARD, 1 A. 535.

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See BILL OF LADING, 8 W.R. 35.

See CIV. PRO. CODE, 1908, s. 115, A. W. N. 1886, 188.

See CIV. PRO. CODE, 1908, O. XXXIII, rr. 7, 15, 20 B. 86.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 6 W.R. Act X, Rul. 91.

See HINDU LAW—CUSTOM, 22 M. 515, P. C. = 26 I.A. 55.

See HINDU LAW—DEBTS, A. W. N. 1884, 327.

—Partition suit for property of grandfather without impleading him—Death of grandfather before trial—Objection on appeal to frame of suit—*See* HINDU LAW—PARTITION, 8 M. 214.

See HINDU LAW—REVERSIONERS, A. W. N. 1883, 282.

See LANDLORD AND TENANT — EJECTMENT, 18 B. 110.

See LIMITATION—QUESTION OF LIMITATION, 1 M.H.C. 358.

See MISJOINDER—OF PARTIES, A. W. N. 1882, 113.

See MISJOINDER—OF PLAINTIFFS AND CAUSES OF ACTION, 24 C. 540.

—Hindu widow—Interest provided by unregistered "rukahs"—Appeal, plea taken for the first time in—*See* MORTGAGE—GENERAL, 2 O.C. 209.

See PRACTICE AND PROCEDURE, 6 M. I. A. 232.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 36 P.R. 1889.

See RESISTANCE TO EXECUTION OF DECREE, 1 B.L R.A.C. 206=10 W.R. 318.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 22 P.R. 1898.

See SPECIFIC PERFORMANCE, 1 O. C. 1061.

—Second appeal, new pleas first taken in—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 4 O. C. 207.

See STAMP ACT, 1879, s. 34, 139 P.R. 1890, 2 P.R. 1891.

—Unstamped hundi, admission on appeal—Objection in second appeal disallowed—*See* STAMP ACT, 1879, s. 34, cl. 3, 5 M. 220.

See SUITS VALUATION ACT, 1887, s. 11, 2 C.P.L.R. 18.

See WILL—MISCELLANEOUS, 15 B. 697.

——4.—**Powers of Appellate Court.**

(1)—*Clear record of reasons by first Court—Appellate Court not to upset judgment on assumption of falsity of evidence.*—Where the first Court records its reasons distinctly, the Lower Appellate Court ought not to upset the judgment on the assumption that the tenants gave false evidence in favour of the shareholder. J. P. WISE v. MUSST. RUBAA KHATOON, **19 W.R. 299.**

Appellate Court—continued.

——4.—**Powers of Appellate Court**—*contd.*

(2)—*Conditions for Appellate Court to reverse finding on facts.*—The Appellate Court cannot reverse the finding of the Lower Court, unless it is clear that the finding of the Lower Court is entirely against the evidence. BAGH SINGH v. FATTA, **28 P.R. 1873.** *But see* MOHUNT RADIKA DAS v. BHUGWAN DAS, **7 P.R. 1874.**

(3)—*When Appellate Court should reverse finding on facts.*—In regular appeal, the Appellate Court is as much a Judge of the facts as the original Court and is bound to give its judgment on the facts with reference to the recorded evidence, independently of the decision of the Court of the first instance; and it is at liberty to reverse such decision, although there is no glaring mistake of the effect of the evidence in the Court below. MOHUNT RADIKA DAS v. BHUGWAN DAS. **7 P. R. 1874.** *But see*, BAGH SINGH v. FATTA, **28 P.R 1873.**

(4)—*Joinder of causes—Same defendant—Same matter—Separate trial on merits—Joint trial.*—Where a number of cases are instituted against the same defendant relating to the same matter, and plaintiff applies to have them all tried together, *held* that the cases should be tried together; failing which each case should be separately tried on its merits. NEHAL SINGH v. SYED ALAI AHMED, **15 W.R. 110.** [*R.*, 22 C. 511.]

(5)—*Judgment in one case when to govern another—Consent of parties.*—Where both the parties and subject-matter are different, a Judge should not, without the consent of the parties, allow his judgment in one case to govern his decision in another. SOORENDRANATH ROY v. PURMANUND GHOSE, **15 W. R. 342.**

(6)—*Amending plaint in Appellate Court.*—A plaint cannot be amended in an appellate Court. ABDUL GAFUR v. MUSST. NUR BANU, **1 B.L.R. A.C. 78=10 W.R. 111.**

(7)—*Prayer for declaratory decree without consequential relief—Appellate Court cannot dismiss suit—Amendment of suit.*—A Court of appeal must not dismiss a suit, because it is one praying only for a declaratory decree without any consequential relief, where the defendants had not taken that objection, but must allow the plaint to be amended. LIMBA *Bin* KRISHNA v. RAMA *Bin* PIMPLU, **13 B. 548.** [*F.*, 14 M. 46; *R.*, 15 M. 15, U.B.R. 1897—1901, Vol. II. 231, 5 Bom. L.R. 329, 12 C.L. J. 74=14 C.W.N. 1057; *D.*, 15 M. 255, 19 A. 429, 26 C. 845.]

(8)—*Return of plaint for presentation to proper Court.*—An Appellate Court has jurisdiction to return a plaint for presentation to the proper Court. KRISHNA RAO AMRIT BUTY v. RAGHUNATH SADASHIV, **6 C.P.L.R. 105.** (7 C. 157, 9 B. 266, *F.*)

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——4.—Powers of Appellate Court—*contd.*

(9)—*Act X of 1877, s. 57 (a)—Return of plaint after trial on the merits.*—If the Appellate Court thinks that the Lower Court ought to have returned the plaint under s. 57 (a) of Act X of 1877, it can direct its return, notwithstanding a trial upon the merits of the case. SHADI v. MUSSUMMAT AISHAN, **55 P.R. 1878.** [*R.*, 118 P.R. 1881; *Appr.*, 90 P.R. 1884.]

(10)—*Plaint insufficiently stamped—Failure to supply deficiency—Dismissal of suit—Civ Pro. Code, 1877, s. 578.*—The fact that a plaintiff has paid too small a Court-fee on his plaint, and that he, as respondent, failed or refused to supply the deficiency when called upon to do so, is only an error or irregularity which does not affect the merits of the case, (s. 578 of the Civ. Pro. Code), and does not justify the Appellate Court in dismissing his suit without going into the merits MEHDI HUSAIN v. MADAR BAKSH, **2 A. 889.**

(11)—*Appeal—Levy of deficiency in stamp duty—Court Fees Act, s. 6.*—It is competent to the Appellate Court to levy the deficient stamp duty, when the memorandum of appeal is not sufficiently stamped. CHENNAPPA v. RAGHUNATHA, **15 M. 29=1 M.L.J. 598.** [*R.*, 19 C. 780, 24 M. 331, 4 O.C. 108, 159 P.L.R. 1901, 25 M. 380, 123 P.R. 1907=82 P.W.R. 1907=3 M.L.T. 63.]

(12)—*Decree dismissing a suit, when can be set aside by.*—A decree dismissing a suit should not be set aside, unless the Court of Appeal is in a position to decree the plaintiff's claim in whole or in part or to direct the lower Court to take action of some kind. KAUNG HLA v. KA TI, **3 L.B.R. 11=1 Ind. Cas. 357.**

(13)—*Dismissal of whole suit against all defendants—Ground common to all defendants—Suit for possession of lakheraj lands.*—One of the defendants (A) admitted with the plaintiff that the lands in dispute were *lakheraj*, and not the *mal* lands of the other two defendants; but he pleaded limitation on the ground of his possession under a purchase from the plaintiff's ancestor more than 12 years ago. The first Court having decreed the suit, defendant A alone appealed, and the Lower Appellate Court not only decided in his favour, but dismissed the plaintiffs whole claim under s. 337, Act VIII of 1859. *Held* that the decision of the first Court did not proceed on a ground common to all the defendants, so as to justify the dismissal of the entire suit by the Lower Appellate Court. SREEMUTTY DOYAMOYEE DOSSEE v. ESHUR CHUNDER MUTTYLOLL, **1 W.R. 203.**

(14)—*Party to suit—Appeal to set aside whole decree—Power of Appellate Court.*—A party to a suit is competent to appeal to set aside the whole decree, and it is competent to the Appellate Court, on such appeal, to set aside the whole decree. DAYAL CHAND SAHOY v.

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——4.—Powers of Appellate Court—*contd.*

NABIN CHANDRA ADHIKARI, **8 B.L.R. 180=16 W.R. 235.**

(15)—*Suit against two defendants—Decree exonerating one of the defendants—No appeal by plaintiff against the exonerated defendant—Exonerated defendant made liable on appeal by the other defendant—Power of Appellate Court to make exonerated defendant liable.*—The plaintiff filed a suit for profits against two defendants, the *lambardars* of a certain village. The Court of first instance dismissed the claim as against one of the defendants, the present appellant. The other defendant against whom the whole of the plaintiff's claim had been decreed, appealed, making the exonerated defendant (the present appellant), a party to that appeal. The lower appellate Court held that both the defendants were jointly liable to pay profits to the plaintiffs. The present appeal was preferred against that decree. *Held*, that, when a suit has been dismissed against one of two defendants by the Court of first instance and the defeated plaintiff has not appealed against that part of the decree, the addition of the defendant, against whom the suit has been dismissed, to the array of the parties does not empower the appellate Court to pass against him a decree, which the Court of first instance declined to pass and in the decision of which Court, the plaintiff chose to acquiesce. FARZAND ALI KHAN v. BISMILLAH BEGAM, **27 A. 23=1 A.L.J. 358=A.W.N. 1904, 155.** (8 C.W.N. 495, F.B. *Diss.*; 2 A. 487, 5 A. 266, *F.*) [*F.*, 4 A.L.J. 772=30 A. 48=A.W.N. 1908, 4=3 M.L.T. 176; *R.*, 3 N.L.R. 85, 12 O.C. 260.]

(16)—*Power to make co-defendant liable upon appeal by a defendant—Mortgage-suit.*—In an appeal by defendants Nos. 2 to 8 against the decision of the 1st Court in which the real contest was whether defendant No. 1 who was joined as a respondent with the plaintiffs or defendants Nos. 2 to 8 were liable for the mortgage-debt, the Appellate Court has power to alter the decree of the 1st Court so as to make defendant No. 1 liable and to direct that a decree to recover the mortgage-debt against defendant No. 1 be made in favour of plaintiff. ISHWARDHARY SINGH v. BIBI SAHEBZADI, **12 C.W.N. 720=35 C. 538.**

(17)—*Appeal by one defendant—Power to reverse whole decree.*—On an appeal by one defendant, the appellate Court need not confine itself to that part of the case concerning the appellant but may reverse the whole decree. BHUPA v. CHETU, **26 P.R. 1881.**

(18)—*Powers of appeal by one defendant—Reversal of whole decree—Place of suing—Hundis.*—One of several defendants might obtain a reversal of the whole decree if it proceeded on any ground common to all the defendants. A suit on a hundi is not to be brought in a place where the contract was entered into, but at a place where it is to be performed and a breach of

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——4.—Powers of Appellate Court—*contd.*

such stipulated performance occurred. Meaning of 'cause of action' discussed. BANKA MAL v. CHUAH MALIK, **71 P.R. 1883**. (10 P.R. 1886, 104 P.R. 1886, 29 P.R. 1867, 2 P.R. 1868, 56 P.R. 1868, 57 P.R. 1874, 118 P.R. 1881, 147 P.R. 1882, *Cited*) [*F.*, 132 P.R. 1883.]

(19)—*Appeal of one defendant—Reversal of entire decree.*—An appellate Court cannot, on the appeal of one defendant only, reverse the whole of a decree which has been passed against two defendants on a ground not common to both. ABDOOL ALI v. SYED BANOO, **2 W.R. 287.** [*F.*, 11 W.R. 238.]

(20)—*Ss. 244 (c), 545, 647, Civ. Pro. Code, 1882—Stay of execution—Appeal from order, in execution pending.*—The Appellate Court can stay execution, during the pendency of an appeal before it, from an order in execution. PASUPATHI NATH BOSE v. NANDA LAL BOSE, **28 C. 734=5 C.W.N. 67.** (1.A. 178, F.B., 11 W.R. 494, *R.*) [*F.*, 3 C.L.J. 67=33 C. 927; *R.*, 3 C.L.J. 29, 34 C. 1037, F.B.=11 C.W.N. 1030=6 C.L.J. 298, 3 C.L.J. 29; *D.*, 31 C. 1081, 9 C.W.N. 123.]

(21)—*Execution of decree—Decree, addition to, or alteration of—Appellate Court.*—It is not competent to the Appellate Court in a matter arising in execution to add to or alter the decree. BECHARAM PAUL v. BHUGWAN CHUNDER GHOSE, **5 C.L.R. 522.**

(22)—*Power of, to take notice of facts transpiring during pendency of appeal—Discretion—Mortgages executed on the same day—Priority—Joint tenancy or tenancy in common when neither proved to have been executed before the other.*—As a general rule, a Court of Appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts, which may have arisen subsequently. But the Court will, in exceptional cases, depart from this rule, specially where, by so doing, it can shorten litigation and best attain the ends of justice. Plaintiff was given leave to amend his plaint, so as to adopt his case and prayers for relief to the new facts, the amendment not altering the nature of the case. When two mortgages are executed on the same day, that which was executed first takes priority, and evidence may be given to ascertain which was in fact executed first. Where this cannot be ascertained, the mortgagees would take as joint tenants or tenants in common. RAM RATAN SAHU v. BISHUN CHAND, **11 C.W.N. 732=6 C.L.J. 74.** [*F.*, 6 C.L.J. 102, 662; *Expl.*, 13 C.W.N. 815.]

(23)—*Powers of—Objection as to invalidity of agreement, defendant not raising—Agreement involving inquiry into other's property—Fraudulent object.*—An Appellate Court could, of its own notion though not urged by the defendant, take objection as to the invalidity of an agreement and discuss a suit on that ground, for a

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——4.—Powers of Appellate Court—*contd.*

Court cannot be asked to enforce an agreement unenforceable by law, whether such plea is set forth in the defence or not. When the object of an agreement is fraudulent, it is void under ss. 17 and 23, Indian Contract Act, even though it may involve or imply no inquiry into the property of another. A promise made, without any intention of performing it, is a false representation and amounts to fraud under s. 17, Contract Act. SAHIB RAM v. NAGAR MAL, **63 P.R. 1884.** [*D.*, 96 P.R. 1902=17 P.L.R. 1903.]

(24)—*Practice—Remand — Appellate Court, whether to deal with whole appeal after return of findings.*—In an appeal where the respondent filed objections under s. 561, the Civ. Pro. Code, the Court, without delivering judgment, remanded an issue with reference to the objections, stating, however, that the appellant was, in its opinion, entitled to succeed. It was apparent that, at that time, the appeal could not have been argued out, and the true meaning of the facts as found could not have been present to the mind of the Court. *Held* that, upon the return of the findings on remand, the Court could not treat the appeal as already decided, and the objections the sole matter for consideration, but should consider the question which has been raised by the appellant and the objections raised by the respondents, and decided the whole case. But, from this ruling, it must not be inferred that, where Judges have heard arguments on some of the issues and have come to or expressed their views on those issues and have remanded another issue or issues under s. 566, the same Judges should be bound to hear the case *de novo*, on the return of the remand. In such a case, the counsel may be confined to the findings on remand. LACHMAN PRASAD v. JAMNA PRASAD, **10 A. 162=A.W.N. 1887, 295.** [*F.*, 80 P.L.R. 1902.]

(25)—*Appeal from order of remand—High Court's power to confirm first Court's adjudication upon preliminary point.*—Upon an appeal from the order of an Appellate Court remanding a case, disposed of by the first Court on a preliminary point, the High Court is not limited to consider merely the form of the remand order. It can go into the merits of the adjudication, by the first Court, on the preliminary point and might allow the successful party to retain the benefit of the first Court's decree, if it is found that the Appellate Court's order is defective. LOKI MHATO v. AGHOREE AJAIL LALL, **5 C. 144=4 C.L.R. 465.** [*F.*, 14 B. 14, F.B., 20 M. 152, 1 P.L.R. 1903=1 P.R. 1903, 85 P.R. 1895, 6 P.R. 1892, 3 A. 655, F.B.; *Appl.*, 17 C. 168; *R.*, 26 C. 361.]

(26)—*Power of remand — Limit—S. 562, Civ. Pro. Code.*—The powers of remand given to an appellate Court under this section should be exercised only when the lower Court had decided the case on a preliminary point and not on the merits or on a point preliminary to

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a trial of a case on merits. Exclusion of evidence of facts would not of itself justify a remand. MUHAMMAD v. FATTEH MUHAMMAD, **46 P.R 1885.**

(27)—*Remand order not specifically appealed against—High Court's power to question, in second appeal, validity of order.*—The High Court has power to question in second appeal the validity or otherwise of the order of remand, although there was no specific appeal made against the order under s. 588 (28) of the Code. CHEDA LAL v. BADULLAH, **11 A. 35.** [*R.*, 12 A. 510, 24 C. 725.]

(28)—*Remand — Objection to finding — Appellate Court, powers of—Civ. Pro. Code, 1877, ss. 566, 567, 578—Error or irregularity.* —See this case noted at p. 14, *supra*, under 1 A. 165, which it follows. Even assuming that an Appellate Court acts irregularly in not accepting the findings returned by the Lower Court on remand the irregularity is one which does not affect either the merits of the case or the jurisdiction of the Court, and is cured by s. 578 of the Civ. Pro. Code. AKBARI BEGAM v. WILAYAT ALI, **2 A. 908.** [*F.*, 6 A. 383 = A. W.N. 1884, 127, 6 A. 391 = A.W.N. 1884, 129.]

(29)—Ex parte *decree—Application to set aside—Ordering of security for decree—Legality of—Ss. 560, 108, Civ. Pro. Code, 1882.*—As s. 560, Civ. Pro. Code, 1882, enacts that an appellate Court may re-hear an appeal heard *ex parte* on such terms as to costs or otherwise as the Court thinks fit to impose, the word 'otherwise' empowers such Court to impose terms other than those relating to costs, covering an order as to furnishing security for the due performance of the decree. As an original Court can direct the payment of the decree into Court before hearing an application to set aside *ex parte* decree, an appellate Court has like powers. BAWA NARAIN SINGH v. GANGA RAM, **70 P.R. 1885.**

(30)—*Appeal from partial decree by plaintiff—Power of appellate Court to reduce decree further.*—Where a decree was passed allowing a certain amount and disallowing the remainder, and the plaintiff appealed from the decree disallowing a portion, and the defendant did not appeal, *held* that it was not competent to the appellate Court to further reduce the amount, as the defendant had not appealed. SITA RAM v. BANNO BIBI, **A.W N. 1881, 40.**

(31)—*Modification of claim before Appellate Court.*—It is competent to the Courts to allow a plaintiff to modify his original claim for the direct settlement of a superior proprietary right in an estate into one for a sub-settlement of a sub-proprietary right. GOURI SHUNKER v. THE MAHARAJA OF BULRAMPORE, **4 C. 839. P.C. = 6 I.A. 1 = 3 Sar. 873.** [*R.*, 13 A. 108.]

(32)—*Original jurisdiction, exercise of, by Appellate Court—Right of appeal to the Court of the Judicial Commissioner.*—Where, in an

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——4.—Powers of Appellate Court—*contd.*

appeal from the decree of a Court first instance, the Deputy Commissioner set aside the decree of an original Court of competent jurisdiction and then passed a new decree in proceedings styled a regular suit in the Court of the District Judge, *held*, that an Appellate Court cannot give itself jurisdiction to try the case as an original suit under its original jurisdiction in this manner. The further decree thus made in the suit is a pseudo-original decree. It does not follow that, because an Appellate Court in an appeal from an original decree, calls its proceedings a regular suit, that appellate proceedings do become an original suit, or that its further decision in such pseudo-original proceedings becomes less liable to appeal in the Court of the Judicial Commissioner. MOIDEEN BAWA v. ALLANDOO, **L.B.R. 1893—1900, 229.**

(33)—*Original jurisdiction, exercise of, by Appellate Court—Right of appeal to the Court of the Judicial Commissioner.*—In an appeal from a decree passed by Court of first instance, the Appellate Court set aside the original decree in the suit and then, styling its further proceedings an original suit, passed a decree as if in an original suit. On application being made to the Court of the Judicial Commissioner for stay of execution of that further decree, *held*, —that the further proceedings, though styled an original suit, must be treated as a continuation of appellate proceedings in the same appeal from an original decree already passed in the same suit. The application for stay of execution of pseudo-original decree passed in such further appellate proceedings by a Court of first appeal is properly made to the Court of second appeal, that is, the Court of the Judicial Commissioner. MOIDEEN BAWA v. ALLANDOO, **L.B.R 1893—1900, 231.**

(34)—*Decree not prepared by Court of first instance—Jurisdiction of Appellate Court.*—The mere fact of the absence of a decree giving effect to the decision of the Court of first instance, does not prevent the appellate Court from entering into the case, nor from remanding the case to the first Court for preparing a decree. KADIR BAKSH v. KIFAITULLAH, **A.W.N. 1884, 224.** (5 A. 520, *R.*)

(35)—*Jurisdiction—Appellate Court dealing with matters not before it in appeal.*—An appellate Court is not competent in its decree to deal with any portion of the decree of the first Court which is not before it either by way of appeal or by way of objection under s. 561 of the Civ. Pro. Code. TIRATH RAJ v. KUNJ BEHARI, **A.W.N. 1893, 144.** (11 A. 35, 9 C. 635, *R.*)

(36)—*Jurisdiction—Appellate Court not entitled to decide matters not brought before it by way of appeal or objection.*—Where a plaintiff appealed in respect of a portion of his claim which had been dismissed by the Court of first instance and the defendant did not file any

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——4.—Powers of Appellate Court—*contd.*

objection as to that part of the plaintiff's claim which had been decreed, it was *held* that the Court of appeal had no jurisdiction to consider the propriety of the decree so far as it was in the plaintiff's favour. BALDEO SINGH v. KEOLA, **A.W.N. 1899, 125.**

(37)—*Issue not raised between parties in first Court.*—A Lower Appellate Court is not justified in determining an appeal upon an issue which was not raised between the parties in the Court of first instance. MUSSAMUT USTOORUN v. BABOO MOHUN LALL, **21 W.R. 333.**

(38)—*Declaration by appellate Court of right not in issue between parties—Civ. Pro. Code, s. 565.*—S. 565 of the Civ. Pro. Code of 1877 (identical with the same section in the latter Code of 1882) does not enable an appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up before the lower Court. THE OFFICIAL TRUSTEE OF BENGAL v. KRISHNA CHANDRA MOZUMDAR, **12 C. 239, P.C. = 12 I.A. 166 = 4 Sar. 657.** [*D.*, 9 A. 434.]

(39)—*Appeal by one defendant—Decree in favour of other defendants.*—An appellate Court, in a case where the Court of first instance did not proceed in its decision on ground altogether common to all the defendants, would not be legally justified in giving virtually a decree in favour of the other defendants also. BOYDONATH SURMAH v. OJAN BIBEE, **11 W.R. 238.** (2 W.R. 287, 7 W.R. 49, 366, *F.*)

(40)—*Civ. Pro. Code, 1877, s. 542—Memorandum of appeal.*—The High Court confined the appellant to the ground of objection set out in the memorandum of appeal (which was that the suit was barred by limitation), and refused to give him permission to urge another ground, as it had not been urged by him on first appeal in the lower appellate Court. BHAWANI GIR v. DALMARDAN GIR, **A.W.N. 1881, 40.**

(41)—*Appellate Court's power to raise points in favour of* ex parte *respondent—Court to confine itself to points put in issue.*—An appellate Court must confine its decision to the points put in issue by the parties before it. It cannot, of its own motion, raise points in favour of a respondent, who remains *ex parte*. DURGA PRASAD v. KAIRATI, **1 A. 545 = 2 Ind. Jur. 680.**

(42)—*Lower Appellate Court, competency of, to raise points not taken in first Court.*—*Held* that, as an ordinary rule, a Judge should not (except as to jurisdiction) take up points in bar not taken in the first Court or not urged in the trial there. RANEE SURNOMOYE v. SING KROOP BEBEE, **W.R. 1864, Act X, Rul. 133.**

(43)—*Suit instituted in Court without jurisdiction—Reference to arbitration, and decree in accordance with award passed therein—Finality of decree.*—Where a suit, instituted in a Court

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——4.—Powers of Appellate Court—*contd.*

having no jurisdiction, is referred to arbitration, and a decree passed in accordance with the award passed therein, it is competent for the appellate Court, the finality of the decree according to the award notwithstanding, to entertain the question whether the lower Court had jurisdiction to entertain the suit. KALIAN DAS v. GANGA SAHAI, **5 A. 500 = A.W.N. 1883, 100.** (4 A. 283, *R.*; 7 C. 157, 7 C. 428, *Diss.*)

(44)—*Act XXIII of 1861, ss. 5, 6, 7, 37—"Powers"—"Jurisdiction"—Non-payment of expense of notice—Talabana—Application to have appeal re-heard.*—S. 37 of Act XXIII of 1861 does not apply to cases where the subject which is being dealt with by the Court is not the actual appeal itself and cannot, therefore, be rightly treated as standing in an analogous position to that of the original suit itself; and further the same section has not the effect of making s. 7 of the same Act applicable to cases where the appellate Court has passed an order under ss. 5 and 6 dismissing the appeal. The word "powers" in s. 37 is not synonymous with "jurisdiction," and especially in other parts of Act XXIII of 1861 and in Act VIII of 1859, it does not comprehend jurisdiction. In a case in which a memorandum of appeal had been filed, but owing to the expenses of service not having been deposited, no notice had been served on the respondent, and he did not appear, the Judge, under ss. 6 and 7, Act XXIII of 1861, dismissed the appeal. About a month after this, the appellant presented a petition, explaining the reasons of his default and praying that, on payment of the *talabana*, his appeal should be restored, but the Judge rejected the prayer. *Held*, that the application to have the appeal re-heard was essentially one for review of judgment, and the decision of the Judge rejecting it was final. KALIKRISHNA CHUNDER v. HARIHAR CHUKERBUTTY, **1 B.L.R., A.C. 155 = 10 W.R. 160.** (2 W.R. Mis. 23, 3 W.R. Mis. 23, 2 W.R. 254, *R.*)

(45)—*Suit within Munsif's jurisdiction—Principal Sudder Amin rejecting plaint—Appeal Court's power to order such Amin to try as Munsif.*—A Court hearing an appeal from an order made by a Principal Sudder Ameen rejecting a plaint, because the suit was within the Munsif's jurisdiction, may at the same time, direct the Principal Sudder Amin to try the suit as a Munsif. MODOOSOODUN SURMA GHOSAL v. SEEDHESSURE DEBEA, **4 W.R. 85.**

(46)—*Decision of suit by first Court—Jurisdiction of Appellate Court.*—Where a Court of first instance hears and finally determines a suit, it is not competent to the Court of Appeal to adjudge the case on the allegations found in the plaint. SUTTROGHUR PUTTEE v. MANICK RAM GANGOOLY, **1 W.R. 198.**

(47)—*Appeal — Costs — Power of the High Court on second appeal to consider propriety of*

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order of Lower Court as to costs.—It is competent to the High Court on second appeal to interfere with that portion of an appellate decree which relates to costs. DUNGAR MAL v. RAM CHANDAR, **A.W.N. 1893, 130.** (A.W.N. 1893, 110, *R.*)

(48)—*Civ. Pro. Code, s. 591—Appeal from decree—Competency of Appellate Court to deal with unappealed interlocutory orders of lower Court.*—It is competent to an Appellate Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect or irregularity, in any order of the lower Court, affecting the decision of the case. The Court must have such power, because s. 591 provides that an objection to such order may be made a ground of objection in the memorandum of appeal, and the fact that a miscellaneous appeal might have been, but has not been preferred from such order, cannot make any difference in the power of the Appellate Court to deal with such order in the course of the regular appeal. HAR NARAIN SINGH v. KHARAG SINGH, **9 A. 447 = A.W.N. 1887, 89.** (7 C. 148, *R.*) [*R.*, 10 A. 223, 12 A. 510, 14 B 232, 15 B. 145, U.B R. 1897—1901, Vol. II, 310 ; *D.*, 12 A. 200.]

(49)—*Reversal of lower Court's decision re party not appealing.*—An Appellate Court has no power to reverse the decision of the Lower Court as regards a party who has not appealed. LALLA RAM SURAN LALL v. MUSSAMUT LOKEBAS KOOER, **18 W.R. 39.**

(50)—*Title not set up—Finding for defendant.*—An Appellate Court cannot find for defendant on a title not set up. MAHABEER MISSER v. JUGGUR NATH MISSER, **25 W.R. 11.**

(51)—*Power of Appellate Court to try on issue in bar, overlooked by first Court.*—Case where it was held that there was no necessity for a Lower Appellate Court to remand a suit to the Court of first instance to try an issue in bar, which had been overlooked by the first Court, as there was sufficient evidence to enable the Appellate Court to do so. BROJO SOONDUR HOOM ROY v. GOUR KISHORE HOOM ROY, **2 W.R. 161.**

(52)—*District Judge not to ignore on appeal directions of co-ordinate Court of appeal.*—A District Judge has no authority, when hearing an appeal from a Munsiff's Court, to vary or ignore the directions made by an appellate Court of co-ordinate jurisdiction. BROJO SOONDUR GOSSAMEE v. JUGGUT CHUNDER DEY, **21 W.R. 199.** [*R.*, 32 M. 318.]

(53)—*Finality of award of wassilat.*—A Judge cannot disturb the award of wassilat, which is a final award so far as the Appellate Court is concerned. PUNCHANUN BOSE v. OOMANATH ROY CHOWDHRY, **14 W.R 160.**

(54) — *Caste questions — Jurisdiction of appellate Court.*—On questions of caste, a lower appellate Court has a right to come to a finding based on history or the custom of the country. ROGOONATH DOSS MOHAPATTUR v. BYDONATH DOSS MOHARATHA, **14 W.R. 364.**

(55)—*Local inquiry — Interference with results.*—Appellate Courts ought not to interfere with the result of a local inquiry, except upon very clearly defined and sufficient grounds. MONKEE DUMBER SAHEE v. MONKEE BHULLUNDUR SAHEE, **15 W.R. 423.**

(56)—*First Court's decision based on careful inspection of suit land—Appellate Court—Not to reverse such decision.*—An appellate Court ought not to reverse a first Court's decision based on careful inspection of the land in dispute, except on a very clear opinion on the evidence, and for sufficient reasons recorded. BRINDABUN BHAROTEE v. RAJAH DHUNUNJOY NARAIN BHUNJO DEO, **18 W.R. 452.**

(57)—*Overt act justifying declaration of title not alleged by plaint—Cause of action apparent—First Court deciding on merits—Incompetency of Lower Appellate Court to dismiss claim.*—Where although the plaint mentions no overt act justifying the plaintiff's request for a declaration of title, it appears on the admitted facts that there is a cause of action, and the Court of first instance adjudicates on the merits, *held* that it is too late for the Lower Appellate Court to dismiss the claim on the ground of the above defect in the plaint. SHOME DUTT CHOWDHRY v. SURB NARAIN CHOWDHRY, **24 W.R. 252.**

(58)—*Suit for partition revived, after plaintiff's death, on behalf of his minor sons with permission of first Court—Appellate Court not competent to object to revival of suit.*—When a suit for partition of family property is, upon the death of the plaintiff, revived on behalf of his minor sons with the permission of the Court of first instance, and a decree for partition given, it is not open to the Appellate Court to reverse the decree upon the ground that, as a partition can be enforced on behalf of minors only when it can be proved to be necessary for the protection of the minor's interest, such suit does not survive to minors ; because the Court of first instance has allowed the suit to be revived, considering that it has been brought on grounds which entitled the minors to the partition. PARVATHI v. MANJAYAKARANTHA, **5 M.H C. 193.**

(59)—*Addition or substitution of parties—Powers of Appellate Court.*—An appellate Court can add or substitute new applicants or respondents, even after the expiry of the period of limitation. THE COURT OF WARDS v. GAYA PRASAD, **2 A. 107.**

(60)—*Appeal from one Civil Judge to another.*—One Civil Judge is not empowered to hear an appeal from another Civil Judge. DAWALA v. RAO SAHIB BALWANT RAO BHUSKUTE, **12 C.P.L.R. 10.** [*Diss.*, 3 N.L.R. 53.]

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(61)—*Neglect to prove genuineness of conveyance in lower Court—No help from Appellate Court.*—The appellate Court cannot relieve parties of the consequences of their neglect in the lower Court to prove the genuineness of conveyances. MISREE BEGUM v. PUNNOO SINGH, **8 W.R. 362.**

(62)—*Unstamped receipts for rent—Evidence—Stamp duty and penalty—Powers of Appellate Court.*—Where a party to a suit does not apply to a Court of first instance to receive certain unstamped receipts in evidence offering to pay the requisite stamp duty and penalty, an appellate Court cannot admit such documents on payment of such duty and penalty. BABOO GOUR PERSHAD SINGH v. LALLA NUND LAL, **7 W.R. 439.**

(63)—*Original Court receiving stamp duty and penalty—Appellate Court not empowered to question.*—Where the Court of the first instance determined what the stamp was and received the penalty accordingly, the appellate Court is incompetent to question its decision. MOOLA MULL v. GUNPUT. **66 P.R. 1866.**

(64)—*Act XVIII of 1869 — Unregistered acknowledgments of barred debts admitted in evidence.*—Where the Court of first instance admitted in evidence an unstamped acknowledgment of a debt which embraced items more than three years old, and consequently barred by limitation, the Appellate Court is precluded from questioning whether the acknowledgment had under the provisions of Act XVIII of 1869 been wrongly admitted in evidence as unstamped. DYAL SINGH v. MANGAL SINGH, **28 P.R. 1878.**

(65)—*To enlarge time for payment prescribed in decree—Appeal from mortgage-decree—Formality of order making decree absolute—Practice.*—The Transfer of Property Act, 1882, not being in force in Burma outside Rangoon, it is quite clear that this Court has no power in execution of enlarging the time prescribed for payments by its decree of the 14th December, 1896. There can, however, be no doubt that the Privy Council has the power of enlarging the time, and that any Appellate Court deciding an appeal from a mortgage decree has similar power. Where that Act is not in force, it is not the practice to pass a final order making the decree absolute, and, if such an order is passed, it is merely a formal order. KADIR MOIDEEN v. CHARLES WIDIKEND NEPEAN, **L B R. 1893—1900, 420.** (15 B. 644, 13 B. 106, 17 B. 547, 18 A. 223, 455, 20 B. 279, 7 B. 532, 13 C. 13, 11 B. 172, *R.*)

(66)—*Principle on which account taken in error—Correction of error.*—Where there has been an error in the principle upon which an account has been taken, the appellate Court will correct such error, if it had been expected to in the Lower Court. VENKATA REDDI v. VENKATARAMAYYA, **1 M.H.C. 418.** [*Diss.*, 6 B.H.C. 149, 6 M.H.C. 36.]

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—— 4.—Powers of Appellate Court—*contd.*

(67)—*Power of Court under s. 354, Civ. Pro. Code, 1859, to decide a question in absence of any objection under s. 348, Civ. Pro. Code, 1859—Verbal objection under s. 348, Civ. Pro Code, 1859, sufficient.*—The plaintiff, who sued for the possession of certain land alleged to have been purchased from the defendant for Rs. 300 valued his claim at Rs. 150 and stamped his plaint accordingly. The Lower Court, being of opinion that the defendant had no legal power to sell the land, gave a decree for Rs. 300 in favour of the plaintiff. The Deputy Commissioner, to whom the plaintiff prepared an appeal asking for possession of the land instead of a refund of the purchase-money, not only dismissed it, but also set aside a money decree for Rs. 300 without any written objection taken by the defendant under s. 348, Civ. Pro. Code. *Held, Per Lindsay, J.*, that the defendant not having taken objection under s. 348, the Deputy Commissioner could not reverse the money decree of the original Court, which would accordingly be affirmed. *Held, Per Campbell, J.*, that, as plaintiff did not pray for a refund of the purchase-money, the stamp on his plaint being insufficient to cover the amount, and also, as the plaintiff himself appealed from the decree awarding him Rs. 300 instead of possession, the Deputy Commissioner could reverse the decree without giving the plaintiff other relief and that a verbal objection under s. 348, Civ. Pro. Code, 1859, was valid. *Held, Per Cunningham, J.*, that the Deputy Commissioner had power to reverse the order of the first Court, as, under s. 354, the Appellate Court may raise and decide any question of fact essential to the right determination of the suit upon the merits. RAMJEE DASS v. CHOOHUR, **78 P.R. 1870.**

(68)—*Suit— Survey award — Possession — Limitation—Act XIV of 1859, s. 1, cl. 12.*—Where a plaintiff sued not only for the cancelment of a survey award, but also to be restored to possession of land wherefrom he had been subsequently dispossessed, his suit was held not to be barred because not brought within three years of the award, the latter claim being a different cause of action, to be governed by the limitation of twelve years in cl. 12, s. 1, Act XIV of 1859. An Appellate Court can *suo motu* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit is barred. MAZUFFUR ALLY v. GIRISH CHUNDRA DAS, **1 B.L.R A.C. 25=10 W.R. 71.**

—Powers of, in India—*See* MAD. ACT I OF 1908, 3 Ind. Cas. 736.

—Power of appellate Court to enter into question of misconduct or corruption of arbitrator—*See* AWARD, 13 P.R. 1906.

—Appellate Court, whether has power to remand a case for second decision except as provided by s. 562, Civ. Pro. Code, 1882—*See* CIV. PRO. CODE, 1882, ss. 562, 564, 138 P.R. 1908.

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——4.—Powers of Appellate Court—*concld.*

—Powers of, under ss. 566. 568, Civ. Pro. Code—*See* CIV. PRO CODE, 1908, ss. 47, 65, O. XXI, r. 94, O. XLI, rr. 25, 27, 9 C.L. J. 464=4 Ind. Cas. 168.

—Power of, to review its order of remand, on filing of appeal, after remand and subsequent decision by original Court—*See* CIV. PRO. CODE, 1908, s. 105, 5 M.L.T. 75=32 M. 318 =2 Ind. Cas. 525.

—First Court allowing document on which suit based to be produced at a late stage—Appellate Court, if may reject and on what ground —Dealing with case as if there was no evidence when in fact there was—Revision—*See* CIV. PRO. CODE, 1908, s. 115, O. VII, rr. 14, 17, 18, and s. 99, 13 C.W.N. 737=10 C. L. J. 33 =2 Ind. Cas. 946.

—Court of second appeal, power of— *See* CIV PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2) (3) (5) (11), 1 L.B.R. 350.

—Preliminary point—Remand— Amendment of plaint in appeal—Power of Appellate Court to amend plaint—Suit for rent converted into one of ejectment—*See* CIV. PRO. CODE, 1908, O. VI, r. 17, O. VII, r. 11, O. XLI, r. 23, s. 107 (2), O. XXII, r. 11, 19 B. 303.

—Power of, to act under s. 158, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XVII, r. 3, s. 104, O. XLIII, r. 1, 10 O.C. 245.

See CIV. PRO. CODE, 1908, O. XXIX, rr. 2, 3, O. V, r. 6, 3 M.H.C. 167.

—Power of, to go behind first Court's order setting aside award for judicial misconduct of arbitrator—*See* CIV. PRO. CODE, 1908, sch. II, r. 15, 66 P.R. 1907=159 P.L.R. 1908= 148 P.W.R. 1907.

See COMPROMISE—ENFORCING, W.R. 1864, 146.

See DOCUMENT, L.B R. 1893—1900, 551.

—Document received and acted on by lower Court—Court of appeal to be slow to interfere with lower Court's discretion—*See* ESTOPPEL —ESTOPPEL BY JUDGMENT, 6 C.L.J. 621.

See LETTERS PATENT, HIGH COURT, 1865 —N.W.P., 17 A. 475=A.W.N. 1895, 104.

See PLAINT—RETURN OF PLAINT, 73 P.R. 1876, 55 P.R. 1878.

—Appellate Court—Powers of remanding case—*See* REMAND, 5 M.H.C. 313.

—Power of, to question admissibility of document, admitted by Court of first instance —*See* STAMP ACT, 1899, ss. 12 (3), 36, 61, 108 P.R. 1908.

—Appellate Court, competency of, to decide on ground not urged by appellant—*See* TRANSFER OF PROPERTY ACT, 1882, s. 41, 17 A. 280=A.W.N. 1885, 69.

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——5.—Practice and Procedure.

(1)—*Court of first appeal—Mode of disposal of appeal.*—A Court of first appeal should determine an appeal on the evidence and merits of the case, and not merely on a preliminary point. RAM NARAIN v. BHAWANIDIN, **9 A. 29, Note=A. W. N. 1882, 104.** [*Appr.*, 7 A. 136, 7 A. 765. F.B., 9 A. 26; *R.*, 7 A. 649= A.W.N. 1885, 151, F.B.]

(2)—*Civ. Pro. Code*, 1882, s. 574—*Court of first appeal—Disposal of appeal not on merits—Validity of.*—Where a Court of first appeal did not decide the appeal on the merits, failed to comply with every one of the provisions of the section and disposed of it, by saying that the suit was a bit of wanton liligation with nothing tangible, upon which the claim could be grounded, the appeal was remanded for adjudication on the merits. SHEOAMBAR SINGH v. LALLU SINGH, **9 A. 30 Note=A.W.N. 1882, 158.** [*Appr.*, 7 A. 136, 7 A. 765, F.B., 9 A. 26; *F.*, 27 A. 691=2 A.L.J. 635=A. W. N. 1905, 159, 27 P.W.R. 1907, 2 P.R. 1903=12 P.W.R. 1908 =96 P.L.R. 1908; *R.*, 7 A. 649=A.W.N. 1885, 151, F.B., 16 M. 207.]

(3 & 4)—*Materials on record to guide Appellate Court.*—An Appellate Court can determine the appeal only upon the materials on record. RAKHAL MONI DASSI v. ADWYTA PROSAD ROY, **30 C. 613=7 C.W.N. 419.** (5 C.W.N. 877, *F.*)

(5)—*Lower Court's procedure—Presumption.* —The rule is to presume that lower Court has done its duty; neglect of duty cannot be assumed at the mere suggestion of the appellant. RAJAH RASH BEHARI LAL SINGH v. NABAYI PADDAR, **3 B.L.R. A.C. 99=11 W.R. 465.**

(6)—*Appellate Court reversing judgment of lower Court—Mere suspicion insufficient*— Before an appellate Court could reverse the decision of the lower Court, it is bound to satisfy itself that that decision was wrong. It is not enough for the appellate Court to think that there are circumstances raising suspicion. GOVINDAN NAIR v. CHERULI ACHAN, **9 M.L. J. 126.**

(7)—*Change of case in appeal.*—The plaintiff set up in the Court of first instance a deed of sale, executed in favour of his niece, by a Mahomedan *pardanashin* lady, during the latter's severe illness, of which she died a few days afterwards. That Court pronounced against the validity of the deed as a deed of sale on a consideration of the whole evidence. In appeal before the High Court it was contended that, though apparently it was a deed of sale, it was really a deed of gift, that as such it was good, and that it was drawn up as a deed of sale for the purpose of giving effect to a gift which, otherwise, it would be difficult to make under the Mahomedan Law. The High Court refused to allow the contention to prevail. *Held*, by the Judicial Committee, that the plaintiff could not be allowed to change his plea in appeal. MUSSAMUT MUMEEROONISSA BEGUM v. MIRZA SYUFFOOLLAH, **16 W.R. 32, P C.**

Appellate Court—continued.

——5.—**Practice and Procedure**—*continued.*

(8)—*Concurrence of two Courts—S. 353, Civ. Pro. Code, 1859.—Per Campbell, J.*—If two Courts had not concurred as to the facts relating to a particular issue, only one Court having determined it, the Chief Court should accept the defendant's appeal, in order that the lower Appellate Court might remand the case to the original Court for a finding on the point left undecided by the latter Court. An appellate Court cannot find as to a fact not touched by the lower Court but should refer an issue to the lower Court, and on the return of the finding should either concur in or dissent from that finding In the latter case, a second regular appeal would lie; in the former, the finding as to the fact would be conclusive. *Per Boulnois* and *Lindsay, JJ.*—The procedure of the lower Appellate Court could not be disturbed under s. 353, Civ. Pro. Code, 1859, such Court could come to a finding upon a fact left untouched by the original Court, provided there was sufficient evidence on record; and Act IX of 1873 (Punjab Appeals Act) did not change the procedure. GANDA SINGH v. HARSA SINGH, **79 P.R. 1876.**

(9)—*Appellate Court—Power to reverse part of decree not appealed against.*—In a suit to recover money due under an hypothecation bond against the mortgagors and against the transferee of the hypotheca, a decree was passed against the mortgagors on a confession of judgment, the suit being dismissed as against the purchaser. On appeal by the mortgagee as regards the exemption of the purchaser from liability, the lower appellate Court dismissed the whole suit. *Held* that the lower appellate Court was not justified in disturbing the decree against the confessing defendants who were not before it in appeal. MATA DAYAL v. JOKHU, **A.W.N. 1881, 157.**

(10)—*Whether fraud can be considered for the first time in appeal.*—In a case where the plaint made no charge of fraud and collusion, and no issue was framed on it, and the lower Court did not make mention of it, the Court of appeal refused to take it into consideration. IMDAD HUSAIN v. AZIZ-UN-NISSA, **6 M.L.J. 43, P.C =23 C. 483=23 I.A. 8=6 Sar. 669.** [*R.*, 2 N.L.R. 49.]

(11)—*Interlocutory decree not appealed from—Final decree—Interest.*—It is not too late, on an appeal from a final decree, to raise a question as to interest decided in an interlocutory decree not appealed from. SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH, **11 W.R. 19, P.C.=2 B.L.R. 44=12 M.I.A. 157.**

(12)—*Practice—Local inquiry—Interference in appeal.*—An appellate Court in India ought not to interfere with the result of a local inquiry except upon clearly defined and sufficient grounds and such grounds must be expressed in the judgment. RANI SERATSUNDARI DEBI v. PRASANNAKUMAR TAGORE, **6 B.L.R. 677, P.C.=18 W.R. 2C=13 M.I.A. 607.** [*F.*, 15 W.R. 423; *D.*, 17 W.R. 472.]

Appellate Court—continued.

——5.—**Practice and Procedure**—*continued.*

(13)—*Practice—Errors of procedure.*—The errors of procedure of the Courtof first instance are not to be remedied, where they have not been made a ground of complaint before the lower appellate Court. ANURUP CHANDRA MUKHOPADHYA v. HIRAMANI DASI, **3 B.L.R. App. 38.**

(14)—*Practice—Suit decreed in part—Appeal by defendant only—Appellate Court whether decree more to plaintiff than was decreed by lower Court.*—Where a suit decreed in part, and the plaintiff's accept the decree and do not appeal but the defendants prefer an appeal, the Appellate Court cannot pass a decree giving to the plaintiffs more than was decreed in their favour by the original Court, because the appellate Court is not seized of the whole case and cannot pass any such order as will place the appellants-defendants, in a worse position than they were in when the decree of the first Court was passed. ISHRI MAL v. BHAGWAN MAL, **A.W.N. 1887, 214.**

(15)—*Practice—Lower Court entertaining suit without jurisdiction—Procedure of appellate Court.*—An Appellate Court deciding that a suit was entertained by the lower Court without jurisdiction, should return the plaint to the plaintiff, so that it may be presented to the proper Court. BHAI MAHKKOR v. BULAKHI CHAKU, **1 B. 538.** [*R.*, 8 C. 126, 7 C.L.J. 152.

(16)—*Written statement not to be called for by Appellate Court—Party who can read it as evidence.*—A written statement cannot be called for by an Appellate Court or read as evidence against any party to the suit, save the person by whom it is made, and those who are bound by admissions made by him. JUGGESSUR MOOKERJI v. GOPEE KISHEN SEIN, **5 W.R. 50.**

(17)—*Appeal—Decision of Lower Court upheld on other grounds—Amendment—Objection in appeal.*—Where a Judge in appeal upholds the decision of a Lower Court, he may do it on any ground whatsoever, that is to say, he may come to the same conclusion, but through a different channel. But it is quite a different thing when an amendment is allowed, and no appeal has been preferred against it, to ask the Court to go out of its way and admit an objection taken at the last moment. ASAD ALI MIRDHA v. TOYPARI BIBI, **13 C.L.R. 328.**

(18)—*Objection to validity of document—Reg. XVIII of 1827, s. 10—Merits of case, objection to.*—Under Act VIII of 1859, it is an objection on the merits of the case to object to the validity of a document under Bom. Reg. XVIII of 1827, s. 10 as apart from its inadmissibility in evidence or a prohibition to Courts of justice or public officers to act upon it. GIRDHAR NAGJIS SHET v. GANPAT MOROBA, **11 B.H.C. 129.**

(19)—***Cases of the nature cognizable by Small Causes Courts.*—A second regular appeal can be**

Appellate Court—continued.

—5.—**Practice and Procedure**—*concluded.*

preferred in cases of the nature cognizable by Courts of Small Causes. DEVI DITTA MULL v. GOLAB SINGH, **48 P R 1869.**

(20)—*Modification of decision of first Court by Appellate Court.*—A party can only prefer a second regular appeal under s. 5, Act IX of 1873, when he is aggrieved by and seeks to impugn the portion of the decision of the first Appellate Court which modifies the decision of the Court of first instance. MUSSAMMAT JANI BEGAM v. MUSSAMMAT MUNNI, **71 P.R. 1877.**

(21)—*Modification on point material to merits of case—Act IX of 1873, s. 5.*—A Judicial Assistant on appeal modified the decision of the first Court on a point material to the merits of the case; held that a second regular appeal on the whole case lay under s. 5, Act IX of 1873, to the Commissioner. ILAHIA v. SADHARA, **57 P.R. 1878.**

(22)—*Judgment of Lower Court—Grounds for reversal—Defect in investigation—Insufficient finding.*—An Appellate Court should find some sufficient and significant facts before it reverse a judgment of the lower Court, and should show a proper basis for its conclusions. MUSSAMMAT ANISUL FUTWA v. MUSSAMAT CHANDO, **8 B.L R. App. 8.**

(23)—*Memo of appeal to be incorporated in appellate Courts.*—Memorandum of appeal to be embodied in decrees of lower appellate Courts. **Cir. No. 4, dated, the 16th January, 1867, 7 W.R. Civ. Cir. Orders, p. 2.**

—Plaint not properly verified, amendment of—Procedure of appellate Court—Defect in verification, whether justifies dismissal of suit —*See* PLAINT—VERIFICATION AND SIGNATURE, 18 A. 396=A.W.N. 1896, 102.

—Appellant dead at time of remand—Trial of issues by first Court without substituting legal representatives—Procedure of appellate Court — Fresh remand—Practice — *See* REMAND, A.W.N. 1885, 164.

—Witness—Omission to summon witness—Appeal on ground of such omission—Appellant to show that witness not summoned could have given evidence in his favour—*See* WITNESS—SUMMONS TO AND ATTENDANCE OF WITNESS, A.W.N. 1896, 120.

—6.—Rejection or admission of evidence.

See EVIDENCE.

See PRACTICE AND PROCEDURE.

(1)—*Enlargement of time for filing documents —Appeal.*—An appellate Court has no power to interfere with an order of a Court of first instance, enlarging the time for filing documents. GOUR SURUN DOSS v. KANHYA SINGH, **2 W.R 237.**

(2)—*Document once received without objection —Rejection for want of stamp on appeal—Irregularity.*—A document once received without objection should not be rejected on appeal, because it is not stamped, when the irregularity does not affect the merits of the case. HUR CHUNDER GHOSE v. WOOMA SOONDUREE DOSSEE, **23 W.R. 170.** [*F.*, 25 W.R. 554.]

(3)—*Power of appellate Court to reject unstamped document admitted by lower Court.*—Where a document executed on an unstamped or insufficiently stamped paper before Act X of 1862 came into force was admitted in evidence by the lower Court but was rejected by the appellate Court: *Held* that an appellate Court has no power to reject such a document. UMBAH v. HURJAS, **21 P.R. 1866**; *and* NARAIN DOSS v. BUNT LALL, **79 P.R. 1870.**

(4)—*Admission of insufficiently stamped document by lower Court—Admissibility in appeal.*—Where a document was admitted in evidence by the Subordinate Judge without objection by either party, and no objection was made in the memorandum of regular appeal to the District Court, the latter Court cannot exclude it from its consideration, and cannot decline to regard it as evidence in the cause, on the ground that it was not sufficiently stamped. KASTUR BHAVANI v. APPA, **5 B. 621.**

(5) *Evidence — Admissibility of document subject to payment of stamp duty—Finality of decision of Court of first instance.* Where a Court of first instance admitted a document subject to the payment of stamp duty, the decision was final and could not be reviewed by the appellate Court. LAKSHMI NARAYANA AIYAR v. SUPPARA GAUNDEN, **2 M.H.C. 321.** [*D.*, 3 M H.C. 71.]

(6) *Unstamped documents.*—The want of stamp in a document admitted as evidence, where the error of receiving it unstamped did not affect the merits of the case, is not a ground for reversing a decision. MARK RIDDED OURRIE v. S. V. MUTU RAMAN CHETTY, **3 B.L.R. A.C. 126=11 W.R. 520.** [*F.*, 5 B.L. R. App. 10, 16 W.R. 6, 25 W.R. 376; *R.*, 13 B. 449, F.B.; *Disc.*, 2 A. 554.]

(7) *Act X of 1862, s. 14—Act VIII of 1859, s. 350—Suit-bond unstamped—Appeal.*—An appellate Court has no power to reverse a judgment of a Court of first instance, merely on the ground that the document on which the suit was based did not bear a stamp at all. SRINATH SAHA v. SARODA GOBINDO CHOWDHRY, **8 B.L.R App. 10.** (3 B L.R. A. C. 126, 235, *Rel. on.*) [*D.*, 11 B.H.C. 125.]

(8) *Reception in evidence of unstamped pro-note— irregularity not affecting the merits Appellate Court's powers.*—The reception in evidence of an unstamped pro-note is an irregularity not affecting the merits. Such an irregularity does not justify an appellate Court in reversing the decree of the Court of first instance. AFZAL-UN-NISSA v. TEJ BAN, **1 A. 725.**

Appellate Court—continued.

——6.—Rejection or admission of evidence —*continued.*

(9)—*Exclusion of documents insufficiently stamped—Rights of parties not put an end to—Stamp thought unnecessary by first Court—Appeal.*—The exclusion under the stamp law of dooument unstamped or insufficiently stamped is not intended to create or put an end to the rights of parties. A document admitted by the first Court as not requiring a stamp cannot be questioned in appeal. ENAYETOOLLAH v. SHAIKH MEHJAN. **16 W.R. 6.** [*Appr.*, 13 B. 449, F.B., 3 C. 787 ; *D.*, 11 B.H.C. 129.]

(10)—*Stamp Act, ss. 34, 50.*—When an instrument has been admitted in evidence, and judgment delivered, its admission can be questioned only by the appellate Court in a proceeding under s. 50 of the Stamp Act REFERENCE UNDER STAMP ACT, S. 46, **8 M. 564, F.B.** [*F.*, 13 B. 449, F.B., U.B.R. 1897=1901, Vol. II, 559.]

(11)—*Stamp Act, s. 34, cl 3—Civ. Pro. Code, s. 578—Unstamped hundi, admission on appeal—Objection in second appeal disallowed.*—An unstamped *hundi*, which is admitted in evidence upon an erroneous construction of the law, cannot, under cl. 3, s. 34 of the Stamp Act, be allowed to be called in question in second appeal. Nor can the Court entertain the objection, as it is not one affecting the merits of the decision. RAMASAMI v. RAMASAMI. **5 M. 220.** [*F.*, 8 M.L.J. 66 ; *Appr.*, 13 B. 449, F.B., 17 B. 235.]

(12)—*Stamp Act (X of 1862), s. 17, cl. 1—Document liable to stamp duty, unstamped—Objection for first time taken in appeal—Maintainability of.*—The Stamp Act (X of 1862) prohibits an unstamped document from being received in evidence or acted upon in any civil proceeding in a Court of justice, except on payment of the proper amount of stamp duty and penalty which every Civil Court is by s. 17, cl. 1, empowered to ascertain and receive. It is imperative on the High Court hearing the suit on appeal to give effect to this provision, though the objection be pointed out for the first time on the hearing of the appeal. ADINARAYANA SETTI v. F. J. V. MINCHIN, **3 M.H.C. 297.** [*R.*, 5 M.H.C. 391.]

(13)—*Objection to document after examination of witness upon it.*—An Appellate Court cannot object to a document after witnesses to it have been examined and dismissed without being questioned as to its genuinenesss. LALLA MOHADEO PERSHAD v. SUTTANUND, **17 W.R. 502.**

(14)—*Appellate Court to give reasons for admitting rejected evidence.*—It is the duty of an Appellate Court to give its reasons for admitting evidence rejected by the Court of first instance. LAWA JHA v. BISSESHUR SINGH, **11 W.R. 6.** (7 W.R. 21, P.C., *F.*)

(15)—*Reception in evidence of unstamped and unregistered document—Objection in first appeal—Civ. Pro. Code, 1859, s. 350—Civ. Pro. Code 177, S. 578.*—An appellate Court may admit, and consider an objection to the reception, in evidence, of an unstamped and unregistered document. SAFDAR ALI KHAN v. LUCHMAN DAS, **2 A. 554=5 Ind. Jur. 92.** (3 B.L.R. 126, *Disc.*) [*R.*, 2 N.L.R. 121.]

(16)—*Unregistered documents wrongly admitted in evidence—Power to reject.*—Where the Lower Court admitted in evidence unregistered documents required by law to be registered, and decreed the claim : *Held* that the appellate Court has power to reject the documents wrongly admitted by the first Court. SARBALAND KHAN v. CHANDA SINGH, **84 P.R. 1877.** [*F.*, 123 P.R. 1882.]

(17)—*Rejection of document—Tender of Stamp duty and penalty before Appellate Court—Stamp Act, arts. 5, 11,*—Where the amount of Stamp duty and the penalty on a document were not tendered, when it was first offered in evidence and rejected, an Appellate Court has no authority to direct the reception of the instrument on a subsequent tender of the amount. CHAMPABATY v. BIBI JIBUN, **4 C. 213.** (1 B.L.R. 58, F.B.=10 W.R. 51; 7 W.R. 439, *F.*)

(18)—*Documents admitted in evidence on payment of stamp-duty and penalty—Subsequent rejection—Validity—Stamp Act (I of 1879), s. 39, proviso 3—Remand—Civ. Pro. Code, 1882, s. 578.*—The plaintiff sued to recover a sum of Rs. 653-7-0 due on 3 *khatas* signed by the defendant. On an objection having been taken by the defendant that the *khatas* sued on were not duly stamped, the Subordinate Judge admitted them in evidence on payment by the plaintiff of the proper stamp duty and penalty, as required by s. 34 of the Stamp Act (I of 1879), holding that the *khatas* were bonds within the meaning of s. 3 of the Act. His successor in office held that the *khatas* were promissory notes and could be stamped only on the date of their execution. Being of opinion that they had been illegally admitted in evidence on payment of stamp duty, he dismissed the suit. On appeal, the District Judge held that the Subordinate Judge, having once admitted the *khatas* in evidence on payment of the requisite stamp duty, was precluded from calling in question their admissibility by the terms of proviso 3 to s. 34 of the Stamp Act. The Lower Court's decree was reversed and the case remanded for trial on the merits. On appeal to the High Court against the order of remand, *held*, (1) that the *khatas* sued on cannot be rejected, when once they had been admitted on payment of the requisite stamp duty and penalty, and (2) that the order of remand not being one which affected the merits of the case or the jurisdiction of the Court, it was not competent to the High Court to interfere with it under s. 578 of the Civ. Pro. Code, 1882. DEVACHAND v. HIRACHAND KAMARAJ, **18 B. 449, F.B.** [*F.*, 18 B. 737, 8 M. L. J. 66.]

(19)—*Suit incorrectly valued—Reversal of decree of first Court—Jurisdiction.*—A Lower

Appellate Court—continued.

—6.—Rejection or admission of evidence —*continued.*

Appellate Court was held to have done a wrong in reversing a decree of the first Court, on the ground that the suit had not been correctly valued, where the error in valuation did not affect the jurisdiction of the Court which tried the case. SUBAH ROY v. BULDEO SINGH, **24 W. R. 225.**

(20)—*Civ. Pro. Code, 1859, s. 350—Stamps—Interference of High Court.*—Under s. 350, Act VIII of 1859, the High Court does not interfere where the Lower Appellate Court's decision on the question of stamps does not affect the case on the merits. KHAN MAHOMED SHAHA v. LALL MAHOMED, **16 W.R. 179.**

(21)—*Supplemental plaint—Additional stamp—Irregularity.*—Where defendants object that a plaint is under-valued, and a supplemental plaint with the required stamp is put in and received, the irregularity does not affect the merits of the case, or call for a reversal of the Moonsiff's decision. GUDADHUR BANERJEE v. RANEE PREMOMOYEE DEBIA, **10 W.R. 286.**

(22)—*Under-valuation of suit--Powers of appellate Court—Jurisdiction—Civ. Pro Code, 1859, s. 350.*—S.350, Act VIII of 1859, did not operate to prohibit a Court of Appeal from modifying or reversing a Lower Court's decision on the ground of under-valuation if the proper valuation would take the suit beyond the jurisdiction of that Court. HUREE PANDEY v. BASSOO, **11 W.R. 257.**

(23)—*Jurisdiction—Valuation*—Ad valorem *duty—Stamp duty—Appellate Court—Court Fees Act, VII of 1870, s. 12, cl. II.*—Where a Munsiff ruled erroneously that a suit instituted in his Court had been correctly valued, and it appeared that, if the suit had been correctly valued, the munsiff would not have had jurisdiction to entertain it, the Lower Appellate Court, having regard to cl. II, s. 12 of the Court Fees Act, VII of 1870, ordered that the appeal should be decreed, the plaint retained until the plaintiff should pay the additional stamp duty, when the suit would be made over to the Subordinate Judge for re-trial. *Held* that the order was a proper one. BROJO COOMAR SEN v. ESHAN CHUNDER DAS, **3 C.L.R. 79.**

(24)—*Court Fees Act, VII of 1870—Decision of first Court as to stamp on plaint, how far binding on Appellate Court in valuing appeal.*—In fixing the Court-fees payable on a memorandum of Appeal, the appellate Court is not bound by the decision of the Court of first instance as to the stamp on the plaint. In the present case, the High Court *held* that the plaint had been over-valued by the first Court, and, as the suit was one for possession of lands and mesne profits, the appeal had to be stamped as in a suit for the recovery of land and money, in which, as regards the alternative relief sought, the larger of the two reliefs sought must determine the amount of the stamp. MOTIGAVRI v. PRANJIVANDAS, **6 B. 302.** [*F.*, 15 B. 82; *R.*, 20 B. 265, 30 M. 61=16 L.J. 462=1 M.L.T. 426.]

Appellate Court—continued.

—6.—Rejection or admission of evidence —*concluded.*

(25)—*Rejection by Appellate Court of evidence believed by recording Court.*—An Appellate Court ought not to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it, which did not occur to that Court, and which, if his attention had been called to it, he might have been able easily to explain. RUN BAHADUR SINGH v. LUCH KOER, **11 C. 301, P.C.=12 I. A. 23=4 Sar. 602.** (*On appeal from* **6 C. 406.**) [*R.*, 9 Bom. L.R. 393.]

(26)—*Evidence—No objection taken to admissibility of document in first Court—Competency of appellate Court to raise or entertain objection.*—No objection was taken in the Court of first instance to the admission of the copy of a document. In an appeal from the decree of the first Court, the appellant contended that the copy was not admissible in evidence in the absence of any satisfactory explanation for the non-production of the original. *Held* that it was not competent to the appellate Court to raise or entertain the objection to its admissibility. But there was nothing to prevent the appellate Court from considering what weight was due to the document as evidence in the absence of the original. ITTICHIRI AMMAH v. KALIANI, **5 M.L.J. 81.**

(27)—*Evidence—Documentary evidence—Conduct amounting to tacit waiver of proof—Necessity for formal proof.*—Where the genuineness of a document relied on by a party was not disputed by the opposite party, and the only question was as to its binding character, the opposite party must be deemed to have tacitly waived its proof by consenting to its admission in the first Court and could not be permitted to question its admissibility for the first time in the appellate Court. VIRARAGHAVA AIYANGAR v. RAMASWAMI AIYANGAR, **10 M.L.J. 242.**

(28)—*Appeal—Tender of documentary evidence—Rejection.*—Where a sale-deed, which the defendant alleged to be a fraudulent document, was withheld in the Court of first instance, although it had been returned unregistered to the plaintiff by the Registration officer during the pendency of the suit, *held* that the plaintiff was not entitled to tender it in evidence for the first time in the appellate Court. IMRAT KHANUM v. MUHAMMED SARFARAZ KHAN, **A.W.N. 1882, 5.**

—Appellate Court—Fresh evidence—Remand on ground arising subsequent to lower Court's decree—*See* CIV. PRO. CODE, 1908, O. XLI, r. 27, 9 M.L.T. 317.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 6 W.R. 64.

—Admission of document in evidence as being duly stamped—Competency of appellate Court to question the admissibility — *See* STAMP ACT, 1879, s. 24, cl. 3, 13 B. 493.

Appellate Court—continued.

——7.—Miscellaneous.

(1)—*Delivery of judgment out of Court—Error in procedure—Civ. Pro. Code, 1859, s. 350.*—In a suit for possession of land, the Judge, after hearing the evidence and admitting the documents on both sides, intimated that he should examine the place to satisfy himself with respect to the boundaries. He did make such examination, the defendant attending, but the plaintiff being absent; and he afterwards delivered his judgment in favour of the defendant out of Court. *Held* that the mere circumstance that the judgment was delivered out of Court did not constitute an error under s. 350, Act VIII of 1859, and was no ground of appeal. NILMONEY SINGH DEO v. BHOBANY CHURN PANDA, **Marsh 327=2 Hay 305.**

(2)—*Civ. Pro. Code, 1882, ss. 45 (=O. II, r. 6, new Code), 578(=s 99)—Attachment of joint family property in execution of decree against one only—Joint suit by others for raising attachment on ground of prior partition—Misjoinder of causes of action.*—Where ajoint suit was brought by two persons for a declaration that their shares in property attached in execution were not liable to attachment on the ground of a previous partition between them and the judgment-debtor, and no objection was taken to the frame of the suit, it was *held* that the suit ought not to have been dismissed, but that the plaintiffs ought to have been allowed to amend the plaint by striking out the name of one of them; and also that, where the Court irregularly proceeded to try the suit as it was framed, and the irregularity did not affect the merits of the case or the jurisdiction of the Court, the defect was cured by s. 578, Civ. Pro. Code, BEHARI LAL v. KODU RAM, **15 A 380= A.W.N. 1893, 150.** [*R.*, 18 A. 131, 3 O. C. 215. 2 C.L.J. 602.]

(3)—*Appellate Court—Errors affecting or not the merits of case—Filing appeal without copy of decree—Cure of irregularity.*—The appellant filed an appeal against the judgment of the Court of the first instance without a copy of the decree. Subsequently the decree of the Court of the first instance was filed within the time allowed for appeal and accepted by the Judge. *Held* that the irregularity was cured and the appeal should not have been dismissed on the ground of such irregularity. LULLEE v. RAM PERSHAD, **2 Agra 34.**

(4)—*Right to begin—Burden of proof—Irregularity not affecting merits—Powers of Appellate Court—Civ Pro. Code, 1877, s. 578.*—If, when the burden of proof in a suit is on the one side, the Court allows the other side to begin, with the result that a case different from that which is set up by that side is proved, and the suit is in consequence decided against that side, it is not competent for the appellate Court to reverse the decision of the original Court; for, the irregularity in procedure is one not affecting the merits of the case; and in any case, the appellate Court could not ignore what had taken place in the lower Court, but must decide the suit in the shape in which it came before it. MAKUND v. BAHOPI LAL, **3 A. 824=A.W.N. 1881, 86.** [*Appr.*, 14 B. 206; *R.*, 25 B. 202, 15 C.P.L.R. 24, 25 A, 159, 5 Bom. L. R. 177.]

Appellate Court—continued.

——7.—Miscellaneous—*continued.*

(5)—*Civ. Pro. Code, 1877, s. 578—Appellate Court—Omission to state reasons.*—Where the point for decision in a suit was very simple, *held* that the fact that the first appellate Court adopted the view of the original Court, without stating its reasons, would not amount to such an error of law within the meaning of s. 578, Civ. Pro. Code, as would affect the merits of the case or the jurisdiction of the Court. ROHIMONI DABI v. ZAMIRUDDIN, **8 C.L R. 597.**

(6)—*Practice — Judge's liberty to make different case for appellant.*—A Judge is not at liberty in appeal to make a different case for the appellant from that which she alleged for herself in the lower Court. KACHUBHAI *bin* GULABCHAND v. KRISHNABA KOM BABAJI, **2 B. 635.**

(7)—*Civ. Pro. Code*, 1882, s. 574—*Remand of suit by Appellate Court—No objections by either party to findings of lower Court—Duty of Appellate Court to hear appeal.*—The Court of first appeal, considering that the issues framed in a suit were useless, framed fresh issues and remanded the suit to the lower Court for findings after taking evidence. On the appeal coming on for final hearing, as neither party filed any memorandum of objections, the Appellate Court dismissed the appeal. *Held* that the Appellate Court was wrong in holding that it was absolved from hearing the appeal, by the absence of a memorandum of objections. SUBBAYYA v. RAMI REDDI, **22 M. 344.** [R., U.B.R. 1905, 3rd Quarter, C.P.C. 574.

(8)—*Civ. Pro. Code (Act VIII of 1859), s. 348—Absence of objection or appeal by defendant against amount awarded to plaintiff—Power of Appellate Court on plaintiff's appeal—Practice.*—Where the defendant has not appealed against the amount found by the lower Court to be due from him to the plaintiff, nor has taken objections to such amount in the plaintiff's appeal, it is not competent to the appellate Court to reduce the amount decreed to the plaintiff by the Court of first instance. NYANCHANDRA v. NARAYAN, **4 B. 293.**

(9)—*Improper procedure—Suit by raiyat for rent.*—In a suit by raiyat against a zamindar for rent, the Court of first instance gave the plaintiff a decree for a part of his claim. The plaintiff appealed against the disallowance of the residue. The Judge on appeal reversed the decree and dismissed the suit, although no objection was made by the defendant to the judgment of the Court below, merely saying that a claim for rent by a raiyat against a a zamindar was absurd. On appeal to the High Court, the decree of the Judge was reversed,

Appellate Court—continued.

—7.—Miscellaneous—*continued.*

and the original decree established. HEM CHUNDER v. AHMED REZA, **Marsh 332=2 Hay 429.**

(10)—*Limitation—Appeal presented out of time—Admission—Objection at hearing.*—Notwithstanding that an appellate Court might have admitted an appeal beyond the prescribed time, if it be shown to such Court by the opposite party that the appellant had obtained leave for the admission of the appeal by any misrepresentation or suppression of fact, or if he could show that there was no sufficient cause of any sort or kind, or if he showed that the appellate Court had made any mistake in admitting the appeal, though the appellant himself had not been guilty of any fraud, the Court may set aside its own order and direct that the petition of appeal should be removed from the file. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUTUSAWMY **4 B L.R. App. 84=13 W.R. 245.** (2 B.L R. A.C. 184, *Not F.*) [R., 6 B. 304, 5 C.L.J. 380=34 C. 216.]

(11)—*First Court's finding not appealed against—Interference.*—The finding of a Court of first instance not appealed against should not be interfered with in appeal. KALEE DASS ROY v. KHIRODA SOONDUREE DEBIA, **16 W.R. 300.**

(12)—*Arbitration—Award—Appeal—Act VIII of 1859, ss. 325, 327.*—A Civil Court's order rejecting an application to file an arbitration award is not appealable. RAJ KUMAR SINGH v. KALI CHARAN SINGH, **2 B.L.R. App. 20 (b)= 11 W.R. 57.**

(13)—*Appellate Court differing from Lower Court—Reasons to be given in judgment.*- An appellate Court, when differing from the judgment of the lower Court, must give its reasons. LALLAH SOOKLOLL SINGH v. BUNSHEEDHUR, **W.R. 1864, 347.**

(14)—*Non-disclosure of cause of action in plaint—Decree upon merits—Ground for reversal of decree.*—The fact that, in a suit for confirmation of possession and declaration of title to property, the plaint did not make it clear that the defendant denied the plaintiff's title, though it might have justified the original Court in rejecting the plaint under s 53 of the Civ. Pro. Code, could not be made the sole ground for the appellate Court reversing the original Court's decree in the plaintiff's favour, where the dispute sufficiently appeared from the proceedings before the lower Court. SHAH AHMED SUJAD v. TAREE RAI, **7 C. 348.** [*F*, L.B.R. 1893—1900, 337, 2 C.L.J. 534.]

(15)—*Order in exercise of judicial discretion—Order refusing to admit appeal after time—High Court, powers of.*—Where, after a proper enquiry and due consideration of the facts alleged by the appellant, the District Court, in the exercise of its discretion, held that the delay in presenting the appeal was not satisfactorily accounted for, *held* that such order

Appellate Court—continued.

—7.—Miscellaneous—*continued.*

refusing to admit the appeal was not one which the High Court could reverse on appeal, even if it thinks that it would, under the circumstances, have treated the appellant more leniently. No error of law had been committed by the District Judge; nor had he exercised his discretion capriciously or without sufficient material in law to satisfy himself whether or not there was sufficient cause for the delay. The order was the result of the exercise of a judicial discretion vested in the Judge, and was, therefore, clearly one with which the High Court could not interfere. RANCHODJI v. LALLU, **6 B. 304.** [*R.*, 23 B. 513, 3 C. C. 37, 9 L.B.R. 313, 31 B. 33=8 Bom. L.R. 858.]

(16)—*Appellant referred to fresh suit—Order accepted by parties—Effect.*—Where an appellate Court refers an appellant to a fresh suit, the order, if accepted by the parties, is binding on them. RAJIB SARKHEL v. RAJAH NIL MONEE SINGH DEO, **20 W.R. 440.**

(17)—A suit to re-open a pathway was decreed by a Munsil after evidence legally taken; but the Judge reversed this decision in appeal on the information given to him by persons whom he found on the spot in dispute, which he had gone to inspect. *Held* that the Judge's evidence not having been taken on solemn affirmation was legally worthless. LALLA MEWA LALL v. SREE MAHATO, **23 W.R. 152.**

(18)—*Act VIII of 1869 (B.C.), ss 52, 54—"Reversed," meaning of.*—The word "reversed" in Act VIII (B.C.) of 1869, ss. 52 and 54, means reversed in respect of that part of the arrears which is contested in the appellate Court. PATTAREY SIRCAR v. MAHARANEE SURNO MOYEE, **24 W.R. 185.**

(19)—*Decision on preliminary issue of fact—No appeal against decision—Special appeal—Consent obtained by duress.*—The decision of an appellate Court on a preliminary issue of fact, which was not at the time appealed against, and which on a subsequent special appeal was not altered or noticed by the special appellate Court, is conclusive between the parties, and the issue determined cannot be re-opened on a second special appeal. An award of the late Raja of Satara founded upon a deed of consent, set aside, on proof being given that the consent had been obtained by duress. SUBNAJI *bin* BAHIRJI *et al* v. BHAVANRAO *bin* ANANDRO, **1 B H.C. 173.**

(20)—*Decree of appellate Court—Parties that have not appealed.*—An appellate Court is competent under s. 337 of the Civ. Pro. Code of 1859 (=s. 544 of the Code of 1877), to draw up a fair decree even as regards the rights of parties that have not appealed. JOYKISTO COWAR v. NITTYANUND NUNDY, **3 C. 738= 2 C.L.R. 440.**

(21)—*Act X of 1859, s. 23, suit under—Appeal.*—An appeal lies to the Judge from a decision of a Collector in a suit under cl. 1, s. 23, Act X of 1859. RAJOO NAIK v. MOHUNT KHOSALEE RAM DOSS, **1 W.R. 210.**

Appellate Court—continued.

——7.—**Miscellaneous**—*continued.*

(22)—Where an original suit is brought for a sum exceeding Rs. 5,000, or for property exceeding that value, and the decree is for a less sum, or for property of less value, an appeal according to s. 22, Act VI of 1871, will lie to the High Court. RAMPERSHAD SINGH v. NEERBHOY SINGH, **18 W.R. 261.**

—Power of Appellate Court to refer to arbitration—*See* AWARD, 12 C. 173.

—Refusal by original Court to allow plaintiff to examine defendant as witness—Dismissal of suit—Duty of—*See* CIV. PRO. CODE, 1859, ss. 148, 162, 6 M.H.C. 299.

—Order of appellate Court under s. 57 returning plaint—Whether appeal lies—*See* CIV. PRO. CODE, 1908, s. 107 (2), O. XXII. r. 11, s. 104, O. XLIII. r. 1, s. 106, 25 A. 174, F.B. =A.W.N. 1902, 222.

—Decision of, in analogous cases, duty of inferior Court to await decision of—*See* CIV. PRO. CODE, 1908, s. 115, 11 C.W.N. 112= 8 C.L.J. 43.

—Execution of decree of—Restitution—Mesne profits—*See* CIV. PRO. CODE, 1908, s. 144 (1), 4 Ind. Cas. 376.

See CIV. PRO CODE, 1908, O. VI, r. 17, O. VII, r. 11, s. 107 (2), O. XXII, r. 11, 5 C.W.N. 273.

—Power of, to alter effect of decree for redemption, on appeal from order in execution thereof—*See* CIV. PRO. CODE, 1908, O. XXI, r. 35, 3 L.B.R. 129.

—Report of Commissioner—Order confirming the report—Appeal—Appellate Court, power of, to deal with findings of fact by the Commissioner—*See* CIV. PRO. CODE, 1908, O. XXVI, rr. 11, 12, 5 C.W.N. 692.

—Power of—to call upon the respondent to furnish security for the due performance of any decree, which may be made on appeal, notwithstanding that the lower Court's decree, has been already executed—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, s. 104, O. XLIII, r. 1, 3 C.L.J. 67=33 C. 927.

—On dismissal of an appeal under s. 551 of the Code, the decree appealed against becomes merged in the decree of—*See* CIV. PRO. CODE, 1908, O XLI, r. 11, s. 114, O. XLVII, r. 1, 4 C.L.J. 566.

—to give reasons for its decision—*See* CIV. PRO. CODE, 1908, O. XLI, r. 31, 17 B. 428.

—Judgment of, contents of—*See* CIV. PRO. CODE, 1908, O. XLI, r. 31, 1 L.B.R. 204.

See CO-SHARERS—SUIT BY CO SHARERS, 4 A. 289=A.W.N. 1882, 36.

See DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 8 A. 365=A.W.N. 1886, 129.

—Declaratory suit—Remand—Discretion of Appellate Court—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 4 C. 190, P.C.=3 C.L.R. 31=5 I.A. 149.

Appellate Court—continued.

——7.—**Miscellaneous**—*continued.*

Construction of decree—Not bound by explanation of Judge—*See* DECREE—DECREE, CONSTRUCTION OF, 1 B. 158.

—Suit for pre-emption—Deposit of purchase-money—Powers of—*See* DECREE—DECREE, FORM OF, 2 A. 744.

—Decision of, whether can be based on suggestion by a pleader as to a matter of fact—*See* EVIDENCE — MISCELLANEOUS, 11 C.W.N. 130, P.C.=1 M.L.T. 429=29 A. 29=9 Bom. L.R. 80=17 M.L.J. 32=5 C.L.J. 4.

—Execution of decree—Decree confirmed by appellate Court—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, A.W.N. 1882, 126.

—Power of—to stay proceedings in pursuance of an order appealed against—*See* GUARDIAN AND WARDS ACT, 1890, ss. 4, 7, 12, 47, cl, (*a*), 3 C.L.J. 29.

—Power of—to vary decree in accordance with subsequent occurrences—*See* HINDU LAW—PARTITION, 6 B. 113.

—Issue not raised by parties before lower Court—Power of, to try issue—Practice—*See* ISSUES—GENERAL, A.W.N. 1885, 126.

See ISSUES—ADDITIONAL ISSUES, 11 W. R. 61.

—Appellate Court, findings of, not conclusive when unaccompanied by reasons—*See* JUDGMENT—FORM AND CONTENTS, 9 B. 527.

—Defective judgment of Lower Appellate Court—Remand by High Court—*See* JUDGMENT—FORM AND CONTENTS, 10 C. 932.

—Judgment of first—not satisfying provisions as to first appeals—Validity—*See* JUDGMENT—FORM AND CONTENTS, 9 A. 26.

—Remand for finding—Duty of—to examine it in the absence of memo of objections—*See* JUDGMENT—FORM AND CONTENTS, 20 M. 496.

—Appellate Court—Reasons for judgment—*See* JUDGMENT—FORM AND CONTENTS, 1 B. L.R.S.N. 2 (*c*).

—Judgment of appellate Court—*See* JUDGMENT—FORM AND CONTENTS, 22 M, 12= 8 M.L.J. 183.

—Duty of—*See* JUDGMENT—FORM AND CONTENTS, 4 M.H.C. App., 56.

See JUDGMENT—FORM AND CONTENTS, 1 C.W.N. 691.

—Powers of—*See* LIMITATION ACT, 1908, s. 22, 2 A. 487.

—Meaning of—*See* LIMITATION ACT, 1908, ART. 182—PERIOD FROM WHICH LIMITATION BEGINS TO RUN, 9 C. 100.

See MAHOMEDAN LAW—CUSTOM, 8 B. 408.

Appellate Court—concluded.

—7—Miscellaneous—*concluded.*

—Suit for increase of maintenance by member of Malabar tarwad—Necessary parties—Joinder by appellate Court—*See* PARTIES TO SUITS—GENERAL, 7 M. 428.

—Case made in plaint—Relief on a different title—Duty of—*See* PLAINT—AMENDMENT OF PLAINT, 8 C. 871.

—Under-valuation of relief claimed in plaint—Rejection of plaint by—*See* PLAINT—REJECTION OF PLAINT, A.W.N, 1885, 294.

—Documents received without objection by lower Court—Right of—*See* PRACTICE AND PROCEDURE, 6 C. 666=7 C.L.R. 497.

—Suit for pre-emption—Appeal by purchaser for enhancement of purchase-money—Duty of—to extend time for payment of purchase-money when confirming decree of first Court—*See* PRE-EMPTION—PURCHASE MONEY, 48 P.R. 1906. F.B.=104 P.L.R. 1906.

Appellate Decree.

See APPEAL.

See APPELLATE COURT.

—Dismissal of appeal—Presumption as to, incorporating terms of original decree—*See* BEN. ACT VIII OF 1869, s. 52, 13 C.W.N. 1060=4 Ind. Cas. 12.

—in favour of respondents, whether enures for the benefit of respondent who did not appeal—*See* CONTRACT ACT, 1872, s. 2 (*h*), (*e*), (*d*), 5 Ind. Cas. 102=7 M.L.T. 296.

Appellate Orders.

See CIV. PRO. CODE. 1908, O. XXI, rr. 97, 99, 21 B. 392.

Application.

(1)—*Interpretation put on the word "application" as used in Civ. Pro. Code, and Limitation Act not depending on Succession Certificate Act.*—Both the Civ. Pro. Code and the Limitation Act having been passed long before the Succession Certificate Act, whatever interpretation may be put on the word "application," as used in the Civ. Pro. Code, and the Limitation Act, it could in no way depend upon the Succession Certificate Act. HAFIZUDDIN CHOWDHRY v. ABDOOL AZIZ, **20 C. 755.**

(2)—*Suits, applications, and appeals, distinction between limitation—Jurisdiction.*—The distinction taken for the purposes of *limitation* between suits, appeals and application by the Limitation Acts, has no bearing upon a question of *jurisdiction*. BALAJI v. RANCHODDAS, **5 B. 680.**

(3)—*Limitation Act—Appeal.*—The Limitation Act draws a clear distinction between what are styled "application" and what are styled "appeals." LAKSHMI v. ANANTA SHANBAGA, **2 M. 230.**

—Application as further appeal—Grounds of admissibility—*See* APPEAL—GROUNDS OF APPEAL, 136 P.R. 1908, Note.

Application—*concluded.*

—Right of party to present application in person where there is an attorney—*See* BELCHAMBER'S RULES AND ORDERS, r. 329, 1 C.W.N. 303.

—to sue as pauper—Power of High Court in revision—Order under s. 409 on—*See* CIV. PRO. CODE, 1908, s. 115, 2 L.B R. 333.

See LIMITATION ACT, 1908 s. 14, 1 A. 97.

—Order striking off an application, and one dismissing it for default, no substantial distinction between—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 12 C.W.N. 3=7 C.L.J. 301.

Appointed Heir.

—Right of sons of—to succeed to adoptive grandfather—*See* CUSTOMS—PUNJAB (ADOPTION), 124 P.L.R. 1906=51 P.R. 1906.

Appointment.

(1)—*Power of—Will—Creation by will.*—A general power of appointment may be exercised by will executed previously to the creation of the power and that too by mere residuary gift. DINSHAW v. DINSHAW, **9 Bom. L.R. 488=31 B. 472.**

(2)—*Appointment of Munsiff's officers—Appeal to Judge.*—All officers of a Munsif's Court are appointed by him subject to the Judge's approval; and if any person is aggrieved by the Munsif's order the Judge should hear the party and decide whether the Munsif has rightly exercised his discretion in his appointment. *In the matter of* GOOROO DOSS BHUTTACHARJEE, **11 W.R. 158.**

—Power of appointment given to testatrix by will of her husband if "property" within the meaning of—*See* COURT FEES ACT, 1870, sch. I, Item II, 25 M. 515.

—Deed of, construction of—*See* DEED—CONSTRUCTION OF DEEDS, 9 Bom. L. R. 1071.

See HINDU LAW—RELIGIOUS ENDOWMENT, 17 B. 600.

—Power of appointment—Validity—Rule of construction—English Law—*See* HINDU LAW—WILL, 16 B. 492.

See HINDU LAW—WILL, 15 B. 326, 19 B. 647.

See TRANSFER OF PROPERTY ACT, 1882 s. 53, 22 C. 185.

—Will—Testator's direction—Power of—Execution of—*See* WILL—CONSTRUCTION OF, 4 C. 514.

—Power of—*See* WILL—CONSTRUCTION OF, 18 B. 1.

Apportionment.

(1)—*of rent—Basis—Present assets of different portions of tenure—Landlord and tenant.*—An apportionment of rent should be on

Apportionment—*concluded.*

the basis of the present assets of the different portions of the tenure which passed into different hands, and not on the basis of the assets of the different villages at the time of creation of the original tenure. HARI KISHUN BHAGAT v. TILUKDHARI LAL, **7 C.W.N. 453.**

—Apportionment of compensation money between zemindar and partnidar—*See* ACT X OF 1870, 7 C. 585=9 C.L.R. 227.

—Amount of compensation under the Land Acquisition Act—, between zemindar and patnidar—Principle—*See* ACT X OF 1870, 14 C. 749.

—of compensation between landlord and tenant—*See* ACT X OF 1870, 17 C. 144.

See ACT X OF 1870, part of IV, ss. 15. 59, 16 B. 525.

—Separate suits by landlords, after partiton for—of consolidated rents, arrear and future, etc.—*See* BEN. ACT VIII OF 1885. s. 188, 27 C. 479=4 C.W.N. 494.

—Principle of—Of mesne profits and interest thereon, where decree for mesne profits was satisfied by some, out of the entire body of persons liable, by payments made from time to time—*See* MESNE PROFITS—GENERAL. 7 C.L.J. 454, P.C.=35 C. 303=35 I.A. 32.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 9 C.L.R. 1.

See MORTGAGE—GENERAL, 1 L.B.R. 210.

—Mortgage—Division among mortgagors and apportionment of mortgage debt—Acquiescence by mortgage—Effect—Liability of mortgagors—*See* MORTGAGE — ACCOUNTS BETWEEN MOTGAGOR AND MORTGAGEE, 15 B. 257.

—between all the properties mortgaged—*See* MORTGAGE—MARSHALLING, 9 C. 406=11 C. L.R. 565.

—Mortgage decree—Several parcels of mortgaged property—of debt—*See* MORTGAGE—REDEMPTION, 4 C.L.R. 294.

—Government-revenue, doctrine of contribution and—*See* SALE—SALE FOR ARREARS OF REVENUE OR CESS—PURCHASERS, RIGHTS AND LIABILITIES OF, 6 C. 389=7 C.L.R. 456.

—of rent—Transfer of lessor's interest by operation of law—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2 (*d*), 36, 33 C. 786.

—Mortgage-debt—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 30 C. 755=7 C.W.N. 723.

Appropriation of Payments.

(1)—*Sale or mortgage of goods not in existence — Charge—Lien—Appropriation—Gooas consigned to vendee—Attachment by consignor's decree-holder in the course of transit*—Plaintiffs advanced money to defendant No. 1 under the agreement that he would cut and send timber to the plaintiffs, who would sell and appropriate the sale-proceeds towards the discharge of a

Appropriation of Payments—*continued.*

debt owing by defendant No. 1. In pursuance of the said agreement defendant No 1 despatched some logs to plaintiffs, and while these were in the course of transit, defendant No. 2 attached them in execution of a decree against defendant No. 1 and they were purchased by defendant No. 3: *Held*, that the plaintiffs acquired a right to the timber as soon as it was cut, and the timber being specifically appropriated for the satisfaction of plaintiff's debt, they had a valid charge created on it. This charge is unlike the sort of lien mentioned in the Contract Act, which an unpaid vendor, a bailee, a factor, a banker, an agent, a pawnee or finder of goods, has on the goods in his possession. The question whether there has been appropriation of goods by their owner for the benefit of a particular creditor is one of fact, and the law does not require any particular mode or form of appropriation. If there has been a specific appropriation, the consignor, if he is still in possession of the goods, will hold them merely as trustee for the consignee. A contract to sell or mortgage goods, answering a particular description, which are to come into existence in the future, passes property in such goods when they actually come into existence. MARADUGULA VENKATA RATNAM v. KOTTAYA RAMANNA, **9 Ind. Cas. 255=9 M.L.T.276=21 M.L.J. 413.** (21 B. 287, 11 W.R. 171, 16 M. 429, 31 C. 667, *R.*)

(2)—*Unappropriated payment, application of —Earliest debt.*—An unappropriated payment should be applied to the earliest debt although such debt is barred by limitation. S. MOONEAPPAH v. V. VENCATARAYADOO. **6 M.H.C. 32.**

(3)—*Rule.*—Payments unapplied by either the debtor or the creditor should be appropriated to the earlier items making up the debt due. This rule is not impaired by the decisions in the cases of *Mills* v. *Fowkes*, 5 Bing. N.C. 455, and *Nash* v. *Hodson*, 6 De G.M. & G. 474; 25 L.J. Ch. 186. HIRADA KARIBASAPPAH v. GADIGI MUDDAPPA, **6 M.H.C. 197.**

(4)—*General payment of rent, how appropriated.*—Where a tenant makes a general payment of rent in one year without saying to which the money is to be applied, the money may be applied to satisfy the previous years' arrears if any. MR. ROBERT AHMUTY v. MR. K. BRODIE, **W.R. 1864, Act X, Rul. 14.**

(5)—*Payment of rent—Presumption in respect of.*—Payment for rent cannot be credited to arrears of previous years beyond the term of limitation. Payments for rent are presumed to be for current years and surplus payments for past year. TARA MONEE DOSSEE v. KALLY CHURN SURMA, **W.R. 1864, Act X, Rul. 14.**

(6)—Though one person may be the representative of two idols, money brought into Court as the property of one idol cannot be applied by the representative of that idol to pay the debts of the representative of the other. MOONSHEE MAHOMED AKBAR *alias* TENOO MOONSHEE v. KALEE CHURN GEEREE GOSSAMEE MOHUNT, **25 W.R. 401.**

Appropriation of Payments—*continued.*

(7)—*Creditor and debtor—Payments appropriated towards interest—Absence of evidence of appropriation by creditor at the time—Creditor's right.*—Even in the absence of evidence that any appropriation was made by the creditor at the times when the various sums were paid by the debtor, the creditor can be allowed to make out his account on the basis that, when each sum was paid, portion of it was appropriated towards the interest then due. YARANASI SEETHAMMA v. SREESHTALURVIJIARAGHAVA CHARYULU, **7 M.L.T 199 = 5 Ind. Cas. 940.** (8 B.L.R. 110, *F.*)

(8) —*Contract Act, 1872, ss. 59, 60, 61—Circumstances indicating appropriation to a particular debt.*—Certain persons engaged in the manufacture of indigo, and requiring money for such manufacture, hypothecated to A and B an Indigo factory and its appurtenances together with the Indigo crop of the following season, and the deed provided that the mortgage-money should be paid on demand with certain interest, and that all payments made by the mortgagors should go first towards satisfaction of the interest, and the balance credited to principal. The mortgage transaction was throughout conducted by A alone, but both mortgagees contributed half the amount advanced. It was agreed that the proceeds of the crop hypothecated should be sent to A, and transmitted by him as agent for the mortgagors to Calcutta for sale in the market; and it appeard that at the time of the advance one main object of A was to make it certain that the indigo should be transmitted to Calcutta through him, and that the deed was executed for the purpose of preventing the mortgagors from disposing of the crop in any other way. The indigo was accordingly sent to Calcutta through A, and its price was from time to time sent to and received by him from the broker. Between the dates of the mortgage and the first of such receipts, A made, on his own account, further advances to the mortgagors; and the arrangement was that as against these advances the cash received by him was to be applied. In a suit by A and B to enforce the mortgage, the defendants having pleaded payment: *Held* that A's receipt and payment to himself of the moneys received by him as the price of the indigo must be regarded as payments by the mortgagors to him on account both of the mortgage-debt and of the subsequent advances; and that his power to appropriate such payments to either the former or the latter debt was not affected by the circumstance that he had associated B with him in advancing the mortgage-money, or that he alone had acted as the mortgagor's agent in receiving the price of the indigo. *Held*, that the terms of the mortgage-deed and the circumstances in which it was executed, the relations of the parties, the fact that the very thing which was to be handed over to A was to be given as part security for the debt, the mode in which the indigo was consigned to him for transmission to Calcutta, and the fact that at the time when its price was realised it had passed away into the hands of

Appropriation of Payments—*continued.*

purchasers, and that A could not have supposed that he had any charge or lien upon it in their hands, constituted circumstances within the meaning of s. 60 of the Contract Act, 1872, indicating that the payments where to be applied to the mortgage-debt; and the option of appropriation therefore did not open up to the mortgagees as it might otherwise have done. BANSIDHAR v. AKHAY RAM, **A W.N. 1890, 62.** (5 A. 27, 10 A. 133, *R.*)

(9)—*Rents paid by tenant without any specification—Credit by landlord.*—Moneys paid by a tenant as rent without any specification may be credited by the landlord as he thinks fit. RANEE SHURNO MOYEE v. KASHEE KANT BHUTTACHARJEE, **7 W.R. 511.**

(10) *Law before Act IX of 1872.*—A creditor entitled to appropriate payments made by a debtor to any account which he might have against him unless the debtor at the time of payment stipulated that the payment should be credited to a particular account in which case the creditor would not be entitled to disregard the request. GOPAL DAS v. WURYAM SINGH, **101 P.R. 1867.**

(11) *Current account—No election as to appropriation of payment—Court empowered to appropriate it to time-barred items.—Held* that in the case of current accounts, if no election as to the appropriation of a payment is made by either debtor or creditor, the Court can appropriate the payment to the discharge of the first item on the debit side though that item is time-barred. NOUBUT v. KHUBEE, **27 P.R. 1872.**

(12)—*Current accounts—Money paid by debtor to creditor without any stipulation—Creditor entitled to credit it to barred items.—Held*, that money paid to a creditor in a case of current account without any specific appropriation by the debtor might be appropriated as the creditor thought fit and the creditor might apply in payment of items barred by limitation. If the amount paid was only sufficient for part-payment of a debt or item, the rest of the debt was not revived without the assent of the debtor. GYAN CHAND v. KURM BHAGGUN, **78 P.R. 1870.**

See CONTRACT ACT, 1872, s. 59, 2 Bom. L.R. 706.

See CONTRACT ACT, 1872, ss. 59, 611 Ind. Cas. 909.

—by creditor to one or other of debts—*See* CONTRACT ACT, 1872, s. 60, 26 C. 39, P.C. = 25 I.A. 179 = 2 C.W.N. 633.

See CONTRACT ACT, 1872, s. 60, 13 C. 164.

See CREDITOR, 4 M.L.T. 326.

—Payment of half notes—Effect—*See* CURRENCY NOTES, 5 Ind. Cas. 202 = 33 M. 196 = 8 M.L.T. 316.

—Effect of sending half notes—*See* DEBTOR AND CREDITOR 5 M.L.T. 32 = 19 M.L.J. 233 = 2 Ind. Cas. 611.

Appropriation of Payments—*concluded.*

See GUARANTEE, 4 C. 560 = 3 C.L.R. 361.

—Suit by olient for return of money deposited with advocate—Plea of appropriation for advance fees—*See* LEGAL PRACTITIONERS—ADVOCATE, 32 P.R. 1897.

—Payment of money by debtor—Appropriation of payment for interest—Discretion of creditor—*See* LIMITATION ACT, 1908, s. 20, A.W.N. 1881, 119.

—Towards interest—*See* LIMITATION ACT, 1908, s. 20, 6 A.L.J. 207 = 31 A. 285 = 1 Ind. Cas. 137.

See PRINCIPAL AND SURETY—SURETY, RIGHTS AND LIABILITIES OF, 1 Agra 17.

—to specified arrears—Amount if may be credited towards previous arrears—*See* SALE—SALE FOR ARREARS OF RENT—GENERAL, 15 C.W.N. 443.

Approver.

—Suit against—Evidence at criminal trial if admissible—Sessions Court's finding, if binds Civil Court—Civil suit, if barred—*See* EVIDENCE—MISCELLANOUS, 13 C.W.N. 501 = 4 Ind. Cas. 523.

Arbitration.

1.—GENERAL.
2.—APPOINTMENT OF ARBITRATORS.
3.—DUTIES OF ARBITRATORS.
4.—POWERS OF ARBITRATORS.
5.—PRIVATE ARBITRATION.
6.—REFERENCE TO ARBITRATION.
7.—REVOCATION OF REFERENCE TO ARBITRATION.
8.—MISCELLANEOUS.

See APPEAL—ARBITRATION.

See AWARD.

See CIV. PRO. CODE, 1908, sch. II.

See RIGHT OF SUIT — AWARDS, SUITS RELATING TO.

——1.—General.

(1)—*Civ. Pro. Code, 1882, ss. 506 and 510 Arbitration.—Held*, that when parties apply orally to the Judge to refer the suit to arbitration, and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him, having regard to the provisions of s. 510 of the Civ. Pro. Code, to supersede that reference, the arbitrator having declined to act. *Held*, further, that the second paragraph of s. 506 is directory only. ABDUL HAMID v. RIYAZ-UD-DIN, **4 A.L.J. 691 = A.W.N. 1907, 273 = 30 A. 32.** (6 M.I.A. 134, *D.*; 27 C. 61, 23 B. 699, *R.*)

(2)—*Withdrawl of suit—Change of circumstances* pendente lite—*Arbitration.*—Where, by the death of a party or some other change of circumstances *pendente lite*, the plaintiff may be enabled to claim a larger or different relief,

Arbitration—continued.

——1.—General—*continued.*

permission under s. 373, Civ. Pro. Code, may be granted; but it cannot be granted where arbitration-proceedings have intervened, and the defendant has acquired a right, in virtue of the award passed therein, to have the suit finally determined. KALIAN SINGH v. LEKHRAJ SINGH, **6A. 211 = A.W.N. 1884, 28.** [*R.*, **9 A. 253.**]

(3)—*Arbitration—Misconduct of arbitrator—Omission to take evidence and to give party an opportunity of proving his case—Civ. Pro. Code, s. 521.*—The word "misconduct" as used in s. 521 of the Civ. Pro. Code, is not confined to misconduct of a fraudulent, or improper character, but it includes action on the part of an arbitrator which is, upon the face of it, opposed to all rational principles which should govern the procedure of a person to whom matters in dispute have been referred for decision. Where an arbitrator has taken no evidence upon such matters, and has not allowed a party an opportunity of proving his contention, he is guilty of "misconduct" within the meaning of the section, and the Court, upon objection being made, should consider whether there has been any real arbitration-proceeding, and whether the arbitrator has arrived at his conclusions upon legal and proper materials. Where the lower Court had failed so to consider such an objection, the High Court in the exercise of its revisional powers under s. 622 of the Civ. Pro. Code, set aside the decree affirming the award, and the award itself, and directed the case to be restored to the lower Court's file for determination. DEOKI NANDAN v. RAJ KUMAR, **A.W.N. 1889, 124.**

(4)—*Arbitration—Extension of time to an arbitrator to make and file an award—Delegation of power by Court to arbitrator to extend time—Award, validity of—Civ. Pro. Code (Act V of 1908), sch. II, rr. 3 (1), 8.*—When a case is referred to arbitration, the Court should itself fix a date for making the award, and where the award is not completed within the time fixed, the Court itself should, in extending the time, fix a particular date for the making of the award, and not leave it to the discretion of the arbitrator to enlarge the time for himself. Time can only be extended until the award has not been made and filed; no extension can be allowed in a case where the award has been made and filed beyond time. Where an award has not been properly made and filed according to law, it is a nullity and the decree passed on the basis thereof should be set aside. GUR DAS v. GARUL DHUJ, **9 Ind. Cas. 241.**

(5)—*Civ. Pro. Code, 1882, s. 508—Arbitration—Order of reference not fixing a period within which the award is to be made—Appeal.*—Where an order of reference to arbitration made by a Court omits to fix a date for the delivery of the award, such omission is not a mere irregularity, but is a defect fatal to the

Arbitration—continued.

——1.—General—*continued.*

order and to all subsequent proceedings founded thereon. LUCHMAN DAS v. ABPARKASH, **A.W.N. 1908, 59=5 A.L.J. 144=30 A. 169.** (8 A. 548, *F.*; 18 I.A. 55=13 A. 300, *R.*)

(6)—*Civ. Pro. Code, 1882, ss. 520, and 521—Enforcement of award of compensation in a seduction case—Courts have only to look to the provisions of s. 520 and s. 521 Civ. Pro. Code.*—There is no authority for the view that arbitrators can take cognizance only of claims in respect of which the Regular Courts will give relief. In deciding whether an award should be enforced or not, the Courts have only to look to the provisions of ss. 520, 521, Civ. Pro. Code and determine whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the applicant could not have sued the respondent for damages cannot be regarded as "an objection to the legality of the award." The Buddhist Dhammathats provide for the payment of compensation for seduction, and though such cases are not now decided according to Buddhist Law, compensation for seduction is still frequently paid by private arrangement between the parties or their families, and there is nothing immoral in such an arrangement. According to English Law, the consideration of past co-habitation and previous seduction does not make a bond void. Such consideration is not held good so as to support a promise not under seal, but it is not illegal. MI HLA WAING v. NGA KAN. **U.B.R. 1908, 2nd Quarter, Civ. Pro. p. 19.**

(7)—*Arbitration out of Court—Filing of award—Civ. Pro. Code (Act V of 1908), sch. XI, s. 20—Arbitrator, duty of—Misconduct of arbitrator—Award based partly on private enquiries, if valid—Award, a final decision.*—In arbitration proceedings, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it except in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. Where the award recites on the face of it that the arbitrator held, partly on evidence taken before him, and partly on private enquiry, that the will executed by a certain person was genuine: *Held*, that it was not competent for him to do so and the award was vitiated. An arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him. The position is different where the arbitrator is empowered to make one or more awards at his discretion. Where the award leaves undecided one of the cardinal points in controversy, the award is

Arbitration—continued.

——1.—General—*continued.*

incomplete and cannot be sustained. GANES NARAIN SINGH v. MALIDA KOER, **13 C.L.J. 399.**

(8)—*Arbitration—Award—Question arising between two firms—Enquiry as to matters outside jurisdiction—Not affecting validity of award—Such enquiry when necessary and proper—Its scope—Firm—What it means—S. 239, Contract Act, 1872—Whether affected by O. XXX, Civ. Pro. Code 1908—Guarantee broker paying claim in full—Award in respect of claim so paid, valid—Accountability as between guarantee broker and person paid—Guarantee broker also partner—Effect—Disputes under several contracts—Single submission and one award—Validity—Civ. Pro. Code, provisions of—Not strictly applicable to arbitration proceedings—Questions affecting arbitrator's jurisdiction—Not final.*—The mere fact that arbitrators had taken evidence, which proved to cover matters outside their jurisdiction, would not necessarily invalidate the award or make their proceedings improper, if the award itself is within their jurisdiction. Where the arbitrators have to decide between two firms, they must perforce enquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices of meetings, and the scope of their enquiries. They may have even to take evidence outside the jurisdiction of the subject which they have to decide. It is because a firm is merely a collection of the individuals having implied powers of agency, one for the other, that a submission to arbitration in the firm's name does not necessarily bind the partners. S. 239, Contract Act, makes it clear that a partnership is a collection of individuals "called" collectively a "firm." A firm has no existence as legal-entity—as a corporation. The provisions of O. XXX, Civ. Pro. Code, 1908, do not alter the legal condition of a partnership. The firm's name is merely a legal devise for collectively connoting the individuals composing it. Where G & Co., received in full the amount owing to them by B & Co., from the guarantee brokers, and after such receipt obtained in award against B & Co., *held* that such receipt would not invalidate the award, as G & Co. would have to account to the brokers for anything which they received from B & Co. The fact that the guarantee broker is also a member of the firm B & Co., will not alter the application of the rule. The decision of the arbitrators on a question of their own jurisdiction is not final and can be raised in the objections raised to the filing of the award One submission of disputes under several contracts and a single award are not invalid. The provisions of the Code of Civil Procedure cannot be applied strictly to proceedings in arbitration. Where the question whether, as between the various partners in the firms, any agreement existed by which the liability of each was limited, is one going to the root of the jurisdiction of the arbitrators, the Court must independently consider the

***Arbitration*—continued.**

——1.—General—*continued.*

question apart from the decision of the arbitrators which does not bind the Court. MESSRS. D. GRAHAM & CO. v. KEWALRAM, **4 S.L.R. 196=9 Ind. Cas. 712.**

(9)—*Arbitration—Suit part-heard—Agreement of parties to be bound by Court's decision after local inspection—Judgment of Court—Nature—Award—No review—No appeal—No second appeal—Power of High Court to revise—S. 622, Civ. Pro. Code, 1882 (=s. 115, Civ. Pro. Code, 1908).*—Where, in a part-heard suit before a Munsif, both the parties agreed to be bound by any decision of the Court which it may arrive at after an inspection of the locality in dispute, and also agreed not to raise any objection to the same or to prefer an appeal, and where the Court, after making a local inspection, gave a certain judgment: *Held*, that the Munsif's judgment was in the nature of an award, and that it was not open to the Munsif to alter that award when made or to review his decision. (9 C. 575, *R.*) *Held*, also, that no appeal lay to the District Judge and that the District Judge acted without jurisdiction when he entertained the appeal and made an order of remand. (23 B. 752, *F.*) *Held*, also, that no second appeal lay to the High Court but that the High Court was competent to interfere *suo motu* under s. 622, Civ. Pro. Code, 1882 (=s. 115, Civ. Pro. Code, 1908). BAIKANTHA NATH GOSWAMI v. SITA NATH GOSWAMI, **38 C. 421.**

(10)—*Civ. Pro. Code, 1882, s. 521—Arbitrator receiving evidence from one party in the absence of the other—Judicial misconduct—Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award.*—A Court is perfectly justified in setting aside the award of the arbitrators, on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable, and in having omitted to give the latter sufficient opportunity to produce his own evidence. *Quære*:—Whether an Appellate Court had power to go behind the order of the first Court, setting aside such an award. SOBA RAM v. RAM DAS, **66 P.R. 1907=159 P.L.R. 1908.** (2 A. 181, 3 A. 636, 28 A. 408, 22 M. 202, 8 C.W.N. 390, *R.*)

(11)—*Appeal—Award, application to file, order refusing—Civ. Pro. Code (XIV of 1882), s. 525.*—An appeal lies against an order refusing to grant an application to file an award under s. 525 of the Civ. Pro. Code. SHEO SAHAI MAHTON v. KIRTARTH BHAGAT, **7 C.L.J. 486.** (29 C. 167, *R.*; 3 C.L.J. 450=33 C. 757, *F.*; 6 A. 186, 26 A. 205, *Not F.*)

(12)—*Ch. XXXVII, Civ. Pro. Code, 1882, discussed—S. 522, Civ. Pro. Code, 1882, decree under—Appeal—Finality of award—Application under s. 622, Civ. Pro. Code, 1882—Art. 158, Limitation Act, 1877—Powers of arbitrators.*—Ch. XXXVII, Civ. Pro. Code, 1882, deals with arbitration under 3 heads:—

***Arbitration*—continued.**

——1.—General—*continued.*

(I) Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court. (II) Where parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under supervision of the Court. (III) Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought to give effect to the award. There is one great difference which must be kept in view, *re* reference to arbitration between cases (I), and cases (II) or (III). In cases falling under (I), the agreement to refer and the application to the Court founded on it must have the concurrence of all parties concerned and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases failing under (II) and (III), proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court: that is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in Civ. Pro. Code. [*F.*, 27 M. 255=14 M.L.J. 356, 33 C. 11, 29 M. 303, 9 Bom. L.R. 259; *Expl.*, 1 S.L.R. 149; *R.*, 30 C. 218, 7 C.W.N. 180, 9 O.C. 205, 4 L.B.R. 130, A.W.N. 1907, 177, 1 S.L.R. 86, 12 O.C. 40; *R. and D.*, 26 A. 205, 2 C.L.J. 80.] No appeal lies from a decree upon an award pronounced under s. 522, Civ. Pro. Code, except in so far as the decree may be in excess of, or not in accordance with the award. The principle of finality which finds expression in this section is in accordance with modern decisions, and now-a-days, no Court will sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law. (*Adams* v. *Great North of Scotland Railway Co.*, (1891) L.R.A.C. 31, *F.*) [*F.*, 27 M. 255=14 M.L.J. 356, 33 C. 11, 29 M. 303, 9 Bom. L. R. 259, 2 C.L.J. 142, 8 C.W.N. 916, 33 C. 899, 29 A. 457=A.W.N. 1907, 117=4 A.L.J. 455; *R.*, 9 O.C. 205, 4 L.B.R. 130, A.W.N. 1907, 177; 1 S.L.R. 86, 26 A. 205, 2 C.L.J. 80, 32 M. 510=19 M.L.J. 480=6 M.L.T. 176=4 Ind. Cas. 871, 2 C.L.J. 61, 27 B. 287, 8 C.W.N. 390, 29 B. 285=6 Bom.L.R. 1132, 10 C.W.N. 601=2 C.L.J. 153, 33 C. 498, 33 C. 757=10 C.W.N. 609=3 C.L.J. 450, 7 C.L.J. 486, 31 M. 479=4 M.L.T. 328=18 M.L.J. 485, 11 O.C. 116, 12 O.C. 40; *Cons.*, 11 C.W.N. 220; *Expl.*, 1 S.L.R. 149, 28 A. 21=2 A.L.J. 450=A.W.N. 1905, 165; *Diss.*, 26 A. 205.] Where a decree is passed by a Court in accordance with an award, an application by the unsuccessful party to the High Court (here, the Chief Court

Arbitration—continued.

——1.—General—*continued.*

of the Punjab) under s. 622, Civ. Pro. Code, 1882, is virtually an application to set aside an award, and as such is incompetent. Such an application is more objectionable than an appeal. Art 158, Act XV of 1877, governs such an application. [*F.*, 4 A.L.J. 105; *Not F.*, A.W.N. 1903, 4. 1 S.L.R. 86.] Arbitrators are not bound to give an award on each point referred to them. They have to give the award on the whole case. They may be Judges of law as well as Judges of facts and an error in law does not vitiate an award. GHULAM KHAN v. MUHAMMAD HASSAN, **29 C. 167, P.C.=6 C. W.N. 226=29 I.A. 51=12 M.L.J. 77=4 Bom. L.R. 161=8 Sar. 154.**

(13)—*Civ. Pro. Code, 1882, ss. 525 and 526—Destruction of award after presentation in Court—Whether ground for refusing to file award—Whether parties can be referred to regular suit.*—An application was made to file an award, under s. 525, Civ. Pro. Code. The Court declined to file it on the ground that the records of the case containing the award were destroyed by fire. *Held*, that, since the award had already become part of the record of the Court, the Court could not refuse to file it under s. 526, Civ. Pro. Code, and refer the parties to a regular suit. (12 M. 331, *D.*) The mere fact of the destruction of the records of the case does not necessarily show that the investigation will be either long or difficult. LEKHRAJ KHUBCHAND v. KHUBCHAND MANGHIR MAL **1 S.L.R. 167.** (7 Bom. L.R. 644, *R.*)

(14)—*Civ. Pro. Code, 1882, s. 523—Order refusing to file agreement to refer to arbitration—Appeal.*—*Held*, that an appeal lies against an order refusing to file an agreement to refer to arbitration. KHALKA BAKSH SINGH v. SUAMBAR SINGH, **11 O.C. 116.** (5 A. 333, 26 A. 205, 29 C. 167, 9 O.C. 205, *R.*)

(15)—*Civ. Pro. Code, 1882, s. 526—Order refusing to file award—Appeal.*—An appeal lies against an order refusing to file an award under s. 526 of the Code, inasmuch as it is a decree. MAUNG NGE v. RANGANATHAM CHETTY, **4 L.B.R 180.** (25 C. 757, 33 C. 757, 27 M. 255, *F.*; 28 A. 21, *Diss.*; 29 C. 167, 18 C. 414, *R.*)

(16)—*Civ. Pro. Code, 1882, ss. 521, 591, 32—Arbitration—Award—Award set aside upon ground not contemplated by s. 521—Appeal.*—In a suit pending in the Court of a Munsiff, the matter in dispute between the original parties was referred to arbitration. To this arbitration a third person who had been brought upon the record as a defendant under s. 32 of the Code of Civil Procedure was not a party. An award was made dismissing the plaintiff's claim, but on an objection being preferred to the effect that all the parties to the suit were not parties to the arbitration, the Munsiff set aside the award, proceeded with the suit, and on the merits granted the plaintiff a decree. An appeal against this decree by the defendant was dismissed. Both Courts found that the defendant who had been added under s. 32 had no interest in the subject-matter of the suit. The plaintiff appealed, on the ground, *inter alia* that "the Courts below had no jurisdiction to set aside the award so far as the parties to this appeal are concerned." *Held* that an appeal lay, and was not barred. RAMIAWAN v. NAWAL SINGH, **A.W.N. 1908, 242=5 A.L.J. 644=4 M.L.T. 400.** (18 A. 19, 22 A. 366, *D.*; 22 M. 202, 18 M.L.J. 228, *R.*)

(17)—*Award, jurisdiction of Court to file—Depends on value of entire matter submitted—Omission to give notice to parties or acceptance of a fee by the arbitrators cannot invalidate the award.*—The proper Court for presentation of an application for filing an award is to be determined by its pecuniary jurisdiction with respect to the entire matter to which the arbitration related and not to the amount allowed under the award. (31 C. 203, *R.*) An award does not become invalid by the mere omission to give notice of the arbitrators' meeting to a party, who had previously informed the arbitrators of his cancellation of his *muchilika* for, and his withdrawal from, submission to arbitration, nor is an award rendered illegal by reason of the acceptance, by the arbitrators, of the offer of a fee for their services, such acceptance not involving any misconduct on their part. SUBRAYA PRABHU v. MANJUNATH BHAKTA, **29 M. 44.**

(18)—*Civ. Pro. Code, 1882, s. 523—Agreement in writing to refer difference to arbitration—Award, objection to filing of—Limitation Act, sch. II, art. 158—Decree in accordance with award—Appeal to District Judge—Jurisdiction—Civ. Pro. Code, s. 510—Arbitrators, appointment of by Court—Civ. Pro. Code, s. 510—Arbitrators, number of.*—The parties entered into an agreement in writing that certain differences between them should be referred to the arbitration of five persons named in the agreement. The agreement was filed in Court under s. 523 of the Civ. Pro. Code. Before the Court's order was passed, three of the arbitrators resigned and three other persons were substituted for them by the Court on the application of the parties. On the day fixed for the filing of the award, an arbitrator named by the defendant did not appear. The Court struck out the name of one of the arbitrators nominated by the plaintiff. The remaining arbitrators made an award, in accordance with which the Court passed a decree, disallowing the defendant's objections on the ground that they were not filed within ten days from the date of the filing of the award. The defendant appealed to the District Judge. *Held*, that the defendant was not precluded from appealing to the District Judge from the first Court's decree, because he had not applied to set aside the award within the ten days allowed by art. 158, sch. II of the Indian Limitation Act. The agreement, referred to in s. 523 of the Civ. Pro. Code, is an agreement in writing that any differences between the parties shall be referred to the arbitration of the persons named in the

Arbitration—continued.

——1.—General—*continued.*

agreement or to be appointed by the Court having jurisdiction in the matter to which the agreement relates. In this case there being no clause that the difference should be referred to the arbitration of any persons to be appointed by the Court, the Court, under s. 524 of the Civ. Pro. Code, had no jurisdiction whatever to appoint fresh arbitrators, nor, under s. 570 of the Code, could it reduce the number of the arbitrators fixed by the agreement. *Held*, further, that, where a decree has been made upon a judgment given upon an award and which is not in excess of and is in accordance with the award, an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based, is, from one cause or another, no award in law; *held*, therefore, that an appeal lay to the District Judge from the decree, which was not in excess of the award. SHEOPAL KUAR v. BHAYATARA BAKHSH SINGH, **O.C. 355.**

(19)—*Civ. Pro. Code, 1882, s. 510—Arbitration—Refusal of umpire to act—Power of Court to appoint a fresh umpire. Held*, that s. 510 of the Code of Civil Procedure does not apply only to cases where a person has signified his assent to take upon himself the duties of an arbitrator or umpire and, after so signifying his assent, dies, or refuses or becomes incapable to act. FAYAZ UD-DIN v. AMIN-UD-DIN, **A.W.N. 1908, 159=6 A.L.J. 351.** (18 C. 324, *Diss.*)

(20)—*Civ. Pro. Code, 1882, s. 520—Award by arbitrators in excess of their authority—"Such other and further relief," meaning of.*—Plaintiffs sued for a declaration that the alienee of a Hindu widow got no more than the life-interest of the widow, and that the alienation was invalid and inoperative except for her lifetime. They also added a prayer for "such other relief as the Court deemed fit." The matter "in dispute in the case" was referred to arbitration. The arbitration passed the following award, "we direct that defendant No. 1 do pay Rs. 1,500 to the plaintiffs, and that the sale for which the suit is brought be declared valid, binding and absolute." *Held* that the arbitrators had exceeded their jurisdiction, and that the words "such other and further relief," though wide, cannot be held to include a request to the Court to create an obligation which is not alleged to exist. TIKAM DAS v. PHATUMAL, **1 S.L.R. 209.** (31 C. 433, 24 A. 229, *R.*)

(21)—*Civ. Pro. Code, 1882, ss. 509, 522—Difference of opinion, no provision for—Judgment not in accordance with award—Appeal.*—When the arbitrators have given an unanimous award, the award is not a nullity, because no provision has been made in the order of reference for a contigency that has never arisen, *viz.*, that the arbitrators might have differed. S. 522 of the Code does not allow an appeal on the ground that the judgment is in excess of the award, but only on the ground that the decree

Arbitration—continued.

——1.—General—*continued.*

is so. BEPIN BEHARY SEN v. KRISHNA BEHARY SEN, **8 C.L.J. 475.** (17 W.R. 30, *F.*; 4 W.R. 4; 14 W.R. 150, 8 A. 64, *D.*)

(22)—*Civ. Pro. Code, 1882, s. 508 et seq—Arbitration—Award—Award set aside—Court not empowered to make a second reference on the same submission.*—The parties to a suit pending in the Court of a Munsiff referred the matters in dispute between them to arbitration. An award was made and delivered; but it was afterwards discovered that one of the plaintiffs had died before the termination of the arbitration proceedings, and the Munsif accordingly set aside the award. *Held* that the Munsif had no power to make a second order on the same agreement of the parties again referring to arbitration the matters in dispute between them. PACHKAURI RAM v. NAND RAI, **A.W.N. 1908, 228=3 A.L.J. 658.** (21 A. 314, *D.*; 2 A. 181, 27 M. 112, *R.*)

(23)—*Civ. Pro. Code, 1882, ss. 520 and 522—Award remitted by Court for revision—Decree in terms of revised award—Appealability of remittal—Construction of s. 522, Civ. Pro. Code.*—When an award, remitted by Court under s. 520, Civ. Pro. Code, is revised by the arbitrators, and a decree has been passed by the Court in terms of the revised award, the terms of s. 522, Civ. Pro. Code, preclude an appeal on the ground that the order of remittal is wrong and that the award as originally submitted should have been accepted and acted upon. (22 M. 203, *D.*) When the decree is in accordance with the award, the policy of the law is to refuse appeal on the ground that an order under s. 520, Civ. Pro. Code, has been improperly made or improperly refused. The provisions of s. 522, Civ. Pro. Code, should be strictly construed. SUBBIAH IYER v. SUBRAMANIA AIYER, **4 M.L.T 328=18 M.L.J. 485=31 M. 479.** (29 C. 167, *R.*)

(24)—*Arbitration—Award founded on agreement between the parties subsequent to reference.*—The plaintiff and defendants in a suit agreed to refer the matters in dispute between them to the arbitration of one S.F. After the reference had been made, the parties came to an agreement and submitted this agreement to the arbitrator, who drew up his award in accordance with its terms. The award, however, also dealt with certain matters which arose subsequently to this agreement. *Held* that the award was a good award and was not vitiated by the fact of its having been founded on a previous agreement between the parties. MIHR ALI SHAH v. MUHAMMAD HUSEN SHAH, **A.W.N. 1892, 79.**

(25)—*Civ. Pro. Code, 1882, s. 522 (=sch. II, r. 16, Civ. Pro. Code, 1908)—Arbitration—Award not necessarily to be made a rule of Court.*—Where it is established that the parties have agreed to a reference and the arbitrators have made an award, so long as the validity of that award is not questioned, it is binding upon

Arbitration—continued.

——1.—General—*continued.*

the parties to it. It is not necessary that the award should be made a rule of Court under s. 522 of the Code of Civil Procedure. BHIKHARI DAS v. GOVIND RAM, **A.W.N. 1892, 238.**

—Order of Court referring dispute to—Decision of majority—*See* ACT XX OF 1863, s. 16, 7 M.H.C. 173.

See ACT XX OF 1863, ss. 14, 16, 12 M.L.J. 431.

—Enhancement suit—Reference to arbitration—Jurisdiction of arbitrators to settle equitable rent—*See* BEN. ACT VIII OF 1885, s. 30, 6 C.W.N. 614.

See BOM. ACT XVII OF 1879, ss. 13 (*c*) and (*d*), 15, 19 B. 553.

—Award on—under if valid when delivered after specified time—*See* U. P. ACT XIX OF 1873, s. 221, 14 A. 347=A.W.N. 1892, 20.

—Court acting as arbitrator by consent of parties—Decree—Appeal— Review—Remand—*See* APPEAL—GENERAL, 9 Ind. Cas. 296.

See APPEAL—GENERAL, 84 P.R. 1901.

—Civ. Pro. Code, 1882, ss. 523 and 526, difference between, as regards appeal—Revision—*See* APPEAL—ARBITRATION, 58 P.W.R. 1907, F.B.=1 P.R. 1908.

See APPEAL—CASES WHERE APPEAL LIES OR NOT, 88 P.R. 1902, F.B.

See APPEAL—MISCELLANEOUS, 47 P.R. 1883.

See APPELLATE COURT — MISCELLANEOUS, 2 B.L.R. App. 20 (*b*)=11 W.R. 57.

—Death of one of the parties to the agreement — Abatement—*See* CIV. PRO. CODE, 1908, s. 99, 8 A.L.J. 678.

—Arbitrators not named in the agreement—Effect—Ambiguity—Power of Court to appoint arbitrator—Three agreements to refer to arbitration relating to one transaction—Joinder of different causes of action—*See* CIV. PRO. CODE, 1908, s. 141, O. II, r. 3, sch. II, cl. 17, 85 P.L.R. 1911=9 Ind. Cas. 655.

—Retirement of some of the arbitrators before expiry of time fixed for filing award—Presentation of award by umpire—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, sch. II, rr. 9, 18, 1 A.L.J. 29=A.W.N. 1904, 49.

See CIV. PRO. CODE, 1908, O. XXIII, r. 3, sch. II, r. 20, 20 B. 304.

—Witnesses before arbitrators—The Court can issue commission for examination of witnesses in cases referred to arbitration—*See* CIV. PRO. CODE, 1908, O. XXVI, r. 1 and sch. II, r. 1, 7 Bom. L.R. 560.

—Appeal from decree based on award—Further reference to arbitration—Bad award—Remand—*See* CIV. PRO. CODE, 1908, O. XLI, r. 23, A.W.N. 1905, 164=2 A.L.J. 477.

Arbitration—continued.

——1.—General—*concluded.*

—Undue influence what constitutes—Submission to—Through fear of criminal proceedings—Voidability—*See* CONTRACT ACT, 1872, ss. 16, 19, 23, 22 A. 224=A.W.N. 1900, 52.

—Contract to refer to arbitration, agreement in the nature of—Validity—*See* CONTRACT ACT, 1872, s. 28, 11 C. 232.

—Reference to—*See* CRIM. PRO. CODE, 1898, s. 145, 7 C.W.N. 461.

—Agreement between debtors and creditors—Validity—*See* DEBTOR AND CREDITOR, 2 A. 173.

—Suit for partition—Decree on award—Direction in decree to deliver moveable property—Part of such property lost—Alteration of decree—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 17 B. 657.

—Contract—Breach of stipulation—Reference to—Award—Effect—*See* ESTOPPEL—ESTOPPEL BY DEEDS, ETC., 8 C. 809.

See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1894, 38.

—Power of guardian to submit matters to—On behalf of minor—Reference to Registrar—Practice—*See* GUARDIAN — DUTIES AND POWERS OF GUARDIAN, 19 C. 334.

—Proceedings—Power of senior members to bind junior members—Good faith—*See* HINDU LAW—JOINT-FAMILY, 9 M.L.J. 34.

—Hindu Law—Partition of joint family referable to—by father as managing member—*See* HINDU LAW—JOINT FAMILY, 16 A. 231=A.W.N. 1894, 60.

—Kumaon Rules, 1894, Rule 17—"Final decree"—Retirement of some of the arbitrators before expiry of time fixed for filing award—Award presented by umpire—*See* KUMAON RULES, 1894, A.W.N. 1904, 49.

See MAMOMEDAN LAW—INHERITANCE, A.W.N. 1883, 115.

See REMAND, 7 A. 523=A.W.N. 1885, 139.

See REVISION—GENERAL, A.W.N. 1888, 123.

See RIGHT OF SUIT—AWARDS, SUITS CONCERNING, 2 Agra 340.

See SPECIFIC RELIEF ACT, 1877, s. 21, 11 B. 199.

—Agreement to refer made pending suit—Such agreement a bar to the continuance of the suit—*See* SPECIFIC RELIEF ACT, 1877, s. 21, A.W.N. 1904, 9.

—Agreement to refer future disputes to—Maintainability of suit—Burden of proof—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 35 P.L.R. 1911=25 P.R. 1911=55 P.W.R. 1911=9 Ind. Cas. 736.

—Power to extend time—Umpire—*See* UMPIRE, 4 M. 311.

See VENDOR AND PURCHASER—MISCELLANEOUS, A.W.N. 1890, 78.

Arbitration—continued.

—— 2.—Appointment of Arbitrators.

(1)—*Power of Court to appoint new arbitrators.*—The Code of Civil Procedure does not empower a Court to appoint a new arbitrator in the place of one who has refused to accept his appointment. RADHA KISHEN v. DAULAT RAM, **110 P.R. 1900.** (6 M 414, 18 C. 324, 17 M. 498, *R.*)

(2)—*S. 510, Civ. Pro. Code—Arbitrators appointed without consent—Refusal to act—Power to appoint new arbitrators*—Where a Court referred a case to arbitrators named by the parties, without ascertaining before the reference was made, whether they would act or not, and the arbitrators subsequently declined to act, it has no power to appoint new arbitrators, when one of the parties object to the substitution of new arbitrators. PUGARDIN v. MOIDIN, **6 M. 414.** [*Appr.*, 18 C. 324 ; *R.*, 17 M. 498, 38 P.L.R. 1901, 110 P R. 1900, 6 A.L.J. 351=A.W.N. 1908, 159.]

(3)—*Power of appellate Court to refer to arbitration—S. 582, Civ. Pro. Code, 1882—Formalities prescribed by Civ. Pro. Code, to be complied with.*—Under the provisions of s. 582, Civ. Pro. Code, the appellate Court can refer a case to arbitration if the parties to the appeal pray for such reference. (3 M. 78, 12 C. 173, *F.*) The formalities prescribed by Act XIV of 1882 (Civ. Pro. Code) for awards should be strictly complied with. SURESH CHUNDER BANERJEE v. AMBIKA CHURN MOOKERJEE, **18 C. 507.**

(4)—*Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Failure to appoint, effect of.*—The rules of the Arbitration Tribunal of the Bengal Chamber of Commerce were construed to contemplate the appointment of the umpire before the arbitrators entered upon the reference and not on their disagreement. If the terms of a reference provide that the umpire is to be appointed before the arbitrators enter upon the reference, the same cannot go on until such umpire is appointed, and the award of the arbitrator cannot be made a decree of the Court. CHOONI LAL v. MADHORAM, **13 C.W.N. 297=36 C. 388=1 Ind. Cas. 391.**

(5) —*S. 522—Civ. Pro. Code, 1882—Arbitration—Award—Appeal—Application to Court to appoint a new arbitrator.*—Where a party to a suit has agreed to an arbitration and has selected an arbitrator, he cannot ask the Court to appoint another arbitrator. It is only under s. 510 of the Code that the Court can appoint a new arbitrator. SHIAM SUNDER LAL v. BHAIRON SINGH, **A.W.N. 1906, 51=3 A.L.J. 185.** (10 B. 381, *F.*)

(6)—*Award objected to on the ground that one of the arbitrators was interested in the case.*—If parties appoint an arbitrator with full knowledge of material facts as to his connection with or even interest in the subject-matter, they cannot object to the award on the ground of that connection or interest. AH KIN SHOK v. MAUNG TA HIN, **U.B R. 1897—1901, Vol. II, 8.**

Arbitration—continued.

——2.—Appointment of Arbitrators—*contd.*

(7)—*Award—Act VI of 1857—Land acquisition—Judgments of arbitrators separately recorded—What is a valid award—Suit for recovery of acquired land three months after award—Award held null—Fresh arbitration.*—The separately recorded opinions, on different dates, of arbitrators (appointed, under Act VI of 1857, to assess the value of land taken for a public purpose) who have never met or consulted together do not constitute an award under the Act. An award to be good must contain the *joint* judgment of the arbitrators up to the latest period previous to the execution of the award. Where a suit for the recovery of land taken, or compensation for being deprived of it, was filed *after* the expiration of three months from the date of an award, and the Court held the award to be null, the Court, following the procedure laid down in s. 31 of Act VI of 1857, referred the parties to a fresh arbitration. FATMA BIBI v. THE COLLECTOR OF SURAT, **8 B.H.C. A.C. 79.** [*R.*, 9 B.H.C. 177.]

(8)—*Duty of Judge, before and after referring a case to arbitration*—Before arbitrators are appointed by a Judge, he should find out whether they are willing to accept the office. Where the Judge nominates an arbitrator without the consent of the parties, such nomination is illegal. When a case is referred to arbitration, it is the Judge alone who has got the sole power of appointing fresh arbitrators. *Quære*:—Whether a Judge who proceeds under s. 319, Act VIII of 1859 (Civ. Pro. Code), to appoint arbitrators is not bound to nominate, where some arbitrators resign, an equal number of fresh arbitrators, except where the parties consent to have a smaller number for the decision of their case. TROYLUCKHO NATH ROY v. THE COLLECTOR OF BEERBHOOM. **W.R. 1864, 338.**

(9)—*Parties not agreeing as to nomination of arbitrator—Nomination by Judge—Inference.*—Where the two parties to a suit did not agree in naming anybody as arbitrator and the Judge nominated an arbitrator under s. 214 of Act VIII of 1859, the inference arises that he did so at their desire. SUROOP RAM DEB v. GOBIND RAM DEB, **7 W.R. 13.**

(10)—*Arbitrators not consented to by parties—Invalid award.*—The Code gives no power to a Court to enforce arbitrators on an unwilling suitor. The award of arbitrators so appointed will not be enforced. SHEONATH *alias* BURRAY KAKA v. RAMANATH *alias* CHOTAY KAKA, **1 Ind. Jur. N.S. 161=5 W.R. P.C. 21=10 M.I.A. 413.**

(11)—*Act VIII of 1859, ss. 315, 318, 319—Arbitration—Death of umpire—Recall of reference—Consent—Power of Court.*—The matters in dispute in a suit for partnership account were referred by consent to certain persons and an umpire for arbitration. The award was not made within the prescribed period and the umpire died. Then, on the application of one

Arbitration—continued.

——2.—**Appointment of Arbitrators**—*contd.*

of the parties which was opposed by other, Court ordered the recall of the order of reference and appointed a new arbitrator to settle the dispute. *Held* that the subsequent order of the Court was not an order recalling the reference under s. 318, and then referring it afresh under s. 315, but it was an order under s. 319 appointing a new arbitrator in the place of the old ones, for which the consent of all parties was not necessary. Under s. 319 of Act VIII of 1859, the Court is competent to appoint an arbitrator or arbitrators either in the place of an arbitrator or in the place of arbitrators. RAMPERSHAD v. JUGEERNAUTH, **6 C.L.R. 1.**

(12)—*Act VIII of 1859, s. 316—Arbitration—Order of reference—Jurisdiction.*—An order referring a suit to arbitration should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority. A matter referred to arbitration cannot be dealt with by the Court, unless the reference be fruitless, in which case the suit may be brought back on the file of the Court without any reference to the arbitration proceedings. The Court referring a matter to arbitration cannot sit in appeal from the decision of the arbitrators, nor has a lower appellate Court jurisdiction to go into the merits of the case. HARADHAN DUTT v. RADHANATH SHAHA, **2 B.L.R. S.N. 14=10 W.R. 398.**

(13)—*S. 510, Civ. Pro Code, 1882—Appointment of arbitrator by Court.*—S. 510 of the Code of Civil Procedure applies only in cases where a person has signified his assent to take upon himself the duty of an arbitrator and, after so signifying his assent, dies or refuses, or becomes incapable to act, or leave British India under the circumstances therein referred to. The power of the Court to appoint a new arbitrator, under s. 510 of the Code of Civil Procedure, in the place of another, arises only when the latter had given his consent to take up the office. BEPIN BEHARI CHOWDHRY v. ANNODA PROSAD MULLICK, **18 C 324.** (6 M. 414, *Appr.*) [*F.*, 31 P.L.R. 1901; *R.*, 17 M. 498, 110 P.R. 1900; *Diss.*, 6 A.L.J. 351=A.W.N. 1908, 159.]

(14)—*Arbitration—Delegation of work by arbitrators, invalid.*—Where a contract provides that the matters in dispute should be referred to two arbitrators, and that if the arbitrators differ they should appoint an umpire, it is not a compliance with such a provision for the arbitrators to refer the matter to the Chamber of Commerce, and for the latter body to select, a gentleman to deal with the dispute. J. G. SMITH v. LUDHA GHELLA DAMODAR, **17 B. 129.** (L.R. 2 Q.B. 367, *D.*)

(15)—*Act VIII of 1859, s. 319 - Umpire—Leaving the country with no intention to return.*—When a person has gone to England, and remains there and there is no evidence to show that he has any intention of coming back to India, he renders it impossible for himself to act as umpire and is incapable of acting as umpire within the meaning of s. 319, Act VIII of 1859. GADADHAR MOITRY v. GANGAPRASAD MOITRY, **4 B.L R. O.C. 89.**

Arbitration—continued.

——2.—**Appointment of Arbitrators**—*concld.*

(16)—*Small Cause Court—Dismissal of suit by—Appointment of arbitrators before new trial granted—Jurisdiction of.*—Where the Court of Small Causes dismissed the plaintiff's suit and appointed arbitrators before a new trial was granted, *held* that such appointment was beyond the jurisdiction of the Court. KHEEMA v. KUNHYA, **19 P.R. 1869.**

(17)—*Arbitrators' remuneration—Lien of award.*—When there is no express agreement to remunerate an arbitrator, he has no right of action for his remuneration. But his remedy is by way of refusing to deliver the award till he is remunerated and he has a lien on the same for the payment of his reasonable charges. KIRKPATRICK, *In re*, **22 P.R. 1897.**

——3.—**Duties of Arbitrators.**

(1)—*Arbitrator's power to alter course of legal devolution.*—An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of the law by which the parties are governed, in the absence of a special custom prevailing in the family. He has no power to make property which is divisible by law, indivisible for ever. JAFRI v. ALI RAZA, **3 Bom. L.R. 311.**

(2)—*Arbitrator not bound to give award on each point—Award on whole case—Error in law, effect of, on award.*—Where a case is referred to arbitrators, they are not bound to give an award on each point: they have to give their award on the whole case. They are Judges of law as well as Judges of facts, and an error in law does not vitiate an award. GULAM JILANI v. MUHAMMAD, **4 Bom. L.R. 161.**

(3)—*Arbitrators to confine themselves to order of reference—Order of reference defective—Proper procedure.*—Arbitrators appointed under an order of reference in the course of a suit can exercise no greater power than is vested in them by the referring order. Their powers are confined to the said order and can neither be enlarged nor narrowed by the view the arbitrators may themselves take of their duties. Where the reference order itself is defective, the proper course is to set aside all proceedings in arbitration and proceed according to s. 510, Civ. Pro. Code, 1877. RAM DITTA v. MUSSAMMAT BHAGAN, **3 P.R. 1883.** [*Cited*, 91 P.R. 1888, 35 P.R. 1884.]

(4)—*Summons to attend court—Failure to attend, an offence.*—The arbitrators in a civil suit, who were summoned several times to attend Court, having made default, were convicted by the Court, whose order was disobeyed, under s. 174, Penal Code. *Held* that no

Arbitration—continued.

——3.—Duties of Arbitrators—*continued.*

offence has been committed and that, even if an offence has been committed, the Court whose order was disobeyed could not try the offenders. MUSSAMMAT SUBHAN BIBI v. RAHIM BUKSH, **18 P.R 1875, Cr.**; MUSSAMMAT BEGUM KHATUN v. ABDUL KI, **2 P.R. 1871.** [*R.*, 4 P.R. 1907, Cr.]

(5)—*Delay or inattention of arbitrators—Misconduct.*—Arbitrators do not render themselves to a charge of misconduct by mere delay or inattention. WALI MUHAMMAD v. SOHARA, **41 P.R. 1875.**

(6)—*Application to set aside an award disclosing no legal ground, effect of—Duty of Court in case of a specific allegation of misconduct—Open disregard of proved law not a misconduct.*—An order ignoring an application to set aside an award disclosing no legal ground for the order applied for, was upheld in this case correct. A specific allegation of misconduct or corruption by the applicant will oblige the Court, before passing a decree to record whether or not the allegation is supported. Open disregard by arbitrators of proved law or custom does not amount to misconduct under s. 324 of Act VIII of 1859: (*Semble*, it might be ground for remitting the award under s. 323). The Court accepting the award is the proper Judge of the propriety of remitting it. SECUNDUR BEG v. MUSSAMMAT RAJEE, **12 P.R. 1869.**

(7)—*Arbitrators should ascertain points at issue and make a finding on each point—S. 323 of Act VIII of 1859.*—When a case in referred to arbitration, the arbitrators are bound to ascertain upon what points the parties are at issue, and upon each of these points they should come to a finding. If a Court regards an award as unobjectionable, such Court must deliver judgment in accordance with the terms of such award, and not modify the same. An award, defective and illegal on the face of it, should be at once remitted to the arbitrators, under s. 323 of Chap. 6 of Act VIII of 1859. LUCHMEE NARAIN v. PYLE, **2 N.W.P. 150.**

(8)—*Arbitrators—Duty of—Evidence.*—It is the duty of arbitrators in hearing evidence to act according to the terms of the agreement in pursuance of which the dispute is placed before them. KRISHNA KANTA PARAMANIK v. BIDYA SUNDARI DASI, **2 B.L.R. App. 25.**

(9)—*Judgment to follow award — When award can be questioned by way of appeal.*—A judgment in accordance with an award cannot be appealed against, except in cases of the illegality of the award, or of irregularity in the procedure of the Court. The only ground for appealing against a judgment following an award is that the decree is in excess of the award or that it is not in accordance with it. GHULAM JILANI v. MUHAMMAD HASSAN, **74 P.R. 1894, F.B.** (23 W.R. 429, 8 B.L.R. 315, 16 C. 482, 17 B. 357, 6 M. 414, 11 M. 144, 15 M. 348, 4 A. 283, 6 A. 174, 8 A. 449, **A.W.N. 1892, 151, *R.*; 14 P.R. 1882, F.B.,**

Arbitration—continued,

——3.—Duties of Arbitrators—*continued.*

Disappr.) [*R.*, 1 P.R. 1908, F.B. = 58 P W.R. 1907, 3 P.R. 1910. Rev.; *Disappr.*, 84 P.R. 1901 = 112 P.L.R. 1901.]

(10)—*Judgment not in accordance with award appealable.*—A decree, if not in accordance with the award, though professing to follow the same, is appealable. If the Court has to determine matters not referred to arbitration in order to pass a decree embodying all the provisions of the award, it must remit the award to the arbitrators for re-consideration. MUSSAMMAT GONDI BAI v. THAKAR DASS, **60 P.R. 1896.**

(11)—*An item based on a budnee allowed as set-off—Court disallowing that item as illegal—Proper procedure.*—Where, in a suit for a balance of account, the arbitrators allowed as a set-off an item founded on a budnee or wagering transaction and the Court, disallowing the item as illegal, decreed the rest in terms of this arbitrators' award: *Held*, that the budnee set off had been rightly disallowed for illegality, but that the proper procedure was to remit the award for the re-consideration of the arbitrators on account of the illegal matter apparent on the face of it. *Held*, also, that the refusal of arbitrators to amend their award would amount to misconduct under Civ. Pro. Code, 1859, s. 324. RAM KURN v. ZAHIRA, **101 P.R. 1868.** [*R.*, 89 P.R. 1883.]

(12)—*Award — Omission to give notice—Ss. 516 to 522, Civ. Pro. Code*, 1882—Omission to give notice as required by s. 516, Civ. Pro. Code, 1882, is a material irregularity. (14 A. 343, 20 A. 474, 3 M. 59, 11 M. 144, 15 M. 354, U.B.R. 1892—1896 Vol. II, 9, *R.*) The spirit of ss. 516 to 522, Civ. Pro. Code, appears to require that, if an award has to be remitted, the notice to be issued under s. 516 should be issued, when the award, in its final shape, is filed in Court. MA SHWE ME v. MAUNG TOK THO, **U.B.R. 1897—1901, Vol. II, 24.**

(13)—*Arbitration to effect partition—Arbitrator must effect complete partition—Partial partition valid, if such was intention of parties*—As it is not ordinarily the intent of the parties that some matters only should be determined and that they should be at liberty to go to law for the rest, it follows that, where a reference is made to arbitration, the arbitrator is equally bound to make a final decision upon all the matters referred to him in order that is award as to any should be effectual. But, if, in the reference to arbitration, there be a clause empowering the arbitrator to make one or more awards at his discretion, the Courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only. The strict rule of English law cannot be applied to India, where the submission to arbitration is not written by one who is conversant with the law. Consequently, the Court will rather look to the probable intention of the parties and to

Arbitration—continued.

——3.—**Duties of Arbitrators**—*concluded.*

what the justice of the case requires. Thus, an award of the arbitrators will be upheld as regards the property, divided, even though the whole has not been divided, if, from the nature of the property and other circumstances of the case, a partial partition was the probable intention of the parties. Further, if a question is not brought before an arbitrator for decision, the fact that he does not decide the question does not detract from the finality of his award. MUKUND RAM SUKAL v. SALIGRAM SUKAL, **2 C.P.L.R. 202.**

(14)—*Arbitration award, when reversible by Court—Co-defendants—Rival claims.*—A Court cannot reverse the award given by an arbitrator, which is binding on all those who consented to the arbitration, unless the provisions of s. 324 of Act VIII of 1859 apply. The technical rules of the Court are not binding on an arbitrator. His duty is to give an equitable award. A Court, when dismissing the plaintiff's suit, cannot adjudicate on the rival claims of two co-defendants. REEDOY KRISTO MUJOOMDAR v. PUDDO LOCHUN MUJOOMDAR, **1 W. R. 12.** [*D.*, 9 A. 253; *R.*, 7 W.R. 401.]

(15)—*Arbitrators, application by—Order in respect of costs of reference—Confirmation by Court.*—The Civ. Pro. Code does not authorise arbitrators to apply to the Court for confirmation of their order, which makes the hearing of a reference conditional upon payment of their fees. STEEL v. ROBERTS, **6 C. 809=8 C.L.R. 439.**

See ARBITRATION—REVOCATION OF ARBITRATION, 5 P.R. 1876.

——**4. Powers of Arbitrators.**

(1)—*Power of arbitrator to administer oath other than in prescribed form.*—An arbitrator has no power to administer an oath other than in the prescribed form. WALI-UL-LA v. GHULAM ALI, **1 A. 635=2 Ind. Jur. 468.**

(2)—*Award by private arbitration if binding—Revocability—Delegation of power by arbitrators.*—There is no reason why an award made by private submission should not be perfectly valid and binding on the parties, though the parties may not have sought to enforce it by summary proceedings under s. 327, of Act VIII of 1859, Civ. Pro Code. A submission to arbitration is revocable before the award is made. Where there is no agreement by the parties to be bound by the award given by the majority of the arbitrators in order to make the award binding, it is necessary that all the arbitrators should concur. Arbitrators have no power to delegate their authority to others. BABOO SURUBJEET NARAIN SINGH v. BABOO GOUREE PERSHAD NARAIN SINGH, **7 W.R. 269.**

(3)—*Arbitrator—Award—Vaildity—Delegation.*—Though an oral award may be given and a note or minute of it taken for record, still, if the arbitrators resolve that their award is to be put in the form of a document to be signed by

Arbitration—continued.

——4.—**Powers of Arbitrators**—*continued.*

them as the final expression of their decision, nothing but that document can be treated as the award. One arbitrator cannot delegate his powers of decision to another. When the arbitrators have been appointed by agreement, and no provision has been made for a difference of opinion, the award is invalid, unless it is unanimous. MA THET TIN v. MA SAW KIN. **U.B.R. 1902—1903, Vol. II, Arbitration, p. 1.** (U.B.R. 1892—1896, Vol. II, 18, 276, *R.*)

(4)—*Want of power of private arbitrator to procure attendance of witnesses—General rule—Exception.*—The general rule is when parties chose to abide by the settlement of matters in dispute made by a private arbitrator, they in effect agree to accept all the limitations of the position of such a Judge among which is the want of power to compel the attendance of witnesses. The following is an exception to that general principle. Where the issue in the case was as to the validity of the award on account of the conduct of the arbitrator in not examining all the witnesses wanted, according to his undertaking to examine them, *held* that the award was not valid under the circumstances. MA SAT KYU v. MAUNG TUN GYI, **U.B.R. 1897—1901, Vol. II, 4.** [*R.*, U.B.R. 1897—1901, Vol. II, 10.]

(5)—*Reference to arbitration by the Judge—Parties to the suit referring other matters to the same arbitrators—Separate award to be given*—Where a Judge refers a case to arbitration and the parties to the case appoint the same persons as arbitrators in respect of some other matters not connected with the case, the arbitrators must give separate awards instead of mixing them up and giving a general one. ROGHOO NUNDUN LALL SAHOO v. BUNWAREE LALL SAHOO, **3 W.R. Mis. 27.**

(6)—*Matter not in difference referred to—Decision void.*—In respect of the decision of arbitrators in a matter not in difference between the parties, nor referred to them, *held* it was void. MOSHAHEL SINGH v. KONOMUTTY BEWA, **15 W R. 172.**

(7)—*Act VIII of 1859, ss. 312, 322—Award—Interest—Costs.*—The questions of costs of the reference and award may be dealt with by the arbitrators, only when all the matters in difference between the parties have been referred to them, under an order of Court. Then, they may also award interest after date of submission. MOHAN LAL v. NATHURAM, **1 B.L.R. O.C. 144.**

(8)—*Costs—Omission to fix scale of costs.*—An award directed that the defendant should pay the costs of the suit, of the reference and of the award, without fixing the scale. On application to the Court to do so, the case was sent back to the arbitrator for that purpose. *Held* that, when the order of reference gives the arbitrator full discretion over costs, he alone can fix the sale. BARRUTT CHUNDER DOSS v. DAMJEE PITTUMBER, **Bourke O.C. 7—Cor. 160.**

Arbitration—continued.

——4.—Powers of Arbitrators—*continued.*

(9)—*Civ. Pro. Code, 1859, s. 317 et seq.*—Where, by an order of reference made pending a suit, all matters in difference between the parties are referred to an arbitrator by the Court under Act VIII of 1859, s. 317, et seq., the arbitrator has power to deal with the costs of the suit. MUDDOOSOODUN CHOWDHRY v. KOYLAS CHUNDER SHAW; KOYLAS CHANDER SHAW v. MUDDOOSOODUN CHOWDHRY, **2 Ind. Jur. N.S. 12.**

(10)—*Question of costs not referred to arbitration, arbitrators not competent to deal with—Exces of jurisdiction of arbitrators—Exercise of extraordinary jurisdiction of High Court—Civ. Pro. Code (Act XIV of 1882), ss. 520, 521, 526.*—S.526 of the Civ. Pro. Code (Act XIV of 1882), specifies the causes enumerated in ss. 520, 521, as those which may be urged against filing an award, but it does not say that the award may be remitted nor, without express authority, can a Court send back an award to private arbitrators over whose proceedings it has no control. The only course, in such cases, is to refuse to file the award. The High Court therefore upheld the contention in this case that as the award in question gave costs to one of the parties, and the submission did not leave this question to the arbitrators, the lower Court should have refused to file the award itself. No appeal being entertainable as from an order under s. 526, the High Court will generally, in such a case, if there has been a disregard of law amounting to an excess of jurisdiction, or a perversion of the purpose of the legislature, hold itself ready to interfere by way of exercising its extraordinarily jurisdiction. DAGUSA TILAKCHAND v. BHUKAN GOVIND SHET, **9 B. 82.** [*Appr.*, 11 M. 220.]

(11)—*Costs, power of arbitrators to deal with.*—Where a suit, as a whole, is generally referred to arbitration, the arbitrators have power to go into the question of costs. But they have no such power, when only one or more specific issues are referred to their decision, the question of costs not being one of such issues. HAR GOLAL v. SODHI KARTAR SINGH, **91 P.R. 1888.** (19 P.R. 1880, 3 P.R. 1883, *R.*)

(12)—*Civ. Pro. Code (1882), ss. 518, 522—Arbitrators, power of, to direct payment in instalments—Decree under s. 518, when appeal lies from.*—Where the arbitrators appointed in the course of a suit to recover money gave an award in favour of the plaintiff, but made the money payable by the defendants in instalments, and, on objection by the plaintiffs, the first Court modified the award, so far as it related to the payments in instalments, on the ground that that was not a matter referred to arbitration, it was held that the Court should not have modified the award, as it did, since, under the terms of the reference, the arbitrators were given full powers, not only as to the amount to be paid, but also to the mode of payment. The plea that no appeal lay from the decree of the first Court under s. 518 of the

Arbitration—continued.

——4.—Powers of Arbitrators—*concluded.*

Civ. Pro. Code, was held unsustainable, since the decree of that Court was not in accordance with the award and was appealable with reference to s. 522 of the Code which disallowed appeals "except in so far as the decree is in excess of, or not in accordance with the award." These words in s. 522 have been intended to enable the Court of appeal to check the improper use of the power conferred by s. 518. JAWAHIR SINGH v. MUL RAJ, **8 A. 449 = A.W.N. 1886, 210.** [*F.*, 12 O.C. 23; *R.*, 74 P.R. 1894.]

(13)—*Arbitrator, power of, to direct payment by instalments—Award, meaning of—Civ Pro. Code (Act XIV of 1882), ss. 518 and 522.*—*Held*, that the word "award" in the last sentence of s. 522 of the Code, means the award as given by the arbitrators, and not as amended by the Court under s. 518 of the Code. (8 A. 449. *F.*; 13 P.R 1906, *R.*) *Held* further, that, where all matters in dispute between the parties to a suit for money due on a bond were referred to arbitration, the arbitrator had power to determine not only the amount to be paid, but also the mode of payment, and could therefore direct payment by instalments. RAM SARUP v. BINDRA PRASAD, **12 O.C. 23 = 1 Ind. Cas. 328.**

——5.—Private Arbitration.

(1)—*Arbitration not started with Court sanction—Necessity for agreement in writing.*—In arbitrations not started with the sanction of the Court the agreement need not be reduced to writing before it can be binding. MUDHOO MANJEE v. RAJAH NILMONEE SINGH DEO, **18 W.R. 533.**

(2)—*Award of private arbitrators—Suit to set aside—Civ. Pro. Code, 1882, s. 525.*—An award by private arbitrators not appointed by a Court of Justice may be filed under s. 525, Civ. Pro. Code, 1882, and a suit will lie to enforce it MAUNG KYAN PON v. MAUNG YAN NYEIN, **U.B.R. 1897—1901, Vol II, 10.** (U.B.R. 1892—1896, Vol. II, 13, U.B.R. 1897—1901, Vol. II, 4, *Rel. on.*)

(3)—*Private arbitration—Validity—Evidence of arbitrators.*—A submission to private arbitration may be perfectly valid, though not put in writing, and a private award made in pursuance of such submission will be respected and treated as valid by the Courts if duly performed, and the possession of the contested property be held under them. The arbitrators may be competent to prove as well the submission as the making of the award, though no *ikrarnama* was ever executed. BAHAL SINGH v. SHIBO RAM SINGH, **W.R. 1864, 76.**

(4)—*Submission of points in dispute to.*—There is nothing in Act VIII of 1859 to prevent parties, who have a suit pending in Court, to submit the subject-matter of that suit and other matters in dispute to arbitration under s. 327. THAKOOR DOSS ROY v. HURRY DOSS ROY, **W.R. 1864, Mis. 21.** [*Appl.*, 6 C. 251; *F.*, 4 B. 1; *R.*, 26 B. 76, 3 Bom. L.R. 431.]

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

(5)—*Civ. Pro. Code (Act X of 1877), ss. 506, 523 and 525—Parties to suit, power of, to agree to refer to private arbitration.*—Ss. 523 and 525 of the Civ. Pro. Code (Act X of 1877), contemplate arbitration without the intervention of the Court by "any persons" with respect to "any matter" and contain no express exception as to parties to a suit or to matters in litigation in a suit or proceeding actually pending, and there is nothing in s. 506 of the Code showing any intention on the part of the Legislature to forbid arbitration by the parties to a suit without the intervention of the Court. Consequently, the mere circumstance of matters having been agreed to be referred to arbitration during the pendency of a suit in which they were in litigation, is not of itself a sufficient reason for the Court's refusing to file such agreement to refer. HARIVALABDAS KALLIANDAS v. UTAMCHAND MANEKCHAND, **4 B. 1.** [*Diss.*, 30 C. 218=7 C.W.N. 180; *R.*, 6 C. 251 =7 C.L.R. 92, 26 B. 76=3 Bom. L.R. 431, 8 Bom. L.R. 777.]

(6)—*Private award, partly good and partly bad—Validity.*—In the case of a private award, it is open to the Court to affirm such of the portions of the award as are good and reject those that are bad, and it is not necessary that it should affirm the award in its entirety or reject it altogether which would be the case with an award under the Civ. Pro. Code. MIRAN BAKHSH v. RAHIM BAKHSH, **18 P.R. 1892.** [*R.*, 84 P.R. 1907.]

(7)—*Civ. Pro. Code, 1859, s. 327—Private award—Grant of new trial—Disposal of case in defendant's absence—Oral pronouncement of judgment—Subsequent writing of judgment—Award not enforceable.*—In the case of a private award, where the arbitrators grant a new trial, and dispose of the case in the absence of the defendant, and a year after allowing the new trial one day verbally pronounce their judgment to one party, and another day to the other, and on a subsequent date write out the award which is signed on a particular date by one arbitrator who sends it to others elsewhere for signature on a different date, held that the award ought not to be enforced under Act VIII of 1859, s. 327. NADER ALI v. MAJOO, **21 W.R. 377.**

(8)—*Civ. Pro. Code (Act X of 1877), ss. 525, 526, "show cause," meaning of—Omission of some of the arbitrators to sign award, not fatal to award—Award on private arbitration—Omission to decide principal items of dispute, effect of.*—In cases under s. 525 of the Civ. Pro. Code, the Legislature cannot be taken to have intended that a mere allegation of the existence of cause, without any inquiry whatever into the validity of the cause alleged, should be taken as sufficient to prevent the filing of an award. The words "show cause," wherever they occur in the Civ. Pro. Code, have been used in their well understood and technical sense signifying not merely to allege cause, nor even to make out that there is room for

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

argument, but both to allege cause and prove it to the satisfaction of the Court. Two main objections were taken to the arbitration award directed to be filed by the lower Court in this case. The first of them was that the award was drawn up and signed by four only out of seven arbitrators, and that the remaining three were not asked to sign and never did sign it. But, as was contended by the other side in support of the award, it was not effected by the document in question, nor on the date on which it was signed. The actual award was an oral award made by all the arbitrators on a previous day, and the drawing up of the document was a purely ministerial act to give effect to the judicial act already completed. Consequently, the omission to take the signatures of the minority of the arbitrators to be document which formed the merely formal record of the award, could not vitiate the award itself. The other objection was that the award had left undetermined an important matter referred to arbitration, *viz.*, the partition of certain field lands regarding the division of which the parties were at issue, and the High Court allowed the objection and held that the fact of the award having left undetermined one of the main subjects of dispute and reference, constituted sufficient cause shown against the award, such as is mentioned in s. 520, cl. (*a*) of the Code, and affecting the award in an important particular, and that, as the High Court had no power to remit the award to the arbitrators for re-consideration and amendment, the lower Court's order for filing the award should be set aside. DANDEKAR v. DANDEKARS, **6 B. 663.** [*F.*, 9 C. 575, 11 C. 166, 8 A. 340=A.W.N. 1886, 107, 16 A. 231=A.W.N. 1894, 60; *Appl.*, 20 B. 208; *R.*, 7 B. 316, 7 B. 341, F.B., 9 B. 82, 2 C.P.L.R. 202, 16 C. 482, 21 C. 213, F.B., 17 A. 21=A.W.N. 1894, 187. F.B., 20 B. 596, 28 B. 287=6 Bom. L.R. 15, 27 A. 526= 2 A.L.J. 416=A.W.N. 1905, 86; *D.*, 17 B. 674, U.B.R. 1892—1896, Vol. II, 276.]

(9)—*Private award, Plea of, whether tenable.*—A private award is a good plea to a suit in which plaintiffs seek to recover property, being part of the subject-matter of the award in favour of the defendant ALAM KHAN v. MUHAMMAD NAWAZ KHAN, **32 P. R. 1888.** (56 P.R. 1886, *D.*)

(10)—*Private arbitration—Award—Time for enforcing the award.*—An award of private arbitration must be enforced within 6 months from the date of the award. BHYRUB JHA v. HUNOOMAN DUTT JHA, **3 W.R. 123.**

(11)—*Civ. Pro. Code (Act VIII of 1859), s. 327—Enforcement of award, suit for.*—S. 327, Civ. Pro. Code, is not imperative, and there is no doubt that a suit lies to enforce an award made without the intervention of a Court of Justice. PALANIAPPA CHETTY v. RAYAPPA CHETTI, **4 M.H.C. 119.** [*F.*, 20 W. R. 420, 20 M. 490; *R.*, 8 M.H.C. 81, 21 C. 213, U.B.R. 1892—1896, Vol. II, 11, 18 M. 423, U.B.R. 1906, Specific Relief, 30, p.3.]

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

(12)—*Award by arbitrators—Act VIII of 1859, s. 327.*—S. 327, Act VIII of 1859, does not provide that no arbitration-award shall be binding upon the parties unless filed in Court. It gives the sanction of a decree to all awards duly filed. Awards not filed, when pleaded, require to be regularly proved. SOOPHUL SINGH v. METHOO SINGH, **1 W.R. 163.**

(13)—*Award of arbitration, when valid without Court's intervention.*—If possession under an award of arbitration is shown, it would suffice to make it a valid award without the intervention of the Courts. MOHESH CHUNDER MOITER v. BULORAM MOITER, **6 W.R. 94.**

(14)—*Private arbitrations—Validity.*—Arbitrations not brought into Court under s. 327, Act VIII of 1859, are not necessarily invalid. RAMYAD SAHOO v. DOOLAR SAHOO, **9 W.R. 441.**

(15)—*Award not filed under Civ. Pro. Code, 1859, s. 327—Validity of award.*—An award of arbitrators is not a nullity, because it has not been filed in Court under the provisions of Act VIII of 1859, s. 327. NURSINGH GARIWAN v. PUTTOO OSTAGUR, **20 W.R. 420.**

(16)—*Civ. Pro. Code, ss. 520, 521, 525, 526, —Application to file award—Objections to filing, impeaching identity of award—Court not competent to inquire into.*—S. 525 of the Civ. Pro. Code makes no provision for the trial of a question of whether the reference to the arbitration has been really made or whether the award is *prima facie* void. The provision that is made by s. 526, which must be read along with s. 525 of the Code as its intended complement, is that the award must be filed, unless one of the objections specified in ss. 520 and 521 is established. These objections all relate to a case in which the reference and the award are accepted facts. In this case, when application was made to the Subordinate Judge to file the award, an objection was taken which, in the result, impeached the identity of the award, and the Judge, after an investigation, decided against the objections, and ordered that the award should be filed. The High Court set aside the order, directing that the award be not filed or be deemed not to have been filed. SAMAL NATHU v. JAISHANKAR DULSUKRAM, **9 B. 254.** [*F.*, 17 B. 674, 17 A. 21=A.W.N. 1894, 187, F.B.; *Appr.*, 21 C. 213, F.B.; *Expl.*, 29 B. 621=7 Bom.L.R. 644; *R.*, 10 B. 381, 18 M. 423, 20 B. 596, 25 C. 757, F.B., 13 C.P. L.R. 53, 6 Bom.L.R. 15,28 B. 287, 19 M.L. J. 394=6 M.L.T. 137=2 Ind. Cas. 92.]

(17)—*Civ. Pro. Code, 1882, ss. 520, 521, 525, 622—Objection to filing award—Misconduct—Application agreed to be tried as regular suit—Appeal--Second appeal.*—When an application is made to the Court to file an award under s. 525, Civ. Pro, Code, 1882, and an objection is made to the filing of it upon any of the grounds mentioned in ss. 520 or 521, the proper course

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award, in which all the objections to its validity may be properly tried and decided. (15 W.R. F.B., 9, 13 W.R. 85, 21 W.R. 183, 12 W.R. 85, 3 C. 377, *R.*) But, where the first Court, instead of dismissing the application as it ought to have done, fixed an issue for trial in this general form—"whether the award could be filed and enforced?"—and had proceeded to try the questions at issue, precisely as if it had been a regular suit brought to enforce the award and both the parties had consented to that course and had brought forward all the arguments and evidence on both sides which they could have brought forward in a regular suit, and the first Court, after hearing the evidence, dismissed the application, and the first appellate Court decided that the award was valid, *held* that it could not be objected in second appeal that the lower Courts had acted without jurisdiction and that the proceedings of the lower Courts could not be set aside under s. 622, Civ. Pro. Code, even if any application had been made under that section. HURO NAUTH ROY v. NISTARINI CHOWDHRAIN, **13 C.L.R. 14.**

(18)—*Partnership—Reference to arbitration.*—Partners may, in a partnership deed, agree that future disputes arising between them with reference to partnership transactions shall be settled by reference to arbitration; and when once they have so agreed, they are bound by such agreement and by any proceedings that may be adopted thereunder. And when the agreement, though not naming the arbitrators, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the arbitrators were named in the agreement itself. G. S. JONES v. LEDGARD, **8 A. 340 = A.W.N. 1886, 107.**

(19)—*Ss. 520, 521, 525, 526, Act XIV of 1882 (Civ. Pro. Code) — Application for filing a private award—Objections raised in a verified written statement falling within s. 521—Practice — Arbitration private.* — Where an application is made to a Court for filing a private award, and objections are raised in a verified written statement, and the objections are such as fall within s. 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not. (By the Full Bench). *Per Prinsep, Piggott and Macpherson, JJ.*—Where the objection taken was that the matters in dispute had never been referred to arbitration, *held*, that the Court had no jurisdiction under s. 525 to deal with it, and that it should reject the application and refer the parties to a suit.

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

Per Ghose, J.—When the Court refuses to file an award, such order of refusal is not a decree, and is not open to appeal. *Quære.*—Whether in that case, the proceedings could be regarded as proceedings in a suit properly so called. *Per Petheram, C.J.*—S. 526, Civ. Pro. Code, creates a mode by which the award, when made, to be enforced. SURJAN RAOT v. BHIKARI RAOT. **21 C. 213, F.B.** [*F.*, 26 B. 596, 25 C. 757, F.B.; *Appr.*, 33 C. 757=10 C. W.N. 609=3 C.L.J. 450; *R.*, 16 A. 234, Note =A.W.N. 1894, 60, 17 A. 21, F.B.=A.W.N. 1894, 187, 18 M. 423, U.B.R. 1897—1901, Vol. II, 5, 13 C.P.L.R. 53, 28 B. 287, 2 C.L.J. 80; *Disappr.*, 112 P.L.R. 1901, F B.=84 P. L.R. 1901; *Diss.*, 25 C. 757, F.B.]

(20)—*Arbitration—Reference out of Court—Application to file award—Objection as to validity of submission and award—Civ. Pro. Code, 1882, ss. 521, 522, 525, 526—Practice.*—Where on an application to file an award under ss. 525 and 526 made by arbitrators under a private reference the respondent questions the *factum* and validity of the submission itself and also the award, and such objection is, in the opinion of the Court, neither frivolous nor colourable, the Court has no jurisdiction to deal with it and must refer the parties to a regular suit. (9 B. 254, 21 C. 213, *F.*; 17 A. 21, *Not F.*) And the Court is not bound to go into evidence on the objections raised, even though it had issued notice under s. 525 of the Code. TAJPUR v. MAHOMED JAMAL, **20 B. 596.** [*Not F.*, 112 P.L.R. 1901, F.B.; *R.*, 25 C. 757, F.B.=2 C.W.N. 529, 13 C.P.L.R. 53, 29 B. 621=7 Bom. L.R. 644, 11 C.L.J. 131; *D.*, 6 Bom. L.R. 15=28 B. 287.]

(21)—*Ss. 525, 526, Civ. Pro. Code, 1882—Reference to arbitration, denial of—Jurisdiction for determining factum of reference—Order under s. 525 amounting to decree—Appeal.*—When an application is made under s. 525 and notice is given to the parties to the alleged arbitration, the Court's jurisdiction to order the award to be filed and to allow proceeding to be taken under it, is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference. (17 A. 21, *F.*) [*Appr.*, U.B.R. 1897—1901, Vol. II, 5 (6); *R.*, 13 C.P.L.R. 53, 112 P.L.R. 1901, F.B. =84 P.R. 1901, 29 C. 278=6 C.W.N. 235, 28 B. 287, 31 C. 516, 2 C.L.J. 80, 2 C.L.J. 431, 28 A. 621=A.W.N. 1906, 136, 1 S L.R. 149, 36 C. 713=13 C.W.N. 654=9 C.L.J. 563, 46 P.R. 1909=72 P.L.R. 1909, 29 B. 621.] An order, under s. 525, rejecting an application to file an award on the ground that there has been no valid reference to arbitration, amounts to a decree within the meaning of s. 2, Civ. Pro. Code. An appeal lies from such order. MAHOMED WAHIDUDDIN v. HAKIMAN, **25 C. 757, F.B.=2 C.W.N. 529.** (25 C. 141, *F.*) [*F.*, U.B.R. 1897—1901, Vol. II, 297, 23 M. 101, 100 P.R. 1907=17 P.L.R. 1908, 4 L.B.

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

R. 130, 7 C.L.J. 486; *R.*, 112 P.L.R. 1901, F.B.=84 P.R. 1901, 27 M. 255, F.B.=14 M. L.J. 356, 10 C.W.N. 601=2 C.L.J 153, 33 C. 757=10 C.W.N. 609=3 C.L.J. 450, 9 O.C. 205, 13 C.P.L.R. 53, 2 C.L.J. 80, 80 P.R. 1909, 46 P.R. 1909=72 P.L.R. 1909.]

(22)—*Civ. Pro. Code, 1859, s. 329—Motion to amend award—Power of Court.*—Where, on the ground of obvious errors in an award, a motion to amend it was made the Court held that it had no power under Civ. Pro. Code, 1859, s. 327, to amend or remit it for the re-consideration of the arbitrators, but only to file and enforce the award or reject it. ALLARAKHIA v. JEHANGIR, **10 B.H.C. 391.** [*Appl.*, 3 M. 68; *F.*, 27 A. 526=2 A.L.J. 416=A.W.N. 1905, 86.]

(23)—*Award in criminal matter—Civ. Pro. Code, 1859, s. 327.*—When a complaint has been preferred to a Criminal Court, and the Magistrate has directed that the subject-matter of the complaint be referred to arbitration, if the parties consent and proceed to such reference, the award may be enforced under the provisions of s. 327, Act VIII of 1859. SHEO NUND RAI v. MAHANUND RAM, **1 Agra 45.**

(24)—*Filing private award in Court—Amendment of plaint taking case out of scope of Ch. 37 of the Civ. Pro. Code. 1877—Civ. Pro. Code, 1877, ss. 520 (a), 525, 526—Appeal.*—Where, by the amendment of a plaint, permitted by the Court after the first hearing, a case under s. 525 of the Civ. Pro. Code, is converted into one beyond the scope of Ch. 37 of the Code, a decree passed in such a suit is appealable. Where a private award determines matters not referred to arbitration, an application, under s. 525, for the filing of such award, is liable to be dismissed. JUALA SINGH v. NARAIN DAS, **4 A. 541.** [*F.*, 27 A. 526=2 A.L.J. 416=A.W. N. 1905, 86.]

(25)—*Awards—Power of arbitrators—Act VIII of 1859, s. 327.*—The parties submitting to an arbitration are at liberty, if they choose, to allow the arbitrators to take *seriatim* the matters in dispute, and, so to say, to deliver a series of awards. The Court has power to file an award, in the above circumstances, though all the matters submitted to arbitration had not been decided. BRIMOTI SHOSHEMUKHI DABIA v. NOBIN CHUNDER ROY, **4 C.L.R. 92.**

(26)—*Private arbitration award filed in Court—Practice before execution ordered.*—Where a private arbitration award is filed in a Court, the prescribed course is for the Court to give judgment upon it, and pass a decree; not to order execution before such decree has been passed. SAHEB RAM JHA v. KASHEE NATH JHA, **21 W. R. 295** [*R.*, 2 A. 471.]

(27)—*Civ. Pro, Code, 1882, s, 526—Private award—Order refusing to file such award—Appealability.*—An order under s. 526 of the Code, refusing to file an award of arbitrators

Arbitration—continued.

—5.—**Private Arbitration**—*continued.*

made out of Court, is appealable as a decree. MUL RAJ v. LADHA MAL, **100 P. R. 1907=17 P.L.R. 1908.** (26 A. 205, *Diss.*; 27 M. 255, 29 M. 303, 25 C. 757, 33 C. 757, 84 P.R. 1901, F.B.=112 P.L.R. 1901, *F.*; 25 P.R. 1902, P.C., *R.*)

(28)—*Power of Civil Court to finally adjudicate—Private arbitration during suit—Whether can be regarded as adjustment.*—Every Civil Court has power to proceed to finally adjudicate on a civil suit, unless under some provision of Civ. Pro. Code or any other Act, its jurisdiction is ousted. The only bar a reference to arbitration not made a rule of Court can be said to create is that which was provided for in the last clause of s. 21, Specific Relief Act, which will be inapplicable to a case when reference is made during pendency and not before the institution of a suit. A mere reference to arbitration where there is no distinct agreement that the proceedings should be abandoned could not be regarded as an adjustment within the meaning of s. 375, Civ. Pro. Code. The adjustment contemplated by that section should be of such a nature as to enable the Court then and there to dispose of the suit finally; a mere reference to arbitration is no adjustment, if it leaves the matter in as unsettled a condition as before and more so when one of the parties defies the reference itself. An equitable bar to the continuance of the suit that the parties had agreed to forego further legal proceedings cannot be pleaded if there is no express agreement to that effect. BUDHA v. HAKU, **130 P. R. 1882.** [*F.*, 50 P.R. 1891.]

(29)—*Act VIII of 1859, s. 327—Private arbitration-award—Small Cause Courts—Jurisdiction.*—A Small Cause Court has jurisdiction, under Act VIII of 1859, s. 327, to entertain an application to file a private arbitration-award relating to a debt not exceeding the amount cognizable by such Court, if the defendant resides within its jurisdiction. ELAM PARAMANICK v. SOJAITULLAH SHAIKH, **1 B.L.R. A. C. 43=10 W.R. 85.** [*F.*, 13 W.R. 233=4 B.L.R. App. 82, 10 B.H.C. 54.]

(30)—*Reference to arbitration of matter in suit—Award therein, bar to further proceedings—Specific Relief Act, s. 21.*—Where the parties to a suit refer the matter of such suit to arbitration, without the intervention of the Court, and an award is passed dismissing the plaintiff's claim, such award is a bar to further proceedings in the suit. (S. 21, Specific Relief Act). SALIG RAM v. JHUNNA KUAR, **4 A. 546=A. W. N. 1882, 135.** [*Not F.*, 4 O.C. 17; *F.*, 27 A. 53=A. W. N. 1904, 160=1 A.L.J. 389.]

(31)—*Ss. 522, 526 and 622—Civ. Pro. Code, 1882—Award, private—Application to file—Objection under s. 520—Matters left undetermined—Disallowance of objection—Decree directing award to be filed—Appeal—S. 522, when applies—Practice—Mofussil Courts—Original side—Revision, power of, of High Court—Exercise suo motu.*—*Per Curiam* (*Rampini and Pratt, JJ., contra*)—An appeal lies from an order passed under s. 526, Civ. Pro. Code, merely directing the filing of an award made on a submission to arbitration without the intervention of a Court of Justice. Upon an application under s. 525, Civ. Pro. Code, to have a private award filed, the opposite party objected that the arbitrator had left undetermined certain matters referred to him for decision. The objection was overruled and the award was ordered to be filed and a formal decree was drawn up containing the following direction: "It is ordered that the arbitration award in this case be filed in Court." This decree was set aside on appeal, the lower appellate Court holding the objection to be a valid one: *Held, Per Curiam* (*Maclean, C J.*, and *Sale, J., contra*)—That no appeal lay from the decree of the first Court and the lower appellate Court had no authority to interfere with it. *Per Maclean, C.J.*, and *Ghose, J.*—When an award has been ordered to be filed under s. 526, the party, in whose favour it is, must proceed to obtain a judgment and consequent decree under s. 522, and if that decree is according to the award, then there is no appeal from it. *Per Ghose, Rampini* and *Pratt, JJ.*—The decree in this case was substantially a decree in accordance with an award as contemplated by s. 526, read with s. 522. *Per Sale, J.*—No decree expressly incorporating the terms of the award is required to be drawn up in pursuance of the order to file the award made under s. 526, nor is the clause restricting the right of appeal in the case of a decree made under s. 522, applicable to an order to file an award made under s. 526. *Per Rampini* and *Pratt, JJ.*—No appeal lies from an order directing an award to be filed under s. 526, except when the decree is in excess of, or not in accordance with, the award, although an order refusing to file the award, is appealable. *Per Maclean, C.J.*—An order directing as well as one refusing the filing of an award stand on the same footing as regards appealability. (6 C.W.N. 226=29 C. 167=29 I.A. 51, *Cons.*). *Per Curiam.*—The High Court can interfere under s. 622, of its own motion and in the absence of an application under that section. JANOKEY NATH GUHA ROY v. BROJO LAL GUHA ROY, **10 C.W.N. 609, F.B. =3 C.L.J. 450=33 C. 757.** [*Diss.*, 58 P.W.R. 1907=1 P R. 1908; *F.*, 126 P.R. 1907=88 P.W. R. 1907=50 P.L.R. 1908, 7 C.L.J. 486; *Cons.*, 11 C.W.N. 220; *R.*, 1 S.L.R. 86, 149, 100 P. R. 1907=17 P.L.R. 1908, 4 L.B.R. 130; *D.*, 4 L.B.R. 249=14 Bur. L.R. 129.]

(32)—*Reference to private arbitration by parties pending a suit—Arbitration—Award—Application to file the award—Such application is foreign to the suit—Practice.*—Ch. XXXVII of the Civ. Pro. Code governs references to arbitration. It contemplates two classes of references: one by the parties to a suit who obtain an order from the Court for a reference to arbitration; the other when persons agree in writing that the difference between them shall

Arbitration—continued.

——5.—**Private Arbitration**—*continued.*

be referred to arbitration. Parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration. But the mere fact that litigants may agree to a private arbitration, does not make that arbitration an arbitration in the suit unless there is an order of reference as contemplated by s. 506. The parties to a suit during the pendency thereof referred the matters in dispute to a private arbitration. The arbitrator having given his award, the plaintiff applied to have the award filed and for a decree in terms of the award. The defendant objected to the award on several grounds. The Subordinate Judge asked the plaintiff to pursue the remedy given him by law to enforce the award and dismissed the suit:—*Held*, that as there was no order of reference, the reference was governed by ss. 523—526 of the Civ. Pro. Code; and under those sections, it was necessary for an application to be made as provided by s. 525. *Held*, further, that it was not open to the Court to treat the application as made in the suit; the application was completely foreign to the suit. The Court had, therefore, no power on that application to dismiss the suit. SHIVLINGRAO v. RANGO, **8 Bom. L.R. 777**.

(33)—*Civ. Pro. Code, 1882, ss. 522 and 526—Private arbitration—Awird made a rule of Court—Appeal.*—When an award made in a private arbitration has been made a rule of Court and a decree passed thereon no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. BAHADUR SINGH v. NEGI PURAN SINGH, **A.W.N. 1908, 54=5 A. L.J.160=30 A. 151.** (27 A. 526, *D.*)

(34)—*S. 525, Civ. Pro. Code, 1882—Award—Submission without the intervention of Court—Order refusing to file—No appeal.*—No appeal lies from an order refusing to file, under s. 525 of the Code, an award passed upon a submission made without the intervention of the Court. BASANT LAL v. KUNJI LAL, **2 A.L.J. 450=A.W.N. 1905, 165=28 A. 21.** (6 A. 186, 26 A. 205=A.W.N. 1903, 234, *F*; 29 C. 167, *Expl*; 18 C. 414, *R*.) [*Not F.*, 4 L.B.R. 130; *R.*, 9 O.C. 205, 1 S.L.R. 149, 7 A.L.J. 425; *D*, 126 P.R. 1907=88 P.W.R. 1907=50 P.L.R. 1908.]

(35)—*Ss. 522, 525, 526, Civ. Pro. Code, 1882—Arbitration award, private—Decree—Appeal.*—When a Court has ordered a private arbitration award to be filed under s. 526, Civ. Pro. Code, and has drawn up a decree in accordance with the award, no appeal lies against such decree except in so far as the decree may be in excess of, not in accordance with the award. *Quære.*—Whether this rule is not limited to cases of misconduct and has any application when the cause shown against the

Arbitration—continued.

——5.—**Private Arbitration**—*concluded.*

filing of the award has denied the submission to arbitration or the genuineness of the award. (18 M. 423, *R.*) S. 526 should be read with s. 522, the provisions of which are, by implication, made applicable to cases under the former section; the Court must proceed to give the judgment according to the award and upon the judgment so given, a decree shall follow, from which decree, no appeal lies, except in so far as the decree is in excess of, or not in accordance with, the award. The decision of the Full Bench in 25 C. 757, in so far as it affirmed the decision in 25 C. 141, has been overruled by the Privy Council in the case of 29 I.A. 51. *Semble.*—An order of refusal by a Court of first instance to file an award under s. 526, Civ. Pro. Code, is a decree, against which an appeal lies. (27 M. 255, 2 C.L.J. 80, *F.*; 26 A. 205, *D.*) The bar as to appeal provided by s. 522, Civ. Pro. Code, is applicable only when a decree has been made in accordance with the award by the Court of first instance and not when a similar decree has been made by a Court of appeal in reversal of the order of the first Court setting aside the award. CHINTAMONI ADITYA v. HALADHAR MAITI, **2 C.L.J. 153=10 C.W.N. 601**. [*Appr.*, 33 C. 899, 33 C. 757=10 C.W.N. 609=3 C.L.J. 450; *R.*, U.B.R. 1906, 4th Qr., Civ. Pro. Code, 52, 1 P.R. 1908=58 P.W.R. 1907, F.B., U.B.R. 1905, C.P.C. 40.]

(36)—*Private award regarding family property—Penalty for breach of terms of agreement—Enforcement.*—The parties to a private award regarding some family property agreed among themselves that the terms of the agreement should be complied with in a certain way and also agreed to a summary mode of enforcing the penalty prescribed for the breach of the conditions. When application was made to the Court for enforcing the penalty, both parties tried to take advantage of it and an objection was taken that the penalty should be enforced by a regular suit. *Held* that such an objection cannot be entertained in special appeal. BABOO KOYLASHPUTTY NARAIN SINGH v. BABOO BEER NARAIN SINGH, **6 W. R. Mis. 41.**

See BOM. ACT XVII OF 1879, s. 47, 8 B. 20.

See COMMISSION, 3 B.L.R. App. X 3 (*a*).

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 4 B.L.R. App. 82=13 W.R. 233.

——6.—**Reference to Arbitration.**

(1)—*Arbitration—Act XVIII of 1873 (N.W.P. Rent Act)—Act XIX of 1873 (N.W.P. Land Rev. Act).*—The general law, which allows parties to suits, if they are so minded, before issue joined, to refer the matter in dispute to arbitration, and after issue joined, with the leave of the Court, applies also to suits under Act XVIII of 1873, which does not prohibit such reference. *Per Stuart, C.J. contra.* GOSHAIN GIRDHARIJI v. DURGA DEVI, **2 A. 119, F.B.**

***Arbitration*—continued.**

——6.—Reference to Arbitration—*continued.*

(2)—*General reference to arbitration—Powers of arbitrator.*—Under a general reference of all matters in difference, the arbitrator is not confined within the rules of law and equity, but has greater latitude than the Courts of Law in order to do complete justice between the parties; and he may take into consideration all moral questions in forming his judgment, and decide according to equity and good conscience, *e.g.*, he may relieve against right which lies hard upon one party, but which, having been acquired legally and without fraud, cannot be resisted in a Court of Justice. Such being the powers of arbitrators, the effect of their award also is powerful. An award is a final and conclusive judgment as between the parties respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal, except where it is provided expressly that it shall have a temporary effect only. (Russel on Arbitration's, 4th edition, pp. 110 and 476, *R.*) PARMESHRI v. LACHUMI, **A W.N. 1884, 148.**

(3)—*Arbitration—Reference—Award—Powers of arbitrators—Award—Decree.*—The Code of Civil Procedure deals with arbitration under three heads: (1) where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In this case all proceedings from first to last are under the supervision of the Court; (2) where parties having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court; (3) where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. There is a difference between these three classes. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So, in this class, no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3 proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. There is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civ. Pro. Code. GHULAM JILANI v. MUHAMMAD, **4 Bom. L.R. 161.**

(4)—*Ss. 312 and 325, Civ. Pro. Code, 1859. scope of—Agreement to settle suit.*—Ss. 312 and 325 of Civ. Pro. Code, 1859, are enabling, and were not intended to be restrictive or exclusive. Parties, who are *sui juris*, are

***Arbitration*—continued.**

——6.—Reference to Arbitration—*continued.*

competent, before decree, to make any agreement as to the settlement of the suit. JOGES SUR BANERJEE v. KULYANEE CHURN DEO, **24 W.R. 41.** [*R.*, 1 Bom L.R. 261.]

(5)—*Duty of Court in passing judgment on award—Matters to be referred to arbitration—Principle.*—In passing judgment on an arbitration-award, the Court must confine itself to the plaintiff's claim on which it must give a decision. Whatever matters the parties may agree to refer to arbitration, they can only apply to the Court to refer such matters as are in difference between them in the suit, or any of such matters. TARANATH CHOWDRY v. MANICK CHUNDER DOSS, **14 W.R. 469.**

(6)—*Arbitration—Act VIII of 1859, s. 313—Parties.*—An application for arbitration as provided by s. 313, Act VIII of 1859, is wholly invalid, unless made by all the parties materially interested. BAIKANTHNATH CHATTERJEE v. SHEIKH NAZIRUDDIN, **1 B.L.R.S.N. 11 (b) = 10 W.R. 171.**

(7)—*Application made during hearing—Civ. Pro. Code. 1859, s. 313*—When an application for reference to arbitration is made in open Court at or during the final hearing of a suit, in the presence of all parties, and they consent thereto, a written authority, such as that referred to in s. 313 of Act VIII of 1859, would not be required. MIRZA AKBER BEG v. BUNDA ALI, **2 N.W P. 419**; JEYSANKIRA DEVI v. NAGANNADA DEVI, **1 M. 106 = 1 Ind. Jur. O S. 136.**

(8)—*Submission in writing—Civ. Pro. Code, 1859, s. 326*—S. 326 of the Civ. Pro. Code made all submission to arbitration by an instrument in writing practically a rule of Court. PESTONJEE NUSERWANJEE v. MANOCKJEE AND CO., **1 Ind. Jur. N.S. 69.**

(9)—*Application, how and by whom to be made.*—The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person or their pleaders specially authorized in that behalf. BHRIGOO ROY v. BHAGRUTH UPADHYA, **W. R. 1864, Act X, Rul, 41.** [*D.*, 27 C. 61.]

(10)—*Oral application of parties.*—A reference on the oral application of the parties in person is valid. NATHA SINGH v. JODHA, **24 P.R. 1878.**

(11)—*Letters submitting to arbitration—Stamp not required—Verbal agreement, evidence of.*—Letters written by parties authorising the arbitrators to arbitrate between them do not require to be stamped. Each letter is to be read as against the party writing it, and operates as a submission to arbitration by that party. Together they might be used as evidence of a verbal agreement to submit to arbitration. GANGA RAM KUSHABA RANGOLE v. NARAYAN BABAJI RANGOLE, **19 B. 32.**

(12)—*Appointment of an umpire, what it implies.*—Where an umpire is appointed, the

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

implication is that, under the provisions of ch. VI of Act VIII of 1859, the parties agree to be bound by the award of the umpire or of the majority of the arbitrators. BUSSAWA SINGH v. BOODHOO, **9 P.R. 1869.**

(13)—*Arbitration—Consent of all parties necsssary to reference—Civ. Pro. Code, 1882, s. 506.*—The appointment of arbitrators being virtually a statutory delegation of authority by a Court of Justice to persons who are appointed by the parties as their Judges, such delegation must be in strict conformity with the provisions of the statute which allows such delegation; and therefore, if "all the parties" do not, consent to refer to arbitration, the arbitration is invalid under s 506, Civ. Pro. Code, and the award that follows thereupon is, therefore, also not binding on the parties. DEO NANDAN v. BHIRGU RAI, **A.W.N. 1887, 215.** (4 A. 302, 10 W.R. 463, *Rel. on.*) [*R.*, 24 A. 229.]

(14)—*Civ. Pro. Code 1882, s. 506—Application by pleader not specially authorised—No acquiescence.*—Where a pleader who signed the application for reference to arbitration was not as required by s. 506, Civ. Pro. Code, specially authorised to put in such an application, and there was nothing to show that the reference to arbitration was acquiesced in by the subsequent conduct of the party, *held* that there was no valid reference to arbitration. SHEO DAS MISSER v. BIRJ NANDAN PERSHAD, **7 C.W. N. 343.** (24 C. 469, *D.*)

(15)—*Submission signed by mukhtar not specially empowered—Effect of award.*—The signing by a mukhtar, not specially empowered to refer a case to arbitration, of the submission, rendered, under s. 313, Civ. Pro. Code, the award not binding on the principals. WAZEERA v. MOOKUM, **11 P.R. 1869.**

(16)—*Agent's power to refer to—Custom of trade judicially recognised—Existence of—Contract Act, s. 188—Effect.*—Where a custom exists among European importers of Karachi to the effect that no European firms in Karachi will import goods from Europe except on an indent containing an agreement to submit disputes to arbitration, and has been judicially recognised, *held*, that, in the case of an agent dealing with European firms importing goods, the effect of s. 188 of the Indian Contract Act is to confer upon him the authority to refer the disputes to arbitration, that being a lawful thing necessary for the purposes of doing business. An agent dealing with such firms cannot do business at all unless he agrees to a submission of matters in dispute to arbitration. THOMAS BETRAM SHIMWELL v. BANIRAM GOVINDRAM, **3 S.L. R. 5=1 Ind. Cas. 937.**

(17)—*Recognised agent—Power to refer to arbitration—Suit for declaration—Jurisdiction.*—The recognized agent of a party has power to refer the matter in dispute to arbitration. Where the plaintiff's suit for a declaratory decree for title was dismissed in accordance

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

with the award of arbitrators, it cannot be contended in appeal that the Court had no jurisdiction to entertain a suit for a mere declaratory decree, as in that suit a relief in the form of perpetual injunction was also asked for and as there was nothing in s. 42 to deprive the Court of its jurisdiction. HARI SINGH v. MUSSAMMUT LACHMI, **1 P.R. 1882.** [*R.*, **92 P.R.** 1885.]

(18)—*Recognised agent.*—A party to a suit may file an application to refer the case to arbitration through a recognised agent, who need not be specially authorised like a pleader. RAM DAS v. ABBASS KHAN, **51 P.R. 1893.**

(19)—*Next friend—Power to refer.*—There is nothing in the Civ. Pro. Code which prevents a next friend, suing on behalf of a minor, from referring the matter (minor's interests) to arbitration. HAIDAR v. MAUJU, **92 P.R. 1885.** (64 P.R. 1870, F.B., 1 P.R. 1882, 48 P.R. 1882, *R.*)

(20)—*One plaintiff absent—Arbitration—Special authority.*—One plaintiff can assent to an arbitration on behalf of another plaintiff only where there is special authority. The Court cannot allow a case, as regards an absent plaintiff, to be decided by a reference to arbitration. GOUR CHUNDER PUTEETUNDO v. JOOGAL CHUNDER *alias* SHAMA CHURN GHOSE, **1 W.R. 80.**

(21)—*Unauthorized reference—Civ. Pro. Code, 1859, s. 313—Mooktears—Without special authority.*—Where a reference to arbitration was made by mooktears of the parties without holding special authority for that purpose as provided by law (s. 313, Act VIII of 1859) from their clients respectively: *Held* that such reference to arbitration was unauthorised and illegal, and not sufficient to remove the bar of limitation. RAM PERSHAD v. NAZEER HOSSEIN. **1 Agra Rev. 63.** *See, also,* SHUNKER v. HUR NARAIN, **1 Agra Rev. 49.**

(22)—*Reference to arbitration—Consent of parties, not pleaders—Act X of 1859, if provides for reference.*—In referring a matter to arbitration, all the parties to the suit must accord their written consent: the consent of the pleaders is not sufficient. *Quære*—Does Act X of 1859 empower a Judge to refer a case to arbitration. MONSHEE GAZEE v. HAMEED BUKSH, **16 W.R. 160.** [*Diss.*, 27 C. 61.]

(23)—*Want of express consent.*—The Judge intimated that he should refer the suit to arbitration, and allowed a certain time to the parties to object to that course. No objection was made within such time, and, thereupon the Judge referred the cause to arbitrators named by him. After the day fixed, the defendants objected. *Held* that the reference was not warranted, there having been no express consent by the parties. DEGUMBUR CHATTERJEE v. RAM PREA DEBEA, **Marsh 517=2 Hay 583.**

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

(24)—*Voluntary submission to arbitration—Submission by coercion, effect of.*—For a binding award, the parties must voluntarily refer to arbitration; coercion of any sort by the Court will vitiate the reference. ALI BUKSH v. KADIR BUKSH, **28 P.R. 1868.**

(25)—*Negotiations between parties to suit not to be considered—Refusal to submit to arbitration—Presumption.*—Nothing passing between the parties to a suit in an attempt at arbitration or compromise ought to affect the merits of the case as eventually tried before the Court. No presumption can be raised against a party from his refusal to withdraw from the determination, and submit to arbitration. MOHABEER SINGH v. DHUJJOO SINGH, **20 W R. 172.**

(26)—*Conditions for valid decree on award.*—The provisions to be observed in order to the validity of a decree on an arbitration award are that the award should be filed, that the judgment should be passed according to the award and that upon that judgment decree should follow and be carried into effect in the same manner as other decrees of Court. HIMATTOLLAH CHOWDHRY v. BIBEE HEERUN, **13 W.R. 62.**

(27)—*Reference to arbitration—Provision in cases of aifference among arbitrators.*—A Court referring a matter to arbitration must provide for difference of opinion among the arbitrators by enabling a majority to decide the case. FUTTEH SINGH v. GANGO, **4 W.R. 4.**

(28)—*No provision as to difference of opinion—Effect.*—A reference to arbitration is fruitless, if no provision is made as to the procedure in case of difference of opinion. The defect cannot be rectified by the Court authorising the arbitrators to appoint an umpire and to make an award subsequently and without the consent of the parties or their pleaders. MUSSAMMAT BEGAM BIBI v. GHULAM GHAUS, **191 P.R. 1882.** [*D.*, 67 P.R. 1886.]

(29)—*Agreement — Umpire — Difference of opinion.*—Where an agreement to refer to arbitration provides for an umpire, the latter's opinion as to the question referred to will, in cases of difference of opinion, prevail, even though he may not side with the majority. GULAB SINGH v. DHUNI CHAND, **46 P.R. 1889.**

(30)—*Award by arbitrators—Disagreement—Oral evidence—Admissibility.*—An oral stipulation that, in case the arbitrators are not unanimous, the decision of the majority should prevail is admissible in evidence. It does not contradict or vary the express terms of the document, the reference to arbitration being a written submission and providing for the appointment of three arbitrators for deciding the matter in dispute. MA ME HMYIN v. U. NANDA MYIZU, **U.B.R. 1897—1901, Vol. II, 8.** (U.B.R. 1892—1896, Vol. II, 18, 21 C. 213, 25 C. 757, 16 C. 482, *R.*) [*F.*, **2 L.B.R. 105.**]

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

(31)—*Ss. 318, 326, Civ. Pro. Code, 1859—s. 28, Contract Act—Written agreement to refer to arbitration—Order of reference—Award not filed—Order superseding reference—Suit subsequently brought—Agreement not a bar.*—An agreement made in writing by the plaintiff and defendant before suit to refer the matter of disputed accounts between them to arbitration was filed in the District Court under s. 326, Civ. Pro. Code, 1859, and an order of reference was made. The arbitrators filed no award and about 2 months after, the order of reference was made, the Court, under s. 318, Civ. Pro. Code, 1859, superseded the reference and recalled the suit. The plaintiff subsequently sued in the Small Cause Court for the recovery of money received by the defendant for plaintiff's use. *Held*, that the agreement to refer did not preclude the plaintiff from suing under s. 28 of Indian Contract Act and that the order of the District Court amounted to a rejection of the petition to file the agreement. RAI BHAG SINGH v. ASSA SINGH, **37 P.R. 1876.**

(32)—*Parties agreeing to refer to—Arbitrarily altering the mind—Breach of agreement—Suit for damages.*—On an agreement by the parties to refer their differences to arbitration, the Court should, on the application of one of the parties, file the agreement and proceed under s. 326, Civ. Pro. Code, 1859, unless sufficient cause be shown against the agreement by the other party and the fact that such party has altered his mind arbitrarily and without good reason is not a sufficient cause within the section. In case of an arbitrary breach of agreement, a suit for damages will lie. PEER BUKSH v. JUMAL, **80 P.R. 1870.**

(33)—*Petition of arbitrators not an award.*—A report from the arbitrators to the effect that the parties had by their advice settled the dispute amicably between them and executed a document embodying the terms of the settlement not being an award cannot be enforced. ABDUL REHMAN KHAN v. GULAM KADIR KHAN, **79 P.R. 1877.**

(34)—*Agreement signed by some defendants—Disposal of case as regards others by Court, legality of.*—Where only three out of four defendants in a suit signed the agreement to refer to arbitration and the award, followed by a decree, was appealed against, held the decree of a Court dismissing the appeal as regards the three defendants, who had submitted to the arbitration on the ground of the award being final and remanding the case as regards the fourth for a decision on that party's assent was bad in law, as it would give rise to more than one and probably conflicting decisions in the same suit. KHAN MUHAMMAD v. JALAL-UD-DIN, **3 P.R. 1892.** (4 P.R. 1882, F.B., 170 P. R. 1883, *R.*)

(35)—*Application to file award—Objections—Revision—Civ. Pro. Code, 1908, sch. II, ss. 14, 16.*—On an application to file an award, the Court has no power to enquire into and decide

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

objections other than those mentioned in ss. 14 and 16, 2nd Sch., Civ. Pro. Code, 1908, when a party has another remedy open to him, the High Court will not invariably, though usually, refuse to interfere under (s. 622 of 1882), s. 115, Civ. Pro. Code. NARAIN DAS v. MANOHAR LAL, **21 P.R. 1898, F.B.** (134 P.R. 1888, 42 P R. 1893, *Overruled.*) [*Overruled*, 84 P.R. 1901=112 P.L.R. 1901; *R.*, 51 P.R. 1899, 13 P.R. 1903=57 P.L.R. 1903.]

(36)—*Civ. Pro. Code, 1882, ss. 522, 523, 591—Agreement to refer to arbitration—Power of Court to deal with—Finality of award—Appealability.*—A Court is bound to go into the question of the *factum* of an agreement to refer to arbitration. Though a decree based on an award is final, yet, if it could not be shown that there was no valid or legal award, regularly and properly arrived at by arbitrators, it can be appealed against like any other ordinary decree. ATMA RAM v. JAMITA, **134 P.R. 1888.** (48 P.R. 1882, *R.*) [*Cited*, 84 P.R. 1901=112 P.L.R. 1901; *Overruled*, 21 P.R. 1898, F.B.]

(37)—*Award, acceptance of—Subsequent objections—Procedure of Court.*—Where a suit is referred to arbitration and an award had been filed, it is an irregular procedure on the part of the Court to adjourn the case for filing objections against the award, when both parties express their willingness to accept the award. If such irregularity is committed at the instance of any party to the suit, such party is (estopped) by his conduct from questioning the proceedings of the Court. SHEO NARAIN v. SHEO RAM, **15 P.R. 1899.**

(38)—*Date fixed for filing award—Holiday—Filing on following day proper.*—Where the date fixed for filing an award falls on a Court holiday, it may properly be filed on the following day and such filing will be held to be within time. MUHAMMAD YUSAF v. KARIM BAKSH, **78 P.R. 1899.**

(39)—*Agreement to refer to arbitration—Plea of fraud—Investigation by Court.*—In an application to file an agreement to refer a dispute to arbitration, if the defendant raises any objection, such as, that it was obtained by fraud, misrepresentation, etc., the Court is bound to investigate the matter and adjudicate upon his objections. The defendant's bare allegation that his consent was not a free and intelligent consent is not a sufficient cause for not filing the agreement, till the Court adjudicates upon it. RAM PATTER v. BASAKAMAL, **49 P.R. 1893.** (13 P.R. 1888, *F.*) [*Overruled*, 21 P.R. 1898, F.B.; *R.*, 84 P.R. 1901=112 P.L.R. 1901.]

(40)—*Remuneration of arbitrators—Power of Court to order.*—The Court cannot, when there is no agreement by parties to pay any sum as remuneration to arbitrators, order deposit or payment of money for such purpose. MUL CHAND v. NARINJAN DAS, **94 P.R. 1894.**

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

(41)—*Consent to refer to arbitration—Additional property—Mutual mistake.*—When a dispute after succession was referred to arbitration, and it was found after the award that the property was larger than was supposed at the time of the reference, *held* that the plaintiff, though a party thereto, could claim her share in the additional property. MA PWA v. MA BWIN, **L.B.R. 1872—1892, 196.**

(42)—*Condition as to payment of costs—Legality of.*—The Court has no power to hold back a reference to arbitration or attach to it a condition as to payment of costs. The power to deal with costs is limited to an order after the filing of the award. KAUSHIA v. PIRA, **11 P.R. 1886, Rev.**

(43)—*Arbitration award—Reference by Tahsildar*—Ultra vires—*Hindu Law—Mother's share—Right to inherit*—In a mutation case, the parties made an application to the Tahsildar, who was a Magistrate of second class, stating that they would be bound by the award of one P. The Tahsildar made a reference to arbitration. *Held*, that the Tahsildar had no power to make the reference, and the award, not having been made on private reference, was *ultra vires*. The share which a Hindu mother gets on partition between her sons is her *stridhan*. MATHURA PRASAD v. GANGA RAM, **7 A.L.J. 69=5 Ind. Cas. 519.**

(44)—*Withdrawal from the arbitration.*—The parties to a suit agreed through their attorneys to refer the suit to arbitration; and Judge's order was by consent of both attorneys signed in order to carry out that agreement. The defendant was present at the two meetings of the arbitrators but afterthat he changed his attorney, and sent notices to the plaintiff and to the arbitrators withdrawing his assent to the arbitration and took out summons alleging that as he did not sign a special authority to his attorney to sign the consent order that order was not binding upon him: *Held*, that the objection was not valid and the order of reference would stand good. *Semble.*—When a party has seen an order of reference to arbitration and authorized his attorney to consent to it, even though he does not sign it, that writing may be regarded as a special authorization in writing to his attorney to consent to the terms referred to therein. BHANMAL v. MATHURADAS, **1 Bom. L.R. 261.**

(45)—*One of the arbitrators unable to act—Superseding reference.*—If one of the arbitators becomes unable to act, the Court can supersede the reference and decide the case itself. MEHTAB v. MUSSAMMAT MADAN, **24 P.R. 1875.**

(46)—*Arbitrator—Referee—Consent order—Referee unable to act—Court's jurisdiction to proceed with the hearing.*—There is a great difference between the appointment of an arbitrator and of a valuer or referee: the first is appointed to decide differences which have arisen, the second to prevent differences arising.

Arbitration—continued.

—6.—Reference to Arbitration—*continued.*

Where, a consent order is taken out, by the parties to a suit, referring the dispute to a referee, and it becomes impossible for the referee to act, it is competent to the Court to set the consent order aside and to proceed with the further hearing of the suit. SHANTARAM v. JAMSETJI, **4 Bom. L. R. 212.**

(47)—*Arbitration—Invalid reference and award—Appeal from decree passed in accordance with such award.*—Where there is no valid reference to arbitration and no valid award, the decree passed in accordance with it cannot be maintained, and an appeal lies against such decree. SHIB LAL v. CHATURBHUJ, **6 A.L.J. 496=2 Ind. Cas. 363=31 A. 450.** (6 A.L.J. 333, *R.*)

(48)—*Ss. 462 and 506, et seq—Civ. Pro. Code, 1882—Guardian and minor—Arbitration—Authority of guardian to agree to a reference to arbitration on behalf of the minor.—Semble*: that s. 462 of the Code does not apply to proceedings under Chapter XXXVII of the Code. A minor party, therefore, will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence, although the Court has not, under the provisions of s. 462, sanctioned the agreement to refer. HARDEO SAHAI v. GAURI SHANKAR, **A.W.N. 1905, 171=2 A.L.J. 493=28 A. 25.**

(49)—*Award—Decree—Appeal—Second submission, effect of—Infructuous arbitration—Order of remand good.*—In a suit to recover money, the parties referred the matter to arbitration. An award was made and a decree passed in the terms thereof, the Court of first instance having overruled all objections to the validity of the award. Upon appeal to the District Judge on the ground that there was no valid award in law, the parties agreed to refer the matter to a fresh arbitration. The second submission having proved infructuous, and the suit having been remanded for trial on the merits, *held*, that the effect of the agreement to refer the matter to fresh arbitration was that the decree and the award upon which the decree had been founded, were both set aside and could not be regarded as subsisting; the course open to the Judge was either to try the case on the merits or to refer the matter to arbitration. The Court adopted the latter course, and the arbitration having proved infructuous, the only other course open to the Court was to remand the case for trial on the merits. RAHIM BAKSH v. RAM NATH, **2 A.L.J. 477=A.W.N. 1905, 164.**

(50)—*Execution of decree—Costs, question as to, referred in, by agent of judgment-debtor having no express power to refer it to—Subsequent ratification by principal of his agent's reference of the question of costs to arbitration—Civ. Pro. Code, Ch. XXXVII.*—The respondents held a decree against the husband of appellant No. 1, in which there was a question as to costs incurred in an appeal to the Privy

Arbitration—continued.

—6.—Reference to Arbitration—*continued.*

Council. In execution-proceedings of this decree, the decree-holders and the agent of the judgment-debtor applied to have this question of costs referred to arbitration. The agent was not specially authorised to refer the matter to arbitration. The reference was, however, subsequently ratified by his principal, the judgment-debtor. The award was objected to, on behalf of the appellants, on two grounds. Firstly, that Chap. XXXVII of the Code of Civil Procedure relating to arbitration did not apply to execution-proceedings; secondly, the award was illegal and void *ab initio* because it was made on the application of an agent not specially authorised in writing to make such an application. *Held*, that Chap. XXXVII of the Code of Civil Procedure relating to arbitration applies also to execution proceedings. *Held*, further, that where the principal, subsequent to the reference, ratified the conduct of his agent, such ratification cured the defect in procedure. MUSSAMMAT SATTAR-UN-NISSA v. SHAIKH MUHAMMAD RUHULLA, **8 O C. 263.** (17 A. 106, P.C., *Expl.*; 9 M. 451, 24 C. 469, 23 B. 629, *R.*)

(51)—*Agreement to refer under mistake—Right to set it aside.*—An agreement to refer to arbitration made under a mistake of law may be set aside, but not an award made in pursuance of the reference. MANBODH v. BARI BOHU, **3 C.P.L.R. 89.**

(52)—*Reference of question of fact during pendency of appeal.*—During the pendency of an appeal, any question of fact in issue between the parties may be referred to arbitrators for decision by them. KAPILESHWAR v. JOHARMAL, **1 C.P.L.R. 118.** (7 A. 243, *Not F.*; 21 W R. 210, *F.*)

(53)—*Civ. Pro. Code, 1882, ss. 506, 522—Reference to arbitration—Reference not at instance of all parties to suit—Decree in terms of award—Appeal.*—In a suit for an account of a partnership business, the matter in dispute was referred to arbitration at the instance of the plaintiff and some of the defendants. The legal representative of one of the defendants, who had died, was not a party to the reference. The arbitrators having made an award, a decree was passed in terms thereof. The question was whether there was an appeal against the decree. *Held*, that the petition requesting the Court to refer the matter to arbitration in a case for winding up of a partnership should not have been granted except on the application of all the parties. The legal representative of the deceased defendant not being a party to it, the reference was illegal and the award was void. There was therefore an appeal against the decree notwithstanding that it was in conformity with what purported to be an award. INDUR SUBBARAMI REDDY v. KANDADAI RAJAMANNAR AYYANGAR, **26 M. 47=12 M.L.J. 396.** [*Diss.*, 6 M.L.T. 176; *R.*, 17 C.P.L.R. 147, 17 M.L.J. 394; *F.*, 32 M. 510=19 M.L.J. 480.]

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

(54)—*Suit for removal of trustee—Reference to arbitration by Court—Jurisdiction.*—The District Judge has jurisdiction to refer to arbitration a suit for the removal of a trustee. NAMBI AIYANGAR v. NARAYANA, **11 M.L J. 337.**

(55)—*Application of a party—Agreement to refer to arbitration—Civ. Pro. Code, 1882, ss. 375, 506 and 523.*—Where one of the parties to a suit applied to the Court for an order referring the matters in dispute in the suit to arbitration, stating that there had been an agreement between the parties to make such a reference, and the Court passed such an order under s. 375, Civ. Pro. Code, *held* that the Court was not competent to make the order under s. 375; and that neither s. 506 nor s. 523, Civ. Pro. Code, applied, as, under both the sections, the agreement to refer to arbitration must be in writing, and s. 523, Civ. Pro. Code, did not apply to the agreement as there was a pending suit (6 C.W.N. 276, *F.*; 4 B. 1, *Diss.*) *Per Maclean, C.J.*—A mere agreement to refer to arbitration is not an agreement within the meaning of s. 375, Civ. Pro. Code, (26 B. 76, *D*). *Per Hill* and *Stevens, JJ.*—Since the application was not made with advertence to s. 375 or with a view to the adjustment of the suit within the meaning of that section, the Court was wrong in passing an order under that section. *Quære*:—Whether an agreement to refer to arbitration would under no circumstances be an adjustment of the suit within the meaning of s. 375, Civ. Pro. Code? FAKIR CHAND DEY v. TINCOWRI DEY, **7 C.W.N. 180.**

(56)—*Question of title referred to arbitration—What it implies.*—Where parties agree to refer the question of title to arbitration, it is implied that possession will be given up, if the decision be adverse to the defendant. If defendant refuses to deliver up possession, a new cause of action arises, and one different from any mentioned in Act VIII (B.C.) of 1869, s. 27. RAJ NARAIN ROY v. MOODHOO SOODAN MOOKERJEE, **20 W.R. 19.**

(57)—*Civ. Pro. Code, 1882, s. 523, cl. 4—Agreement to refer future differences to arbitration, if within section—Naming of arbitrator, if necessary.*—S. 523 of the Civ. Pro. Code, 1882, is not confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbitration. And although the section does not contemplate an agreement to refer future differences being filed until differences have actually arisen, still, when a difference has arisen, it is immaterial whether the agreement to refer is contained in a previously existing agreement entered into for the purpose of determining the existing dispute. And the words "any difference" must be taken to embrace alike any present difference and any future difference arising out of the contract. Although giving its widest meaning of "designated" or "described" to the word

Arbitration—continued.

——6.—Reference to Arbitration—*continued.*

"named" in the section, still, when the agreement provides only for the future appointment or election of arbitrators, it cannot be said that they are "named" and therefore the agreement does not fall within the section. The last clause in s. 523 of the Civ. Pro. Code, 1882, is not happily worded, nor does it adapt itself readily to, or fit in with, the provisions of its earliar clauses. It appears inferentially to give the parties power by agreement to nominate their arbitrator, even when they have agreed that their differences shall be referred to an arbitrator to be appointed by the Court. In such a case, the Court must appoint their nominee, which is not unreasonable. This is the only mode of reading the section so as to make it harmonious throughout. FAZUL BHOY MEHRALI CHINOY v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LD., **20 B. 232, F.B.**

(58)—*Will—Probate, application for*—Caveat—*Reference to arbitration—Award, effect of.*—Where against the application for probate of a will by the executor, a *caveat* was filed denying the execution of the alleged will, and the matter was duly registered as a regular suit and both the parties subsequently referred "the dispute" to arbitrators and an award was made that the alleged will had not been executed, *held* that the award was binding on the executor, and that the Testamentary Court had jurisdiction to try the question of the award, and was not limited to the question of the execution of the will, as contended by the executor who wanted to proceed with the suit in spite of the award. GHELLABHAI ATMARAM v. NANDUBHAI, **20 B. 238.**

(59)—*Arbitrators appointed without intervention of Court—Disagreement—Appeal from order of Court filing award—Code of Civil Procedure, ss. 525, 526, 522.*—When parties have agreed to refer a matter to arbitrators appointed without the intervention of a Court, and the agreement makes no provision for difference of opinion, it must be presumed, in the absence of evidence to the contrary, that unanimity was intended. U.B.R. 1892—1896, Vol. II, 18, U.B.R. 1897—1901, Vol. II, 5, *F.*) S. 522 no doubt applies where the Court has made a reference to arbitration. Ss. 526 and 522 do not operate to bar an appeal from an order filing such an award, when the objection is that by reason of want of unanimity the award is void. MUANG THA AUNG v. MAUNG THA SHUN, **2 L.B.R. 105.** (25 C. 141, 16 C. 482, *R.*)

(60)—*Civ. Pro. Code, 1859, Ch. VI—Power of Court to refer dispute to arbitration.*—*Held* (in accordance with the opinion of the Full Bench) that the lower Appellate Court was competent to refer the matters in difference in the suit to arbitration, under the provisions of Act VIII of 1859. Ch. VI. CHIRANJI LAL v. JAMNA DAS, **7 N.W.P. 243, F.B.**

Arbitration—continued.

——6.—**Reference to Arbitration**—*continued.*

(61)—*Award—Appeal.*—It is competent for an appellant, in his appeal against a decree, to contest an order of the Court setting aside an arbitration award. MAUNG TA HIN v. AH KIN, **U.B.R. 1897—1901, Vol. II, 310.** (9 A. 447, 10 A. 97, 14 B. 232, 7 C. 148, 23 C. 335, 24 C. 725, 7 M.I.A. 302, 14 W.R. 327, *Rel. on.*)

(62)—*Plaintiff objecting to arbitration—Reference to arbitration—Validity of award.*—Where, notwithstanding that plaintiffs actively object, a case is submitted to arbitration, the award is invalid. (*Quære*) Is an Appellate Court authorised to refer to arbitration a case pending in appeal? SREEMUTTY HACHUN BANOO v. ABDOOL HAKIM, **19 W.R. 321.**

(63)—*Reference to arbitration in appeal, Civ. Pro. Code, s. 582*—An Appellate Court may, with the consent of the parties, refer matters in dispute in appeal, to arbitration, as s. 582, Civ. Pro. Code, imposes the same duties on Appellate Courts as it does on Courts of First Instance. SANKARALINGAM PILLAI, *Petitioner*, **3 M. 78.** (12 B L.R. 266, *Diss.*) [*F.*, 18 C. 507; *R.*, 12 C. 173.]

(64)—*Suits under the Civ. Pro. Code of 1859—Reference to arbitration under Code of 1877—Suit for Kabuliat—Decree in terms of the award of arbitrators.*—Though the chapter on reference to arbitration in the Civ. Pro. Code of 1877 does not refer to suits instituted under the old Code, Act X of 1859 (Bengal Rent), yet parties to a suit under the latter Act are at liberty to refer the matter in dispute to arbitration, through the Court and a decree passed in terms of the award is valid. (W.R. 1864, Mis. Rul. 21, 4 B. 1, *R.*) Where, in a suit for a Kabuliat, the matter was referred to arbitration, a decree in terms of the award was held valid though the rate of rent in the award was less than that demanded by the plaintiff, where the rate determined by the arbitrators is fair and equitable. KHEMNA GOWALA v. BUDOLOO KHAN, **6 C. 251=7 C.L.R. 92.**

(65)—*Suit for removal of member of devastanam Committee—Arbitration—Award.*—A District Court may refer to arbitration, and the arbitrators may decide the question of the dismissal from office of the members of a Devastanam Committee. Also, interest prior to date of suit on the sums misappropriated by the members of a committee, though not asked for in the plaint, may be awarded, provided the whole amount awarded does not exceed the amount of damages claimed therein. PERUMAL NAIK v. SAMINATHA PILLAI, **19 M. 498.** [*F.*, 11 M.L.J. 337=12 M.L.J. 431.]

(66)—*Suit instituted in Court without jurisdiction—Reference to arbitration, and decree in accordance with award passed therein—Finality of decree.*—Where a suit, instituted in a Court having no jurisdiction, is referred to arbitration, and a decree passed in accordance with the award passed therein, it is competent for the Appellate Court, the finality of the decree according to the award notwithstanding, to entertain the question whether the lower Court had jurisdiction to entertain the suit. KALIAN DAS v. GANGA SAHAI, **5 A. 300=A.W.N. 1883, 100.** (4 A. 280, *R.*; 7 C. 157, 7 C. 428, *Diss.*)

(67)—*Ss. 506, 578, Civ. Pro. Code, 1882—Reference to arbitration made by Court on verbal application—Effect.*—Para 2, s. 506, Civ. Pro. Code, which says that every application for an order of reference shall be in writing, is directory only, as to the form of application to be made. Non-compliance with its provisions does not render the reference a nullity. Absence of a *written* application to the Court under that section, when the parties otherwise consent to the reference to arbitration, does not render the reference void, such non-compliance amounting only to an irregularity which would be cured by s. 578, Civ. Pro. Code. Such non-compliance does not affect the merits of the case or the jurisdiction of the Court. SHAMA SUNDRAM IYER v. ABDUL LATIF, **27 C. 61=4 C.W.N. 92.** (6 M.I.A. 134, 16 W.R. 160, *R.*; W R. 1864, Act X, Rul 41, *D.*) [*F.*, 4 A.L.J. 691=A.W.N. 1907, 273=30 A. 32; *Appr.*, 4 P.R. 1907=20 P.W.R. 1907; *R.*, 5 O.C. 13.]

(68)—*S. 522, Civ. Pro. Code, 1882—Illegal award—Appeal—Reference by unauthorised agent—Implied ratification by principal.*—An appeal will lie from an award, which is illegal and void *ab initio* (17 B. 357, *F.*) [*F.*, 1 Bom. L.R. 261, 2 N L.R. 81; *R.*, L.B.R. 1893—1900, 548, 112 P.L.R. 1901=84 P.R. 1901, 5 O.C. 13.] When a principal is aware of the reference to arbitration on the application of his agent not authorised to do so, and tacitly ratifies the action of his agent in applying for such reference, he cannot then question the legality of the order of reference. SATURJIT PERTAB BAHADOOR SAHI v. DULHIN BULAP KOER, **24 C. 469.** (9 M. 451, *R.*) [*F.*, 8 O.C. 263; *D.*, 28 C. 303=5 C.W.N. 268, 7 C.W.N. 343.]

(69)—*Agreement to refer to arbitration—Plea in bar of suit—Specific Relief Act, s. 21.*—Before s. 21 of the Specific Relief Act could be pleaded in bar of a suit for damages for breach of a contract according to whose terms the parties had agreed to refer any disputes between them to arbitration; it must be shown that the plaintiff had refused to refer to arbitration. The filing of the plaint is not such a refusal. KOOMUD CHUNDER DASS v. CHUNDER KANT MOOKERJEE, **5 C. 498=5 C.L.R. 284.** [*F.*, 80 P.R. 1906=70 P.L.R. 1907; *R.*, 11 B. 199, U.B.R. 1897=1901, Vol. II, 542.]

(70)—*Reference to—by Court against the protest of a party—Award on such arbitration not binding—Civ. Pro. Code (VIII of 1859), ss. 312, 314.*—No power is vested in the Court of the Civil Judge at Lucknow, under the provisions of ss. 312 and 314 of the Code of Civil Procedure (Act VIII of 1859) which is in force in

Arbitration—continued.

— 6.—**Reference to Arbitration**—*continued.*

Oudh, to refer the decision of any issue raised in a suit to arbitrators nominated by the Court against the protest of one of the parties. An award founded on such a reference, *held*, on appeal, not binding on a defendant and set aside, as the parties must either name the arbitrators or consent to the nomination of them by the Court. SHEONATH v. RAMNATH, **5 W.R. 21, P.C.=10 M.I.A. 413=1 I.J.N.S. 161=1 Suther. 616=2 Sar. 134.**

(71)—*Matters beyond jurisdiction—Filing of agreement to refer to.*—The matters comprised in an agreement to refer to arbitration must be those over which a Civil Court must have jurisdiction to give a final adjudication. An agreement dealing with matters beyond its jurisdiction cannot be ordered to be filed. In such a case, the Court has no power to strike out that portion of the agreement which was in excess of its jurisdiction and accept the other portion, unless the parties agreed to do so. PARTAB SINGH v. DEVI SINGH, **5 P.R. 1883.** [*F.*, 56 P.R. 1886.]

(72)—*Agreement—Matters beyond jurisdiction—Effect of award.*—Where an award deals with matters beyond the jurisdiction of the Court and is thus partly illegal, it is illegal as a whole. FATEH SINGH v. KARM CHAND, **56 P.R. 1886.** (5 P.R. 1883, *F.*) [*D.*, 32 P.R. 1888.]

(73)—*Omission to pass order of reference—Defect fatal—Ss. 508, 509, 512, Civ. Pro. Code, 1882.*—The omission to pass an order of reference to arbitration will vitiate the whole arbitration proceedings and there can be no legal award without such order. HARCHAND RAI v. CHUTTAN LAL, **35 P.R. 1884.** (3 P.R. 1883, *R.*)

(74)—*Omission to pass order of reference—Legality of award—Procedure—S. 524, Civ. Pro. Code, 1882.*—An award passed without an order of reference by the Court is illegal and the proper order for the appellate Court to pass is to remand the case in order that, after making an order of reference, it might proceed under s. 524, Civ. Pro. Code, 1882. RALLA RAM v. BADHAWA MAL, **67 P.R. 1886.** (191 P.R. 1882, *D.*) [*R.*, 22 P.R. 1891.]

(75)—*Reference to arbitration—Filing of award and decree passed in accordance with it, over-ruling defendant's objections—Appeal—Civ. Pro. Code, 1877, ss. 520, 521.*—Where a Subordinate Judge, overruling certain objections made by the defendant, made a decree in favour of the plaintiff, in accordance with the award, *held* that it was not competent to the District Judge to hear an appeal from such decree. ASSADULLAH KHAN v. AHMADULLAH KHAN, **A.W.N. 1882, 93.** (4 A. 283=A.W.N. 1882, 34, *F.*)

(76)—*Reference to—Omission as to time within which award to be submitted—Validity of award—Bombay Regulation, VII of 1827.*—In order to enable the *Zillah* Court, under *Bom. Reg* VII of 1827, to give an award the force of a decree of Court, the deed of submission to arbitration must contain all the conditions required by that Regulation. S. 3, cl. 1, of *Bom. Reg.* VII of 1827, enacts, among other things, that the deed of reference must contain "the time within which the award is to be given." A deed of submission to arbitration contained no provision for the time when the award was to be made by the arbitrator; *held* to be bad, and an award made under it, which had been ordered to be enforced as a decree of Court, directed to be taken off the file, as the Court had no jurisdiction except upon fulfilment of the requirements of the Regulation. NUSSERWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR, **6 M.I.A. 134.**

(77)—*Question of limitation when to be raised.*—All question of limitation must be presumed to have been disposed of prior to the first reference to arbitration. JAGMANDHAR DAS v. PIARI LAL, **A.W.N. 1881, 17.**

(78)—*Award—Civ. Pro. Code, 1882, s. 520—Limitation—Court not competent after award to dismiss suit on point of limitation.*—After a suit has been referred for decision to arbitrators with the consent of parties and of the Court and an award has been delivered, it is not competent to the Court to dismiss the suit on a point of limitation. RAMJATAN RAI v. SHEOBALAK RAI, **A.W.N. 1897, 162.** (S.D. A.N.W.P., 1864, 472, *R.*)

See ACCOUNTS — MISCELLANEOUS, 35 P.R. 1867.

—Suit to remove trustee—Reference by Court of entire suit to arbitrator—Legality of reference—*See* ACT XX of 1863, s. 16, 26 M. 361.

See U. P. ACT, XIX OF 1873, ss. 222, 223, 231, A.W.N. 1882, 82.

See APPEAL—MISCELLANEOUS, 109 P.R. 1883, 130 P.R. 1883, 170 P.R. 1883.

—Agreement to refer to arbitration—Appeal from order of reference—*See* CIV. PRO. CODE, 1908, s. 2, sch. II, r. 17, 126 P.R. 1907=98 P.W.R. 1907=50 P.L.R. 1908.

See CIV. PRO. CODE, 1908, O. IX, r. 3, sch. II, r. 5, 10 P.R. 1899.

—Reference to arbitration in pending suit—Interest of minors involved—Order of reference not made by Court—Validity of award—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, O. XXXII, r. 7, 24 M. 326.

See CIV. PRO. CODE, 1908, O. XXIII, r. 3, sch. II, rr. 1, 17, 30 C. 218.

Authority of guardian to agree to arbitration on behalf of a minor—*See* CIV. PRO. CODE, 1908, O. XXXII, r. 7; sch. II, r. 1, A.W.N. 1905, 171=2 A.L.J. 493=28 A. 85.

Arbitration—continued.

—6.—**Reference to Arbitration**—*continued.*

—Decree in accordance with award—Reference to arbitration by guardian *ad litem* of minor without Court's sanction, validity of—*See* CIV. PRO. CODE, 1908, O. XXXIII, r. 4; O. XXXII, r. 7, sob. II, r. 1; O. XLI, r. 23, 4 P.R. 1907 = 20 P.W.R. 1907.

See COSTS—TAXATION OF COSTS, 61 P.R. 196.

—Will—Application for probate by executor—Executor whether could submit to arbitration—Question of execution of will—Admissibility of evidence to explain written document—*See* EXECUTION, 21 B. 335.

—Reference to—Invalidity of award—Second reference without consent—Validity of second award—*See* FOREIGN COURT—JUDGMENT OF, 2 M.L.T. 269=30 M. 292.

—Partition suit referred to arbitration—Death of arbitrator after making partition—Application to determine partition—Right of minor plaintiff to account—*See* HINDU LAW—PARTITION, 27 C. 1013.

—Termination of pleader's authority—*See* LEGAL PRACTITIONERS—PLEADER—AUTHORITY TO BIND CLIENT, A.W.N. 1888, 199.

See LIMITATION—QUESTION OF LIMITATION, 3 N.W.P. 177.

See MAHOMEDAN LAW—DOWER, A.W.N. 1885, 19.

—Dispute about succession to trusteeship cannot be referred to—Award—Application to file award—Jurisdiction of Court—What matters can be referred to—*See* MAHOMEDAN LAW—WAKF, 6 Ind. Cas. 219=7 A.L.J. 761.

See REMAND, 22 W.R. 207.

See RES JUDICATA—MATTERS IN ISSUE, 13 B. 242.

—Reference by Court to—Munsarim's power to fix date for hearing—Effect of sch. 2, cl. 8, Civ. Pro. Code, 1908—*See* REVISION—GENERAL, 13 O.C. 341=8 Ind. Cas. 876.

See RIGHT OF SUIT—AWARDS, SUITS CONCERNING, 3 N.W.P. 92.

See SANCTION TO PROSECUTE, 6 A. 101=A.W.N. 1883, 226.

—Withdrawal of suit before award with liberty to bring a fresh suit—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 1 A.L.J. 257.

—Arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 8 A. 57=A.W.N. 1885, 331.

—Suit referred to arbitration—Withdrawal of suit with liberty to bring fresh suit—Subsequent suit for same matter, maintainability of—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 9 A. 168=A.W.N. 1887. 13.

Arbitration—continued.

—6.—**Reference to Arbitration**—*concluded.*

See SPECIFIC RELIEF ACT, 1877, s. 21, 19 P.R. 1896, U.B.R. 1897—1901, Vol II, 542 P.L.R. 1900, p. 451, A.W.N. 1882, 58, A.W.N. 1898, 133.

See SUCCESSION ACT, 1865, ss. 261, 234, 12 P.R. 1894.

See WAIVER, 6 M.I.A. 134.

—7.—**Revocation of reference to arbitration.**

(1)—*Submission to arbitration—Withdrawal—Civ. Pro. Code (Act VIII of 1859), s. 326—Revocation.*—A submission to arbitration is not countermandable when it has been made a rule of Court under s. 326, Civ. Pro. Code. If a revocation by deed can set aside a deed by which a person binds himself to abide by the decision of arbitrators, revocation by parol may set aside a parol agreement. ALLA AIYAPPA v. NUNDULA PERAIYA, **3 M.H.C. 82.** [*Appl.*, 1 N.W.P. 252.]

(2)—*Submission or reference to—Whether revocable.*—A party is incompetent to revoke a regular submission to arbitration. PARS RAM v. ASA RAM, **9 P.R. 1870.**

(3)—*Power to revoke arbitrators' authority.*—A party to an agreement to refer a matter in dispute to arbitration has power to revoke, at any time before the award, the authority of the arbitrators appointed by him. KOEGLAR v. THE CORINGA OIL CO., **1 C. 42.** (*On appeal*, **1 C. 466.**) [*D.*, 17 B. 129.]

(4)—*Revocation of arbitrators' authority to arbitrate.*—A revocation of the authority of arbitrators must be clear and distinct. If it is ambiguous or doubtful, it cannot operate as a revocation. KELLIE v. FRASER, **2 C. 445.**

(5)—*Award — Validity — Setting aside.*—When parties to a suit agree to refer the same to arbitrators and bind themselves to abide by their decision, the award of the arbitrators cannot be set aside lightly or for a mere formal defect. If the arbitrators act in excess of their authority, the award will be good and valid so far as it refers to matters within the scope of their arbitration and the rest may be thrown out as invalid,—but the award will not on that score become wholly invalid. MUNICIPAL COMMITTEE, LAHORE v. BUTA, **65 P.R. 1899.**

(6)—*Remitting award, proper Court for.*—The propriety of remitting an award should properly be judged by the Court accepting such award. SECUNDUR BEG v. MUSSAMMAT RAJEE, **12 P.R. 1869**; CHOOHUR SINGH v. JEET SINGH, **64 P.R. 1870.** [*F.*, 1 P.R. 1882; *R.*, 92 P.R. 1885, 92 P.R. 1903.]

(7)—*Agreement to refer to arbitration—Lapse by long efflux of time.*—When nine months were allowed to run without either party taking active measures to carry out an agreement to refer a dispute to arbitration, the plaintiff cannot be debarred from prosecuting his suit. JEORAKHUN LOLL v. MUTTRA PERSHAD, **1 N.W.P. 252.**

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

(8)—*Arbitration—Reference of existing dispute—Binding character of reference.*—An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract; and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable. NAGASAWMY NAIK v. RUNGASAWMY NAIK, **8 M.H.C. 46.** [*R.*, 10 B. 381, 27 M. 112=13 M.L.J. 311.]

(9)—*Effect of—Plaintiff revoking consent to arbitration.*—A plaintiff's revocation of his consent to arbitration does not put an end to the arbitrator's power. MUSSAMUT ABLAKHEE KOOER v. OODEN SINGH, **15 W.R. 331.**

(10)—*Arbitration—Revocation of submission, whether permissible.*—Where parties had agreed to submit the matter in difference between them to arbitration, no party to such agreement could revoke the submission unless for good cause; and a mere arbitrary revocation of authority would not be permitted. (12 M. I.A. 112, *R.*) Where the parties selected a vakil's clerk as an arbitrator on the vakil's promising to assist him in every way, and subsequently one of the parties sought to revoke the submission on the ground that the arbitrator was being unduly influenced by his master, *held* that there was no sufficient cause under the circumstances for the revocation. SULTAN MUHAMMAD KHAN v. SHEO PRASAD, **20 A. 145.**

(11 & 12) *Civ. Pro. Code, 1882, ss. 506, 508, 510, 521—Arbitration, reference, to—Revocation of authority of arbitrators when and how can be made.*—Where an order of reference to arbitration has once been made under s. 506 of the Civ. Pro. Code, 1882, it is not competent to the Court under the second paragraph of s. 508 of the Code to "deal with" the matter in difference between the parties "except as provided" in the sections of chapter XXXVII of the Code, following s. 508. There is no section of that chapter which authorise the Court to revoke the authority conferred on the arbitrator, and to appoint a new one; s. 510, which permits the appointment of a new arbitrator, applies only in cases falling strictly within the purview of that section; *i.e.*, where the scope and object of the reference cannot be executed. Even under s. 510, the authority conferred on the arbitrator can be revoked, only "for good cause," such as where an arbitrator "refuses or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will not probably return at an early date." And the enactment of the second paragraph of s 508 of the Code, which does not occur in the corresponding s.315 of Act VIII of 1859, has the effect of rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary. In the present case, a reference was made under s. 506 of the Code by both the

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

parties to the suit. It was signed by the defendant and the plaintiff's pleader who, however, happened to possess no special authority in writing to consent to such a reference. The Court, therefore, postponed making any order to a certain date, and the required authority having been obtained and submitted by the pleader within that time, the order was made. Sometime after, the defendant applied to revoke the authority of the arbitrator and to appoint a new one, on the ground that after signing the reference he became aware of certain circumstances connected with the arbitrator which showed he was not likely to act impartially. *Held*, that the objection not having been taken till the order of reference was made, *i.e.*, till the plaintiff's pleader produced the necessary authority, his failure to do so implied acquiescence in the course adopted by the Court, and that such acquiescence amounted to a fresh submission; and that, as no charges of misconduct or partiality imputed to the arbitrator had been made out, the authority could not be revoked. HALIMBHAI KARIMBHAI v. SHANKER SAI, **10 B. 381.** (9 Bom. H.C 177, 8 W.R. 171, *R.*) [*R.*, 1 Bom. L.R. 261, 3 A.L.J. 185=A. W.N. 1906, 51.]

(13)—*Reference by Court—Revocation at party's suggestion—Award set aside and matter tried as suit—Examination of arbitrator as witness.*—A reference to arbitration made under an order of Court cannot be revoked at the instance of a party. If an arbitration award is set aside, and the matter is tried as a suit, the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission which may have been made before him. NIL MONEE BOSE v. MOHINA CHUNDER DUTT, **17 W.R. 516.** [*R.*, 10 B. 381.]

(14)—*Submission to—Preliminary award—Revocation of agreement to submit to arbitration.*—A and B, two partners, agreed to submit certain differences to arbitration. The arbitrators entered into consideration of the matters referred to them, and gave a preliminary decision, which the parties to the arbitration submitted to and acted on; as, however, the arbitrators could not agree upon all the points referred to them, they were requested by A to make their award within ten days or to appoint an umpire. Some delay took place in the appointment of the umpire, when, A sent notice to withdraw from the arbitration and cancel the agreement, upon which B applied by petition to the Court, under the 326th section of the Civ. Pro. Code, to make the submission to arbitration a rule of Court, which was ordered. *Held*, that it was not in the power of A, at his mere will and pleasure, to revoke the authority of the arbitrators, in whose appointment he had concurred, and has acquiesced in, and acted upon, their preliminary award. PESTONJEE NUSSURWANJEE

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

v. MANOCKJEE & CO., **10 W.R. 51, P.C.=12 M.I.A. 112=1 I.J. N.S. 69=2 Suther 164=2 Sar. 390.** (*On appeal from* **3 M H.C. 183**). [F., 15 W.R. 331. 7 A. 273. 17 C. 200 ; *Cons.*, 21 W.R. 395; *R.*, 22 W.R. 522, 7 M.H.C. 257, 8 M H.C. 46, 10 B. 381, 11 B. 199, 17 B. 129, 20 A. 145, 27 M. 112=13 M.L.J. 311, 29 A. 13=3 A.L.J. 613=A.W.N. 1906, 253 ; *D.*, 9 A. 253.]

(15)—*Agreement to have case decided on the evidence of third person—Revocation of agreement—Act X of 1873 (Oaths Act), ss. 8, 12—Arbitration—Civ. Pro. Code, 1877, Chapter XXXVII*—An agreement to have a case decided on the evidence of a third person given on oath, is in the nature of a reference to arbitration under the Civ. Pro. Code, and would be valid and binding on the parties to a suit if all of them join in it. The provisions of ss. 8, 12 of the Oaths Act have no application to such a case. (*Per Stuart, C.J.*) Such an agreement does not constitute a reference to arbitration and is not governed by the provisions of the Civ. Pro. Code, relating to arbitration ; and assuming it to be made under the Oaths Act, there is nothing to prevent the parties from revoking it. (*Per Oldfield, J.*) LEKHRAJ SINGH v. DULHMA KUAR. **4 A. 302.** [*Appr.* 29 A. 49=3 A. L.J. 654=A.W.N. 1906, 280 ; *R.*, 18 A. 46. 85 P.R. 1903=143 P.L.R. 1903.]

(16)—*Revocation by Court—Illness of arbitrators—Civ. Pro. Code, 1859, s. 318.*—Where one of the arbitrators had been ill and the time for sending it in elapsed before they could make their award, the Court superseded the arbitration and recalled the suit. JOSEPH v. SREERKER, **Bourke O.C. 359.**

(17)—*Submission to arbitration—Long and unreasonable delay on the part of a party to prosecute proceedings—Revocation — S. 523, Civ. Pro. Code, 1882—Aid of Court Sought in appointment of arbitrator.*—Generally, a submission to arbitration can be revoked on good and sufficient grounds. The claimant, in a reference to arbitration, is the person on whom, *ceteris paribus*, it is incumbent to promote the conduct of the proceedings. Where there is a long, unexplained and unreasonable delay on the part of a party to prosecute proceedings before the arbitrator, and the other party did not conduce to it or consent to it, the latter is, *prima facie*, entitled to decline to go on with the reference and to insist on revoking the agreement to refer to arbitration. [F., U.B. R. 1897—1901, Vol. II, 542, 29 C. 278.] So, an agreement to refer having been duly revoked, it is no longer competent to the Court to order the agreement to be filed under s. 523, Civ. Pro. Code. It seems, in a case in which no arbitrator has been named in an agreement and the aid of the Court is sought for the appointment of an arbitrator, the Court ought to have allowed the parties an opportunity of being heard as to the selection of an arbitrator. O.R. COLY v. V. A. DACOSTA, **17 C. 200.**

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

(18)—*Withdrawal from submission to arbitration—Sufficient cause.*—A party is not entitled to withdraw, without good cause shown, from a submission to arbitration. Where an arbitration award is about to be pronounced, and a party withdraws on the ground that the arbitrator is entering into foreign matters, and that a minor is likely to be interested who will not be bound, the grounds do not constitute a good cause for withdrawal. RAM COOMAR SHAHA v. KALA CHAND SHAHA. **21 W.R. 395.**

(19)—*Arbitration—Suit to restrain proceedings in aribtration—Maintainability.*—The parties to the suit agreed to refer the disputes between them in another suit to the arbitration of five persons named by them, and did not agree to accept the decision of any less number of persons so nominated. Three only of the arbitrators nominated were proceeding with the arbitration and one had declined to act. The suit, which was one to put an end to the arbitration, was maintainable. The Court which made the reference released in favour of the plaintiffs in the suit in which the reference was made the attachments existing on debts due to the defendant in that suit, at the instance of the three arbitrators, who proposed to authorize the plaintiffs to collect those debts, and directed the debtors to pay their debts to the plaintiffs. It was held that, assuming that the reference permitted the arbitrators nominated to authorize either of the parties to collect the debts attached, inasmuch as the agreement was unaccompanied by any stipulation that a less number than the whole of the arbitrators could determine whether such permission should be given, the act of the three arbitrators which led to the issue of the order could not be supported, and that the last portion of that order was *ultra vires* and must be declared void. The Court of first istance in its decree "prohibited the arbitrators from giving an award." As they were not parties to the suit, in substitution of that order, it was ordered that the defendants be enjoined from proceedings in the award before the arbitrators, and from collecting the debts released in their favour from attachment. PARMESHAR DAT v. HARI NAIK, **7 N.W.P. 357.**

(20)—*Omission to disclose—Interested character of arbitrator.*—Omission of an arbitrator to disclose the fact that he was consulted, engaged, or retained by the defendants' respondents, previous to the arbitration, is such a misconduct as to vitiate the award. MAUNG LU GYI v. MAUNG LU NGWE. **U.B.R. 1897—1901. Vol. II, 13** (25 C. 141, *F.*)

(21)—*Refusal of some arbitrators to act—Civ. Pro. Code, 1895, s. 319—Refusal to nominate other arbitrators—Withdrawal from arbitration.*—Where some of the arbitrators named in an arbitration-agreement refuse to act, and the parties do not agree to appoint

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

others instead of them, it is not incumbent upon the Court to appoint other arbitrators, unless both parties agree, the provision of s. 319 being not obligatory, but simply permissive: *Held*, further, that, under such circumstances, the refusal on the part of one party to nominate other arbitrators does not amount to a withdrawal from the agreement to proceed to arbitration. SADA SOCKH v. SHIVA DYAL, **1 Agra 109.**

(22)—*Arbitration—No award—Agreement to withdraw suit—Effect.*—In a suit, an order was made by the Court, with the consent of the parties, directing all matters in dispute between them to be referred to three specified arbitrators who were to make the award within six months after the date of reference, and in case of difference of opinion between the arbitrators, an umpire was to be appointed. The arbitrators only met once but did not make any award, and at that meeting the parties entered into an agreement in writing to settle all matters in difference among themselves. The agreement was left with the defendants and they had not come to any settlement as agreed on. Thereupon the plaintiff applied to have the case put down on the file of the Court for re-hearing. *Held*, that the suit was still pending and that should be brought again before the Court. GOPINATH NANDI v. SHIB CHANDRA NANDI, **6 B L.R. App. 74.**

(23)—*Award—Application to set aside—Civ. Pro. Code, 1859, s. 324—Time within which application must be made.*—In an application to set aside an order, made by a Judge in chambers, extending the time (of ten days) for making an application, under s. 324 of Act VIII of 1859, to set aside an award on the ground of misconduct of one of the arbitrators and of the umpire: *Held*, the words of the section being in their ordinary import obligatory and there being nothing in the other parts of the Code to show that such construction was at variance with the intention of the Legislature; and a similar provision having been held by the Courts in England to be imperative that the application to set aside the award must be made within the ten days, provided the Court be then sitting; and if not, on the first day of its sitting after that time; and that there is no power to enlarge the time to make such application. EDALJI SHAPURJI v. TULSIDAS SUNDARDAS, **2 B.H C. 270.**

(24)—*Difference between English and Indian Law — Reference to arbitration—Revocation only for good cause shown—Death of either party — No revocation — Civ. Pro. Code, 1882, ss. 361, 365, 367, 523—Reference to arbitration without intervention of Court—Death of party — Effect—Procedure.*—Under the English Law, the authority of an arbitrator is revoked by the death of any one of the parties to the submission before an award is made. This was a corollary of the rule of

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

common law that the authority of an arbitrator might, at any time before the award was made, have been revoked at the pleasure of any party to the submission, whether the submission was by agreement in writing, by bond, deed, Judge's order or order at *nisi prius*. This rule was due to the disfavour with which contracts to refer to arbitration were formerly looked upon in England as contracts tending to oust the jurisdiction of the ordinary Courts. But in India the policy of the Legislature has always been different, and the English common law rule has not been followed. According to the law here, the submission of an existing dispute once made is not without just and sufficient cause revocable even in the case of a submission which has not been made a rule of Court, and consequently, where the matter has become the subject of a suit, the submission can be revoked only with the leave of the Court for good cause shown. Therefore, contracts to refer to arbitration should not in this country be treated as being essentially of a personal nature. On the death of a party to the reference, the question whether the legal representative of the deceased party is or is not entitled to enforce the contract to refer, is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature, or is one which survives to the legal representative. The members of an undivided Hindu family entered into an agreement in writing to submit to the decision of certain persons the disputes which had arisen between them with reference to the partition of their joint property and to abide by the partition to be made by them. One of the parties to the reference applied to the Court to have the agreement filed. With the consent of the other party, the application was numbered as a suit and the matter was referred to the decision of the arbitrators named. Pending the proceedings before the arbitrators one of the parties to the reference died. The daughter's son of the deceased, alleging himself to be his (deceased's) adopted son, applied under s. 365 of the Code, to have his name entered on the record in the place of the deceased (plaintiff). The adoption thus set up was denied by the defendant. *Held*, that the proceedings could not, under s. 361 of the Code, be held to abate by reason of the death of a party, and as the right to partition, which was the subject-matter of the submission, survived to the deceased plaintiff's adopted son, if there was one, the Court was bound to proceed under s. 367 of the Code to determine the question whether the applicant was the legal representative of the deceased plaintiff. VENKATA SATYANARYANA v. VENKATA RANGAYYA, **13 M.L.J. 311.**

(25)—*Arbitrator, holding private and secret enquiries—Misconduct.*—An arbitrator making private enquiries is guilty of legal misconduct for which an award is liable to be set aside. DAYA KISHEN v DHARAM DAS, **4 A.L.J. 169 = A.W.N. 1907, 75.**

Arbitration—continued.

——7.—Revocation of reference to arbitration—*continued.*

(26)—*Reference to arbitration—Petition for superseding arbitration—Power of Court.*—The parties having referred the matter in dispute to arbitration, an umpire was called in. The defendant, alleging that the umpire had been tampered with by the plaintiff, requested the Court to supersede it. Thereupon the Court itself decided the case. *Held* that the Court has no power to supersede it and that the case must be remanded for disposal according to the reference. KASHMIRI DAS v. MUSSAMMAT PARAS, **28 P.R. 1874.**

(27)—*Arbitration—Arbitrator's ignorance of law not a ground for setting aside an.*—The fact that arbitrators are ignorant of the law is not a reason for setting aside an award. FUTTOO v. GHOLAM SULTAN, **47 P.R. 1867.**

(28)—*Submission to—Revocation of—Good cause—Collusion of arbitrator.*—A submission to arbitration can be revoked for good cause and not arbitrarily. Where the arbitrator is in fraudulent collusion with the defendant, the submission can be revoked. BANSI DHAR v. SITAL PRASAD, **3 A.L.J. 613=A.W.N. 1906, 253=29 A. 13.** (12 M.I.A. 112,*F.*)

(29)—*Reference to, for examination of accounts—Award without inspection, effect of.*—A submission to arbitration having been with the object that certain accounts should be examined, on the arbitrators not inspecting them, the Chief Court annulled the award and the decree following it. CHARANJI LAL v. BAMJI DAS, **5 P.R. 1876.**

(30)—*Arbitration, reference to—Application before Commissioner — Civ. Pro. Code (Act V of 1908), sch. II—Reference to arbitration—Withdrawal from.*—An application for reference to arbitration, to be operative, must be presented to the Court. It cannot be entertained by a Commissioner appointed to examine a witness. Parties can withdraw from a reference to arbitration, when there has not been a completed agreement for reference, for instance, when it is not yet settled upon what terms as to remuneration, the nominated arbitrator is to act. ASUTOSH DEB SARKAR v. APURBA KUMER DEB SARKAR, **10 C.L.J. 449=4 Ind. Cas. 370.**

(31)—*Arbitration, reference to—Award not submitted on due date—Setting aside of order of reference—Procedure to be followed by Court.*—Where a reference to arbitration falls through owing to non-submission of the award on the date fixed for submission, the course the Court should follow is to fix a date for the hearing of the suit, so as to enable the parties to appear and adduce evidence in support of their respective cases. Where this procedure was not followed, the High Court set aside the order of dismissal of the suit for default of appearance. GOPAL LAL MANDAL v. SURESH CHANDRA MUKERJI, **12 C.L.J. 624.**

Arbitration—continued.

——7.—Revocation of reference to arbitration—*concluded.*

(32)—*Award of arbitration, when can be set aside.*—When the parties agree to refer matters to arbitration and to be bound by the decision of the majority, the award given by the arbitrators cannot be set aside on the ground of error, or because only two out of three arbitrators signed the award. KAZEE SYED NASER ALI v. MUSST. TINOO DOSSIA, **6. W.R. 95.**

(33)—Ex-parte *decree in accordance with award whether can be set aside by review.*—A judgment, given in accordance with an award, cannot be set aside by a review, even though it was passed in the absence of the defendant to whom due notice was given to file objections. SIDHU RAM v. GAMAN, **98 P.R. 1900.**

(34)—*Arbitration award—Setting aside of—S. 324 of Act VIII of 1859, Civ. Pro. Code.*—Under s. 324 of Act VIII of 1859, an award given by the arbitrators cannot be set aside on the ground of the said arbitrators having decided the case against the written statement of the defendant. GOOROO CHURN DEY v. RAM DHUN PAUL, **7 W.R. 28.**

See PUN. ACT XVII OF 1887, ch. X, 52 P.R. 1898.

—Reference to arbitration of matters in dispute in pending suit—Revocation of reference—Power to permit withdrawal, with liberty to bring fresh suit—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 1, s. 89, sch.II; rr. 1, 5, 9 A. 168=A.W.N. 1887, 13.

—Contract to refer to—What amounts to revocation of the contract—Rights of parties—Limitation—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 6 Ind. Cas. 420.

——8.—Miscellaneous.

(1)—*Court to recommend, not to order.*—A Court has only power to recommend a reference to arbitration but cannot compel the parties to adopt such a course. KAZEE KASIMOODEEN v. HAJOODEEN, **52 P.R. 1869.**

(2)—*Notification No. 1225 of 26th Sep. 1886, persons admitted to act under, if recognised agents.*—Persons acting under Notification 1225 of 26th Sep. 1886 are recognised agents, and their principals are bound by the agents' submission to arbitration. No special authority in writing is necessary. CHOOHUR SINGH v. JEET SINGH, **64 P.R. 1870.** [*F.*, 1 P.R. 1882; *R.*, 92 P.R. 1885, 92 P.R. 1903.]

(3)—*Civ. Pro. Code, 1877, s. 506—Application in writing, want of—Jurisdiction—Waiver of the condition required by the Act—Consent to be recorded in writing.*—Under s. 506 (Act X of 1877), a case can be submitted to arbitrators only by means of an application in writing, and in the absence of such writing the reference by the Court and the proceedings of the arbitrators will be without jurisdiction; and a decree based on the award will not be conclusive.

Arbitration—continued.

— 8.—**Miscellaneous**—*continued.*

The consent of the parties to make the reference without a writing will not give the Court any jurisdiction to delegate its own functions to arbitrators, and to pass a decree upon their award; a consent in writing is essential to enable the Court to make an order of reference so as to render the award following it capable of being turned into a final decree. MIR AMANULLAH v. CHOTA MIRZA, **67 P.R. 1879**. [*R.*, 109 P.R. 1883.]

(4)—*Plaintiff and one of the defendants consenting to—Award against all—Lower Court striking out name of non-consenting defendant—Procedure illegal.*— Where the plaintiff and one of the defendants, in a suit for breach of betrothal, referred the matter to arbitration and where the arbitrators awarded damages against all the defendants, the Court that tried the suit passed judgment upon the award but against the consenting defendant only. *Held* that the lower Court erred in procedure and that it should remit the award under s. 323, Civ. Pro. Code, for illegality on the face of it. NARAIN v. KANHA, **3 P.R. 1872**.

(5)—*S. 316, Civ. Pro. Code, 1859—Deed of reference containing a provision in case of disagreement among arbitrators — Court itself deciding case — Finality of proceedings.*—A reference to arbitration recited that, if there be a difference of opinion between the arbitrators, an umpire should be appointed either by the arbitrators themselves or by the Court, or that the Court itself might decide the case. On the arbitrators differing in opinion, the Court adopted the last alternative. *Held* that, under the circumstances of the case, the decision was not final under s. 316 of Act VIII of 1859, that the arbitration was inoperative and that the decision passed by the Court was open to appeal. KANH SINGH v. RUTTUN SINGH, **96 P.R. 1868**.

(6)—*Question in issue not referred to arbitrators in reference—Procedure of Court.*—The Court is not wrong in passing no order on a question at issue omitted from reference to arbitration, and on which the award contains no decision. RAJ NARAIN ROY v. JUGGESSUR MOOKERJEE, **14 W.R. 247**.

(7)—*Award—Submission—Completion—Act VIII of 1859, ss. 315, 318, 320.*—It has been held in numerous English cases that if, after the time for making an award has expired, the parties attend further meetings before the arbitrators with full knowledge of the circumstances, and without making any objection, they are precluded from saying that the authority of the arbitrators is at an end. S. 320, Act VIII of 1859, does not say by whom the award is to be submitted. There is nothing in the language of the enactment which makes it necessary that the arbitrators should personally submit the award to the Court. Submission to the Court under s. 320, is not necessary to the completion of an award under ss. 315 and

Arbitration—continued.

—8.—**Miscellaneous**—*continued.*

318. These two sections show that the act contemplated the award as completed before it is actually submitted to the Court. Although an arbitrator may deliver an award to one of the parties, he ought not to hand over with it the proceedings, depositions and exhibits in the suit. S. M. JAGAT SUNDERI DASI v. SONATAN BYSAK, **5 B.L.R. 357**. [*R.*, 13 B. 119]

(8)—*Right to object to validity of submission in Chief Court without such objection in Lower Appellate Court.*—An award, on a reference to arbitration by a mukhtar, not specially empowered to refer the case to arbitration, who signed the submission or ikrarnamah was held under s. 313 of Act VIII of 1859, not to bind his principals. If the principals did not object to the validity of the arbitration in the lower Appellate Court but relied on the merits of the case they were not precluded from taking such objection in the Chief Court as they had not adhered to the award. WAZEERA v. MOOKUM, **11 P. R. 1869**.

(9)—*Judgment in terms of award when final—Agreement without provision for award of majority being binding, Effect of—Objections to award—Omission to dispose of—Decree—Appeal.*—If there is no provision in an agreement to refer to arbitration that the award of the majority shall be binding, the inference is that only a unanimous award is binding. A judgment in terms of an award is not conclusive, unless the proceedings immediately preceding the decree have been strictly regular, and all the legal conditions observed. The appeal against the decree passed by the Court considering the question raised by the defendants, whether there was a case for remitting the award was not barred under s. 325, Act VIII of 1859, or s. 522, Act X of 1877. HARDHYAN v. MEHR CHAND, **57 P.R. 1879**.

(10)—*Award in plaintiff's favour—Award set aside on defendant's objections—Plaintiff's acquiescence—Plaintiff debarred from insisting on award.*—On a reference to arbitration in the original Court an award was made in the plaintiff's favour; the defendant objected to it on the ground that the arbitrators had excluded certain evidence deed that they had not acted together. The award was set aside and the suit dismissed subsequently on a full investigation. The plaintiff, first objected to the cancellation of the award but subsequently acquiesced in the proceedings. The lower appellate Court considered the award final and gave plaintiff a decree accordingly. On the defendant's appeal the plaintiff's acquiescence was held to debar him from insisting upon the award. MOTI v. UTMA, **117 P.R. 1876**.

(11)—*Case referred to arbitrators — When Court to remand the case to them for re-consideration—Refusal to re-consider — Effect.*—S. 323 of Act VIII of 1859 authorizes a Court to remand a case to arbitrators for reconsideration, where there are mistakes which it cannot amend under s. 322. And if the arbitrators refuse to

Arbitration—continued.

——8.—Miscellaneous—*continued.*

reconsider, their award is void and is of no effect. MOHUN KISHEN v. BHOOBUN SHYAM, **7 W.R. 406.**

(12)—*Act VIII of 1859, ss. 325, 324—Award—Reconsideration of award.*—A judgment passed in accordance with an award under s. 325 of Act VIII of 1859, in disregard of provisions of s. 324 of that Act, is not legal and it will be set aside. After passing judgment in pursuance to an award, such award cannot be re-submitted to the arbitrator for reconsideration and correction. POHKAR PERSHAD v. PUNCHUM RAE, **2 N.W.P. 285.**

(13)—*Different awards—First Court trying case anew—Decision upheld—Sending back case to arbitrators.*—Where arbitrators give in different awards, and the Court of first instance having tried the case anew its decision is upheld in appeal, the case cannct, in special appeal, be sent back to the arbitrators with a provision for difference of opinion. THAKOOR DAS v. RAM JEEBUN CHUCKERBUTTY, **14 W.R. 150.** [*D.*, 8 C.L.J. 475.]

(14)—*Civ. Pro. Code, 1859, ss. 323 and 324—Remitting award.*—Where there is no illegality apparent on the face of an award, a Court cannot remit it for reconsideration by the arbitrator, nor can it set aside the award and proceed to determine the suit itself. NANAK CHAND v. RAM NARAYAN, **2 A. 181, F.B.** [*R.*, 3 A. 636, 22 M. 202, L.B.R. 1893—1900, 548, 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907, Suppl., 5 A.L.J. 658=A.W.N. 1908, 228=30 A. 505.]

(15)—*Arbitration — Remission of award—Refusal of arbitrators to reconsider—Appeal questioning propriety of order of remission—Civ. Pro. Code, 1877, ss. 520, 521.*—S. 520 of the Civ. Pro. Code, empowers a Court to remit an award for reconsideration upon some grounds specified therein, but upon no others; and under s. 521, an award, remitted under s. 520, becomes void on refusal of arbitrators to reconsider it. S. 520 gives no unreserved discretion to a Court in the matter of remitting awards for reconsideration; and the refusal of the arbitrators to re-consider the award will render it void only when the order remitting it was one which could be properly made under s. 520. Where, therefore, a Court remits an award for reconsideration, and the arbitrators refuse to reconsider it, and the Court proceeds with the suit and passes a decree, the question whether the award was properly remitted under s. 520 or not, is one which could be entertained in an appeal from such decree. ABDUL RAHMAN v. YAR MUHAMMAD, **3 A. 636=A.W.N. 1881, 34.** [*F.*, 22 M. 202, 31 M. 345=18 M.L.J. 228 =3 M.L.T. 315; *R.*, 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907, Suppl.]

(16)—*Reference to arbitration through Court—Decree passed on incomplete award—Civ. Pro. Code, 1877, ss. 2, 520, 523, 522, 524.*—A decree cannot be passed upon an incomplete award.

Arbitration—continued.

——8.—Miscellaneous—*continued.*

Such a decree, however, is a decree within the meaning of s. 2 of the Civ. Pro. Code; for it is a formal expression of the adjudication upon the rights of the parties, and decides the suit to the extent covered by the award. It is, therefore, appealable on that ground and also on other grounds, where it happens to be in excess of, or not in accordance with, the award. When an award is imperfect or incomplete and leaves undetermined some of the matters referred to arbitration, the Court should not confirm it, but must remit it to the arbitrator to determine such matters also. SADIK ALI KHAN v. IMDAD ALI KHAN, **3 A. 286.**

(17)—*Procedure where reference will be fruitless.*—If it appears that a reference would turn out to be fruitless, the Court may would proceed with the case to final judgment. MEHTAB v. MUSSAMMAT MADAN, **24 P.R. 1875.**

(18)—*Submission to—Submission made only by some members of the partnership—Submission not binding on those members who do not submit.*—One of several partners in a partnership cannot bind the others by a submission to arbitration even of matters arising of the business of the firm. It is no part of the ordinary business of a trading firm to enter into a submission to arbitration. DATOOBHOY v. VALLU, **1 Bom.L.R. 828.**

(19)—*Manager of joint Hindu family—Power of, to bind family by reference to arbitration.*—A manager of a joint Hindu family has the power to bind the family by a reference of its dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Any minors in the family would be bound by the reference and consequently by the award made upon it. BALAJI v. NANA, **5 Bom L.R. 95=27 B. 287.**

(20)—*Procedure at — Arbitrators deriving information from a third person—Presence of the referring parties — Award — Arbitrator—Delegation of duties—Ministerial acts.*—It would be prudent and discreet for arbitrators, when they desire to put themselves on the best footing of information as to matters of law to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. But if they cannot be shown to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shown to have been misled as to the law, their award should not on that ground be set aside. An arbitrator may delegate to a third person the performance of acts of a ministerial character. BUTA v. MUNICIPAL COMMITTEE OF LAHORE, **4 Bom. L. R. 673.**

(21)—*Failure of arbitration—Record coming back into Court—Dismissal of suit with costs—Notice—Validity of dismissal.*—Where an arbitration fails, and the record comes back

Arbitration—continued.

——8.—**Miscellaneous**—*continued.*

into the Deputy Commissioner's Court, that officer has no power to dismiss the suit with costs, without giving notice to the parties, or fixing a date for the hearing. MUDDUN MOHUN SINGH v. KANAYE DASS CHUCKERBUTTY, **2 W.R. 231.**

(22)—*Subsistence of Munsiff's award quashing award—Award not existent.*—As long as the order of a Munsiff quashing an arbitration-award subsists in full force, the award cannot be said to exist as a binding award between the parties. MR. D FITZ PATRICK v. MR. E. MACNAGHTEN, **21 W.R. 261.**

(23)—*Refusal to enforce award of arbitration—Law prior to Act VIII of 1859—Limitation.*—The refusal to enforce an arbitration award did not under the law previous to Act VIII of 1859, bar the award being used to base a suit. A mere agreement to refer to arbitration, if it contained no acknowledgment of the plaintiff's right of possession, did not save limitation; but the time during which the case was before the arbitrators, and the plaintiff was trying in another from to enforce the award, may be deducted from the period of limitation. RAMDHONE SIRCAR v. SEETANATH SIRCAR, **W.R. 1854. 283.**

(24)—*Civ. Pro. Code, 1908, sch. II, r. 16—Refusal of arbitrator to sign award—Legality of award—Decree passed on such award—Appeal.*—*Held*, that no appeal lies from the decree of a Court passed in accordance with an award, in a case where five arbitrators were nominated and two of the arbitrators appointed by one party refused to sign it, but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. KAMTA PRASAD v. JODHA SINGH, **7 A.L.J. 890=7 Ind. Cas. 99.**

(25)—*Decree in accordance with the award—No appeal lies—Arbitrator delegating authority.*—Where a decree is in accordance with the award no appeal lies. Where parties to an arbitration agreed to accept certain estimate and valuation made by a certain person, and the arbitrator proceeded to examine that person as a witness and accepted his estimate and valuation: *Held*, that the arbitrator was thereby not guilty of delegating his authority to that person. HAFIZ HAJI MUHAMMAD FAKHARUD DIN v. MURLIDHAR, **5 Ind. Cas. 621.**

(26)—*Arbitration—Award—Appeal—Revison—Tearing original and making fresh award—Taking evidence in absence of parties—Corruption or misconduct—Civ. Pro. Code, 1908, second schedule, paras. 15 and 16.*—*Held*, that a decree passed in accordance with an award, after finding that there was no misconduct or corruption of the arbitrators, to whom a case is referred for arbitration on the application of the parties, is neither subject to appeal nor to revision, and that an Appellate Court's action to interfere with it in any way even with the consent of the parties

Arbitration—continued.

——8.—**Miscellaneous**—*continued.*

is *ultra vires ab initio*. *Held*, also, that, on the objection of any party, the arbitrators can reconsider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one. *Held*, further, that it does not amount to misconduct of an arbitrator if he takes evidence in the absence of the parties, with their express or implied consent. DIAL CHAND v. KHUDA BAKHSH, **73 P.W.R. 1910=6 Ind. Cas. 963.** (92 P.R. 1903, 25 C. 141, *F.*; 148 P.W.R. 1901, 18 B. 299, *R.*)

(27)—*Arbitrator's award made after the death of one of the parties*—Nunc pro tunc, *whether applicable to the award—Submission to arbitration, revocation of, by the death of a party.*—Where a submission to arbitration has been made a rule of Court, the death of one of the parties does not work a revocation. Where, an agreement to refer having been filed in Court, the Court appointed an arbitrator, who, after finishing his enquiries and hearing the arguments of the pleaders of the parties, reserved his report and award, and then one of the parties died; *held*—that, under the circumstances of the case, the death of a party did not make the award void, and the doctrine of *nunc pro tunc* was applicable as in the case of a judgment of Court. HARA KRISHNA MITRA v. RAM GOPAL MITRA, **14 C.W.N. 759=6 Ind. Cas. 170.**

(28)—*Arbitrators not acting—Award filed by other—Validity of.*—Where it is provided that the two arbitrators should both file an award, an award filed by an arbitrator and the umpire is invalid, if it is found that the second arbitrator has taken no part in the proceedings. GANDA MAL v. FATTEH ALI SHAH, **55 P.R. 1882.** [*D.*, 112 P.R. 1885.]

(29)—Onus probandi—*Improper consent—Practice of Privy Council.*—Plaintiff and defendant were owners of adjoining Zamindaries. The question in the suit related to certain lands, each party claiming the same as part of her or his Zemindari. The Collector of the District, by an award, decreed the lands in dispute to the plaintiff. This award was set aside by the Civil Court, whose judgment was upheld by the *Sudder Adawlut* Court, from which the present appeal to the Privy Council was preferred. The respondent alleged that his consent to the arbitration was procured by means of threats and undue influence exerted on him by persons in authority. *Held*, the burden of proof as to threats and undue influence lay on the respondent and that he failed to discharge the burden. It was contended for the respondent that an agreement in writing referring the matters in dispute to the arbitration of the Collector, was not taken from him and that it should be inferred that his free consent was not given. There was, however, evidence in the case which showed that consent had been given by the respondent for the

Arbitration—continued.

—8.—Miscellaneous—*continued.*

arbitration. On this part of the case their Lordships observed:—"In the examination of questions like these, their Lordships are of opinion that it is their duty to look to the broad principles of justice and equity; and, whilst they are always willing to pay due deference to the Regulations which in part constitute the law of India, to discourage, in proceedings of this description, mere technical objections which affect not the merits of the case, and, more especially, to discountenance the invention of new grounds of dispute which have occurred in the course of the litigation, and which were not even mentioned at the commencement of it, as the cause for promoting the suit," it being satisfactorily established by other evidence in the case that the Zemindar gave his consent to the arbitration in adequate terms and in a sufficiently formal manner and did not retract his consent at any subsequent stage. It also appeared that the Zemindar himself was present at some of the sittings of the arbitration. RANEE PURVATHA VARDHUY NAUCHIAR RANEE AND ZEMINDAR OF RAMNAD v. JAYAVERA RAMAKOMARA ETTAYAPA NAICKER ZEMINDAR OF YETTIAPOORAM, **4 W.R. 31, P.C.**

(30)—*Determination of Court to go on with suit after first arbitration—Court not bound to consider result of second arbitration.*—Where the Court determined to go on with the suit after an award had been made under an arbitration, it had nothing to do with a fresh attempt at arbitration and was not bound to consider the result of the second arbitration. MT. HASANBIBI v. TALEWARKHAN, **4 C.P. L.R. 105.**

(31)—*Arbitrator—Refusal to act, what amounts to—Civ. Pro. Code, 1882, s. 522.*—Where an umpire, after completing the enquiries, falls ill and returns the file, but subsequently signs the award and submits it, within the time fixed by the Court for the delivery of the award, *held* that he has not refused or neglected to act. The mere fact that an arbitrator declines to sign an award which has been arrived at by the majority of the arbitrators, does not show that he has refused to act as arbitrator GHISSA v. BHAWANI DAS, **1 A.L.J. 683.**

(32) — *Arbitration — Arbitrators deriving information on matters of law without consulting all parties to reference — Delegation of ministerial acts to third person.*—It would be prudent and discreet for arbitrators, when they desire to put themselves on the best footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentlemen whom they may see upon that subject. But if they cannot be shown to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shown to have been misled as to the law, their award should not on that ground be set aside. (*Rolland* v. *Cassidy*, (1888), L. R. 13 App. Cas., *F.*)

Arbitration—continued.

—8.—Miscellaneous—*continued.*

[*R.*, 34 C. 305=5 C.L.J. 270.] An arbitrator may delegate to a third person the performance of acts of ministerial character. Such delegation does not amount to misconduct on the part of an arbitrator. BUTA v. MUNICIPAL COMMITTEE OF LAHORE, **29 C. 854=7 C.W.N. 82=4 Bom. L.R. 673.**

(33)—*Institution of suit—Agreement to refer arbitration—Instituting a second plaint—Dismissal of suit on merits—Appeal on merits—Dismissal of appeal—Second appeal insisting reference to arbitration—No ground of special appeal.*—In a suit for possession of real property in the Court of the Assistant Commissioner the parties before the issues were settled, agreed to submit the matter to arbitration. In the next month, an amended plaint claiming proprietary right which was presented to the Assistant Commissioner was transferred to the Deputy Commissioner. Subsequently the plaintiff applied to the Court to file the agreement under s. 326, Civ. Pro. Code, 1859; or to refer the case under s. 312. The defendant having objected to this, the Court tried the case on the merits and dismissed it. An appeal was preferred to the Commissioner on the merits without making alluding to the reference to arbitration. On being dismissed, an appeal was preferred to the Chief Court on the ground that the case should have been referred to the arbitrators. *Held*, that there was no ground of special appeal and that the Chief Court could not revise the orders of the Court below. CHAJJU MAL v. KASHI RAM, **57 P.R. 1876.**

(34)—*Award—Decree passed thereon—Appeal—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State*—No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision *Quære*:—Whether an appeal lies to His Majesty in Council from a decision of the Governor General's Agent at Sehore in Bhopal. HANSRAJ v. SUNDER LAL, **12 C.W.N. 585, P.C.=7 C.L.J. 520=138 P.L.R. 1908=10 Bom. L.R. 581=18 M.L.J. 266=99 P.W.R. 1908=14 Bur. L.R. 146=4 M.L.T. 25=80 P.R. 1908=35 C. 648=35 I.A. 83.** [*Appl.*, 1 Ind. Cas. 693; *R.*, 12 O.C. 40.]

(35)—*Award set aside by Court of first instance—District Courts setting aside such decision—Decision on merits.*—Where a suit was referred to arbitration and an award was made thereon, the defendant applied to set aside the award. The award was set aside, and, the suit having come on for decision on the merits, it was determined in favour of the defendant. The plaintiff appealed and the District Judge, in appeal, decided that the Munsiff was wrong in setting aside the award and, without going into the merits, reversed the decree of the Munsiff and entered judgment in accordance with the award in favour of the plaintiff: *Held*, the District Judge had authority to inquire into, and decide as to the propriety or otherwise of a decision of

Arbitration—continued.

——8.—**Miscellaneous**—*continued.*

a Munsiff setting aside an award, K. ACHUTHAYYA v. N.S. THIMMAYYA, **3 M.L.T 315 = 18 M.L.J. 228 = 31 M. 345.** (3 A. 636, 5 A. 293, 11 C. 172, 14 W.R. 327, 8 C.W.N. 392, 26 B. 551, 22 M. 202, *F.*; 28 A. 408, 4 A.L.J. 256. *Diss.*) [*F.*, 5 A.L.J. 644 = A.W.N. 1908), 242 = 4 M.L.T. 400.]

(36)—*Indian Arbitration Act (IX of 1899), s. 14—Bengal Chamber of Commerce, arbitration by the—Rules of the—Indian Stamp Act (II of 1899), ss. 5, 6 and 35, sch. I, arts. 5 and 43—"Submission" required to be proved and stamped—Award made out of time—Enlargement of time after expiry of original time—Concealment of names and appointment of arbitrators—Notification of time and place of hearing—Evidence, refusal to hear, when misconduct—Award against a firm—Jurisdiction of Court to set aside award, if may be ousted.*—Contract-notes which contain a provision for the submission of disputes to arbitration ought each to bear eight annas stamp under art. 5, sch. I of the Indian Stamp Act, 1899, as an agreement not otherwise provided for in the schedule. Although the Indian Arbitration Act, 1899, has made the procedure for the enforcement of an award simpler than the old practice of instituting suit for the purpose, it is still necessary to prove that the arbitrators acted under a valid submission, before an award can be made a decree of Court under the Act. The rules for the guidance of the arbitration 'tribunal' of the Bengal Chamber of Commerce were construed to contemplate the parties being notified of the names and the fact of the appointment of the arbitrators. Where the arbitrators appointed by the Bengal Chamber of Commerce under its rules did not appoint a time and place for the hearing of the reference, *held*, that the arbitrators failed in their duty in not doing so. Whether the arbitrators should or should not hear evidence and the parties by counsel of otherwise must depend on the particular circumstances of every case, the arbitrators exercising, in a judicial manner, their discretion in the matter. The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm. An award made againt a firm, without ascertaining as to who are the persons who constitute it, is, on the face of it, bad and no Court can make a decree in such circumstances upon the award, against a firm. It is not competent for the parties by an agreement to oust the jurisdiction of the Court vested in it by s. 14 of the Indian Arbitration Act, 1899, to set aside an award, if misconduct on the part of the arbitrators were shown or if it were shown that the award was improperly procured, when the parties desire that the award should

Arbitration—continued.

——8.—**Miscellaneous**—*continued,*

be enforced under the provisions of the Act, HURDWARY MULL v. AHMED MUSAJI SELAJI, **18 C.W.N. 63 = 1 Ind. Cas 371.** [*R.*, 13 C.W.N. 297 = 36 C. 388 = 1 Ind. Cas. 391]

(37)—*Award—Examination of arbitrator as to whether a portion of his proceedings was an award—Admissibility in evidence—Civ. Pro. Code, 1882, s.526—second schedule, s.21 of Code of 1908)—Appeal against order filing award.*—Although an arbitrator cannot be examined to show what he intended by his award, yet, he can give evidence on the question whether a particular portion of his proceedings was an award at all. An appeal lies from an order directing an award to be filed under s. 526, Civ. Pro. Code (=second schedule, s 21 of Code of 1908). TULSI DAS NARSI v. MADAM SUBANNA CHETTY, **6 M.L.T. 187 = 2 Ind. Cas. 92 = 19 M.L.J. 394.** (27 M. 255, 29 M. 303, *F.*)

(38)—*Arbitrators—Award—Decree—Allegation of misconduct on the part of arbitrators—Appeal.*—No appeal lies from a decree which follows an award made according to law, even where the Court passing the decree disallows the application by one of the parties who seeks to attack the award by reason of the arbitrator's alleged misconduct. WALJI v. EBJI, **6 Bom. L.R. 1132 = 29 B 285.**

(39)—*Award of arbitrators—Enforcement—General rights of inheritance.*—A plaintiff may sue for damages and losses sustained in respect of the ancestral property, under his general rights of inheritance, whether adjudicated upon by a previous award of arbitration or not; as regards lands, he may institute a suit either for enforcing the award or upon his general rights. But he cannot sue for moveables by a suit to enforce an award of arbitration. RAM COOMAR SINGH v. DEWAN RAM JEEBUN SINGH, **5 W.R. 165.**

(40)—*S. 525, Civ. Pro. Code, 1882—Arbitration—Award—Filing of award—Dispute as to the* factum *of arbitration and award—Jurisdiction of the Court to deal with the objection—Separate suit.*—When an application is made under s. 525, Civ. Pro. Code, to file an award as an award made in the matter which has been referred to arbitration, the question, if raised whether the matter has been referred to arbitration and an award has been made thereon, is one which the Court to which the aforesaid application has been made, can and ought to decide. MANILAL v. VANMALIDAS, **7 Bom. L.R. 644 = 29 B. 621.**

(41)—*Award—Filing of award—Assumption of* factum *of refernce and award—Dispute as to validity of award on account of matter alleged to have existed prior to reference—Objection falling outside the scope of ss. 520 and 521—Jurisdiction of the Court to deal with such objection.*—A claim based on a promissory-note was referred to arbitration without the intervention of a Court of justice and an award made thereon. The plaintiff applied to the

Arbitration—continued.

——8.—Miscellaneous—*continued,*

Court of the Subordinate Judge to file the award. In showing cause under s. 526 of the Civ. Pro. Code, the defendant maintained that there was no consideration for the promissory-note and that the award was sham and fraudulent. The Subordinate Judge in view of these objections declined to file the award. The plaintiff then applied to the High Court under s. 622 of the Civ. Pro. Code: *Held*, (1) that the question whether there was no consideration for the promissory-note having been decided by the arbitrator in the plaintiff's favour, the matter could not again be investigated or considered by the Subordinate Judge; but that would not entitle him to say that the award should not be filed; (2) that if the objection that the award was sham and fraudulent meant that there was corruption or misconduct of the arbitrator, then it would fall under s. 521 (*a*) of the Civ. Pro. Code and would have to be investigated by the Subordinate Judge on the application before him. ANTAJI v. NARAYAN, **7 Bom. L.R. 793.**

(42)—*Arbitration — Award — Application to have the award filed—Record-of-rights extract to be annexed to the application—Bombay Land Record-of-rights Act (Bombay Act IV of 1903), s. 10.*—It is not necessary to annex a record-of-right extract, required by s. 10 of the Bombay Land Record-of-rights Act, 1903, to an application in the case of proceedings under s. 525 of the Civ. Pro. Code, 1882. HARIDAS v. SUBRAYA, **9 Bom. L.R. 885.**

(43)— *Arbitrators—Award— Misconduct of arbitrators—Revision* —An order under s. 521, Civ. Pro. Code, setting aside an award made under ch. XXXVII of the Code on a reference to arbitration in the course of a suit on the ground of the arbitrator's misconduct is not subject to revision under s. 622 of the Code of Civil Procedure, 1882. DAMODAR v. RAGHUNATH, **4 Bom. L.R. 267 = 26 B. 551.**

(44)—*Decree in accordance with award—Suggestion of majority treated as surplusage—Review refused—Appeal.*—Where a Munsiff gives a decree in accordance with an award dealing with a suggestion of two out of the three arbitrators as surplusage, and refuses a review, *held* his decision was final. SURBOREE KANT BHUTTACHARJEE v. ANADYA KANT BHUTTACHARJEE, **12 B L.R. Ap. 10 = 20 W.R. 226.**

(45)—*Arbitration award—No reference by all parties — Final decree — Evidence.* — An arbitration award not made on a reference by all the parties to the suit cannot be converted into a final decree under ch. VI, Act VIII of 1859, though it is evidence against any party agreeing to the reference. BEEJOY CHUNDER BANERJEE v. BHYRUB CHUNDER BANERJEE, **15 W.R. 427.**

(46)—*Judgment according to compromise come to an arbitration—Effect of judgment.*—A judgment based on any compromise come to in

Arbitration—continued.

——8.—Miscellaneous—*continued.*

course of arbitration proceedings, is binding on parties to the compromise. NEM ROY v. LALMUN ROY, **25 W.R. 376.** [*R.*, 17 M.L.J. 469.]

(47)—*Benefit desired from award—Failure to apply under s. 327, Civ. Pro. Code, 1859—Effect.*—Failure to make an application under s. 327, Civ. Pro. Code, 1859, where benefit is desired from an arbitration award, will necessitate the person relying on the award to prove it in the usual way. LALLA MEWA LALL v. SREEMAHATO, **25 W.R. 152.**

(48)—*Civ. Pro. Code. 1859, s. 216—Appointment of umpire—Plurality of arbitrators.*—Appointment of umpire under Act VIII of 1859, s. 216, is necessary where there are two or more arbitrators. MAHABUR MISSER v. JUGGUR NATH MISSER, **25 W.R. 11.**

(49)—*Construction of arbitration award—Instalments—Interest.*—Where a sum found due under an arbitration award was to be paid in annual instalments, and, if one was in default, the judgment-creditor was to be entitled to recover upon the whole sum at the rate of 1 per cent. interest per mensem (instead of 6 annas), and a default took place after annual kists had been paid for several years: *held* that interest at 1 per cent. per mensem must be paid on the balance due at the time of the default, from the date of the award. ANUCK CHUNDER ADHICARRY v. PUDMO LOCHUN MOOKERJEE, **10 W.R. 111.**

(50)—*Intervenor not bound by award—Decree in regular suit.*—An arbitration-award is not binding on an intervenor as a decree in a regular suit. HAREE PERSHAD MUNDAL v. BAISHTUB DOSS LAGA BAWAJEE, **17 W.R. 233.**

(51)—*Small Cause Court Judge granting new trial — Subsequent reference to arbitration—Failure to make award—Effect.*—Where a Small Cause Court Judge, after granting a new trial, refers the matter to arbitration and the arbitrators fail to make any award, a fresh judgment should be given by the Judge. SURBO CHUNDER ACHARJEE v. RAM BUKSH CHITLANGEE, **24 W.R. 469.**

(52)—*Award—Objections—S. 324, Act VIII of 1859.*—Before setting an award aside a Court should make full enquiry into the objections raised against the award. And the Court should not hastily assume that the mere circumstance of the arbitrator having some interest in the matter at issue would necessarily bring the award within the provisions of s. 324 of Act VIII of 1859, and render it liable to be set aside. SENUK KACHEE v. OREE DOOBEY, **2 N.W.P. 241.**

(53)—*Extension of time for delivery of award.*—Time for delivery of an arbitration-award may be extended at the discretion of a Court. ANUND MOHUN PAUL CHOWDHRY v. RAM KISHEN PAUL CHOWDHRY, **2 W.R. 297.**

Arbitration—continued.

——8.—**Miscellaneous**—*continued.*

(54)—*Award—Irregularity of procedure—Objecton waived by parties.*—Any irregularity of procedure may, according to the rulings of the English Courts, be waived. Case where it was held that in attending and taking part in the proceedings, when and after witnesses are examined by one or two of the three arbitrators, in the absence of the others or other, the defendants-respondents in this case waived any objection which they might have taken to the proceedings on this ground. MAUNG MYIN v. MAUNG YAN AUNG, **U.B.R. 1897—1901, Vol. II, 21.** (15 C. 319, *R.*)

(55)—*Award — Decree—Appeal — Waiver—Estoppel.*—When the validity or legality of an award is questioned, an appeal lies from a decree passed in accordance with it. (25 C. 141, *F.*) The examination of a witness by two out of three arbitrators in the absence of a third and the refusal of the arbitrators to examine witnesses already examined amount to misconduct within the meaning of s. 521, Civ. Pro. Code, 1882. (7 W.R. 269, 8 W.R. 171, 12 M. 113, *D.*) Though an arbitrator may have been guilty of some irregularity in the course of reference, it will not vitiate the award if the conduct of the parties be such as to show that they waive any objection on account of it. Waiver must be clearly made out, full knowledge of the defect must be proved, and where a party objected to evidence received in his absence, etc., his not receding from the reference and allowing the remaining business to be transacted *ex parte* was not treated as an acquiescence in the irregularity. MA MI TU v. MAUNG NAING, **U.B.R. 1897—1901, Vol. II, 14.** (U.B.R. 1897—1901, Vol I, 290, *R.*) [*Overruled*, U.B.R. 1905, 4th Qr., Civ. Pro. Code, 40.]

(56)—*Award by arbitrator agreed upon by both parties—Undue influence of arbitrator—Burden of Proof.*—An award, made upon an agreement to submit, to the arbitration of the Collector of the District, a dispute respecting the boundaries of certain lands lying between two *Zemindaries*, upheld; the agreement to submit to arbitration having been deliberately entered into, acted upon, and acquiesced in by both parties; the *onus probandi*, that the consent of one of the parties to the award was obtained by threats and the undue influence of the Collector lies upon the party, setting up that charge. THE ZEMINDAR OF RAMNAD v. THE ZEMINDAR OF YETTIAPOORAM, **7 M. I.A. 441.**

(57)—*Arbitration—Refusal by one of the arbitrators to act—Award passed by remaining arbitrators, if valid—Civ. Pro. Code, 1882, s. 510.*—Where a matter in dispute was referred to arbitration and one of the three arbitrators named by the parties refused to act, and an award is passed by the other two, *held* there was no valid award on which a Court could pass a decree. The course which the Court should follow under such circumstances is that

Arbitration—continued.

——8.—**Miscellaneous**—*continued.*

pointed out by s. 510, Civ. Pro. Code, 1882. SAT KUMAR v. ATMA RAM, **A.W.N. 1885. 60.**

(58)—*Arbitration—Two arbitrators appointed by each party—Umpire—Umpire empowered to agree with one set of arbitrators or the other—Umpire awarding larger sum than either set—Effect.*—In an action for dissolution of partnership and for an account, the parties agreed to a reference to arbitration. The plaintiffs appointed two arbitrators and the defendants appointed two, and it was agreed that if two of the arbitrators should differ from the other two, the question was to be settled by an umpire, who should agree with the opinion of one set of arbitrators, and had no power beyond that. The plaintiffs' arbitrators made no award. The defendants' arbitrators awarded Rs. 6,757-15-3. whereupon the matter went before the umpire, and he awarded to the plaintiffs Rs. 7,357-15-7, and consequently did not agree with the arbitrators who made the award. *Held* that the arbitration was futile and that the lower Court was wrong in treating it as a good arbitration. JANNAT BIBI v. ABDUL AZIZ, **A.W.N. 1857, 197.**

(59)—*Arbitration—Judgment affirming award—No opportunity afforded of substantiating objections—Appeal—Civ. Pro. Code, 1882, s. 522*—Where certain objections to an award alleged misconduct and corruption on the part of the arbitrator, and others involved questions of fact and law, and the Judge overruled such objections without giving the objector any opportunity of substantiating them, and gave judgment affirming the award. *Held*, that, as there was no judicial disposal of the objections, the Judge was not competent to give judgment in the matter, and his decree was a bad one in law, and an appeal lay therefrom, notwithstanding the concluding portion of s. 522 of the Civ. Pro. Code. RAM MANOHAR MISR v. LAL BEHARI MISR, **A.W.N. 1889, 15.**

(60)—*Arbitration—Illegal award—Judgment—Appeal—Effect of certain arbitrators resigning before enquiry completed.*—Where an award is illegal, an appeal against the judgment based thereon can be maintained. Although it is true that the question referred to arbitration may be decided by a majority of the arbitrators, still all the arbitrators should be present, or else the award will be of no effect. In the present case, two issues were referred to the arbitration of four persons and an umpire. One of the issues only was determined by them, two of the arbitrators and the umpire being of one opinion and the other two of a different opinion. The Court thereupon returned the case to the arbitrators, for a finding on the other issue. The finding was returned by the umpire and the two arbitrators who agreed with him in the first issue; and the other two arbitrators did not take any part in the matter, and in fact, gave in a formal resignation. *Held*, that the award

Arbitration—continued.

—8.—Miscellaneous—*continued.*

was not proper, and that a decree cannot be passed thereon. GAYADIN v. HANUMANDIN, **A.W.N. 1884, 50.**

(61)—*Merger—Pro-note accepted in full satisfaction of claim—Suit on pro-note dismissed for insufficient stamp—Determination of all rights—Subsequent conduct of defendant, effect of—Arbitration—"Dispute arising under indent"—Claim not recoverable at law.*—A pro-note was accepted by plaintiff in full settlement of his claims against defendant under an indent which contained an arbitration clause. Plaintiff sued defendant on the pro-note, but the suit was dismissed on the ground that the note was insufficiently stamped. Plaintiff thereupon made an *ex-parte* reference to arbitration, purporting to act under the indent. The arbitrators delivered their award and plaintiff then sued defendant to have the award filed. It was contended for plaintiff that, subsequent to the execution of the pro-note, defendant so altered it as to convert it into an instrument of higher value than it bore. *Held*, that, as soon as plaintiff accepted the pro-note, all obligations and rights under the contract were determined. The subsequent conduct of defendant might possibly have furnished ground for a suit in tort, but it could not revive the rights and obligations under the indent which had been extinguished prior to the commission of the tort. *Obiter dictum*:—The question whether a dealer should pay a claim which is not recoverable at law is not a "dispute arising under an indent," and could not, therefore, be referred to arbitration under the clause of indent. EWART RYRIE AND CO. v. TARACHAND DHANRAJ, **9 Ind. Cas. 896.**

(62)—*Award by majority—Minority giving no opinion—Validity of award.*—The award of a majority of arbitrators, where it is provided that the decision should rest with the majority, is not invalid merely because no separate opinion is given by the dissenting arbitrators. KANHYA LAL v. SETH HARBHAGWAN DASS, **112 P.R. 1885.** (55 P.R. 1882, *D.*)

(63)—*Arbitration—Objections to award on ground of collusion—Decree upon award—Appeal—Civ. Pro. Code, s. 522.*—No appeal lies from a decree passed upon an award of arbitrators under s. 522, Civ. Pro. Code, where misconduct of the arbitrators that was set up was disproved. MUHAMMAD ISMAIL KHAN v. IMAM ALI KHAN, **A.W.N. 1888, 131.** [*R.*, 18 A. 422, 5 O.C. 13.]

(64)—*Application to remit award to abitrators—Time for remission—Civ. Pro. Code, 1859, s 320.*—An application that an award be remitted to the arbitrators, in order that the proceedings, depositions, and exhibits in the suit which had not been submitted with it to the Court under Act VIII of 1859, s. 320, should be so submitted, ought to be made within ten days after the award has been originally submitted; otherwise if the award be good on the face of it, the Court will give judgment upon it. BANEY MADHUB ROY v. HURRY MOHUN ROY, **2 Ind. Jur. N.S. 16.**

Arbitration—continued.

—8.—Miscellaneous—*continued.*

(65)—*Agreement to dispense with appeal—Validity of, ss. 523, 524, Civ. Pro. Code—Contract Act, s. 28, exceptions 1 and 2.*—A stipulation, in an agreement to submit to arbitration, which was filed in Court, that there should be no appeal against the decision of the arbitrator, by either party, is not such as would prevent the Court from setting aside the award on the ground of misconduct of the arbitrator. [*R.*, 11 Bom. L.R. 273.] Exceptions 1 and 2 of s. 28 of the Contract Act do not legalise such an agreement. RANGA v. SITHAYA, **6 M. 368.**

(66)—*Recommendation by arbitrator upon questions referred—No award—Civ. Pro. Code, 1882, s. 525.*—A so-called award, signed by an arbitrator, which merely recommended a solution of the questions referred, cannot be treated as an award upon an application under s. 525 of the Civ. Pro. Code. NUNDOLOLL MOOKERJEE v. CHUNDER KANT MOOKERJEE, **11 C. 356.**

(67)—*Arbitration—Extension of time after expiration of period fixed—Omission to fix time for delivery of award—Acceptance of award by Court—No objection by parties—Effect—Arbitrator first tendering and then withdrawing resignation—Effect of.*—An order extending the time was made after the expiry of the time fixed therefor, and it did not fix any positive date for filing the award. *Held*, that the adoption of the award by the Court amounted to an extension of time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and also that the parties, having made no objection to the action of the Court, should be deemed to have waived any objection to the award. The mere circumstance that an arbitrator had first tendered and then withdrawn his resignation, did not formally divest him of his character as arbitrator. HAR NARAIN SINGH v. BHAGWANT KUAR, **10 A. 137 = A.W.N. 1888, 28.** (23 W R. P. C., 429, *R.*)

(68)—*Act VIII of 1859, s. 327—Arbitration.—Award—Appeal.*—Where in an application under s. 327 of Act VIII of 1859, to file and enforce an award, made on a reference to arbitration without the intervention of a Court, the Court directed that the award should be filed, but did not make a decree enforcing the award under the provisions of ch. VI of Act VIII of 1859. *Held*, that the order of the Court did not amount to a decree and was not appealable. (N.W.P. 1868, p. 353, F.B., *F.*) *Per Spankie, J.*—S. 327 of the Civ. Pro. Code, 1859 applies only to those cases where the reference to arbitration is admitted, and not to cases where it is denied that the reference or the award was made. In such cases the enforcement of the

Arbitration—continued.

—— **8.—Miscellaneous**—*continued.*

award must be by suit. HUSSAINI BIBI v. MOHSIN KHAN, **1 A. 156.** [*D.*, 3 A. 427; *R.*, 17 A. 21; *Disappr.*, 84 P.R. 1901, F.B.=112 P.L.R. 1901.]

(69)—*Civ. Pro. Code, 1882, ss. 520, 591—Legality of order remitting award—Appeal—No finding on some issues—Illegality.*—An order remitting an award is an interlocutory order under s. 591, and the legality of such an order can be challenged in an appeal from the ultimate decree passed on the merits. [*F.*, 31 M. 345=3 M.L.T. 315=18 M.L.J. 228; *R.*, 66 P.R. 1907=159 P.L.R. 1908, 5 A.L.J.644=A.W.N. 1908, 242=4 M L.T. 400; *D.*, 31 M. 479=4 M L T. 328=18 M.L.J. 485.] An award which contains no finding on some issues on the ground that no evidence was let in with reference to them, but determines the whole matter in issue, is not illegal, and the award cannot be remitted for re-consideration. GEORGE v. VASTIAN SOWRY, **22 M. 202.**

(70)—*Award of arbitrators—Decree not according to award — Jurisdiction of.*—Where the arbitrators directed that the plaintiff should recover a certain amount to be realised from certain property mortgaged to the defendants and the Court passed a personal decree for the amount against the defendant *held* that the Court could not pass a decree inconsistent with the award. GIRDHARI LALL v. IMRAT MUL, **39 P.R. 1873.**

—Whole case entrusted to arbitrators — Costs—Power to award—Appeal—*See* CIV. PRO. CODE, 1908, s. 89, sch. II, r. 16 (2), 97 P.L.R. 1909=111 P.W.R. 1909.

—Award of arbitrators—Suit for specific performance of contract of sale—Subsequent suit for possession—Maintainability—*See* CIV. PRO. CODE, 1908, O. II, r. 2, sch. II, r. 20, 4 N.L. R. 14.

—Application by arbitrator for extension of period allowed for making award—Dismissal for default—Legality—*See* CIV PRO. CODE, 1908, O. IX, r. 8, sch. II, r. 8, 29 P.L.R. 1910=8 Ind. Cas. 224.

--Application by parties to Court of first instance after reference by appellate Court—*See* CIV. PRO. CODE, 1908, O. XXI, r. 25, A.W. N. 1906, 221,

—Agreement of parties to suit to refer matters in dispute to decision of Court—Appeal against decision of Court—*See* COURT, 10 C. W.N. 835.

—Whether Judge has power to refer dispute as to who should be the guardian of a minor to—*See* GUARDIANS AND WARDS ACT, 1890, ss. 11 (1), 13, 17. 46, 5 A.L.J. 101=A.W.N. 1908, 51=3 M.L.T. 203=30 A. 137.

—Stipulation that award of arbitrator shall be accepted as final—Validity—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

Arbitration—concluded.

—— **8.—Miscellaneous**—*continued.*

—Father's power as managing member to refer a partition question to—Award—Whether sons bound—*See* HINDU LAW—PARTITION, 6 Ind. Cas. 123.

See JURISDICTION OF CIVIL COURTS, 5 W. R. Act X, Rul. 13.

—Appeal—Cardinal principle in construction of submission to arbitration—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, 11 Bom. L.R. 1=1 Ind. Cas. 14=34 B. 1.

—Effect of award of—not filed in Court—*See* LIMITATION ACT, 1908, arts. 113, 120, 181, 4 C.L.J. 162=33 C. 881.

—Partition by—Whether binding on persons not parties—*See* PARTITION—GENERAL, 8 Ind. Cas. 439.

—Award of arbitrators when requires registration—*See* REGISTRATION ACT, 1908, ss. 17, 49, 71 P.R. 1906=111 P.L.R. 1907.

—Setting aside an award for arbitrator's misconduct—High Court's powers of revision—*See* REVISION—GENERAL, 5 A. 293=A.W. N. 1883, 39.

See SPECIFIC RELIEF ACT, 1877, ss. 21, 39, U.B.R. 1897—1901, Vol. II, 544.

See TRANSFER OF CIVIL CASES, 6 W.R. 290.

Arbtiration Act.

See ACT IX OF 1899.

Arbitrator.

See ARBITRATION.

See AWARD.

See CIV. PRO. CODE, 1908, sch. II.

(1)—*Resignation, retracting of.*—An arbitrator has full power to retract his resignation of office before it is accepted. MAHARAJAH JOY MUNGUL SINGH v. MOHUN RAM MARWAREE, **15 W.R. 57.**

—Award — Validity — Delegation—*See* ARBITRATION—POWERS OF ARBITRATORS, U. B.R. 1902—1903, Vol. II, Arbitration, p. 1.

—Misconduct of—*See* AWARD, 5 O.C. 13.

—Reference to—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 1, U.B.R. 1897—1901, Vol. II, 284, 286.

Archaka.

—Archaka managing affairs of temple—Presumption as to his being trustee as well—*See* HINDU LAW RELIGIOUS ENDOWMENT, 2 M.L.J. 251.

See HINDU LAW RELIGIOUS ENDOWMENT, 4 M. 391.

Architect.

See CONTRACT—BREACH OF CONTRACT, 19 M. 78.

Arh.

Mortgage—Construction of document—"Mustaghraq" "Rehan"—Power of sale in default not expressly given—*See* MORTGAGE—FORM OF MORTGAGES, 13 A. 28=A.W.N. 1890, 216.

Arhat.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 39, 204 P.R. 1889.

Arlat.

See MAHOMEDAN LAW—GIFT, A.W.N. 1905, 269=28 A. 264.

Armenian.

(1)—*In India.*—Armenians in India, although Asiatics, are subject to the English Law. NICHOLAS v. ASPHAR, **24 C. 216**. (9 M.I.A. 387, *R.*)

Armenian Christian.

—Succession to property of Armenian Christian residing in Oudh at the time of the annexation—*Lex Loci* with reference to the English Law of Succession—Territorial Law of Oudh on the introduction of British rule—*See* SUCCESSION, 6 O.C. 305.

Arms.

—Sale of arms in execution of decree by Nazir of Court—Sale by public servant in discharge of his duty—Indian Arms Act, XI of 1878, s. 1, cl. (*b*)—*See* ACT XI OF 1878, s. 1, cl. (*b*), 9 B. 518.

Arms Act.

See ACT XI OF 1878.

Army.

—Suit for debt against an officer in the—*See* LIMITATION—GENERAL, A.W.N. 1897, 203.

Army School-master.

—Soldier—Cantonment Court of Small Causes—Jurisdiction—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 6 M.H.C. 83.

Arrack.

—Agreement of partnership between licensee, to vend toddy and licensee to vend arrack—Rule prohibiting such agreement—Legality of agreement—*See* MAD. ACT I OF 1886, 24 M. 401.

See MAD. ACT I OF 1886, s. 24 (*e*), 26 M. 430.

Arrangement.

—*Agreement.*—An arrangement is not necessarily an agreement. It is a preparatory measure or negotiation. CHABILDAS v. DAYAL MAVJI, **6 Bom. L.R. 557.**

Arrears of Maintenance.

See CRIM. PRO. CODE, s. 488.
See HINDU LAW—MAINTENANCE.
See MAHOMEDAN LAW—MAINTENANCE.
See MAINTENANCE.

—Right to sue for—*See* HINDU LAW—MAINTENANCE, 2 Bom. L.R. 945, 10 Bom. L.R. 770.

Arrears of Rent.

See LANDLORD AND TENANT.
See RENT.

—Levy of, by sale of the occupancy—*See* BOM. ACT V OF 1879, s. 56, 8 Bom. L.R. 360, 30 B. 466.

—due under sub-lease payable to lessor's zamindar are debt—Liability to be attached and sold under s. 266, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908. s. 60, 5 A.L.J. 265=A. W.N. 1908, 129.

—Suit to recover—*See* INAMDAR, 5 Bom L.R. 700=28 B. 92.

—Execution of decree—Transferable tenure—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 3 C.L R. 146.

—Limitation for suit to recover—*See* LIMITATION ACT, 1908, art. 110, 6 Bom. L.R. 241.

Arrears of Subscription.

—to a newspaper, limitation for a suit to recover—*See* LIMITATION ACT, 1908, art. 42, 7 Bom. L.R. 190.

Arrears, Sales of land for revenue.

See ACT I OF 1845.

Arrest.

See ATTACHMENT.
See CIV. PRO. CODE.
See EXECUTION OF DECREE.

(1)—Where arrest in execution has not been specifically objected to in the lower Court, the High Court will not interfere. DWARKANATH DOSS BISWAS v. UNNODA CHURN DOSS, **8 W. R. 318.**

(2)—*Civ. Pro. Code (Act XIV of 1882), ss. 245 B, 337-A—Execution of decree.*—Where notice has been issued to the judgment-debtor under s. 245-B, Civ. Pro. Code, to show cause why the decree should not be executed by his arrest and imprisonment, and he alleges some reason, and enquiry is made in Chambers under s. 337-A, the Court, when not satisfied with his reason, is bound under s. 337-A, to cause his immediate arrest. GUBBOY v. RAMDOYAL CHOWBAY, **2 C.W.N. 588.**

(3)—*Arrest — Privilege—S. 642, Civ. Pro Code.*—A plaintiff in a suit at Madras, a native of Patna, on receipt of a letter informing him that his presence was required at Madras, to prosecute his suit, left Calcutta and arrived at Madras on the 24th October. Case posted to 27th October was adjourned for seven weeks, and he therefore remained in Madras awaiting the disposal of the suit till 10th November when he was arrested. *Held*, he was privileged, under s. 642, Civ. Pro. Code, as a suitor, so as to be exempted from arrest. *In the matter of* SIVA BUX, **4 M. 317.** [*Not F.*, 6 A.L.J. 912.]

(4)—*Exemption from arrest—Defendant in summary procedure suit—Arrest under writ of Small Cause Court—Exemption therefrom governed by English law.*—A party to a suit.

Arrest—*continued.*

even though only a defendant in a suit nnder the summary procedure sections of the Civ. Pro. Code, that has not obtained leave to defend therein, is entitled to the privilege of exemption from arrest upon civil process both on his way to, and return from, the place of trial. It is immaterial for the purposes of a right to the privilege, if the shortest route home is abandoned in favour of a more convenient road. Where exemption from arrest under a writ of a Presidency Small Cause Court is claimed, the matter must be governed by the English Law and not by s. 642 of the Civ. Pro. Code, corresponding to which there is no section in the Small Cause Courts Act. *In the matter of* SOORENDRO NATH ROY CHOWDHRY, **5 C. 106.**

(5)—*Arrest and discharge of debtor—Re-arrest.*—D M. a prisoner for debt, having been discharged for non-payment of subsistence-money, the execution-creditor applied for a rule *nisi* for his re-arrest, or for a new writ. *Held* that a prisoner, once discharged on non-payment of his subsistence-money, cannot be re-arrested, nor can a new writ be issued against him for the former debt, and that the principle that no man shall twice be vexed on the same charge applies here. *Per Morgan, J.*—That there may be a distinction between the words "release" and "discharge" in Act VIII of 1859, and that the arrest of the person is not the full satisfaction here that it is under English law. *In the matter of* DWARKALALL MITTER, **Bourke O. C. 109.**

(6)—*Civ. Pro. Code, s. 642 — Exemption from arrest on civil process* redeundo.—An insolvent, discharged and immediately re-arrested on a warrant obtained by a judgment-creditor, is not privileged from arrest as being on his way back from Court, under s. 642, Code of Civil Procedure. SAMARAPURI v. PARRY AND COMPANY, **18 M. 150, F.B.**

(7)—*Arrest and imprisonment, distinction between—Immunity from further process, created only by actual confinement.*—The Civ. Pro. Code preserves a distinction between arrest and imprisonment, and the immunity from further process is only generated by actual confinement. E. CHENGALRAYA CHETTI v. W. SUBBIAH, **6 M.H.C. 84.** [*F.*, 23 C. 128.]

(8)—*Act XI of 1865, s. 18—Defendant examined as witness by plaintiff—Immunity from arrest.*—A defendant in a suit who is summoned by and examined as a witness for the plaintiff is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from the place of trial. APPASAWMY PATTAR v. P.E. GOVINDAN NAMBIAR, **4 M. H.C. 145.**

(9)—*Warrant of arrest, power of detention under — Illegal detention.*—The warrant of arrest in execution of decree empowers the Sheriff only to arrest the defendant in execution, and detain him for such reasonable time as is sufficient to allow of his being brought before the Court, and having an

Arrest—*continued.*

opportunity of applying for his discharge; the detention of such prisoner by the Sheriff after such reasonable time, without further authority of law, is illegal. *In re* SUMBOO CHUNDER HALDAR; *In re* DURGAPRASAD MITTER; *In re* RAKHAL DOSS, **Bourke O.C. 59.**

(10)—*Civ. Pro. Code (Act XIV of 1882)-ss. 342, 481—Computation of period of imprisonment in execution of decree—Imprisonment under arrest before judgment, period of, subsequent to decree, to be taken into account in favour of judgment-debtor.*—An arrest which commenced as one before judgment under s. 481 of the Civ. Pro. Code, becomes, after the decree, arrest under and for the decree itself. Where therefore, the special period of limitation in the chapter of the Civ. Pro. Code, on arrest before judgment, *viz.*, six months, which is imposed in s. 481, terminates while the defendant is still detained under that section, and he is re-arrested in execution under s. 336, the period of the prior imprisonment which has elapsed after the passing of the decree, must be counted, and, when that period *plus* the new period amounts altogether to six months, then s. 342 applies and the defendant must be liberated. The time to be counted is the time of actual imprisonment. GHANASHAMDAS GOORSAMULL v. JOHARIMULL KEDVRI NATH, **7 B. 431.**

(11)—*Arrest, privilege from—Small Cause Court, Calcutta, control of High Court over—Act X of 1877, s. 642—High Courts, Crim. Pro. Code, Act X of 1875, s. 148* (c).—Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small Causes, while attending before an arbitrator appointed by the High Court to take a reference in the suit, it was held that he was privileged from such arrest while so attending, and that the High Court had power to direct his release from custody. Small Cause Courts in the presidency towns are subject to the order and control of the High Courts. *In re* JUGGESSUR ROY, **5 C.L.R. 170.** (1 C. 78, *F.*)

(12)—*Order for arrest before judgment, form of—Civ. Pro. Code, 1877, 1882, s. 487 (1859, ss. 78 and 276)—Commitment in execution of decree.*—An order for the arrest before judgment of a debtor made in the form directed by s. 78, Civ. Pro. Code, 1859, is, after judgment has passed, a commitment in execution of a decree within the meaning of s. 276. RAMPERSAUD ROY v. CALLACHAND DOSS, **Bourke O.C. 423.**

(13)—*Court not competent to release judgment-debtor once put in jail—Civ. Pro. Code, 1882, s. 349—Distinction between arrest and imprisonment.*—The Civ. Pro. Code does not empower any Court to release a judgment-debtor when he has once been put into jail except as provided by s. 341 of the Code. The circumstance that, throughout the Code, the terms "arrest" and "imprisonment" are

Arrest—*continued.*

employed as denoting different things, and further, that in ss. 344 and 355 both "arrest" and "imprisonment" are mentioned where the provisions of the sections are intended to apply in either case, precludes the interpretation of the term "arrest" in s. 349 of the Code as including imprisonment. MAHOMED HUSSEIN v. RADHI, **12 B. 46.**

(14)—*Arrest under civil process of mofussil Court on Sunday, legality of.*—An arrest under civil process of mofussil Court on a Sunday is in this country perfectly legal. ANONYMOUS, **4 M.H.C. App. lxii.**

(15)—*Instalment-decree, arrest and imprisonment in case of—Civ. Pro. Code, s. 341.*—In the execution of an instalment decree, it is not competent to the holder of the decree to get the judgment-debtor arrested and imprisoned separately for default in the payment of each instalment. S. 341 of the Civ. Pro. Code, read in connection with the definition of a decree as given in the interpretation-clause, shows a clear intention on the part of the Legislature that the judgment-debtor should not be imprisoned more than once under the same decree pronounced by the Court as its adjudication of the rights of the parties. DAMODAR SHALIGRAM v. MALHARI, **7 B. 106.**

(16)—*Arrest of pilot brig—Privilege from arrest—St. 21 & 82 Vic. c. 126.*—A Government brig employed in supplying pilots to vessels at the Sandheads was arrested under proceeding *in rem*. *Held* that the brig, by 21 & 22, Vic. c. 126, had become the property of the Crown, and as such was entitled to the same exemption from arrest as all other Queen's ships, and that the proceedings *in rem* was therefore illegal. BROWN v. THE PILOT BRIG "KEDGEREE," **1 Hyde 253.**

(17)—*Civ. Pro. Code (Act X of 1877), ss. 2, 230.—Execution by issue of attachment and arrest at the same time—Discretion of executing Court—Duty of Appellate Court.*—S. 230 of Act X of 1877 leaves it to the discretion of the Court executing a decree to refuse execution at the same time against the person and property of the judgment-debtor; where, however, the executing Court makes such an order of refusal, such order being a decree within the meaning of s. 2 of the Code, an appeal lies therefrom and the Appellate Court is bound to consider whether the lower Court has exercised its discretion properly. CHENA PEMAJI v. GHELABHAI NARANDAS **7 B. 301.**

(18)—*High Court's power to release prisoner committed to custody by P. S. C. Court*—When a prisoner, committed to jail by a Presidency Small Cause Court in execution of a decree of that Court, is brought before the High Court in obedience to a writ of *habeas corpus ad subjiciendum*, it is competent to the High Court to release him from jail on the ground that, at the time of his arrest, he was privileged from arrest. *In the matter of* OMRITOLALL DEY, **1 C. 78.**

Arrest—*continued.*

(19)—*S. 341, Act XIV of 1882 (Civ. Pro. Code)—Circumstances under which judgment-debtor imprisoned in execution of decree, obtaining release, immaterial—Court not empowered to arrest the judgment-debtor a second time under same decree.*—The Civ. Pro. Code contemplates as immaterial the circumstances under which a judgment-debtor, who is imprisoned in execution of a decree against him, obtains his release. Under the Civ. Pro. Code, there is no power in the Court to order a second arrest of such judgment-debtor under one and the same decree. *In the matter of* BOYLE CHUND DUTT, **20 C. 874.** (12 C. 652, *F.*) [*Not. F.*, 26 B. 652; *D.*, 23 C. 128.]

(20)—*Damages for arrest, suit for—Special circumstances under which maintainable.*—The plaintiff must, in a suit for damages on account of injuries resulting from an arrest in pursuance of a decree of Court, show that the original civil action out of which the alleged injury arose has been decided in his favour; that there was no reasonable and probable cause for the arrest, and that the injury sustained was something other than what has or might have been compensated for by an award of the costs of suit; that in fact there has been "some collateral wrong" RAJ CHUNDER ROY v. SHAMA SOONDARI DEBI, **4 C. 583.** [*R.*, 19 B. 717.]

(21)—*S. 341, Civ. Pro. Code, 1882—Judgment-debtor arrested and released immediately without being imprisoned—Second arrest.*—Under s. 341, Civ. Pro. Code, the immunity of a judgment-debtor from a second arrest depends not only upon his having been arrested but upon his having been imprisoned under the arrest. RAJENDRO NARAIN ROY v. CHUNDER MOHUN MISSER, **23 C. 128.** (12 C. 662, 20 C. 876, *D.*; 8 M. 21, *F.*) [*R.*, U. B. R. 1897—1901, Vol. II, 281.]

(22)—*Mahomedan debtor, arrest of, on a Sunday, not illegal—Lord's Day Act (XXIX Car. 2, c. 7).*—The arrest of a Mahomedan debtor within the original jurisdiction of the High Court on a Sunday is not illegal.—*Per Holloway, J.*—The provisions of the Lord's Day Act (XXIX), Car. 2 c. 7, do not apply in this country. Even if the substantive portions of the statute were applicable, it did not follow that s. 6 would be. The mode of execution of a judgment is exclusively determined by the Court of process. *Per Kernan, J.*—As between natives of India, the Lord's Day Act does not apply. PARAM SHOOK DOSS v. RASHEED-OOD-DOWLAH BAHADOOR, **7 M.H.C. 285.** [*R.*, 30 A 136=A.W.N. 1908, 43=5 A.L.J. 106 =1 M.L.T. 211.]

(23)—*Arrest in execution of decree—Practice—Delegation by Nazir to peon—Civ. Pro. Code, s. 343—Endorsement of particulars of arrest by Naib Nazir.*—A Nazir directed to arrest a judgment-debtor in execution of a decree is not debarred, by anything in the Civ. Pro. Code, from authorising a deputy to execute it for him, and the endorsement of the deputy's name on the back of the warrant is sufficient *prima facie*

Arrest—*continued.*

evidence of the delegation. An arrest is not rendered illegal by the circumstances that the endorsement of the execution of the warrant is made, professedly under s. 343 of the Civ. Pro. Code, by an officer other than the one who was entrusted with its execution. Instructions as to the manner in which Nazirs should delegate their authority to their deputies, and as to the care to be exercised in the selection of persons entrusted with the duty of executing warrants of arrest. ABDUL KARIM v. J. BULLEN, **6 A. 385 = A.W.N. 1884, 133.** [*Appr.* 22 C. 596.]

(24)—*Civ. Pro. Code, s 341—Arrest of judgment-debtor—Discharge—Non-payment of subsistence allowance--Re-arrest.*—The discharge of a judgment-debtor after arrest and before imprisonment, on account of the non payment of subsistence allowance by the creditor, is no bar to the debtor being re-arrested. SUBBA v. VENKATA, **8 M. 21.** [*F.*, 23 C. 128, 26 A. 317 = A.W.N. 1904, 22.]

(25)—*Civ. Pro. Code, ss. 336, 344, 638—St. 11 & 12, Vict. c. 21—Discharge of judgment-debtor arrested under decree of High Court*—Where a judgment-debtor arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court, claims to be discharged on the grounds that he intends to apply to the Court to be declared an insolvent, either under the provisions of the Civ. Pro. Code, or of st. 11 and 12, Vict., c. 21, he is entitled to be discharged on complying with the conditions of s. 336 of the Civ. Pro. Code. *Ex parte* PINSENT, **8 M. 276.**

(26)—*Civ. Pro. Code, ss. 336, 341, 344, 349—Judgment-debtor--Discharge from imprisonment.*—A judgment-debtor who is arrested can be released on furnishing security under ss. 336 and 349. But if he is committed to jail, he can be discharged only under s. 341. *In re* QUARME **8 M. 503.** [*F.*, 12 B. 46.]

(27)—*Married woman—Imprisonment for debt.*—The Civ. Pro. Code does not exempt married women, against whom personal decrees have been made, from arrest or from being sent into civil custody, in default of payment of the amount decreed. LAKSHMANA v. KULLAMMA, **9 M. 99.**

(28)—*Warrant of arrest—Imprisonment in jail not named in warrant—Effect.*—Where a sheriff's officer, of his own motion, delivered over to the officer in charge of the Alipore jail a debtor committed to the Presidency jail, *held*, the imprisonment was unlawful, and the prisoner was entitled to be discharged in consequence. SHAMSONNESSA BEGUM v. ANNE LOVE, **11 C. 527.**

(29)—*Judgment-debtor arrested and imprisoned in execution of decree—Fresh application for arrest.*—A judgment-debtor once arrested and imprisoned in execution of a decree cannot be again arrested under a fresh writ of attachment on the same decree. SECRETARY OF STATE FOR INDIA IN COUNCIL v. JUDAH, **12 C 652.** [*F.*, 20 C. 874; *D.*, 23 C. 128, 26 B. 652.]

Arrest—*continued.*

(30)—*Judgment-debtor arrested and discharged—Subsequent alienation by him—Liability to re-arrest—Appeal against order of arrest.*—A judgment-debtor, arrested in 1871 and discharged after his examination (his estate not being taken possession of), cannot be re-arrested in execution of the decree for any subsequent act of alienation. [*Not F.*, 1 Bom. L.R. 463.] There is no appeal against an order of re-arrest. VENKATAKRISHNA v. COELHO, **6 M. 170.**

(31)—*Arrest of master and part owner of ship where ship was lost—Repairs of ship, suit for price of.*—In an action for repairs, where the ship had been lost, the Court granted an order for personal arrest of the defendant, the master and part owner, under s. 80 of Act VIII of 1859, CHARRIOL v. COURTOIS, **Cor. 123.**

(32)—*Absconding debtor.*--Where a defendant, against whose person an attachment in execution has been issued, absconded, a second attachment against his moveable property was granted, and the writ of attachment against the person was not recalled. GREGORY v. HADJEE ESSUFF COONJEE, **1 Ind. Jur. N.S. 244.**

(33)—*Small Cause Court decree—Immediate execution—Refund.*—In authorizing immediate execution of a Small Cause Court decree, the Legislature did not intend that the debtor should be protected from arrest until he could return home. Where a judgment-debtor has paid the amount of a Small Cause Court decree, he is not entitled to a refund merely because he was arrested before he reached home. G. A. DEPENNING v. DEBENDRONATA MOITRO, **9 W.R. 549.**

(34)—*Re-arrest of judgment-debtor—No petition from decree-holder.*—A Judge is incompetent to re-arrest a judgment-debtor without any petition or motion of the decree-holder, SHIB RAM MUNDUL v. RUHMUTOOLLAH, **16 W.R. 68.**

(35)—*Contempt of Court—Arrest of party on way to Court—Privilege—Writ of attachment.*—The defendant in a suit was brought up in arrest under a writ of attachment for contempt in not having obeyed an order of the High Court directing him to give an account of, and pay into Court, certain money and property belonging to the plaintiff in that suit. He was arrested on his way to Court to defend the suit. *Held*, that the defendant was not entitled to be released, on the ground that his arrest took place when he was on his way to Court. Being in contempt, he had no privilege from arrest under a writ of attachment issued on account of that contempt. JOHN v. CARTER, *In re* A. M. CARTER, **4 B.L.R O.C. 90.**

See ACT VI OF 1888, 16 C. 85.

See ATTACHMENT BEFORE JUDGMENT, 1 N.W.P. 91.

—Order negativing exemption from—Appealability--Power of Court to release—*See* CIV. PRO. CODE, 1908, ss. 47, 135, 20 M.L.J. 136 = 5 Ind. Cas. 909 = 8 M.L.T. 122.

Arrest—*concluded.*

—Non-payment of subsistence-money—Arrested person discharged from Court-house—Effect—Discharge from jail—*See* CIV. PRO. CODE, 1908, s. 58, 9 B. 181.

—Release from—for non-payment of subsistence allowance—Right to re-arrest—*See* CIV. PRO. CODE, 1908, s. 58, 26 A. 317.

—Application for arrest of judgment-debtor—Illness whether ground for refusing application—Discretion of Court to issue notice to show cause against the application—*See* CIV. PRO. CODE, 1908, s. 59, O. XXI, r. 37, 14 O.C. 36=9 Ind. Cas. 746.

—Returning from Court, what does not amount to—Exemption from arrest—*See* CIV. PRO. CODE, 1908, s. 135, cl. (2), 6 A.L.J. 912=32 A. 3=3 Ind. Cas. 46.

—Damages—and imprisonment of wrong person—Liability of person setting Court in motion—*See* DAMAGES—DAMAGES, SUITS FOR, 8 M.H C. 38.

—Arrest under satisfied decree by mistake of officers of Court—*See* FALSE IMPRISONMENT, 9 B. 1.

—Pardanashin lady, arrest of—Entry into zenana—Civ. Pro. Code, 1877, s. 336—*See* PARDANASHIN WOMAN, 7 C. 19=9 C.L.R. 25.

See PARDANASHIN WOMAN, 1 B.L.R. F. B. 31=10 W.R. F.B. 21.

—Payment into Court to prevent arrest—Voluntary payment—*See* PAYMENT INTO COURT, 4 B.L.R. App. 25=13 W.R. 29.

See SUBSISTENCE MONEY, 4 M.H.C, 76, 4 B. 65.

—Arrest in execution of decree—Warrant initialled and not signed by proper officer—*See* WARRANT, 8 A 293=A.W.N. 1886, 106.

—Suit for damages for breach of contract—Arrest under s. 477, Civ. Pro. Code (1882) of defendant before judgment—Summons not served on defendant—Application for withdrawl of suit under s. 373, Civ. Pro. Code, 1882—Objection by defendant — Procedure — *See* WITHDRAWAL OF SUIT, 15 B. 160.

—Civ. Pro. Code, s. 168—When warrant of arrest may be issued to a witness not appearing after summons—*See* WITNESS—DEFAULTING WITNESS, 5 M.H.C. 104.

Arrest before Judgment.

See CIV. PRO. CODE. 1908, s. 95, O. XXXVII, rr. 2, 3, 18 B. 717.

See CIV. PRO. CODE, 1908, O.XXXVIII, rr. 1 (6), 2, 5 B.L.R. 215=13 W.R. 278.

Arrest of Ship.

See SALVAGE, 17 C. 84.

Articles of Association.

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITIES OF SHAREHOLDERS.

Articles of Association—*concluded.*

—Construction of—*See* ACT VI OF 1882, s. 61, 3 M L.T. 250=31 M. 66.

See STAMP ACT, 1879, sch. I, art. 8, 22 A. 131=A.W.N. 1900, 15.

Articles of War.

See ACT V OF 1869.

Artificer.

See ACT XIII OF 1859, 4 B.L.R. App. 1.

Artizans.

See COMPANY--FORMATION AND REGISTRATION, 1 B. 550.

See EJECTMENT, SUIT FOR, 43 P.R. 1868.

Ascetics.

—Trust for religious purposes, what constitutes—Succession to property of Hindu religious mendicant, who is not hermit or—*See* HINDU LAW—INHERITANCE, 3 O.C. 281.

—Succession among ascetics—*See* HINDU LAW—INHERITANCE, 4 C. 539=6 C.L.R. 28.

—Sudra ascetic—Devolution of property—*See* HINDU LAW—INHERITANCE, 22 M. 302.

—Order of Nihangs in Gorakhpur—Succession to property of number—Necessity of proving that deceased was a member of the order—*See* HINDU LAW—INHERITANCE, 16 A. 191=21 I.A. 17, P C.

See HINDU LAW—INHERITANCE, 5 N.W.P. 50.

—Observations on the origin, growth and functions, of mutts and ascetic orders in India—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 10 M. 375.

—Application for administration by preceptor's preceptor — Custom, Proof of—*See* LETTERS OF ADMINISTRATION, 28 C. 608=5 C.W.N. 873.

Assam.

—Land in Assam—Declaration of title—Jurisdiction of Civil Court—*See* JURISDICTION OF CIVIL COURT, 7 C. 437=9 C.L.R. 218.

—Occupancy-right in—Pykes—Their rights and privileges—*See* RIGHT OF OCCUPANCY—GENERAL, 15 C. 100.

Assam and Bengal Laws.

See BEN. ACT VII OF 1905.

Assam, Bengal and Agra Civil Courts.

See ACT XII OF 1887.

Assault.

(1)—*Assault by parties in concert—Common cause of action.*—An assault by parties acting together as to time, place and assault, is a single act and the cause of action common to all the parties. RAMESSUR BHUTTACHARJEE v. SHIB NARAIN CHUCKERBUTTY, 14 W.R. 419.

G. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir)

Assault—*concluded.*

(2)—*Suit for compensation—Damage for assault—Criminal prosecution.*—A person who is assaulted can pursue his civil in addition to his criminal remedy; but if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. MISR RAMJI v. JIWAN RAM AND KIDAR NATH v. MISR RAMJI, **A.W.N. 1881, 131.**

—for—Beating with shoe—*See* DAMAGES—DAMAGES, SUIT FOR, 6 C.W.N. 915.

—Suit to recover damages for assault—*See* DAMAGES—DAMAGES, SUITS FOR, A.W.N. 1893, 62.

See DAMAGES—MEASURE AND ASSESSMENT, 6 W.R. 95.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 M.I.A. 164.

—Insult—Suit for damages—Cause of action—Limitation—*See* LIMITATION ACT, 1908, arts. 22, 36, 120, 5 Ind. Cas. 124.

—Suit for damages for, misjoinder of parties and causes of action—*See* MISJOINDER OF PLAINTIFFS AND CAUSES OF ACTION, 3 Bom. L.R. 878=26 B. 259.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 4 B.L.R. A.C. 31=12 W.R. 477.

Assessment.

See LANDLORD AND TENANT.

See RENT.

See REVENUE.

(1)—*Exemption from.*—Where lands are continued to an Inamdar and his lineal male descendants, free from assessment, the Government are not debarred from levying assessment when the lands pass to a third person. MAHADEV v. SECRETARY OF STATE, **1 Bom. L.R. 528.**

(2)—*Payment of, by mortgagee.*—Apart from special stipulation, a mortgagee is under no liability to pay assessment as between himself and his mortgagor; and if he does pay it for the purpose of preserving his security, then he is ordinarily entitled to add that amount to his mortgage-money, and to require that he should be paid it before he can be redeemed. Where the mortgagee agrees to pay a certain sum as assessment and the assessment is subsequently increased, he is entitled to add the amount of the excess payments so made to his mortgage security. NILAWA v. KRISHNAPPA, **8 Bom. L.R. 350.**

(3)—*Suit for arrears of.*—An Inamdar suing for arrears of assessment is not entitled to a charge on the lands of, but only to a money-decree against, the occupants; hence, no personal decree can be passed against an occupant in respect of assessment for the years previous to his coming on the holding. VINAYAK v. LAKSHMAN, **5 Bom. L.R. 700=28 B. 92.** [*F.*, 6 Bom. L.R. 423.]

Assessment—*continued.*

(4)—*Levy of—By Government.*—Where the grantee on the assurance of the assessment being kept at a fixed amount undertakes to keep an embankment in repair and expends his money thereon, it is not open to the Government to levy further assessment on his lands. SECRETARY OF STATE v. DATTATRAYA, **3 Bom. L.R. 923=26 B. 271.**

—Non-payment of—Forfeiture consequent upon non-payment—Re-grant of the lands to the holder—Relation between the mortgagee of the first holding and the holder under the re-grant—*See* ACT V OF 1879, s. 56, 8 Bom. L. R. 360=30 B. 466.

See BEN. ACT IV OF 1876, ss. 75, 77, 79, 7 C. 322=9 C.L.R. 193.

—of tax by Municipality—Jurisdiction of Civil Courts to review same—*See* BEN. ACT III OF 1884, ss. 85 (*a*), 87 (*d*), 116, 12 C.W.N. 709=7 C.L.J. 631=35 C. 859.

—Suit to cancel an—by a Municipality—*See* BEN. ACT III OF 1884, ss. 113, 116, 21 C. 319.

—Owner of building required to set it back—Corporation to make full compensation to—Assessment of compensation—"Any damage he may sustain—*See* BOM. ACT III OF 1872, 14 B. 292.

—Prohibitory—*See* MAD. ACT II OF 1864, 27 M. 386.

See MAD. ACT I OF 1876, s. 7, 26 M. 389.

—Liability of District Forest Officer to be assessed by Municipal Council—*See* MAD. ACT IV OF 1884, sch. A, 25 M. 747.

—Voluntary payment of, by plaintiff for his own benefit and merely to forestall the defendant, does not give him a right to sue for the payment—*See* CONTRACT ACT, 1872, ss. 69, 70, 1 Bom. L.R. 371.

—of damages may be approximately stated in plaint with offer to pay additional Court-fee if more damages are found due—S. 50, Civ. Pro. Code does not prevent it—*See* COURT FEES ACT, 1870, s. 11, 17 M.L.J. 625.

—of damages, prinoiples regulating—*See* DAMAGES—DAMAGES, SUITS FOR, 6 C. L. J. 398.

—Sale of zamindari land for arrears of revenue and purchase thereof by Government—Irrigation from existing source, right to, by way of easement—Government's right to assess ryots in occupation—*See* EASEMENTS ACT, 1882, s. 13, 26 M. 51.

—Increase of, after hundred years—Legality—*See* GRANT—RESUMPTION OF GRANTS, 8 M.L.T. 378.

—Inherent right of Sovereign to assess revenue on land—Rate of assessment right of Government to enhance—Foras—Toka land in Bombay—*See* LAND REVENUE, 9 B. 483.

Assessment—*concluded.*

—Unauthorized occupation of Government land—Levy of penal—Suit to recover payments made—Necessity for proof of coercion—Limitation—*See* LIMITATION ACT, 1908, arts. 14, 16, 13 M.L.J. 269.

—Liability of mortgagor to pay enhanced assessment — *See* MORTGAGE — USUFRUCTUARY, 8 M.L.T. 420=7 Ind. Cas. 871.

—Grant of — Consideration in shape of services rendered—Sale—Gift—Registration—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 56 (6) (b), 123, 12 Bom. L.R. 9=5 Ind. Cas. 599=34 B. 287.

Assessment, Land Revenue, Madras, Act.

See MAD. ACT I OF 1876.

Assessment of new lands, Amending Act IX of 1847.

See BEN. ACT IV OF 1868.

Assessor.

See ACT X OF 1870.

See ACT X OF 1870, 17 B. 299, 8 B. 553, 17 C. 380, 10 C. 769.

Assets.

(1)—Government compensation for abolition of pilgrims' tax held to be assets, and to be divided among the grantees' heirs. MAHARANEE INDERJEET KOOAR v. MUSSUMATH ISMUDH KOONWAR, **3 W.R. 14, P.C.=10 M.I.A. 329.**

—Administrator-General—Right of retainer in satisfaction of his own claim—*See* ACT VIII OF 1855, 2 M.H.C. 255.

—Suit for refund of—Realized in execution—*See* CIV. PRO. CODE, 1908, ss. 38, 39. 41, O. XXI, rr. 4, 5, s. 73, 1 C.L.J. 315.

See COMPANY—WINDING UP OF COMPANY, 18 C. 31.

—Whether an impartible estate is—in the hands of a successor for payment of debts contracted by a previous holder—*See* HINDU LAW—IMPARTIBLE ESTATES, 16 M.L.J. 339 =1 M.L.T. 272=29 M. 453.

—Decree against Karnavan — Undivided family—Share of deceased Karnavan not assets in the hands of his sons—Tarward property not—in the hands of successor—*See* MALABAR LAW—JOINT FAMILY, 5 M. 223.

Assignee.

—Representatives of, if competent to carry on execution-proceedings—Conveyance authorising assignee to carry on all execution-proceedings, effect of—Rights of representatives of—*See* EXECUTION OF DECREE—MISCELLANEOUS, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.

Assignment.

See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—ASSIGNMENT.

(1)—*Power-of-attorney to receive money becoming due.*—A document authorizing a person to receive on behalf of another such sums as should become due in the course of execution of a contract for work is a power-of-attorney, and not an assignment. BHAGVANDAS KISHORDAS v. ABDUL HUSEIN MAHOMED ALI, **3 B. 49.**

(2)—*Defences in suit by assignee.*—The defendant, in a suit by the assignee can set up, against the latter, all the defences that he would have had against the assignor, at any rate, those available to him up to the date when notice of the assignment was given to him. KANHAIYA LAL v. DOMINGO, **1 A. 732.**

(3)—*Executory Contract involving personal considerations — Assignment.*—Rights arising out of a contract cannot be transferred, if they are coupled with liabilities or if they involve a relation of personal confidence NAMASIVAYA GURUKAL v. KADIR AMMAL, **17 M. 168=4 M. L.J. 31.**

(4)—*Of decree for arrears of rent—Execution by assignee—Bengal Tenancy Act, s. 148 (h).*—The mere fact of an assignment of a decree for arrears of rent having been made before the Bengal Tenancy Act will not protect the assignee, who proceeds to execution afterwards, from the operation of s. 148 (*h*) of that Act; but execution will proceed if, before that Act came into force, the assignment had been recognised by the executing Court under s. 232, Civ. Pro. Code. KOILASH CHUNDER ROY v. JADU NATH ROY, **14 C. 380.** [*Cons.*, 1 C.L.J. 500.]

(5)—*Assignment by bond—Liability of assignor.*—Three bonds, two of them being hypothecation-bonds and the third a simple bond, were assigned to the plaintiff's predecessor-in-title for Rs. 300, with an undertaking on the part of the transferor to produce evidence to prove the bonds, and to be responsible in case of any damage incurred. The transferor realized a certain amount as interest subsequent to the transfer, and the claims on the hypothecation-bonds were reduced by the Court, and the claim under the simple bond was dismissed altogether, but the transferee did not prefer an appeal. *Held* that the first Court was right in decreeing the claim of the vendee for the interest realized by the vendor under one of the bonds subsequently to its sale, and that, as he had not appealed as regards the simple bond, he was not entitled to realize that amount. HARDEO v. KISHEN LAL, **A.W.N. 1881, 90.**

(6)—*Assignment of interest* pendente lite—*Civ. Pro. Code, 1882, s. 372.*—If a plaintiff in a suit sells his right to prosecute it, the purchaser must carry on the suit in his vendor's name. But if it is desired to bring the vendee's name upon the record, the Court must be satisfied that consideration had been paid and that there had been a *bona fide* transfer. In such cases, evidence of the necessary proceedings

Assignment—*continued.*

under s. 372, Civ. Pro. Code, 1882, having been taken must be adduced, and the preliminaries essential for giving the vendee a title to carry on the suit must be complied with. RAMJI MAL v. HAZARI LAL, **A.W.N. 1885, 242.**

(7)—*Discharge of prior debt—Consideration for transfer—Remission part of the debt by assignor's creditor—Who is entitled to the benefit of the reduction.*—Where a person transfers his property, the consideration in part for the transfer being the discharge of a debt due to his creditor, the assignee, and not the assignor, is, in the absence of anything in the nature of a contract, entitled to any remission made by the creditor of the assignor. CHENCHURAMAYYA v. SUBBARAMAYYA, **9 M.L.T. 79.**

(8)—*Mortgage—Suit on — Parties—One defendant, also assignee from another defendant—Claim under assignment--Court's duty to adjudicate on—Assignee already party—Not necessary to be again made party as such.*—Where, in a mortgage suit, the assignee of a mortgage claiming under an assignment made by a defendant in her favour was also himself a defendant and put forward his claim as such assignee. *Held*, that the Court was bound to adjudicate upon his claim and that it was unnecessary to make him, who was already a party, again a party expressly as assignee. SAMINATHAIER v. ADINARAYANA-SAMIER, **9 M L.T. 410=9 Ind. Cas. 643.**

(9)—*Validity of, by way of mortgage—Conditional assignment — Assignee's right — Law applicable to the Punjab.*—An assignment of the assignor's interest in a certain sum due from a third party, "until certain advances made by the assignee to the assignor had been paid off with interest," is a conditional assignment. And a charge or a conditional assignment is not such an assignment as gives the assignee all the rights which, under the Judicature Act, he can have, only when the assignment is absolute, *i.e.*, when it absolutely vests the property in him. So, a person, to whom a non-negotiable promissory-note is assigned by the payee, as security for a debt due from the payee to the assignee, *until* the debt due to the assignee remains unpaid, cannot, as such an assignment is only conditional, sue the maker of the pro-note, in his own name, for recovery of the amount due on the note. (12 P.R. 1894, 1 A. 732, *R.*) Neither the Judicature Act nor the Transfer of Property Act is, in terms, in force in the Punjab, and the Court is at liberty to adopt such provisions of the one or the other, as appear to it to be consonant with the general principles of law and equity. NIHAL CHAND v. ALI BAKSH, **9 P.R. 1907=41 P. W. R. 1907=28 P.L.R. 1908,**

(10)—*Plea of assignment without consideration—Benami transactions—Sham transaction—Fraud.*—An assignee of a debt suing the debtor cannot be defeated by a plea of the latter that the assignment is without consideration. This principle has no application where the assignment is impeached not merely on the

Assignment—*concluded.*

ground of being *benami* but on the ground of being a sham transaction, intended to defeat the provisions of an Act and prejudice the rights of the person so impeaching it. In such a case, the transaction is substantially assailed on the ground of fraud. To cases like these the rule in *Mulji* v. *Nathubhai*, 15 Bom. 11 applies. SATU VITHUJI v. DAGDU BHAGU, **9 Bom. L.R. 462.**

(11)—*Execution—Application in accordance with law—Assignment of decree by some of decree-holders to one of them—Refusal of those who did not assign to join assignee in execution—Failure to prove validity of assignment, effect of—Parties.*—Some of the decree-holders in a suit assigned the decree in favour of one of them. The others having refused to join the assignee in execution, he applied for execution, making them defendants. *Held*, (1) that this was an application in accordance with law; (2) that the failure of the assignee-decree-holder to prove the validity of the assignment did not make his application any the less in accordance with law. VASHA KUTHIYAKATH UDUMAN HAJEE v. ASHI KALAKATH MAMIKUTTI, **5 Ind. Cas. 120.** (12 M.L.J. 348, *R.*)

(12)—*Assignment of decree—Order refusing recognition of—Appeal.*—An appeal lies against an order refusing to recognise an assignment of a decree. UNNAMALAI AMMAL v. KANDASWMY MADPANOR, **6 Ind. Cas. 199=8 M.L.T. 66.** (25 M. 383, *F.*)

(13)—*Transfer of Property Act (IV of 1882), ss. 130, 131, 134—Assignment of debt—Recognition of assignment by debtor-Notice of assignment to debtor—Notice for payment of debt to assignee, conditioned on non-payment by the assignor—Notice by transferee as effectual as by assignor.*—An assignment of a debt lawfully due and owing by a person to the assignor binds the debtor, who is thenceforward liable for its payment to the transferee. The debtor cannot refuse to recognise the transfer, provided he has notice of it, and payment to the assignor, after notice of assignment will not absolve the debtor from liability to the transferee. If the debtor has paid the original creditor before notice of assignment, he can plead such payment in discharge of his liability, although, at the time of payment, the right had vested in the assignee. Notice of assignment may have conditions or qualifications attached to it. Where the assignor notified to his debtor that the money due to him should be paid to his assignee, provided it was not paid already by the assignor himself: *Held*, that the notice was perfectly valid as a notice of assignment and did not entitle the debtor to refuse payment to the assignee if he knew that the assignor had not paid the amount himself. Under s. 131 of the Transfer of Property Act, the transferee can sign the notice if the transferor refuses to do so, and he need not set out the circumstances under which he gives notice. If the transferor gives an invalid notice, the transferee is entitled to give a legal notice, so as to prevent the

Assignment—*continued.*

original debtor from defeating the assignment. *Obiter*.—The Transfer of Property Act does not lay down what the debtor is to do when the fact of the assignment or its validity and operation is in dispute, but there can be no doubt that, in such a case, if he has received a duly signed notice of the alleged assignment, the only safe course for him is not to pay either of the claimants but to ask them to interplead. If he pays one of them he does so at his peril, and he will be obliged to pay over again to the right person, if the person to whom he paid had no title. R. GOPALAKRISHNA IYER v. D. GOPALAKRISHNA IYER, **4 Ind. Cas. 420=7 M.L.T. 97=33 M. 123.** (11 B. 1. *R.*)

(14)—*Rights of third party to impeach—Assignment defrauding the third party.*—Ordinarily an assignment cannot be impugned by a third party when the assignor admits. But it is otherwise where the question is whether the transaction to which the assignment relates is colourable and intended to defraud that third party. GAURISHANKAR v. HIRALAL, **12 Bom. L.R. 822=1 Ind. Cas. 957.**

(15)—*Of debt—Plea that no valid assignment took place—Parties—Suit for dissolution of partnership—Sale of outstanding debts of partnership before preliminary decree under s. 215, Civ. Pro. Code, is invalid.*—In a suit by the plaintiffs for recovery of money as assignees of the creditors, the defendants, the debtors are entitled to plead that the plaintiffs arenot in fact or law assignees of the debts in suit. In order to have this clearly and satisfactorily tried and decided, the obvious course would be to join the original creditors as defendants. In a suit for an account of a dissolved partnership, a decree should be passed under Civ. Pro. Code, s. 215, in accordance with form No. 132 in sch. IV; and it should direct an account to be taken of the dealings and transactions between the parties, and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. A sale of outstanding debts of the partnership cannot be legally ordered or carried out until an order, in accordance with s. 215, sch. IV, No. 132, Civ. Pro. Code, deciding that there is to be a dissolution from a certain date, has been passed. Any sale so ordered would *ipso facto* fall to the ground if no decree for dissolution were passed, and the suit itself were dismissed. The purchaser under such sale would have no *locus standi* to sue the debtor. MUL CHAND v. PIYARE LAL, **77 P. L.R. 1903=23 P.R. 1903.** (20 M. 313, *R.*)

(16)—*Lien on present and future property.*—In equity there can be a valid assignment of property to be subsequently acquired. THE NATIONAL BANK OF INDIA v. THE DELHI COTTON MILLS COY., LTD., **57 P.R. 1902.**

(17)—*Of mulgeni tenure—Assignee's liability arises by transfer to him and not by obtaining possession—Transfer of Property Act, s. 109 (j).*—The liability of the assignee from a lessee arises by reason of his privity of estate, and this

Assignment—*continued.*

privity is created by the transfer to him, and not by his obtaining possession. Similarly, when the assignee in turn assigns over, his privity of estate ceases, and, consequently, his liability also ceases in respect of breaches of covenant committed after he has assigned over. This principle applies both to agricultural and non-agricultural leases, although the Transfer of Property Act does not apply to an agricultural lease. SALDANHA v. SUBRAYA HEBBARA, **17 M.L.J. 258=2 M.L.T. 363=30 M. 410.** (1 M.H.C. 21, 3 C.L.R. 285, *Not F.*; 17 M. 296, *R.*)

(18)—*By co-owner without objection by others—Assignment of whole of the debt due to a shop—Validity.*—Where a co-owner assigned the whole debt due to a shop to the plaintiff, and the other co-owner who was made a party to the suit did not question the assignment, it was held, that, under such circumstances, the assignment was good for the whole amount. MALAI KOLANDAI CHETTI v. ROYAR PILLAI, **3 M.L.T. 294.**

(19)—*Assignment admitted by assignor—When can be impugned by a third party—Pleadings.*—Ordinarily, an assignment cannot be impugned by a third party when the assignor admits it. But a third party is entitled to impugn it when the transfer is a colourable one and has been entered into with the object of defrauding him. JWALA PRASAD v. BHARAT SINGH, **10 Ind. Cas. 226.**

See ACT XXIII OF 1871, s. 12, 6 A. 630=A.W.N. 1884, 209, 7 A. 886=A.W.N. 1885, 281.

—Suit on a promissory-note—Suit by assignee—Assignment found to be not made in fact—Effect—*See* ACT X OF 1873, 3 M.L.T. 163.

—Assignment of Government revenue—Rights of assignee—*See* MAD. ACT II OF 1864, 7 M. 258.

—Mismanagement of trust—Management made over to Municipality—Suit by Municipality on a mortgage document belonging to trust—Maintainability of suit on document without assignment in writing—*See* MAD. ACT IV OF 1884, s. 26, 3 M.L.T. 241=31 M. 111.

—Assignment *pendente lite*—Addition of assignee as co-defendant after period of limitation, effect of—*See* PUN ACT XVI OF 1887, ss. 53, 60, 3 P.R. 1907, Rev.=4 P.W.R. 1907, Rev.=44 P.L.R. 1908.

—Act IV of 1900 (Punjab descent of jagirs), s. 8, cl. 3—Sub-assignment—Liability to be attached in execution—*See* PUN. ACT IV OF 1900, s. 8, cl. 3, 117 P.R. 1907.

—of Government revenue—Rights of assignee—*See* U.P. ACT III OF 1901, ss. 58, 99, 8 A.L.J. 534.

—Assignment by mortgagee of mortgage-debt without consideration—Benamidar's right to sue on such assignment—*See* BENAMI TRANSACTION—GENERAL, 12 C.W.N. 409.

Assignment—*continued.*

—Endorsement on bond "the balance due should be paid into the hands of my son," whether can be treated as assignment of bond —Assignee's right of suit—*See* BOND, 1 Ind. Cas. 212.

—Rights of third party to impeach—*See* CHAMPERTY, 8 A.L J. 652.

—Rights of assignee of decree—*See* CIV. PRO. CODE, 1908, ss. 47, 49, O. XXI, r. 2, 7 Ind. Cas. 55=12 C.L.J. 312.

See CIV. PRO. CODE, 1908, s. 58, 9 B. 179.

See CIV. PRO. CODE, 1908, ss. 64, 73, 15 C. 771.

See CONTRACT — ILLEGAL CONTRACTS, 13 B. 42, 99 P.R. 1901.

—of contract—*See* CONTRACT — MISCELLANEOUS, 9 Bom. L.R. 114.

—Contract to assign pattas—Legality of contract of insurance—*See* CONTRACT—MISCELLANEOUS, 3 M.L.T. 393.

—of personal contract without promisor's consent—*See* CONTRACT—MISCELLANEOUS, 17 C. 115.

See DEBTOR AND CREDITOR, 1 Hyde 178, 1 Agra 79.

See DECREE — DECREE, CONSTRUCTION OF, A.W.N. 1883, 198.

—Distinction between attachment and assignment of decree — *See* EXECUTION OF DECREE—MISCELLANEOUS, 6 A.L.J. 564=2 Ind. Cas. 626.

See EXECUTION OF DECREE— MISCELLANEOUS, A.W.N. 1881, 101, A.W.N. 1883, 262.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 12 B. 686.

—Joint family property—Mortgage by father alone—Transferee from father acquiring title by adverse possession—Right to question validity of mortgage—*See* HINDU LAW—ALIENATION, 8 A.L.J. 901, F.B.

—Deposit of policy as security for debt—Subsequent assignment of policy to another creditor—Priority—*See* INSURANCE, 12 Bom. L.R. 717=7 Ind. Cas. 952.

—of lease—*See* LEASE — MISCELLANEOUS, 7 Bom. L.R. 313=29 B. 391.

—Limitation—Minority — Right to sue—Personal exemption—by minor—*See* LIMITATION ACT, 1908, ss. 6, 8, A.W.N. 1901, 12.

—Assignment *pendente lite*—Addition of assignee as co-defendant after period of limitation, effect of—*See* LIMITATION ACT, 1908, s. 22, 3 P.R. 1907=42 P.W.R. 1907=3 P.L.R. 1908.

—Fraudulent, of debt not really existing—Assignee whether bound to assume non-existence of debt as set forth in debtor's written statement—*See* LIMITATION ACT, 1908, arts. 62, 95, 97, 18 M.L.J. 19=31 M. 230=4 M.L.T. 80.

Assignment—*continued.*

—Claim merged in judgment—Assignment of right under judgment whether original cause of action be alienable or not—Assignment of decree for maintenance—*See* MAINTENANCE, 14 C.W.N. 918=12 C.L.J. 130=6 Ind. Cas. 826.

—of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgagee for consideration—Scope of s. 53, Transfer of Property Act—*See* MORTGAGE—GENERAL, A.W.N. 1908, 116=5 A.L.J. 305=30 A. 297.

—Assignment of mortgage, amount of consideration of, for the purpose of registration—*See* MORTGAGE—GENERAL, 8 B. 610.

See MORTGAGE—GENERAL, 4 A. 462=A.W.N. 1882, 106.

See MORTGAGE — REDEMPTION, 4 O.C. 210.

—by mortgagee for lesser consideration—Right of assignee to recover entire amount due to his assignor—*See* MORTGAGE—USUFRUCTUARY, 8 M.L.T. 420=7 Ind. Cas. 871.

See MORTGAGE—MISCELLANEOUS, 2 C.L.R. 18.

—of hundi — *See* NEGOTIABLE INSTRUMENTS—HUNDIS, 1 Ind. Jur. N.S. 247.

—of property in promissory-note, whether can be effectively made on mere delivery of it to plaintiff, for a suit to be filed on it, for no consideration — *See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—GENERAL, 14 Bur. L.R. 25.

—Endorsement on pro-note—Intention to effect a transfer—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY-NOTE — GENERAL, 1 M.L.T. 329=16 M.L J. 554=30 M. 75.

—Promissory-note payable to two persons—Endorsement by one payee in favour of the other—Suit by endorsee as such—Right of endorsee to sue as assignee of chose in action —Admissibility of endorsement as evidence of assignment—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 51, 24 M. 654.

—of business of firm—Liability of assignee for debt not shown in books of firm—*See* NOVATION, A.W.N. 1881, 52.

—Money-bond—*Bona fide*—Assignor if liable to be made party to suit by assignee to enforce bond—*See* PARTIES TO SUITS—GENERAL, 1 M.H.C. 140.

See PARTIES TO SUITS—ADDING PARTIES TO SUITS, Marsh 251=2 Hay 111.

See REGISTRATION ACT, 1908, s. 17, 1 B. 267, 2 B. 97, 3 B. 312, 23 C. 450.

—Determination of validity of, after notice to parties—Effect—*See* RES JUDICATA—GENERAL, 7 M.L.T. 224=6 Ind. Cas. 286.

See RIGHT OF SUIT—CONTRACTS, SUITS ON, 15 B. 1.

Assignment—*concluded.*

See STAMP ACT, 1879, sch. I, art. 44 (*b*), 8 M. 104, F.B.

—Assignee of property mortgaged not a debtor—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 19 C. 336.

—of trade-mark without the business confers no right—*See* TRADE MARK, 13 C.W.N. 82=4 Ind. Cas. 318.

—of executory contract, legality and validity of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 3, 10 C.W.N. 755=33 C. 702.

—Hindu reversioner's contingent right—Assignment of such right—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 25 C. 778.

—of mortgage-right pending suit on mortgage—Insufficient attestation of the mortgage-deed—Discovery of this defect after assignment—Suit by assignee for refund of purchase-money—Special covenant protecting assignor from liability—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 55, 59, 1 M.L.T. 416=17 M.L.J. 167=30 M. 284.

—Lease—Liability of assignee for rent—When ceases—*See* TRANSFER OF PROPERTY ACT, 1882, s. 108 (*j*). 14 C.W.N. 831=12 C.L.J. 256=37 C. 683=7 Ind. Cas. 198.

—Notice of assignment of debt, object and effect of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 131, 10 A. 20=A.W.N. 1887, 270.

See TRANSFER OF PROPERTY ACT, 1882, s. 131, 10 M. 289, 12 C. 505.

—of a right to recover subscription—Right of holder of a charge—*See* TRANSFER OF PROPERTY ACT, 1882, s. 134, 7 M.L.T. 125=5 Ind. Cas. 834.

—Right of assignee of actionable claim, to recover only price actually paid—*See* TRANSFER OF PROPERTY ACT, 1882, s. 135, 9 A. 476=A.W.N. 1887, 67.

—Assignment of mortgage for less amount—Right of assignee to lien for larger amount—*See* TRANSFER OF PROPERTY ACT, 1882, s. 135, 22 M. 301.

—of foreign judgment—Right of assignor to whole amount of judgment-debt—Transfer of Property Act, IV of 1882, s. 135, cl. (*d*) foreign judgment whether covered by—*See* TRANSFER OF PROPERTY ACT, 1882, s. 135, 23 M. 449=10 M.L.J. 77.

—Fiduciary relationship—By married woman—*See* TRUSTEE, Bourke O.C. 292.

Assignment in trust for Creditors.

(1)—*Assignment by debtor of property to trustees—Effect—Subsequent attachment.*—A *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in

Assignment in trust for Creditors—*continued.*

execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out. BAMANJI MANIKJI *et al* v. NAVROJI PALANJI, **1 B.H.C. 233.** [*R*., 10 B. H.C. 327, 3 Bom. L.R. 905.]

Assignment of Administration Bond.

See GUARDIANS AND WARDS ACT, 1890, ss. 35, 36, 37, 7 Bom.L.R. 803=30 B. 164.

Assignment of chose-in-action.

See ASSIGNMENT.

See ASSIGNMENT OF DECREE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 131 to 135.

(1)—*Purchaser of defendant's interest after decree of lower Appellate Court in plaintiff's favour—Right of Purchaser to prefer special appeal.*—The plaintiff sued the defendant for *khas* possession of land and got a decree in the lower appellate Court. Two days after this, the rights and interests of the defendants in the property were sold in Court auction; and the purchaser preferred a special appeal to the High Court, without joining the defendant as a party to the appeal. *Held*, that the purchaser could not maintain the appeal without joining the defendant as a co-appellant or co-respondent. GAJADAR PRASAD v. GANESH TEWARI, **7 B.L.R. 149=15 W.R. 485.**

(2)—*Transfer of Property Act, ch. VIII, s. 131—Contract Act, s. 60—Assignment—Notice—Plea of settlement.*—An assignment of a chose in action cannot affect the original debtor so long as he has no notice of the same. The institution of a suit by the assignee is itself notice of assignment. Where, in a suit by an assignee against the original debtor, the latter pleads settlement of the debt in question with the assignor and want of notice, the Court, before going into the question whether he had notice of assignment or not must first decide whether there was any such settlement; if it finds there was no such settlement, notice is immaterial. The Contract Act had no bearing on the assignment of debts, and though the Transfer of Property Act was not in force in the Punjab, yet, the law applicable to the assignment of debts in the Punjab was the same as that contained in Ch. VIII and s. 131 of the Transfer of Property Act. JHOKI RAM v. MALICK KADAR BAKSH, **12 P.R. 1894.** [*R*., 144 P.R. 1906, 9 P.R. 1907, 11 P.R. 1907=9 P.W.R. 1907.]

(3)—*Decree for rent—Right of assignee-decree-holder to carry on suit.*—Where an *ex-parte* decree for rent has been sold by the decree-holder, the assignee of the decree-holder may carry on the suit instead of the landlord. BINODE BEHAREE MOOKERJEE v. BEER NARAIN ROY. **3 W.R. Act X, Rul. 52.**

(4)—*Promise by a debtor to pay money when received from his debtor not an assignment.*—A promise by A, a debtor, to pay money to his

Assignment of Chose-in-action—*continued.*

creditor when B, A's creditor, pays the amount due to A does not constitute an assignment of the debt due by A to B. It simply holds out to the promisee the expectation that he will receive the money when paid by B. MOOL CHUND v. JAMYUT SINGH, **63 P.R. 1873.** [*Cited.* 60 P.R 1884.]

(5)—*Equitable assignment of debt—Assignee entitled to priority over assignor's creditors.*—Plaintiffs M and B, all these three made an agreement among themselves that M is to borrow money from plaintiff to enable him to carry out a building contract for B, and that whatever becomes due to M from B up to the 20th December 1872 should be paid to plaintiff. Before that date and before any money was paid by B to M the defendant obtained a decree against M and attached what was due from B to M. Plaintiff sued to establish his right to receive the money from B. *Held* that the original agreement amounted to an assignment to plaintiff of B's debt to M and that he had a right to the money in preference to the defendant. LAKHA v. SOBHA, **66 P.R. 1875.**

(6)—*Money-bond—Right of obligee to assign bond without obligor's consent.*—A common money-bond may be assigned to any person without the consent of the obligor, and the assignee may sue upon the bond. KRISTNA CHETTI v. BALARAMA CHETTI, **1 M H.C. 139.**

(7)—*Purchaser of moiety of right to damages.*—Where the plaintiff purchased from a certain person a moiety of whatever the latter might obtain as damages from the defendants for the breach of a contract. *Held* that such a transfer did not confer on the plaintiff a right to sue the defendants for a moiety of the damages. BHEKAREE SINGH v. MUHOSSEIN ALLY, **1 Hay 482.**

(8)—*Amalgamation of joint debt and personal debt.*—A joint debt cannot be amalgamated by a colourable assignment with a personal debt, so as to give the assignee the right to sue in respect of both debts. SREEHURRY PAUL v. NILMONEY SEN, **1 Hyde 169.**

(9)—*Wrongful attachment of property—Assignment of right to sue for damages.*—A mere right to sue for damages for injury caused by a wrongful act, such as a wrongful attachment, cannot be made the subject of sale or assignment. PRAGI LAL v. FATEH CHAND, **5 A. 207=A.W.N. 1882, 219.**

(10)—*Chose-in-action or actionable claim—Defences in suit by assignee.*—Such a pronote is, however, an actionable claim or chose-in-action, and can be acquired. And just as in England, Courts of equity allow the assignee of a *chose-in-action* to sue in his own name, he can do so in this country, where the Courts are both Courts of law as well as Courts of equity. [*F.*, 13 B. 42; *R.*, 28 M. 544=15 M.L.J. 384, 9 P.R. 1907=41 P.W.R. 1907.] The defendant, in a suit by the assignee can set up, against the latter, all the defences that he would have had

Assignment of Chose-in-action—*continued.*

against the assignor, at any rate, those available to him up to the date when notice of the assignment was given to him. KANHAIYA LAL v. DOMINGO, **1 A. 732.**

(11)—*Assignment of mere right to sue invalid—Public policy.*—An assignment merely with a view to litigation, to a person who, but for the litigation, would have no interest whatever in the subject-matter of the assignment, was *held* invalid as against public policy. GOCULDAS JAGMOHANDAS v LAKHMIDAS KHIMJI, **3 B. 402.** (4 I.A. 46, *R.*) [*Cons.*, 2 N.L.R. 17; *D.*, 13 B. 42.]

(12)—*Hindu Law—Assignment of debt—Right of assignee to sue in his own name.*—Under the Hindu law, the assignee of a debt may sue the debtor in his own name. KADARBACHA SAHIB v. RANGASAMI NAYAK, **1 M.H C. 180.** [*F.*, 13 B. 42; *Appr.*, 4 M.H.C. 176; *R.*, 9 Bom. L.R. 114.]

(13)—*Assignment of—Practice—Rights of assignee—Lien, holder of—His rights.*—In the practice of the Courts of this country, it is lawful to assign choses-in-action when there is neither fraud against individuals, nor special violation of the rules of public policy. The assignee of a claim for rents can sue under Act X of 1859. Where a factory is pledged as security for rent due on a land, and the person having the lien obtains a decree and cannot realise the amount due under the decree from the estate of the lessee or his assigns, he must institute a suit in the Civil Court. HURRINATH MUZOOMDAR v. MESSRS. MORAN & CO., **W. R. 1864, Act X, Rul. 127.** [*D.* 27 C. 827 F.B.]

(14)—*Chose-in action—Assignment.*—Choses-in-action are assignable in this country as also in England, although at law the assignee cannot sue in his own name. JUG MOHUN LALL v. MUSSAMUT BUDDAM KOER, **9 W.R. 243.**

(15)—*Suit to recover seer land—Suit by proprietor—Civil Courts—Suit to enforce contract.*—In a *sulehnamah* between B, the assignee of the plaintiff, and the defendant and a third party, it was agreed that as B held less seer land than the other two persons, there should be an equal division between the shareholders within a certain time, and in case no division took place, that B should be entitled to damages. The plaintiff sued to recover possession of certain seer land and a certain sum as damages for the breach on the contract. *Held*, that if the suit was regarded as one brought by a proprietor, who had purchased a certain share, the suit was not cognizable in the Civil Courts; and that if on the other hand it was a suit to enforce a contract made with B, which contract did not convey any right in specific lands the cause of action was one not legally assignable. JURBUNDHUN SINGH v. SHEORAJ SINGH, **5 N.W.P. 184.**

(16)—*Purchaser of putnidar's rights—Sale during pendency of suit—Effect—Right of suit.*—The purchaser of a putneedar's rights and interests in a putnee sold during the pendency

Assignment of Chose in action—*continued.*

of a suit brought by the latter against his tenants acquires the putneedar's right to carry on the suit. WILSON v. THE GOVERNMENT, **12 W.R. 122.**

(17)—*Title declared valid—Subsequent attack—Sale of decree—Execution by vendee—Rights of judgment-debtor as against purchaser.*—When a title has been declared valid, it cannot be attacked, on other grounds, which are not newly discovered, but which were available, and might have been taken when the former suit was under trial. If A has sold his decree to B, and ratified it by his own admission in Court, it is not for the judgment-debtor to contest the right of the purchaser to execute it; his only valid plea would be payment to the original decree-holder. SUNNOBURNESSA KHANUM v. MEHER CHUND, **W.R. 1864, 313.**

(18)—*Decree-holder transferring interest to stranger—Certificate—Filing of copy of decree—Purchaser—Presumption of genuineness of sale.*—If a decree-holder does not apply to a Court to certify a transfer of his interest to a third party, the Court can take no notice of such transfer. A decree holder applying for execution need not file a copy of his decree, and when a professed purchaser of the decree files a copy and the alleged deed of sale, no presumption arises as to the genuineness of the sale. KHETTUR MOHUN CHUTTOPADHYA v. ISHUR CHUNDER SURMA, **11 W.R. 271.** [*R.*, 18 C. 639, 10 C.L.J. 396.]

(19)—*Assignee of decree—Admitting assignee to execution.*—The Court is not bound to admit the assignee of a decree to execution thereof. If there is no dispute, or if it can decide the dispute, it may admit him to carry on the decree. BISHTOO CHURN BHOOSUN v. KISHEN GOPAL MISSER, **13 W.R. 207.**

(20)—*Act X of 1859—Decree under Act—Assignment.*—No law forbids the assignment of a decree under Act X of 1859. *In the matter of* JUNMEJOY MOOKERJEE, **14 W.R. 215.** [*R.*, 1 C.L.J. 500.]

(21)—*Transfer of plaintiff's interest—Written statement — Transferee's appeal — Parties.*—Where plaintiff's interest has been transferred with his assent, and the written defence is afterwards put in without demur, the original plaintiff need not be associated with the transferee in an appeal by the latter. MONEEROODDEEN MOJOOMDAR v. PARBUTTY CHURN GHOSE, **15 W.R. 121.**

(22)—*Purchaser of plaintiff's right after suit dismissed—Appeal against dismissal—Joinder of parties.*—The purchaser of plaintiff's rights after a suit has been dismissed cannot appeal against the order of dismissal without joining the original plaintiffs as appellants. DHUNNOO SOWDAGUR v. SUNNOO BIBEE, **15 W.R. 106.**

(23)—*Quære.*—Whether the speculative purchase of a right of appeal can be recognized by a Court of Justice where third parties purchase the rights and interests of plaintiffs in

Assignment of Chose in action—*concluded.*

a suit which is dismissed, and file an appeal in which they describe themselves as plaintiffs, appellants, together with the original plaintiffs, and the original decree is confirmed with costs: *held* that the purchasers take the risks and liabilities of the plaintiffs from the commencement, including liability for all costs awarded against plaintiffs generally without limitation. TROYLUCKHONATH BANERJEE v. BRINDABUN CHUNDER SIRCAR CHOWDHRY, **18 W.R. 438.**

(24)—*Assignee of right to receive rent—Right of suit.*—The assignee of a zamindar's right to receive rent has a right in a Civil Court whether the assignment has been effected by the intervention of the Civil Court or the private act of the zemindar. REEDOY MONEE BURMONEE v. HUGH SIBBOLD, **15 W.R. 344.** [*F.*, 4 C. W.N. 10; *D.*, 27 C. 827.]

(25)—*Civil Courts—Courts of law and equity—Equitable assignment of chose in action.*—Civil Courts in this country, being not merely Courts of law but of equity also, can assign choses in action, which, if legally saleable, are equitably assignable also. MUNRUNJUN SINGH v. LEELANUND SINGH, **11 W.R. 5.**

(26)—*Suit by assignor—Conditional assignment—Assignor's right to sue.*—When an agreement of assignment provided that the assignor should sue for the benefit of the assignee who is to supply funds for and enjoy the fruits of litigation, the plea that the assignor having parted with his property and rights in the subject-matter of suit is not entitled to sue will not avail. It will hold good only in the case of an unconditional assignment of which notice had been given to the debtor. MUHAMMAD SADIQ v. POLLARD, **1886 P.R. 183.**

See CHAMPERTY, 4 B.L.R. O.C. 1=12 W.R. O.C. 13.

See EXECUTION OF DECREE—STAY OF EXECUTION, 8 W.R. 202.

See HINDU LAW—CONTRACT, 4 M.H.C. 176.

Assignment of Decree.

See ASSIGNMENT.

See ASSIGNMENT OF CHOSE IN ACTION.

See CIV. PRO. CODE, 1908, O. XXI, r. 16.

(1)—*Assignment of decree pending proceedings in execution by decree-holder—Right of transferee to go on with execution—Power of executing Court to question validity of transfer or assignment—Ss. 244, 588, Civ. Pro. Code, 1882—Appeal by judgment-debtor—Second appeal by assignee or transferee of decree—"Decree-holder" includes person to whom decree is transferred.*—The executing Court can, under the provisions of s. 244, Civ. Pro. Code, go into the disputed question of the transfer of the decree. If there is an assignment of a decree pending proceedings in execution, nothing in the Code debars the Court from recognising the transferee as the person to go on with the execution. The omission of the transferee, if it is an omission,

Assignment of Decree—*concluded.*

to make a formal application for execution, is merely an error of procedure, and does not affect the merit of the case. On a Court determining a question as to a valid transfer of the decree as well as one relating to the satisfaction of the decree between the judgment-debtor and the person whom he found to be the decree-holder's representative, an appeal by the judgment-debtor lies before the lower Appellate Court, and it is bound to determine all the questions raised in it, including the question of representation if raised. If the appealing party is found by the first Court to be the decree-holder's representative, and the lower Appellate Court has not found that he is not so, a second appeal lies to the High Court. [*R.*, 15 C.P.L.R. 69, 6 A.L.J. 71.] A decree holder as defined in the Procedure Code includes any person to whom the decree is transferred. DWAR BUKSH SIRKAR v. FATIK JALI **26 C. 230=3 C W N. 222** [*R.*, 3 O.C. 32; *F.*, 27 C. 670, 25 M. 529.]

(2)—*Right of assignee—Equities.*—Where a decree is assigned, the assignee takes the decree subject to any equities or limitations attached to it. SUBARAYA AIYAR v. SRINIVASA RAGHAVAIYANGAR, **10 M L.J. 211.**

See BEN. ACT VIII OF 1885, s. 148, cl. (*h*), 6 C.W.N. 91.

See BENAMI TRANSACTIONS—GENERAL, 4 B.L.R. App. 40.

—Satisfaction of decree by set off of another decree before assignee was brought on record—Validity of satisfaction as against assignee—*See* CIV. PRO. CODE, 1908, s. 49, O. XXI, r. 18, 7 M.L.J. 227.

—Assignment of decree by joint-holder—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, 19 M. 306=6 M.L.J. 17.

—Attachment, effect of, on execution application by assignee—*See* CIV. PRO. CODE, 1908, O. XXI, r. 53, 7 M.L.T. 83.

—Assignee of decree before presentation of appeal—Application to bring assignee as respondent—*See* CIV. PRO. CODE, 1908, O. XXII, r. 10, 18 A. 36=A.W.N. 1895, 232.

—Effect—Decree attached by third party—Assignee's remedy—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 23, 27, 6 M.L.T. 273.

—Pending appeal—Assignee made party-respondent—Liability of assignee for costs—*See* COSTS—SPECIAL CASES, 20 B. 167.

—for costs—*See* COSTS—MISCELLANEOUS, 24 A. 288=A.W.N. 1902, 47.

—Whether its validity can be questioned after assignee is made substituted decree-holder—*See* REGISTRATION ACT, 1908, s. 17, 12 C. W.N. 625.

—Execution of decree—Assignment of decree for costs—Costs realised by assignee—Decree reversed in appeal—Costs cannot be recovered by way of execution—*See* RESTITUTION OF RIGHTS BY MOTION, 20 A. 139=A.W.N. 1897, 222.

Assignment of Revenue.

See REVENUE, A.W.N. 1881, 63.

Assignment, Policies of Insurance (Marine and Fire).

See ACT V OF 1866.

Assistant Commissioner.

See BUR. ACT XI OF 1889, L.B.R. 1893—1900, 285.

Assistant Judge.

—Case referred for trial to—by the District Judge under s. 17 of Bombay Civil Courts Act (XIV of 1869)—Powers of Assistant Judge in respect of case so transferred—Jurisdiction—*See* DISTRICT JUDGE, JURISDICTION OF, 15 B. 107.

Association.

See COMPANY.

—Meaning of—*See* ACT VI OF 1882, s. 4, 8 A.L.J. 32=9 Ind. Cas. 25.

—Illegal—Chief fund consisting of more than 20 members—Association for gain—Non-registration under Act VI of 1882—*See* ACT VI OF 1882, s. 4, 1 M L.T. 106.

See COMPANY—FORMATION AND REGISTRATION, 1 B. 550.

Assurance, Registration of.

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Atet Property.

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See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 81 P.R. 1888, 108 P R. 1887.

Attached Property.

See ATTACHMENT.

—Suit to establish right to,—Value of suit for purposes of jurisdiction—*See* VALUATION OF SUIT, 142 P.R. 1906=11 P.W.R. 1907=63 P.L.R. 1907.

Attaching Creditor.

(1)—*Attaching creditor—Official assignee—Priority.*—A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order. FREDERICK PEACOCK v. MADA GOPAL, **29 C. 428, F.B.=6 C.W.N. 677.** (15 C. 202, *F.*; 28 C. 419, *Overruled*; 5 B.L. R. 691, 10 C. 150, *D.*) [*F.*, 29 B. 405=7 Bom. L R 488; *R.*, 26 M. 673=13 M.L.J. 278, 7 O C. 314, 5 C.L J. 80=11 C.W.N. 163, 5 P W.R. 1909=6 P.L.R. 1909; *D.*, 30 M. 413=17 M.L.J. 334=2 M.L.T. 365.]

Attachment.

1.—GENERAL.
2.—ALIENATION DURING ATTACHMENT.
3.—ATTACHMENT PENDING APPEAL.
4.—LIABILITY FOR WRONGFUL ATTACHMENT.
5.—MODE OF ATTACHMENT.
6.—PRIORITY OF ATTACHMENT.
7.—STRIKING OFF EXECUTION PROCEEDINGS.
8.—SUBJECTS OF ATTACHMENT.
9.—MISCELLANEOUS.

See CIV. PRO. CODE, ss. 47, 50—54, 60—64 and O. XXI.

See EXECUTION OF DECREE.

See SALE—SALE IN EXECUTION OF DECREE.

——1.—General.

(1)—*Act VIII of 1859, s. 214—Attachment—Description of property attached.—Per Peacock, C.J., and Mitter, J.* (Division Bench) :—In attaching property, a reasonably accurate description of the property is all that is required by s. 214, Act VIII of 1859. NGA THA YAH v. F. N. BURN, **2 B.L.R. F.B. 91=11 W.R. F.B. 8.**

(2)—*Attachment confers no title.*—Attachment only prevents alienation, it does not confer title. MOTI LAL v. KARRABULDIN, **25 C. 179, P.C. =24 I.A. 170=1 C.W.N. 639=7 Sar. 222.** [*F.*, 29 C. 428=6 C.W.N. 577; *Expl.*, 5 C.L.J. 80=11 C.W.N. 163; *R.*, 26 M. 673, 7 O.C. 314, 11 P R. 1906=4 P.L.R. 1906, 19 M.L.J. 401=32 M. 429.]

(3)—An attachment does not confer any title ; it merely prevents alienation. FREDERICK PEACOCK v. MADAN GOPAL, **29 C. 428=6 C. W.N. 577, F.B.** (25 C. 179, *R.*) [*F.*, 29 B. 405= 7 Bom. L.R. 488; *R.*, 26 M. 673=13 M.L.J. 278, 7 O.C. 314, 5 C.L.J. 80=11 C.W.N. 163, 5 P.W.R. 1909=6 P.L.R. 1909; *D.*, 30 M. 413 =17 M.L.J. 334=2 M.L.T. 365.]

(4)—*Execution sale—Validity—Jurisdiction of attaching Court.*—An attachment and sale of property situate outside the limits of the Court that passed the decree is improper and without jurisdiction and will have no validity as against a sale in pursuance of even a subsequent attachment in execution of a decree of a Court within whose limits the property is situate. OBHOY CHURN COONDOO v GOLAM ALI, **7 C. 410= 9 C.L.R. 361.**

(5)—*Application for removal of attachment, dismissal of owing to non-subsistence of attachment, whether bars a fresh applcation for removal of a second attachment.*—At the time when the Court originally rejected the plaintiff's application for removal of the attachment placed by the defendant over his property, no attachment was in fact subsisting, it having been withdrawn by the Court on account of the defendant's failure to pay the necessary Court-fees. The decision against the plaintiff under the circumstances, was void of any effect

***Attachment*—continued.**

——1.—General—*continued.*

and one that could not properly be regarded as *res judicata* at all. So, where a second attachment was placed on the same property by the defendant, the plaintiff was not precluded from again applying to remove such attachment. The second attachment by the judgment-debtor, after the first had been withdrawn, was a new and distinct act giving rise to a new cause of action or complaint to the plaintiff on which he was entitled to a fresh enquiry and decision. KASHINATH MORSHETH v. RAMCHANDRA GOPINATH, **7 B. 408.** [*F.*, 13 B. 72.]

(6)—*Right of a creditor attaching a decree—Reversal of decree on appeal—Remedy of creditor.*—G attached, in execution of a decree against R, a decree, got by the latter against M. Before G could reap the fruits of his attachment, an appeal, which had been preferred against the attached decree, was concluded by a compromise between R and M, the effect of such a compromise being to reduce the amount due to R under the original decree by a very large sum. The attaching creditor, G, protested against the compromise, but the appellate Court passed a decree on the basis of the compromise, disallowing the objection of G. G, now, proceeded to execute the original decree, which he attached. The execution Court refused to execute the decree, on the ground that it had been re-placed by the decree of the appellate Court based as it was on the compromise. Hence this appeal. *Held*, whatever might be the inconvenience or loss to which the attaching-creditor might be put by the compromise of the appeal, the original decree was no longer subsisting, the same having been re-placed by the decree of the appellate Court, and the attaching-creditor was without remedy. He was himself to blame for having attached a decree as to the reversal of which, on appeal, there was a chance. GANPAT SHAH v. RAM CHAND, **22 P.L.R. 1905.**

(7)—*Execution of decree—Ss. 268, 617, Civ. Pro. Code, 1882 (=O. XXI, rr. 46, 48; s. 113, new Code)—Power of S.C. Court to attach salary of Railway servant not fallen due—Salary disbursable outside jurisdiction of Court.*—The salaries of Railway servants residing and working for gain and actually getting their pay within the local jurisdiction of a Court can be attached in execution of a S. C. Court decree passed by such Court, if the attachment is made at or about the time when the agent of the disbursing officer goes to hand the money to the Railway servants within the jurisdiction of that Court. But if the attachment is of salary not actually fallen due, it can be made only by the Court having jurisdiction at the place where the disbursing officer has his office. An attachment by a S. C. Court of the salary of a Railway servant which has not accrued due and which is disbursable outside its jurisdiction, by a prohibitory order under s. 268 Civ. Pro. Code, 1882, to the officer whose

Attachment—continued.

—1.—General—*continued.*

duty it is to disburse the salary, is invalid. (3 C.L.R. 30, 6 A. 243, *F.* ; 10 W.R. 447, *R.*) When a disbursing officer who has submitted and conformed to such an order subsequently discovers that the attaching Court had no jurisdiction, he is not bound to pay the money kept in deposit with him into the attaching Court. ABDUL GAFUR v. ALBYN, **30 C. 713=7 C.W.N. 821.** [*F.*, 28 B. 198=5 Bom. L.R. 803.]

(8)—*Execution of decree—Attachment of property of third person—Right of owner to follow such property in the hands of an auction-purchaser.*—Where property, not of the judgment-debtor, but of a third person was attached in execution of a decree and the owner having objected, his objection was summarily rejected on the sole ground that it was preferred on the day fixed for the sale and the property was sold: *Held*, that the owner was entitled to follow the property into the hands of the auction-purchaser and to recover either the property itself or damages. RAM PRASAD v. HAR BHAGWAN, **A.W.N. 1893, 148.**

(9) — *Attachment in execution of decree—Second attachment applied for by assignee of decree*—Onus *of proving continuance of first attachment.*—Although where the assignee of a decree wishes to execute it, it is incumbent on him to apply under s. 232, Civ. Pro. Code, 1882, yet, if, at the date of the assignment, the judgment-debtor's property is already under attachment, it is not necessary for the assignee to apply for a fresh attachment. On a second attachment of property previously attached, it lies upon the decree-holder or assignee, if the question is raised, to show that his second application was unnecessary by reason of the first attachment being still subsisting, and that the first attachment had not been taken off. HAFIZ SULEMAN v. SHEIKH ABDULLAH, **16 A. 133=A.W.N. 1894, 13.** (12 B.L.R. 411, *R.*) [*R.*, 23 A. 114=A.W.N. 1900, 214.]

(10)—*Mortgage-debt attached in execution of decree against mortgagee—Mortgaged property, not attached, effect of—Civ. Pro. Code, 1882, s. 274 (O. XXI r. 54).*—The sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under s. 274, Civ. Pro. Code, since a debt secured on immoveable property is itself immoveable property. BALDEO DHANRUP MARWADI v. RAMACHANDRA BALVANT KULKARNI, **19 B. 121.** [*F.*, 18 P. R. 1909=22 P.W.R. 1909=1 Ind. Cas. 450 ; *R.*, 14 C.P.L.R. 5, 26 B. 305 ; *D.*, 13 Bom. L. R. 233.]

(11)—*Execution of decree — Attachment—Sale—Sale cancelled by appellate Court—Re-sale—No second attachment necessary.*—Certain properties were attached and sold in execution of a decree. The Court confirmed the sale and ordered the execution proceedings to be struck off the file of pending cases, but expressly maintained the attachment. On appeal, the appellate Court set aside the sales. *Held*, that the attachment remained in force after the cancelment of the sales and that no re-attachment was necessary before the respondent could apply for re-sale of the property in execution of his decree. ATA HUSAIN v. THE BANK OF UPPER INDIA, **A.W.N. 1881, 5.**

(12)—*Attachment in execution—Effect thereon of an order striking execution proceeding off the file.*—Whether an attachment in execution proceeding subsists or is removed by an order striking the execution proceedings off the file, must be decided with reference to what appears to have been the object and intention of the order. When, therefore, certain properties were attached in execution of a decree, and the proceedings struck off the file, and afterwards an application was made again to attach the property, and granted, *held* that the first attachment was not subsisting and that a private sale of the property before the second attachment was not void. ZIB-UN-NISSA v. JAIRAM GIR, **1 A, 616.** (N.W.P. 1869, p. 51, *F.*) [*R.*, A.W.N. 1885, 57, 8 O.C. 152.]

(13)—*Held* by the Full Bench (*Markby, J., dissenting*) that a private *bona fide* alienation of property during the continuance of an attachment is null and void only as respects the attaching creditor and those who claim under or through the attachment. ANUNDOLALL DASS v. RADHAMOHUN SHAHA, **11 W.R. O.C. 1.**

(14)—*Subsistence of attachment, period of—Application for second attachment—Effect on first attachment.*—An attachment subsists, if not expressly abandoned by the party at whose suit it is issued, until an order for its withdrawal is passed. Where a judgment-creditor applies for a second attachment of his own accord, the first must be deemed to be abandoned ; but where the second attachment is taken out only because the Court requires him to begin *de novo*, the first attachment remains in force. JHOBOO SAHOO v. RAM CHURN ROY, **11 W.R. 517.** [*F.*, 15 W.R. 222.]

(15)—*Wrongful attachment and sale—Invasion of right—Attachment—Effect on owner's title—Sale—Owner's title passes by.*—Where the attachment itself is wrong, the sale of properties so attached is a fresh and greater invasion of the rights of the lawful owner. The person injured might have sued but is not bound to sue. (31 A. 10, *R.*) The attachment gives the creditor only certain rights. The title to the properties continues in the owner and will so continue, even if his objection to the attachment be disallowed. (18 M.L.J. 590, *R.*) The sale passes the title. It affects the owner's title differently and to a greater degree than an attachment. ANANTHARAZU GARU v. NARAYANARAZU GARU, **(1911) 2 M.W.N. 531.**

Attachment—continued.

——1.—General—*continued.*

(16)—*Procedure—Will—Probate— Appreciation of evidence—When an appellate tribunal will disturb the finding of the Lower Court on a pure question of fact — Judge approaching evidence with strong pre-possession and pre-conceived theories—Erroneous procedure.*—Where the questions at issue depend entirely on the proper appreciation of the evidence of the witnesses examined in the case, it is an obvious duty of the appellate tribunal not to disturb the conclusion of the Court of trial, unless it is satisfied that the Judge of first instance who had the witnesses before him has, in dealing with the evidence, adopted an erroneous procedure and has decided against the clear weight of the evidence. Where the District Judge approaches the evidence in support of the will with strong pre-possession against its authenticity, based on what he considers to be suspicious circumstances connected with its appearance and the tenor of its contents, and rejects that evidence mainly on certain pre-conceived theories of his as regards the general credibility of witnesses belonging to a certain class, the method adopted by the District Judge in dealing with the case is clearly wrong. RAMASWAMY CHETTIAR v. KARUTHALACHI, **(1911) 2 M W N. 495.**

—Decree for share of rent—Void attachment—Alienation made during—*See* BEN. ACT VIII OF 1869, ss. 63, 65, 2 C.L.R. 325.

See BEN. ACT VII OF 1880, s. 10, 20 C. 325.

See BEN. ACT I OF 1895, 5 C.W.N. 291=28 C. 217.

—of profits of vatan, removal of, on Collector's certificate—*See* BOM. ACT III OF 1874, s. 10, 4 B. 426.

—for non-payment of kist—Payment of kist subsequently — Detention of property attached in consequence of orders of superior officer—Liability of village officer for damages—*See* MAD. ACT II OF 1864, s. 60, 26 M. 263.

See U.P. ACT XIX OF 1873, s. 205-B, 24 A. 136=A.W.N. 1901, 183.

See U.P. ACT XII OF 1881, s. 56, A.W.N. 1885, 262,

--Suit for possession on invalid mortgage executed during attachment—Objection to validity of attachment for the first time in appeal—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 6 C. 129, P.C.=7 I.A. 157.

See CIV. PRO. CODE, 1859, ss. 270, 271, 2 B.L.R. A.C. 100.

—Execution — Illegal acts committed—Jewels attached not mentioned in attachment list—*See* CIV. PRO. CODE, 1908, s. 47, 14 M.L.J. 295.

—Decree against Karnawan as senior member and manager of tarwad—Objection by members of tarwad to attachment of tarwad property—Release of attachment—Suit to set aside order—*See* CIV. PRO. CODE, 1908, s. 47, 24 M. 658.

Attachment—continued.

——1.—General—*continued.*

See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 17, A.W.N. 1888, 155.

—Decree-holder first attaching property—Priority not forfeited by delaying to obtain order for sale—*See* CIV. PRO. CODE, 1908, s. 73, 6 M.H.C. 348.

See CLAIM TO PROPERTY ATTACHED, 4 B. L.R. F.B. 175=13 W.R. F.B. 63.

See CONTRACT ACT, 1872, s. 70, A.W.N. 1885, 219.

—Suit for declaration, that certain property was joint ancestral property and not liable to attachment in execution of certain decree—No consequential relief — Court-fee payable thereon—*See* COURT FEES, 13 A, 389=A.W.N. 1891, 139.

See COURT FEES, 4 B. 515, F.B.

See DAMAGES—DAMAGES, SUITS FOR, 20 M. 157, 1 Agra 104.

—Order *re* management of property attached, under s. 146—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 29 C. 382=6 C.W.N. 469.

—Property of insolvent attached during insolvency proceedings—Dismissal of petition—Validity of—*See* INSOLVENCY—CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE, 20 M. 452=7 M.L.J. 229.

—before and after judgment—*See* INSOLVENCY—MISCELLANEOUS, 2 B.L.R. A.C. 61=10 W.R. 353.

—Money due to insolvent deposited in Court—Attachment by creditors—Right of Official Assignee—*See* INSOLVENCY—MISCELLANEOUS, 4 B.L.R. A.C. 72, Note=12 W.R. 103.

See INSOLVENCY—MISCELLANEOUS, 7 C. 213=8 C.L.R. 213.

—of a chose in action—*See* JURISDICTION OF SUBORDINATE JUDGE, 3 Bom. L.R. 462.

—of rebel's property—*See* LIMITATION—MISCELLANEOUS, 1 Agra 46.

See LIMITATION ACT, 1908, arts. 11, 11-A, 125, 122 P.L.R. 1904=32 P.R. 1904.

See LIMITATION ACT, 1908, art. 13, A.W.N. 1885, 305.

See LIMITATION ACT, 1908, arts. 29, 42, 27 M. 346.

—Order of Magistrate for—*See* LIMITATION ACT, 1908, art. 47, 3 Agra 65.

—Time within which to set aside an attachment before judgment—*See* LIMITATION ACT, 1908, art. 164, 8 Bom. L.R. 567.

—In execution of decree— Claim to attached property—Effect of order under Civ. Pro. Code, 1859, s. 246—*See* MORTGAGE—REDEMPTION, 2 A. 455.

Attachment—continued.

——1.—General—*continued.*

—Suit by trustees of deed for benefit of creditors to set aside attachment—*See* PARTIES TO SUITS—GENERAL, 3 Agra 104.

See PAYMENT INTO COURT, 15 B. 681.

—Possession—Lands under attachment by Magistrate—*See* POSSESSION — GENERAL, 1 C.W.N. 569.

— Decree against owner — Attachment of property in execution—Running of time in favour of trespasser not arrested by attachment —Adverse possession— *See* POSSESSION—ADVERSE POSSESSION, 11 M.L.J. 344.

See BEN. REG. VIII OF 1819, 2 Hay 347.

See BOM. REG. XXIX OF 1827, s. 6, 11 B. 222.

See MAD. REG. II OF 1802, s. 18, cl. 4, 1 M.H.C. 150.

—Execution of decree—Objection to suit to establish right of judgment-creditors—Subsequent suit by one of the judgment-debtors to recover possession as against the objector—*See* RES JUDICATA—PARTIES, A.W.N. 1890, 177.

See RES JUDICATA— RES JUDICATA IN EXECUTION PROCEEDINGS, 14 M.L.J. 359.

—Resumption and re-grant of Inam lands—No title to lands acquired by grantee—Attachment placed on village by Government, limited to exemption from assessment—*See* RESUMPTION—EFFECT OF RESUMPTION, 11 B. 235.

—Crim. Pro. Code, ss. 88 and 89—Property of alleged absconding offender attached and sold under an illegal warrant—*See* RIGHT OF SUIT—MISCELLANEOUS, A.W.N. 1904, 159.

—Revenue sale for patni—Darpatnidar's decree for compensation—Attachment by patnidar's mortgagee—Priority—*See* SALE—SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE, RIGHT TO 7 C. 173=8 C.L.R. 341.

Execution of money-decree—Sale without attachment void—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 10 A. 506= A.W.N. 1888, 195.

—Sale of property without attachment, invalidity of—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 5 A. 86, F.B.,= A.W.N, 1882, 186.

—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 18 C. 188, 21 A. 311= A.W.N. 1899, 84.

—Civ. Pro. Code, 1882, s. 295—of fund before judgment—Assignment of fund—By other creditors subsequent to assignment—Rights of assignee and attaching creditors—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALES, RIGHT TO, 16 B. 91.

See SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 18 B. 458.

Attachment—continued.

——1.—General—*concluded.*

—Warrant of—Not signed by Judge but by Munsarim—Irregularity—Invalidity of sale—*See* SALE—SALE IN EXECUTION OF DECREE —SETTING ASIDE SALE, 7 A. 506, P.C.

—Omission to cause attachment—Validity of sale of mortgaged property not affected—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 21 C. 639.

See SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 12 C. 317.

—Suit for damages — Small Cause Court Suit—Wrongful attachment of property in execution of decree—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 6 A. 10=A.W.N. 1883, 172.

—of moveable property in execution—Suit to establish right—Small Cause suit—Jurisdiction—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 A. 462.

—of moveable property—Suit by claimants—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 167 P.R. 1882.

—of trust-property—Mortgagor keeping with mortgagee part of mortgage-money on trust—*See* TRUST PROPERTY, 7 P.L.R. 1905.

See VALUATION OF SUITS, 3 Agra 104.

See WARRANT OF ATTACHMENT, 29 C. 244 =6 C.W.N. 164.

—Without and of suit for attached property —Subsequent and sale—*See* WITHDRAWAL OF SUIT, 8 C. 871.

——2.—Alienation during attachment.

(1)—*Attachment of immoveable property—"Private alienation"—Civ. Pro. Code, 1877, s. 276.*—Where, after attachment of immoveable property in execution of a decree the matter in dispute between the judgment-debtor and the appellant was referred to arbitation and a decree, passed in accordance with the award, ordered the judgment-debtor to execute a conveyance of the property to the appellant, *held, per Straight, J.* The conveyance to the appellant could not be regarded as a "private alienation" as these words mean a voluntary sale, gift or mortgage in contravention of the order of attachment, and not the enforced execution of a conveyance in obedience to a decree. *Per Spanki, J.*—The conveyance to the appellant is not an invountary one, since it has arisen out of the voluntary exercise of the will of the parties who have given their consent to abide by the award of the referee. DURBAN ALI v. ASHRAF ALI, **A.W.N. 1881, 75.**

(2)—*Alienation by judgment-debtor before attachment.*—There is no bar to alienation of property by the judgment-debtor under the Procedure Code, so long as that property has not been attached, unless it was shown that the alienation was intended to defraud creditors. BHABA NATH ROY CHOWDHRY v. DURGA PROSONNO GHOSE, **16. C. 826.**

Attachment—continued.

——2.—Alienation during attachment—*contd.*

(3)—*Attachment of property—Subsequent sale—Vaildity.*—An alienation of property, which was previously attached in execution of a decree, is void. LALLA RUNG LAL v. LALLA AMBIKA PERSHAD, **1 W.R. 212.**

(4)—*Withdrawal of attachment—Alienation unquestionable.*—The withdrawal of an attachment implied, and also understood to be withdrawn by the decree-holder, bars objection against the validity of alienation of the attached property by mortgage or otherwise. JUGUNNATH v. GHASEE RAM, **1 N.W.P. 30.**

(5)—*Act VIII of 1859, s. 119—Sale of attached property—Setting aside of decree under which attachment was made.*—The effect of granting an application made under s. 119, Act VIII of 1859, is to declare that there has not been yet a vaild decree in the suit. Where a decree is set aside, and a new trial granted on an application under s. 119, Act VIII of 1859, any attachment made under the decree falls to the ground, and the validity of a sale of the property attached is not affected. LALA JAGAT NARAYAN v. TULSIRAM, **1 B.L.R. A.C. 71=10 W.R. 99.** [*R.*, 7 C.L.R. 424 ; *D.*, 15 M.L.J. 377.]

(6)—*Act VIII of 1859, s. 240—Attachment—Alienation.*—By the Full Bench (*Markby, J., dissentiente*) :—A private *bona fide* alienation, for value, of property attached in the manner pointed out by s. 240, Act VIII of 1859, made during the continuance of the attachment is, by virtue of that section, null and void, not as against all the world, but only as against the attaching creditor or persons who may acquire rights under or through the attachment. ANANDLAL DAS v. RADHAMOHAN SHAW, **2 B.L.R. F.B. 49=11 W.R.O.C. 1.** [*Affirmed*, 10 B.L.R. P.C. 134 ; *F.*, 4 B L.R. A.C. 20=12 W.R. 457 ; 13 W. 134 ; *R.*, 23 M. 478 ; *D.*, 16 B. 91.]

(7)—*Private* bona fide *alienation of attached property—Void against creditor and his heirs only.*—A private *bona fide* alienation of property during the continuance of an attachment is null and void only against the attaching creditor and those claiming under him. BAL MOKUND MOHUNT v. RAMHIT DASS, **13 W.R. 134.**

(8)—*Private sale after attachment—Civ. Pro. Code, 1882, s. 276—Sale with knowledge and consent of decree-holder.*—Plaintiff held a mortgage of certain properties, and sued on his mortgage and obtained a decree enforcing his mortgage. The defendant was a prior mortgagee in possession. After the property was attached under the plaintiff's decree, the defendant bought the property. Plaintiff brought a suit to have the sale to the defendant declared invalid, so far as affecting his right of sale under his decree. It appeared that the sale to the defendant had been made with the full knowledge and consent of the plaintiff and with a view to satisfy his decree. It also appeared that the defendant had applied to the Court executing the decree to be allowed to deposit the purchase-money in Court and so far showed his *bona fides*. *Held* that though the sale would, under ordinary circumstances, not affect the plaintiff's right as it was made subsequent to the attachment, but as, in the special circumstances of the case, it appeared that the defendant was led by the conduct of the plaintiff to believe that the latter had no objection to the sale, the plaintiff was not in a position to object to the purchase. FAKIR SAHU v. GANESH PRASAD, **A.W.N. 1886, 176.**

Attachment—continued.

——2.—Alienation during attachment—*contd.*

(9)—*Sale by owner of property before attachment—Knowledge of execution.*—The owner of any property is not precluded by law from selling it before attachment, even though he knows that a judgment-creditor is seeking to get process of execution against it. RAM BURUN SINGH v. JANKEE SAHOO, **22 W.R. 473.** [*F.*, 24 C. 825 ; *R.*, 25 B. 202.]

(10)—*Execution of decree more than twelve years old—Attachment more than nine years old—Presumption.*—An attachment more than nine years old, in execution of a decree more than twelve years old, will be presumed by the Court, in the absence of other information, to have been removed, and the execution proceedings to have come to an end. MUSSAMMUT COONJESSUR KOONWAR v. LUCHMEE NARAIN SINGH, **20 W.R. 418.** (20 W.R. 135, P.C., *F.*)

(11)—*Second attachment of property—Prior attachment proceedings—First creditor's lien preferable.*—Where some property was made the subject of a second attachment while proceedings in execution on account of a prior attachment were in progress, *held* that first creditor's lien, dating from his latest attachment, which preceded second incumbrance, should be satisfied before the second creditor's claim. MUSST. MATONGINY DASSEE v. CHOWDHRY JUNMUNJOY MULLICK, **25 W.R. 513.** [*Appl.*, 8 C. 395 ; *F.*, 9 C. 230]

(12)—*Construction of Privy Council Ruling—Delay caused by decree-holder's willingness to give debtor time to repay.*—*Held* that the Privy Council Ruling (20 W.R. p. 133), does not include such a case as that in which the delay is caused by the decree-holder's willingness to give his debtors every indulgence and every opportunity of re-paying their debt : nor does it bind the Court to hold (where a second kistbundee is executed by the judgment-debtors before the first execution proceedings are struck off) that, in consequence of the long interval in question, the decree-holder can only count from the date of the second kistbundee and so lose the benefit of his decree in favour of a mortgage-bond, which pledged to third parties the judgment-debtors' rights in property attached under the decree, and which was executed at a time when the property was under attachment, and the third parties were aware of the fact. MOHARANEE INDURJEET KOOER v. LUCHMUN SINGH, **24 W.R. 56.**

Attachment—continued.

—— 2.—Alienation during attachment—*contd.*

(13)—*Decree satisfied—Subsequent alienation—Right of attachment after judgment—Decree payable by instalments—Attachment for one instalment—Payment—Right of Court to continue attachment.*—If the debt to secure which an attachment has been made is satisfied, a subsequent alienation of the property attached is not void, merely because the attachment has not been formally withdrawn. [*R.*, 16 B. 91, 23 M. 478.] The right of attachment after judgment exists for the purpose of realizing sums actually due under a decree, and not for that of securing property, so that it may at some future period be made available for the realization of moneys not yet due, but which are to become payable under the decree. Where the total amount payable under a decree was payable by instalments and all the instalments which had become due, and in respect of which the property was attached were fully satisfied, when the alienation took place, by the amount which was paid into Court and drawn out by the decree-holder, and the Court afterwards ordered that the attachment on the property was to continue until all the subsequent instalments which should thereafter become payable under the decree should be satisfied, *held* that the Court had no power to make any such order and that such order could not in any way affect the validity of the alienation. RAMDHAN MITTER v. KAILAS NATH DUTT, **4 B.L.R. A.C. 20=12 W.R. 457.**

(14)—*Act VIII of 1859, ss. 239, 240—Invalid attachment — Alienation—Undertaking not to alienate—Mortgage—Charge.*—W, under a decree against A, obtained an order for the attachment of the estate belonging to A. The attachment was not an attachment made known in the manner required by s. 239 of Act VIII of 1859. The property was advertised for sale on 24th November, 1864. Three days before that day, A put in a petition, reciting that the decree-holder had agreed to give him time on condition that the attachment would remain good and that he would not in any way alienate the attached property until the whole of the decree was satisfied. On the 26th of the same month, A mortgaged a portion of this property to R. Subsequent to the date of the mortgage, W sold the decree to L. The execution case was then struck off. On the 18th February, 1866, fresh proceedings in execution were taken by L, the property was attached and ultimately sold to P. The mortgagee R having taken steps to foreclose the mortgage, P, to prevent the foreclosure, paid into Court the amount of the mortgage and now sued to recover back that amount with interest from him. *Held* that A's petition did not create a charge on the property and that the plaintiff had no right or title whatever as against the mortgage to R which was not null and void. RAMESWAR SINGH v. RAMTANU GHOSE, **4 B.L.R.A.C. 24 =12 W.R. 491.** (12 W.R. 362, *R.*) [*Appr.*, **7 A. 702.**]

Attachment—continued.

——2.—Alienation during attachment—*contd.*

(15)—*Mortgage after attachment—Act VIII of 1859, s. 240.*—A mortgage made after attachment is alienation under s. 240, Act VIII of 1859 and is null and void. The alienation contemplated by s. 240, Act VIII of 1859, is null and void, not only as against the creditor but in regard to the whole world. MANNOO LALL v. BEET BHUNGUN SINGH, **9 W.R. 544.**

(16)—*Attachment that will defeat subsequent alienation, nature of—Civ. Pro. Code, 1859, s. 240—Written order.*—For an attachment to be relied on under s. 240, Act VIII of 1859, it must be shown to have been duly made by a written order issued and published. DWARKANATH BISWAS v. RAM CHUNDER ROY, **13 W.R. 136**

(17)—*Alienation during attachment—Effect against attaching creditor—Rights of prior and puisne attaching creditors—Civ. Pro. Code, 1859, s. 240.*—When property is alienated privately while under attachment the alienation is null and void only as regards the attaching creditor and those who claim under or through the attaching creditor as such. (17 W.R. 313, *F.*) The fact that a puisne attaching creditor, mentioned, in his application for attachment and sale of certain property of his judgment-debtor, that the same property had already been attached at the instance of another execution-creditor, will not entitle the puisne creditor to claim through the first attaching creditor. A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next of kin of a deceased attaching creditor, may be said to so claim. Act VIII of 1859, s. 240, favours an attaching-creditor (subsequent to, and in defiance of, whose attachment the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not puisne attaching-creditors, whose attachment is made later than such private alienation. Ss. 270 and 271 of the Civ. Pro. Code cover only cases where there has been a sale under the first attachment. BALAJI v. GAJANAN, **11 B.H.C. 169.** [*R.*, 16 B 91.]

(18)—*Alienation during attachment voidable.*—When certain property is alienated while under attachment, the alienation is not absolutely void, but voidable only; it is capable of confirmation. SYUD MAHOMED ALI v. GOKUL CHAND, **1 N.W.P. 18.**

(19)—*Alienation of attached property for satisfaction of decree, not invalid—Civ. Pro. Code, 1859, s. 240.*—An alienation of attached property made to satisfy the decree, in respect of which the attachment has been made, is not invalid under s. 240 of the Code of Civil Procedure. PURMESHUR RAI v. HIDAYUTOOLLAH, **1 N.W.P. 114.** [*R.*, 11 B. 285, F.B.]

(20)—*Alienation of attached property after decree—Satisfaction—Alienation not void—Civ. Pro. Code, 1859, s. 240.*—On satisfaction of

Attachment—continued.

——2.—Alienation during attachment—*contd*

a decree under which attachment of his property had been made. The judgment-debtor reported the satisfaction to the Court, and on the following day he executed a mortgage of his property. The day after the execution of the mortgage the attachment was removed by the Court. *Held*, that the mortgage, if *bona fide*, was not null and void under s. 240 of the Code of Civil Procedure. BULDER SINGH v. KANAHA, **1 N.W.P. 125.**

(21)—*Alienation of property after attachment—Validity.*—Any alienation of property made after it has been attached in execution of a decree is illegal. JADUBANUND ROY v. BEEJOY GOBIND CHOWDHRY, **7 W.R. 510.**

(22)—*Purchaser of rights of mortgagor—Sale of property under attachment—Evidence.*—Where the purchaser of the rights of a mortgagor sold in execution is ousted after foreclosure, and urges in appeal that the mortgagor had no power to alienate the property as it was under attachment for debts prior to date of mortgage, he must show that the attachment was made by himself or in execution of the decree under which he purchased, otherwise it is held to be no sufficient evidence of attachment. MOORUL SINGH v. MOHUN KOER, **9 W.R. 167.**

(23)—*Alienation of attached property—Act VIII of 1859, ss. 236, 240.*—If, during the pendency of a suit, a third party, in execution of a former decree, attaches a plaintiff's share of the claim under s. 236, Civ. Pro. Code, any alienation of the share, while the attachment is in force, is null and void. MONOHUR LALL v. JUGGOMOHUN LALL, **9 W. R. 307.**

(24)—*Private alienation of property after attachment—Civ. Pro. Code, 1859, s. 240.*—Although, under the provisions of s. 240 of Act VIII of 1859, a private alienation by sale of property after attachment, can be impugned by the holder of the decree in execution of which it was attached, if obstructive of the execution; but not because it obstructs the execution of another decree obtained by him subsequently to the date of the alienation. MUSSUMAT MAHBUBAN v. MUSSUMUT RAHEEMUN, **6 N. W. P. 217.**

(25)—*Civ. Pro. Code, 1859, s. 240—Execution of decree—Alienation after attachment.*—While certain immoveable property was under attachment, the judgment-debtor mortgaged it for value to the Mussoorie Savings Bank with the knowledge of the attaching creditor, the Delhi Bank, which acquiesced in and benefited by the mortgage. The property was subsequently released from attachment, but was again attached, and was brought to sale in execution of the decree held by the Delhi Bank and purchased by the defendants. The Mussoorie Savings Bank sued the auction-purchasers, claiming the right to bring the property to sale on the ground of its being under mortgage to the bank prior to its purchase by the defendants.

Attachment—continued.

——2.—Alienation during attachment—*contd*

It was held that, under the circumstances, the defendants must take the consequences of having purchased the property without having satisfied themselves as to its condition. Had it not been for the conduct of the Delhi Bank, however, the rule that a private *bona fide* alienation for value of property attached under Act VIII of 1859, is, by virtue of s. 240 of the Act, null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment, would have saved the defendants, notwithstanding that the sale took place in pursuance of a second attachment. DHURRUM DASS v. THE MUSSOORIE SAVINGS BANK, **6 N. W. P. 296.**

(26)—*Sale of attached property—Release of property—Validity of sale.*—A deed of sale conveying attached property is not made valid by the release of the property. MAHARAJAH DHEERAJ MAHATAB CHUND BAHADOOR v. SURNO MOYEE DOSSEE, **15 W.R. 222.**

(27)—*Lease granted by judgment-debtor of property under attachment, void by reason of s. 276, Civ. Pro Code.*—Leases granted by a judgment-debtor, while the property leased was under attachment, are private alienations thereof, void by reason of the prohibition in s. 276 of the Civ. Pro. Code. That section is not limited to cases in which the alienation is unfavourable to the judgment-creditor. It altogether prohibits any alienation. DEBI PRASAD v. BALDEO, **183 A. 12=A.W.N. 1896, 13.** [*Appr.*, 20 A. 349; *R.*, 13 C.P.L.R. 145, 15 C.P.L.R. 6.]

(28)—*Purchaser subsequently put into possession by Civil Court—Rights of ownership—Period of attachment*—Purchasers subsequently put into the possession who received from the Collectorate the rents of an antecedent period do not thereby exercise rights of ownership for the period during which the property remained under attachment in charge of the Collector. SOOLOCHUNA DAYEE v. DURP NARAIN BOSE, **12 W.R. 95.**

(29)—*Attachment by decree-holder having lien on property—Validity of alienation by judgment-debtor during pendency of attachment.*—The holder of a decree, reserving a lien on immoveable property, can attach the property, though he cannot bring it to sale otherwise than by a suit brought under s. 67 of Act VIII of 1859. Consequently, an alienation of the property by the judgment-debtor, while it has been under such attachment, is avoid against all claims enforceable under the attachment. AMRIT RAO v. RAO YESHWANT, SINGH, **4 C.P.L.R. 69.**

(30)—*Sale of attached property by judgment-debtor and payment to creditor—Withdrawal of creditor from execution—Effect on sale.*—Where a portion of attached property is sold by the judgment-debtor, and a part of proceeds paid to the decree-holder, who withdraws from the execution, the sale is not invalidated by the attachment. PRANNATH MITTER v. SHUMBOO CHANDER NATH, **7 W.R. 430.**

Attachment—continued.

——2.—Alienation during attachment—*contd.*

(31)—*Civ. Pro. Code, 1877, ss. 274, 276—Attachment of immoveable property—Private alienation.*—Private alienation, after attachment, is not affected by such attachment, if such order is not fixed in the Court-house or in the Collector's office as required by law. BIRMH DEO v. GOPI NATH, **A.W.N. 1881, 65.**

(31-a)—*Attachment—Alienation before attachment—Allegation of fraud.*—A transfer of immoveable property made before attacement of that property, for a valid and subsisting debt, must be held good as against a person who has purchased it in execution-sale. If fraud is alleged it is on the person alleging it to prove it. FARIDUNNISSA v. ALADAD KHAN, **A. W. N. 1881, 77.**

(32)—*Attachment of decree—Notice of attachment not served on judgment debtor—Attachment proceedings struck off—Alienation of decree—Validity.*—Where a decree of a Revenue Court in favour of the judgment debtor was attached by the decree-holder, but the notice of attachment was not served on the judgment-debtor, and the decree holder taking no further steps, the case was struck off the file, a subsequent alienation of the decree by the judgment-debtor would not be invalid. RAO KARAN SINGH v. BAQAR ALI KHAN, **A W.N. 1881, 158**

(33)—*Civ. Pro. Code 1859, ss. 235, 239 and 240.*—*Held* that the alienation of property cannot be declared void under the provisions of s. 240, Act VIII of 1859, where no attachment order has issued or notified in the manner prescribed by ss. 235 and 239 of the said enactment. Where there was no attachment after the manner prescribed in Act VIII of 1859, but the property was advertised for sale and the judgment-debtor encumbered the property with lien, *held* that the decree-holder could sell the property, but subject to liens which were not otherwise proved to be collusive. SAHOO CHUND v. GEETUM SINGH, **2 Agra 206.**

(34)—*Mortgage, prior and subsequent—Execution—Sale under first mortgage—Priority—Civ. Pro. Code, 1859, s. 240—"Null and void," meaning of.*—Plaintiff had a first mortgage of half of a mouza, and a second of the whole. Subsequently, the mouza was sold in execution of a decree obtained by her under s. 53, Act XX of 1866, upon her first mortgage, and which wrongly ordered the sale of the mouza and purchased by defendant with notice of the second mortgage. *Held* that the defendant was not entitled to have the second mortgage held void against him, but that, as purchaser under the sale of eight annas, he was entitled to have priority over the second mortgage. The expression "null and the void" in s. 240 of the Civ. Pro. Code, 1859, means not null and void against anybody, but only against the attaching creditor. Property which was attached in execution of a decree was subsequently mortgaged. Subsequent to the mortgage, the property was again attached and sold

Attachment—continued.

——2.—Alienation during attachment—*cld.*

in execution of another decree. *Held* that the purchaser of the right, title and interest of the judgment-debtor under the sale took it subject to the mortgage, which mortgage was null and void only as against the first attaching creditor. GURU PRASAD SAHU v. MUSSAMAT BINDA BIBI, **9 B.L.R. 180=18 W.R. 279.** [*R.*, **12 C. 317.**]

——3.—Attachment pending appeal.

(1)—*Setting aside of decree on appeal—Release of attachment under decree.*—The setting aside of a decree on appeal and ordering a re-trial of the suit operates *ipso facto* as a release of any attachment made in pursuance of the decree. RAJA GOKULDASS v. KARANSEE, **9 C.P.L R. 120.** (10 W.R. 99, *R.*)

(2)—*Appeal to Privy Council—Security from successful party.*—During the course of a suit for damages, plaintiff applied that security might be required from the defendants under s. 81, Act VIII of 1859, and no their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on appeal by the High Court. He then appealed to the Privy Council and prayed to the High Court either to continue the attachment, or to require security from the defendants, pending the result of the appeal. *Held* that the Court was not competent to adopt either course. *In re* DITTA HARAKMAN SINGH, **3 B. L R. F.B.45=12 W.R. F.B. 16.** [*Appr.*, **4 B.** L.R. O.C. 92; *R.*, 11 P.R. 1871.]

——4.—Liability for wrongful attachment.

(1)—*Suit for damages—Stay of sale pending attachment—Question of damages—Contract Act (IX of 1872), s. 73.*—In a suit for damages arising out of a wrongful attachment, the usual rule is to award an amount which will be as near as can be estimated to that by which the plaintiff is the worse for the defendant's wrong-doing, provided that the harm suffered by the plaintiff is a natural and probable consequence of the defendant's wrong-doing. The principle of the rule is the same as of s. 73 of the Contract Act (3 B. 74, *R.*) A Court need not have much compassion for the trespasser and is bound to be exact in assessing damages. The fact that a plaintiff causes a sale in execution to be stayed pending the attachment would not in any way affect his right to damages for wrongful attachment. K. MAMU NAINA v. RAMAN CHETTY. **8, Ind. Cas. 1206.**

(1-a)—*Liability for attaching without sufficient ground—Party not bound to release his property wrongfully attached—Failure to release does not mitigate wrong-doer's liability.*—Where an attachment before judgment is made without sufficient ground for assuming the property to be the defendant's, the parties attaching are rightly ameroed in damages. Parties whose property has been wrongfully attached are not bound to release it, and their declining

Attachment—continued.

——4.—Liability for wrongful attachment— *continued.*

to do so does not shift the responsibility of the illegal acts of those attaching it. VELAET ALI KHAN v. MATAEEN RAM, **13 W.R. 3.**

(2)—*Attaching stranger's goods—Liability of the judgment-creditor and Court officer.*—The judgment-creditor, his attorney or agent and the officer of the Court will be held responsible for attaching the goods of a stranger in execution. CHAJJU MALL v. KARM CHAND, **20 P.R. 1877.**

(3)—*Damages—Half costs to plaintiff.*—Damages were held to have been rightly decreed on account of wrongful attachment as well as half costs to plaintiff. KANGALEE CHUNDER SHAHA v. KOONJESSUREE NURTAKEE, **17 W.R. 150.**

(4)—*Order attaching pension—Payment of money to decree-holder—Attachment illegal—Power of Appellate Court to order refund.*—In execution of a decree, the defendant's pension was attached to the decree-holder. The Lower Appellate Court held that the attachment was illegal and ordered its refund. But the Chief Court held that the Lower Appellate Court could not summarily order a refund of it. TABA SHAH v. RAI SARAMPAT RAI, **60 P.R. 1876.**

(5)—*Irregularity in attachment will not necessarily make it void—Reg. VII of 1825, s. 7—Limitation Act (XIV of 1859), s. 1, cl. 5.*—In 1852, K sued A and M to recover the amount with interest of a bond executed by M (who was A's general agent) in the name of H on the permission of plaintiff for the purpose of paying off the debts of A. The Principal Sudder Ameen decreed the case against M with costs, and released A from K's claim In appeal to the Sudder Court, the plaintiff obtained a decree with interest and costs against A as well as against M. In execution, K prayed, on 2nd December, 1858, for the attachment and sale of certain estates. A notice having been ordered to issue, K represented that the judgment-debtor was attempting to alienate her estates, and prayed that orders might be passed to prevent alienation of the estates mentioned in her application for execution. A process of attachment was issued accordingly on 20th March, 1859, but without security being first demanded, as prescribed in Reg. VII of 1825, s. 7. In September 1861, one B A, who had objected to the attachment, petitioned the Judge, and obtained an order, dated 14th September, 1861, releasing the attached properties as being his in virtue of a hibbanama from A and in his possession. From this order K appealed, but the appeal was struck off on 29th November 1862. On review the first order was upheld, but it was declared that this would not be a bar to a regular suit. She accordingly sued for a reversal of the Judge's order, for the cancelment of the deed of gift as being collusive, and for the sale of the property in question as

Attachment—continued.

——4.—Liability for wrongful attachment— *continued.*

that of her judgment-debtor A. The suit was decreed, and an appeal preferred to the High Court: *Held* that the order of 28th March 1859 was wrong in ordering attachment without first requiring security; but the irregularity did not affect the jurisdiction of the Court, or render the attachment void. *Held*, further, that plaintiff had a right of appeal from the order of 14th September, 1861; that the appeal was wrongly rejected on 29th November, 1862, and it saved her from the operation of the law of limitation while it was pending; and as she brought her suit within a year from that time, she was within the period prescribed by Act XIV of 1859, s. 1, cl. 5. BIBEE KHODAJAMNISSA v. R. F. STEVENS, **20 W.R. 433.**

(6)—*Caveat emptor, Applicability of—Attaching creditors, responsibility of—Decree-holder, liability of, for improper attachment—Warranty of title of judgment-debtor—Revision by High Court—Small Cause Courts Act, s. 25.—Per Lindsay, A.J.C.*—The rule of *caveatemptor* had no application in India in the case of ordinary sales of goods by private contract. In India the attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. In the case of sale in execution in India, although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, there is a warranty by the decree-holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution. A stranger whose property is sold behind his back without any authority does not need to have the sale set aside. Where the decree-holder pointed a carriage as the property of the judgment-debtor and the property was thereupon attached and sold and purchased by the plaintiff's predecessor-in-title, but subsequently a suit brought by a third person claiming the carriage as his own was decreed and the purchaser lost the carriage, *held*, that the plaintiff was entitled to recover the purchase-money from the decree-holder. *Per Piggott, J.C.*—It is no doubt dvisable that the High Court should in exceptional cases assert a general power of revision in suits tried by Small Cause Courts, where the decision arrived at appears to be capricious or perverse or arrived at in defiance of well-known principles of law. But it is not at all an adequate ground for interference under s. 25, Provincial Small Cause Courts Act, that the presiding Judge of the Small Causes Court had before him for determination a doubtful issue of law, and that his decision on the said issue, though honestly arrived at and upon a reasonable and fair consideration of the law applicable to the point and the authorities thereon, is one which

Attachment—continued.

——4.—Liability for wrongful attachment— *concluded.*

this Court might not have been prepared to affirm if the matter had come before it in a second appeal. BRIJ MOHAN LAL v. MUSAMMAT MUNNI BIBI, **14 O.C. 343.**

—Dismissal of application for execution—Power of Court to continue attachment—Effect of Court's error of law—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 57, 66, 16 C. W. N. 428.

See COMPENSATION, L. B. R. 1893—1900, 411.

See DAMAGES—DAMAGES, SUITS FOR, 8 B.H.C.A.C. 177.

—Attaching creditor—Only person entitled to execute attached decree—Original decree-holder not so entitled—Limitation—*See* EXECUTION OF DECREE—GENERAL, 9 M. L. T. 312=21 M.L.J. 577=9 Ind. Cas. 786.

See SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 5 N.W.P. 211.

——5.—Mode of Attachment.

(1)—*Attachment of property—Suit for sale—Procedure.*—An attachment can issue in respect of property, even though it might not be liable to sale without instituting a suit for sale. CHUNDRA NATH DEY v. BURRODA SHOONDURY GHOSE, **22 C. 818.** [*R.*, 25 C. 262, 31 M. 33=3 M. L. T. 107=17 M. L. J. 503.]

(2)—*Sale without attachment — Civ. Pro. Code, 1859 s. 203.*—Property must, under Act VIII of 1859, be attached before being sold in execution of a decree, the words "attachment and sale" in s. 203 being taken together and not read distributively. DENONATH RUCKIT v. MUTTY LALL PAUL, **1 Hyde 158=1 Ind. Jur. O.S. 125.**

(3)—*Attachment of debts in execution of decree—Ss. 236, 207, Act VIII of 1859—Joint decree—Execution*—When the property sought to be attached consists of debts, a written order under s. 236 of Act VIII of 1859 shall be issued for the parties. Till the debtor receives this order, he was bound to pay the amount of his debt to the creditor whose right to receive it had been declared by a decree of Court, and it was no part of the duty of the debtor to make enquiries whether his creditor was or was not entitled to receive the money. Though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint decree under s. 207, Act VIII of 1859, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such order as may be necessary for protecting interests of other decree-holders. THACOOR DASS SINGH v. LUCHMEEPUT DOOGUR, **7 W. R. 10.**

(4)—*Attachment of property in execution of decree—Sale—property not in the jurisdiction*

Attachment—continued.

——5.—Mode of Attachment—*continued.*

of the Court which passed decree—Procedure.—After an attachment under s. 235 of Act VIII of 1859 is made in execution of a decree, the next process is the due issue of the sale proclamation for bringing the property to sale. If the property is not within the jurisdiction of the Court whose duty it is to execute the decree, the course which the decree-holder must follow is that prescribed by s. 285 of Act VIII of 1859 and the following. MOOKTAKESHEE DEBEE v. KUNUCK MONEE DEBEE, **7 W. R. 267.**

(5)—*Lessee hypothecating shares of zamindari—Shares sold for arrears of rent due to Court of Wards — Attachment unnecessary—Collector's power.*—Where the shares of a zemindaree hypothecated by the lessee are to be sold for arrears of rent due to the Court of Wards, no attachment is necessary, and the Collector has not the power to attach. JOGESSUR SUHOY v. GOPAL LALL, **13 W.R. 173.**

(6)—*Attachment of revenue paying estates—Civ. Pro. Code, 1859, s. 213—Information to be given by attaching creditor.*—A judgment-creditor attaching an estate paying revenue to Government must give the special information indicated in the latter clause of S. 213, Act VIII of 1859, as well as that required by the first clause, the section being cumulative in respect of estates paying revenue to Government. AJOODHYA DOSS v. SHEO PERSHUN SINGH, **11 W.R. 175.**

(7)—*Civ. Pro. Code, 1859, s. 213—Sufficiency of description—Lakheraj tank—Identification of.*—S. 213, Act VIII of 1859, intends that the description of property in a notice of attachment should be sufficient to identify it. A *lakheraj* tank with four banks, the boundaries of which are given, is sufficient identification. MAHARAJAH DHIRAJ MAHATAB CHUND BAHADOOR v. BURODANATH MUNDUL, **18 W.R. 411.**

(8)—*S. 272, Civ. Pro. Code, 1882—Attachment—Sanction of Court not obtained.*—The words of s. 272, Civ. Pro. Code, were not intended to alter and do not in fact alter, what has been the practice of the Court, which is to require that persons attaching property in the hands of the Receiver of the Court should previously obtain the permission and sanction of the Court and to regard an attachment not so authorised as a breach of the injunction and therefore a comtempt of Court. The Court will refuse to recognise such attachment. MAHOMED AZOHURUDDEEN v. MD. NOOROODDIN, **21 C. 85.** (16 B. 577, *F.*) [*R.*, 27 B. 556, 32 C. 198, P.C.=2 A.L.J. 190=9 C.W.N. 225.]

(9)—*Civ. Pro. Code, 1882, ss. 268, 274 (=O. XXI, rr. 46, 54, new Code)—Mortgage-debt, attachment of.*—The attachment of the rights and interests of a mortgagee under a mortgage without possession, must be effected as prescribed in s. 268, Civ. Pro. Code; and s. 274 of

Attachment—continued.

—5.—Mode of Attachment—*continued.*

the Code has no application. KARIM-UN-NISSA v. PHUL CHAND, **15 A. 134=A.W.N. 1893. 51** (1 A. 348, *D.*) [*R.*, 18 A. 469=A.W.N. 1896, 154. 14 C.P.L.R. 5, 26 B. 305=4 Bom. L.R. 18.]

(10)—*Civ. Pro. Code, ss. 263, 274—Attachment under wrong section—Sale in execution—Validity.*—Plaintiff sued for sale under a mortgage, on his title as auction-purchaser at a Court-sale, of the rights and interests of the mortgagees under the mortgage. Setting aside the decrees of both the Courts below which had dismissed the suit on the ground that the rights of the mortgagees, judgment-debtors in the previous case, by reason of the attachment previous to the sale having been made under s. 274 instead of under s. 268 did not pass to the plaintiff, the purchaser at such sale, the High Court held that, whether the attachment ought to have been made under the one section or the other, all the parties interested knew that the rights and interests of the mortgagee under the mortgage were being put up for sale; and those interests having been sold and the sale having been confirmed and a certificate granted to the plaintiff, he was, so far as that point was concerned, entitled to maintain the suit. SHEO CHARAN LAL v SHEO SEWAK SINGH, **18 A. 469=A.W.N. 1896, 154.** (5 A. 142, 5 A. 86, 10 A. 506, 15 A. 134, *R.*) [*R.*, 14 C.P.L.R. 5, 23 A. 25.]

(11)—*Attachment under s. 239 of Civ. Pro. Code (Act VIII of 1859)—Irregularities—If attachment could be set aside.*—In an application under s. 239, Civ. Pro. Code, (Act VIII of 1859) to declare an attachment of immoveable property void because the forms prescribed in the section have not been gone through, *held*, that the proceedings cannot be set aside, where the irregularities complained of are immaterial and not productive of any substantial injury or injustice to the applicant. MUSSAMMAT KORANEE BIBEE v. BHOOBAN MOHINEE DOSSEE, **6 W.R. Mis. 52.**

(12)—*Irregularities in attachment—Attachment of more property than is necessary.*—Where the decree-holder wantonly attached more property than was necessary for the discharge of his claim, the Court may order sequestration of only a portion of the property attached. PURSOTUM DOSS v. RAJA OODEY NARAIN MULL, **1 Agra. Mis. 3.**

(13)—*Judgment debtor residing and receiving salary outside jurisdiction of executing Court—Procedure for executing decree by attachment of salary or otherwise.*—There is no provision in the Civ. Pro. Code, enabling a Court to issue a prohibitory order to the officer disbursing salary to the judgment-debtor when such officer resides beyond its local jurisdiction, in order to obtain satisfaction of the decree against the judgment-debtor also residing beyond such jurisdiction. In such a case a copy of the decree must be sent to the Court having local

Attachment—continued.

—5.—Mode of Attachment—*continued.*

jurisdiction either by reason of the judgment-debtor residing within such jurisdiction or of his having assets, including salary available for the satisfaction of the decree, and that Court can execute the decree in any of the ways provided for in the Code. GOPAL v. T. H. LAVET, **12 B. 45 Note.**

(14)—*Equity of redemption, sale and attachment of, in execution—Civ. Pro. Code.—1882, ss. 266, 274—Transfer of Property Act (IV of 1882), s. 60.*—The equity of redemption in mortgaged premises is immoveable property liable to be attached and sold, falling within the scope of s. 266 of the Civ. Pro. Code, 1882. The attachment of such property is effected under s. 274 of the Code by an order prohibiting the judgment-debtor from transferring or charging the attached property in any way and all other persons from receiving the same from him by purchase, gift, or otherwise, such order being proclaimed and notified as there directed. The "equity of redemption" of the mortgagor or as it is called in s. 60 of the Transfer of Property Act "the right of the mortgagor to redeem" the mortgaged premises is not vested in the mortgagee, nor does he hold it in trust for the mortgagor. When the right to redeem only is attached, the mortgagee cannot come in and ask to have the attachment raised under s. 280 of the Civ. Pro. Code, but it is otherwise when the property itself is attached. PARASHRAM HARLAL v. GOVIND GANESH, **21 B. 226.** [*R.*, 26 B. 305, 33 B. 311=11 Bom. L.R. 26=5 M.L.T. 228.]

(15)—*Civ. Pro. Code, s. 274—Attachment of immoveable porperty—Omission to affix copy in Collector's Office.*—Where a copy of the order for attachment of immoveable property in execution of a decree is not fixed up in the Office of the Collector of the District in which the property is situated, such a defect, though it might render the attachment ineffectual for the purpose of avoiding subsequent alienations, cannot affect the validity of the attachment as against the judgment-debtor, and the execution-proceedings cannot be declared ineffectual on that ground. RAI BALKISHEN v. RAI SITA RAM, **7 A. 731=A.W.N. 1885, 210.** [*R.*, 11 C.W.N. 163=5 C.L.J. 80.]

(16)—*Suit to establish right to attached property—Jurisdiction.*—In a suit to establish the plaintiff's right to property attached in execution of a decree, the jurisdiction of the Court must be decided with reference to the amount of the decree in execution of which the property is attached, and not the value of such property. GULZARI LAL v. JADAUN RAI, **2 A. 799.** (S.A. No. 320 of 1876 decided the 16th May, 1876, *F.*) [*F.*, 15 C. 104, 55 P.R. 1906=71 P.L.R. 1906; *Criticised*, 94 P.R. 1908, F.B.=74 P.W.R. 1908; D., 7 A. 230, F.B, 9 A. 140=A.W.N. 1886, 328, 17 A. 69.]

(17)—*Act VIII of 1859, s. 136—Decree—Collector.*—In attaching a decree under Act VIII of 1859, the Civil Court should apply the

Attachment—continued,

——5.—Mode of Attachment—*continued.*

provisions under s. 136 alone and the Collector has no power to attach such a decree. JOY KALEE DASSEE v. BABOOANNUND CHUNDER **9 W.R. 133.** [*App.*, 12 W.R. 329; *R.*, 14 C.W.N. 96, 10 C L J. 226.]

(18)—*Property in possession of mortgagee—Attachment to be effected by prohibitory order*—An attachment of property in the possession of a mortgagee should be made by a prohibitory order and not by actual seizure. BEHARILAL v. RATTIRAM, **1 C P.L.R. 85.**

(19)—*Execution of decree — Attachment of judgment-debtor's monies in deposit in Collectorate*—On application by a judgment-creditor for attachment of money in deposit in a Collectorate at the credit of the judgment-debtor, a Judge who is moved to apply to the Accountant-General for the purpose ought not to refuse on the ground that the money is confiscated to Government. KRISTO DOSS KOONDOO v. INDRO NARAIN CHOWDHRY, **18 W.R. 189.**

(20)—*Burden of proof as to ownership of moneys.*—Where an application is made to a Court to attach, as owing to A, money placed by B in hands of C, it is incumbent on the applicant to prove that the money belongs to A and not to C. ZAHOOROODEEN AHMED v. KALEE DOSS BANERJEE, **25 W.R. 20.**

(21)—*Reasonable and probable cause, what is.* The fact that statements stated in an application for attachment was true, and that nothing was concealed which the Court ought to have known, is evidence that the applicant had reasonable cause upon those facts for the application. CHOUDHAREE SHEORAJ SINGH v. DWARKA DASS, **4 N.W P. 42.**

(22)—*Attachment of property in the custody of a Court—Civ Pro Code (Act V of 1908), O. XXI, r. 52—Any other attachment irregular and ineffective.*—A obtained a decree against B, in the Township Court and attached B's paddy in execution thereof. Subsequently, C obtained a decree also against B in the Sub-Divisional Court, and attached the same paddy by putting the bailiff of the Sub-Divisional Court in possession. The next day the paddy was sold by the bailiff of the Township Court under A's decree, and A withdrew the sale-proceeds. On C's suing A for his rateable share in the sale-proceeds: *Held*, that A was not liable for taking no notice of an irregular attachment. As the attached paddy was in the custody of the Township Court, C ought to have made his attachment by notice to that Court under O. XXI, r 52. MAUNG TAUNG BO v. VYRAVEN CHETTY, **11 Ind. Cas. 859.**

—by actual seizure—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, U.B.R. 1902—1903, Vol. II, Execution of decree, 1.

See LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 1 M.H.C. 24.

Attachment—continued.

——5.—Mode of Attachment—*concluded.*

See LIMITATION ACT, 1908, ART. 182—JOINT DECREES, 6 W.R. Mis. 18.

See MANAGER—MANAGER OF ATTACHED PROPERTY, 19 W.R. 37.

—Life-interest, not attachable by notice to trustee of funds—*See* OFFICIAL TRUSTEE, 12 M. 250.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 W.R. 310.

——6.—Priority of Attachment.

(1)—*Rival judgment—creditors — Priority—Judgment debtor's rights.*—The judgment of one judgment-creditor who has secured attachment must be satisfied before the proceeds can be available in satisfaction of a later attachment by another creditor. The mere fact of attachment does not destroy a judgment-debtor's right in the property. SHUNKUR SAHOO v. MUNGUL SINGH, **15 W.R. 158.**

(2)—*Attachments—Priority in order of time.*—The first attachment of property in execution of a decree, has priority over any subsequent attachment by a different Court. ADJOODHYA SAHOO v. SHEIKH BAICHOO, **2 N. W. P. 259.**

(2-*a*)—*Attachment before judgment of joint property—Application for removal of the attachment by another buyer from one of the owners—Value of attached property—Costs in the miscellaneous proceedings not to be awarded in the regular case*—The plaintiffs sued the judgment-debtors for moneys advanced to them and obtained an attachment before judgment on certain bricks. They were attached on the fields where they were stacked. The first defendant applied for removal of attachment and obtained it. The plaintiffs then brought the present suit to have their right to attach the bricks declared, or in the alternative for the value of the bricks. The first defendant set up that the attached bricks were his, having been bought at different times by him for value before the attachment from one of the judgment-debtors to whom alone they were said to have belonged. The District Court gave the plaintiffs a decree for Rs. 4,575, being the value of the bricks at the contract rate, which was for delivery at Rangoon and included cart-hire to Rangoon. He also gave the plaintiffs a decree for the costs incurred by them in the proceedings for removal of attachment and he allowed them their costs of suit calculated on the total amount: *Held*, (1) on the facts that the bricks where the property of the judgment-debtor, at the time of the attachment; (2) that the District Judge was in error in allowing the plaintiffs the value of the attached bricks at the rate in their contract, which was for delivery in Rangoon and included cart-hire to Rangoon, and that not more than the value of the bricks at the brick-fields should have been allowed; (3) that the allowance to the plaintiffs of the costs in the removal of attachment-proceedings was not justified as these costs had been provided for in these proceedings. RUGBEER MISSER v. MAREAPPA PILLAY, **11 Ind. Cas. 828.**

Attachment—continued.

——6.—Priority of Attachment—*continued.*

(3)—*Ss. 84, 270, Act VIII of 1859,—Attachment prior to decree—Fresh attachment after decree—Attachment before judgment.—Held (Norman, J., dissenting)* that a judgment-creditor, who has caused the property of his debtor to be attached prior to decree, under s. 84, Act VIII of 1859, is bound, after decree, to attach the property a new before he can proceed against it in execution The attachments mentioned in s. 270, Act VIII of 1859, refer to attachments after decree only, and not to attachments before judgment. SREERAM MANICK v. TINCOWREE ROY, **13 W.R.F B. 9.**

(4)—*Attachment before and after judgment—Priority.*—One of the creditors of a certain debtor attached his property before decree. Subsequently another creditor attached the same property in execution of his decree. In a claim for priority between the two, held, that the creditor, who attached the property in execution of the decree was entitled to priority, which should be determined from the date of attachment, after decree. KESREE CHUND v. POORUN CHUND, **68 P. R. 1868.**

(5)—*Separate attachments simultaneously made—Rateable distribution—Civ. Pro Code, 1859, s 270.*—Where two separate attachments in execution of separate decrees are simultaneously placed on property, the proceeds of the sale of such attached property should be rateably distributed between the parties in proportion to the amount of their respective decrees; and the attachment obtained by one of the parties before judgment does not operate to confer on him a right to priority over the other in the distribution of the sale-proceeds under s. 270 of Act VIII of 1859. BUKHT RAM v. MUSSAMMAT BUDDAMO, **2 N. W. P. 368.**

(6)—*Effect of—Rights of attaching creditor—Interference with right—Measure of damages—S. 244, Civ. Pro. Code—Applicability to person not party to proceedings—Power of executing Court to commit for contempt.*—Although an attaching creditor does not by attachment acquire priority over other creditors coming in later (29 C. 428, 26 M. 473, *R.*), he acquires a right to have the whole of the attached property applied in satisfaction of his debt, if no other creditors come forward, and in any case, to have a rateable proportion so applied. In this sense, an attaching creditor is said to have a charge on the attached property (5 C. 148, 12 M L. J 24, *R.*), and he has also the right to prevent the attached property passing by survivorship (4 M 302, 11 C. W. N. 163, *R.*), a person, who interferes with that right, as by carrying away the crops attached, violates a legal right and commits an actionable wrong. The amount of damages will depend upon the evidence, but cannot exceed the value of the attached property. S. 244 of the Civ. Pro. Code does not apply where the person violating the right of an attaching creditor is not a party to the original suit. (3 I. A. 241, *D.*). An attaching Court has no

Attachment—continued.

——6.—Priority of Attachment—*continued.*

inherent power to commit for contempt. SANKARALINGA REDDY v. KANDASAWMY THEVAN. **17 M. L. J. 334=2 M. L. T. 365=30 M. 413.** (26 M. 494, *R.*) [*R.*, 8 C. L. J. 20, 32 M. 429=19 M. L. J. 401=2 Ind. Cas. 18.]

(7)—*Right of prior attaching creditor to sale-proceeds as against holder of decree charging lands.*—*Held* by a Division Bench, that the attaching creditor is not entitled to the sale-proceeds, as against the holder of a decree charging the lands attached, on the ground of the priority of his attachment, if the charge had been created prior to the attachment. RAM KISHAN v. BHAVANI DAS, **1 A 333. F. B.**

(8)—*Attachment by more than one judgment-creditor of property of judgment-debtor in Court—Priority—Second attachment subsequent to Payment—Order by the first attaching Court—Power of Court having custody of property over it.*—Where the property of a judgment-debtor lying in Court was attached by more than one judgment-creditor, in execution of decrees of different Courts, the question of priority is to be decided only by the Court in whose custody the property is, and not by the attaching Court. But where the judgment-debtor's property was attached and a payment order was made by the attaching Court, previous to the other attachment in execution of the decree of the other judgment-creditor, the Court in whose custody the property is, would cease to have any power of disposal over it, and any order by such Court on the question of title or priority would be wrong. GOPEE NATH ACHARJE v. ACHCHA BIBEE, **7 C. 553=9 C. L.R. 395.**

(9)—*Property attached by different decree-holders—Sale under second attachment—Rights of creditor making first attachment.*—When property is attached by two different decree-holders, and sold at the instance of the one who made the second attachment the claim of him who made the prior attachment must be satisfied first, but he cannot again sell the rights and interests of his debtor in the property. UNNOPOORNA DASSEA v. GUNGA NARAIN PAUL, **2 W R. 296.**

(10)—*Execution of rival decrees in same Court—Priority of attachment—Mortgage-liens—Execution-sales.*—Where rival decrees were being executed in the same Court, and the properties mortgaged were attached by all the mortgagees and advertised to be sold, held that the mouzahs were sold unencumbered with the respective liens of the mortgagees and the lien over the property was transferred to the sale-proceeds. MODHOO SOODUN SINGH v MOKUNDEE LALL SAHOO, **23 W.R. 373.** [*D.*, 10 C. 567.]

(11)—*Execution of decree—Writs of attachment—Priority of one over another—Criterion—Time of lodging of writs in office of Sheriff—Time when writs reach Sheriff's hands.*—In considering which of two writs of attachment in

Attachment—continued.

—6.—Priority of Attachment—*concluded.*

execution of a decree is to have priority over the other. the time when the writs are lodged in the office of the Sheriff is the criterion by which priority is to be determined, and not the time when such writs reach the hands of that officer. NARSINGDAS MULTANCHAND v. NAHANUBAI, SUMARMAL; JOHARIMAL v. NAHANUBAI, **7 B.H.C.O.C. 183.**

(12)—*Attachment—Finality of attachment where previous pledge on money in deposit and a decree on such pledge exist*—Res-adjudicata—*Civ. Pro. Code, 1859, s. 7.*—Where the plaintiff obtains a bond for a sum of money from K, who pledges as security certain fees in deposit in the Collectorate, and defendant No. 2, in execution of a decree against K, attaches those fees, the attachment is not final, but merely to prevent the money being taken out of Court. Where the plaintiff sues K for a sum of money, K pledging as security certain fees in deposit in the Collectorate and obtains against K a simple money-decree and then sues K and defendant No. 2, who had meantime, under s. 16, Beng. Act VI of 1862, attached those fees in execution of his decree against K; *Held* that the causes of action in the two suits were not identical nor against the same party. LALLA TEELUCK-DHAREE LALL v. THE COURT OF WARDS, **2 B.L.R. A.C. 230=11 W.R. 149.** (1 W.R. 315, 6 W.R. 312, 5 W.R. 115, 10 W.R. 27, *F.*) [*F.*, 13 C. 262.]

(13)—*Rival decree-holders attaching property—Interval of four hours between two attachments—Priority—Creditors not entitled to share* pro-rata.—One of two distinct decree-holders attached the property of a judgment-debtor four hours before the other had attached it. *Held* that the decree-holder, who first attached it, was entitled to be satisfied out of the proceeds of the sale and that the creditors could not share the proceeds *pro rata*. *In re* NANAK CHUND, **54 P.R. 1872.**

(14)—*Priority of attachment, effect of—Sale on subsequent attachment.*—Priority of attachment does not give a decree-holder a right to set aside a sale on a subsequent attachment, but only a right to be paid first from proceeds of sale. LALLA JOOGUL KISHORE LALL v. BHUKHA CHOWDHRY, **9 W.R. 243.**

See APPEAL—DECREE AND EXECUTION OF DECREE, 6 W.R. 21.

See CIV. PRO. CODE, 1905, s. 73, 8 W.R. 501.

—7.—Striking off execution-proceedings.

(1)—*Order striking off execution-Proceeding, effect of.*—The striking an execution-proceeding off the file is an act which may admit of different interpretations according to the circumstances of the case; and when a Court, which has to consider in an execution-proceeding whether a previous attachment has not come to an end by the dismissal of some execution-proceedings in the interval, and which has no opportunity of considering the circumstances

Attachment—continued.

—7.—Striking off execution-Proceedings.—*continued.*

under which those execution-proceedings were dismissed, holds that the attachment is still subsisting, the order of the Court cannot be held to be bad in law. MOHUNT BHAGWAN RAMANUJ DASS v. KHETTER MONI DASSI, **1 C.W.N. 617.**

(2)—*Striking off case in execution—Effect.*—On a case being struck off, on the termination of the proceedings in execution, the owners of an estate (previously attached) can deal with it as an unattached estate. JAIN SINGH v. TEELUCK DHAREE PATTUCK, **1 W.R. 318.**

(3)—*Execution case—Striking off—Attachment—Release.*—There is no authority in Act VIII of 1859 for saying that an attachment is at an end because the execution case is struck off the file. In executing an *ex-parte* decree, dated 22nd September, 1864, plaintiff obtained an order for attachment in December of that year. On 12th May, 1866, defendant prayed under s. 119, Act VIII of 1859, to have the judgment against him set aside. His petition having been rejected, he appealed to the Judge, who remanded the case for trial upon which the Munsiff struck the execution case off the file. The plaintiff having appealed from the decision of the Judge to the High Court, the Judge's order was set aside, and the case remanded. In February 1868, the Judge found that defendant, not having come within 30 days after the first process to enforce the judgment, could not come in under s. 119. Plaintiff then applied for an order for the sale of the property. *Held* that, when the Judge's order of remand was set aside after the finding to which he came in February 1868, it was the Munsiff's duty to allow the execution to proceed in the ordinary course; and that, whether the case was formally restored to the file or not, the order of attachment revived when the Judge's decision of 20th August, 1862, was reversed. SHEIK GOLAM YABEYA v. MUSSAMAT SHAMA SUNDARI KUARI, **3 B.L.R. App. 134=12 W.R. 142.**

(4)—*Agreement between decree-holder and judgment-debtor—Postponement of sale—Order striking off case—Effect.*—A judgment-debtor, on the very date on which the sale was advertised to take place, paid a part of the money due on the decree, and obtained a postponement of the sale by the consent of the decree-holder, on the express provision suggested by the judgment-debtor himself that the attachment should continue, a provision accepted by the decree-holder. *Held* that a mere formal entry on the record showing that the case was struck off the file was not of any effect. MOTHOOR MOHUN PAL CHOWDHRY v. SHURROOP CHUNDER PAL, **6 W.R. 291.**

(5)—*Removal of attachment—Dismissal of application—Civ Pro. Code, ss. 102, 283—Courses open to applicant.*—If an application for the removal of an attachment is dismissed under s. 102, Civ. Pro. Code, the only course

Attachment—continued.

——7.—Striking off execution—Proceedings *—continued.*

open to the applicant is either to apply under s. 193 for an order to set the dismissal aside, or to file a regular suit under s. 283 W.S. THANEGA CHELLUM MOODALIAR v. K. T. NARAYANAN CHETTY, **1 L.B.R. 70.**

(6)—*Revival of attachment on reversal of sale in execution of decree.*—An attachment, once legally made, is revived upon the reversal of the sale in execution. RAJAH MOHESH NARAIN SINGH v. KISHNANUND MISSER, **2 Ind Jur.O.S. 1=5 W.R P.C. 7=Marsh 592=9 M.I.A. 324.**

(7)—*Sale, reversal of—Attachment, revival of.*—*Held* that, by the setting aside of a decree, the parties are remitted to the position in which they stood immediately before the sale, and therefore an attachment once legally made revives. GUNNO SINGH v BABOO MUDDUN MOHUN SINGH, **W.R. 1864, 26.** [*F.*, 12 W. R. 142.]

(8)—*Suit struck off the file—Effect on attachment previously made.*—When a suit has been struck off the file for neglect of the party to pay in the *tulubana* for the service of the necessary sale-processes, an attachment previously made cannot subsist. PURBHOO DOSS v. GOMA BHUJUN SINGH, **5 W.R. Mis 4.**

(9)—*Attachment in execution of decree—Mere dismissal of application for execution, whether affects the continuance of the attachment.*—Where, on an application for execution of a decree, the attachment of certain property has once been ordered, the fact that, subsequent to such attachment, the Court happened to merely strike the execution case off its file of pending cases, without expressly releasing the attachment or saying that the decree was incapable of execution, cannot have the effect of affecting the continuance of the attachment, so that, when the order striking the petition off the file is reversed on appeal, the decree-holder is restored to his original position with the right to claim the benefit of the continuing attachment. THE BANK OF UPPER INDIA v. SHEO PRASAD, **19 A. 482=A W N 1897, 124.** (N. W.P. 1873, 72, 14 B.L.R. 425, 12 W.R. 142, *R.*; [R., 9 C. L. J. 239]

(10)—*Execution of decree - Attachment, when subsists—Striking off the file*—If property is once attached, the attachment will subsist if not expressly abandoned by the party at whose suit it was made until an order is issued for its withdrawal, even although no further steps are taken on the attachment within a reasonable period. If an execution case is struck off with the consent of the judgment-creditor, or in such manner as the law provides, or if the judgment-creditor subsequently applies *of his own accord* for a second attachment treating the first as non-existent, then, the first must be deemed to have been abandoned. If, on the contrary, the judgment-creditor did not intend to abandon his first attachment and takes out the second attachment merely because the Court insists on his beginning *de novo*, then, the first attachment remains in force notwithstanding the issue of the second. JHATU SAHU v. BABO RAM CHARAN LAL, **3 B.L.R. App. 68=11 W.R. 517.** [*R.*, L.B.R. 1893—1900, 340.]

(11)—*Execution in progress set aside totally—Property released from attachment.*—Where execution has been set aside *in toto* after being proceeded with to a certain point, the property is not under attachment for benefit of decree-holder. KHADEM HOSSEIN KHAN v. KALEE PERSHAD SINGH, **8 W.R. 49.**

(12)—*Execution-cases—Stay of sale—Continuance of attachment.*—Execution-cases in which sale or other proceedings are stayed for a fixed period, at the request of the debtor, and with consent of the decree-holder, should not be struck off the file till the period has expired; and, if struck off by an order providing continuance of attachment, sale may follow within the period without a fresh attachment. CHUMUN LALL CHOWDHRY v. DOMUN LALL, **9 W.R. 205.**

(13)—*Execution struck off for convenience of Court—Attachment if put an end to.*—An order striking an execution-case off the file for the convenience of the Court does not put an end to the attachment. J. DACOSTA v. KALEE PERSHAD SING, **12 W.R. 260.**

(14)—*Appeal—Interim order striking off attachment—Release from attachment.*—An order striking off an attachment pending an appeal does not release the property from attachment. SHEW NARAIN SINGH v. A. B. MILLER, OFFICIAL ASSIGNEE, **17 W.R. 234.**

(15)—*Sale of attached property, stay of—Striking off of execution-application—Effect.*—Where a sale of attached property is stayed by the Court upon the application of the judgment-debtor, on condition of the attachment remaining in force, the subsequent striking off of such application from the file would not affect the decree-holder's rights. MUNGUL PERSHAD DICHIT v. GRIJA KANT LAHIRI, **8 C. 51. P. C.=11 C.L.R. 113=8 I.A. 123=4 Sar. 249.** [*D.*, 35 C. 1060=8 C.L.J. 193=12 C.W.N. 216, Note.]

(16)—*Execution of decree—Postponement of sale does not operate to remove attachment.*—Property had been attached in execution of decree; the parties had applied that the sale might be postponed, but the Court executing the decree ordered the sale to be postponed, and the "case to be struck off the file." *Held* that as there was no order passed directing the removal of the attachment, and as it appeared that it was the intention of the Court, and of the parties that the attachment should continue, the direction that the case should be struck off the file of pending cases did not operate to remove the attachment. AHMUD HOSSEIN KHAN v. MAHAMED AZEEM KHAN, **1 N.W.P. 48.** [*F.*, 1 A. 616.]

Attachment—continued.

——7.—Striking off execution—Proceedings —*continued.*

(17) — *Attachment — Execution-case struck off the file—Effect on attachment.*—By an order of the Court a case of execution of decree, in which an attachment had been taken out, was struck off the file. The plaintiff never asked for, or consented to the withdrawal of the prior attachment, nor did the Court by any formal order withdraw the same. *Held*, that the attachment was not terminated by the order which struck the case off the file of pending cases. MOOKHESUR RAI AND ANOTHER v. RAMPHUL SAHOO, **5 N.W.P 70.**

(18)—*Striking off execution — Effect* —An attachment by a judgment-creditor ceases when his execution-case is struck off the file. BABOO LUCHMEEPUT v. BABOO LEKRAJ ROY, **8 W.R. 415.**

(19)—*Attachment of money in Deputy Collector's hands—S 237, Civ Pro. Code, 1859—Dismissal of suit.*—An attachment of money in the hands of a Deputy Collector without any such direction, as is enjoined by s. 237, Act VIII of 1859, ceases to be binding when once the suit is dismissed. LUCHMEEPUT SINGH DOOGUR v. HUMPHREY, **14 W.R. 101.**

(20)—*Decree establishing right to attach after property released from attachment--S. 246, Civ. Pro. Code, 1859—Effect* —The effect of a decree establishing a right of attachment after the release of the property from attachment under Act VIII of 1859, s. 246, is to set aside the order of release, and restore the state of things which had been disturbed. MAHOMED WARRIS v. PITAMBUR SEN, **21 W.R. 435.** [*F.*, 23 C. 829, 10 B. 400, 31 A. 367 ; *R.*, 6 A.L.J. 434.]

(21)—*Execution of decree pending appeal to Privy Council—Suit to cancel alienation during attachment.*—While an appeal from a decree was pending before the Privy Council, the decree-holder (M) applied for execution and attached the property of the judgment-debtor (B), who thereupon obtained an order of the High-Court for stay of sale until security could be furnished. The decree-holder having failed to furnish adequate security, the execution-case was struck off. The appeal to the Privy Council having been dismissed, the decree-holder revived execution-proceedings, adding costs and interest to her original claim. Upon this a third party intervened, and objected to the attachment, on the ground that he had obtained a *mokurruree pottah* of the property from B's representative. The objection having been allowed, under Act VIII of 1859, s. 246, M brought a suit to have the *mokurruree* declared to be invalid and fictitious. *Held* that plaintiff is not required to cause M's admitted proprietary right to be sold before she can maintain this suit, and that the act of the Court in striking off the execution-proceedings only for the convenience of business, and leaves in tact all the proceedings taken up to that stage : nor does the decree-holder

Attachment—continued.

7.—Striking off execution—Proceedings —*concluded.*

abandon the attachment, which was therefore subsisting when the *mokurruree pottah* was granted. Accordingly the alienation of the property by the *pottah* is invalid and inoperative. SOONDUR SINGH v. MUSSAMUT BUHOORIA ALUM BASHEE KOOER, **24 W.R. 36.**

(22)—*Property under attachment — Execution struck off—Attachment not put an end to.* —Where property is under attachment, the mere fact of the execution-case being struck off the file does not put an end to the attachment. JUGOBUNDHOO SEIN v. BHUGWAN CHUNDER DOSS, **17 W.R. 15.**

(23)—*Munsif declining to reverse predecessor's attachment order—Jurisdiction of District Judge.*—A Judge has no power to interfere with a Moonsiff's order declining to reverse an order of attachment of a former Moonsiff, when nothing else is before the Judge. GHOONA MAHOMED SIRCAR v. SHURNO LUTTU DEBIA, **16 W.R. 311.**

(24)—*Attachment before and after decree—Striking off execution sale proceedings.*—*Held* that attachment issued after suit supersedes the attachment order obtained during the pendency of the suit, and that the former was taken off the property when the sale-proceedings were struck off the file. RAM JEWAN v. RAM LALL, **2 Agra 190.**

See EXECUTION CASE, L.B.R. 1893—1900, 340.

——8.—Subjects of attachment.

See ACT XXIII OF 1871.

See CIV. PRO. CODE, 1908, s. 60.

(1)—*Annuity charged on estate—Civ. Pro. Code, 1859, s. 205—Grantor's heir.*—An annuity, which is a charge upon an estate, can be attached, under s 205, Act VIII of 1859, at the instance of the grantor's heir by whom it is payable. MAHARAJAH DHERAJ MAHTAB CHAND BAHADOOR v. SREEMUTTEE DHUN COOMAREE BIBEE, **17 W.R. 254.**

(2)—*Civ. Pro Code, s. 266—Sale of immoveable property to Court of Wards—Annuity payable in return to vendor, liable to attachment in execution.*—Where a judgment-debtor sold his immoveable property to the Court of Wards for consideration, part of which was present payment, and another part an annuity payable to the judgment-debtor, such annuity was held to fall within s. 266 of the Civ. Pro. Code, as being money belonging to the judgment-debtor, and a stipulation in the deed of sale by which the judgment-debtor undertook not to alienate, such annuity was held to be wholly inoperative to defeat the claim of the judgment-creditor. HAR SHANKAR PRASAD SINGH v. BAIJNATH DAS, **23 A. 164=A.W.N. 1901, 10** (27 C. 98, 6 B.L.R. 646, *R.*; 14 M.I.A. 40, *D.*) [*D.*, 31 A. 304=6 A.L.J. 227 =1 Ind. Cas. 186.]

Attachment –continued.

——8.—Subjects of attachment—*continued.*

(3)—*Stipends allowed to members of Mysore family, if attachable.*—The original stipends allowed by the Government to the members of the Mysore family cannot be attached. HAJEE MOHAMED KUZULBASH v. SHAZADA MOHAMED BUSEEROODEEN, **7 W.R. 169.**

(4)—*Reg. IV of 1831, s. 3, Act XXIII of 1838 —State stipend, whether liable to attachment* — The stipend of a Carnatic stipendiary is not liable to attachment in execution of a decree against him, it being one of the description of personal grants expressly protected from attachment in satisfaction of any decree or order of a Court by s. 3, Reg. IV of 1831, extended by Act XXIII of 1858. MOHAMED ABDUL VAKAB SAHIB v. RAMASAWMY AIYANGAR, **4 M.H C. 277.**

(5)—*Allowance granting maintenance from grantor's estate—Civ. Pro. Code, 1859, s. 205* —An allowance granting by means of a deed a regular maintenance from the grantor's estate and recoverable from it, is property which may be attached under s. 205, Act VIII of 1859. ENAET HOSSEIN v. NUJEEBOONISSA BEGUM. **11 W.R. 138.** [*F.*, 17 W.R. 254.]

(6)—*S. 266, cl. (g), Civ. Pro. Code, 1882—Political pension—Oudh loans, 1838 and 1842, payments due under—Political pension—Liability to attachment for debt—Exemption from s. 266 (g), Civ Pro. Code, 1882—No distinction observed between state property and private property vested in the Sovereign of Oudh* —Although it is probable that the enactments of s. 266 (g) of the Civ. Pro. Code, were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension, which the Government of India has given a guarantee that it will take, by a treaty obligation contracted with another Sovereign Power is in the strictest sense a political pension. [*F.*, 1 O.C. 170, 26 M. 69; *R.*, 26 M. 423.] An allowance payable by the Government of India under an arrangement effected between the King of Oudh and the Governor-General in 1842 for the benefit of members of the King's family and household and their respective heirs in perpetuity, and payable to one of such heirs, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of s. 266 (g), Civ. Pro. Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of the King's private estate for the maintenance of members of his family; there having been, in a State like that of Oudh, no distinction observed between State property and private property vested in the Sovereign. BISHAMBAR NATH v. IMDAD ALI KHAN, **18 C. 216. P.C.= 17 I A. 181=5 Sar. 619.** [*F.*, 1 O.C 170; 26 M 69; *R.*, 26 A. 617=A.W.N. 1904, 144= 1 A.L.J. 338.]

(7)—*Decree against representatives of deceased Yeomiahdar—Arrears of Yeomiah pension due to estate of deceased, not subject to attachment in execution of decree.*—Arrears of Yeomiah pension due to the estate of a deceased Yeomiahdar which have accidentally accumulated, are not subject to attachment in satisfaction of a decree of a Civil Court obtained against the representatives of the Yeomiahdar. REFERRED CASE No. 33 OF 1870, **5 M.H.C. 371.** [*F.*, 26 M, 69]

Attachment—continued.

——8.—Subjects of attachment—*continued.*

(8)—*Pensions Act (XXIII of 1871), s. 11—Tora garas hak, whether exempt from attachment as pension.*—The word "pension" in s. 11 is used in the sense of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants. So, a *tora garas hak* in the hands of a mamlatdar, granted to him for his rendering certain services when required, cannot constitute a 'pension' within its meaning in s. 11 of Act XXIII of 1871 so as to be exempt from attachment under a decree of a Civil Court. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KHEMCHAND JEYCHAND, **4 B. 432.** [*F.*, 5 M. 272, 30 M. 153=2 M.L.T. 33, 31 A. 382=6 A.L.J. 519= 5 M.L.T. 388; *R.*, 16 B. 731, 21 M. 105, A.W. N. 1902, 161, 26 A. 617=A.W.N. 1904, 144= 1 A.L.J. 338, 8 C.W.N. 665.]

(9)—*Agreement by Government to pay money in lieu of tora garas haks—Act XXIII of 1871, s. 4.*—The claim against the Government in this suit, which was based on an alleged agreement made by Government, *viz.*, an agreement to pay moneys from the Government treasury in lieu of the *tora garas haks* which the *garasias* used to levy directly from the villages, was held to fall within the prohibition contained in s. 4 of the Indian Pensions Act (XXIII of 1871) against Civil Courts entertaining any suit relating to any grant of money made by the British Government, whatever may have been the consideration for such grant, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted. MAHARAVAL MOHAN SANGJI JEYSANGJI v. THE GOVERNMENT OF BOMBAY, **4 B. 437. Note.** (*On appeal* **5 B. 408=8 I.A 77=4 Sar. 230**). [*F.*, 4 B. 432; *R.*, 4 M. 341, 17 A. 1, P.C., 22 B. 496, 29 B. 480=7 Bom. L.R. 497.]

(10)—*Claim against Government for money in lieu of tora garas haks—Jurisdiction of Civil Courts—Indian Pensions Act (XXIII of 1871).* —The plaint in this case contained an express prayer for a declaration, not that the Government should collect and pay over the *garas* to the plaintiffs, but that the plaintiffs are entitled to take it hereditarily, from the Government treasury and, in fact, treat themselves as entitled to a grant of money out of the treasury in lieu of the levy which their ancestors were making from the villages, and such claim was

Attachment—continued.

—8.—Subjects of attachment—*continued.*

held to come within the scope of the prohibition of the jurisdiction of Civil Courts by the Indian Pensions Act, in respect of suits relating to grants of money made by Government. MANSANG MADHAVSANGJI v. THE GOVERNMENT OF BOMBAY, **4 B. 443, Note.** [*F.*, 4 B. 432],

(11)—*Civ. Pro. Code (Act X of 1877), s. 266—Pension—Saleable property — Attachment.*—"Saleable property" means property which, if sold, would pass to the purchaser. In the case of pensions not exempted from attachment, it is only arrears actually accrued due that are attachable in execution of a decree. BHOYRUB CHUNDER ROY v. MADHUB CHUNDER SEN, **6 C.L.R. 19.** (14 M.I.A. 40=7 B.L.R. 186, *F.*)

(12)—Bonus, *attachment of.*—A *bonus* granted by the Government is not a pension, and if proceedings in execution had commenced prior to 1st June, 1882, the *bonus* is attachable. KHASIM v. CARLIER, 5 **M. 272.** [*R.*, 30 M. 153=2 M.L.T. 33.]

(13)—*Pensions when attachable—Law before Act, XXIII of 1871.*—Before Act XXIII of 1871 it was held that a pension was liable to attachment though not in anticipating of its becoming due and that it could also be attached when the amount was in deposit in the Government treasury at the pensioner's call. GOORDIT SINGH v. BISHESHUR, **79 P.R. 1867.**

(14)—*Act VI of 1849 (Pensions)—Kinds of pensions liable to attachment.*—All pensions, except military and naval pensions and superannuation allowances, were *held* liable to attachment under ordinary process or proceedings in bankruptcy in the hands of the Treasuary Officer. NIZAKUT-UL-NISSA v. RAM SAHAI, **100 P.R. 1869.**

(15)—*Pension paid to judgment-debtor and in his possession not attachable—Ac. XXIII of 1871, s. 11.*—Money paid to a judgment-debtor on account of his pension cannot be attached and so also while it is at the treasury, though waiting his call. KALI MALL v. SHAZADA JILAL-UD-DIN, **30 P.R. 1874.**

(16)—*Pension paid to the pensioner or his agent, attachable—Act XXIII of 1871, s. 11.*—The money paid on account of pension to the pensioner or his agent ceases to be money due on account of the pension the moment it is so paid. It is exempted from attachment so long as it remains in the Treasury officer's hands and has not been paid to the prisoner or his agent. The moment it is paid it loses its privilege and becomes subject to attachment. LALLU MAL v. MAHOMED SHERDIL KHAN, **87 P.R. 1877.** (30 P.R. 1874, *Diss.*).

(17)—*Power of executing Courts—Pensions by authorities other than British—Attachment.*—S. 60 (*g*), Civ. Pro. Code (1908) contemplates pensions payable by the British Government only. So a sum of money paid as a

Attachment—continued.

—8.—Subjects of attachment—*continued.*

charity allowance out of the revenues of the Mamdot Estate may be attached. HAZARI MAL v. KHAN BAHADUR KHAN, **58 P.R. 1884.** [*R.*, 47 P.R. 1893.]

(18)—*Execution of decree—Political pension.*—*Held*, that a pension awarded by the Deed of Trust, dated the 23rd November 1839, on the part of Mohammad Ali Shah, King of Oudh, printed at page 149, Aitcheson's Treaties, is a political pension and, as such, it cannot be attached in execution of a decree against the pensioner. JAFAR MIRZA v. BHAGWAN DAS, **1 O.C. 170.**

(19)—*Civ. Pro. Code, 1882, s. 266 (g)—Political pension—Right of creditor to attach pension due at date of pensioner's death.*—An application was made to attach the amount due to a deceased judgment-debtor as arrears of Malikana due from Government. *Held* that the character of the fund remained uncharged as long as it remained in the hands of Government irrespective of whether the intended beneficiary was alive or dead. Consequently, the amount in the hands of the Collector was not liable to attachment. VALIA THAMBURATTI v. ANUJANI KUNHUNNI, **26 M. 69.** [*R.*, 12 O.C. 323.]

(20)—*Civ. Pro. Code, 1882, s. 266(g)—Attachment of pension payable in British India to descendants of former Royal family in Ceylon—Validity of attachment—Pensions Act, XXIII of 1871, s. 11—Pensions not granted or continued by Indian Government—Exemption from attachment under Act.*—The descendants of two families who at one time occupied the throne of Ceylon applied for the release of attachment of pensions payable to them in British India. The attachment was effected in execution of a decree obtained against them in British India. *Held*, that as the pensions attached were "political pensions" within the meaning of s. 266 (*g*), they were exempted from attachment. *Per Sir Arnold White, C.J.*—If the Government of India be regarded as merely the agent of the Ceylon Government for the purpose of paying these pensions, the Courts in British India would not have any jurisdiction to proceed by way of attachment since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon. *Per Benson, J.*—S. 266 (*g*), Civ. Pro. Code, does not restrict the exemption to political pensions granted by the Government in India and the Courts in British India would not be justified in adding such a limitation to the plain words of the section. *Per Sir Arnold White, C J.*—Pensions not granted or continued by the Indian Government are not exempt from attachment by virtue of the provisions of s. 11 of the Pensions Act, 1871. MUTHUSAMI NAIDU v. PRINCE ALAGIA MANAVALA SIMMALA RAJA, **26 M. 428.** (5 B. 219, 18 C. 316, *R.*)

(21)—*Pensions Act, XXIII of 1871, ss. 8 and 11—Civ. Pro. Code, s. 266—Grant of zemindari*—The words "pension" in s. 11 of the

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***Attachment*—continued.**

——8—Subjects of attachment—*continued.*

Pensions Act and s. 266 *(g)*, Civ. Pro. Code, implies periodical payments of money by the Government to the pensioner in the manner prescribed by s. 8 of the Act. Where, as a return for good services, land was granted once for all under a *sanad* by the Government, *held* that the grantee took the proprietary right in the subject of the grant which was transferable and attachable. *Quære*—Whether, if the grant had been of land revenue, different considerations would not have arisen? LACHMI NARAIN v. MAKUND SINGH, **26 A. 617=1 A.L.J. 338.** (4 B. 432. A.W.N. 1902. 161, 17 I.A. 181, 18 C. 216, *R.*) [*F.*, 30 M 153=2 M.L.T. 33, 6 A.L.J. 519=31 A. 382=5 M.L.T. 388.]

(22)—*Decree against predecessor—Liability of jaghir in execution.*—The jaghir is not liable to attachment and sale in execution of a decree against the predecessor, as assets in the hands of a jaghirdar approved by Government. NILMONI SINGH DEO v. BAKRANATH SINGH, **9 C. 187. P.C =9 I.A. 104=4 Sar. 335.** (*On appeal from* **5 C 389**) [*R.*, 10 C. 677, 9 B. 198, 5 Bom. L.R. 983, 5 C.L.J. 583=34 C. 753.]

(23)—*Civ. Pro. Code, 1882, s. 266 (g)—Pensions Act, XXIII of 1878, s. 11—Jaghir income—Attachment of assigned land revenue in the hands of lambardars*—Neither the Civ. Pro. Code, nor the Pensions Act exempt jaghir income from attachment in execution of a decree *Quære*:—Whether assigned land revenue is liable to be attached in the hands of the lambardars of a village before reaching the assignee? KUNDAN LAL v. DALIP SINGH, **57 P.R. 1884.** [*F.*, 133 P.R. 1888; *R.*, 47 P.R 1893.]

(24)—*Grant by Government to compensate for resumption of rent free land—Pension—Liability to attachment.*—A grant of annual sum made by the Government in return for their having, by mistake, resumed certain rent-free lands of the grantee, is not a "pension" within the meaning of s. 11 of the Pensions Act (XXIII of 1871). Such a grant is liable to attachment in execution of a decree against the grantee. JIBAN KRISHNA GHOSH v. SRIPATI CHARAN DEY, **8 C.W.N. 665.** [*R.*, 2 M.L.T. 33=30 M. 153.]

(25)—*Execution of decree—Attachment of estate yielding periodical payment.*—When an estate yielding a periodical payment is attached, the execution of the decree is continuable under the original attachment, and it is not necessary to file a fresh application for each payment. JAMNADAS v. LALITARAM, **2 B. 294.**

(26)—*Civ. Pro. Code, s. 266 (g)—Gratuities, liability of, to attachment in execution of decree.*—S. 266 of the Civ. Pro. Code, prohibits the attachment of all gratuities allowed by Government, whether they are allowed to pensioners or granted in consideration of past services. BAWAN DAS v. MUL CHAND, **6 A. 173=A.W.N. 1884, 16.**

***Attachment*—continued.**

——8.—Subjects of attachment—*continued.*

(27)—*Gratuity sanctioned but not yet paid, whether liable to attachment in execution—Civ. Pro. Code, s. 266—Trasfer of Property Act, s. 123,—Indian Contract Act, s. 90.*—A gratuity sanctioned in favour of a Railway employee subsequent to the 1st July, 1882, but not yet handed over to him by the District Paymaster to whom it had been sent for such payment, could not be attached in execution of a decree against the employee, as, being a gift of moveable property, it was not evidenced by a registered instrument, and had not been completed by delivery, and as the Paymaster was not authorised by the employee to hold the money on his behalf. JANKI DAS v. EAST INDIAN RAILWAY COMPANY, **6 A. 634=A.W.N. 1884, 210.** [*R.*, 5 Bom.L.R. 454.]

(28)—*Books of account.*—Books of account cannot be taken in execution. *In re* PESTANJI CURSETJI SHROFF, **3 B.H.C.O.C. 42.** [*Appr.*, 3 N.W.P. 334; *Diss.*, Rat. Un. Cr.C. 43.]

(29)—*Account books are subjects of attachment, but not of sale.*—Although a Court will not allow account books to be attached and brought to sale as mere waste paper; yet, to prevent a judgment-debtor from making away with his books and defeating a decree holder, it will be competent to a Court executing a decree, if execution is applied for by attachment of debts to require the judgment-debtor to produce his books in Court, and leave them in the custody of the Court. ABJOODHYA PERSHAD v. MIDDLETON COHEN AND CO., **3 N W.P. 334.**

(30)—*Civ. Pro. Code (X of 1877), s. 266, proviso (c), property of agriculturist specifically mortgaged, not exempted under.*—In enacting the provisions of s. 266 of Act X of 1877, it cannot have been the intention of the Legislature to prohibit the sale of property specifically mortgaged. The operation which the Legislature has intended cl. (*c*) of the section to have, in favour of an agriculturist, cannot be so extended as to prohibit the sale of the house-material, etc., of such a person, under a decree for sale passed on a specific mortgage of the house executed by him. BHAGVANDAS v. HATHIBHAI, **4 B. 25.** [*Diss.*, P.L.R. 1900, p. 357; *D.*, A.W.N. 1888, 154.]

(31)—*Civ. Pro. Code, s. 266, cl. (c)—Exemption in favour of agriculturist debtor, whether extends to his representative—Scope of clause.*—The use of the word "materials" in cl. (*c*) of s. 266 of the Civ. Pro. Code, has not the effect of limiting the exemption in the clause so as to exclude the house itself in which the agriculturist lived, and the buildings which he used in the exercise of his calling. The provision cannot be construed to exempt merely loose materials of buildings and those only. While the house stands, he cannot attach it as a house without attaching the materials of which it is composed. Nor does the exemption cease to operate on the death of the agriculturist, provided the property came into the hands of his heir, also an

Attachment—continued.

—8.—Subjects of attachment—*continued.*

agriculturist. Where the original agriculturist judgment-debtor is dead, the decree-holder proceeds against his representative as liable under the decree, and the representative, taking the place of the deceased as to liability under s. 266 takes his place also as to the protection afforded by cl. (*c*) of the section. Consequently, if, having become owner, he is in good faith occupying the house, sought to be attached, as an agriculturist, it continues to be exempt from attachment. RADHAKISAN HAKUMJI v. BALVANT RAMJI, **7 B 530.** [*R.*, 12 B. 363, 13 C.P.L.R. 30, 59 P.R. 1902; *D.*, A.W.N. 1888, 154.]

(32)—*House occupied by agriculturist as such—Agriculturists' town residence.*—A house occupied by an agriculturist as an agriculturist cannot form the subject of attachment. The town residence of an agriculturist is liable to attachment. MANECKLAL v. MANILAL, **7 Bom. L. R. 685.**

(33)—*Execution of decree—Attachment of agriculturist's house—Civ. Pro. Code, s. 266 (c).*—Where, upon an agricultural tenant leaving the village, the zamindar, according to custom, was entitled to re-enter upon the tenant's premises which reverted to him, and such premises are sold in execution of a money-decree against the tenant, *held* that the interest of the zamindar was not affected by the sale which was prohibited by s. 266 of the Civ. Pro. Code, and to which he was no party. TOTA RAM v. CHAIN SUKH, **A.W.N. 1888, 154.**

(34)—*Civ. Pro. Code, 1882, s. 266 (c)—Building site—Building-site of houses occupied by agriculturists not liable to attachment and sale in execution of decree.*—A creditor holding decree against the representatives of an agriculturist, attached the site of their house, and pleaded that, under s. 266 (*c*), Civ. Pro. Code, the materials of houses and other buildings belonging to, and occupied by, agriculturists, were alone exempt from sale and prayed that the site under the house may be sold. *Held* that the house and its materials were exempt from attachment and that the attachment of the site could not affect the tenant's immunity from the attachment of the materials of the house forming the house as it stood. KRISHNA v. KANSHI RAM, **59 P.R. 1902.** (7 B. 530, *R.*)

(35)—*Fodder, liability of, to attachment in execution of decree—Civ. Pro. Code, 1882, s. 266 (b).*—*Held*, that in execution of a decree against an agriculturist, fodder was liable to attachment whether in whole or in part. WASIL v. MUHAMMAD DIN, **93 P.R. 1904.** [*R.*, 82 P.R. 1907.]

(36)—*Bombay Bhagdari Act (V of 1862)—Execution of decree against* bhagdar—*Attachment of* gabhan (*home-stead*) *appurtenant to* Bhag—*Validity—Civ. Pro. Code, 1822 s. 266 (c).*—In execution of a decree obtained against a *bhagdar*, his *bhag* was attached, as also the *gabhan* or site of the dwelling house, as a part of the *bhag*. The judgment-debtor applied to have the attachment raised from the *gabhan*, alleging that he was an agriculturist, and claiming protection from attachment in respect of *gabhan* of his house under s. 266 (*c*) of the Civ. Pro. Code, 1882. *Held* that the *gabhan* was liable to attachment. The judgment-debtor occupied the house in the character of a *bhagdar* and not as an agriculturist. The *object* of the Bombay Bhagdari Act (V of 1862) was not that execution of a decree against a *bhagdar* should be prevented altogether, but that it should proceed against the *bhag* as an indivisible aggregate, including the *gabhan*, and where a *bhagdar* holds in that character it predominates over his other character as an agriculturist. Moreover, it was for agriculturists in the strictest sense, and for an agriculturist in that sole character, that the protection afforded by s. 266 (*c*) of the Civ. Pro. Code, was intended. JIWAN BHAGA v. HIRAV BHAIJI, **12 B. 363.** [*R.*, 13 C.P.L.R. 30.]

(37) *Civ. Pro. Code (Act X of 1877), ss. 278, 287—Person served with prohibitory order in respect of debt, application not maintainable by, under s. 278—Duty of Court.*—No application can be made, by a person served with a prohibitory order in respect of an alleged debt due by him to the judgment-debtor, as for the raising of the attachment under s. 278 of the Civ. Pro. Code. Where, however, the property of which a sale is sought is a debt, and the Court receives notice from the alleged debtor that no such debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and if it comes to the conclusion that the debt does not exist, should abstain from proceeding to sale. HARILAL AMTHABHAI v. ABHESANG MERU, **4 B. 323.** [*F.*, 10 M. 194; *R.*, 14 C.P.L.R. 124, 27 M. 67.]

(38)—*Vendor's right to purchase money—Debt—Attachment—Civ. Pro. Code 1877, ss. 266 and 268.*—Where it is agreed, that the purchase-money on a sale of immoveable property shall be payable after the execution of the conveyance, then, so long as the conveyance remains unexecuted, the vendor's right to the purchase-money is a contingent right, which, under s. 266 of the Civ. Pro. Code, cannot be attached and sold in execution of a decree, and sale of such a right cannot convey anything to the purchaser. AHMAD-UD DIN KHAN v. MAJLIS RAI, **3 A. 12.** [*F.*, A.W.N. 1888, 154.]

(39)—*Execution against vendor—Property held by vendee—Attachment—Limitation.*—*Held* that, where a party holds possession of a property for 21 years under a sale from another, it cannot be attached in an execution against that other. ACHUMBEET LAL v. RADHA KISHEN, **6 W.R. 161.**

(40)—*Civ Pro. Code, 1877, s. 266—Attachment of debt arising out of claims over which British Courts have no jurisdiction.*—Claims over

Attachment—continued.

——8.—Subjects of attachment—*continued.*

which no Court in British India has jurisdiction are not debts liable to be attached under the section. Thus debts due to a British subject by the Gaikwar or other Government or its subjects are not debts which, under this section, are liable to attachment in execution of a decree. But, it must be noted that the mere circumstance that the garnishee is, at the time of the application for attachment, beyond the limits of British India, would not of itself render the debts not liable to be attached. GHAMSHAMLAL v. BHANSALI, **5 B. 249.** [*R.*, 26 M. 423.]

(41)—*Debt secured by mortgage of immoveable property not moveable property.*—A debt secured by mortgage of immoveable property is not moveable property, within the meaning of the execution sections of the Civ. Pro. Code. SRINATH DUTT v. GOPAL CHUNDRA MITTRA, **9 C 511=12 C L.R. 445.** [*F.*, 9 M. 5; *Disappr.*, 26 B. 305; *Cons.*, 10 M. 169, 14 C.P. L.R. 5; *R.*, 20 C. 805.] *But see* DEBENDRA KUMAR MANDEL v. RUP LALL DASS, **12 C. 546.**

(42)—*Civ. Pro. Code, 1882, s. 274=O. XXI, r. 54, new Code—Attachment in execution of money decree—Incorrect description of property—Effect of subsequent purchase of same property by stranger under another decree.*—Where the judgment-debtor had only *muafi* interests in a village, but the holder of a money decree in attaching the judgment-debtor's interests therein incorrectly described them as *zamindari* interests and a sale of the zamindari interests was held subsequently, the attachment was not a good attachment, under the section, of the *muafi* interests of the judgment-debtor; the auction-purchaser could not be held to have purchased those *muafi* interests; and the title of certain persons who had obtained a pre-emptive decree in respect of the *muafi* interests must prevail over that of the auction purchaser. HARGU LAL SINGH v. MUHAMMAD RAZA KHAN, **13 A. 119=A. W. N. 1891, 16.**

(43)—*Debt secured by collateral hypothecation of land—Immoveable property—General Clauses Act*, 1868, *s. 2 (5).*—A debt which is made a charge on land, constitutes a "benefit to arise out of land," within the meaning of those words in s. 2 (5) of the General Clauses Act, 1868, and is, therefore, immoveable property for the purpose of attachment and sale under the Code of Civil Procedure. *Quære*:—Whether the debt could be sold apart from the security as immoveable property? APPASAMI v. SCOTT, **9 M. 5.** [*Not F.*, 26 B. 305; *Appr.*, 19 B. 121; *R.*, 10 M. 169, 14 C.P.L.R. 5.]

(44)—*Attachment applied for—No further steps taken—Mortgage by judgment-debtor—Effect.*—On an application for execution of a simple money-decree, fresh attachment was ordered to be made, on 6th December, 1873. On the 31st December following, the judgment-debtor filed a petition praying that, in accordance with an arrangement made with the

Attachment—continued.

——8.—Subjects of attachment—*continued.*

judgment-creditor, the execution proceedings might be stayed for another month, he promising not in the meantime to alienate the property. This was acceded to by an order of that date and the execution case struck off, the proceedings being stayed for a month. Nothing was done by the decree-holder until the 30th November, 1874, when a fresh application for attachment and sale was made. The Court directed execution to be taken out. But, subsequently, the judgment-creditor failed to prosecute the matter, and eventually, on the 31st May, 1875, the Court, on the ground of negligence of the judgment-creditor, again struck the case off the file. In the meanwhile, on the 2nd February, 1874, the judgment-debtor had mortgaged the property in question. *Held* that the attachment did not subsist on the date of the mortgage and the mortgagee had a lien over the mortgaged property. The circumstances that the judgment-debtor induced the judgment-creditor from time to time to put off the sale of his property, by promising that he would not sell the property to anybody else, could not convert such promise into a mortgage. GANGAGOTTI PAL v. RAM SUNDER DUTT, **8 C. L. R. 157.**

(45)—*Application for and sale of property under mortgage decree—Common error of Courts—Claim to such property under s. 278, Civ. Pro. Code.*—It is not necessary for the holder of a mortgage-decree to apply for the attachment and sale of the mortgaged property. The decree contains or ought to contain, a direction for sale; and it only remains for the decree-holder to apply for the sale to be proclaimed. If he unnecessarily applies for an attachment, which is granted, a claim to the property cannot be brought under s. 278, Civ. Pro. Code, 1882. S.R.M.A.N. MUTHAPPA CHETTY v. S.A.R.M. PALLATHAPPA CHETTY, **2 L.B.R. 138.** (14 C. 631, 18 B. 98, 4 B. 515, *R.*)

(46)—*Property in possession of mortgagee, legality of attachment of.*—An attachment of property mortgaged even when in a mortgagee's possession is not illegal. BIHARILAL v. RATTIRAM, **1 C.P.L R. 85.**

(47)—*Civ. Pro Code, s. 268—Debt attached in execution of decree—Payment of amount out of Court to proper person, effect of.*—Under s. 268 of the Civ. Pro. Code, a debtor prohibited to pay the debt due by him might pay the amount of the debt into Court, and such payment would discharge him as effectually as payment to the party entitled to receive the debt. Also where, instead of paying the amount due by him into Court, the debtor, after the issue of the order of attachment pays that amount out of Court, to the person who would have been entitled to withdraw it from the Court, if it had been paid into Court, and the payment is certified to the Court, such payment out of Court becomes, by reason of the certification of it to the Court, equivalent to a payment into Court within the meaning of s. 268

Attachment—continued.

——8.—Subjects of attachment—*continued.*

of the Code so as to constitute sufficient compliance with the requirements of that section. FIDA HUSAIN v. MAULA BAKHSH, **21 A. 145 = A.W.N. 1899, 12.**

(48)—*Partnership debt, attachment of.*—An uncertain sum, which may or may not be payable by one member to another of a partnership, not shown to have been wound up, cannot be attached or sold in execution of a decree. DWARIKA MOHUN DAS v. LUCKHIMONI DASI, **14 C 384** [*Diss.*, 13 M. 417 ; *R.*, 20 C. 693, 158 P.L.R. 1903]

(49)—*Attachment of debt due to judgment-debtor by third person—Order of Court on garnishee admitting debt — Procedure when garnishee denies debt—Civ. Pro. Code, 1882, ss. 267 268, 503.*—Where a decree-holder has attached in execution a debt payable to the judgment-debtor by a third person, the power to the Court, implied in s. 268 of the Civ. Pro. Code of 1882, to make an order for payment of the debt which the garnishee is to obey has been held to justify also an order for payment to the judgment-creditor, when the garnishee admits the debt to some amount or does not deny the debt *in toto*. If however the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under s. 503. TOOLSA GOOLAL v. JOHN ANTONE, **11 B. 448.**

(50)—*Money in the hands of agent, attachment of—Civ. Pro Code, s. 266.*—The fact that, when a principal sues to recover a balance in the hands of his agent, he may, until the agent's accounts are produced, be unable to specify the particular amount of the balance in the agent's hands, does not render it the less a debt due to the principal. Such a debt in the hands of an agent or a vendee is capable of being attached by a creditor of the person to whose order or for whose benefit the money is held. Such debt, even where it happens to be unascertained, is capable of being ascertained, and is, as such, attachable under s. 266 of the Civ. Pro. Code. MADHO DAS v. RAMJI PATAK, **16 A. 286 = A.W.N. 1894, 84.** (14 M. I. A. 40, 6 M.I.A. 510, 5 B.L.R. 382, *Disc.*)

(51)—*S. 268, Civ. Pro. Code, 1882 (= O. XXI, r. 46, present Code)—Moveable property must belong to judgment-debtor—Government Promissory Notes in the Bank of Bengal.*—Where certain Government Promissory Notes in the custody of the Bank of Bengal were declared to belong to the plaintiff, and the plaintiff applied for execution of the decree by attachment, s. 268, Civ. Pro. Code, 1882, was held to be applicable only to cases where the property, in the possession of a third party, belonged to the judgment-debtor, and not to cases where it was declared to be plaintiff's. The only remedy open to the plaintiff to recover possession of moveable property decreed to belong to him and not in the possession or power

Attachment—continued.

——8.—Subjects of attachment—*continued.*

of the judgment-debtor, is to proceed by suit against the person in whose possession or power it is. RAJA PUDMANUND SINGH v. CHANDI DAT JHA, **1 C.W.N. 170.**

(52)—*Civ. Pro. Code, 1859, ss. 205, 233 to 238—Attachment of decree.*—A decree comes under the term "property" in s. 205, Civ. Pro. Code, 1859, and is, therefore, liable to attachment and sale in execution. For the purpose of attaching the decree itself, and the money when it came into Court, the form of attachment under s. 237 is perhaps the most appropriate. PRINCE GHOLAM MAHOMED v. INDRACHAND JAHURI. **7 B L.R. 318 = 15 W.R. 84** [*R.*, 21 A. 405 = A.W.N. 1899, 157.]

(53) —*Sale of, decree — Appeal—Remedy of party dissatisfied.*—A decree belonging to a judgment-debtor may be attached and sold, it being a part of the judgment-debtor's effects and not falling under the head of immoveable property. An appeal does not lie for setting aside a sale of a decree under Act X of 1959. The party dissatisfied with such order may proceed under s. 104, Act X of 1859. BUNSHEE MOHUN DOSS v. HUR CHUNDER DOSS CHOWDHRY, **W.R. 1864, Mis. 28.**

54)—*S. 266, Civ. Pro Code, 1882—Whether offerings which may in future be made to a Hindu idol, liable to attachment.*—Offerings which may in future be made to a Hindu idol, being voluntary, or entirely uncertain. The right to receive such offerings is not a "saleable property" within the meaning of s. 266, Civ. Pro. Code. So, such offerings cannot be attached in execution of a decree for money against the idol. SHOILOJA OJHA v. PEARY CHARAN DEY, **29 C. 470 = 6 C.W.N. 728.**

(55)—*S. 232, Act VIII of 1859—Mesne profits to be ascertained in execution—Attachment pending ascertainment.*—Mesne profits to be ascertained in execution of a decree may be decreed under s. 232, Act VIII of 1859; and a decree-holder may, pending ascertainment, apply for attachment of judgment-debtor's property. SHANODA MOYEE BURMONEE v. WOOMA MOYEE BURMONEE, **8 W.R. 9.**

(56)—*Future rents and profits, attachment of —Prohibitory order to* ghatwal, *in execution proceedings against him* —Attachment of future rents and profits due to a *ghatwal* as such, cannot be made in execution of a decree against him. (23 C. 873, 27 C. 39, *F.*) So, in execution proceedings against a *ghatwal*, it is not proper to issue a prohibitory order to the *ghatwal* not to receive any rents and profits from the raiyats, and, also, to the raiyats, not to pay their rents to him, without a Receiver being appointed for collecting rents and profits as they fall due from time to time. UDOY KUMARI GHATWALIN v. HARI RAM SHAHA, **28 C. 483.** [*R.*, 30 A. 246 = A.W.N. 1908, 101 = 5 A.L.J. 251 = 4 M.L.T. 10.]

(57)—*Civ. Pro. Code, s 273—Decree—Execution—Judgment-debt — Sale—Procedure.*—

Attachment—continued.

—8.—Subjects of attachment—*continued.*

A decree for money, though it be a judgment-debt, is not liable, as a "debt" to sale in execution of a decree. [*F.*, 20 C. 111, 16 B. 522.] The judgment-debt could be rendered available in execution without attachment, and s. 273 is imperative as to the procedure to be adopted to secure the judgment-debt and make it available to satisfy the claim of the attaching decree-holder. TIRUVENGADA v. VYTHILINGA, **6 M. 418.**

(58)—*Execution of decree—Effect of attachment of money-decree—Civ. Pro. Code (1877), ss. 266, 273.*—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree, (s. 266 of the Civ. Pro. Code, 1877), yet it is apparent from the provisions of s.273 that the sale of a money-decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale. SULTAN KUAR v. GULZARI LAL, **2 A. 290.** [*F.*, 16 B. 522, 20 C. 111; *R.*, 28 A. 771=3 A. L J. 585=A.W.N. 1906, 237=1 M.L.T. 247; *D.*, 21 A. 405=A.W.N. 1899, 157.]

(59)—*Civ. Pro, Code. 1882, ss. 266, 273—Attachment of money-decree—"Saleable property"—Subsequent adjustment—Effect.*—A money-decree cannot be sold after being attached, by reason of the particular procedure prescribed by s. 273 of the Code. But that procedure is clearly confined to money-decrees. All other decrees are both attachable and saleable as "saleable property" under s. 266. (2. A 290, 6 M. 418, R.) [*R.*, 27 B. 556=5 Bom. L.R. 529, 2 C.L.J. 499, 28 A. 771, F.B =3 A.L.J. 585=A.W.N. 1906, 237=1 M.L.T. 247, 5 M. L.T. 278=1 Ind. Cas. 535.] An adjustment of a decree for money subsequent to the attachment of the same under S. 273 of the Code cannot be recognised by the Court. GOPAL NANASHET v. JOHARIMAL, **16 B. 522.**

(60)—*S. 411, Act XIV of 1882 (Civ.Pro.Code)—Court not justified in selling decree* in forma pauperis *for money on application of Collector in pursuance of order in his favour for realisation of Court-fees.*—As s. 411 provides that persons, who have been successful as paupers, shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them, it seems that the provisions of that section do not justify the Court in selling a decree *in forma pauperis* upon the application of the Collector, in pursuance of an order made in his favour at the time when such decree was passed. JOTINDRO NATH CHOWDHRY v. DWARKA NATH DEY, **20 C. 111.**

(61)—*Appointment of manager to minor's estate—Points to be considered.*—The Court has to consider, not only the nearness of kindred, but the suitableness of the person whom it may appoint to the office of the manager of a minor's estate. KHOODEE MONEE DOSSEE GHOSSAMEE v. KOYLAS CHUNDER GHOSE, **4 W.R. Mis., 22.**

(62)—*Civ. Pro. Code, 1882, ss. 268, 273—(O. XXI, rr. 46, 53, new Code)—Revenue Court's decree, nature of—Non-liability to attachment and sale under Civil Court's decree.*—The words "decree for money passed by another Court" in s. 273, Civ. Pro. Code, are not wide enough to include decrees of Revenue Courts; and, therefore, a Revenue Court decree is not liable to attachment and sale in execution of a Civil Court decree. (16 A. 496; *R.*, 7 B.L.R. 318, A.W.N. 1885, 123, 2 A. 290, *D.*) But a Revenue Court decree, before it is executed and the proceeds deposited in Court, stands in the position of an ordinary debt, and may be dealt with under the provisions of s. 268, Civ. Pro. Code. ALIA BIBI v. ABU JAFAR, **21 A. 405=A.W N. 1899, 157.** [*R.*, 22 A. 192.]

(63)—*Expectancy, sale of—Hindu Law—Power of guardian.—Quœre.*—Whether a mere expectancy can be the subject of a sale, and if so, of a sale by a guardian acting or purporting to act on behalf of an infant. DOOLI CHAND v. BIRJ BHOOKAN LAL AWASTI, **6 C L.R. 528 P.C.** [*R.*, 8 C. 12, 10 C.P.L R. 1.]

(64)—*Hindu Law—Sale of expectancy.*—The Judicial Committee expressed that they were not prepared to affirm that an expectancy could be made the subject of a sale, still less that it could be made the subject of a sale, highly speculative as such a sale must be, by a guardian acting or purporting to act on behalf of an infant. DOOLI CHAND v. BIRJ BOOKUN LAL AVASTI, **10 C L R. 61, P.C.**

(65)—*Sum to be paid in future.—Civ. Pro. Code, 1859, s. 205.*—A sum receivable by way of assignment is not liable to be attached and sold in execution of decree. SHAM CHUNDER BABOO v. TEELUCK CHUNDER BABOO, **2 Hay 142.**

(66)—*Civ. Pro. Code 1859, s. 205—Property liable to be attached in execution of decree.*—It is said in Macpherson's Civil Procedure that unproved assets may by seized by attachment; but it is also said that mere rights of suit cannot be attached. These two apparently but not really, conflicting positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Future property cannot be attached nor a mere expectancy nor a mere right of suit. The attachment must operate at the time of attachment, and not be anticipatory so as to fasten on some future state of property in which the suit may result. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money-claim accruing due may not be attached. A claim which may accrue under a binding

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—8.—Subjects of attachment—*continued.*

award cannot be attached and sold in execution. SYUD TUFFAZAL HOSSEN KHAN v. RAGHUNATH PRASAD. **7 B.L.R. 186 P.C. 14 M I A. 40=2 Suther. 434=2 Sar. 656=R. & J's No. 10 (Oudh).** [*F.*, 6 C.L.R. 19, 14 C. 384 ; *R.*, 8 B.H.C.A.C. 150, 10 B.H.C. 139, 22 W R. 214, 2 B. 540, 13 M. 447, 18 B. 739, 20 C. 693, 27 C. 38. 8 O C. 409, 9 C.W N. 703, 13 C.W.N. 966=10 C.L.J. 180=36 C. 936, F.B., 14 C.W.N. 918=12 C.L.J. 130=6 Ind. Cas. 826=38 C. 13; *Diss.*, 16 A 286 ; *D.*, 10 A. 462.]

(67)—*Civ. Pro. Code, 1882, s. 266 cl. (l)—Execution of personal decree against Hindu widow—attachment of land assigned to her without absolute power of disposal for her maintenance—Illegality*—Land assigned to a Hindu widow for maintenance with proviso against alienation is land over which she has no power of disposal, and, as such, is exempt from attachment under s. 266, cl. (*l*) of the Civ. Pro. Code, 1882, in execution of a money-decree against her. DIWALI v. APAJI GANESH, **10 B. 342.** [*F.*, 15 M.L.J. 7 ; *R.*, 15 A. 371, 16 A. 443, 9 C.W.N. 309, 12 C.L.J. 146 ; *D* ; 20 C. 273.]

(68)—*Civ. Pro. Code, 1882 s. 266. cl. (l) (= s. 60 n. new Code)—Attachment of property made over to Hindu widow in lieu of maintenance.*—The rights and interests which have been made over to a Hindu widow by the family to which she belongs, in lieu of maintenance, cannot, under s. 266 (*l*) Civ. Pro. Code, be attached and sold in execution of a decree against her. GULAB KUAR v. BANSIDHAR. **15 A. 371=A. W.N. 1893, 149.** (10 B. 342, *R.*) [*Not F.*, 14 C.P.L.R. 114.]

(69)—*Decree against members of joint Hindu family, sale in execution of—Rights of purchaser.*—A sale in execution of a decree against some of the members of a joint Hindu family of the interest of those persons in the family-property does not give the purchaser a right to recover possession of a definite quantity of land. *Quære.*—May not the creditor of a member of a joint Hindu family have, under Act VIII of 1859, s. 206, Civ. Pro. Code, 1859, some remedy against the property to which his debtor may be entitled? KALEE PUDO BUNERJEE v. CHOITUN PANDAH, **22 W.R. 214.**

(70)—*Reversionary interest—Execution of decree*—R. C. D. a Hindu, died possessed of property, leaving, as his heiress, his widow, R. D. He also left four daughters, two of whom died in the life-time of their mother, each leaving a son. R D. died, leaving her surviving two daughters, P.D. and J.D., who succeeded to the estate of R C.D. *Held*, that J.B., one of the sons of J. D., had no such interest in the property as could be attached and sold in execution of a decree against him. BHOOBUN-MOHUN BANERJEA v. THAKOORDOSS BISWAS, **2 Ind. Jur. N.S. 277=16 W.R. F.B. 18, note.**

(71)—*Civ Pro. Code, 1859, s. 205—Sale in execution—Reversionary interest.*—The interest

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of an heir, according to Hindu Law, expectant on the death of Hindu widow in possession, is not property and therefore not liable to attachment and sale in execution of a decree. RAM CHANDRA TANTRA DAS v. DHARMO NARAYAN CHUCKERBUTTY, **7 B L.R. 341, F.B.=15 W. R.F.B. 17.** [*Appr.*, 2 Ind. Cas. 865 ; *R.*, 8 B. H.C O.C, 140, 2 B. 67, 17 A. 125, 22 B. 984 ; *D.*, 10 A. 462.]

(72)—*Reversioner's right—Sale in execution of decree—Validity.*—The right of the reversioner of a Hindu widow, being purely contingent on his surviving her, cannot be the subject of sale in execution of a decree. KORAJ KOONWAR v. KOMUL KOONWAR, **6 W.R. 34.**

(73)—*Hindu Law—Attachment of undivided share—Death of the judgment-debtor—Survivorship.*—Where the undivided share of a co-parcener in the family is attached in execution of a personal decree against that co-parcener, and the co-parcener dies before the property is brought to sale, the effect of the attachment is to bring the interest of the judgment-debtor under the control of the Court for the purpose of executing the decree, so as to preclude the accrual of a title by survivorship. BAILUR KRISHNA v. LAKSHMANA, **4 M. 302.** (6 I. A. 88, *F.*) [*R.*, 30 M. 413=17 M L.J. 334=2 M. L.T. 365, 32 M. 429=19 M.L.J. 401.]

(74)—*Son's right to succeed by survivorship.*—A son's right to succeed by survivorship to his father's property is too remote to be sold in execution of a decree. BABOO GOUR SURUN DASS v. BABOO RAM SURUN BHUKUT, **8 W. R. 263.**

(75)—*Execution of decree—Grant to Hindu widow for maintenance for life—Reversionary interest of grantor liable to attachment and sale—Civ. Pro. Code, 1882, s. 266 (k.) (=s. 60 (m), new Code)—"Expectancy"*—A granted, to a Hindu widow, a life-interest in the usufruct of certain lands. In execution of a decree against A, his interest in the lands was attached and sold : *held*, that the interest which A had in the land was not a mere expectancy within the meaning of the section, but a vested interest similar to that which a mortgagor or lessor has in the lands mortgaged or leased, and that such interest was liable to attachment and sale. KACHWAIN v. SARUP CHAND, **10 A. 462=A. W.N. 1888, 200.** (6 W.R. 34, 15 W. R. F. B., 17, 14 M.I.A. 41 *R.*)

(76)—*Gift of family house to mother—Attachable interest—Remainder—Civ. Pro. Code, 1882, s. 266—Hindu Law.*—R executed a deed to his mother by which he made over to her the family house which was admittedly the only ancestral property remaining in the family, as a provision for her maintenance, and she was to support herself by the rent, etc., of the house. There were no words giving her the power to alienate the property. *Held*, that the house should be considered revertible to R on

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—8 —Subjects of attachment—*continued.*

his mother's death, that R had a saleable interest in the house during the mother's life, that his interest in the house during the mother's life was capable of being attached under s. 266, Civ. Pro. Code, and that such an interest did not fall within the description of an expectancy or of a merely contingent or possible right or interest. ANNAJI DATTATRAYA v. CHANDRA BAI, **17 B. 503.** (11 B. H.C. 199, 2 I.A. 256, 18 C. 164, *R.*) [*Expl.*, 32 C. 1051=9 C.W.N. 784=2 C.L.J. 50; *R.*, 19 B. 36, 1 Bom. L.R 303, 3 Bom. L.R. 790, 6 Bom. L.R. 625. 6 Bom. L.R. 975=29 B. 306, 1 S.L.R. 211, 9 O.C. 119, 22 B. 934.]

(77)—*Execution of decree—Hindu widow—Maintenance—Attachment and sale—Civ. Pro. Code, 1882, s 266, cl. (l).—Held* that an interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of her family is not capable of being attached and sold in execution of a decree against the widow. GULAB KUMAR v. BANSIDHAR, **A.W.N. 1893, 149=15 A. 371.** (10 B. 342, *R.*)

(78)—*Crim. Pro. Code s. 146—Attachment of immoveable property by Magistrate—Right to profits of such property accruing during attachment.*—Where immoveable property has been attached by a Magistrate under the provisions of s. 146 of the Crim. Pro. Code, pending the decision of a Civil Court in respect thereof, such Magistrate is not entitled, after the final decision of the Civil Court, to retain in his hands the profits derived from such property during attachment. *In the matter of the petition of* AVADH NARAIN LAL, **A.W.N. 1893, 100.**

(79)—*Civ. Pro. Code, s 272—Attachment of letters in Post Office—Claim by sender.*—Certain registered covers sent through the Post Office were attached at the instance of the judgment-creditors of the addressees, before they were delivered to the addressees, and while they were in the hands of the Post Master. The senders of those covers had, the day before, applied for their return to them. The senders, under these circumstances, could have no claim for the return of these covers, which were held by the Post Master in trust for the addressees, and the attachment was properly placed under s. 272, Code of Civil Procedure. NARASIMHULU v. ADIAPPA, **13 M. 242.**

(80)—*Prospective right of maintenance—Contingency—S. 205, Act VIII of 1859.*—A prospective right of maintenance cannot be attached, and a contigency of this kind is not included in Act VIII of 1859, s. 205, as something capable of attachment. MONESSUR DOSS v. MAHARAJAH KISHEN PROTAB SAHEE, **23 W. R. 427.**

(81)—*Decree for maintenance—Right to attach future maintenance—Act VIII of 1859, ss. 205, 243.*—A creditor holding a decree against a party who is entitled to an allowance by way of maintenance under a decree of Court though entitled to attach such sums as have already

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become due on account of maintenance, is not entitled to an order to attach and sell prospectively his judgment debtor's rights to maintenance, but the Court may properly make an order, in view of any instalment of allowance about to become due under the decree, that the person chargeable should not pay such sum to the judgment-debtor, and may forbid the judgment-debtor to receive the sum, so that the amount may either be paid to such person as the Court may direct, or an arrangement be made under s. 243 of Act VIII of 1859 for the collection or administration, if necessary, of the amount of the maintenance. MANISWAR DAS v. BABOO BIR PERTAB SAHU, 6 **B. L. R. 646=15 W.R. 188** [*F.* 24 W.R. 5; *R.*, 12 C. L.J. 130=14 C.W.N. 918=38 C. 13=6 Ind. Cas. 826; *D.*, 23 A. 164.]

(82)—*Arrears of maintenance, if liable to attachment in execution of decree.*—Arrears of maintenance already accrued due are liable to be attached in execution of a decree, although the right to future maintenance is not so liable. KASHEESHUREE DEBIA v. GREESH CHUNDER LAHOREE, **6 W. R. Mis. 64.**

(83)—*Right to future maintenance, if saleable in execution*—The right to maintenance being a personal one, such a right to future maintenance cannot be sold in execution of a decree. MUSSAMUT DULOON KOONWUR v. SONGOM SINGH,, **7 W. R 311.**

(84)—*Allowance when can be attached—Instalment of maintenance becoming due—Attachment.*—No allowance can be attached until it is actually due and paid to the judgment-debtor; but when an instalment of maintenance is about to become due, the Court may make an order for non-payment by the party chargeable, and its non-receipt by the debtor. CHUKOWREE MISSER v. MUSSAMUNT NUMOODAH KOOER, **24 W. R. 5.**

(85)—*Money-allowance for maintenance.*—A was liable to pay B, a widow, a monthly allowance for maintenance. B obtained a decree against A, as heir of her husband for a debt of her husband. *Held*, without deciding as to whether a money-allowance for maintenance can be attached in execution of a decree, that, under the circumstances of this case, he was not entitled to attach the maintenance under the decree. KOMAREE DABEE v. GREESH CHUNDER LAHOORY. **Marsh 200=1 Hay 583.**

(86)—*Arrears of maintenance, attachment of.*—Arrears of maintenance, may, as debt due to a widow, be attached in execution of decree against her. HOYMOBUTTY DEBIA CHOWDHRAIN v. KOROONA MOYEE DEBIA CHOWDHRAIN, **8 W.R. 41.**

(87)—*Heritable right to monthly allowance—Lability to be sold in execution—Civ. Pro. Code, s. 266.*—A heritable right to receive a monthly allowance derived from a person's deceased wife, to whom it was assigned in lieu

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——8 —Subjects of attachment—*continued.*

of her share of landed property, is not a mere right to maintenance nor any thing else exempted under s. 266 of the Civ. Pro. Code, and is therefore saleable in execution of a decree. SALAMAT HOSSEIN v. LUCKHI RAM, **10 C. 521**. [*R.*, 12 M. 250.]

(88)—*S. 266, Civ. Pro. Code, 1882—"Debt," meaning of—Maintenance allowance due at a future period, attachment of—Effect.*—The debt referred to in s. 266, Civ. Pro. Code, is a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time, or the payment of which depends upon contingencies which may or may not happen. An attachment must operate at the time of attachment upon some existing debt, and it must not be of an anticipating character, so as to fasten upon some future state of property. (14 M.I.A. 40, *F.*) Where an attachment was made of a maintenance-allowance which might become papable after the date of attachment, and which maintenance was payable only during the lifetime of the grant, *held*, that there was no legal attachment of that money. HARIDAS ACHARJIA CHOWDHRY v BARODA KISHORE ACHARJIA CHOWDHRY, **27 C. 38=4 C.W.N. 87.** [*F.*, 28 C. 483, 9 C.W.N. 703; *R.*, 12 C.W.N. 145 =7 C.L.J. 658, 30 A. 246=A.W.N. 1908, 101 =5 A.L.J. 251=4 M.L.T 10; *D.*, 23 A. 164 = A.W.N. 1901, 50.]

(89)—*Act VIII of 1859, s. 205—Partnership—Decree-holder, partner of judgment-debtor—Attachment in execution of decree.*—Where a decree-holder, a partner of the judgment-debtor—sought to attach in execution of his decree, the share of the judgment-debtor in the assets of the partnership business, the business then being in the hands of the Receiver of the Court under a decree for dissolution and winding-up. *Held* that such share of the judgment-debtor was not property within the meaning of s. 205, Act VIII of 1859, and, therefore, not liable to attachment in execution. ABBOTT v. ABBOTT AND CRUMP. **5 B.L.R. 382.** (2 Ind. Jur. N.S. 277, 3 B.H.C 42, 4 B.L.R. F.B. 175, 4 B.L.R.O.C. 83, *R.*) [*Not F.*, 13 M. 447; *Appr.*, 8 B.H.C A.C., 150; *R.*, 16 A. 286=A.W.N. 1894, 84.]

(90)—*Law of procedure—Partnership-property—Mode of attachment*—The law of procedure does not go to the extent of authorising the judgment-creditor to take property out of the possession of a person entitled to immediate possession not being the judgment-debtor. The attachment of a share of partnership-property should be by a prohibitory order, not by actual manual seizure. THAMA SINGH v. KALIDAS ROY, **5 B.L.R. 386.**

(91)—*Partnership—Money decree against individual partner—Partnership-property, if liable—Suit by other partners on attachment of partnership-property—Amendment of plaint in appeal.*—A decree obtained personally against one of the several partners of a firm cannot be executed by attaching property belonging to the firm. All that the judgment-creditor of one partner could seize would be the right, title and interest of his judgment-debtor in the partnership, which could not be ascertained until an account is taken of all its dealings and transactions and until all its debts and liabilities are discharged. On such attachment of partnership property, the proper course to be taken by any of the partners other than the judgment-debtor is, not to seek to establish his exclusive title to the whole of that property, but to sue for a dissolution of partnership and an account, with a view to ascertain the amount due to the judgment-debtor in respect of his share. Where, however, such a plaintiff had sued in the former way, *i.e.*, for the declaration of his title to the whole of the attached property, he was, on appeal, allowed by the High Court to amend his plaint as for dissolution of partnership and accounts. KARIMBHAI v. THE CONSERVATOR OF FORESTS, N.D., **4 B. 222.** (4 B. 227, Note 1, *F.*; 4 B. 229, Note 2, *R.*). [*R.*, U B.R. 1897—1901, Vol. II., 431; *D.*, 13 M. 447.]

(92)—*Holder of decree against one of several partners, not competent to attach debt due to firm—Remedy open to other partners on such attachment.*—The lower appellate Court, having found that the subject of attachment in this case was the joint property belonging to the entire partnership, as such, ought not to have held as it did, that such property could be attached in execution of a money-decree obtained against one only of the members of the partnership. The creditor could get only what belongs to his debtor, and so all that could be seized in execution by him is the right, title and interest of his judgment-debtor, as a member of the partnership, which could not be ascertained until an account was taken of all the partnership dealings and transactions. The decree holder, if he desires execution to proceed against the share of his judgment-debtor in the partnership at large, must do so by taking out proper proceedings for such purpose. SITARAM v. ATMARAM BAJI, **4 B. 227 Note 1.** [*F.*, 4 B. 222.]

(93)—*Partnership—Decree against one partner—Joint property of firm if liable.*—The sale of partnership joint property in execution of a decree obtained against one of the partners of the firm does not transfer any part of the joint property to the purchaser so as to entitle him exclusively to take it or withhold it from the other partners. But it confers on him an equitable right to call for an account and settlement of the partnership concerns, and thus to entitle himself to that interest in the property which, upon the final adjustment and settlement of the partnership concerns, shall be ascertained to belong to his judgment-debtor, and nothing more. HARIBHAI v. ARDESIR UKADJI, **4 B. 229, Note 2.** [*R.*, 4 B. 222.]

(94)—*Civ. Pro. Code, s. 266—Unascertained interest in a partnership—Court-sale—Validity.*

Attachment—continued.

—8.—Subjects of attachment—*continued.*

—The right to an account of a partnership business is a vested and heritable interest. Though a partner is not at liberty to introduce a new patner into the firm without the consent of the other partners, his interest in the partnership may be legally transferred. The effect of such transfer is that it is operative for all purposes but that of forcing him as a partner on the other partners without their consent, the relation of partners being one of mutual confidence and fiduciary in its character. A partner's unascertained interest in partnership business is saleable property, and a Court is entitled to sell it under s. 266, Code of Civil Procedure. It is not necessary that the *quantum* of a vested interest should be certain to make it saleable by Court. PARVATHEESAM v. BAPANNA, **13 M. 447.** (14 C. 384, *Diss.*) [*R.*, 20 C. 693, U.B.R. 1897—1901, Vol. II, 431.]

(95)—*S. 266, Civ. Pro. Code, Act XIV of 1882—Sale of unascertained interest in partnership—Share of partner liable to be attached and sold by execution-creditor.*—The interest of a partner in a partnership business is liable to be seized and sold in England, in execution of a personal decree against that partner in favour of third parties, and there is nothing in the Civ. Pro. Code to prevent a similar course of proceeding in India. The words in s. 266 of the Code, "saleable property.....belonging to judgment-debtor" are sufficiently wide to include the interest which he possesses in partnership business. It is true that a partner cannot himself sell his share so as to introduce a stranger without the consent of co-partners, but the share may be sold with their consent, or by the Court. Therefore, the share of a partner in a partnership business being saleable property under s. 266, Civ. Pro. Code, it can be attached and sold in execution of a decree against that partner, provided the execution proceeded in a proper manner. JAGAT CHUNDER ROY v. ISWAR CHUNDER ROY, **20 C 693.** (14 C. 384, 3 C. 193, P.C., 14 M.I.A. 40, 13 M. 447, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 431, 158 P.L.R. 1903.]

(96) — *Decree dissolving partnership.*—"A decree dissolving a partnership" can be attached. SIDLINGAYA v. SHANKARAPA, **5 Bom. L.R. 529=27 B. 556.**

(97)—*Execution of decree—Perishable articles not to be taken in attachment.*—Articles of such a perishable nature that they cannot be kept for fifteen days and sold, according to the Civ. Pro. Code, ought not to be taken in execution. SADASHIV MORESHVAR v. HANSO *bin* SHRAVAN, **5 B.H.C. A.C. 156.**

(98)—*Country liquor.*—"Country liquor" is subject to attachment. PURSHOTTAM v. BALVANT, **10 Bom. L.R. 13=32 B. 157.**

(99)—*Tenant having hereditary interest in property paying quit-rent and performing duty—Beneficial interest,*—Where a tenant has an herepitary interest in property, paying a small quit-rent for it, and holding it subject only to the duty to the zemindar of furnishing a few men in aid of the regular police, the interest is a beneficial one, which can be attached and sold by the tenant's creditors. RAJA RAMESSUR NATH SINGH v. GOLAMEE SAHOO, **24 W. R. 309.**

(100)—*Ship-owner, interest of, in mortgaged ship—Sale under prior mortgage.*—A ship-owner having mortgaged his ship has still an interest in her seizable in attachment under the Civ. Pro. Code. An attachment on a vessel in respect of the mortgagor's right and interest does not affect the validity of a sale under a prior mortgage. AUHIN v. AHMED MAHOMED, **1 Ind. Jur. N.S. 241.**

(101)—*Equitable right—Objection arising out of proceedings outside a suit—Cross-appeal—Reg. II of 1806—Priority—Attachment of property—Attachment of profits.*—An equitable right should be urged *before* decree, and not afterwards in execution when rights of third parties have accrued. No objection arising out of proceedings outside a suit can be entertained by way of cross-appeal. Reg. II of 1806 does not give a judgment-creditor holding an attachment made prior to judgment any priority over another who comes in and attaches the same property. A party attaching property attaches the profits also; and profits passing into the pockets of the original owner when he is allowed to remain in possession are not specifically liable for the judgment-debt under the attachment. RAM COOMAR GHOSE v. GOBINDNATH SANDYAL, **12 W.R. 391.**

(102)—*Doors and windows of building—Liability for separate attachment in execution.*—The doors and window-shutters of a *pucca* building cannot be attached in execution of a decree, forming part, as they do, of an immoveable property, and having no separate existence. PERU BEPARI v. BONUO MAIFARASH, **11 C. 164.** [*F.*, 13 M. 518=1 Weir 730.]

(103)—*Judgment-debtor's property becoming subject of suit—Attachment of such.*—The fact of a judgment-debtor's property being the subject of an existing suit, is no hindrance to its attachment in execution; but it is in the Court's discretion to order its sale at the fittest time. RAM CHUNDER v. NUND LALL BOSE, **19 W.R. 132.**

(104)—*Right of property in another's possession—Transferable claim — Civ. Pro. Code, s. 266*—A right to get by division a piece of land reserved by a donor for his own use in his deed of gift (but possession of which was with the donee) was *held* to be a transferable claim and, therefore, capable of being attached and sold under s. 266 of the Civ. Pro. Code. RUDRA PERKASH MISSER v. KRISHNA MOHUN GHATUCK, **14 C. 241.** [*R.*, 16 A. 315, F.B.]

(105)—*Property in judgment-debtor's zenana—Liability to attachment.*—Act VIII of 1859 does not exempt from attachment of property in

Attachment—continued.

—8.—**Subjects of attachment**—*continued.*

a judgment debtor's zenana. DOORGA CHURN MITTER v. HOREE MOHUN GOOHO, **17 W.R. 86.**

(106)—*Execution of decree — Exemption of property from attachment — Civ. Pro. Code, s. 266*—Before property of a judgment-debtor can be exempted from execution under s. 266 of the Civ. Pro. Code, the Court issuing execution should first express its opinion that such property is necessary for the debtor to earn his livelihood. BAKHIR MOHAMMED v. DOORGA-CHURN SHAHA, **10 C. 39 = 13 C L.R. 200.**

(107)—*Receiver of High Court, property in hands of*—Property in the hands of a Receiver of the High Court cannot be attached by a Court in the Mofussil, by means of a process issued without the leave or sanction of the High Court. A proceeding by way of attachment is an interference with the possession of a Receiver. HEM CHUNDER CHUNDER v. PRANKRISTO CHUNDER, **1 C. 403.** [*D.*, 26 C. 127.]

(108)—*Right to receive money for ever—Attachment in execution—Civ Pro Code (Act VIII of 1859), s. 237 = s. 272 of the Code of 1882.*—An attachment under s. 237 of Act VIII of 1859 (Civ. Pro. Code), was not applicable to a right to receive money from Government for ever; such an attachment would be good only with respect to any specific amount, then payable or likely to become payable. [*D.*, 10 C. 521; *R.*, 12 M. 250.] *Semble*—In such cases, the attaching creditor ought to proceed under s. 235 or s. 236 of the old Code, so that the debtor might have noticed that he was not at liberty to alienate his rights. NILKUNTO DEY v. HURRO SOONDEREE DOSSEE, **3 C. 414 = 1 C L.R. 412.** [*R.*, 12 M. 250.]

(109)—*Civ Pro. Code, s 268—Decree—Execution—Attachment—Deposit by servant of Railway Company—Rights of attaching creditor.*—Where monies or other valuable securities are deposited as security for the due performance of their duty by servants in the employ of a Railway Company, the Court may, in execution of a decree obtained against the depositor, place an attachment on such deposits, subject to the lien of the Company, but cannot proceed to order the sale thereof until the deposit is at the disposal of the judgment-debtor free from the lien of the Company, and if the deposit carries interest, and the interest is not, under the terms of the contract, between the employer and employee, at the disposal of the employer, order may be made for payment to the judgment-creditor of the interest as it, from time to time, falls due. KARUTHAN v. SUBRAMANYA, **9 M. 203.**

(110)—*Attachment after issue of cheque to third person—Right of holder of cheque to recover money paid to decree holder — Attachment of monies due under a contract after sale thereof to another—Right of vendee to obtain refund from attaching creditor.*—Under a general power-

Attachment—continued.

—8.—**Subjects of attachment**—*continued.*

of-attorney, the plaintiff was entitled to receive money as it became due in respect of works done by a contractor. On the completion of the contract, the plaintiff was given a cheque for the amount found due. Some time after, a creditor of the contractor served the officer who issued the cheque with a notice attaching moneys due by him to the contractor. The officer stopped payment of the cheque and paid the amount to the attaching creditor. *Held*, that the cheque having become the property of the plaintiff before the date of attachment, he was entitled to the refund of the amount from the attaching creditor. [*R.*, 28 B. 264.] Monies due under a contract were attached by the judgment-creditor of the contractor. The attachment took place after the sale of the contract to a third person. *Held* that the vendee was entitled to a refund of the amount realized by the attaching creditor. BHAGVANDAS KISHORDAS v. ABDUL HUSEIN MAHOMED ALI, **3 B. 49.**

(111)—*Materials vested in third person, not liable to attachment.*—Where a person deposited upon the works of another certain materials for the purpose of their being used in carrying out a contract with such second person, and the latter had received such deposit by the advance of the value thereof: Ruled, that such materials had vested in the person with whom they were deposited, as a purchaser, and were not liable to attachment under a decree against the depositor. SMALL CAUSE COURT REFERENCE, **2 N.W.P. 337.**

(112)—*Civ. Pro Code, 1877, ss. 272, 277—Attachment of property—Court's discretion.*—On an application by a decree-holder to attach money in deposit with the Collector, the Court has no discretion, under s. 272, Civ. Pro. Code, either to grant or refuse the application, but it is vested with discretion either to direct or not to direct that a portion of the money thus attached should be paid over to the decree-holder. NOOR JEHAN BEGUM v. MASHITHY KHANAM, **8 C.L.R. 17.**

(113)—*Civ. Pro. Code s. 266 — Standing crops — Immoveable property*—Standing crops are, for the purposes of the Code of Civil Procedure, immoveable property. MADAYYA v. YENKATA, **11 M. 193.** [*F.*, 15 A. 394 = A.W.N. 1893, 145, 1 N L.R. 131; *Appr.*, 14 A. 30 = A.W.N. 1891, 417; *R.*, 22 C. 877, 11 C.P. L R. 89, 7 C.L J. 152.]

(114)—*Small Cause Courts Act, IX of 1887, Sch II cl 6—Small Cause Courts, whether could attach and sell standing crops—General Clauses Act, I of 1868*—On the points arising for determination as to whether standing crops are moveable or immoveable property for the Small Cause Courts Act and the Civ. Pro. Code, whether a Small Cause Court can pass a decree for enforcement of lien against such crops or make a valid attachment and sale of the same in execution of its decree, it was *held*, that standing crops are immoveabl property in the sense

Attachment—continued.

—8.—Subjects of attachment—*continued.*

of the General Clauses Act, I of 1868, of Sch. II (6) of Act IX of 1887, and of the Civ. Pro. Code, and it is therefore not competent to a Small Cause Court to try suits for enforcement of lien against standing crops or to attach the same in execution of its decree, treating them as moveable property. CHEDA LAL v MULCHAND, **14 A 30=A.W.N. 1891, 174.** (11 M. 193, *R.*) *F*, 15 A 394=A.W.N. 1893, 145, 11 C.P.L.R 89 ; *R.*, 22 C. 877.]

(115)—*Vritti—Civ. Pro. Code, 1882, s 266, cl. (f)—Non-liability of vritti to attachment and sale in execution of decree—Vritti, nature of.*—The *upadhikpana vritti* on the river Godavari at Nasik was held to be a "right of personal service" within the meaning of cl. (*f*) of s. 266 of the Civ. Pro. Code, 1882, and hence was protected from attachment and sale in execution of a decree [*F.*, 12 B. 366 ; *R.*, A.W.N. 1889, 169, 23 B. 131.] The *vritti* is an hereditary priestly office by virtue of which certain religious ceremonies were performed on the river Godavari on behalf of pilgrims who paid fees to the holders of such offices for the performance of the ceremonies at or about the time of their performance. By law and usage, a certain relationship grows up between certain pilgrims or worshippers and a particular priest, and when such relationship exists, such pilgrims or worshippers are called *yajmans*, or clients of the priest, whose right to perform the religious ceremonies in question for such *yajmans* becomes exclusive against rival priests, so far that, under the Hindu Law as applied and followed in the Bombay Presidency, if any such *yajmans* accept the religious services of another priest, they must compensate the priest whose *yajmans* they are by paying to him a reasonable fee. GANESH RAMCHANDRA DATE v. SHANKAR RAM CHANDRA, **10 B. 395.**

(116)—*Jotishi vritti—Nature of right—Right if liable to attachment in execution of decree—Civ. Pro. Code, 1882, s 266 (f).—Jotishi vritti* is a right to take certain emoluments as a reward for personal service. Such a right is not liable to be attached under s. 266 (*f*) of the Civ. Pro. Code, 1882. *Semble* :—The most correct view of *vrittis* under the Hindu law would be to regard them as generally *extra commercium*. GOVIND LAKSHMAN JOSHAI v. RAMKRISHNA HARI JOSHAI, **12 B. 366.** [*F.*, 23 B. 131.]

(117)—*Attachment of right of suit.*—A right of suit cannot be attached under the Code of Civil Procedure. ARRATOON CARAPIET v. PANNALALL SEAL, **14 W R. 152.**

(118)—*Right of action not attachable*—A right of action cannot be attached in execution of a decree. MR. E.J. DRURY v. HARADHUM BHUTTACHARJEE, **3 W.R. Mis. 18.**

(119)—*Mere right to sue—Sale—Attachment.*—A mere right to sue is not a subject of attachment and sale in execution of a decree. SYUD MAHOMED HADEE v. SHEO SEVUK DOOBEY, **6 N.W.P. 95.**

Attachment —continued.

—8.—Subjects of attachment—*continued.*

(120)—*Mesne profits, right to sue for—Inalienable in execution—Civ. Pro. Code, s 266.*—The right to sue for mesne profits is a "right to sue for damages" within the meaning of s. 266 (*e*) of the Code, and is incapable of being sold in execution of a decree, so that an execution-purchaser of such a right cannot maintain a suit to enforce the right. SYAM CHAND KOONDOO v. THE LAND MORTGAGE BANK OF INDIA, LIMITED, **9 C. 695=12 C.L R. 440.**

(121)—*What is not attachable in execution of a decree—Directions by Court.*—A judgment-debtor's right to appeal and his right to future maintenance are not attachable in execution of a decree by the decree-holder. It is not for the Courts to prescribe to the decree-holder what course he is to take for the realization of his claim, or what property he is to attach and sell in execution. BIPRO PROTAB SAHEE v. DEO NARAIN ROY. **3 W R. Mis. 16.** [*F.*, 7 W.R. 311, 6 W.R. Mis 64.]

(122)—*Salary of telegraph officer due for past services—Civ. Pro. Code, 1859, s 236.*—The salary of a telegraph officer which is due for past services is a debt which may be attached under s. 236, Act VIII of 1859. HUSSEN BHAMJEE v. MR. W. HICKS, **18 W.R. 124.** [*F.*, 24 W.R. 446.]

(123)—*Salary of peon under Mamlatdar—Entire salary attachable.*—The whole salary of a peon in the service of a Mamlatdar under Government is liable to attachment as it becomes due. TEJRAM JAGRUPOJI v. KUSAJI *bin* GINGJI *et al*, **7 B.H.C. A.C. 110.** [*Expl.*, 21 M. 393.]

(124)—*Civ. Pro. Code. 1882, s. 266 cl. (h)—Percentage received by khot, if liable to attachment in execution.*—A khot is not a "public officer," and the percentage received by him for collecting the assessment on *dhara* lands is not "salary" within the meaning of s. 266, cl. (*h*) of the Civ. Pro. Code, 1882. So, such a percentage is attachable in execution RAVJI MORESHWAR v. SAYAJIRAV GANPATRAV, **13 B. 673.**

(125)—*Hereditary office — Official remuneration — Liability to civil process—Collector—Special protection.*—The official *emoluments* of the officiating hereditary officer is not liable to civil process while in the hands of the Collector or other disbursing officer, but when it goes into the hands of the hereditary officer himself, no special protection is given to it. GANPATLAL v SAMPATRAM, **10 B.H.C. 400.** [*R.*, 12 O.C. 323.]

(126)—*Salary due—Debt—Ss. 236, 237, Act VIII of 1859—Creditor's remedy.*—A judgment-debtor's salary which has become due is a debt within the meaning of Act VIII of 1859, s. 236, which indicates the remedy open to the judgment-creditor. S. 237 has no bearing on such a case. KALU SHAIKH KHANSAMA v. W. H. BEATSON, **24 W.R. 446.**

Attachment—continued.

—8.—Subjects of attachment—*continued.*

(127)—*Civ. Pro. Code, (XIV of 1882) s. 266—Wages of private servant not attachable in advance under.*—The salary or wages of a private servant does not become liable to attachment until it becomes due and a debt exists. There is nothing in s. 266, Civ. Pro Code, to indicate that, under that section, salaries even of public officers or Railway servants can be attached before they become due. Salaries or wages cannot be attached in advance of their becoming due except under the special provision in s. 268, which, however, applies only to the case of the salary of a public officer or a Railway servant and not to the case of the wages of a private servant. AYYAVAYYAR v. VIRASAMI MUDALI, **21 M. 393.** [*R.*, 31 A. 304 =6 A.L.J. 227.]

(128)—*Civ. Pro. Code, s. 266 (h)—Attachment of salary.*—Under s. 266, Civ. Pro. Code, cl. (*h*), a moiety of the salary of a public officer, drawing half-pay on sick-leave, is liable to attachment. BEARD v. EGERTON, **6 M. 179.**

(129)—*Army Act, 1881. s. 151 (3)—Civ. Pro. Code. s 266. Expl. (b)—Debtor subject to Military law—Attachment of moiety of salary under Rs. 20 per mensem.*—As cl. (*b*) of the proviso to s. 266 of the Civ. Pro. Code, provides that nothing in that section affects the Army Act, 1881, the attachment by a Civil Court of half the salary (which does not exceed Rs. 20 a month) of a judgment-debtor subject to Military law, is legal. VIRARAGAVA v. RAMUDU, **9 M. 170.**

(130)—*S. 266, Civ Pro. Code, 1882—Pay of Officer of "Indian Staff Corps"—Public officer—Whether his pay liable to attachment—Repealed s. 151, Army Act, 1881—Officer of regular forces—Pay—Attachment.*—An officer of the Indian Staff Corps is a Public Officer within the meaning of cl. (*h*), s. 266, Civ. Pro. Code, read with the interpretation clause. The pay of an officer of the Indian Staff Corps is liable to attachment. A moiety of the pay of such an Officer, received from the Indian Government, is liable to attachment under Civ. Pro. Code, subject to any unsatisfied decree under the repealed s. 151 of the Army Act, 1881: [*F.*, 25 M. 402.] The pay of an Officer of the regular forces is not liable to attachment. CALCUTTA TRADES ASSOCIATION v. RYLAND, **24 C. 102=1 C.W.N. 138.** [*Not Appr.*, 59 P.R. 1897.]

(131)—*Decree against military officer—Execution in terms of the decree—St. 40. Vic. (Mutiny Act). Cl. 7, s 99*—A decree against a military officer, passed in view of the terms of the Mutiny Act, 1877, cannot be executed otherwise than in accordance with its terms. Where, therefore, a decree directed that the judgment-creditor should be paid by the stoppage of half the military officer's pay for the current or future months, execution could not be taken by attachment of his property. MERCER v. NARPOT RAI, **1 A. 730.**

Attachment—continued.

—8.—Subjects of attachment—*continued.*

(132)—*Attachment of military officer's pay in hands of Pay Master—Provision for stoppage.*—The pay of a military officer cannot be attached in the hands of the Pay Master in the execution of a decree, where the decree makes no provision for its stoppage. BANSI LAL v. COLONEL MERCER, **7 N.W.P. 331.**

(133)—*Attachment of moiety of pay of officer of the Indian Staff Corps—Army Act (1881), ss. 136. 151—Army (Annual) Act, 1895, s. 4—Civ. Pro. Code ss. 2, 266.*—By s. 136 of the Army Act as amended by s. 4 of the Army (Annual) Act of 1895, Civil Courts have got power, under s, 266, proviso (*i*), Civ. Pro. Code, to attach one moiety of the salary of an officer in the Indian Staff Corps. WATSON v. LLOYD, **25 M. 402.** (24 C. 102, *F.*)

(134)—*Execution of decree—Soldier's pay, liability for attachment of—Warrant officers—Assistant Surgeons in the Indian Subordinate Medical Department—Army Act, s 144.*—The respondents, judgment-debtors, were Assistant Surgeons in the Indian Subordinate Medical Department. The question was whether the whole or any portion of their pay was liable to attachment in execution of the decree. *Held*, that the respondents being warrant-officers were "soldiers" as defined by the Army Act, and therefore their pay was exempt altogether from attachment under the proviso to s. 144 of the Act. MURRAY & CO., LD. v PRINS. E. G.A. **14 O.C. 82.** (25 M. 402, 24 C. 102. *R.*)

(135)—*Native grass-cutter—Attachment of pay, legality of.*—Neither the Army Discipline and Regulation Act of 1879 nor the Indian Articles of War, 1869, prohibits the attachment of the pay of a native grass-cutter, attached to the Artillery of H. M's British Army while cantoned in British India and not on active service. THALLI v. GANGA, **41 P.R. 1882.**

(136)—*Civ. Pro. Code (Act XIV of 1882), ss. 2 and 266—Army Act, 1881, st. 44 and 45, Vic. Ch. LVIII, ss 136 and 151 (3)—Army (Annual) Act. 1895, st. 58. Vic. Ch. VII, s. 4—Attachment of pay of Military Officer.*—A Captain in the Indian Staff Corps is a public officer within the meaning of s. 2, Civ. Pro. Code, and a moiety of his salary is attachable under s. 266 (*i*). S. 136 of the Army Act, 1881, as amended by Army Act 1895, is not in conflict with the provisions of s. 266, Civ. Pro. Code. CAPTAIN T E. MADDAM v. THE CALCUTTA TRADES ASSOCIATION, **143 P.L R. 1902.**

(137)—*Execution against civil pay of non-commissioned officer—Legality.*—Execution of a decree against the civil pay of a non-commissioned officer employed in the Civil Department, and residing beyond Military Cantonments, is in conformity with law. COHEN v. MCCARTHY **14 W.R. 231.**

Attachment—continued.

——8.—Subjects of attachment—*continued.*

(138)—*Salaries of Railway employees—Attachment—Jurisdiction of Small Cause Courts—Act VIII of 1859, ss. 236, 239, 240—Attachment of debts—Procedure* —Salaries or other debts actually due from a Railway Company to any of its servants can be attached in satisfaction of Civil Court decrees under s. 236, Act VIII of 1859. A Small Cause Court need not make the High Court or any other Court the medium of attachment. It is a mistake for a Small Cause Court to direct the Chief Paymaster of a Railway Company to attach the pay due to the judgment-debtor (a servant of the Company). The order of attachment of pay due to the judgment-debtor, the servant of a Railway Company, must be made by the Small Cause Court and a copy served upon the debtor. Debts are to be attached by written order made by the attaching Court, prohibiting the creditor from receiving the debts, and the deotor from making payment to any other person, until the further order of the Court. Such written order is to be hung up in some conspicuous part of the Court-house and a copy is to be addressed, directed and sent registered by post to the Agent of the Railway Company at the Head Office of the Company, notwithstanding the Head Office is out of jurisdiction of the Small Cause Court. *In the matter of* J. HOLLICK, **2 B.L.R. A.C. 108=10 W.R. 447.** [*Diss.*, 6 A. 243, F.B.; *Expl.*, 30 C. 713=7 C.W.N. 821.]

(139)—*Salary of Railway officer.*—The salary of a railway servant who resides within jurisdiction, but in the hands of a disbursing officer who holds his office beyond jurisdiction is not attachable. SAYADKHAN v. DAVIES, **5 Bom. L.R. 803=28 B. 198.**

(140)—*Salary of officer of Small Cause Court, Calcutta—Execution of decree of High Court.*—The pay of an officer of the Small Cause Court will be set aside by an order of the High Court, in satisfaction of the judgment obtained in that Court. KOOMKURRUN v. MICHAEL, **Bourke O.C. 259.**

(141)—*Official salary, attachment of.*—Before the salary of an office is in deposit in the office, no prohibitory order can be issued for its attachment, HURDEO DASS v. CLIFTON, **113 P.R. 1868.**

(142)—*Execution of decree—Attachment of salary—Small Cause Court—Civ. Pro Code, ss. 223, 268.*—A Small Cause Court must follow the procedure prescribed in s. 223, Civ. Pro. Code, in all cases where execution is sought against persons or property outside its local jurisdiction. It cannot, therefore, attach, under s. 269, the salary of a person which is disbursed outside its local jurisdiction. PARBATI CHARAN v. PANCHANAND, **6 A. 243, F.B.** (3 C.L.R. 30, *F.*) [*F.*, 30 C. 713; *R.*, 11 C.P.L.R. 148, 28 B. 198.]

(143)—*Execution of decree—Attachment—Money contributed to a Provident Fund—Burden of pooof.*—Certain creditors of a deceased employee of a Railway Company sued and

Attachment—continued.

——8.—Subjects of attachment—*continued.*

obtained a decree against his widow and children for a debt owing by the deceased. In execution of that decree, they sought to attach certain moneys which, under certain rules framed by the Company, had been contributed to the Provident Fund of the Railway Company by the deceased debtor. *Held*, that the attaching creditors were bound to show that the property sought to be attached was property which was attachable under the decree which they had obtained, and that, in order to do so, it was necessary for them to produce the rules under which the deceased had made the contributions to the Fund which it was sought to attach. BINDRABAN v. THE INDIAN MIDLAND RAILWAY COMPANY, **A W.N. 1897, 88.**

(144)—*Compulsory deposits—Provident Funds Act (IX of 1897).*—'Compulsory deposit' under the Provident Funds Act, 1897, by a railway servant, after he has retired from service, is liable to attachment. MILLER v. B.B. & C.I. RY., **5 Bom. L.R. 454.**

(145)—*Compulsory deposits.* — Compulsory deposits under the Provident Funds Act, 1897, is not liable to attachment. VEERCHAND v. B.B. & C.I. RAILWAY, **6 Bom. L.R. 921=29 B. 259.**

(146)—*Property in trust with managers—No execution against such property.*—Property placed in trust with parties as managers, but not beneficial owners, cannot be taken in execution of a decree against them. MOHUPUT SINGH v. SHAIKH ETBAREE CHOWDHRY, **19 W.R. 226.**

(147)—*S. 622, Civ. Pro Code, 1882—When can attachment of trust property be made.*—In execution of a personal decree against the judgment-debtor, there can be no attachment of trust property. If, under such circumstances, trust property was attached, the attachment would be an irregularity of procedure which would justify the interference of the High Court under s. 622, Civ. Pro. Code. The mere fact that a trustee in carrying on the business of a trust had rendered himself personally responsible for the business debts would not of itself give creditors a right to proceed against the trust-property. Before the judgment-creditors could obtain a decree which they could execute, against the trust-property, they would have to show (1) that the debt was incurred in the regular course of the trust business, (2) that the trustee had a right to be indemnified from the trust property to the extent of the claim, and (3) that the creditors were entitled to stand in the shoes of the trustee in respect of the indemnity and to be recouped out of the trust estate. [*In re Johnson Shearman* v. *Robinson*, (1880), L.R. 15 Ch. D. 548; *Strick Land* v. *Symons*, (1884) L.R. 26 Ch. D. 245, *R.*; *Raybould* v. *Turner*, (1900) 1 Ch. 199, *D.*] *In the matter of* SHARD, **28 C. 574.** [*R.*, 31 C. 1084, 9 C.W.N. 9, 35 C. 320=12 C.W.N. 256 =3 M.L.T. 156.]

Attachment—continued.

—8.—Subjects of attachment—*continued.*

(148)—*Property held by judgment-debtor in trust for specific purpose—Attachment of surplus after fulfilment of trust.*—Where a decree is made against the trustee personally, the *corpus* of the trust estate cannot be sold to satisfy the judgment-creditor's claim, nor can any specific portion of the *corpus* of the estate be taken out of the trustee's hands, because there was or might be a margin of profits coming to him personally after performing the trust. BISHEN CHAND BASAWAT v. NADIR HOSSEIN, **15 C. 329=15 I A. 1, P.C.** [*R.*, 6 C.W.N. 663.]

(149)—Shebait—*Hindu idol—Right of worship—Sale.*—Rights of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of a *shebait*. KALI CHARAN GIR GOSSAIN v. BANGSHI MOHAN DAS BABOO, **6 B.L.R. 727=15 W.R. 339.** (7 W.R. 266, *R.*) [*R.*, 5 B. 393, 10 B. 395, 1, C W.N. 493, 23 B. 131, 20 W.R. 280=12 B.L.R. 65; *D.*, 21 W.R. 365, 6 B. 298.]

(150)—*Attachment under s. 236, Act VIII of 1859—Money payable to sirdars as wages of coolies.*—Money payable to sirdars as the wages of coolies over whom they are sirdars does not constitute a debt to the sirdars but debts to the coolies themselves, even where a sirdar is entitled by custom or contract to have the wages of coolies paid to him, in order that he may deduct the amounts due to him by the coolies for food supplied. Money payable as above is, therefore, not attachable under s. 236, Act VIII of 1859, in execution of a decree against the sirdar. SAJIMAN v. GOPAL, **1 B L.R S.N. 15=10 W.R. 149.**

(151)—*Civ. Pro. Code, 1877, s 266, cl. (i)—Labourer-wages—Attachment in execution.*—Plaintiff obtained a money-decree against the defendants, who were spinners who had entered into an agreement with a certain company to receive payment on the number of pounds of cotton spun by them calculated at a certain rate for every 100 pounds. He attached in execution of the decree, the moneys due to the defendants under the said agreement. The defendants contended that the said moneys were their 'wages' and as such were exempt from attachment under cl. (*j*), s. 266, Civ. Pro. Code, 1877. *Held* that the defendants were 'labourers' within the meaning of the section, as they earned their daily bread by personal, manual labour and in an occupation which required little or no art, skill, or previous education; that their remuneration was none the less 'wages,' because the amount was made to depend upon the number of pounds of cotton spun; and that therefore, the moneys were exempt from attachment. JECHAND KHUSAL v. ABA AND BAIKA, **5 B. 132.**

(152)—*Civ. Pro. Code (Act XIV of 1882), s.266, Mangalyasutra of Hindu married woman, not attachable under*—Having regard to the universal practice amongst Hindus for a married woman to wear the neck ornament, called *Mangalyasutra*, during the life-time of her husband, without ever removing it, such ornament must be regarded as part of her necessary wearing apparel under s. 266 of the Civ. Pro. Code, so as to be exempted, under the section, from attachment in execution. APPANA v. TANGAMMA, **9 B. 106.**

(153)—*Civ. Pro. Code, 1859, ss. 205 and 273—Wearing apparel—Attachment.*—Necessary wearing apparel is not liable to attachment under s. 205 of the Code of Civil Procedure. GANGARAM VEIJI v. PARBHU DAYARAM, **9 B.H.C. 272.**

(154)—*Execution against husband—Ornaments forming wife's stridhan not to be taken under execution—Personal right of husband to take same.*—Ornaments on the person of a Hindu wife, if forming part of her *stridhan*, cannot be taken under an execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him. TUKARAM *bin* RAMKRISHNA v. GUNAJI *bin* MHALOJI, **8 B H.C. A.C. 129.**

(155)—*Property beyond jurisdiction.*—"Property situated outside the jurisdiction of the Court" is not liable to attachment. RAJA v. JANKIBAI, **5 Bom. L.R. 570.**

—Provident Fund established by Calcutta Corporation to which Provident Funds Acts applies is not liable to—*See* ACT IX OF 1897, **12 C. W.N. 633=35 C. 641.**

—Superstructure of house in Bhagdari village, not subject to attachment—*See* BOM. ACT V OF 1862, **21 B. 588, F.B.**

—Attachment of moveable property—Doors of a house—*See* MAD. ACT IV OF 1884, s. 103, **13 M. 518.**

—Crops growing on inam service lands not to be attached in execution—*See* MAD. ACT III OF 1895, s. 5, **23 M. 492.**

—Allowance of ward granted by Court of Wards, attachment of, in execution of decree against him—Code of Civil Procedure, s. 266—*See* U.P. ACT III OF 1899, s. 22, **7 O.C. 174.**

See APPELLATE COURT—MISCELLANEOUS. **15 A. 380=A.W.N. 1893, 150.**

See ASSIGNMENT IN TRUST FOR CREDITORS, **1 B.H.C. 233.**

—by inferior Court of property already attached by Superior Court—*See* CIV. PRO. CODE, 1909, ss. 73, 63, O. XXI, rr. 58, 62, **L.B.R. 1893—1900, 161.**

See GHATWALI TENURE, **9 C. 388.**

See HEREDITARY OFFICE, **10 B.H.C. 299.**

—Hindu Law—Mitakshara—Grandson's interest in ancestral property—Right to enforce partition—Saleability of interest—*See* HINDU LAW—PARTITION, **5 A. 430, F.B.**

—Lease prohibiting alienation by sale or gift—Lessee "having saleable interest" under s. 266, Civ. Pro. Code—*See* LEASE—CONSTRUCTION OF LEASE, **20 C. 273.**

Attachment—continued.

—8.—**Subjects of attachment**—*concluded.*

See MORTGAGE — SALE OF MORTGAGED PROPERTY, 18 C. 164, P.C. = 17 I.A. 201.

See TITLE, L.B.R. 1893—1900, 234.

—9.—**Miscellaneous.**

(1)—*Effect on transfer of ownership.*—An attachment effects no transfer of ownership, it is rather a prohibition of transfer, since it is a process preparatory to sale by which intermediate transfers or charges are prevented and the title to the property kept in *statu quo.* SHIVLAL v. MULAJI, **1 Bom. L.R. 154.**

(2)—*Effect on attaching creditor.*—The attachment of any property does not *per se* create any interest in the attaching creditor but merely gives him the right to take further proceedings which might enable him to recover the amount of his judgment-claim. JITMAL v. RAMCHAND, **7 Bom. L.R. 488 = 29 B. 405.**

(3)—*Objections to — Inquiry into.*—Where objection is taken by mortgagee to attachment by decree-holder, the Court should inquire into the nature of those objections. CHHAGANLAL v. MOTI, **2 Bom. L.R. 476.**

(4)—*Objection to attachment — Procedure.*—The proper procedure in case of objection to an attachment was held in this case to be first to make a summary enquiry, and, on a *prima facie* objection being established to refer the objector to a regular suit. JUGOOL KISHORE v. DWARKA DAS, **44 P.R. 1866.**

(5)—*Execution of decree — Attachment — Objections to attachment dismissed for default — Power of Court to restore such application to the file — Remedy of objector — Procedure — Civ. Pro. Code, 1882, ss. 103, 278, 623, 647 — Revision in civil cases — Chief Court's powers of revision — Practice — Punjab Courts Act, 1884, s. 70.*—An objector, whose objections under s. 278, Civ. Pro. Code, 1882, to an attachment of certain property in execution of a decree have, owing to his absence on the date fixed for hearing, been dismissed in default, cannot avail himself of the remedy provided by s. 103 of the Civ. Pro. Code, because the procedure prescribed for original suits by the Code does not apply to execution proceedings under Ch. XIX. On the failure of a person making an application within Ch. XIX to prosecute it, it is incumbent on to dispose of it by dismissing it in default; in such a case, the objector can only make a fresh application to obtain his relief, if he is not otherwise barred, but, when such an application has been disposed of on the merits, the Court cannot entertain another of a similar nature or alter or set aside its order except on review under s. 623, the provisions of which apply to such proceedings. (17 A. 106, P.C. 15 A. 84, F.B., *F.*). *Held*, also, that it is the general policy of the law and the usual practice of the Superior Courts that the latter should interfere on the revision side in the interests of justice, only in those cases where there is no other

Attachment—continued.

—9.—**Miscellaneous**—*continued.*

remedy or the remedy is cumbrous or expensive and to refer the applicant to it would be tantamount to denying him his relief. COATES v. KASHI RAM, **76 P.R. 1903.** (12 C.L.R. 148, 6 A. 233, *R.*) [*R.*, 128 P.R. 1906, 70 P.R. 1904, 29 P.R. 1908 = 71 P.W.R. 1907 = 61 P. L.R. 1907; *D.*, 97 P.R. 1907, 144 P.R. 1908, 28 P.R. 1910.]

(6)—*Execution of decree — Attachment — Mortgage of attached property — Civ Pro. Code, 1882, s. 276 — Objection to validity of attachment — Burden of proof.*—An objection was made to the sale of certain property in execution of a decree to the effect that the property sought to be sold has been mortgaged to the objector and he had also purchased from the mortgagor his remaining interest in the property. The decree-holder replied that the objector's mortgage has been made while the property was under attachment, and was, therefore, void as against him by reason of s. 276 of the Code of Civil Procedure. The Court executing the decree raised for the objector the question whether the attachment relied upon by the decree-holder had been properly effected. *Held* that it was for the objector to establish that what was *prima facie* a legal attachment was in fact not so. An order under s. 274 of the Code having been drawn up, it was to be presumed, until the contrary was shown, that the requirements of the law had been complied with in effecting the attachment. PIRTHI NATH v. SRI KISHAN LAL, **A.W.N. 1899, 127.**

(7)—*Attachment in execution, necessity of the existence of the decree at the time of.*—At the time when an attachment was made in execution of an *ex parte* decree, and even when the order for attachment was made, the said decree was not in existence, the same having been set aside prior to the attachment. *Held*, neither the attachment nor the order for it could have any force or validity; nor could the fact, that the decree had been transferred for execution to another Court, give the said attachment any additional validity. The attachment was null and void, not having been based on any decree in existence at the time of such attachment. Also, the fact that a renewed decree was subsequently passed in terms of the decree which was set aside, could not render the attachment valid, the renewal not having the effect of restoring original decree. CHETTIATILL MUHAMED v. KUNHI KORU, **29 M. 175.**

(8)—*Attachment in execution — Subsequent attachment of same property by same decree-holder as precautionary step — Subsisting character of prior attachment.*—Where a decree-holder who had attached the judgment-debtor's property, again applied for attachment of the same property as a precautionary step, expressly stating in the petition that the former attachment was in law subsisting, but that, if the Court thought it necessary, a re-attachment might issue, the subsequent attachment so

Attachment—continued.

——9.—Miscellaneous—*continued*.

effected did not put an end to the prior attachment. MAHOMADSHA KHAN SAHIB v. SRINIVASULU, **13 M L J 221.**

(9)—*Execution of decree—Attachment of property—Subsequent transfer of property to jurisdiction of another Court—Certificate of non-satisfaction by attaching Court—Effect on subsisting attachment.*—An attachment validly made creates a real charge in favour of the attaching creditor. Such an attachment cannot cease merely because the land attached is transferred from the jurisdiction of the Court which attached it to that of another Court or because the Court to which the decree was sent for execution certifies that it is unable to complete the execution of the decree. VENKATAPPIAH v. JAGANNADHA RAO, **12 M.L.J. 24.**

(10)—*Attachment in execution — Release of attachment on claim petition—Appeal against order—Compromise between decree-holder and claimant—Mortgage by claimant subsequent to release—Right of mortgagee.*—In execution of a decree, certain property was attached. The widow of the judgment-debtor put in a claim to the property, alleging that it belonged to her in her own right, having been purchased by her from her husband in part satisfaction of her dower. The claim was allowed and the property ordered to be released from attachment. The decree-holder thereupon appealed to the High Court against this judgment and that Court framed an issue and remanded the case for trial. It did not set aside the order of the lower Court. Whether that was to be done depended upon the finding upon the issue framed. The issue was never tried; the decree-holder and the claimant came to a compromise, whereby the decree-holder was to take only a certain amount out of the total amount due to him under the decree and the agreement was to be taken as a part of the original decree, capable of being executed. Thereupon, the Court struck the case off the list of pending suits. Subsequently, the decree-holder applied for sale of the property. The sale proclamation recited that the said claimant had mortgaged the property and the mortgagee had obtained a decree upon the mortgage. In the sale that followed, the decree-holder purchased the property and now sued for possession from the above said mortgagee-decree-holder, who had purchased and taken delivery in execution of his mortgage decree. It was framed by the Court and the High Court that the sale to the widow was *benami* and not in good faith for consideration. It was also found that she had been registered in the Collectorate as the owner of the property and all the usual acts of ownership had been exercised in her name. She was for all purposes the apparent owner. *Held* that the order striking the case off the list of pending suits could not have the effect of reversing the order releasing the property from attachment. As the case was before the High Court, the District Judge had no power to reverse his order. Even if the order was intended to give effect to the compromise, the compromise did not operate to revive or restore the attachment and make it effective upon the mortgage by the widow. The liability of the widow under the compromise was different from her liability as the representative of her deceased husband. *Held* also that the plaintiff who had purchased only the right to redeem the property could not sue to recover possession of it freed from the mortgage. MIR MAHOMED HOSEIN v. KISHORI MOHAN ROY, **5 M.L.J. 101, P.C.**

(11)—*Undivided share in joint Hindu family—Order of attachment of such share, effect of, on survivorship—Attaching creditor and arrangements made behind his back.*—An undivided share in a joint Hindu family can be attached in execution, and, even before sale, an attachment and order for sale suffice to create such a charge as will defeat the right of survivorship. An attaching creditor, who has taken actual possession of a share, cannot be deprived of any part of it by an arrangement made by his debtor behind his back and subsequent to the acquisition of his rights. *Per Ranade, J.*—An attachment placed by a judgment-creditor, before a suit for partition is instituted, has the effect of a sort of judicial hypothecation which cannot be disturbed by the results of any partition suit to which such judgment-creditor is not a party. PARIKH GIRDARLAL v. THAKOOR FATEHSING, **2 Bom. L.R. 32.**

(12)—*Wrongful attachment—Property stolen during attachment—Liability of the decree-holder—Cause of action—Damages*—Certain crops were wrongfully attached at the instance of a decree-holder. During the subsistence of the attachment, the crops were stolen: *Held*, that the decree-holder, who had obtained the wrongful attachment, was responsible for the value of the crops: *Held*, further, that a complete cause of action for the recovery of the attached property accrued in favour of the plaintiff at the date of the wrongful attachment, and it was not impaired by any subsequent occurrence for which the plaintiff was not responsible. BISHAMBAR DAS v. GODDAR, **6 Ind. Cas. 789.** (3 B. 74, *F.*; 17 C. 436, 17 I.A. 17, *R.*)

(13)—*Attachment—Liability of creditor—Sale—Damages—English and Indian Law not similar, regarding procedure on attachment.*—In England, a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. (Walker *v.* Olding). There, the execution of decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India, under s. 483, Civ. Pro. Code, 1882, warrants for attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the

Attachment—continued.

——9.—Miscellaneous—*continued.*

property which he desires to attach and its estimated value. So, the attachment, whether legal or illegal, is the direct attachment of the creditor, for which he becomes immediately responsible in law. If the goods attached do not belong to the debtor, the litigation and delay, and consequent depreciation of the goods are the natural and necessary consequences of the unlawful act of the creditor. KISSORI MOHUN ROY v. HARSUKH DAS, **17 C. 436, P.C. =17 I A. 17=5 Sar. 472.** [*R.*, 7 C.P.L.R. 77.]

(14)—*Act VI (B C.), 1862, s. 16—Attachment.*—Where plaintiff obtains a bond for a sum of money from K who pledges as security certain fees in deposit in the Collectorate, and defendant No. 2, in execution of a decree against K, attaches those fees, the attachment is not final, but merely to prevent the money being taken out of Court. LALA TILAKDHARI LAL v JAMES FURLONG, **2 B.L.R. A.C. 230=11 W.R 149.** [*F.*, 13 C. 262.]

(15)—*S. 88, Act VIII of 1859—Attachment made prior to Act VIII of 1859.*—*Held* that the provisions of s. 88 of Act VIII of 1859 were not applicable to an attachment made prior to that Act coming into operation. KISHEN CHUNDER SINGH ROY v. M.R.G.M. GASPER, **W R. 1864, 224.**

(16)—*Notice of attachment or its withdrawal.*—Attachment or withdrawal of attachment in execution was ordered to be notified to District Collector. **25 W.R H.C Rules, Cir. No 3, dated 8th February, 1876, p. 4.**

(17)—*Execution-proceedings—Property attached by one creditor—Another creditor's claim under s. 295, Civ. Pro Code, 1882—Latter creditor obtaining order for rateable share of assets in sale proceeds of property attached by former—Withdrawal of attachment, private alienation after—Right of assignee—Transfer for good and valuable consideration in favour of one creditor—Obvious effect of such transfer to delay claim of less active creditor—S. 274, Civ. Pro. Code.*—On the application by a judgment-creditor for execution of his decree and for attachment of the judgment-debtor's property, (the property which was immoveable) was duly attached under s. 274, Civ. Pro. Code; subsequent to this, another decree-holder holding a decree against the same judgment-debtor, filed an application for execution and in this application he set out the facts that the former judgment-creditor had already applied for execution of his decree and had succeeded in having the property attached. He, therefore, prayed that the said property might be held to be attached also in respect of his application of execution, and that he might be permitted to share rateably in the proceeds of the sale of the property (s. 295 of the Code). *Held* that, when the decree, in execution of which the property was attached was satisfied and there had been a withdrawal of the attachment, the latter decree-holder, obtaining an order in accordance with his prayer for a rateable share in the

Attachment—continued.

——9.—Miscellaneous—*continued.*

assets in the proceeds of sale of property attached by the former creditor had no right to claim the benefit of the attachment. Where after the removal of such attachment, such property was assigned to a certain person, *held*, that the assignee had a good title as against the latter decree-holder. An alienation obtained by one creditor for a genuine consideration which is not inadequate, is not necessarily void, because its obvious effect will be to defeat or delay the claim of a less vigilant creditor. LAHORI MAL v. GANGARAM, **81 P.R. 1908=148 P.W.R. 1908.** (7 A. 702, 15 C. 771, 25 A. 431, 23 M. 380, 6 P.R. 1901, 21 P.R. 1875, 25 B. 202, *R.*)

(18)—*Attachment and sale of mortgage bond—Lien of purchaser on mortgaged property after attachment under s 268 of the Civ Pro. Code.*—A debt secured by a mortgage, by a lien upon immoveable property, more especially when the mortgagee is not in possession, cannot be regarded as immoveable property within the meaning of s. 274, so that such a debt, sold in execution after an attachment made under s. 268, would carry with it the lien. DEBENDRA KUMAR MANDAL v. RUP LAL DASS, **12 C. 546.** [*F.*, 20 C. 805, 19 B. 121, 18 M. 437; *Cons.*, 14 C.P.L R. 5, 26 B. 305; *R.*, 18 P.R. 1909, 29 C. 1, F.B.]

(19)—*S. 274, Civ. Pro. Code, 1882—Attachment—Sale in execution of decree—Purchaser of a mortgage bond rights of.*—Non-attachment under s. 274, Civ. Pro. Code, by a purchaser of a mortgage bond (whereby certain immoveable property is given as collateral security for an advance) at a sale in execution of a decree, will not affect his right to have the collateral security enforced by the sale of the properties hypothecated. KASINATH DAS v. SADASIV PATNAIK, **20 C. 805.** (12 C. 546, *F.*) [*F.*, 18 M. 437; *R.*, 18 P.R. 1909.]

(20)—*Attachment—Release—High Court without setting aside release order framing issue and remanding the case—Compromise—Issue not tried—Mortgage* bona fide *of property released from attachment—Recognition—Title of mortgagees.*—Where an attachment of a lower Court is released by a superior Court, and the High Court on appeal, without setting aside the release order, frames an issue and remands the case for a finding on it, which in consequence of a compromise is never tried and the case is simply ordered to be struck off the file, the compromise may not operate to revive or restore the attachment, so as to make it effective on any alienation prohibited by it. Where, under such circumstances, a mortgage of the property released from attachment is subsequently taken *bona fide* for value and without any notice of the doubtfulness of the mortgagor's title, and where the conduct of those who question the mortgage both before and after it, shows the mortgage to have been recognized by them, the mortgagees have a good title as *bona fide* mortgagees and auction-purchasers in execution

Attachment—continued.

——9.—Miscellaneous—*continued.*

of their decree. MAHOMED MOZUFFUR HOSSEIN v. KISHORE MOHUN ROY, 22 C. 909, P.C. = 22 I.A. 129.

(21)—*Attachment—Power of attaching Court to set aside attachment—Legality of order declaring right to property attached—Interference by High Court under s. 35 of Act XXIII of 1861.*—During the pendency of a suit, certain lands were attached. Though the suit was dismissed, the defendant omitted to get the attachment set aside. On his death, his widow sold the lands to another. The lands remained in the undisturbed possession of the purchaser for thirty years. The legal heir of the said defendant thereupon applied to the Court to set aside the attachment and get him back the lands. The Court not only set aside the attachment but also directed the petitioner to be put in possession of the lands on the ground that the widow had no right to sell them. *Held* that as no appeal lay against the order, the High Court could interfere under s. 35 of Act XXIII of 1861. *Held* also that the Court which made the attachment was competent to remove it. *Held*, further, that the Court had no right to direct the transfer of possession of the lands to the petitioner. The Court could not have gone on to decide as to the widow's right to sell, but must have confined itself to setting aside the attachment. *Ex parte* CHELLAPPERUMAL PILLAI, 1 M.H.C. 135.

(22)—*Attachment for arrears of rent—Liability of person collecting profits.*—When an estate is attached for arrears of rent, the party who collects the profits is liable for what remains after payment of rents. NOBOKISSORE ROY v. NILMOONEE SIRCAR, 2 W.R. 245.

(23)—*Attachment for arrears of rent—Payment to prevent sale.*—Where the purchaser of a jote jumma, to save the tenure from sale under a decree against defendant obtained by the patnidar for arrears of rent due before the purchase, pays the amount of the decree, *held* that the payment was a voluntary one made without legal necessity, and was not recoverable by sale against the defendant. RAM BAKSH CHATLANGI v. HRIDOY MANI DEBI, 8 B.L.R. 10, Note = 10 W.R. 446. [*R.*, 15 W.R. 341]

(24)—*Notice of attachment for arrears of revenue.*—All orders for attachment of estates for arrears of revenue should be notified to the Collector in whose district the estate lies. **Civ. Cir. No. 2 dated 10th January 1871, 15 W.R. Civ. Cir. 1.**

(25)—*Attachment of holding before judgment—Surrender of holding during attachment—Surrender invalid if holding transferable—Civ. Pro. Code (Act V of 1908), s. 64.*—In a suit for money, a holding of the defendant was attached before judgment. During the continuance of the attachment, the defendant surrendered the holding, and the landlord settled it with another person. The plaintiff obtained

Attachment—continued.

——9.—Miscellaneous—*continued.*

a decree and in execution purchased the holding. *Held*, that, if the holding was transferable, a surrender of it after attachment could not, in view of the provisions of s. 64 of the Code of 1908, affect the position of the decree-holder-purchaser or create in the landlord and his new tenant any preferential right. INDRA NARAIN v. NUT BEHARY JANA, 8 Ind. Cas. 76.

(26)—*Attachment—Claim—Disallowance—Suit for declaration—Cause of action.*—In execution of a decree, a certain house was attached as the property of the judgment-debtor. The respondent preferred a claim and it was disallowed. Thereupon he paid the amount of the decree into Court on behalf of the judgment-debtor and the house was released from attachment. The respondent then instituted the present suit for a declaration that the house belonged to him, and to have the order disallowing his objection to its attachment set aside. The defendant (the decree-holder) contended that the suit was not maintainable, as the house having been released from attachment, there was no cause of action. *Held* that the suit was not maintainable against the decree-holder whose proceedings in the execution department, which had never had any operation in respect of the house in question, did not furnish the respondent with a cause of action. KALLIAN v. MAKBUL HUSAIN, A.W.N. 1883, 14.

(27)—*Execution of decree—Attachment of decree held by judgment-debtor against third party—Death of holder of decree attached after attachment—Civ. Pro. Code, s. 273.*—In execution of his decree, a decree-holder attached a decree held by his judgment-debtor against a third party, which decree he caused to be transferred from the Court which passed it, the High Court of Calcutta, to the Court of the Subordinate Judge of Benares, which was executing his own decree. Subsequent to such transfer, the judgment-debtor, holder of the attached decree, died. *Held* that, in executing his judgment-debtor's decree, the decree-holder was under no obligation to bring upon the record the representatives of such judgment-debtor. MAHARAJ BAHADUR SINGH v. JAWAHIR LAL, A.W.N. 1900, 99. (12 A. 440, *R.*)

(28)—*Attachment of immoveable property in execution of decree—Sale—Nothing realised in the sale—Question whether attachment is in force or not—Question of law or fact—Ajmere Court's Regulation I of 1887, ss. 21, 17.*—Where, under s. 21 of the Ajmere Court's Regulation I of 1877, a reference was made to the High Court in the following terms, *viz.*—"Whether an attachment ceases when nothing can be realised by a sale, or remains in force till the property is formally released by the Court which caused the attachment to take effect,"—the High Court in reply to the reference, observed that the question referred was one not properly coming within the scope of

Attachment—continued.

——9.—Miscellaneous—*continued.*

s. 17 of the Regulation, not being a question of law or usage having the force of law, but a question of fact to be decided by a consideration of the circumstances of the case. SHAM LAL v. HAMID, **A.W.N. 1885, 57.**

(29)—*Execution of decree—Attachment of property under decree of Small Cause Court—Subsequent attachment under decree of High Court—Claim to attached property by what Court decided—Jurisdiction—Civ. Pro. Code, 1882, s. 272(=O 21, r. 52, New Code)*—In execution of a decree obtained in the High Court, the plaintiffs, on the 2nd March, 1895, attached certain goods as belonging to the defendants. This property had been already attached on the 22nd February, 1895, in execution of a decree obtained by one R against the defendant in the Court of Small Causes. The attachment of the plaintiffs on the 2nd March, 1895, was, therefore, effected by a notice under s. 272, Civ. Pro. Code, addressed by the Prothonotary of the High Court to the Registrar of the Small Cause Court. The claimant was the landlord of the house in which the attached property was lying, and the defendants were his tenants. He had, on the 28th February, 1895, lodged in the Court of Small Causes a claim to the said goods as mortgagee in possession, and on the 25th March, 1895, a consent order was passed by the Chief Judge of that Court directing that R's attachment should stand subject to the claimant's claim. On the 22nd April, 1895, the claimant applied to the Chief Judge of the Small Cause Court to issue a notice to the plaintiffs under s. 272, Civ. Pro. Code, to attend in order to determine the question of priority of claim to the said property as between the said claimant and the plaintiffs, but the Chief Judge declined to grant the application, being of opinion that he could not interfere in a High Court suit. The claimant then field his claim in the High Court, and took out this summons to remove the plaintiff's attachment. *Held* that, under s. 272, Civ. Pro. Code, the Small Cause Court was the only Court to decide the question of priority between the claimant and the plaintiffs. JEYNARAYAN MEGHRAJ v. ISMAIL KURIMALI, **19 B. 710.**

(30)—*Act VIII of 1859, s. 243—Attachment—Ground of rejecting application.*—*A mokuraridar* having failed to make due payment of her rent to the zamindar, the *dar mokuraridar* paid the rent and obtained a decree against her for the amount. In satisfaction, he attached the very property of which he was her lessee. Upon this, the *mokuraridar* petitioned the Judge, under s. 243, Act VIII of 1859 offering to place this and other property under the management of the Court, so that after the payment of a small yearly sum for her maintenance the profits should be carried to account in payment of the sum due. The Judge refused to make such an order. *Held* that the circumstance of her having other property of inferior value such as could be more conveniently dealt with for the purpose of saving the property under

Attachment—continued.

— 9.—Miscellaneous—*continued.*

attachment, was a ground, not for rejecting but for complying with the judgment-debtor's petition. To save a particular property from sale, a judgment-debtor must show the value and condition of other properties in her possession, and the Judge must consider how and by what arrangement such a disposal of different portions of such property may be made, so as to avoid the sale of the property already attached. DEBKUMARI BIBI v. RAM LAL MOOKERJEE, **3 B.L.R. App. 107=12 W.R. 66** (1 B.L.R.F.B. 7, *Diss.*)

(31)—*Attachment before judgment—Execution of decree—Sale by Munsiff under Small Cause Court decree—Attachment by Subordinate Judge pending sale, a nullity—Jurisdiction—Code of Civil Procedure (Act XIV of 1882), ss. 285, 490.*—Where property is placed under attachment before judgment, it is not necessary to re-attach it after the passing of the decree. Where property had been attached before judgment by the Subordinate Judge, the decree being passed afterwards and the property was sold in execution of a Small Cause Court decree by the Munsiff to whom that decree had been transferred, *held*, that a re-attachment by the Subordinate Judge being unnecessary, the Munsiff had no jurisdiction to sell the property pending attachment by a higher Court, and the sale was a nullity. DURPATI BIBI v. RAMRACH PAL, **6 A.L.J. 703=3 Ind. Cas. 31 =31 A. 527.**

(32)—*Attaching creditor—Right to sue for a declaration that another attaching creditor has no right to attach—Attachment, effect of.*—The plaintiff attached the property in dispute in execution of a simple money-decree. Another judgment-creditor of the same judgment-debtor attached the same property. The plaintiff brought a suit for a declaration that the property was not saleable in execution of the decree of the second judgment-debtor. It was found that the decree was not tainted by fraud. *Held*, that the plaintiffs had no cause of action, as the second decree was a decree by a competent Court and was not tainted with fraud. (25 B. 337, *R.*) Attachment prevents only voluntary alienation attempted or proposed. It does not give a *locus standi* to a person attaching property in execution of a simple-money-decree to dispute a decree of a competent Court. LACHMI DAYAL v. HARDANNI LAL, **25 A. 347 =A.W.N. 1903, 61.** (25 C. 179, *R.*)

(33)—*Attachment in execution—Objection by judgment debtor—Release from attachment—Decree-holder's remedy—Civ Pro Code, 1877, ss. 278 to 283—Suit to establish right.*—Where property attached in execution of a decree is released, on the objection of the judgment-debtor to the effect that it was in his possession not as his own property, but as superintendent of an endowment, the decree-holder's remedy is not by way of appeal against the order releasing the property, but by means of a suit under s. 283 of the Civ. Pro. Code, to establish his right to proceed against such property.

Attachment—continued.

——9.—Miscellaneous—*continued.*

For, though the objection was made by the judgment-debtor, it was one to be dealt with under ss. 278 and 279, &c., of the Civ. Pro. Code. SHANKARA DIAL v. AMIR HAIDAR, 2 A. 752. (6 B.L.R. 721, 6 B.L.R. 725, 6 W. R. 61, *F.*) [*F.*, 7 A. 36, 15 C.W.N. 437, 6 C. W.N. 63 ; *R.*, 8 A. 626=A.W.N. 1886, 228, 10 M. 117, 16 C. 1, 23 B. 237, 1 O C Sup. Vol. II; *D*, 7 A. 547=A.W.N.(1885, 132, 9 A. 605, 16 C. 603.]

(34)—*Property released from attachment—Subsequent decree declaring it liable to be attached—Effect of decree.*—Where property has been released from attachment in execution of a decree, and, in a subsequent suit brought for the purpose, a decree is obtained declaring it liable to be attached, and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the order which released the property from attachment, thus leaving matters as they were before that order was passed. WOOMA CHURN CHATTERJEE v. KADAMBINI DABEE, 3 C.L.R. 146. (6 W.R. Act X, Rul. 59, 20 W.R. 90, 22 W.R. 46, *Cited.*)

(35)—*Time up to which attachment by Criminal Court in cases of disputed possession will be in force—Certificate under Act XXVII of 1860—Right to possession.*—An attachment of land under s. 319, Act XXV of 1861, remains in force until right of possession is decided in a regular suit. A certificate under Act XXVII of 1860, gives no right to possession. KRISTO CHUNDER MAHATA v. MUSSAMUT OBINESSUREE DEBIA, 11 W.R. 532.

(36)—*Attachment in execution of decree—Order releasing part of property from attachment, right of execution-creditor to set aside, whether affected by stoppage of execution-proceedings of the subsisting decree.*—The order obtained by the first defendant in this case releasing a share in the *vatan* in question from the attachment secured by the plaintiff in execution of his decree would operate as a decree in favour of such defendant unless set aside by suit and, under s. 283 of the Civ. Pro. Code, plaintiff had the right to file a suit within a year to set that order aside. Plaintiff had withdrawn his execution *darkhast* temporarily, but such temporary cessation of his execution-proceedings could not deprive him of his right to continue the suit. The plaintiff's decree being yet subsisting and operative, if he continues the suit and succeeds in it, he can subsequently renew the execution-proceedings and re-attach the interest (if any) which he shall have been in such suit declared entitled to attach. BALAJI v. MOROBA, 21 B. 58.

(37)—*Priority of—Attachment before judgment—Insolvent—Re-attachment — Priority.*—A creditor obtained an attachment before judgment and then followed the decree. The debtor meanwhile applied to be declared an insolvent and was adjudicated accordingly. The Insolvent Court attached the same property.

Attachment—continued.

——9.—Miscellaneous—*continued.*

The said creditor had re-attached the same after decree and attachment by the Insolvent Court and pleaded priority over other creditors on the ground that the effect of the original attachment followed by decree was to create a charge on the property and convert him into a secured creditor. *Held* that the Court is not entitled to any priority and there is no illegality in the order of the Insolvency Court directing a distribution *pro rata* amongst the scheduled creditors. SUNDER SINGH v. CHARANJI LAL, 93 P R. 1882. (37 P.R. 1871, *R.*)

—Attaching creditor whether should be made party in apportionment proceedings—*See* ACT I OF 1894, s. 54, 7 Ind. Cas. 481=12 C. L.J. 545.

Effect of—Invasion of person's right—Cause of action—*See* BEN. ACT VIII OF 1885, ss. 18, 73, 88, 9 Ind. Cas. 663.

See MAD. ACT VIII OF 1865, s. 38, 8 M. 573.

—Rent—Attachment for a larger sum than is due—Validity—*See* MAD. ACT VIII OF 1865, ss. 39, 16, 14, 17 M.L.J. 479=3 M.L.T. 29=31 M. 22.

—Blacksmith's inam in proprietary estate whether liable to be attached in execution—*See* MAD. ACT III OF 1895, ss. 3, 5, 5 Ind. Cas. 41=7 M.L.T. 264.

—and sale of property in execution—Suit by claimant in possession to establish title—*See* BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 6 B. 215, F.B.

—for recovery of excess amount drawn by Commissioner as fees—Power of Court—*See* CIV. PRO. CODE, 1908, ss. 36, 37, O. XIV, r. 7, 6 Ind. Cas. 386.

—Power to realise property attached by two Courts of different grades—*See* CIV. PRO. CODE, 1908, ss. 47, 63, 1 Ind. Cas. 78.

—before judgment on insufficient grounds —Order for compensation when to be made—Revision—*See* CIV. PRO. CODE, 1908, ss. 95, 115, 17 M.L.J. 310.

—Position of attaching creditor—Right to notice—*See* CIV. PRO. CODE, 1908, O. IX, r. 14, s. 47, O. XXII, r. 10, 20 M.L.J. 524=7 Ind. Cas. 66=8 M.L.T. 237.

—prior to judgment—Application for rateable distribution—Ss. 213, 295 and 490, CIV. PRO. Code (1882)—*See* CIV. PRO. CODE, 1908, O. XX, r. 13, s. 73, O. XXXVIII, r. 12, ss. 115, 136, 4 M.L.T. 348.

—Conditions necessary for—*See* Civ. Pro. Code, 1908, O. XXXVIII, r. 5, 11 C.L.J. 19=5 Ind. Cas. 181.

—before judgment of property outside jurisdiction — *See* CIV. PRO. CODE, 1908, O. XXXVIII, r. 5, s. 113, O. XLVI, r. 1, 3 L.B.R. 255.

—before sale, necessity for—Execution of compromise decree—*See* COMPROMISE—EFFECT OF, 6 C.L.J. 95=11 C.W.N. 879=36 C. 886.

Attachment—continued.

——9.—**Miscellaneous**—*continued.*

—of debt stops not running of interest—*See* CONTRACT ACT, 1872, ss. 2 (*c*), 37, 38, 67, 4 M.L.T. 335.

—Right of creditor attaching the debtor's property before judgment—*See* CONTRIBUTION, SUIT FOR—GENERAL, 7 A.L.J. 409=6 Ind. Cas. 113=32 A. 479.

—Objection to, successful—but costs not allowed—Recovery of costs—*See* COSTS—SPECIAL CASES, A.W.N. 1908, 18=5 A.L.J. 140.

—Suit for damages for wrongful attachment—*See* DAMAGES—DAMAGES, SUITS FOR. 3 A. 504.

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 4 C.W.N. 151.

—Necessity of fresh—before issue of a sale proclamation, when a previous application for execution under which an—was made is dismissed for default—*See* EXECUTION OF DECREE MISCELLANEOUS, 33 C. 666.

—Effect on, of execution-proceedings being struck off—*See* EXECUTION OF DECREE—MISCELLANEOUS. 11 C.W.N. 163=5 C.L.J. 80.

—Whether enfranchised Inam is liable to—in execution of a decree of Civil Court—*See* EXECUTION OF DECREE—MISCELLANEOUS, 6 M.L.T. 132.

—of decree—Failure of attaching creditor to execute the attached decree—Attached decree barred by limitation—Right of decree-holder to claim damages from attaching creditor—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 56=7 M.L.T. 262.

—Distinction between attachment and assignment of decree — *See* EXECUTION OF DECREE—MISCELLANEOUS, 6 A.L.J. 564=2 Ind. Cas. 626.

—Personal right—Hindu widow's right of residence—*See* HINDU LAW—WIDOW, 4 M.L.T. 485.

—Attachment for amount larger than due—Effect—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 M.L.T. 429.

—Limitation for suit for compensation for unlawful attachment—Attachment not a continuing wrong—*See* LIMITATION ACT, 1908, s. 23, art. 29, A.W.N. 1907, 194=4 A.L.J. 548 =29 A. 615.

See LIS PENDENS, 6 B. 567.

—in execution of money-decree, if creates a charge—*See* LIS PENDENS, 14 C. W. N. 677= 11 C.L.J. 528=6 Ind. Cas. 40.

—Right to maintenance when attachable—*See* MAINTENANCE, 12 C. L. J. 146=7 Ind. Cas. 80.

—Attachment, wrongful—Sheriff's right to poundage—*See* PRACTICE AND PROCEDURE, 37 C. 649=7 Ind. Cas. 876.

Attachment—concluded.

——9.—**Miscellaneous**—*concluded.*

—by a Court without jurisdiction—Effect—Effect of due confirmation of sale—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 13 O.C. 43=5 Ind. Cas 798.

—Attachment of mortgage-debt—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 18 M. 437=5 M.L.J. 60.

—Suit to declare moveable property not liable to attachment—*See* SMALL CAUSE COURT MOFUSSIL, JURISDICTION OF—GENERAL, 9 M. 206.

—Small Cause Court's power to award compensation for erroneous attachment before judgment—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 77 P.R. 1907=50 P.W.R. 1907=30 P.L.R. 1908.

—Insolvent's salary when exempt from—*See* ST. 46 AND 47, VIC. C. 52, 8 Ind. Cas. 438.

—Conditional order of—Transfer of suit—Power of Court to deal with—*See* TRANSFER OF CIVIL CASES, 6 Ind. Cas. 746=20 M. L. J. 980.

—of property mortgaged in 1879—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2, 67, 99, 10 M. 129.

See WILL—CONSTRUCTION, 8 W.R. 276.

Attachment before judgment.

See ATTACHMENT.

See CIV. PRO. CODE, 1908, O. XXXVIII.

(1)—*Attachment before judgment, effect of.*—An attachment before judgment places the property in the custody of the law, but does not alter the right to it. *In the matter of* GOCOOL DASS SOONDERJEE PETUMBER MUNDLE v. GOCOOL DAS SOONDERJEE, **1 Ind. Jur. N.S. 32=Bourke O.C. 24.**

(2)—The effect of attachment before judgment is to ensure that the property attached shall be forthcoming at the time of pronouncing the decree, to abide whatever order the Court shall make upon it. JIVA RAMJI v. JADVAJI NATHA, **1 B H.C. 224.** [*R.*, 8 B.H.C. O. C. 140, 20 B. 403.]

(3)—*Civ. Pro. Code, 1859, s 83—Extent of Court's disposal—Vesting order in insolvency, nature of—Assignment in trust for creditors.*—In an attachment before judgment, under the 83rd and subsequent sections of Act VIII of 1859, the Court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming, at the time of pronouncing the decree, to abide whatever order it shall make about it. A vesting order in insolvency is in effect an assignment in trust for the benefit of creditors, and as such paramount to the right of an attachment before judgment-creditor; as it is more

Attachment before judgment—*continued.*

equitable that property under the control of the court should be applied for the benefit of all the creditors, than for the exclusive advantage of one. SAVA RAMJI v. JADHAVJI NATHU; EX PARTE GAMBLE, OFFICIAL ASSIGNEE, **2 B.H C. 142.** [*R.*, 8 B.H.C O.C. 140. 16 B. 1.]

(4)—*Civ. Pro. Code, s. 89—Effect.*—S. 89, Civ. Pro. Code renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment. ANONYMOUS, **6 M.H.C. 135.**

(5)—*Sale of property—Whether further process required.*—If there are no conflicting attachments, a sale of property under a decree may legally follow without further process on attachment previously to decree. M. S. MUSTAN SAIB v. BENJAMIN BROOKS, **7 M.H C. 347.**

(6)—*Civ. Pro. Code, O. XXXVIII, r. 10 (= s. 489, Civ. Pro Code, 1882) Attachment after judgment necessary.*—The law requires that attachment after judgment should issue although a plaintiff may have already obtained attachment before judgment. MUSSUMMAT SATBHAWAN v. SAHOO BANARSEE DOSS, **2 N.W.P. 365.**

(7)—*Priority—Civ. Pro Code, 1859, s 81.*—N.S, and subsequently J.S, filed plaints and obtained attachment orders against J P's property. J S, who got a decree on the 13th and an order for sale on the 16th of February, claimed priority. Claim disallowed. *Held* that, of several creditors who have attached a debtor's property under s. 81 of Act VIII of 1859, the one who first obtains judgment is entitled to priority. JUGGURNAUTH SHAW v. ISSURCHUNDER ROY, **Bourke O.C. 146**; LUTCHMEEPUT DOGAREE v. KENARAM SEN, **1 Ind. Jur. N.S. 393 = Bourke O.C. 92.**

(8)—*Attachment before judgment — Suit against member of a joint Hindu family—Death of defendant before decree—Right of survivorship.*—In a suit against a member of a joint Hindu family, not in his capacity as manager or representative, an attachment before judgment of family property was obtained. The defendant died before decree. Consequently, the right of survivorship took effect before the attachment became effectual for the purpose of execution. RAMANAYYA v. RANGAPPAYYA, **17 M. 144.** (8 M. 554, *F.*) [R., 16 C. P. L. R. 19 *D.*, 26 M. 604.]

(9)—*Suit on hypothecation-bond—Attachment before judgment of property other than hypotheca—Sale of hypotheca not necessary to prove insufficiency—Civ. Pro. Code 1882, s. 483.*—Where before the decree in a suit upon a hypothecation-bond, the plaintiff applied under s. 482 of the Civ Pro. Code, for an order of attachment of certain immoveable property belonging to the defendant but not hypothecated under the bond, it was held that, though the Court should act with extreme caution in ordering attachment of non-hypothecated property, and should be thoroughly satisfied, before

Attachment before judgment—*continued.*

making such an order under s. 483 of the Code, that the hypothecated property would be insufficient to discharge the debt, it would not be necessary for the purpose, that the sale of the hypotheca should have actually taken place. BESHAMBAR SAHAI v. SUKH DEVI, **16 A. 186 = A. W. N. 1894, 20.**

(10)—*Execution of decree—Money deposited in Court, attachment of—Civ. Pro. Code, ss. 483, 484, 486—"Property" meaning of.*—S. 272 of the Civ. Pro. Code, which, by reason of the provisions of s. 486, applies to the attachment of property deposited in a Court, directs that the attachment shall be made by a notice to such Court requesting that such property may be held subject to the further order of the Court which ordered the attachment. Where, however the property ordered to be attached is deposited in the Court which made the order for attachment, that order is itself sufficient notice that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up. The word "property" as used in ss. 483, 484, is wide enough to include property of every description moveable or immoveable, whether in the actual possession of the defendant or in the possession of some other person on his behalf, and the words in s. 494 as to the Court requiring the property sought to be attached to be produced and placed at its disposal, refer only to such property as is capable of being produced in Court. OHEDI LAL v. KUARJI DICHIT, **17 A. 82 = A.W.N. 1895, 14.**

(11)—*Company in liquidation, not made party to suit against defendant as Company's manager—Property of Company attached before judgment—Application of liquidator to raise attachment dismissed — Reversal of order of attachment on appeal.*—Plaintiff, respondent, instituted this suit against the defendant in his own individual capacity and as manager of the Company of which applicant was the liquidator. Though plaintiff's claim was professedly against the Company, he did not make the Company, which was then in liquidation, a party to the suit. On plaintiff's application under s. 483 of the Civ. Pro. Code, to attach before judgment the Company's factory, the lower Court, though the Company was no party to the suit, issued notice to the defendants under s. 484 and conditionally attached the Company's factory until further order. No notice of the application or of the order of attachment made upon it was given to the liquidator of the Company, who, under s. 177 of the Companies Act, was engaged in winding up its affairs and was charged with the duty of distributing its assets. The liquidator, however, applied to raise the attachment, and the lower Court made the Company a party to the suit, disallowed his objections, and confirmed its previous attachment order. On the Company through its liquidator appealing to the High Court from this order confirming the attachment, it was objected that no appeal lay,

Attachment before judgment—*continued.*

as the liquidator's remedy was by suit under ss. 283 and 487 of the Code ; it was *held* that, though the above objection may hold good if the Company were not a party to the suit, yet, the Court having made it a party, the Court's order amounted to one made against the Company under s. 485, so that an appeal would lie from it under s. 588 of the Code. MIR ALI v. BIHARI LAL, **21 B. 273.**

(12)—*Attachment, effect of—Necessity of subsequent attachment—Civ. Pro. Code, 1859, s. 89.*—R R filed a plaint against I R on the 15th, and obtained a decree on the 27th of February and a prohibitory order was made against I R's property on the 18th of March, subject to three prior attachments ; one by J S, whose plaint was filed on the 30th of January, and who obtained a probibitory order on the 13th and a decree on the 16th of February ; a second by N S, who filed his plaint and obtained a prohibitory order on the 30th of January, and obtained a decree on February 22nd ; and a third by K S, who also filed his plaint and got a prohibitory order on January 30th, and a decree on February 28th for an order for the sale of the goods on notice to the other three plaintiffs ; and the Court ruled that N S and K S were entitled to priority over R R. *Held* that the process in attachment before judgment is in all respects the same as in cases of attachment after judgment, and the effect in binding the property attached, so as to prevent alienation, is the same. That an attachment, whether before or after judgment, places the property in the custody of the law. That if the property have been attached before judgment, there is no need of a second attachment in the same suit after judgment. That the words "attachment before judgment" in s. 89 of Act VIII of 1859 must be read as equivalent to "attachment in pending suits," or, in other words, the phrase "before judgment" must be read as meaning "until after judgment." RAJCHUNDER ROY v. ISSURCHUNDER ROY, **Bourke O.C. 139.**

(13)—*Attachment before judgment—Power of High Court to attach property out of ordinary original civil jurisdiction.*—The High Court has no power to attach before judgment a defendant's property situate outside the limits of its ordinary original civil jurisdiction. HAJI JIVA NUR MUHAMMAD v. ABUBAKAR IBRAHIM MEMON, **8 B.H C.O.C. 29.**

(14)—*Ss. 483 to 490, Civ. Pro. Code, 1882—Private alienation of property attached before judgment during attachment—Effect of attachment whether before or after decree.*—When property is ordered to be attached before judgment, a private alienation of the property so attached during the continuation of the attachment void as against all claims enforceable under attachment. The effect of an attachment, whether it be before or after decree is the same, provided that in the former case, a decree is made for the plaintiff, at whose

Attachment before judgment—*continued.*

instance the attachment takes place. GANU SINGH v. JANGI LAL, **26 C. 531.** (Bourke O.C. 139, *R.*)

(15)—*Execution of decree in presidency town—Act XXIII of 1840.*—It is competent to the High Court under Act XXIII of 1840, to order a warrant of attachment before judgment issued by a Mofussil Court to be executed within the limits of the High Court's ordinary original civil jurisdiction. *In re* R. J. ABRAHAM, **6 B. H C. A.C. 170.** [*Not F.*, 8 B.L.R. 335 ; *Cons.*, 8 B.H.C. O.C. 29.]

(16)—*Grounds of application - Suit not commenced—Civ. Pro. Code, 1859, s. 81*—In an application made under s. 81, Act VIII of 1859, the Court must be satisfied that a removal of goods is being made, or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal. RAMNARAIN PODDAR v. LEVY, **2 Hyde 183.**

(17)—*Attachment before judgment—Property within jurisdiction.*—The words "any portion of his property" in the latter part of s. 483, Civ. Pro. Code, Act X of 1877, mean any portion of the property of the defendant which is within the jurisdiction of the Court in which the suit is pending. KEDAR NATH DUTT v. SEEVA VEYANA RANA LUCHMUN CHETTY, **1 C.L.R. 336.** [*R.*, 5 Bom. L.R. 570.]

(18)—*Civ. Pro. Code, ss. 483 and 484—Attachment before judgment - Property not within jurisdiction.*—Under the provisions of ss. 483 and 484, Civ. Pro. Code, a Court cannot attach before judgment, property not situated within its jurisdiction. KRISHNASAMI v. ENGEL, **8 M. 20.** [*F.*, 5 Bom. L.R. 570, 3 L.B.R. 255 ; *R.*, 1 L.B.R. 310.]

(19)—*Civ. Pro. Code, 1877, s. 484 (=O. XXXVIII, r. 5, new Code)—Attachment—Security—"Conditional attachment," meaning of.*—The defendants were, on 10th March, 1881, called on to furnish security for the fulfilment of a decree that the plaintiff might obtain against them, or to show cause on the 28th March, 1881, why the security should not be furnished. To this direction, the order was appended, which is provided by the form at the end of the Code for a provisional attachment. The defendants, to avoid the attachment, gave security on the 12th March, 1881, for satisfaction of the decree, and the attachment was not carried out. On the 28th March, 1881, they showed cause why security should not be furnished but the Subordinate Judge, as security had been furnished thought the matter was at an end, and that he could not cancel the security-bond. *Held* by the High Court that the Sub-Judge was not right ; that the security given under such circumstances was not the security expressly provided under s. 484 of the Civ. Pro. Code, and did not preclude the defendants from showing cause why no security should be furnished, because the continuance

Attachment before judgment—*continued.*

of the order beyond the 28th March 1881, was subject to the revision of the Sub-Judge on that day, so too should the continuance of the security given in substitution for attachment. S. 484 of the Civ. Pro. Code, 1877, speaks of a "conditional attachment" as within the competence of the Court. This might mean an attachment to be made conditionally on the security not being furnished nor cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order. The form at the end of the Code for a provisional attachment shows that the latter was the intention of the Legislature. LOTLIKAR v. LOTLIKAR, **5 B. 643.**

(20)—*Grounds for granting application—Defendant leaving jurisdiction to avoid or delay process—Civ. Pro. Code, 1859, s. 74, 75* —Applications under ss. 74 and 75, Act VIII of 1859, on the ground first mentioned in s. 74, must show at least that defendant is about to leave the jurisdiction, with a view to avoid process, or to delay the plaintiff in the prosecution of his suit. Evidence sufficient to support this must be adduced in all cases. TEENARAM v. RAMRUTTON, **2 Hyde 181.**

(21)—*Malicious arrest before judgment—Remedy.*—When a person thinks himself aggrieved by a malicious arrest on mesne process, or malicious attachment of property prior to decree, he is not compelled to apply for redress under the provision of s. 98 of the Civ. Pro. Code. If he choses, he may institute a suit for compensation without having recourse to that special provision of law. To maintain such a suit, legal not actual malice should be proved. A creditor is not entited, merely because he has a just demand against his debtor, to mave the Courts to put in force the extraordinary process of arrest or attachment on mesne process; he must also have good reason to believe that his debtor is about to depart from the jurisdiction of the Court, or to deal with his property in such a manner that it will be unavailable for the satisfaction of the claim against him. GOUTIERE v EMILE ROBERT JOSEPH CHARRIOL, **1 N.W.P. 91.** [*R.*, 2 N.W.P. 353.]

(22)—*Defendant leaving India—Good cause—Civ. Pro. Code, 1859, ss 74, 80.*—When it appears *prima facie* that the defendant is going to leave India with intent to remain absent so long that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant, he will be ordered, unless he show good cause to find security for the amount of the claim and the costs of the suit. And "good cause" must be either that he is not going to leave India, or not for so long a time as will obstruct, or be likely to obstruct, the plaintiff, should he succeed or that the suit is not a *bona fide* one; or that, even if it is, the institution of it has been vexatiously delayed till the defendant is

Attachment before judgment—*continued.*

about to depart from India, in order to embarass or coerce him. SPENCE'S HOTEL COMPANY v. ANDERSON, **1 Ind. Jur. N.S. 294, Note.**

(23)—*Defendant leaving jurisdiction — Civ. Pro Code, 1859, s. 80.*—It is not necessary for the plaintiff to show that the defendant intends to obstruct or delay the plaintiff in execution of his decree, in order to justify an application to the Court for his arrest before judgment under Act VIII of 1859, s. 80. It is enough if his going away will have that effect. AGRA AND MASTERMAN'S BANK v. MINTO, **1 Ind. Jur. N.S. 265.**

(24)—*Defendant leaving the jurisdiction—Repairs of ship, suit for price of.*—The defendant having employed the plaintiffs to do repairs to his ship on the promise that they would be paid for out of the proceeds of a letter of credit from the owners for that purpose, afterwards drew bills on the credit for other purposes — The defendant being about to leave Calcutta, on the application of the plaintiffs an attachment order was issued against him and the proceeds of the bills in the hands of P's agent.—CALCUTTA DOCKING COMPANY v. PASSMORE, **Bourke O.C. 125=Cor. 151.**

(25)—*Civ Pro. Code, 1882, s. 483—Attachment before judgment—Power to be sparingly exercised.*—The power given to the Courts under s. 483 of the Civ. Pro. Code, 1882, should be exercised sparingly and with the utmost caution. The Court should be thoroughly satisfied, before it proceeds under that section, that the defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him. SHOSHEE SHEKHORESWAR ROY v. HARO GOBIND BOSE, **13 C.L.R. 356.**

(26)—*Civ. Pro. Code 1882, s. 493 (=O. XXXVIII, r 6 new Code)—Attachment before judgment, when terminates.*—An attachment before judgment, like a temporary injunction, becomes *functus officio*, as soon as the suit terminates RAM CHAND v. PITAM MAL, **10 A. 506=A.W.N. 1888, 195.** (A.W.N. 1887, 297, *Appl.*; 3 I.A. 230, 14 W.R. 384, 9 C. 656, *R.*)

(27)—*Civ Pro Code, s. 648—Residence.*—Where an officer proceeding from Burma to England on leave, stayed for a few days at Madras on the way, this amounted to a residence for the purposes of s. 648 of the Civ. Pro. Code, so as to render him liable to arrest before judgment. EVERET v. FRERE, **8 M 305.** [*R.*, 14 B. 541, 1 L.B R. 222, 29 M. 239=16 M.L J. 238=1 M.L.T. 71.]

(28)—*Attachment before judgment subsistence of, in case of re-attachment* —Although it is usual to re-attach property already attached before judgement, the proceeding implies no abandonment of the first attachment. RAMAKRISHNA DAS SURROWJI v. SURFUNNISSA BEGUM, **6 C. 129, P.C. 7 I.A. 157.**

Attachment before judgment—*continued.*

(29)—*Attachments, priority among.*—Where one of several writs first reaches the sheriff, it has priority, and he has no power to deprive it of such priority and transfer it to another by first executing a writ delivered to him later. DWARKANATH SHAW v. PRANKRISTO PAUL CHOWDHRY, **Bourke O C. 260.**

(30)—*Attachment before judgment—Execution—Competency of Court.*—A Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. MARTHAMMA v. KITTU SHEREGARA, **6 M.H C. 91.**

(31)—*Objection that property not transferable if to be taken then or on application for execution—Civ Pro. Code (Act XIV of 1882), ss. 483, 487, 488, 490.*—When property is attached before judgment, the defendant is not bound to take exception to the attachment on the ground that the property is not transferable. Attachment before judgment stands on a different footing from attachment in execution in this respect. In such a case the proper time to take this objection is when the decree-holder applies for execution. BASIRAM MALO v. SRIMATI KATYAYANI DEBI. **15 C.W.N. 795.**

(32)—*Civ. Pro. Code, (Act XIV of 1882), s. 488—Suit, dismissal of—Reversal on appeal, effect of—Court's inherent power—Civ. Pro. Code (Act V of 1908), O. 21, r. 58—Sale without attachment, order for—Validity—Objection as to legality of proceedings.*—It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit. The reversal of the judgment of dismissal on appeal does not operate to revive an attachment which has been cancelled under s. 488 of the Code. Hence a decree-holder is not entitled to bring the properties to sale without a fresh attachment thereof. If a Court is invited by a decree-holder to sell property which has not, as a matter of fact, been duly attached, and the Court is apprised of that circumstance by a person claiming to be interested therein, the Court has inherent power to investigate the matter. When a sale of immoveable property has actually taken place, and its validity is impeached on the ground that it was not attached, the absence of attachment does not, by itself, vitiate the sale. But the position is different when objection is taken to the legality of the proceedings before the sale has taken place. The duty of the Court, under such circumstances, is to ensure compliance with the provisions of the Code when there is still ample time left for necessary action. SASIRAMA KUMARI v MEHERBAN KHAN, **13. C.L.J. 243.**

(33)—*Power of Court to attach before judgment, property outside jurisdiction—Civ. Pro. Code, 1882, ss. 483 and 648.*—A Court has power to attach before judgment, property outside its jurisdiction. It has been the practice in the Calcutta High Court to adopt such procedure. RAM PERTAB JHOWAR v. MADHO RAI, **7 C.W.N. 216.** [*Diss.*, 5 Bom. L.R. 570, 3 L.B.R. 255, U.B.R. 1907, C.P.C., 13, 4 M.L.T. 348=31 M. 502.]

Attachment before judgment—*continued.*

(34)—*Priority—Attachment after decree if necessary—Act VIII of 1859.*—An attachment previous to decree has nothing whatever to do with the question of priority between rival decree-holders, so far as that question depends upon mere priority of attachment. On the 27th June, 1866, the plaintiff sued B and on the 27th August, 1866 obtained an attachment before judgment over his property. On the 29th June, 1866, the defendants instituted a suit against the same person B. Both suits were tried together and both the plaintiff and the defendants obtained decrees against B on the same day. The said property of B was attached in execution of both decrees and the executions were completed simultaneously. The property was sold and the proceeds of sale in execution, so far as they could go, were paid to the plaintiff and defendants rateably. The plaintiff now sued to make the defendants refund so much as would completely satisfy his decree against B, on the ground that he had first attached the property and was therefore entitled to priority over the defendants. *Held* that both the parties having obtained their decrees at the same time and having attached the property at the same time in execution, were equitably entitled to have the proceeds of the execution divided between them, and that the party who obtained an attachment prior to decree was not, in consequence of his having done so, entitled to priority. Under Act VIII of 1859, though an attachment before judgment will remain in force after decree so as to keep property in the custody of the Court, the person who attached it must, if he wished to proceed against the property in execution of his decree, attach it *de novo* proceeding in precisely the same manner as any other person holding a decree against the defendant would have to proceed, if he wished to attach that property. SRI RAMWANIK v. TIN COWRI RAI, **4 B.L.R. F.B. 63=13 W.R. F.B., 9.** [*Expl.*, 21 W.R. 66=14 B.L.R. 323; *R.*, 2 N.W.P. 365.]

(35) *Of property outside jurisdiction—S. 648 Civ. Pro. Code, 1882.*—The property of a defendant, which is not within the jurisdiction of the Court cannot be attached before judgment under the provisions of s. 648, Civ. Pro. Code. A. M. MADAR SAIB BROTHERS & CO. v. MOONA ABDUL KASSIM, **L.B.R. 1893—1900, 56.**

(36)—*Attachment before judgment of property situate outside the Court's jurisdiction—Allowable under the new Code—Civ. Pro. Code (Act V of 1908), ss. 46 and 138, O XXXVIII, r. 5—Civ. Pro. Code (Act XIV of 1882) ss. 483, 648.*—Though the property, referred to in cl. (*b*) of O. XXXVIII, r. 5 of the new Civ. Pro. Code, must be property within the local limits of the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in cl. (*a*). The rule clearly permits the attachment before judgment of property situate either within or without the legal limits of the Court's jurisdiction. The removal from the new rule of this

Attachment before judgment—*concluded.*

restriction as to the locality in which property capable of being attached under it must be situate, which there was in the corresponding s. 483 of the old Code, has altered the law. SOMASUNDARAM CHETTY v. MUTHU VEERAPPA CHETTY, **10 Ind. Cas. 794.**

See CIV. PRO. CODE, 1908, ss. 63, 73, 29 C. 773=6 C.W.N. lxvii.

—Compensation for, obtained on insufficient grounds—Power of Small Cause Court to grant —*See* CIV. PRO. CODE, 1908, s. 95, 26 M. 504.

—Attachment before judgment on insufficient grounds—Award of compensation—Appeal—*See* CIV. PRO. CODE. 1908, s. 95 : s. 104, O. XLIII, r. 1, 24 M. 62=10 M.L.J. 355.

—Before judgment—Compensation for unnecessary attachment—Appeal—*See* CIV. PRO. CODE. 1908, s. 95, O. XLIII, r. 1, s. 104, A.W.N. 1905, 197=2 A.L.J. 602=28 A. 81.

See CIV. PRO. CODE, 1908, s. 136, 1 L. B.R. 310.

—in suits for money-decrees in Subordinate Court—*See* CIV. PRO. CODE, 1908, O. XL, rr. 1 to 3, L.B.R. 1893—1900, 432.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 12 B. 400.

See INJUNCTION—UNDER CIV. PRO. CODE, 6 W.R. Mis. 1.

See INSOLVENCY — MISCELLANEOUS, 8 M. 554, Bourke O.C. 149.

—Insolvency of defendant before decree—Right of Official Assignee to attached property —*See* INSOLVENCY—MISCELLANEOUS, 20 B. 403.

—Suit for damages—*See* LIMITATION ACT, 1908, art. 49, 19 M. 80=6 M.L.J. 12.

—Affidavit in support of application for—Plaintiff in examination stating that affidavit is based upon hearsay—*See* SANCTION TO PROSECUTE, 27 M. 223=14 M L.J. 24.

Attachment of person.

See ARREST.

See ATTACHMENT.

See EXECUTION OF DECREE.

(1)—*Judgment-debtor—Maximum period of imprisonment.*—Where a judgment-debtor has been on several occasions, imprisoned in execution of a decree, for more than the maximum period for which he can be legally kept in prison, he is entitled to be released. KHODA BUKSH v. SHEIK SHUKR OLL-LAH, **5 N.W.P. 220.**

(2)—*Execution-decree—Powers of Court.*—A Court is not bound to grant a second application for execution, unless satisfied that the failure of the first process is not attributable to the applicant's own fault. BYJNATH PUNDIT v. KUNHYA LALL PUNDIT, **9 W.R. 527.**

Attachment of Person—*concluded.*

(3)—It is optional with a judgment-creditor to proceed in the first instance against either the person or the property of the judgment-debtor, and the Small Cause Court is bound to issue execution according to the nature of the application made in writing after passing of decree. The Court may refuse execution against person and property at the same time, or against the person, when application for immediate—is made verbally at the time of passing decree. J. DAVIS AND CO. v. M. A. MIDDLETON, **8 W.R. 282.**

Attendance in Court.

—As to attendance of civil prisoners when required as parties to suits or witnesses in civil suits **Cir. No. 45, dated the 12th October, 1866, 6 W.R. Civ. Cir. Order, p. 12.**

Attestation.

See ESTOPPEL.

See EVIDENCE ACT, s. 68.

(1)—*Hindu Law—Attestation of gift-deed by vendee—Effect on vendee's title.*—The attestation of a deed of gift of certain immoveable property, by subsequent vendee of the same property from the donor, could not affect the vendee's title, where the gift had not been completed by delivery of possession. ALEAJI GANGADHAR v MUKTA, **18 B. 688.**

(2)—*S. 68, Evidence Act—Mortgage—Proof.*—Where only one attestor proved a mortgage-bond attested by more than two witnesses and where its due execution was not denied, *held*, that having regard to s. 68 of the Evidence Act the document may be taken as properly proved. NUND KISHORE LAL v. KANEE RAM TEWARY, **29 C. 355=6 C.W.N. 395.**

(3)—*Meaning of.*—Attestation means that what is said to be attested happened in the presence of the attesting witness. DINAMOYEE DEBI v. BON BEHARI KAPUR, **7 C.W.N. 160.**

(4)—*Attesting witness—Mortgage—Evidence (Act I of 1872), s. 68—Transfer of Property Act (IV of 1882), s. 59—Writer of the deed*—A person who is present and witnesses the execution of a (mortgage) deed and whose name appears on the document, though he is therein described merely as the writer of the deed, is a competent witness to prove the execution of the deed. He need not be described in the deed as an attesting witness. RAJ NARAIN GHOSH v. ABDUR RAHIM, **5 C.W.N. 454.** (20 A. 532, *R.*)

(5)—*Of mortgage-deed, question as to the validity of—Applicability of maxim* "omnia præ sumuntur rite et solenniter esse acta"—*Entry in the record-of-rights by settlement officer, effect of.*—One of the issues in this case was, whether the mortgage-deed sued upon was genuine and for consideration. The first Court did not go into the question of consideration but held the mortgage to be invalid because the attesting witnesses were not proved to have seen the mortgagor sign the deed. Plaintiff

Attestation—*continued.*

appealed and the lower Appellate Court remanded the case directing further evidence to be taken. The first Court complied but again came to the conclusion that valid attestation of the deed had not been established by the plaintiff. *Held*, under the circumstances of the case (*viz.*, the mortgagor, the mortgagee, the scribe and one of the attesting witnesses of the deed in question were all dead and the surviving witness had no clear recollection of the circumstances attending the execution, neither the evidence of that witness nor that of the other persons, examined to show what happened when the document was written and executed, contained anything which tended to establish positively that the attesting witness did not see the mortgagor sign), for the purpose of deciding whether the mortgage-deed was duly attested or not, the maxim "*omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium*" might be applied so as to presume due attestation, the maxim being applicable, in such cases, under all circumstances except where the attestation required by law has been either actually proved or disproved. As to the other issue in the case, whether the mortgagor had the legal right to mortgage the land, it had to be determined whether he held proprietary or mere tenant rights in the land mortgaged by him. *Held*, the fact that, in the record by the settlement officer, under s. 72 of the Land Revenue Act, a person has been styled as a tenant is no bar to that person establishing, subsequently, that his status was not that of a tenant but that of a proprietor. (10 C.P.L.R. 33, *F.*) The said record is merely a statement as to the condition of facts as ascertained by the officer in the course of his inquiry and is of no final or conclusive effect whatever on the status or the right of the person concerned. SETH MUL CHAND v. MT JANKI, **2 N.L.R. 65.** [*Appl.*, 5 N.L.R. 3; *R.*, 6 N.L.R. 152.]

(6)—Mere attestation of a deed does not necessarily import an assent to all the recitals contained therein. IMAM ALI v. BAIJ NATH RAM SAHU, **10 C.W.N. 551=3 C.L.J. 576=33 C. 613.**

(7)—*Attesting witness — Party to deed cannot be attesting witness—Meaning of attestation*—Pardanashin *lady—Execution behind* parda—*How to be attested—Document to be explained to, and understood by.* Pardanashin *lady—Payment of interest—Agent duly authorised—Limitation Act (XV of 1877), s. 20*—A person, who is a party to a deed, cannot be regarded as an attesting witness; therefore, a co-executant cannot be considered as an attesting witness. When an instrument is required to be attested, the meaning is that a witness would be present at its execution and shall testify that it has been executed by the proper person. (3 Bom. L. R. 513, *Rel. on.*) Where, according to the custom of the country, *pardanashin* ladies are unable to appear before male witnesses, a document, which by independent testimony is conclusively proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *parda*, and who before attestation satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze. (13 C.W.N. 40, 3 Ind Cas. 309, 3 Ind. Cas. 311, 14 C.W.N. 165, *F.*) In the case of deeds and powers executed by *Pardanashin* ladies, it is requisite that those, who rely upon them, should satisfy the Court that they had been explained to, and understood, by those who executed them. In a case where such a lady had the advice of her eldest sister who joined her in the transaction of a mortgage, and the husband of the eldest sister looked after the matter for the benefit of both, and the money was paid into the hands of the ladies and was urgently needed to meet the expenses of the litigation then pending in respect of the estate of their father: *Held*, that the mortgage-deed executed by the lady under such circumstances was valid. Payments of interest on the mortgage-money made by the lady's sister's husband, who held a power-of-attorney from both the sisters, were held to be made by an agent of both the ladies duly authorised within the meaning of s. 20 of the Limitation Act, 1877. NAWAB SARURJIGAR BEGAM v. BARODA KANT MITTER, **5 Ind. Cas 589=11 C L.J. 563=37 C. 526=14 C.W.N. 974.**

(8)—*Estoppel—Attestation, whether amounts to a guarantee of title in the vendor.*—The mere attestation of a deed of sale executed by a person does not in law amount to a representation by the attestor that the vendor has a good title to the property, so as to create an estoppel against the attestor. Plaintiff attested a sale-deed executed to second defendant by the third and fifth defendants. Later he obtained a mortgage of the same property from the first defendant, who was found to be the real owner, and sued to enforce his mortgage: *Held*, that the mere attestation by plaintiff in second defendant's sale deed did not amount to a representation of good title in the vendor, and that the plaintiff was entitled to enforce his mortgage. DEENABANDU CHOUDARI v. VINAYAKA DOSS, **7 Ind. Cas. 174=8. M.L.T. 171=M W.N. 1910, 333.**

(9)—*Estoppel—Attesting a deed as witness.*—The mere fact of a person attesting a deed is not in itself sufficient proof that he consented to it or knew its contents, and does not necessarily import his assent to all the recitals therein. MEWA SINGH v. BHAGWANT SINGH, **5 Ind. Cas 252.** (9 C. 463; 3 B L.R. 57, P.C.=12 W. R. 47. P.C.=13 M.I.A. 209, *F.*; A.W.N. 1888, 294, *D.*)

(10)—*Attestation—Essentials of—Necessity of signature—The word "gawah" "witness" prefixed to executant's signature—Due execution—Presumption—When repelled—Signature of scribe—Whether attestation—Evidence Act, s. 68—S. 59, Transfer of Property Act*—A witness competent to prove the execution of a deed of mortgage can only be an attesting witness, and mere presence at, and visual observance of, execution, do not amount to an attestation;

Attestation—*continued.*

added to them, there must be a signature made in token of such presence and observation. (5 N.L.R. 3, *F.*; 5 C.W.N. 454, *Diss.*; 7 C.W.N. 160, 33 C. 861, *R.*) Meaning of "attested" in s. 59, Transfer of Property Act, and s. 68, Evidence Act discussed. In the absence of proof to the contrary, Indian Courts presume that the word 'gawah' (witness) means that the necessary steps of attestation have been performed, namely, that each witness was present, and, having therefore seen the executant sign the instrument, thereafter subscribed his own name thereon as a witness of that fact; or, in other words, the presence of a name subscribed to an executant's signature on an instrument, such subscription having prefixed to it (in full or in abbreviated form) some such word or words as 'gawah' (witness), or 'in the presence of,' raises an implication which takes the place of the express declaration of facts contained in the attestation clauses appended to more formally executed instruments. (14 C.P.L.R. 42, 2 N.L.R. 65, *R.*) But such an implication is absolutely repelled in the case of a scribe of the body of an instrument, who has signed the same before execution merely in acknowledgment of the fact that he is such a scribe. His subsequent presence at the execution will not make his said signature an act of attestation for the purposes either of s. 68, Evidence Act or of s. 59, Tr.P.Act. AJAB v. MANGAL, **6 N.L.R. 152.**

(11)—*Description of property in transfer deed—Liability of attestor to be bound by description.*—The attestor to a document transferring property is not by the mere fact of attestation bound by the description of the property contained therein. GANPAT SINGH v. GOPAL, **1 C.P.L.R. 67.**

(12)—*Estoppel—Attestation—Recitals in instrument.*—Mere attestation of a document cannot amount to an estoppel. RAM SARUP v. KISHEN SAHAI, **A.W.N. 1883, 142.**

—of witness after execution of bond—Material alteration—Validity of bond—*See* CONTRACT—ALTERATION OF CONTRACTS, 15 B. 44.

—Hypothecation-bond—Forged—Effect of—*See* CONTRACT—ALTERATION OF CONTRACTS, 15 M. 70.

See CUSTOM, 2 Agra 217.

See DEED—ATTESTATION OF DEEDS, 1 C.W.N. 81, 2 C.W.N. 603.

—S. 59, T.P. Act, 1882—required by—*See* DEED—ATTESTATION OF DEEDS, 27 C. 190.

—Knowledge of contents of document—Effect of signing document as witness—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 7 A.L.J. 664=7 Ind. Cas. 264.

—Surety-bond—*See* EVIDENCE ACT, 1872, s 68, 26 C. 222=3 C.W.N. 228.

—Writer of document signing his name at the foot of it, but above the executant's signature, if attesting witness—*See* EVIDENCE ACT, 1872, s. 68, 5 N.L.R. 3=1 Ind. Cas. 179.

Attestation—*continued.*

—Attestation, effect of—Attestation not constructive fraud—*See* FRAUD—FRAUD, ELEMENTS OF AND PROOF OF, 1 A. 303.

—Estoppel—Gift by Hindu widow—Attestation of deed by reversioners—Effect—*See* HINDU LAW—WIDOW, 20 M. 269.

—of deed, if amounts to consent—Consent of reversioner—*See* HINDU LAW—WIDOW, 13 C.W.N. 931=3 Ind. Cas. 415.

—Hindu Law—Alienation by widow for necessity—Reversioner's consent and—Suit by reversioner for declaration that sale does not affect his rights—Estoppel—Evidence Act, 1872, s. 115—*See* HINDU LAW—WIDOW, A.W.N. 1898, 294.

See HINDU LAW—WIDOW, A.W.N. 1899, 218.

—Attorney—Striking an attorney off the rolls—Falsehood in a deed—of the deed by an attorney—*See* LEGAL PRACTITIONERS—ATTORNEY, 10 W.R. 43, P.C. =1 B.L.R. P.C. 55.

—to a written will by a Cutchi memon is not necessary—*See* MAHOMEDHN LAW—CUTCHI MEMONS, 7 Bom. L.R. 553.

—Joint Hindu family—Of sale-deed by father—Son's right of pre-emption—*See* PRE-EMPTION—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC., 1 O.C. 252.

See SCRIBE, 5 C.W.N. 454.

—Writer's statement in document as written by him, whether sufficient attestation—*See* STAMP ACT, 1879, s. 3 (4), cl. (*b*), 17 A. 211, F.B.=A.W.N. 1895, 61.

See STAMP ACT, 1879, Sch. I, art. 11, 8 M. 87, F.B.

—Copy of document, filed with plaint—By Court or its officer—Stamp duty not leviable—*See* STAMP ACT, 1879, art. 22, 15 B. 687.

—Co-executant if may attest execution by other—*See* TRANSFER OF PROPERTY ACT, 1882, s. 58, 14 C.W.N. 1046=7 Ind. Cas. 735.

—of mortgage-deed before execution by mortgagor—Effect of such—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 59, 100, 9 C.W.N. 697=32 C. 729.

—A document to operate as a valid mortgage ought to be attested by at least two witnesses—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 59, 100, 9 C.W.N. 1001.

—effect of, to a deed of mortgage—Witnesses should attest the mortgage-deed in the presence of the mortgagor after having received from him a personal acknowledgment of his signature—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 4 Bom. L.R. 869=27 B. 91.

—of mortgagor's signature—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, A.W.N. 1896, 89.

Attestation—*concluded.*

—Evidence relating to—Of mortgage-deed—Burden of proof—Applicability of maxim *omnia rite esse acta*—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 2 N.L.R. 10.

—should be by two independent witnesses—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 10 Bom. L.R. 943=33 B. 44.

—Absence of, from a mortgage-deed does not convert a mortgage into a charge—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 7 Bom. L.R. 934.

—Mortgage-deed—Necessity for attestation by witnesses of execution—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 14 C.P.L.R. 42.

—What is the meaning of—and how is it to be effected—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 4 C.L.J. 41=33 C. 861.

—of *zurpeshgi* patta executed by *pardanashin* lady—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 13 C.W.N. 40=3 Ind. Cas. 309.

—by marksman by means of his mark—Sufficiency of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 1 N.L.R. 14.

—of mortgage-deed, when valid—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 3 M.L.T. 300=18 M.L J. 219=31 M. 215.

See TRANSFER OF PROPERTY ACT, 1882, s. 59, 26 A. 69=A.W.N. 1903, 201.

—Instrument not attested as required by s. 59, Transfer of Property Act—Effect—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 59, 100, 31 M. 337.

—Forged attestation, effect of—*See* WILL—ATTESTATION, 7 M. 302.

See WILL—REVOCATION, 27 P.R. 1883.

Attesting Witness.

See ATTESTATION.

(1)—An attesting witness is a witness who has seen the deed executed and who signs it as a witness. RANU v. LAXMANRAO, **10 Bom. L.R. 943=33 B. 44.**

See DEED — EXECUTION OF DEEDS, 20 A. 532=A.W.N. 1898, 148.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 138 P.R. 1889.

—Witness—Scribe of a deed—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, A.W.N. 1897, 146.

—Proof of execution of mortgage-deed—Indian Evidence Act, I of 1872, ss 70, 114—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 7 C.W.N. 384.

Attetpa Property.

See BUDDHIST LAW—INHERITANCE, 1 L.B.R. 93.

Attorney.

See LEGAL PRACTITIONERS—ATTORNEY.

Attorney and Client.

See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT.

Attornment.

See LANDLORD AND TENANT.

(1)—*Mortgage—Redemption—Notice of attornment to tenants—Registration—Evidence.*—Where on the redemption of a mortgage, the mortgagee executed a document which purported to be a notice of attornment to the cultivating tenants of the lands redeemed: *Held* that the document, though unregistered, would be admissible in evidence for its own proper purpose of proving the attornment, though not for the purpose of proving that the mortgage charge was satisfied. ANTAJI v. DATTAJI, **19 B. 36.**

—by tenant for number of years to person other than registered proprietor—Right of registered proprietor to compel tenant to accept pattah and execute muchilika—*See* MAD. ACT VIII OF 1865, ss. 1, 3, 7 M L.J. 243.

See ESTOPPEL—DENIAL OF TITLE, 3 N.W.P. 153.

—Tenant attorning to mortgagee—Suit for rent against son of tenant—Liability of son on father's tenancy until notice of surrender to landlord—*See* LANDLORD AND TENANT—ABANDONMENT, ETC. OF TENURE, 8 B. 164.

Auction Purchaser.

See SALE.

See VENDOR AND PURCHASER.

(1)—*First and second mortgages—Sales in execution of decrees enforcing mortgages—Priority between auction-purchasers*—Of two auction-purchasers, purchasing the same property, sold simultaneously in execution of two mortgage-decrees, the one, who purchases in execution of the decree enforcing the earlier mortgage, has a prior right to possession over the other. JANKI DAS v. BADRINATH, **2 A. 698.**

(2)—*Right to avoid under-tenure—Test—Act XI of 1859, s. 37.*—An auction-purchaser's title to avoid an under-tenure and eject a tenant depends on whether the tenure is protected under s. 37, Act XI of 1859, and whether the tenant has a right of occupancy. SHEO PURSHUN SINGH v. MAHARAJA RAJENDRO KISHORE SINGH, **12 W.R. 123.**

(3)—*Purchaser at sale by Court—Same status as judgment-debtor's—Plea of limitation against judgment-debtor applies against purchaser also—Prescriptive title not established by plaintiff—Effect.*—As a purchaser at an auction sale held by a Court only acquires the right, title and interest of the judgment-debtor in the property sold, a plea of limitation that would be good against the judgment-debtor is good also against the purchaser. When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject-matter of such suit in an action brought by him. SHRIDHAR VINAYAK v. BABAJI *bin* JIVAJI, **6 B. H.C.A.C. 220.**

Auction Purchaser—*continued.*

(4)—*Priority between—Certificate of sale.*—As between competing auction-purchasers the principles which govern preference are the same as those which regulate the claims of priority among mortgagees. Independently of any preference secured by reason of registration or possession, the purchaser must redeem all charges created before the sale. He must be held to have made his bid with full knowledge that the property was burdened with debts and he can only claim possession by paying off those debts. His certificate of sale confers on him no right to require the latter mortgagees or those purchasing under them as auction-purchasers to return back the money he paid either personally or out of the property. BAIJANATH v. BHIMAPPA, **3 Bom. L.R. 92.**

(5)—*Priority of, over previous unregistered mortgage.*—A purchaser in possession under a registered sale-deed has priority over a person who claims under a prior unregistered mortgage unaccompanied by possession of which the purchaser had no notice. KARBASAPPA v. DHARMAPPA, **2 Bom. L.R. 223.**

(6)—*Estoppel--Purchase at Court auction of defendant's properties—Genuineness of documents—Whether purchaser bound by findings of Court as to genuineness of documents in a suit to which the defendant, and not purchaser, was a party.*—The purchaser in Court auction of defendant's interest in certain properties is not bound by findings of Court as to genuineness of documents, in a suit to which the defendant, but not the purchaser, was a party. *In re* PALAMPADIYAN NEDUNKULATHIL KUNHIMAMMU, **8 Ind. Cas. 846=9 M.L.T. 207.** (6 *B.* 193, *D.*)

(7)—*Rent for the period between the dates of sale and its confirmation.*—An auction-purchaser is not entitled to the rent accruing due between the auction-sale and the confirmation of that sale. LALLA JUGGILAL v. HUKUM CHAND, **9 Ind. Cas. 25.** (24 A. 475, A.W.N. 1902, 145, 7 Ind. Cas. 65, 2 C.W.N. 589, *R. & F.*)

(8)—*Rights of auction-purchaser under Act I of 1845—Modification by s. 1 of Act X of 1859.*—The rights which an auction-purchaser has under Act I of 1845 are modified by s. 1 of Act X of 1859. RAJEMONEE DOSSEE v. GOLUCK CHUNDER SIRCAR, **6 W.R. Act X, Rul. 102.**

—Accretion—Right of—at revenue sale—*See* ALLUVION—GENERAL, 8 C.W.N. 676.

—being also decree-holder, whether party within meaning of s. 244, Civ. Pro. Code, 1882—*See* CIV. PRO. CODE, 1908, s. 47, 7 C.L.J. 436.

—Sale not set aside—Auction-purchaser's right to recover possession by suit—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 6 A.L.J. 799=6 M.L.T. 99=3 Ind. Cas. 24=31 A. 599.

—Right to sue for possession—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 95, 5 A.L.J. 20=A.W.N. 1908, 12=30 A. 72.

Auction Purchaser—*concluded.*

—Position of, as regards recovery of possession of property purchased by him—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 95, 96, 6 A.L.J. 71, F.B.=5 M.L.T. 185=31 A. 82=1 Ind. Cas. 416.

—at Court-sale of attached property, whether bound by estoppels binding on judgment-debtor—Rights—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 11 Bom. L.R. 26=5 M.L.T. 228=33 B. 311=1 Ind. Cas. 106.

—Title of, when accrues—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 92, 94, s. 65. 7 C.L.J. 1.

—Priority between — *See* DEBTOR AND CREDITOR, 2 Bom. L.R. 30.

—Sale certificate—Rate of rent—Estoppel—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 10 C.L.J. 605=4 Ind. Cas. 739.

—Rights of—*See* EXECUTION OF DECREE—MISCELLANEOUS, 1 L.B.R. 22.

See LIMITATION ACT, 1908, s. 10, 15 C. 703.

—Lis pendens—Applicability to — *See* LIS PENDENS, 15 C. 94.

—Right acquired by, before confirmation of sale, nature of — *See* PRE-EMPTION—GENERAL. 10 O.C. 273.

—Right of, to prove what passed by sale—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 9 C.L.J. 346=1 Ind. Cas. 62.

Auction-sale.

See EXECUTION OF DECREE.

See SALE.

(1)—*Court auction—Withdrawing from bid.*—A bidding at an auction is a mere offer which may be retracted before the hammer is down. In the absence of any law or rule to the contrary, this rule applies to Court auction also. AGRA BANK v. HAMLIN, **14 M. 235.**

(2)—*Agreement between person not to bid at a sale by.*—An agreement between persons not to bid at an auction-sale under the execution of a decree is no ground for setting aside the sale or even for opening the biddings. Where persons act in concert at an auction-sale in such a way as to prevent the best price being obtained, the auction does not amount to fraud, nor is it an irregularity contemplated by s. 311, Civ. Pro. Code, 1882. MAHOMED v. SAVVASI, **2 Bom. L.R. 640.**

(3)—*Combination of bidders—Cause of action—Pleadings—Fraud—Specific allegations, want of.*—Allegations of fraud must be specifically pleaded, general allegations, however strong may be the words, being insufficient to amount to an averment of fraud, of which any Court ought to take notice. (15 C. 533, *F.*) The fact that a combination amongst bidders at an auction sale has been formed to bid at the auction, does not, of itself, give rise to an action at the suit of the vendor. LALA JYOTIPRAKAS NANDE v JOHWMULLI JOHURY, **13 C.W.N. 87=36 C. 134=1 Ind. Cas. 784.** (6 C.L.J. 111, *R.*)

Auction-sale—*continued.*

(4)—*Auction sale—Payment of purchase-money—Rent of the property sold—Transfer of Property Act (IV of 1882), ss. 54, 55.*—One of the conditions of sale at an auction provided that "upon payment of the purchase-money in manner aforesaid the purchaser shall be entitled to the rents and profits—from the day of such payment." *Held*, on a construction of the above clause, that the words "the day of such payment" meant the day of actual payment and not the stipulated day of payment. *Held*, further, that there was no suggestion of wilful delay, want of good faith, nor negligence or other misconduct disentitling the vendor to the interest clearly payable to him under the conditions, and that at the same time there was nothing in the conditions which deprived him of the rents and profits to which, under the Transfer of Property Act, he was entitled until the Transfer of ownership. *Semble*:—It would be well that conditions of sale should be so framed so as to avoid the inequitable consequence of a vendor being entitled both to the rents of the property and interest on the unpaid purchase-money. EMPRESS S. & W. CO. v. ATHAIDES, **7 Bom L. R. 845.**

(5)—*Property purchased at an auction authorized by Court—Payment of the purchase-money—Possession taken by the purchaser—Re-sale, order of—Certificate of sale.*—Subsequent to a partition suit, all the parties to it applied on the 12th December, 1895, to the Civil Court at Poona that a certain property of theirs called "Woodlands" be sold by an auctioneer at an early date and the proceeds deposited in Court, as the property was going out of repairs. The Court granted the application and ordered an auctioneer to sell the house by auction and deposit the purchase-money with the Nazir of the Court. Conditions of sale were specially framed, some of which were, that the purchaser should deposit with the auctioneer 25 per cent. of the purchase-money, that the balance should be paid to the auctioneer within 15 days of the date of sale that the purchaser might require the certificate of sale within 15 days of the date of sale, and that on payment of the purchase-money the purchaser would be entitled to possession and to a conveyance executed by all the parties. The auctioneer advertised the property for sale, and on the 6th February, 1896, the auctioneer reported to the Court that on the 3rd February, 1896, the last day of the sale, "Woodlands" was purchased by Pirozsha (applicant), who had deposited Rs. 2,000 and signed an agreement to pay the balance and complete the sale within 15 days. The auctioneer, therefore, prayed that certificate of sale be granted to the applicant. On the 22nd February, 1896, Pirozsha sent to the pleader, mentioned in the conditions of sale, a cheque for the balance of the purchase-money with instructions not to pay the money till the conveyance was executed. The pleader gave the cheque to the auctioneer, asking him not to cash it at once. The pleader then took steps for the preparation of the conveyance, which

Auction-sale—*continued.*

was finally approved of by the parties. The auctioneer kept the cheque to himself; but he finally cashed it and deposited the sum in the Bank of Bombay. In the meanwhile, Pirozsha obtained possession of "Woodlands," repaired it and let it for the hot season to a tenant. He then pulled down "Woodlands" and built on its site one or two new houses at a very large expenditure. On the 1st March, 1898, Framji, one of the parties in the partition-suit, applies to the Court reciting the sale effected by the auctioneer, that the purchase-money was not paid according to the conditions of sale nor was the sale confirmed by the Court, that the purchaser did not pay the money in time nor did he obtain a conveyance, and prayed that the whole transaction be declared useless and a division of the whole property be made. The Subordinate Judge held that as the balance of the purchase-money was not paid within 15 days, there had been no valid sale, and also that the possession of the property was not given to the purchaser. He, therefore, ordered the property to be resold: *Held*, (1) that in fact the purchaser did obtain possession and that Framji was aware that the purchaser being in possession had spent large sums of money on building one or two new houses; and as the condition of sale was that "upon payment of the purchase-money the purchaser shall be entitled to possession" the point of possession being *given* was of no weight; (2) that the purchaser cannot be regarded as a trespasser; because he did pay the whole purchase-money to the auctioneer, to whom according to the conditions of sale he was to pay it; (3) that the order of re-sale passed by the Subordinate Judge should be reversed and the certificate of sale should be granted to the purchaser. PIROZSHA v. JEEVANBAI, **1 Bom. L.R. 446.**

(6)—*Transfer of Property Act, s. 54—Rights and liabilities of bidder and auctioneer.*—So far as the rights and liabilities of vendor and purchaser are concerned, an auction-sale of immoveable property is not different from a contract of sale under the Transfer of Property Act. As soon as the auctioneer, acting as the agent of the vendor, lets the hammer fall and thus accepts the bid of the purchaser, a contract of sale is created. It does not create of itself any interest in or charge on such property. The vendor becomes a trustee for the purchaser of the estate and the vendee acquires a right *in personam* against the vendor, not a right *in rem* affecting or binding the property of third parties. But the legal estate in the property passes only after the execution of a deed of conveyance and if the property is injured before such execution, the purchaser takes the risk. BUDU SINGH v. HARDIAL SINGH; **52 P.R. 1897.** [*R.*, 45 P.R. 1902=42 **P.L.R.** 1902; *Cited*, 45 P.R. 1902=42 P.L.R. 1902.]

—Auction-purchaser how far a representative of decree-holder or judgment-debtor—Mortgage decree or money-decree—Party to suit or stranger as purchaser—Difference—*See* **CIV. PRO. CODE, 1908, s. 47, 8 Ind. Cas. 429.**

Auction-sale—*concluded.*

—when complete—*See* CIV. PRO. CODE, 1908. O. XVI, r. 12, 7 Ind. Cas. 100=7 A.L. J. 1152.

See CIV. PRO. CODE, 1908, O. XXI, rr. 71, 77, 84, 86, 7 C. 337=9 C.L R. 23.

--Execution—Auction-sale of equity of redemption—Representation by auctioneer—Purchase under misapprehension induced by such representation — Duty of Court — *See* CONTRACT ACT, 1872, s. 19, 6 A.L.J. 34, P.C. = 13 C.W.N. 249=5 M.L.T. 126=9 C.L.J. 165= 11 Bom. L.R. 227=36 C. 323=19 M.L.J. 115 =5 L.B.R. 25=1 Ind. Cas. 122=36 I.A. 32.

—Guardian, purchase by, of property at auction—Sale in execution of decree against minor —Trustee purchasing trust property at auction-sale without permission of Court—Trusts Act, 1882, ss. 53, 88—*See* GUARDIAN — MISCELLANEOUS, 6 O.C. 252.

—Auction-purchaser obtains no guarantee of title—*See* LIMITATION ACT, 1908, art. 134, 7 Ind. Cas. 570.

—Date of auction-sale under art. 166, Limitation Act—What date meant—*See* LIMITATION ACT, 1908, art. 166, 1 P.W.R. 1909=1 Ind. Cas. 12.

—Conditions of sale at an, should be circulated among the intending purchasers—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 6 Bom. L R. 557.

—Suit for possession on basis of purchase in Court-auction—Limitation—*See* POSSESSION —ADVERSE POSSESSION, 9 Ind. Cas. 271= 9 M.L.T. 359.

See SALE—SALE BY AUCTION, 16 C. 702.

—Agreement not to bid against one another, nature and effect of—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 6 C.L. J. 111.

—Title of purchaser at—when commences—Liability to pay Government revenue—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 2 C. 141, F.B.

Auditor.

—Auditor of the company—Damages for misfeasance or neglect, when officer can be held liable for—*See* LIMITATION ACT, 1908, art. 36, 18 A. 12=A.W.N. 1895, 136.

Aulad.

See WILL—CONSTRUCTION, 114 P.R. 1900.

Aulad Dukhtari.

See HINDU LAW—MISCELLANEOUS, 6 O.C. 132.

Aulad Pisari.

See HINDU LAW — MISCELLANEOUS, 6 O.C. 132.

Authorised Agent.

—Appeal in forma pauperis—Presentation of appeal by authorised agent and not by

Authorised Agent—*concluded.*

advocate, vakil, attorney or suitor—Appellant a pardanashin woman—*See* LETTERS PATENT, HIGH COURT—N.W.P. 1865, s. 8, 24 A. 172 =A.W.N. 1901, 203.

Authorities, Local—Loan (Amendment).

See ACT V OF 1907.

Ava.

—Kingdom—if territory of Native prince or state—*See* CIV. PRO. CODE, 1908, O. XXVI, rr. 5, 7, 2 B.L.R. A.C. 73=10 W.R. 385.

Average.

See BEN. ACT VIII OF 1885, s. 30 (*a*), 21 C. 986.

Award.

See APPEAL—ARBITRATION.

See ARBITRATION.

See CIV. PRO. CODE, 1908, sch. II.

(1)—*Award, construction of.*—The principles which would apply in the construction of an award settled by counsel or a solicitor in England, should not be applied in construing an award drawn up by an unprofessional arbitrator in India. The construction of the award should be in accordance with what may reasonably be supposed under the circumstances of the case to have been the intentions of the arbitrator. ABDUL MAJID KHAN v. KADRI BEGAM, **20 A. 245=A.W.N. 1898, 34.**

(2)—*Arbitration awards—Effect of award—Signature of award by parties.*—*Held* that the parties having signed the award of arbitration must be bound by that until it is legally set aside and, until it is set aside a suit to enforce rights irrespective of the award is not maintainable. GOLAM ALI KHAN v. IMAM ALI KHAN, **2 Agra 224.**

(3)—*Arbitration—Award—Mutuality of obligation of parties.*—A person, who has not consented to be bound by the terms of an award, cannot be bound by it and cannot claim any benefit under it. HIRA SINGH v. GANGA SAHAI, **6 A. 322, P.C.=11 I.A. 20.** (*On appeal from* **2 A. 809.**) [*R.*, 12 A. 1, F.B., 10 C.L.J. 41.]

(4)—*Boundary dispute—Arbitration—Award —Ambiguity—Acceptance.*—A dispute arose between two adjoining proprietors as to the boundary of two estates; thereupon both the proprietors joined in a petition to the Settlement Officer to appoint arbitrators for the purpose of settling the boundary between the estates. In pursuance of this request, the Settlement Officer appointed arbitrators who made an award in which they said: "Having in the presence of karpurdazes of both the parties, taken down the depositions of the witnesses of both parties on the disputed locality, and made investigation and inquiry on the spot, and having observed the aspect of the place, we have ascertained as follows."

Award—*continued.*

They then proceed to lay down the boundaries thus:—"Going along west from the high peak of Sathoo Pahar which is on the south of Lufshapara, one comes to a gurh called Rajgurh. On the south of it is Doobiadihi, in Mahomedabad. On the north of that gurh is Kolarkoonda, in Belputta. On the west of it is Perma hill, on the east, south and west is Mahomedabad. On the south is Belputta." At the end of the award, there was this statement: "Decision of the arbitrators confirmed," dated and signed by the Deputy Collector. Upon the award being made, both the parties petitioned the Settlement Officer to lay down solid brick pillars along the line settled by the arbitrators, in order that the boundary should remain a perpetual record of their rights. The Settlement Officer, without complying with this request, made the following order:—"That, if the petitioners construct the pillars themselves, there will be no likelihood of objection hereafter. It is not necessary for the Court to pass any order in this matter." *Held*, (*a*) that both the parties had accepted and adopted the award; (*b*) that the arbitration was intended by both parties not merely to determine possession at the time, but to determine the right to the land between the parties and that the effect of the award was the same; and (*c*) that there was no such patent ambiguity on the face of the award that it cannot be enforced. RAMRUNJUN CHUCKERBUTTY v. RAMPROSAD DASS, **13 C.L.R. 26, P.C.**

(5)—*Award, execution of decree based on—Civ Pro Code (Act X of 1877), s. 526—Limitation—Inapplicability of art. 178 of the Limitation Act*—Before effect can be given to an award by execution proceedings, there must have been a judgment according to the award and a decree following theron. Also, the judgment-debtor against whom an order for execution has been obtained behind his back is not precluded from contending that there existed no decree which would be executed. *Held* also that, under the Codes of Civil Procedure, both of 1859 and of 1877, it is the duty of the Court to pass judgment on an award filed in Court, and it is not necessary for the Court to be set in motion, in order to do so. Consequently, such an application when made to the Court is not subject to the limitation prescribed by art. 178 or any other provision of the Limitation Act. ISHWARDAS JAGJIWANDAS v. DOSIBAI, **7 B. 316.** [*F.*, 30 B. 415=8 Bom. L. R. 218; *R.*, 7 B. 341; *D.*, 1 Bom. L.R. 84.]

(6)—*Award of arbitrators, maintenance granted in perpetuity under—Award, whether could be given effect to as a decree.*—The arbitrators who passed the award in this case had recognized the right of the grantees to maintenance and decided that their allowance should be increased because their family having become large, their allowance, which had from time to time varied, had become insufficient. It was sought to enforce this award as a decree, but it was held that that could not be done, since no Court could pass a decree fixing a grant of

Award—*continued.*

maintenance in perpetity. Also, the allowance could not have been intended by the arbitrators to continue beyond the lifetime of the parties, and, all such parties being dead, the award could no longer be given effect to. An allowance fixed by a decree as maintenance is ordinarily liable to be varied, if circumstances be established which render it equitable to so vary the amount. MADHAVRAV DESHPANDE v. RAMRAV DESHPANDE, **7 B. 151.**

(7)—*Arbitration—Refusal of arbitrator to act—Arbitrator's presence at meetings—Award of remaining arbitrators, whether legal—Civ. Pro. Code, s. 510.*—The presence of all the arbitrators at all meetings, and above all, at the last meeting, when the final act of arbitration is done, is essential to the validity of the award passed by them. When one of the arbitrators refuses to act, the only course open to the Court is to appoint a new arbitrator, or supersede the arbitration altogether and proceed with the case. An award passed by the remaining arbitrators would be invalid, and the Court cannot pass a decree in accordance therewith. NAND RAM v. FAKIRCHAND, **7 A. 523=A.W.N. 1885, 139.** (6 W.R. 95, 6 A. 468, *R.*) [*F.*, 1 O.C. 181; *Appr.*, 12 M. 113.]

(8)—*Arbitration awards—Ground for setting aside award—Delay in returning plea of jurisdiction or limitation.*—An award made by the consent of the parties cannot be set aside merely by reason of its having been sent in a week later than the date appointed when such delay is not owing to misconduct or corruption. When an award has been made, no plea of jurisdiction or limitation can be raised before the Court, which is to pass its decree according to the award. AMMEN CHUND v. MENDHOO KHAN, **1 Agra Rev. 53.**

(9)—*Partnership—Agreement to refer to arbitration—Power of Court in which award is filed—Act VIII of 1859, s. 326.*—Where the partners of a firm in their partnership-deed agreed to refer their disputes to arbitration, and the reference made in pursuance of this agreement gave the arbitrators a power to make partition, but omitted a power to sell, *held*, on the award being made a rule of Court, that the Court had no power, under s. 326 of Act VIII of 1859, to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground. CHUMIMONY DOSSEE v. NISTARINEE DOSSEE, **3 C.L.R. 357.**

(10)—*Arbitration award—Partition—Right of way—Easement of necessity.*—Where the house and lands of a joint Hindu family were partitioned by the Court according to an award made by an arbitrator to whom the parties had agreed to refer the matter, *held*, in a subsequent suit, that the Court could not go behind the award and allow one of the members of the family to claim a right of way from the family house to a public road, through the lands allotted by the award to another member, such right of way not having been granted by the

Award—*continued.*

award, and there being no such right of way of necessity. GOPAL CHUNDER ROY v. BROJENDRO COOMAR ROY, **3 C.L.R. 338.**

(11)—*Application to set aside award—Extension of time for applying to set aside award—Civ Pro Code, 1859, s. 324.*—In an application to set aside an order made by a Judge in chambers, extending the time (of ten days) for making an application under s. 324, Act VIII of 1859 to set aside an award on the ground of misconduct of one of the arbitrators and of the umpire :—*Held* that the words of the section being in their ordinary import obligatory, and there being nothing in the other parts of the Code to show that such construction was at variance with the intention of Legislature, and a similar provision having been held by the Courts in England to be imperative, that the application to set aside the award must be made within the ten days, provided the Court be then sitting, and, if not, on the first day of its sitting after that time, and that there is no power to enlarge the time to make such application. EDALJI SHAPORJI v. TULSIDAS SUNDERDAS, **1 Ind. Jur. N.S. 234=2 B.H.C. 285, 2nd Ed., 270.**

(12)—*Fraud.*—To set aside an award, there must have been some fraudulent suppression of evidence or other mal-practice of the successful party, which should be definitely stated in the plaint. HUR CHURN DASS v. HAZAREE MUL, **1 Ind. Jur. O.S. 12.**

(13)—*Setting aside award for inconsistency.*—An award given by arbitrators can be set aside for corruption or partiality, but not on the ground of inconsistency. DEBRAJ ROY v. KARTICK CHUNDER SIRCAR, **W.R. 1864, 183.**

(14)—*Civ. Pro. Code, 1859, ss. 322, 323, 324.*—Where by the terms of a reference to arbitration all matters in difference are referred to the arbitrator, the Court will not modify (s. 322) remit (s. 323), or set aside (s. 324) the award, on the ground that the arbitrator in his discretion has awarded damages to the plaintiff, and at the same time make him pay all the costs, when it is not shown that he exercised the discretion given him improperly. MOHENDRANATH BOSE v. NUSSEE MANGEE, **1 Ind. Jur. N.S. 224.**

(15)—*Arbitration—Refusal to affirm awar ground for—Appeal—Civ. Pro. Code, 1859 ss. 325, 327.*—The refusal to affirm an award, in a suit referred to arbitration, under the Code of 1859, amounts to a judgment upon the whole subject-matter of the suit ; and, so, an appeal lies therefrom. The reference having been made in a suit, there is no means of enforcing the award, if it were not confirmed. [*Diss.*, 11 C. 172 ; *R.*, 11 A. 375, 11 A. 377, Note.] The improper reception in evidence, by arbitrators, of a document not legally admissible, is not in itself a sufficient ground for refusing to confirm the award of arbitrators. HOWARD v. WILSON, **4 C. 231=2 C.L.R. 488.**

N.B—**B.L.R. Sup. Vol. 505=6 W.R. Mis. 83,** *distinguished* **on the ground that, there, the**

Award—*continued.*

application to confirm the award was made in a case referred (not in a suit, as in 4 C. 231, but) by agreement of parties.

(16)—*Ss. 521, 522, Civ. Pro. Code, 1882—Judgment on award—Appeal—Appointment of arbitrator—Award when not binding on defendant.*—An appeal lies against a decree passed in terms of an award, when the award is not valid and legal. (9 C. 905, 11 C. 37, 16 C. 482, 6 A. 174, 15 M. 348, *R.*) [*Overruled*, 29 C. 157, P.C.=6 C.W.N. 226=29 I.A. 51 ; *F.*, 25 C. 757, F.B., U.B.R. 1897—1901, Vol. II, 290, U.B.R. 1897—1901, Vol. II, 14; *R.*, 84 P.R. 1901 =112 P.L.R. 1901, 5 O.C. 13, 2 L.B.R. 105, 29 B. 285, 6 Bom. L.R. 1132, 10 C.W.N. 601 =2 C.L.J. 153, 33 C. 493.] In cases of arbitration where a person is appointed by two parties to exercise judicial duties, there should be *uberrima fides* on the part of all the parties concerned, in relation to his selection and appointment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. When the arbitrator is the retained pleader of the plaintiff, and when there is no disclosure of that fact before the appointment of the arbitrator, to the defendant who goes to arbitration consequently in ignorance of that fact, the award is not valid and binding on the defendant. KALI PROSONNO GHOSE v. RAJANI KANT CHATTERJEE, **25 C. 141.** [*R.*, U.B.R. 1897—1901, Vol. II, 13, 29 C. 278]

(17)—*Appeal—Jurisdiction of District Judge.*—Jurisdiction of a District Judge in respect of an appeal from the finding of the first Court on the question of misconduct by arbitrators. RAM YAD SINGH v. NIRANJUN KOOER, **22 W.R. 420.**

(18)—*One of the arbitrators not being present.*—Where one of the arbitrators was never present during the course of the arbitration, and only signed the award after completion, the Moonsiff was held to be justified in setting aside the award under Act VIII of 1859, s. 324, and the ruling of the High Court at 8 W.R. p. 171. RAM GUTTEE MUNDUL v. THAKOOR DOSS MUNDUL, **22 W.R. 418.**

(19)—*Arbitration — Setting aside award—Surmise—Revocation of reference—Civ. Pro. Code, s. 508.*—An award can be set aside only on the ground of corruption or misconduct on the part of the arbitrator, and not on the mere suspicion that he was partial. Where the parties have agreed to arbitration, and an order of reference has been made by the Court under s. 508, Civ. Pro. Code, neither of the parties could arbitrarily, and without proper reasons, withdraw from the agreement. NAINSUKH RAI v. UMADAI, **7 A. 273=A.W.N. 1885, 12.** (12 M. I.A. 190, *F.*) [*F.*, 10 A. 8 ; *D.*, 9 A. 253.]

Award- *continued.*

(20) — *Arbitration-award—Appeal — High Courts powers of revision.*—A judgment passed by a Munsiff in accordance with an arbitration-award is not subject to an appeal to the Judge. A judgment of a Judge reversing a judgment of the lower Court passed in accordance with an arbitration-award was accordingly set aside by the High Court, under its extraordinary powers of revision under the Charter Act, as passed without jurisdiction. *In the matter of the petition of* SHEIK ILAHI BAX, **5 B.L.R. App. 75 = 14 W.R. 33.** [*R.*, 18 A. 422.]

(21)—*Civ Pro. Code, ss. 514, 521, 522—Decree in terms of award—Appeal—Extension of time for presenting award—Evidence—Objection to award.*—S. 522 of the Code of Civil Procedure pre-supposes, the existence of an award as the basis of the decree, and it cannot apply to a case, in which there has been no award in law or in fact. [*F.*, 2 N.L.R. 81; *R.*, 18 M. 423, F. B., 20 B. 596, 25 C 757, F.B., 5 O.C. 13; *D.*, 17 B. 357.] An order made by a Court, upon an application for an extension of time presented within time, is not bad in law by reason of its being made after the expiry of the term which it purported to extend. [*Expl*, 15 M. 384.] It is not a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. SUPPU v. GOVINDACHARYAR, **11 M. 83.** [*R.*, 9 Bom. L.R. 757, P.C. = 6 C.L.J. 13 = 11 C.W.N. 841.]

(22)—*Civ. Pro. Code, s. 521—Absence of one of the arbitrators, effect of, on award.*—The presence of all the arbitrators at all the meetings being essential to the validity of the award, where the arbitrators were guilty of misconduct, one of them in absenting himself from the meetings and the others in examining witnesses in his absence, the award was held liable to be set aside as invalid. THAMMIRAJU v. BAPIRAJU, **12 M. 113** [*R.*, 1 O.C. 181, U.B.R, 1897—1901, Vol. II, 14.]

(23)—*Arbitration—Misconduct of arbitrators—Award, ground for setting aside*—Where the arbitrators held their first meeting without giving notice to the defendant, and sent a notice on that day that the next meeting would be held the next day, whereupon the defendant's attorney protested and asked the arbitrators not to proceed, as he intended to make an application to the Court to set aside the reference, and without answering the letter of protest and without taking any notice of it, the arbitrators made their final award, *held*, the arbitrators did not give the defendant a fair and reasonable opportunity of being heard, and were guilty of such misconduct as was sufficient to vitiate the award. [*F.*, 29 C. 278.] *Semble.*—The *ex parte* meeting was alone sufficient to warrant the Court in setting aside the award. SM. TOOLSIMONY DASSEE v. SM. SUDENI DASSEE, **3 C.W.N. 361.**

(24)— *Arbitrator taking evidence in the absence of opposite side—Misconduct-Validity of award—Setting aside of award—Civ. Pro. Code, 1882, s. 521.*—It is a well-established principle

Award—*continued.*

of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it. This proposition is subject to this qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration; and they may also expressly or by conduct, waive their objection to an irregular course of conduct on the part of the arbitrator. CURSETJI JEHANGIR KHAMBATTA v. W. CROWDER, **18 B. 299.** [*R.*, 73 P.W.R. 1910.]

(25)—*Civ. Pro. Code, 1882, ss. 508, 521, 514—Duty of Court directing reference to fix a date for delivery of award—Effect of failure.*—The rule laid down in s. 508 that a Court, directing an arbitration by its order of reference, shall fix a time for the delivery of the award, should be regarded as not mandatory but directory only. It amounts to no more than the imposition of a public duty on the presiding officer of a Court of justice, and any neglect of it, through mistake or error on his part, could not, under the last clause of s. 521, affect the substantiality of the proceedings of the arbitrators or their award. [*F.*, 18 M. 22.] Under s. 514, the Court, of its own motion or on the application of the parties, may extend the time for making the award, even after the time fixed therefor has expired. HAR NARAIN SINGH v. BHAGWANT KUAR, **10 A. 137 = A.W.N. 1887, 28** [*Doubted*, 2 N.L.R. 81.]

(26)—*Civ. Pro. Code, 1882, ss. 508, 516—Arbitration—Omission to fix time for making of award—Signatures of arbitrators.*—An award is not invalid merely because no time was fixed for the making of the award. S. 508 of the Civ. Pro. Code is only directory and not mandatory. (10 A. 137, *F.*) If all the arbitrators agree to an award, they need not sign it in the presence of each other. MUTHUKUTTI NAYAKAN v. ACHA NAYAKAN, **18 M. 22.**

(27)—*Civ. Pro. Code, s. 514 — Award—Extension of time.*—When a suit has been referred to an arbitrator, and the arbitrator fails to make the award within the appointed time, a subsequent extension of time at the request of the parties is not illegal, and the award of the arbitrator made after enlargement of time and within the time so enlarged is not invalid. LAKSHMI NARASIMHAM v. SOMASUNDARAM, **15 M. 384 = 2 M.L.J. 45.** [*F.*, 2 N.L.R. 81; *R.*, U.B.R. 1897—1901, Vol. II, 24.]

(28)—*Civ. Pro. Code, 1882, s. 514—Extension of time for making award on arbitration, power of Court to grant.*—Under s. 514 of the Civ. Pro. Code, a Court has power from time to time to extend the time for making an award. Such power may be exercised by the Judge at any time before the award is actually made, and whether before or after the expiry of the time previously limited for making the award.

Award—*continued.*

RAM MANOHAR MISAR v. LAL BIHARI MISR, **14 A 343=A.W.N. 1892, 18.** (18 I.A. 55=13 A. 300, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 24, 2 N.L.R. 81.]

(29)—*Civ. Pro. Code, 1882, ss. 508, 521—Delivery after time fixed—Validity of award.*—At the instance of both parties, a suit was referred to arbitration. The arbitrator made and completed the award within the time fixed, but did not file it in Court until two days after the time specified in the order for the purpose. *Held*, that the award was valid. The word "delivery" in s. 508 of the Code was used in the sense of making the award and not in that of filing it in Court. Under s. 521, it was not the filing of an award beyond the time fixed that invalidated it, but the omission to make the award within the period allowed. ARUMUGAM CHETTI v. ARUNACHALAM CHETEI, **22 M. 22=8 M.L J. 287.** [*F.*, 27 A. 459=2 A. L J. 201=A.W.N. 1905, 47, 89 P.R. 1907; *Rel. on*, 8 C.W.N. 916; *R.*, 26 A. 105.]

(30)—*Act VIII of 1859, ss. 315, 318—Award—Time for sending in award.*—It is necessary that a time should be fixed in the order of reference for the making of the award. Where, no time is fixed for sending the award in the order of the Court referring a case to arbitration, the award itself falls to the ground. GANGAGOBINDA v. KALIPRASANNA NAIK, **1 B L R.S.N. 18 (b)=10 W.R 206.**

(31)—*Civ. Pro. Code, 1859, s. 315—Time for delivery of award not fixed—Validity of award.*—Where the lower appellate Court omitted, in its order referring the case to arbitration, to fix a time for the delivery of the award, as directed by s. 315 of Act VIII of 1859, but both the parties permitted the reference to proceed and took part in the proceedings, without making any objection until after the award was delivered, and when the omission in the order of reference could work no injury to either party, the High Court saw no reason why the omission should be held to avoid the award. MUBARIK ALI v. KADIR BAKSH, **7 N W.P. 351**

(32)—*Order of appellate Court remitting case to original Court to pass decree upon award of arbitrator—Second appeal—Civ. Pro. Code, 1882, ss 2, 582—Award filed out of time, validity of—Power of appellate Court to refer to arbitration.*—Where an appellate Court passed an order directing a case, which had been referred to arbitration by the original Court, while the case was pending on the file of such appellate Court, to be sent back to the original Court with orders to pass a formal decree in accordance with the award of the arbitrator, *held*, such order amounted to a decree under s. 2 of the Civ. Pro. Code, so that a second appeal would lie therefrom. Where an award was filed after the time fixed by the Court, such period not having been enlarged, *held*, such award was bad in law; and an order by the Court recalling the record after the expiry of the time fixed could not be taken as an indication of the enlargement of the time. [*R.*, 13 B. 119.]

Award—*continued.*

Semble.—An appellate Court can refer a case to arbitration at the instance of parties under s. 582 of the Civ. Pro. Code, 3 M. 78, *approved* and 12 B.L.R. 266, *distinguished*, on the ground that it was decided under the older Codes, the corresponding sections of which were not so wide as s. 582 of the Code of 1882. BHUGWAN DASS MARWARI v. NUND LALL SEIN, **12 C. 173.** [*F.*, 18 C. 507.]

(33)—*Civ. Pro. Code (XIV of 1882), s, 521, meaning of the word 'made' in—Delivery of award within fixed period.*—The provisions of ss. 508 and 514 of the Code of Civil Procedure contemplate the 'delivery' of the award passed by the arbitrators on a reference made to them pending a suit. The rule, under s. 521, that no award shall be valid unless 'made' within the *period fixed by the Court*, must therefore be taken to require that the award must not only have been made and signed by the arbitrators, but also, must have been 'delivered' within that period. The award, in the present case, therefore, which was signed by only two out of three arbitrators within the time fixed for its delivery in a complete state, and was not filed till the day after the expiry of the limit fixed by the Court, was held to be invalid as an award not *made* within the fixed period. BEHARI DAS v. KALIAN DAS, **8 A. 543=A.W.N. 1886, 179.** (*R.*, 22 M. 22, 26 A. 105=A.W.N. 1903, 205, 27 A. 459=2 A.L.J. 201=A.W.N. 1905, 47; *D.*, 13 B. 119.]

(34)—*Civ. Pro. Code, ss. 508, 514, 521—Award invalid as not made within prescribed period, decree passed on, appeal lies from.*—The provisions of ss. 508 and 514 of the Code of Civil Procedure require that there shall be an express order of the Court fixing the time for delivery of the award, or for extending or enlarging such time. The mere fact that the Court has happened to pass a decree on such an award cannot be taken as affording a presumption that an extension of time had in fact been given. The award, in the present case, was invalid, as not having been made within the time prescribed by the Court, and there was, consequently, no award for the Court, to pass a decree on. The decree passed, under the circumstances, was therefore not one made in accordance with an award, so as to preclude an appeal being preferred against it. CHUHA MAL v. HARI RAM, **8 A. 548=A W.N. 1886, 179.** (6 A. 174, *R.*) [*F.*, 30 A. 169=5 A.L.J. 144=A.W.N. 1908, 59; *Appl.*, 13 A. 300=18 I. A. 55; *R*, 84 P.R. 1901=112 P.L.R. 1901, 26 A. 105=A.W.N. 1903, 205, 89 P.R. 1907.]

(35)—*Civ. Pro. Code, ss. 508, 521, 622—Award made after time allowed—Validity of.*—In all cases, an award, if it is to be valid, must be made within the time allowed by the Court, unless such time has been enlarged at the request of the parties or on the Court's own motion SIMSON v. VENKATAGOPALAM, **9 M. 478.** [*Expl.*, 11 M. 85; R., 13 B. 119; *D.*, 15 M. 384.]

Award—*continued.*

(36)—*Matter in dispute referred to arbitration—Award made but not filed within time allowed by Court—Validity.*—Where the matter in dispute was referred to arbitration by the Court, and the arbitration made but did not file the award within the time allowed by the Court, *held* that the award was valid, although it was not filed within the time. UMERSEY PREMJI v. SHAMJI KANJI, **13 B. 119.** [*F.*, 8 C.W.N, 916, 27 A. 459=2 A.L.J. 201=A.W.N. 1905. 47, 89 P.R. 1907 ; *Appl.*, 22 M. 22; *R.*, 26 A. 105.]

(37)—*Award decree upon—Appeal—Civ. Pro. Code, 1882, s 522—Arbitration—Parties not all joining in reference—Award, validity of.*—The question whether, under s. 522 of the Civ. Pro Code, an appeal lies against a decree given in accordance with an award, must depend upon whether the award, upon which the decree was based, was a valid and legal award. (9 C. 905, 6 A. 174, *F.*) [*R.*, 16 C. 482, 20 B. 596, 24 C. 908, F.B., 25 C. 141, 25 C. 757, 27 C. 61.] Where an objection to the validity of an award, on the ground of all the parties to the suit not having joined in the reference, was overruled, and judgment passed in accordance with the award, *held*, an appeal would lie from such decree dismissing the objection and confirming the award. (5 W.R. 130, 6 W.R. 25, 10 W R. 463 and 4 C L.R. 65, laying down that an award, though all the parties may not have joined in the reference, is nevertheless good, *not entirely approved*). The Court, however, did not differ from the above decisions in this suit, under the special circumstances of the case. JOY PROKASH LALL v. SHEO GULAM SINGH, **11 C. 37.** [*R.*, 9 C.W.N. 873.]

(38)—*Award—Submission to arbitration by one of several defendants only—Validity.*—When a suit was instituted for possession against A and his tenants, the plaintiff and A agreed to refer the matter to arbitration and an award was made by the arbitrators. *Held* that the fact of the tenants not having joined in the submission to arbitration did not vitiate the award and that, as between the plaintiff and A, the award was final. BISHOKA DASIA v. ANUNTO LALL PANI, **4 C.L.R. 65.** [*Doubted but F.*, 11 C. 37.]

(39)—*Arbitration—Reference of pending suit to arbitration.*—Where plaintiffs claim a 6-anna share of land belonging to a mouzah, and 262 beegahs are found to belong to that talook, and, pending the suit, all the defendants, except one *O*, agree to arbitration, upon which it is found that 44 beegahs more belong to the plaintiffs. *Held* that plaintiffs may recover as against all the defendants, including *O*, a 6-anna share in 262 beegahs, and as against all, except *O*, a 6-annas in the 44 beegahs. *Quære.*—What is the effect of an award arrived at in a pending suit referred to arbitration by an order of Court otherwise than by consent of all the parties? DOORGA CHURN THAKOOR v. KALLY DOSS HAZRAH, **10 W.R. 463.**

Award—*continued.*

(40)—*Appointment of arbitrators not asserted to—Judgment based on arbitration-award—Binding character of decree on non consenting parties—Number of arbitrators.*—Where the appointment of arbitrators is not consented to, and the judgment proceeds on the arbitration award, the decree is not binding on the non-consenting parties. Where four arbitrators are appointed and only two act, the award is invalid. RASH BEHARY ROY v. DOORGABUR ROY, **14 W.R. 211.**

(41)—*Suit on accounts stated—Arbitration, Reference to—Decree varying award—Silence when decree pronounced—Validity of award.*—An appeal will lie from a decree which varies an award by containing a direction for payment by instalments, which is not contained in the award. The plaintiff in the suit, which was one on accounts stated, agreed to refer to arbitration the question whether the accounts were correct or not. It was unnecessary for the arbitrators to determine whether the account stated was proved. The decree was passed on the very day the award was filed. The plaintiff was not estopped from taking objections to the award by reason of his silence when the decree was pronounced. The award was held invalid, among other reasons, because it purported to be the award of four persons, whereas the order of reference was addressed only to three. PHIRAN v. BAHORAN, **7 N.W.P. 367.**

(42)—*Agreement of reference to arbitration—Appeal—Reference not providing for difference between arbitrators—No difference actually—Award not bad.*—Where the parties to a suit come into Court, and agreed to a reference to arbitration, the case when so settled, is not open to appeal. The mere absence of a clause in the order of reference providing for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference ; nor can an award be considered null and void on account merely of a difference of opinion. GOUR CHUNDER BHUTTACHARJEE v. SODOY CHUNDER NUNDEE, **17 W. R. 30** [*F.*, 8 C.L.J. 475.]

(43)—*Arbitration—Award by majority—Refusal of minority to act.*—A decision by a majority of arbitrators, to whom the parties have agreed to refer their suit for arbitration, is not binding on them, when two of them refuse to act, and there is no provision that the decision of the majority should prevail. GURUPATHAPPA v. NARASINGAPPA, **7 M. 174.** [*R.*, 12 C.P.L.R. 112.]

(44)—*Arbitration—Willingness of arbitrator—Civ. Pro. Code, s. 510.*—One of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator, to undertake the duty assigned to him. And the finality of an award is based entirely upon the principle, that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the

Award—*continued.*

disputes referred to them. So when arbitrators refuse to act, but subsequently make an award in obedience to an order of the Court directing them to proceed, their proceedings are null and void. SHIBCHARAN v. RATIRAM, **7 A. 20**= **A.W.N. 1884, 212.**

(45)—*Civ. Pro. Code, s. 522.*—S. 522, Civ. Pro. Code, which provides that no appeal shall lie from a decree upon an award, except in so far as the decree is in excess of, or not in accordance with the award, assumes that the award has been regularly and properly arrived at by arbitrators duly appointed. PUGARDIN v. MOIDIN, **6 M. 414.** [*R.*, 15 M. 348, 74 P. R. 1894]

(46)—*Finality of award—Appeal—Civ. Pro. Code (Act VIII of 1859), s. 327=s 525 of the Code of 1882.*—The circumstances that four only out of five arbitrators make an award and that they, within a short time after the award, express a doubt as to the correctness of their decision by intimating their readiness to re-consider their decision, are extremely strong and valid objections to the finality of the award tending to show that it was not a valid one. An appeal lies against a decree passed on such an award. BOONJAD MATHOOR v. NATHOO SHAHOO, **3 C. 375=1 C.L.R. 455.** (8 B.L.R. 315 *Cons.*) [*Appl.* 3 A. 427; *R.*, 7 C. 136=8 C.L.R. 505, 4 A. 283, 6 M. 414, 10 C. 74=13 C.L.R. 14, 18 A. 422, F.B.]

(47)—*Judgment upon award—Appeal—Valid award, example of*—A judgment upon a legal award of arbitrators is final; but where the legality of the award is in question, a judgment in accordance therewith is appealable. [*Appr.* 11 C. 37; *R.*, 15 M. 348, 17 B. 357, 20 B. 596, 25 C. 141, 5 O.C. 13.] Where a reference to the arbitration of five persons authorised the absence of any two of them, and the pleaders on either side in the case, who were among the arbitrators, ceased to sit as arbitrators with the consent of the parties, but argued the matter before the other three arbitrators, *held*, the award made by the other three was a valid one. DEBENDRA NATH SHAW v. AUBHOY CHURN BAGCHI, **9 C. 905=12 C.L.R. 525.**

(48)—*Arbitration—Agreement not providing for difference of opinion—Appointment of umpire by Court—Award not concurred in by one arbitrator—Decree—Appeal—Civ. Pro. Code, ss. 508, 509, 511, 523.*—In an agreement to refer matters to arbitration, only two arbitrators were named, and no provision was made for difference of opinion, by appointing an umpire or otherwise. An application having been made for filing it in Court, it was numbered and registered as a suit, and an order of reference was made by the Court. The arbitrators not agreeing, an umpire was appointed by the Court on the application of one of them. An award was eventually made by the umpire and one of the arbitrators, without the concurrence of the other, and submitted to the Court which passed a decree in conformity with it. *Held*—(*a*) that the decree was appealable, as there was no legal award such as the law contemplated (6 A. 174 *R.*) as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties; (*b*) that the Court could not provide for differences of opinion between the arbitrators under the provisions of s. 509 and the other sections preceeding s. 523, Civ. Pro. Code, for these sections are applicable to cases coming under s. 523, only in so far as they are consistent with the agreement filed under that section. MUHAMMAD ABID v. MUHAMMAD ASGHAR, **8 A. 69**= **A. W. N. 1886, 2.** [*D.*, 8 C. L. J. 475.]

(49)—*Civ. Pro. Code, 1859—Submission to arbitration—Umpire to be selected from persons named in submission—Appointment by Court as umpire of person not named in submission—Validity.*—A party to a suit submitted to arbitration the matters in dispute between himself and the other parties thereto, on the terms that an umpire should be selected from seven persons whom he named. These terms were not objected to by the other side. Arbitrators were agreed upon and one of the seven persons named in the submission, was appointed an umpire. But the umpire and some of the arbitrators declined to act. Fresh arbitrators were then chosen, but no umpire; and the arbitrators being equally divided in their opinion on the case, the Court of its own motion appointed as umpire a person not named in the submission. The party, who submitted to arbitration, objected to the appointment of the umpire, but the Judge overruled the objection and passed judgment in accordance with the umpire's award. *Held* that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under s. 319, Civ Pro. Code was controlled and limited by that stipulation; and that, as the umpire appointed was not one of the seven persons named in the submission, there was no valid award. C. D. BARRACHO v. A. D. SOUZA, **7 M.H.C. 72.**

(50)—*Arbitration—Awards—Award by umpire and one arbitrator—Refusal of arbitrator to attend.*—*Held* that an award made by one of the arbitrators and the umpire in the absence of second arbitrator who declined to attend was not a valid award. BUSUNT RAI v. GRIDHAREE SINGH, **3 Agra 93.**

(51)—*Civ. Pro. Code, ss. 521—Power to set aside an award.*—A Court has no power to set aside an award, except for some one of the causes set forth in s. 521, Civ. Pro. Code. KUPU v. VENKATARAMAYYAR, **4 M. 311.**

(52)—*Disagreement among arbitrators.*—Partial disagreement of two arbitrators does not nullify their award as a whole. SHEIKH PONAOOLLAH v. SHEIKH ZUMEEZOODDEEN, **2 W.R. 32.**

(53)—*Arbitration-award—Act VIII of 1859, s. 325,*—Applying the principle that every judicial act which is done by several Judges,

Award—*continued.*

ought to be completed in the presence of the whole of them, it may be said that an award of arbitrators to be legal must be completed and signed by each in the presence of the whole of them. An arbitration-award is not legal, if not signed by the arbitrators sitting together at one place and at the same time. *In the petition of* MAHARAJA SIR JAI MANGAL SINGH BAHADUR, **3 B.L.R.A.C. 82=11 W. R. 433.** (9 W.R. 29, *Appl.*)

(54)—*Act VIII of 1859, s. 327—Arbitration—Award.*—If on a reference to arbitration, the case has been regularly heard by all the arbitrators sitting together, and an award has been drawn up and signed by them, the mere omission of the arbitrators to sign the award at the same time and in each other's presence, does not invalidate the award. BHABASUNDARI DASI v. MAKHUNLAL DEY, **8 B.L.R. 128.** [*R.*, 18 M. 22.]

(55)—*Arbitration—Award—Act VIII of 1859, s. 325—Objections.*—An award should be a single instrument complete in itself, signed conjointly by the arbitrators, and in the presence of each other. An arbitrator should not allow documents entrusted to him by the Court to be removed from the *nathi* and an award returned should be accompanied by all books, etc., pertaining to it. [*Cons.*, 8 B.L.R. 128; *Expl.*, 7 C. 166=8 C.L.R. 505; *R.*, 17 C. 832. 8 B.L.R. 315=15 W.R. F.B. 9.] Under s. 325, a Judge cannot pass judgment till all objections to the award have been disposed of, or within 10 days of the submission of the award. MAHARAJA SRI JAI MANGAL SINGH v. MOHAN RAM MAWARI, **8 B.L.R. 130, Note=12 W.R. 397=8 B.L.R. 319, Note.**

(56)—*Arbitration—Award arrived at before withdrawal of party from submission—Fair copy of award subsequently made—Validity of award.*—Where a valid award has been made, its validity cannot be impeached because the arbitrators choose subsequently to do an act required neither by the law nor by the terms of submission. The submission to an arbitration contained no specification of any particular method of awarding. The arbitrators, having arrived at a decision, prepared a rough draft of the decision and dated and signed the same. Subsequent to this and before a fair copy of the awad was made, the defendant intimated to the arbitrators that he withdrew from the submission. The fair copy bore the same date as that of the rough draft, but was signed by only four out of the five arbitrators. *Held* that the arbitrators had come to a decision upon the matters submitted to them previously to the withdrawal of the submission. The affixing of the same date to the fair copy as that of the original rough draft showed clearly that the arbitrators conceived their purely judicial functions to have ended on that date. There was a valid award binding upon the parties. KULA NAGABUSHANAM v. KULA SESHACHALAM, **1 M.H.C. 178.**

(57)—***Award not signed by all arbitrators.***—An award is illegal where it is not signed by

Award—*continued.*

all the arbitrators, and there has been no agreement to abide by the decision of the majority, or that the voice of the umpire should prevail. MEM ROY v. BHARUT ROY, **22 W.R. 129.** [*R.*, 25 W.R. 376]

(58)—*Arbitrator basing his award on proceedings in previous enquiry.*—Where an arbitrator imports into his proceedings a previous enquiry alleged to have been made by him, and relies upon admissions made in the former proceedings, his award is held to be bad, and the decision based upon it is to be set aside. KANHYE CHAND GOSSAMEE v. RAM CHANDER GOSSAMEE, **24 W.R. 81.** [*R.*, 12 C.L.R. 564.]

(59)—*Objection in special appeal taken for first time at hearing—Arbitrator's proceaure.*—Where, in a suit decreed on an award, an objection vitally affecting the arbitrator's procedure was for the first time urged at the hearing, not having been preferred in the lower Court and even in the memorandum of special appeal, *held* that the Court could not ignore it. WALIUL-LA v. GHULAM ALI, **1 A. 535.**

(60)—*Civ. Pro. Code, s. 522—Decree on award—Appeal—Award—Legality of—Reference to suit.*—The effect of s. 522, Code of Civil Procedure, is, that it is not enough for the Appellate Court to satisfy itself as to the mere correspondence of the decree and the award, but the Appellate Court must look so far behind the decree as to satisfy itself that the award is a legal award. [*R.*, 74 P.R. 1894, 18 A. 422, 25 C. 141, 22 M. 172, 5 O.C. 13.] The legality of an award is not affected because the arbitrator referred the parties to a separate suit with reference to certain matters in which he found the parties had a common interest. VENKAYYA v. VENKATAPPAYYA, **15 M. 348.**

(61)—*Arbitration—Submission—Award not disposing of all the matters referred—Consent of parties.*—The ground for holding an award to be invalid on account of its not disposing of all the matters referred, appears to be that there is an implied condition in the submission of the parties to arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators. MAKUND RAM SUKAL v. SALIQ RAM SUKAL, **21 C. 590, P.C.=21 I.A. 47=6 Sar. 423.**

(62)—*Partner, whether can bind firm by submission to arbitration.*—Although a partner is entitled, on behalf of the firm of which he is a member, to sue for the recovery of a debt due to the firm, he has no power, without special authority, to bind the firm by submission to arbitration. It must be shown that the reference to arbitration was either an act necessary for, or such as is usually done, in carrying on the business of the firm. (*Stead* v. *Salt*, 1825) 3 Bing. 101; *Strangford* v. *Green*, 29 Car. II 2 Mod. 228, *R.*) RAM BHAROSE v. KALLU MAL, **22 A. 135=A.W.N. 1900, 12.** [*R.*, 103 P.L.R. 1902; *D.*, 3 S.L.R. 5.]

(63)—*Suit to enforce Civ. Pro. Code—Award by Ecclesiastical authority.*—Even where the

Award—*continued.*

Code of Civil Procedure is in force it has been held that the special procedure relating to arbitration and awards is not imperative upon a plaintiff, but that he is at liberty to bring a suit to enforce an award. (*See* 4 M.H.C. 119). Much more would this be so where there is no special procedure for the pursose of making awards, decrees of Court. An award by Ecclesiastical authorities on a secular matter is not exempt from the usual rules regarding arbitration. MAUNG PU v. U DE WAINDA, **U.B.R. 1892—1896, Vol. II, 11.**

(64)—*Suit to set aside an—Grounds for impugning an award.*—The improper omission to take evidence vitiates an award. As stated in Russell on the Power and Duty of an Arbitrator, (7th Ed., 665): "The award may be impeached if the arbitrator make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case. There being *prima facie* ground for impeaching the award because of the rejection of evidence, it was incumbent on the other side to meet the objection and show that it was not well-founded. It is necessary in a country where arbitration is so frequently abused, to make sure that when a *prima facie* case is established against the validity of an award it is conclusively rebutted. MA THAN v. MAUNG PYO, **U B.R. 1892—1896, Vol. II, 13.** [*R.*, U.B.R. 1897—1901 Vol. II, 10.]

(65)—*Arbitration—Award of arbitrators—Ground for setting aside award.*—An award should not be set aside as invalid on the ground that the inquiry was somewhat perfunctory. Had there been an application to examine witnesses, and this had been refused, probably this procedure on the part of the arbitrators would have amounted to misconduct invalidating the award and making the reference voidable. The fact that the Buddhist law as administered in our Courts was not followed is not a good ground for setting aside the award. (18 I.A. 72, *R.*) The fact that the award does not follow strict law as to the fractions of partition is not a good ground for putting aside the award. It is often desirable that parties should resort to arbitration rather than come to Court. The arbitrators have local knowledge. The parties, their witnesses, and the arbitrators cannot fail to be usefully influenced by public opinion in their village, and such arbitration often affords a better means of getting at the truth of facts than a suit in a Court of law. It is therefore on this ground undesirable to lightly set them aside. Moreover, the agreement to refer to arbitration is a contract, and the award in the absence of good cause must be treated as a part of the contract. MA YU v. MA KALAMA, **U.B.R. 1892—1896, Vol. II, 15.** (9 A. 253, *R.*)

(66)—*Arbitration—Award of arbitrators.*—Where a reference to arbitration was made to four elders and no provision was made that, in case they did not agree, the award of a minority or of a majority should be binding, the award, unless made by all four elders, could not be enforced. MAUNG KAN v. MA HMWE CHON,

Award—*continued.*

U.B.R. 1892—1896, Vol. II, 18. [*F.*, 2 L.B.R. 105; *R.*, U.B.R. 1902—1903, Vol.II, Arbitration 1; U.B.R. 1897—1901, Vol. II, Arbitration 5.

(67)—*Arbitration—Award of arbitrators.*—A contract was made by the parties to refer the matter in dispute to three arbitrators, who were named, and it was provided that in case there was disagreement, the decision of the majority was to be binding on the parties. One of the arbitrators refused to have anything to do with the arbitration, and the other two, acting by themselves gave a decree in favour of the plaintiff-respondent in this case. It appears that the Judge considered that the clause providing that the decision of a majority of the arbitrators should be binding made is of no consequence whether one of the arbitrators refused to act or not. The District Judge before whom the case went on appeal took the same view *Held*, that an enquiry and decision by two of those persons in the absence of the third must be invalid. The enquiries, arguments, influence, and opinion of the absent arbitrator might be most material to the cause of, at any rate, one of the parties to the reference. Although the opinion of the majority was to prevail, all were to arbitrate, that is, to take part in the enquiry and decision. MAUNG KYE v. MAUNG THA ZI AUNG, **U.B.R. 1892—1896, Vol. II, 19.**

(68)—*Limitation.*—A general reference to arbitration in Upper Burma does not necessarily include a power to throw out a claim on the preliminary point of limitation unless the matter is expressly provided for. But if the reference can be taken as including the power of determining a preliminary point of limitation, there would still be an implied understanding that the question would be decided under the law in force in the country and not under a foreign or obsolete law. Unless it is shown to be otherwise it could not be in the contemplation of parties that their rights should be adjudicated upon in accordance with the provisions of any law other than that of the land. MA MIN KU v. MAUNG THA NYUN, **U.B.R. 1892—1896, Vol. II, 9.** [*R.*, 2 L.B.R. 110, U.B.R. 1897—1901, Vol. II, 24.]

(69)—*Act IV of 1840 (Bengal), award under—Its nature—Setting aside of.*—The award of a Magistrate under Act IV of 1840 (Bengal) on the fact of possession is conclusive on the point. The only way of setting aside the award is by proof of title. SHIB CHUNDER MULLICK v. MODHOO-SOO DUN CHATTERJEE, **1 W.R. 349.** [*F.*, 9 C.L.R. 305.]

(70)—*Act IV of 1840—Award under Act bars recovery of property attached in execution*—Where there has been an award under Act IV of 1840 (Bengal), *held* that it was a bar to the recovery of property attached in execution of a decree and that it obliged a party to bring his suit to set aside the effect of that award within three years from the date of that award. SHEIKH JAINNOO DDEEN AHMED v. AMEEROONISSA, **2 W. R. 182.**

Award—*continued.*

(71)—Award may be set aside in arbitration case if umpire has been appointed without consent of Court and parties. MAHABEER MISSER v. JUGGUR NATH MISSER, **25 W.R. 11.**

(72)—*Filing of award by arbitrator—No "application."* The act of an arbitrator, in handing an award to the proper officer to be filed, is notan "application" within the meaning of the Limitation Act. ROBERTS v. HARRISON, **7 C. 338=9 C.L.R. 209.** [*R.*, 8 A. 492. 8 A. 519, 13 A. 78.]

(73)—*Decree in form of award—Appeal—Procedure.*—There is no appeal from a decree, which is passed in terms of the award, except in the cases mentioned in the Act. Applications for extensions of the period for the submission of the award and orders thereon should be in writing. The Court should review its proceedings on the application of a party, prejudiced by the action of the Court, in curtailing the legal period in which objections to an award are to be delivered. MONJI PREMJI SAIT v. MALIYAKIL KOYASAN KOYA HUJI, **3 M. 69.** [*R.*, U.B.R. 1897—1901, Vol. II, 24.]

(74)—*Civ. Pro. Code. ss. 622, 525 and 526.*—The refusal to file an award, on an application under s. 525, Civ. Pro. Code, is an order and not a decree. No appeal lies against it, but the High Court can interfere under s. 622. [*Overruled*, 27 M. 255=14 M.L.J. 356.] An award in which the invalid portions are independent of, and separable from, the valid portions, is perhaps enforceable but not by summary proceedings under s. 526. MANAVIKRAMA v. MALLICHERRY KRISTNAN NAMBUDRI, **3 M. 68.** [*F.*, 27 A. 526=2 A.L.J. 416=A.W.N. 1905, 86; *Cons.*, 22 M. 299; R., 7 B. 316, 7 B. 341, 2 C.L.J. 80.]

(75)—*Civ. Pro. Code, 1882, ss. 508, 514, 521 (=sch. II, ss. 38. 15, new Code)—Award made after time fixed by Court, validity of.*—S. 508 is not merely directory, but is mandatory and imperative; for, otherwise, s. 521 which declares that no award shall be valid unless made within the period allowed by the Court, would be rendered inoperative. Under s. 514, the Court has power to extend the time for the delivery of the award, only so long as the award is not completed. The Court is not competent to exercise that power after the award was made and delivered. An award made after the time fixed by the Court for the delivery thereof, is invalid. (8 A. 548, *Appr.*) The fact that the Court happened to pass a decree on such an award cannot be taken as affording a presumption that an extension of time had in fact been given. The Court ought to take judicial notice of the invalidity of the award, notwithstanding that neither party has taken any objection thereto. RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR, **13 A. 300 P.C.=18 I.A. 55=6 Sar. 14.** [*F.*, 15 M. 384, 2 N.L.R. 81; *Cons.*, 16 B. 263; *Appl.*, 13 A. 400, 14 A. 347, 25 C. 141, 34 C. 941=11 C.W.N. 959=6 C.L.J. 237; *R.*, 22 M. 22. 14 C.P.L.R. 42, 8 C.W.N. 916, 84 P.R. 1901=112 P.L.R. 1901,

Award—*continued.*

26 A. 105=A.W.N. 1903, 205, 31 C. 849=8 C.W.N. 705, A.W.N. 1905, 47=27 A. 459=2 A.L.J. 201, 7 Bom. L.R. 688, 33 C. 498, 2 N.L.R. 121, 89 P.R. 1907, 30 A. 169=A.W.N. 1908, 59=5 A.L.J. 144, 3 S.L.R. 106; *D.*, 14 A. 343, 119 P.L.R. 1902=88 P.R. 1902, F.B.]

(76)—*Civ. Pro. Code, s. 525—Suit on award.*—When a plaintiff's application to have an award made a rule of Court is opposed by one of the defendants, and he is referred to a regular suit, and a suit is brought in the alternative on the award and on the merits, he must not be allowed to withdraw his prayer for a decree on the award, as he must succeed or fail on it, and, if it is not unenforceable, a decree should be passed in terms of the award. NARASAYYA v. RAMABADRA, **15 M. 474.** [R., 19 P.R. 1907=46 P.L.R. 1907.]

(77)—*Jurisdiction to examine award on grounds other than those specified in ss. 520 and 521, Civ. Pro. Code, 1882.*—The Court has jurisdiction to inquire into the genuineness of an award or its validity on grounds other than those specified in ss. 520 and 521 of the Civ. Pro. Code. CHINTAMALLYA v. THADI GANGIREDDI, **20 M. 89=7 M.L.J. 61.** [*F.*, 16 M. L.J. 474, 29 B. 621, F.B.; *R.*, 13 C.P.L.R. 53, 84 P.R. 1901=112 P.L.R. 1901; *D.*, 13 M.L.J. 275.]

(78)—*Award purporting to be considered award of arbitrators—Award really representing only settlement agreed to by parties.*—Where an award purported to be the result of a judicial consideration by the arbitrators themselves of the issues which they formulated on the statements of the parties and on the depositions of certain witnesses, whereas it was found that no evidence was taken and the arbitrators did not hold any sittings at all, and that the award was only an adoption of a settlement arrived at and signed by the parties to the reference, *held* that this did not prevent the award being valid and binding between the parties. GOBARDHAN DAS v. JAI KISHEN DAS, **22 A. 224=A.W.N. 1900, 52.** [*R.*, 1 S.L.R. 160.]

(79)—*Civ. Pro. Code, 1882, ss. 520, 521, 526—Award, when Court could refuse to file.*—S. 526 of the Civ. Pro. Code, requires that not only should one of the grounds mentioned in ss. 520 or 521 be alleged, but it must also be established. It is only when the alleged ground has been "shown," that is, proved to the satisfaction of the Court, that the Court should refuse to file the award. JAGAN NATH v. MANNU LAL, **16 A. 231=A.W.N. 1894, 60.** (9 C. 575, 6 B. 663, *F.*; 10 C. 74, 9 C. 557, *Diss.*) [*R.*, 17 A. 21; 18 A. 422, 18 A. 414=A.W.N. 1896, 116, 13 C.P.L.R. 53.]

(80)—*Civ. Pro. Code, Ss. 510, 521, 525, 526—Application to file award—Court-fee.*—An application for enforcing an award under s. 525 Civ. Pro. Code, is not considered a suit, though it is to be numbered and registered as a suit, and might be stamped as an application. PALUT BHAGUT v. MONOHUR BHAGUT, **13 C.L.R. 171.**

Award—*continued.*

(81)—*Civ. Pro. Code, Act VIII of 1859, s. 327—Award—Summary enforcement of rights arising under award.*—Rights arising under an award are on the same footing as other rights except in so far as the Legislature has otherwise provided; and the provision in the Civ. Pro. Code of 1859, enabling a summary enforcement of such rights, contained nothing indicating an intention to bar the ordinary remedy by suit where an application for the summary enforcement had been made and refused. KOTA SEETAMMA v. KOLLIPURLA SOOBIAH. **8 M.H.C. 81.** [*R.*, 21 C. 213, 18 M. 423, F.B.]

(82)—*Withdrawal of party, no ground for refusing to file award—Appeal—Lower Court ordering award to be filed.*—Revocation of assent by one of the parties to an award is not a sufficient cause for refusing to file the award. (3 M.H.C. 183, *F.*; 12 M.I.A. 112, *Appr.*) [*F.*, 8 M.H.C. 46.] No appeal lies from the order of the Civil Court ordering an award to be filed. SANTAIYA v. RAMARAYA, **7 M.H.C. 257.**

(83)—*Award of arbitrators directing partition, signature of parties by way of assent to—Chargeable as instrument of partition.*—An award of arbitrators directing division of property between plaintiff and defendant in this case, who stood in the relation of nephew and uncle, happened to be signed by the arbitrators and by the interested parties by way of assent to its terms. The award so signed was held to amount to an instrument of partition and to be chargeable with stamp-duty accordingly. AMARSI v. DAYAL, **9 B. 50.** [*F.*, P.L.R. 1900, p. 459; *R.*, 6 C.P.L.R. 95, 160 P.L.R. 1906.]

(84)—*Hindu law—Disqualified heir—Inheritance.*—A person who is not a party to an award, is not bound by it, and cannot claim any benefit under it. An award which is manifestly against the law cannot deprive a person of his legal rights nor confer on him rights which the law does not give him. An award which decides a right of inheritance in favour of a person disqualified under Hindu law, as against another person assenting to such award, cannot be construed into a gift by the latter to the former, for there could be no gift of property which is decided *not* to belong to the donor. A person, not a party to an award, cannot be said to be represented in it, by his brother who has been adopted into another family. GANGA SAHAI v. HIRA SINGH, **2 A. 809, F.B.**

(85)—*Award directing execution of conveyance of immoveable property—Attachment after filing award—Decretal order enforcing award—Execution of conveyance in pursuance of order—Private alienation—Civ. Pro. Code, 1877, s. 276.—By the Full Bench.*—Where subsequent to the passing of an award directing the execution of a deed of conveyance of certain immoveable property, such property is attached in execution of a decree, the execution of the conveyance in pursuance of a decretal order passed by the Court in accordance with the award

Award—*continued.*

subsequent to the attachment, is not a private alienation of such property (within the meaning of s. 276) which would be void as against a claim enforceable under the attachment. QUARBAN ALI v. ASHRAF ALI, **4 A. 219, F.B.** (N.W.P., 1869, p. 81, *Appr.*) [*R.*, 22 P.L.R. 1905.]

(86)—*Refusal to file award under s. 525, Civ. Pro. Code (1882)—Effect—Contention that an award was invalid for the party, in whose favour it was made, never applied to file it, not sustainable.*—The refusal of an application for the filing of an award, under s. 525, Civ. Pro. Code, merely leaves the award to have its ordinary legal validity; and it cannot be contended that an award is not to be relied on as a defence in a suit relating to the subject-matter dealt with by it only, because such an application has not been granted. Where separable claims, namely, a claim to share property by right of inheritance, and a claim for the office of lambardar, had been disposed of, on the reference of the present parties, without the intervention of a Court, by the award of an arbitrator between them, and an application under s. 525, Civ. Pro. Code, had been rejected, for the reason, among others, that the claim for the office of lambardar was not a matter of civil jurisdiction, *held*, however, that the present suit, which was based on the claim to share property by right of inheritance, was barred by the award made. MUHAMMAD NEWAZ KHAN v. ALIM KHAN, **18. C. 414, P.C. = 18 I.A. 73 = 6 Sar. 26.** [*F.*, 11 Bom. L.R. 20, 33 B. 401 = 11 Bom. L.R. 406, 13 M.L.J. 275; *Appr.*, 14 M.L.J. 356; *Cons.*, 25 C. 757, F.B.; *R.*, 17 A. 21, F.B. = A.W.N. 1894, 187, 28 A. 21 = 2 A.L.J. 450 = A.W.N. 1905, 165, 9 O.C. 205, 33 C. 881 = 4 C.L.J. 162, 4 L.B.R. 130.]

(87)—*Award on one point only—Remission to arbitrator—Refusal by him to act—Procedure.*—Where plaintiffs and defendants claimed under the same landlord and the question between them was which of the two had the better title to the land in dispute, the case cannot be concluded by the arbitrator's finding upon the question of possession alone out of the several points referred to him, and a Court will be acting rightly, on the arbitrator refusing to complete the award, in deciding the case itself. JANARDEN MUNDUL DAKNA v. SAMBHU NATH MUNDUL, **16 C. 806.**

(88)—*S. 522, Civ. Pro. Code, 1882—Illegal award—Appeal.*—An appeal will lie from an award, which is illegal and void *ab initio*. SATURJIT PERTAB BAHADOOR SAHI v. DULHIN BULAP KOER, **24 C. 469.** (17 B. 357, *R.*) [*F.*, 1 Bom. L.R. 261, 2 N.L.R. 81; *R.*, L.B.R. 1893—1900, 548, 112 P.L.R. 1909 = 84 P.R. 1901, 5 O.C. 18, B.]

(89)—*Decree, construction of—Assignment of villages forming part of an impartible estate—Maintenance of a junior member of a joint Hindu family—Agreement—Decree founded on arbitration-award—Revenue payable by whom and local rates and cesses by whom*—The Privy Council refusing to set aside an agreement for

Award—*continued.*

maintenance made between two branches of a family, *held*, by the true construction of a certain decree (founded on the award of arbitrators, between a talukhdar—owner of an impartible estate and head of a joint Hindu family—, and a member of a junior branch of that family), which declared the talukhdar's ownership, and the assignment by him of certain villages to the junior member, free of liability in respect of revenue, and which was the foundation of the title of either party, that the profits at the villages assigned belonged to the junior member, that the revenue was to be paid as between the two, by the talukhdar with subsequent enhancements without benefit to him from the increase in the yield of the land assigned, and that the local rates and cesses should be paid by the junior member himself. LOKNATH v. BISSESSAR NATH, **27 C. 103, P.C.=26 I A. 268=7 Sar. 569.** [*R.*, 31 C. 111.]

(90)—*Award of arbitration—Time to file—Limitation Act (XV of 1877,) art. 176*—A party to an arbitration should have a period of six months to enforce the award, under s. 525 of the Civ. Pro. Code, from the time he is in a position to *enforce it*. DUTTO SINGH v. DOSAD BAHADUR SINGH, **9 C. 373.**

(91)—*Application to file award in Court, dismissal of—Civ. Pro. Code, ss. 525, 526.*—On an application made under s. 525 of the Civ. Pro. Code for filing an award in Court, if it appears that there is a reasonable dispute between the parties on any of the grounds mentioned in ss. 520 or 521, the application should be dismissed. ICHAMOYEE CHOWDHRANEE v. PROSUNNO NATH CHOWDHRI, **9 C 557.**

(92)—*Remission of award to arbitrators for re-consideration—Neglect of arbitrators to comply with orders of remission.*—Where an award was remitted to the arbitrators for re-consideration with an express injunction that a full inquiry was to be made and where the arbitrators took no evidence, but made their second award merely on the strength of a local inspection. *Held* that the award so made as above described must be set aside. SUJAN RAI v. JHABBA, **A. W.N. 1893, 45.** [R., 18 A. 422.]

(93)—*Decision of Collector under butwara law not award.*—The decision of a Collector under the butwara law is not an award within the meaning of Act XIII of 1848. PULTOO ROY v. GREEDHAREE SINGH, **W R. F.B. 12.**

(94)—*Suit to set aside an, made without intervention of Court—Cause of action.*—There is nothing in the section of Ch. 37, Civ. Pro. Code, whether s. 325 or another, permitting a suit to set aside an award. The suit allowed by s. 325 is one to file an award, which is a different thing. The question is whether under the ordinary common law or any special enactment a suit will lie to set aside an award made without the intervention of a Court. The Specific Relief Act, Chs. IV and V set out certain cases in which contracts may be rescinded or cancelled; but nothing is apparent which

Award—*continued.*

would bring this award within such classes of cases. If endeavour is made to enforce the award by suit or otherwise, a cause of action may arise or the suit may be resisted. MA THA HMWE v. MA EIN THA, **L.B.R. 1893—1900, 480.**

(95)—*Appeal against order directing award to be filed—Decree made upon award—Civ. Pro. Code, ss. 520, 521, 525, 526, 622—Objection to filing award—Objection as to jurisdiction and vagueness of agreement—Court's powers—Illegal exercise of jurisdiction—Agreement not defining arbitrator's powers—Enforcement of award—High Court's interference.*—Under the provisions of the Code, no appeal will lie against the order directing the award to be filed. There is an appeal against a decree made upon an award (1) when the decree is in excess of the award; (2) when it is not in accordance with the award; or (3) when there is no valid award. (*F.*, 2 N.L.R. 81; *R.*, 18 A. 414=A.W.N. 1896, 116. 20 B. 596, 25 C. 141, U.B.R. 1897—1901, Vol. II, 5, 2 L.B.R. 105.] Assuming that in a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in ss. 520 or 521, an objection that the value of the property in suit was Rs. 500 only and that therefore the application should have been made in the Munsiff's Court, and not in that of the Subordinate Judge, or an objection that the agreement of submission is vague and indefinite and does not clearly set out the matters in dispute, does not fall under either sections. [*R.*, 21 C. 213, F.B.] With regard to the first objection mentioned above, even if no appeal lies, the High Court can interfere with the decision of the lower Court where it has acted in the exercise of its jurisdiction illegally in assuming jurisdiction without taking evidence. Where the agreement does not clearly define the powers of the arbitrator, the award should not be allowed to be enforced under ss. 525 and 526 of the Code, and the High Court can under s. 622 interfere with the order of the lower Court in the matter. BINDESSURI PERSHAD SINGH v. JANKEE PERSHAD SINGH, **16. C. 482.**

(96)—*Pendency of suit before arbitrators—Binding nature of the award—Decision of case on merits after the giving of award—Legality*—Where a suit is pending before arbitrators, a person who is made a co-plaintiff on his own application and makes no objection to the arbitration is bound by the award. A Civil Court acts without jurisdiction when it decides a case on its merits after an arbitration award. SHITANATH BISWAS v. KISHEN MOHUN MOOKERJEE, **5 W. R. 130.**

(97)—*S. 588. Civ. Pro. Code, 1882—Judgment of single Judge of High Court appeal from—S. 15, Letters Patent, 1865. right of appeal under.*—An order of a single Judge of the High Court in the exercise of original civil jurisdiction refusing to set aside an award is a judgment according to cl. 15, Letters Patent and is appealable. TOOLSEE MONEY DASSEE v. SUDEVI DASSEE, **26 C. 361=3 C.W.N. 347.**

Award—*continued.*

(98)—Panchayet—*Bombay Regulation VII of 1827.*—An award made by a *Panchayet*, settling a disputed boundary to land forming an island, claimed by the inhabitants on the respective banks of the river, under circumstances, set aside, as having been made contrary to the provisions of Bombay Regulation VII of 1827. The decision of the Sub-Collector, appointed by the Government to settle the boundary, annulling the award of the *Panchayet*, and assigning a boundary, confirmed on appeal. THE MOKUDDIMS OF KUNKUNWADDY v. THE ENAMDAR BRAHMINS OF SOORPAL, **7 W.R. 8 P.C.=3 M.I.A. 383=1 Suther. 164=1 Sar, 292.**

(99)—*Judgment in accordance with award—Pronouncement of—In appellant's absence—Irregularity—Second award differing from first—Legality of.*—The objection that an award was confirmed and judgment, passed in appellant's absence if not urged in the lower Court cannot be allowed in second appeal as it is merely an irregularity and not a fatal error where the Court refused to accept the award on the ground of its incompleteness and ordered to file a second award after investigation, such second award, confirmed after the expiry of time for objections, is legal though it may differ from the first award. KALA SINGH v. POHU, **50 P.R. 1881.**

(100)—*Judgment—Arbitrations—Review.*—A judgment passed in accordance with the award of arbitrators is open to review. BUTA v. GUNI DAS, **111 P.R. 1881.**

(101)—*Private award—Propriety of decree thereon under s. 525, Civ. Pro Code, 1877.*—A private award passed in an arbitration made without the intervention of Court is too indefinite to be converted into a decree under s. 525, Civ. Pro Code, 1877. DHARAM DAS v. AJUDHIA PERSHAD, **77 P.R. 1882.** [*R.*, 34 P.R. 1910=11 P.W.R. 1910.]

(102)—*Appeal—Award—One of the arbitrators signing blank paper—Arbitrator, absence of one, from part of hearing—Civ. Pro. Code, (Act XIV of 1882), s. 516*—An appeal lies, when there is no award in fact or when there is a void award. When there was no proper compliance with the requirements of s. 516 of the Code, the award was ineffectual and in fact void, and an appeal lay from the decree or judgment based upon the award made by the arbitrators. S. 516 of the Code contemplates an award in writing properly signed by the persons who make it. Where an award had already been made and a judicial decision arrived at, a subsequent embodiment of the decision of the arbitrators in certain papers which already bore the signature of one of them and was signed subsequently by the others, did not vitiate the judicial act of the arbitrators. The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding. Where the absent arbitrator signs a blank paper on which the decision is written out by the other

Award—*continued.*

arbitrators, the award is void. BENODE LAL PAKRASI v. PRAN CHANDRA PAKRASI, **14 C.L.J. 143.**

(103)—*Arbitration—Submission out of Court if revocable—Agreement to refer to arbitration if of personal nature—Legal representative of deceased party, if and when bound by award—Arbitrator, when can make alteration in award—Award, completion of, what constitutes—Minor, if can enter into submission—Guardian's power to submit to arbitration on behalf of his ward—Award, effect of—Verbal submission to arbitration, affecting immoveable property, if valid—Registration Act (III of 1877), s. 17—Registered agreement to refer to arbitration—Variation—Evidence Act, s. 92—Pleadings, amendment of—Award vitiated, if can be waivd—Waiver—Proof, necessary—Incomplete award—Submission to arbitration, construction of—Award, unreasonableness of—Award, when cannot be set aside for not deciding a question.*—The submission of an existing dispute, once validy made, is not revocable without just and sufficient cause, even in the case of a submission which has not been made a rule of Court. (12 M.I.A. 112, *R.*) Agreements to refer to arbitration cannot, therefore, be rightly deemed as essentially of a personal nature, revocable at the mere will of a party. Whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, depends upon the nature of the right which forms the subject-matter of the reference; that is, upon the question, whether the right is purely personal or survives to the legal representative. If, upon the death of a party to arbitration-proceedings, his representative in interest becomes a party thereto and proceeds with the investigation, the award is binding upon him. When the arbitrator has made, or made and published, his award as a completed instrument, his power is wholly at an end. If after executing the award the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory, and his act is like a spoliation by a mere stranger. Until the arbitrators have finally published their award as their final determination, they may make alterations therein. What consitutes a completion of the award may depend upon the terms of the submission, and upon the facts and circumstances of the individual case. As an infant is unable to bind himself by contract, he cannot enter into a submission, which will render the award absolutely binding on him. In the case of a pending suit, the Court may authorise a submission to arbitration so as to render the award binding on the infant. A guardian may submit to arbitration on behalf of his ward so as to bind both himself and the ward; though, where the guardian is, in his individual capacity, a party to the submission, and his interest in the controversy submitted, happens to be adverse to that of his ward, he has no power to submit on behalf of his ward. An award can only bind the parties to

Award—*continued.*

the arbitration. A verbal submission to arbitration, as a result of which title to immoveable property is likely to be affected, is valid. The allowing an amendment of pleadings is in the discretion of the Court ; but the discretion is judicial and not arbitrary ; and an erroneous exercise of it is capable of correction by a Court of appeal. Leave to amend ought to be granted, unless the party applying is acting *mala fide* or by his blunder has done some injury to his opponent which cannot be compensated by award of costs ; otherwise, whether the original omission arose from negligence, carelessness, or accidental error, the defect may be allowed to be remedied if no injustice is done to the other side. Though an arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such as shows that they have waived any objection on account of it. The waiver must be clearly made out, and the party must be shown to have full knowledge of the defect which he is said to waive. The arbitrator must be careful to see that his award is a final decision of all matters requiring his determination, and his failure to determine any of them may completely vitiate his award ; this would be specially the result where there is such a connection and inter-dependence between the various matters covered by the submission that the decision and disposition of some of them only, to the exclusion of others, would operate to produce injustice between the parties. But this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. An award is none the less final, though it does not execute itself or preclude all future controversies ; if it leaves nothing to be done but the performance of some ministerial act, it is not faulty for want of such finality and certainty ; the principle applicable is *certum est quod certum reddi potest.* (That is sufficiently certain which can be made certain). The Court is always reluctant to entertain the objection that the award, as distinguished from the submission, is unreasonable. An award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference or the parties showed by their conduct that they did not mean him to decide it. RAMJI RAM v. SALIG RAM, **14 C L J. 188.**

(104)—*Decree in accordance with award—Appeal.*—Where the judgment of a Court is in accordance with the award, it is not appealable. JAGMANDAR DAS v. PIARI LAL, **A.W.N. 1881, 17.**

(105)—*Sch. II, r. 20 (=Civ. Pro. Code, 1877, Ch. 37 and s. 525)—Filing private award—Amendment of plaint taking case out of scope of Ch. 37—Appeal.*—Where, on an application to file a private award in Court under s. 525, Civ. Pro. Code, 1877, the Munsif ordered the applicant to amend the plaint, after the first hearing, misunderstanding the provisions of s. 525, by which amendment the case was taken out of the scope of s. 37, Civ. Pro. Code, *held*

Award—*continued.*

that, under the circumstances, an appeal lay from the order of the Court of first instance. GANESH LAL v. NARAYAN DAS, **A.W.N. 1881, 29.**

(106)—*Award declaring title—Subsequent suit for possession—Period of limitation.*—An award which only establishes the right of the plaintiffs to certain shares without directing that possession should be given in accordance with its provision, cannot operate or be enforced as a decree. In a subsequent suit for possession, the award can be used as the evidence of their right, but cannot extend the period of limitation. MOHAN v. MOHSIN ALI, **A.W.N. 1881, 70.**

(107)—*Arbitration—Compromise by parties before arbitrator—Award on compromise—Decree on award—Civ. Pro. Code, ss. 521, 522—Appeal.*—Where an arbitrator passes an award in accordance with a compromise to which the parties to the arbitration had agreed and a decree is passed on the award by the Court under s. 522, Civ. Pro. Code, 1882, such decree is not open to appeal. DEONARAIN RAI v. JAISRI RAI, **A.W.N 1885, 259.**

(108)—*Awards, power of Courts to question legality of.*—Courts of Justice, in dealing with arbitration-awards, are not in the position of a Court of appeal or revision, nor are they called upon to consider whether such adjudications are consistent with their own views of the rights of the parties which became the subject of arbitration. The Court can interfere with the award only on the ground of corruption or misconduct, or other circumstances similar in nature to those mentioned in ss. 520 and 521 of the Civ. Pro. Code, 1882, and well recognised as constituting sufficient reasons for setting aside arbitration awards. PARMESHRI v. LACHMIN, **A.W.N. 1884, 148.**

(109)—*Civ. Pro. Code, s. 522—Award—Decree in accordance with award—Award bad in law—Appeal.*—A submission to arbitration provided for the appointment of two arbitrators, one to be chosen by each party, and an umpire ; and it was further provided that in case of a difference between the arbitrators "the opinion of the arbitrator with whom the umpire agrees shall be considered conclusive." At the last sitting of the arbitrators an application was made for an adjournment on the ground of the illness of one of the parties. No order was passed upon this application ; it was simply recorded. The umpire thereupon requested the arbitrators to record their opinions separately or jointly, and make the same over to him the same day at or before 4 o'clock. The defendants' arbitrator left the meeting, and did not record any opinion upon the subject-matter of the arbitration ; but it did not appear that there was any disagreement between the arbitrators. The plaintiffs' arbitrator recorded an opinion, and the umpire, apparently without communicating with the other arbitrator, accepted that opinion and submitted an award, upon which a decree was passed. *Held* that this was no award in

Award—*continued.*

law, and that an appeal would lie from a decree passed in accordance with it. HAFIZ-ULLAH v. RAHMAT-ULLAH, **A.W.N. 1903, 159.**

(110)—*Arbitration—Award — Circumstances necessary to render an award complete and effectual—Publication.*—In India, as in England, it is necessary to the validity of an award that it should be not only signed and executed by the person making it, but also published. By publication is meant, generally speaking, a delivery to some of the parties to the award ; and probably a holding of it by the arbitrator after notice to the parties for the purpose of delivery might be held to effectuate the award. FATIMA KUBRA BIBI v SAHA WILAYAT HUSAIN, **A. W.N. 1899, 30.**

(111)—*Suit to recover money due under an award—Suit to recover unsecured debt—Limitation—Act XV of 1877 (Indian Limitation Act), sch. II, art.* 113.—*Held* that an award on an arbitration for the division of the property of a deceased person amongst his heirs, by which award it was provided that certain specified persons amongst the heirs should become liable for the payment of a certain specified debt due by the deceased, did not give the creditor a fresh cause of action based on the award for the recovery of such debt, but at most a fresh starting point for limitation in respect of a suit to recover it. GOPAL LALJI v. RAMAN LALJI, **A.W.N. 1897, 144.** (5 A. 263, 16 A. 3, *R. & Diss.*)

(112)—*Mere dissatisfaction does not render an award ineffectual—Agreement to repudiate.*—*Held* that an award has the force of a binding contract or final judgment unless there has been an agreement to repudiate it, the mere expression of dissatisfaction with it by both the parties, being insufficient to render it ineffectual. POKERDAS v. BOLUMAL, **1 S.L.R. 236.**

(113)—*Suit to enforce—Award—Suit for the enforcement of an award—Specific performance—Specific Relief Act, ss. 21, 30* —Where in suit on an award to recover a certain sum of money allowed by the arbitrator, it was contended among other things that having regard to ss. 21 and 30 of the Specific Relief Act, the plaintiff was not entitled to have the award enforced: *Held*, that the objection proceeded on the assumption that the suit was one for specific performance, which in fact it was not ; but it was a suit for the recovery of money and for relief incidental thereto. FARDUNJI v. JAMSETJI, **5 Bom. L R. 705=28 B. 1.** [*R.*, 19 M.L J. 220.]

(114)—*Non-delivery of—Non delivery of verdict—Liability to be sued—Fraud.*—Defendant passed a bond, in 1889, in favour of plaintiff, payable in two years. In 1893, the plaintiff brought a suit on the bond ; but soon withdrew it as the parties agreed to refer their disputes to the arbitration of defendants 1 to 4. The arbitrators delivered no written award ; and in consequence the plaintiff brought a suit against the defendants 1 to 5 alleging that the arbitrators gave only an oral award and that acting in collusion with defendant 5 they omitted to give a written award whereby his original claim

Award—*continued.*

was time-barred. The lower appellate Court awarded plaintiff's claim against defendants 1 to 4, but dismissed it against defendant 5: *Held*, dismissing the claim as against defendants 1 to 4, that they could not be presumed to have acted fraudulently merely because they failed to satisfy the Court that their delay was due to the negligence of the parties. SAVALAPPA v. DEVCHAND, **3 Bom. L. R. 691=26 B. 132.**

(115)—*Award—Objections to it—Alleged misconduct of the arbitrator—Dismissal of objections—Decree in accordance with the award—Incompetency of appeal from such a decree.*—Parties to a suit nominated a sole arbitrator whose appointment was duly confirmed by the Court. The arbitrator submitted his award, to which the appellant filed a great number of objections which were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of the objections, it was perfectly clear that there was no misconduct within the meaning of that expression in the Chapter on Arbitration in the Civ. Pro. Code, nor anything that could justify the Court in setting aside or remitting the award. Those objections were considered and disposed of by the Court, which passed a decree in accordance with the award. From that decree the appellants appealed to the Chief Court of the Punjab, which dismissed the appeal on the grounds that the appeal could not lie, inasmuch as it did not appear that the decree was in excess of or not in accordance with the award. *Held*, that the decision of the Chief Court was perfectly right. HANSRAJ v. SUNDAR LAL. **10 Bom. L R. 581=12 C.W. N. 585=7 C L.J. 520=138 P.L.R 1908=35 C. 648, P.C.=35 I.A. 88=80 P.R. 1908=99 P.W. R. 1908=18 M.L J. 266=4 M L.T. 25=14 Bur. L R. 146.** [*R.*, 12 O.C. 40 ; *Appl.*, 1 Ind. Cas. 693.]

(116)—*Appeal from an award.*—An appeal does not lie from a decree propounded under s. 522 of the Civ. Pro. Code, except in so far as the decree may be in excess of or not in accordance with the award. GHULAM JILANI v. MUHAMMAD, **4 Bom. L.R. 161.**

(117)—*Time fixed for filing—Expiry of time on a holiday—Civ. Pro Code, 1882, s. 521.*—When the time fixed by a Court for filing an award expires on a day on which the Court is closed, and it is filed on the next day, *held*, that the award must be taken to have been filed within time. MUHAMMAD YUSAF v. KARIM BAKHSH, **9 P.L.R. 1900.**

(118)—*Order to file—Amendment of decree—Jurisdiction—Civ. Pro. Code, ss. 206, 522, 525 526.*—On an application made under s. 525 of the Code of Civil Procedure that an award be filed in Court, the District Judge made an order that the award be filed and a formal order was drawn up to that effect. The applicant made an application for execution of the formal order (which she called the decree of the District Judge). Her application was rejected

Award—*continued.*

on the ground that there was no decree capable of execution She then applied to the Court of the Judicial Commissioner under s. 206 of the Code of Civil Procedure to amend the so-called decree of the District Judge, so as to bring it into confirmity with the judgment. *Held*, that the Court had no power to grant the application under s. 206 of the Code of Civil Procedure, the order of the District Judge having been made under s. 526 of the Code, and the formal order giving effect to it being in conformity with the same. *Held* that, having directed the award to be filed, the District Judge should, as the next step, have pronounced judgment in accordance with the award, upon which a decree could follow under the provisions of s. 526 read with s. 522 of the Code of Civil Procedure. *Held*, further that on the application of any of the parties to the suit, the District Judge could proceed to give effect to the award in the manner contemplated by s. 522 of the Code. GULAB KUAR v. THAKUR SHEO RATAN SINGH, **4 O.C. 82.**

(119)—*Award, validity of—Private reference—Some of the plaintiff's parties—Stamp, want of, objection in second appeal.*—An award on a private reference, made by some of the plaintiffs and the defendants, is binding on the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it. An objection as to want of stamp cannot be taken for the first time in second appeal. JADU NATH CHOWDHRY v. KAILAS CHUNDER BATTACHARJEE, **10 C.L.J. 41=2 Ind. Cas. 414=37 C. 63=14 C.W.N. 75**

(120)—*Construction of document—Award—Term in an award granting pre-emption to the co-owners over the joint family property—Property sold through Court in execution of decree—The condition of pre-emption attaches to private and voluntary sale—Court-sale not effected by the provision.*—An award, which effected partition of certain family property, provided, among other things, that, in the case of a sale by any of the co-sharers of his portion of the house of residence, he should sell it to his co-sharer for Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. The share of one of the co-sharers was subsequently sold in execution of a decree against him and purchased by an outsider. The other co-sharer then sued to have it declared that the purchase at the Court-sale was not binding upon him: *held* that the privilege, which the award conferred upon the co-sharers of becoming purchasers by pre-emption attached to sales made privately and willingly, and not to sales *in invitum*. VITHAL NARAYAN KARANDIKAR v. MARUTI NARAYAN KALE, **12 Bom. L R. 582=7 Ind. Cas. 663=34 B. 567.**

(121)—*Private award—Suit based thereon independently of the summary procedure under s. 515, Civ. Pro. Code, 1882—Limitation for such suit—Decree appealable—Award affecting property out of British India—Held*, that a

Award—*continued.*

suit can be brought upon a private award independently of the summary procedure authorized by s. 525, Civ. Pro. Code, 1882 (=Cls. 20 and 21 of sch. II to Act V of 1908), and the decree passed therein is appealable, although there is no appeal from a decree passed in a mere summary proceeding under Ch. XXXVII of the Code (=sch. II of Act V of 1908). The difference between the two proceedings is:—(*a*) An award can only be filed, as the result of a summary proceeding, provided that it is free from each and all of the defects under s. 520, Civ. Pro. Code (=Cls. 14 and 15 of sch. II to Act V of 1908), and it can only be so filed within six months of its being given. (*b*) A suit, however, can be well based upon a defective award—the Court having power to rectify its defects—and it can of course be brought at any period which the law for the limitation of suits permits.—*Obiter: Held*, also, that an award affecting property in a Native State cannot be converted into a decree by a British Indian Court so far as that property is concerned. WAZIR ALI v. SHEIK MULKYAR, **11 P.W.R. 1910=34 P.R. 1910=5 Ind. Cas. 597=183 P.L.R. 1910.** (77 P.R. 1882, *R.*)

(122)—*Arbitration—Award—Minor bound by the award—Grounds for setting aside award—Inequality of benefit under award—Erroneous view of law taken by arbitrators.*—An award, which was open to no reproach but which affected the interests of a minor, was set aside at the minor's instance on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal:—*Held*, that neither ground was sufficient to invalidate the award: since the validity of the award must be determined in the light of the circumtances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. SAKRAPPA LINGAPPA HEBSUR v. SHIVAPPA BASAPPA, **12 Bom. L.R. 984=3 Ind. Cas. 647.** (2 M.I.A. 181, *R.*)

(123)—*Civ. Pro. Code (Act XIV of 1882), Ch. XXXVII—Award—Finality of—Appeal—Revision.*—In no case will an appeal lie from a decree passed in accordance with the terms of an award of arbitration after objections have been heard and disposed of, and no question arsies under s. 522. But an application for revision will lie if the Court which passed the decree has committed an error in procedure or misused its jurisdiction. When the Court passing a decree in accordance with an award has disposed of all the objections made within the time prescribed under art. 158 of the second schedule of the Limitation Act, revision does not lie on the ground of error in procedure for the Court not having considered an application containing further objections filed after the prescribed time. PANNA LAL v. MUSSAMMAT SOMAN, **120 P.L.R. 1902, F.B.=89 P.R. 1902.** [*R.*, 1 P.R. 1908=58 P.W.R. 1907, F.B., 41 [R. 1905=63 P.L.R. 1905; *Cited*, 92 P.R. 1903.]

Award—*continued.*

(124)—*Civ. Pro. Code (Act XIV of 1882), Ch. XXXVII—Award—Finality of—Powers of arbitrators.*—A suit for possession, by partition, was referred to arbitration, and the arbitrator nominated by the parties was agreed to be the "sole arbitrator to decide the matters in dispute in this suit, including the determination what joint property, moveable and immoveable, of every description, except the immoveable property, outside British India is to be partitioned." The arbitrator finally submitted his award on the 29th June, 1900. The Court disposed of objections made by the defendants and passed a decree in accordance with the award. The defendant appealed to the Chief Court and prayed that the memorandum of appeal be treated as an application for revision, if it should be held that an appeal did not lie. It was contended on behalf of the appellants, (1) that they submitted to arbitration under pressure, unwillingly agreed to the appointment of the arbitrator, and the submission to arbitration was therefore bad, (2) that the Punjab Courts had not jurisdiction to entertain the suit, and the reference to arbitration was therefore void, and (3) that costs should not have been decreed against them. *Held*, (1) that the objections now taken, that the appellants submitted to arbitration under pressure; that they unwillingly agreed to the appointment of the arbitrator, and that the submission to the arbitration was bad, were not taken in the original Court, and could not be taken on appeal. The object of taking these objections was to set aside the award, and to allow them to be taken for the first time on appeal would be to defeat the provisions of art. 158, sch. II of the Limitation Act. (2) That an appeal did not lie on the objections taken in the original Court. (3) That the arbitrator was seized of the whole matter in dispute between the parties, except so much as was specifically excluded, and the question whether the suit was competent was one of the issues in the suit, and was as such referred to arbitration. The fact, that the issue as to competence was framed and decided by the original Court before the submission to arbitration, did not affect the arbitrator's competence to decide it as one of the issues between the parties, and the arbitrator was not bound to give an award on each point. (4) That the Civ. Pro. Code contains no mandatory provision as to reference similar to that as to the award being made within the period allowed, and the appellants could have objected that there had been no reference to arbitration, and their failure to do so did not entitle them to appeal on the ground. (5) That the order referring the suit to arbitration provided that the costs should abide the result of the finding of the arbitrator. It had not been shown that the decree for costs was not in accordance with the award. (6) That the reasons for holding that the objection on the ground that there was no reference to arbitration could not be entertained on appeal applied equally to the application for revision, and on

Award—*continued.*

the finding that there was a reference to arbitration, an award and a decree in accordance with that award, which the Court below had no alternative to passing, the application to set aside the award having been refused, no revision lay. (25 P. R. 1902, *R.*) *Per Anderson, J.*—The whole case was referred to the arbitrator. He was competent to decide the question of jurisdiction which had not been finally decided before the reference to arbitration. As regards revision, *held*, that no application lay, the original Court not having failed to exercise a jurisdiction vested in it by law or having acted illegally or with material irregularity in connection with the case. *Per Kensington, J.*—The original Court had found in fact that there was no misconduct, and with the decree based on this finding the Chief Court had no authority to interfere either by way of appeal or revision. SETH HANSRAJ v. GANGA RAM, 119 P.L.R. 1902, F.B.

(125)—*Decree in terms of award, appeal from—Arbitrator, misconduct of—Award, grounds of setting aside—Civ. Pro. Code, ss. 521 and 522—Appeal.*—*Held*, that a decree, which is in terms of an award, is not appealable on the ground of the misconduct of the arbitrator. The terms of s. 522, Civ. Pro. Code, seem to require that a distinction shall be drawn between an award which has no legal effect being void *ab initio*, and an award which has legal effect unless and until it is set aside on any of the grounds mentioned in cls. (*a*) (*b*), or (*c*) of s. 521, Civ. Pro. Code. The award referred to in the final words of s. 522, providing that there shall be no appeal from the decree, except in so far as it is in excess of, or not in accordance with, "the award," clearly includes an award which the Court which passed the decree has been asked to set aside on some one or other of the grounds mentioned in cls. (*a*), (*b*), or (*c*) of s. 521 and which the Court has refused to set aside on the grounds on which it was asked to do so. The decree referred to clearly includes a decree which has followed on a judgment in accordance with such award. Where therefore the Court has refused to set aside an award on the grounds mentioned in cls. (*a*), (*b*) and (*c*) of s. 521 and has given judgment in accordance with the award, the decree which follows on the judgment so given is one from which no appeal lies, except in so far as the decree is in excess of, or not in accordance with, such award. JAGAN NATH v. GAJADHAR, 5 O.C. 13.

(126)—*Of arbitrators—No application for filing it in Court—Whether it can be pleaded in subsequent suit — Deeds—Material alteration after execution and without privity of party to be affected by it, effect of—Deeds which have a continuing effect, and deeds taking effect at once—Distinction—Costs—Relief given to plaintiff not being that which he claimed—Practice.*—An award of arbitrators can none the less be *pleaded* in a subsequent suit, and if valid must be given effect to, though no application for filing it in Court has been made, or such

Award—*continued.*

application has been unsuccessful, if its validity has not been actually put in issue on such application. (18 C. 414, *P.C.F.*) A material alteration made in a written instrument after its execution and without the privity of the party to be affected by it, prevents the party in whose custody the instrument has been, from making any use of it at all. (12 C.P.L.R. 33, *F.*) But there is a distinction between those deeds or clauses of a deed which have a continuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a a conveyance of land. For no case can be found in which a deed or clause of a latter nature has been prevented from taking effect because the deed was altered after execution, so that an altered deed may be given in evidence to prove any effect produced by it in its orginal form at the instant of its execution, or of any right which existed *aliunde*, and of which it is evidence. (25 A. 580, *F.*) In a suit brought by the plaintiff against the defendant the relief given to the plaintiff was not that which he claimed. *Held*, each party should bear his own costs throughout. GANPAT v. RAMAKRISHNAPURI, **6 N.L.R. 1=5 Ind. Cas. 425.**

(127)—*Suit on award—Want of jurisdiction in arbitrators can be pleaded—Binding character of award—Award operates from its date—Award directing partition effects severance at its date.*—In a suit to enforce an award, it is open to the defendant to urge and show that the award is not binding upon the parties for want of jurisdiction in the arbitrators. An award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. When it directs partition to be effected, it dissolves the joint family ; and from the moment of its date, it severs their joint interests. BHAURAO JIVAJI TIVLE v. RADHABAI LAXAMAN JIVAJI, **11 Bom. L.R. 408=33 B. 401=2 Ind. Cas. 431.** (18 C. 414, 11 Bom. L R. 20, *F.*)

(128)—*Arbitration — Construction—Various pieces of evidence held admissible—Award filed in Court six months after passing of Oudh Estates Act, 1869.*—On the construction of an award made by a body of Oudh taluqdars, original grants by a talukdar to a younger member of his family and the holding for three generations in succession by the descendants of that member of land in lieu of maintenance, were held to justify the presumption that such grants were intended to be absolute. The various pieces of evidence that were held admissible were.—(*a*) Certain old pattahs (granted previous to the Mutiny) were releveant as ancient documents coming from proper custody. (*b*) The state of possession which followed upon the grants made by the pattahs, in the absence of any clear words of limitation in them, was relevant evidence on the question of their construction. (*c*) In construing the final award directing the right of maintenance to the younger branch to continue as before, it is legitimate to refer, not

Award—*continued.*

only to evidence of antecedent possession bearing upon that point which is independent of the proceedings in the submission, but to those *quasi*-judicial acts of the arbitrators upon which their ultimate award was based. Though an award made by a body of Oudh talukdars on a point decided by them and approved by the Financial Commissioner, but filed in Court more than six months after the passing of the Oudh Estates Act, 1869, would not come within the provisions of s. 33 of the Act, it would not on that account be invalid, for, though it was not *res judicata*, yet it was obligatory upon both parties to the submission and upon those whose interests they respresented. ARDAWAN SINGH v. PARTAB SINGH, **6 M L J. 79, P.C.=23 C. 838=23 I.A. 64=7 Sar. 24.** [*R.*, 2 O.C. 149.]

(129)—*Award by arbitrators—Petition for withdrawal of suit—Civ Pro.Code 1882, ss. 373, 520 and 521, Ch.XXXVII.*—The general powers relating to withdrawal of suits conferred upon the Court by s. 373, Civ. Pro. Code, are, when an award has been duly made by an arbitrator to whom the case is referred for arbitration, limited by the particular provisions contained in ss. 520 and 521 of Ch. XXXVII of the Code. Where by consent a suit was referred to arbitration and the arbitrators made the award within the time limited for making it and the plaintiff put in a petition of objection to the award under s. 521, Civ. Pro. Code, and before any order had been made on that petition, he put in an application for permission to withdraw the suit with liberty to bring a fresh suit, and that application was granted under s. 373, Civ. Pro. Code. *Held* that the order was made without jurisdiction. DEBI CHURN MANNA v. BIJRA PRASAD JANA, **7 C.W.N. 186.**

(130)—*Order on application to file award—Civ.Pro.Code, 1882, s. 525.*—An order made on an application to file an award under s. 525 of the Civ. Pro.Code, is a decree within the meaning of that expression as defined in the Civ. Pro. Code, and an appeal lies against such order. PONNUSAMI MUDALI v. MANDI SUNDARA MUDALI, **27 M. 255. F.B.=14 M.L.J. 356.** [*F.*, 29 M. 303, 126 P.R. 1907=88 P.W.R. 1907=50 P.L.R. 1908, 4 L.B.R. 130, 7 C.L. J. 486. 10 C.W N. 601=2 C.L.J. 153, 2 C.L.J. 80, 9 O.C. 205, 33 C. 757, F.B.=10 C.W.N. 609, 3 C.L.J. 450, 100 P.R. 1907=17 P.L.R. 1908, 58 P.W.R 1907, F.B.=1 P.R. 1908, 1 S.L.R. 86, F.B , 1 S.L.R. 149, 2 Ind. Cas. 92 =6 M.L.T. 137=19 M.L J. 394.]

(131)—*Civ. Pro. Code, s. 506 (=sch. II, s. 1, new Code)—'All the parties to the suit' meaning of—Decree based on award—Appeal—Judicial determination.*—The words "all the parties to the suit" in s. 506, Civ. Pro. Code, must refer to the succeeding words, "any matter in difference between them in the suit." The section refers to all the parties to a suit who are interested. (1887), A.W.N. 215, *R.*) Therefore, where the decree based on an award was attempted to be set aside on the ground that all the parties to the suit did not join in

Award —*continued.*

the submission, *held* that as the persons who were not parties to the award, never put in any appearance in the Court, and there was no matter in difference between them and any other of the persons who submitted the matter in difference between them to arbitration, the objection was not valid. [*R.*, 1 S.L.R. 209 ; *D.*, 29 A. 423=4 A.L.J. 347=A.W.N. 1907, 147, 17 M.L.J. 394.] Where it was alleged that the Court passing a decree on an award refused to summon two of the arbitrators in accordance with a request made by one of the parties to the arbitration, that there was no judicial determination by the Court, and that consequently an appeal lay, *held* that there was the judgment of the Court, which was a judicial determination, and that, although there may have been some irregularities preceding the judgment, as the decree was in accordance with and was not in excess of the award, no appeal lay therefrom. PITAM MAL v. SADIQ ALI, **24 A. 229=A.W.N. 1902, 19.**

(132)—*Arbitration and award — Suit for specific performance of award—Assessment of compensation impossible.*—The arbitrator in a dispute between the owner and the lessee of a village made an award on the questions submitted to him to the effect that the lessee should surrender possession at a fixed time within the terms of the lease, that the lessee should pay the sum of Rs. 800 to the lessor, and that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor who was to pay to the lessee the aggregate amount of the decrees. Certain terms of the award having been performed, the lessee sued for the specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant and prayed that the defendant might be ordered to accept the conveyance and pay the amount of the decrees. *Held* that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it ; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award. (*Bell* v. *Denner* (1886), 54 Law Times Reports, 739, *F.*) BRIJ MOHAN LAL v. SHIAM SINGH, **24 A. 164=A.W.N. 1901, 208.**

(133)—*Award beyond terms of reference*—Ultra vires.—An award that goes beyond the terms of the reference to arbitration made to the arbitrators and deals with questions in excess of those so referred is to that extent *ultra vires*. MUHAMMAD MUMTAZ ALI KHAN v. FARHAT ALI KHAN, **23 A. 394, P.C.=8 C. W.N. 881=28 I.A. 190=8 Sar. 85.**

(134)—*Award prohibiting partition, when effective—Devolution of property, if alterable by award—Arbitrator, effect of entry made by, in award already made.*—An award prohibiting

Award—*continued.*

partition of an estate liable to partition cannot have any binding effect except upon parties who have agreed among themselves to abide by it. An arbitrator's award cannot have the effect of making property which is divisible by law, indivisible for ever. It is not competent to an arbitrator to alter the course of legal devolution of property in a mode at variance with the ordinary principles of law governing the parties, in the absence of special custom prevailing in the family. [*Appl.*, 33 C. 498 ; *R.*, 13 P.R. 1906.] An entry made by an arbitrator in the schedule of the property, after he had made his award, to the effect that a particular portion had been given to the defendant as a dower and was her separate property, was *held* to be no part of the award and to confer no title on the defendant. The arbitrator, after having made his award, was *functus officio*, and had no jurisdiction to make the entry which he did. JAFRI BEGAM v. SYED ALI RAZA, **23 A. 383, P.C.=5 C.W.N. 585=28 I.A. 111=8 Sar. 27.**

(135)—*Suit to enforce award—Suit for specific performance of contract.*—A suit founded on an award is not a suit for the specific performance of a contract, any more than is a suit based upon a sale-deed a suit for the specific performance of the contract of sale, and the mere fact that the title of the parties to the property had been declared by the award sued on could not make any difference. SHEO NARAIN v. BENI MADHO, **23 A. 285=A.W.N. 1901, 83.** (23 M. 593, *F.*; 5 A. 263, 16 A. 3 *D.*) [*F.*, 15 C.P.L.R. 115, 7 O.C. 369, 33 C. 881=4 C.L.J. 162 ; *R.*, 10 O. C. 218, U. B. R. 1909, Limitation 9 ; *D.*, 26 A. 497=A. W. N. 1904, 72.]

(136)—*S. 522, Civ. Pro. Code, 1882—Appeal—Arbitration—Decree in accordance with award—Legality or validity of award.*—In a suit, in which there were several defendants, one of the defendants alone appeared and the others did not enter any appearance at all. The plaintiff and the defendant who appeared, applied for a reference of the case to arbitration and the suit was accordingly referred and a decree was passed in accordance with the award. *Held*, the defendants, who did not appear, could not challenge the decree by way of appeal on the ground that they were not parties to reference and that, consequently, there was no legal and valid award. It was also decided in this case, that it was unnecessary to go into the question, whether the award was or was not valid by reason of the fact that some of the defendants did not join in the reference. CHAIRMAN OF THE PURNEA MUNICIPALITY v. SIVA SANKAR RAM, **33 C. 899.** (29 C. 167 =29 I.A. 51, P.C., *F.*; 2 C.L.J. 153, 2 C.L.J. 142, *Appr.*; 9 C.W.N. 873, *Diss.*) [*F.*, 11 C.W. N. 1152.]

(137)—*Binding character of award—Award not an agreement but a judgment—Parties cannot nullify an award by non-action, but must agree mutually to treat it as nullity.*—An award

Award—*continued.*

is not a mere agreement but is equivalent to a judgment. It is binding between the parties in all matters which it professes to decide. When once a matter has been decided between the parties, the parties ought to be concluded by an adjudication whatever it may be. In order that the parties should be remitted to their previous rights, it is not enough that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. LALDAS JIBHAI v. BAI LALA, **11 Bom. L. R. 20=5 M L.T. 226=1 Ind. Cas. 105.** (19 M. 290, *F.*)

(138)—*Ss. 522, 523, 525, Civ. Pro. Code, 1882—Punjab Courts Act (XVIII of 1884), s. 70—Arbitration—Award—Application to file—Objections to filing of award—Appeal—Revision.*—An application was made under ss. 523 and 525 of the Code, before the arbitrator had made his award. At the hearing, objections were raised, *inter alia*, that the award dealt with matters not referred to arbitration and that there had been a previous award. The Court, without deciding the objections, passed a decree in accordance with the award. On appeal, the application was dismissed on the ground that the reference to arbitration did not cover the matters dealt with by the award. On further appeal, it was contended that the appeal against the decree of the Original Court was not competent, that the appeal was barred by time and that the award was valid. *Held*, (1) that the proceedings being under ss. 523 and 525 of the Code, an appeal lay as to the fact of reference and the award being covered by the reference. (84 P. R. 1901=112 P. L. R. 1901, *F.*; 25 P. R. 1902, P. C. D.); (2) that the appellant was entitled to deduct the time spent in making the review of judgment and, allowing the time so spent, the appeal was within limitation; (3) that it was not necessary that the award should have been given before application was made under ss. 523 and 525, Civ. Pro. Code, that it was not shown that there had been any previous final award and that the agreement to refer included all the matters in dispute. The lower Appellate Court held that the objections filed by the defendant to the award were filed within time and should have been disposed of by the Original Court. *Held*, that this finding was correct but this question could not be dealt with an appeal. On revision, the Chief Court directed the Original Court to receive the objections and dispose of them according to law. BHAGWAN SINGH v. RAM KAUR, **38 P. L. R. 1906.** [*D.*, 80 P.R. 1909.]

(139)—*Arbitrator deciding by lottery, if is an—I.C.A., s. 30—Wager—Agreement to decide suit by lottery is a wagering contract and void as opposed to public policy.*—Suit for possession of land. The lower Courts dismissed the suit on the ground that there was an award by an arbitrator on reference made to him. As a fact the arbitrator only put a lottery on the parties agreeing to it and he who got the price ticket had the property. *Held*, that there was no arbitration, and that there was no *decision* by the arbitrator which can be called an award. *Held*, also, that the agreement to settle the dispute by lottery was *ab initio* void and forbidden by s. 30, Indian Contract Act. KALURAM v. RAM DAYAL, **3 N.L.R. 107=3 Ind. Cas. 55.** (22 M. 212, *R.*).

(140)—*Civ. Pro. Code, s. 522—Award—Decree in accordance with award—Defendant not appearing to file objections*—Ex-parte *decree.*—Where the defendant did not appear and file objections to an award, and decree was passed in accordance with the award under s. 522, Civ. Pro. Code, the decree cannot be said to have been passed *ex parte* and the order reviewing it was held to be illegal. SIDHU RAM v. GAMAN, **10 P.L.R. 1901.**

(141)—*Order rejecting application for filing award in Court under s. 525, Civ. Pro. Code, appeal from—Memorandum of appeal to be treated as application for revision under s. 622, Civ. Pro. Code.*—Certificate under s. 8, cl. (c), Act XIV of 1891, two Judges hearing application for revision, in the absence of. At the end of the memorandum of appeal from an order rejecting an application that an award may be filed in Court under s. 525, Civ. Pro. Code, the appellant stated that even if no appeal lay, the Court was justified in interfering with the order of the Court below in the exercise of its revisional powers under s. 622, Civ. Pro. Code. *Held*, that the Court could not deal with the case in the exercise of its revisional powers under s. 622, Civ. Pro. Code. *Held*, that an appeal did not lie. *Held* further, that an application for the revision of the order of the lower Court would not be a proceeding which it was incumbent upon the two Judges, sitting together, to hear in the absence of the certificate referred to in s. 8, cl. (c) of Act XIV of 1891. MAHARAJ SINGH v. LOCHAN SINGH, **1 O.C. Sup. Vol. 22.**

(142)—*Ss. 508, 514 and 521, Civ. Pro. Code, 1882—Limitation Act, sch. II, art. 158—Award made and filed after expiry of time fixed—Appeal.*—When a suit was referred to arbitration by a Court in compliance with an application of the parties, it fixed a time for the making of the award. The award, however, was made and filed in the Court after the time fixed by it. Neither party had applied for an extension of time nor had any order been made, by the Court itself, for extension, before the expiry of the time fixed. *Held*, that an award made after the expiry of the time fixed by the Court, is *ab initio* void. It cannot be validated by an acceptance thereof by the Court after the expiry of the time, nor by an order made by the Court, for extension of time, after the making of the award, because, when an award has once been completed and delivered into Court it has no power to grant an extension of time under s. 514, Civ. Pro. Code. (13 A. 300, 11 M. 85, *F.*; 15 M. 384, 14 A. 343, *R.*) A decree passed on such an invalid award is

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appealable. (29 B. 285, 16 C. 482, 24 C. 469, 17 B. 357, 18 A. 422, *R.*) Where an award is made after the expiry of the time prescribed by the Court for the making thereof, the Court ought to take judicial notice of its invalidity (13 A. 300, *F.*), notwithstanding the fact that neither party has taken any objection thereto. Art. 158 of the Limitation Act is inapplicable to such a case. KEWAL LODHI v. BAIJ NATH, **2 N.L.R. 81.**

(143)—*Ss. 518, 522, 588 (26). Civ. Pro. Code, 1882—Modification of award under s. 518—Appeal—Power of appellate Court to enter into question of misconduct or corruption of arbitrator.*—An appeal, under s. 588 (26) of the Civ. Pro. Code, is limited solely to the question of the correctness of the order passed under s. 518; s. 522 of the Code does not allow an appeal from a decree based upon so much of an award as disposes of the matter referred to arbitration. The word 'award' in the last sentence of s. 522 means the modified award where the original award is modified. The concluding sentence of s. 522 of the Code does not empower an appellate Court to enter into the question of the corruption or misconduct of an arbitrator merely because he has delivered an award, which includes an adjudication on a matter not submitted to him. KALU v. KHAIR DIN, **13 P.R. 1906.**

(143-*a*)—*Judgment—Arbitrators—Review.*—A judgment passed in accordance with the award of arbitrators is open to review. BUTA v. GUNI DAS, **111 P.R. 1881.**

(144)—*Ss. 521, 588—Civ. Pro. Code, 1882—Award—Objection of award—Award set aside—Appeal.*—*Held*, that no appeal lies from an order under s. 521 of the Code setting aside an award. GANGA PRASAD v. KURA, **A.W.N. 1906, 64=3 A.L.J. 168=28 A. 408.** (8 C.W.N. 390, *F.*; 10 A. 8, *Overruled.*)

(145)—*Ss. 522 and 525—Civ Pro. Code, 1882—Award, order refusing to file, appeal from—Application to file an award—Appeal.*—An order dismissing an application under s. 525 of the Code, to have an award filed in Court is not a decree and is not appealable. In s. 522, the words "upon the judgment so given a decree should follow" refer to a judgment according to the award and not to a judgment or decision that the award is invalid and not binding on the parties. RAM SEWAK DAS v. DHARM DAS, **9 O.C. 205-B.** (27 M. 255, 18 C. 414, P.C., 29 C. 167, 26 A. 205, 28 A. 21, 25 C. 757, *R.*) [*R.*, 11 O.C. 116.]

(146)—*S. 522—Civ. Pro. Code, 1882—Decree made in accordance with an award—Appeal against the decree depends on the validity or otherwise of the award.*—As soon as an award has been made and filed in Court, the powers of the arbitrators come to an end; they become *functus officio*, and it is not open to a dissentient arbitrator to come in afterwards, and sign the award, nor has the Court any power to allow him to so sign it. The award, if so

Award—*continued.*

signed subsequently, becomes illegal and invalid on that account. The question, whether, under s. 522 of the Code, an appeal lies against a decree made in accordance with an award, depends upon whether the award itself is valid and legal. The said section pre-supposed a valid and a legal award, and not an award, upon which no decree could be pronounced. RAMESH CHANDRA DHAR v. KARUNAMOYI DUTT, **33 C. 498.** (13 A. 300-18 I.A. 55, 23 A. 383, 25 C. 141, 29 C. 167=29 I.A. 51, *R.*)

(147)—*Civ. Pro. Code (Act XIV of 1882), ss. 521 and 522—Arbitration—Award—Finality of—Appeal—Revision.*—The words of s. 522 of the Civ. Pro. Code are very clear and stringent and forbid an appeal except into so far as the decree does not respond with the award. Where the determination of a matter by the award is not included in the decree an appeal to that extent lies against the decree but the appellant has no right to open the whole case on appeal. A revision application against a decree based on arbitration award on the ground of material irregularity is competent but it must have reference to the proceedings of the lower Court and not to those of the arbitrator. The language of s. 520 of the Civ. Pro. Code does not make the remitting of the award compulsory on the Court but leaves it a discretion. A wrong exercise of discretion does not give any party right to apply for revision. When the parties to a dispute refer the whole case to the arbitrators, and the arbitrators erroneously decide a matter which does not actually fall within the scope of the case, their error is not one which can be corrected by the Court. SITA RAM v. DHANI RAM, **38 P.L.R. 1904.**

(148)—*Award not filed in Court within six months, enforcement of specific performance—Joint property, suit for division of—Limitation Act, sch. II, art. 113—Civ. Pro. Code (1882), s. 525.*—The fact that an award has not been filed in Court does not make it invalid, the provisions of s. 525, Civ. Pro. Code, being not imperative. (20 M. 490, 20 W.R. 420, *F.*) *Held* also that a suit to enforce an award cannot be treated as a suit for specific performance of contract within the meaning of art. 113 of the second schedule to the Limitation Act of 1877. (22 A. 285, *F.*) *Held* also that where by an arbitration a property has been awarded jointly to some members of the family alone, a suit can be brought by any of such members against the others for the division of that property alone without including the property which jointly belonged to the whole family. THAKUR SHEO NARAIN SINGH v. THAKUR BISHUNATH SINGH, **7 O.C. 369.** (23 A. 216, *F.*)

(149)—*Suit to set aside—Evidence recorded by umpire alone—Duty of arbitrators—Invalid award.*—In a suit to set aside an award, on the ground that from the commencement to the close of the proceedings the arbitrators did not attend a single sitting and that the umpire alone recorded the evidence in the case: ***Held,***

Award—*continued.*

that until all the arbitrators and the umpire attend every sitting, hear all the evidence bring their minds to bear on the points at issue, and give an award according to their judgment on the merits of the evidence, there can be no award, in fact, made by them. HARPAL SINGH v. AMIR SINGH, **1 O.C. 181.**

(150)—*Arbitration—Award—Ss. 508, 521, 522, Civ. Pro Code, 1882—Appeal.*—An award passed without the submission to arbitration of all the parties interested in the subject-matter of it, and without an order of the Court as prescribed by s. 508, referring the matter in dispute to the determination of arbitration and fixing a time for the making of an award, is not an award in law. *Held*, therefore, that, where an award is made without the submission of all the parties, and without fixing a time for the making, and a decree is made in accordance with it, an appeal is not thereby barred. NEGI PURAN v. HIRA SINGH. **6 A. L.J. 333=1 Ind. Cas. 146.** [*R*, 31 A. 450=6 A.L.J. 496=2 Ind. Cas. 363.]

(151)—*Award made by financial Commissioner in dispute regarding maintenance—Rules of the British Indian Association—U.P. Act, I of 1869, s. 33.*—Against SS, a Talukdar, A and S put in claims to be entitled to shares in the estate. Their claims were dismissed by the Financial Commissioner, Mr. Davies, on the 27th August, 1867, but he advised them to accept any maintenance awarded to them by the Committee of Talukadars. Subsequently on the 9th January, 1869, the Financial Commissioner made the following award in respect of their claims:—"The shares in compliance with Mr. Davies' order have applied to the Talukadars' Committee.....The case has now come to me for disposal, not judicially but as supervisor of the Talukdars' proceedings.....A who is childless will receive for his life a two annas share in the estate. S and his heirs will receive in perpetuity a 3 annas share in the same estate. On the death of A, his share will be divided equally, one anna will revert to S S and his heirs and successors, and one anna will go to S and his successors." A died and one anna accordingly went to S making his share up to 4 annas and one anna reverted to SS. S was put in possession of land having a gross rental equivalent to the profits of a 4 annas share. The plaintiff, the son of SS, sued the defendants, the descendants of S alleging that the award of the 9th January, 1869, was in the nature of an award for maintenance and must be read subject to the rules of the British Indian Association framed in 1867 and that S having died he was entitled under those rules to 25 per cent. of the gross rental from the first generation of his heirs as rent payable by the defendants to himself. The defence set up was that the Financial Commissioner was acting purely as an arbitrator and not as in any way connected with the British Indian Association and that the rules of British Indian Association could not be read

Award—*continued.*

into that award the effect of which was to confer a share in absolute proprietary right on S and his heirs. *Held*, that the Financial Commissioner when making his award of 9th January 1869 was acting as a private gentleman and not in official capacity and that his award should not be treated as an award made by the British Indian Association or read subject to the rules of that Association. GANGA BAKHSH v. DALIP SINGH, **7 O.C. 218,** [*R.*, 9 O.C. 179.]

(152)—*Award—Provision in award to pay a certain sum—Person not a party thereto, whether can take benefit of it—Implied trust.*—Where, in an award to which the plaintiff was no party, a provision was made that defendant should pay Rs. 100 to plaintiff on the responsibility of his share of the property, and it was intended entirely for the benefit of the defendant's brother. *Held*, that there was no trust created in favour of the plaintiff, and that he acquired no interest under the award as he was no party to it. SHRINIVASAYYA v. SITAMMA, **5 M.L.T. 199.** (11 I.A. 20=6 A. 322, *R.*)

(153)—*Power to extend time "for making award"—Arbitration Act (IX of 1899).*—The Court is competent to extend the time for "making" the award, even after the award has been made by the arbitrator. SETH UTOOMAL VASOOMAL v. SETH HARIDAS ASANAND, **4 S.L.R. 26=7 Ind. Cas. 595.** (13 A. 300, 14 A. 343, 9 M. 475, *R.*)

(154)—*Legality of award opposed to Hindu law of inheritance.*—An award of arbitrators cannot be questioned on the ground that it is opposed to the Hindu law of inheritance. MT. JANKI v. PUSA *alias* UMRAO, **14 C.P.L.R. 94.** (1 C.P.L.R. 130, 8 C.P.L.R. 102, *R.*)

(155)—*Binding force as against parties to submission—Effect of signature to award—Validity of award made in excess of authority.*—An award of arbitrators derives its binding force as against the parties entirely from the previous submission of the latter to the jurisdiction of the arbitrators and the subsequent signatures of the parties in token of consent does not in any way affect the character of the document. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently acknowledged the justice of the decision. Where the arbitrators had been directed by the parties to divide certain properties and had not been directed to do anything more a decision by them as to the respective shares of the parties without making a complete division of the property is not valid. JAGANNATH v. RAMBUX, **6 C.P.L R. 95.** (2 C. 386, *D.*)

(156)—*Validity of award by majority.*—An award to be valid must be the unanimous

Award —*continued.*

award of all the arbitrators unless the agreement of reference allows a majority to give a decision. RAMA v. MANA, **12 C.P.L.R 112.** (19 W.R. 47, 7 M. 174, *F.*) [*Cited*, 4 N.L.R. 184.]

(157)—*Civ. Pro. Code (Act V of 1908), s. 2—Arbitration—Award—Objections against—Order disposing of objections — Appeal — Revision — Order—Decree.*—The plaintiff preferred objections to an award in a case referred to arbitration through Court. The Court, by an order dated the 15th February, 1910, having considered the objections, passed an order in these terms "I refuse to set aside this award." The case was adjourned to several dates for arguments on other aspects of the dispute, but before any order was passed, the plaintiff appealed against the order refusing to set aside the award. In reply to the plea that the order was not appealable it was contended that the order was a "decree" within the meaning of s. 2, cl. 2 of the Civ. Pro. Code, and it was also urged that the appeal may be treated as a revision. *Held*, that the contention was not valid and an appeal was not competent against the order; for it could not be held to be a decree. *Held*, also that the appeal could not be treated as a revision; for where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. NARPAT RAI v. DEVI DAS, **1 P.L.R. 1911=9 Ind. Cas. 385=12 P.W.R 1911.** (25 P.R. 1902, P.C., *F.*)

(158)—*Reference under mistake of right—Mistake one of law—Award not to be set aside.*—Where an award was made in pursuance of an agreement to refer, the award could not be set aside on the ground that the parties to the agreement labored under a mistake that all instead of one of them were entitled to the estate in question and the mistake was one of law and not of fact. MANBODH v. BARI BOHU, **3 C P.L.R. 89.**

(159)—Res judicata—*Order refusing to file award—Suit to enforce it—Whether barred.*—An order of a Court refusing to file an award does not operate as *res judicata* in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. SHIB CHARAN DAS v. RAMCHANDAR SARUP, **8 A.L.J. 315.** (28 A. 21, 32 A. 484, *R*).

(160)—*Setting aside award—Misconduct of arbitrators—Mere suspicion not sufficient—Express or implied fraud or corruption necessary.*—To induce the Court to interfere with an award on the ground of misconduct there must be something more than suspicion. The misconduct must amount to corruption or fraud or to something from which fraud or corruption might be inferred. The mere fact that an arbitrator is indebted to one of the parties is not sufficient to set aside an award, though it may be a matter of suspicion. MUKUND RAM SUKAL v. SALIGRAM SUKAL, **2 C.P.L.R. 202.**

(161)—*Reference to arbitration without intervention of Court—Order of Assistant Collector,*

Award—*continued.*

first class, directing award to be filed—Whether appeal from such order lies to District Judge.—*Held*, that no appeal lies to the District Judge from an order of an Assistant Collector, first class, directing that an award made on a matter referred to arbitration without the intervention of the Court should be filed. GOBARDHAN PRASAD v. GUR PRASAD RAM, **8 A.L.J. 1090.**

(162)—*Award—Special performance—Suit on an award not a suit for specific performance of a contract—Limitation—Limitation Act (IX of 1908), sch. I, arts. 113, 116, 120—Specific Relief Act (I of 1877), s. 30.*—A suit for recovery of money, payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by art. 116 or art. 120 of the Limitation Act. S. 30 of the Specific Relief Act lays down that, when the question is one of specific performance, the Court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question is to take the terms of the award before the Court and to see whether, if the same terms had been embodied in a contract between the parties, the suit is or is not one in which specific performance of those terms is claimed and ought to be decreed. KULDIP DUBE v. MAHANT DUBE, **8 A.L.J. 1138.**

(163)—*Award, grounds for setting aside of—Arbitrators, powers and duties of—Misconduct of arbitrator—Civ. Pro. Code, 2nd schedule, paras 14, 15 and 20—Limitation Act, art. 158.*—Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity, and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it, or the rules relating to evidence to be found in the Indian Evidence Act. He may also, in forming his judgment, act upon merely moral considerations of which a Court of law could not take cognizance. Where the award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact, and the Courts will not ordinarily review his discretion, provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment or any mere ground of mistake. An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award, and whether in his estimate of the compensation he took into consideration any

Award—*continued.*

matters not included in the reference and therefore not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the *quantum* of compensation, or so as to scrutinise the exercise of his discretionary power to award compensation. *Held*, further, that the principles accepted in the English law for regulating the conduct of the arbitrators are not inapplicable to arbitration-proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England. *Held* also, that art. 158, Limitation Act, cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court. BADRUDDIN HASSAN v. AMIR BEGAM, **14 O.C. 308**.

(164)—*Award, private arbitration—Partial enforcement of award by Court—Jurisdiction of Court to give a decree on portion of award—Award, rule of construction of—Liberal construction—Arbitrator, power of—Substantial and complete justice, if sufficient—Award, beyond reference, if enforceable—Objection to the award, if can be taken by the party in whose favour it is made—Civ. Pro. Code (Act XIV of 1882), s. 525.*—An arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. In this view, Courts are never astute to entertain technical objections to awards. The Courts will not review awards upon the merits, they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact. An arbitrator cannot, however, go beyond the precise questions submitted; it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. The submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters submitted; he cannot taken upon himself an authority which the submission does not confer. Where, the matter in controversy submitted to the arbitrator was whether the plaintiff had a right of way over a specified strip of land, and not whether the plaintiff should have access to a particular part of the village across the land of the defendant, the arbitrator was bound to base his decision upon an investigation of the first question, and he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party, in whose favour the erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award on this ground. *Semble*:—It is not

Award—*continued.*

competent to the Court, in a proceeding under s. 525 of the Code of 1882, to direct that the award be filed in part; the Court is bound to refuse an application made to it for filing the award, if in its opinion the award is open to attack in part. NARSINGH NARAIN SINGH v. AJODHYA PRASAD SINGH, **15 C.L J. 110**.

(165)—*Award—Construction—British Indian Association, award made by—"In perpetuity," meaning of—Suit for possession after the death of the grantee—Jurisdiction of Civil or Revenue Court—Oudh Rent Act (XXII of 1886), s. 108 (5 A)—Resumption of rent-free grant—Suit for ejectment against transferee.*—Under an award of the British Indian Association, the appellant's predecessor-in-title was granted a village rent-free "in perpetuity." *Held*, that the award did not confer any under-proprietary right; nor did the use of expression "*in perpetuity*" imply an extension of interest beyond the life-time of the grantee. (8 A 39, 12 I.A. 159, 23 A. 194, 7 O.C. 90, *Rel. on*; 23 C. 838, 23 I.A. 64, *D*) A suit for possession of the land, after the death of the grantee, against the transferee of a non-transferable grant, is not a suit for resumption within the meaning of s. 108 (5-A) of the Oudh Rent Act. It is merely a suit for ejectment of a trespasser, and as such is cognizable by the Civil Court. (3 O. C. 48, *Rel. on*). A *talukdar* is entitled to sue in ejectment against the transferee of a non-transferable grant alone, without at the same time or previously suing for resumption of the rent-free grant as against the grantee or his heir. SHAMBHU NATH v. RUDRA PRATAB NARAIN SINGH, **12 Ind. Cas 324**.

Award directing payment to plaintiff within two months by assignment of debts—Failure to make payment—Interest—*See* ACT XXXII OF 1839, 8 M.L.T. 405=8 Ind. Cas. 349.

See ACT XXVIII OF 1860, ss. 21, 28, 12 M. 1.

See ACT XVII OF 1873, 19 C. 584, P.C.= 19 I.A. 95, 19 C. 742.

See ACT I OF 1894, 23 C. 526.

Conditions of a valid award under Land Acquisition Act—When it is deemed to be "made"—*See* ACT I OF 1894, ss. 6, 7, 11, 12, 18, 123 P.R. 1908.

Locus standi to contest the sufficiency of, interest in land whether necessary for—*See* ACT I OF 1894, s. 18, 10 C.W.N. 195.

An—under ss. 26, 30 or 54 of Act I of 1894 (Land Acquisition) is a decree within the meaning of s. 2 of the Civ. Pro. Code—*See* ACT I OF 1894, ss. 26, 30, 54, 53 P.R. 1906=103 P. L.R. 1906.

Under the Land Acquisition Act directing investment of the compensation-money in Government securities, maintainability of appeal against an—*See* ACT I OF 1894, s. 54, 29 M. 117.

Award—*continued.*

Made *ex parte*—Validtiy of *ex parte* award —*See* ACT IX OF 1899, s. 4, 10 C.W.N. 814= 33 C. 1237.

Order dismissing application to set aside award, whether decree—*See* ACT IX OF 1899, ss. 11 (2), 14, 14 Bur. L.R. 129=4 L.B.R. 249.

See BEN. ACT XIII OF 1848, Marsh 323.

Decision under Batwara law—*See* BEN. ACT XIII OF 1848, W.R. F.B. 12=1 Ind. Jur. O.S. 5=Marsh 37.

By Deputy Collector—How far binding—*See* BEN. ACT VI OF 1880, ss. 3, 44 (2), 55, 56, 8 C.W.N. 669.

In arbitration out of Court — Decree in terms of—Power to grant instalments in payment—*See* BOM. ACT XVII OF 1879, s. 15-B, 13 Bom. L.R. 352.

See BOM. ACT XVII OF 1879, s. 47, 8 B. 20.

See C.P. ACT XVIII OF 1881, s. 87, 27 C. 515, P.C.=27 I.A. 39=4 C.W.N. 582.

See C.P. ACT IX OF 1883, ss. 87, 88, 2 C.P.L.R. 116.

Decision on—made by one arbitrator only—Civil suit in respect of same matter—*See* U.P. ACT XIX OF 1873, ss. 220, 230, 231, 18 A. 172 =A.W.N. 1896, 14.

An arbitration under, if valid—When delivered after specified time—*See* U.P. ACT XIX OF 1873, s. 221, 14 A. 347=A.W.N. 1892, 20.

See U.P. ACT XIX OF 1873, ss. 222, 229, 231, A.W.N. 1882, 82.

Decree on judgment in accordance with an award—Appeal—*See* APPEAL—GENERAL, 25 P.R. 1902, P.C.

An award by Court in the form of a decree, no appeal lies against—*See* APPEAL—ARBITRATION, 1 Bom. L.R. 366=23 B. 752.

See APPELLATE COURT—MISCELLANEOUS, 2 B.L.R. App. 29 (*b*)=11 W.R. 57.

Suit to set aside an—made otherwise than on a reference under Ch. XXXVII, Civ. Pro. Code, maintainability of—*See* CIV. PRO. CODE, 1882, Ch. XXXVII, 3 L.B.R. 4.

—Application to file award in 1908—Order refusing to file award made in 1909—Appeal—*See* CIV. PRO. CODE, 1908, ss. 104, 105, 154, 7 A.L.J. 1070=3 Ind. Cas. 8.

Order filing an—Decree based thereon—Appeal—*See* CIV. PRO. CODE, 1908, s. 104 (*f*), sch. II, cl. 21 (1) and (2), 172 P.L.R. 1911.

Award made after expiry of time fixed by Court—Application for extending time to file, award—*See* CIV. PRO. CODE, 1908, s. 148, 38 C. 522.

Adjustment before award—Decree according to award—Adjustment not certified—Powers of executing Court—*See* CIV. PRO. CODE, 1908, O. XXI, r. 2, sch. II, rr. 15, 20, 21, 6 A.L.J. 403=2 Ind. Cas. 608.

Award—*continued.*

See CIV. PRO. CODE, 1908, O. XXIII, r. 1, sch. II, r. 20, 31 C. 516.

Compromise amending award—Delay in acting upon its conditions—Effect—*See* CIV. PRO. CODE, 1908, O. XXIII, rr. 1, 3, sch. II, r. 20, 38 P.W. R. 1910=5 Ind. Cas. 994.

Agreement to refer made by guardian of minor defendant—Sanction of Court not given —Validity of—*See* CIV. PRO. CODE, 1908, O. XXXII, r. 7, 17 C.P.L.R. 147.

Decree based on — Appeal —Further reference to arbitration — Bad—Remand—*See* CIV. PRO. CODE, 1908, O. XLI, r. 23, A.W.N. 1905, 164=2 A.L.J. 477.

See CONTRACT—BREACH OF CONTRACT, 6 M.H.C. 40.

Silent as to costs—Procedure to be adopted by Court—*See* COSTS—SPECIAL CASES, 35 P.L.R. 1906.

See COURT FEES ACT, 1870, s. 31, 10 C. 11.

Appeal from decree in accordance with—*See* COURT FEES ACT, 1870, sch. I, art. 1, A.W.N. 1907, 177.

Order rejecting objections to—Application for revision—Court-fee—*See* COURT FEES ACT, 1870, sch. I, art. 13, 4 P.L.R. 1911=9 Ind. Cas. 388=13 P.W.R. 1911.

See CRIM. PRO. CODE, 1898, s. 145, 7 C.W.N. 461.

Suit for partition—Arbitration—Decree on —Direction in decree to deliver moveable property—Part of such property lost—Alteration of decree—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 17 B. 657.

Empire—Decision by—Binding nature of —*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 4 M. 311.

Right to contest question disposed of by award—*See* ESTOPPEL — ESTOPPEL BY DEEDS, ETC., 11 C. 386, P.C.=12 I.A. 67.

Civ. Pro. Code, 1882, s. 525—Suit upon an —*See* EVIDENCE—SECONDARY EVIDENCE, 15 M. 99=1 M.L.J. 591.

Civ. Pro. Code, s. 525—Non-production of award, procedure—*See* EVIDENCE—SECONDARY EVIDENCE, 12 M. 331.

See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1894, 38.

Award whether evidence against persons not parties—*See* HINDU LAW—ALIENATION, 26 M. 28.

Against Hindoo widow or daughter—Effect on reversioners—*See* HINDU LAW—CONVERSION, 4 A.L.J. 365=A.W.N. 1907, 151=29 A. 487.

Award of arbitrators dividing properties of co-parceners and directing enjoyment till a certain period—Reservation of right to re-partition on the expiry of the period—*See* HINDU LAW—PARTITION, 4 Ind. Cas. 392=7 M.L.T. 67=20 M.L.J. 29=33 M. 246.

Award—*continued.*

See HINDU LAW—PARTITION, A.W.N. 1884, 217, 23 M. 490.

Arbitration — Mortgage-suit — Arbitrator not allowing interest on sum found due—Validity of award—*See* INTEREST—SPECIAL CASES, 7 C.L.R. 206.

Jurisdiction of High Court—Application to file—*See* JURISDICTION—SUITS FOR LAND, 2 C. 445.

See JURISDICTION OF CIVIL COURTS, A. W.N 1886, 158.

See LIMITATION ACT, 1908, s. 14, W.R. 1864, 378.

See LIMITATION ACT, 1908, s. 14. art. 113, 67 P.R. 1889.

See LIMITATION ACT, 1908, arts. 14, 45, 120, A.W.N. 1881, 91.

See LIMITATION ACT, 1908, art. 45, 3-A. 738.

Judicial—Proceedings of settlement officer as to cess—*See* LIMITATION ACT, 1908, arts. 45, 46, 1 Agra 134.

Of settlement officer—*See* LIMITATION ACT, 1908, arts. 45, 46, 1 Agra 228.

See LIMITATION ACT, 1908, arts. 45, 46, 2 Agra 8, 2 Agra 258.

See LIMITATION ACT, 1908, arts. 46, 142, 144, 41 P.R. 1881.

Suit to recover money under—Limitation —*See* LIMITATION ACT, 1908, arts. 113, 115, 120, 178, U.B.R. 1909, 2nd Quarter, Limitation, 9.

Suit for recovery of immoveable property based upon—*See* LIMITATION ACT, 1908, arts. 113, 144, 26-A. 497.

Application to set aside award—Limitation —*See* LIMITATION ACT, 1908, art. 158, 8-A. 64=A.W.N. 1886 2.

Application to set aside—*See* LIMITATION ACT, 1908, art. 158, 5 C.W.N. 813, 36 C. 36.

Whether governed by Mahomedan Law—*See* MAHOMEDAN LAW—DOWER, 8 A.L.J. 746.

See MINOR — SUITS BY AND AGAINST MINORS, 9 B.H.C. 289.

See MORTGAGE—GENERAL, 4 A. 462=A.W.N. 1882, 106.

See PANCHAYAT, 15 M. 1.

See POSSESSION — ADVERSE POSSESSION, 10 M.I.A. 511.

Signed by the parties—Partition-deed—*See* REGISTRATION ACT, 1908, s. 17, P.L.R. 1900, p. 459.

Creating or declaring title to immoveable property—Registration—*See* REGISTRATION ACT, 1908, s. 17, 6 Ind.Cas. 361.

Award—*concluded.*

Thakbust—*See* BEN. REG. VII OF 1882; 2 B.L.R.P.C. 111=12 M.I.A. 275=12 W.R. P.C. 6, 2 B.L.R. P.C. 137=12 M.I.A. 292=12 W.R. P.C. 6.

Suit for partition—Award, effect of—*See* RES JUDICATA—ADJUDICATIONS, 19 M. 290.

Order refusing to file an—Subsequent suit to enforce the—*Res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 7 A.L.J. 425=6 Ind. Cas. 127=33 A. 484.

Previous suit for partition based on general right as co-parcener—Right to partition under previous award not included in plaint—Subsequent suit whether maintainable as based on award—*See* RES JUDICATA—CAUSE OF ACTION, 14 B. 31.

Estoppel—Suit to contest revenue — *See* RES JUDICATA—MATTERS IN ISSUE, 1 B.L. R.A.C. 1=10 W.R. 22.

Decree on judgment in accordance with an award—Revision—*See* REVISION—GENERAL, 88 P.R. 1902.

Notice of filing of award not given to parties—Passing of decree—Material irregularity—Revision—*See* REVISION—GENERAL, 20 A. 474=A.W.N. 1898, 132.

See RIGHT OF SUIT—POSSESSION, SUIT FOR, 10 W. R. 71.

Effect of settlement award—*See* SETTLEMEET—EFFECT OF SETTLEMENT, 13 C.P.L. R. 81.

See SETTLEMENT — MISCELLANEOUS, 68 P.R. 1871.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 3 N.W.P. 117.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—MISCELLANEOUS, 13 M. 344.

See SPECIAL OR SECOND APPEAL—GENERAL, 6 C.W.N. 614.

Decree by first Court against terms of award—Decree on first appeal in accordance with award, no second appeal lies from—*See* SPECIAL OR SECOND APPEAL—RIGHT OF SPECIAL APPEAL, 10 A. 8=A.W.N. 1887, 240.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 4 B.L.R. App. 82=13 W. R. 233, 7 N.W.P. 157.

Nature of suit founded on—*See* SPECIFIC PERFORMANCE, 15 C.P.L.R. 115.

On arbitration out of Court, maintainability of suit under Specific Relief Act, s. 30, to enforce an—*See* SPECIFIC RELIEF ACT, 1877, s. 30, U.B.R. 1906, Specific Relief, 30.

Of lugyis—*See* STAMP ACT, 1899, 1 L. B. R. 84.

Stamp on award directing division of property is an instrument of partition within the meaning of the Stamp Act—*See* STAMP ACT, 1899, s. 2 (15), 8 Bom. L. R. 869=31 B. 68.

Akut Accounts.

See EVIDENCE—ACCOUNTS, 9 M. 285.

Ayautaka Stridhan.

See HINDU LAW—STRIDHANAM, 7 Bom. L. R. 904=2 A.L.J. 238, P.C.

Babuana Allowance.

See MAINTENANCE, 6 C.W.N. 796.

Babuana and Sohag.

Properties—Inheritance—Darbhanga Raj—*See* CUSTOM, 3 Ind. Cas. 207.

Babuana Grant.

(1)—*Durbhanga Raj*—Babuana *grant—Mortgage by grantee—Legal necessity—Alienability—Ancestral property.*—Property granted as *babuana* to junior members of the family by the Maharaja of Durbhanga is ancestral property and is governed by the ordinary rules of *Mitakshara* law to which the Raj itself would be subject but for the peculiar custom necessary for its continuance as a Raj. Such property is alienable for legal necessity. BHABESHWAR SINGH v. RAI BABU GANGA PERSHAD SINGH BAHADUR, **12 C. W. N. 966.** (10 C.W.N. 978=33 C. 1158. 12 C.W.N. 958, *F.*)

(2)—Babuana *grant by the Darbhanga Raj—Impartible and alienable—Mortgage by holder to pay off antecedent debt, if binds sons—Right to maintenance if revives on transfer or loss of grant—Sale by Maharaja of grant to realise revenue paid by him on grantee's default—Condition of grant—Custom.*—It being conceded that the lands or usufructs granted as *babuana* to junior members of the Durbhanga Raj family are impartible, descending to the eldest male heirs of the grantees to be held or managed by the persons to whom they descend for the maintenance of the family, and that, on failure of male descendants, they revert to the Raj—and there being no provision express or implied that the interest granted should be inalienable, *held*, that such grants are alienable. That notwithstanding their impartibility, such grants come, in the absence of some special family custom regulating their enjoyment, within the principle of the *Mitakshara* law, whereby a father may, in order to satisfy an antecedent debt of his own not being of an illegal or immoral character, mortgage ancestral property, and such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are not parties. There is no authority for the proposition that, on the loss or alienation of *babuana* property, the right to maintenance of the present and prospective members of the branch against the Raj revives *toties quoties*. It being a condition of *babuana* grants that, the holder should pay Government revenue due in respect of the property granted through the Maharaja, it cannot be permitted that the subject of the grant should be enjoyed and the condition upon which it was made disregarded. It cannot therefore be disputed that, if, on the

Babuana Grant—*continued.*

failure of the holder to pay revenue, the Maharaja has to pay it, he may recover the amount by suing the holder for it and putting the property granted to sale in execution of the decree obtained by him. Property, though impartible, may be alienable. (8 I. A. 248, 15 I.A. 51, 3 C.W.N. 415=26 I.A. 83, *Rel. on.*) *Held*, that a custom of inalienability of *babuana* property was not proved in this case. DURGADUT SINGH v. MAHARAJA SIR RAMESHWAR SINGH BAHADUR AND TARADUT SINGH *alias* TARANANDJI v. MAHARAJA SIR RAMESHWAR SINGH BAHADUR, **13 C.W.N. 1013, P.C.=6 M. L.T. 68=11 Bom L R. 901=6 A L.J. 847=36 C. 943=10 C L J. 233=19 M.L.J. 567=36 I.A. 176.** (15 I.A. 51, *R.*)

(3)—*Alienability—Hindu Law—Mitakshara—Babuana property, if ancestral in the grantee's hand—Interest of co-parcener, attached before death—Claim—Release from attachment—Right of decree-holder to follow property—Civ. Pro. Code (Act XIV of 1882), s. 280—Regular suit.*—Property granted as *babuana* in accordance with the *kulachar* of the Durbhanga Raj to junior members of the family for their maintenance is alienable, subject to the ultimate claim of the grantor, as reversioner, on the extinction of the grantee's descendants in the male line. (9 C.W.N. 567=32 C. 683, *F.*) Such property is ancestral property in the hands of the grantee, and a son of the grantee acquires an interest in it at his birth. When the undivided property of a joint Mitakshara family was attached in execution of a decree against a co-parcener, the fact that the property was, before the judgment-debtor's death, provisionally released from attachment under s. 280, Civ. Pro. Code, does not prevent the decree-holder from working out his rights acquired by virtue of the attachment, if, subsequently to the judgment-debtor's death, the order under s. 280, Civ. Pro. Code, is set aside in a regular suit. RAM CHANDRA MARWARI v. MUDESHWAR SINGH, **10 C.W.N. 978=33 C. 1158.** (6 I. A. 88, 23 C. 829, *Rel. on.*) [*F.*, 12 C.W.N. 966, 35 C. 823=8 C.L.J. 124=12 C.W.N. 958, 6 A.L.J. 434; *R.*, 5 C.L.J. 80=11 C.W.N. 163.]

(4)—*Revenue and cess, liability for—Durbhanga Raj—Contribution—Interest—Tenure-holder—Proprietor.*—*Held*, in respect of a *babuana* grant of certain mehals in the Darbhanga Raj, that the plaintiff Maharaja and the defendants (holders of the *babuana* grant) are neither co-proprietors, nor are the latter tenure holders under the former; that, in accordance with the *sanad*, the defendants must pay all Government dues, (including cesses), through the plaintiff, and if the plaintiff pays the amount, he is to be fully reimbursed by the defendants; that interest on cesses payable by the defendant should be allowed at the rate of 12 per cent. per mensem, as in a contribution suit. LALITESHWAR SINGH v. MAHARAJA RAMESHWAR SINGH BAHADUR, **13 C.W.N. 118=4 Ind. Cas. 331.**

Babuana Grant—*concluded.*

(5)—Babuana *grant of ancestral property—Grantee's estate, nature of—Custom—Burden of proof—Partition*—Babuana *grant, nature of.*—*Per Curiam.*—Landed property acquired by a grandfather and distributed among his sons does not, by such gift, become their self-acquired property so as to enable them to dispose of it to the prejudice of the grandsons. (6 M.I.A. 165, *F.*) A *Babuana* grant of ancestral property by the owner of an impartible estate to enure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the grantee or his direct male decendants. Hence the other members of the family have the rights in it which they can claim under the Mitakshara Law, that is, the right to restrain alienation except in cases of legal necessity and the right to claim partition : and the original grantee has no power to dispose of the property by Will. (33 C. 1158. *F.*) The custom which operates in the case of the Raj itself does not apply to a *Babuana* grant without the requisite proof which is necessary in such cases. The burden of proof lies upon the person seeking to establish the particular custom and to take this out of the ordinary category of Hindu family property. *Per Brett, J.*—A *babuana* grant is made to a junior member of the family and to his decendants in the male line for their maintenance. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his maintenance from the Raja, but it is a grant for the maintenance of the grantee and his male decendants so long as there are any. LALITESHAR SINGH v. BHABESHWAR SINGH, **8 C.L.J. 124=12 C.W.N. 958=35 C. 823.** [*F.*, 12 C.W.N. 966.]

Alienability of — *See* GRANT — MISCELLANEOUS, 9 C.W.N. 567=32 C. 683.

Bachelor.

Adoption by widower or—*See* HINDU LAW —ADOPTION, 4 M.H.C. 270.

Back Fee.

Stipulation for, and acceptance of, validity of —*See* ACT XVIII OF 1879, ss 6, 12, 13, 27, 28, 29, 30, 45 P.W.R. 1907, F.B.=33 P.L.R. 1907=61 P.R. 1907.

Bad Faith.

See INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 3 B.L.R. App. 14 (*b*).

Badl.

See HINDU LAW—GIFT, 6 M. 319.

Badni Contracts.

Nature of —*See* CONTRACT ACT, 1872, s. 30, 57 P.W.R. 1907=74 P.R. 1908.

Badni Transaction.

See CONTRACT ACT, 1872, ss. 30, 213, 95 P.L.R. 1901=46 P.R. 1901.

Bahi Vaddust.

—prescribes general rules for keeping the "Bahi Yaddust." **Civ. Cir. No. 2, dated 14th February, 1870, 13 W.R. Civ. Cir. 3.**

Bai-bil wafa Deed.

By plaintiff in pre-emption suit, effect of on right to pre-empt—*See* MORTGAGE—FORM OF MORTGAGES, 14 A. 195=A.W.N. 1892, 42.

"Bai-bil wafa" Mortgage.

Proceedings of settlement officer upon award before mortgage—Rights of mortgagee—*See* LIS PENDENS, A.W.N. 1888, 246.

Bai-bil-wafa form of mortgage—Two documents of same date for sale and re-conveyance —Admissibility of parol evidence to show real intention to create mortgage—*See* MORTGAGE —FORM OF MORTGAGES, 19 A. 434=A.W.N. 1897, 109.

Bail.

Malicious prosecution—Refusal to accept —Judicial Act — Malice — *See* JUDICIAL OFFICERS, LIABILITY OF, 2 M.H.C. 396.

Appeal under s. 73—Pending appeal—*See* ST. 11 AND 12, VIC., C. 21, s. 50, 17 B. 334.

Bail-bond.

(1)—*Indemnity for a*—.—A contract whereby it is sought to indemnify a surety for his bond is illegal under s. 24 of the Indian Contract Act, 1872. LAXMANLAL v. MULSHANKAR, **10 Bom. L.R. 553=32 B. 449.**

For accused—Forfeiture of—Suit, recovery of amount by surety against principal—*See* CONTRACT ACT, 1872, s. 23, 1 P.R. 1899.

Bailee.

See BAILMENT.

See CONTRACT ACT.

See ACT IX OF 1890, ss. 72, 76, 17 M. 445.

Rule as to validity of delivery by the, to one of several joint bailors—Scope of the rule —*See* HINDU LAW—PARTITION, 5 Ind. Cas. 343=7 M.L.T. 253=20 M.L.J. 709.

Hire of boats — Damage — Liability of— *See* NEGLIGENCE, 2 Hyde 79.

Bailiff.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 B. 89.

Power of Judge of High Court to appoint special bailiff—*See* ST. 24 AND 25, VIC., C. 104, s. 11, 26 M. 120.

Bailment.

See BAILEE.

See CONTRACT ACT, 1872.

(1)—*Goods damaged by Bailee's negligence—Proof of custom as to liability, admissible.*—**A certain quantity of wheat purchased by the defendant at plaintiff's request was left in the**

Bailment—*continued.*

charge of the defendant who stored it in a room wherein it was damaged by rain-water. The plaintiff sued him in damages. *Held* that proof of custom or usage of trade as to liability was admissible. GOBIND SAHAI v. RAMJI DAS, **68 P. R. 1876.**

(2) — *Pawnee — Inter-pleader suit — Small Cause Court—Act IX of 1850, s. 88* —In execution of a decree of the Small Cause Court obtained by A against B, certain goods of B in pledge with C were seized by, and kept in the possession of, a bailiff of the Court. C instituted an inter-pleader suit to recover possession of the goods. *Held* that the seizure by the bailiff while the goods were in the possession of C entitled C to maintain the suit, and a decree was accordingly given him with costs. BHINJI GOVINDJI v. MONOHAR DAS, **5 B.L R. App. 31 = 14 W.R. 303.**

(3)—*Gratuitous bailee, duty of—Non delivery of goods*—Onus.—A suit cannot be maintained against a gratuitous bailee of goods, for failure to deliver the same, where, having been only bound to account for the manner in which they had been kept he had satisfactorily done so. *Peacock, C.J.*—It is doubtful whether the defendant in this case was a bailee at all. *Per Markby, J.*—The defendant in this case was a bailee for custody, but not a gratuitous bailee. MOOLCHAND v. ROBINSON, **1 B.L.R. O.C. 68.**

(4)—*Principles of law of bailment—Mofussil, applicability to.*—The general principles of the law of bailment are applicable in the Mofussil, and are substantially the same as those which prevail under English law. DOOMUN PEADAH v. SHOOK CHAND PAUL, **17 W.R. 90.**

(5)—*Responsibility of bailee—Burden of proof.*—When loss of goods bailed is established by the plaintiff, it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. TRUSTEES OF THE HARBOUR, MADRAS v. BEST & CO., **22 M. 524.**

(6)—*Contract of bailment—Bailee's lien—*Quantum meruit—*Contract Act, s. 70.*—Where there is an express contract, it must be performed in its entirety, or nothing can be claimed under it, and there is only room for a *quantum meruit* claimed where no such express contract has been made. Therefore, where a person undertook to repair an organ for a particular sum of money and afterwards refused to repair it for that sum, he cannot claim remuneration for the work done by him, at a certain rate, and would not be entitled to retain the organ till such remuneration is paid SKINNER v. JAGER **6 A. 139 = A.W.N. 1883, 263.**

See ACT IX OF 1890, ss. 72, 76, 22 A. 361 = A.W.N. 1900, 111.

See CARRIERS, 2 N.W.P. 237, 3 N.W.P. 195.

Bailment—*continued.*

Bailment of goods—Bailee, whether could sell goods—Rights acquired by vendee from bailee—*See* CONTRACT ACT, 1872, s. 108, Exception 1, 11 B. 704.

Contract of—Bailed goods stolen—Liability of bailee—*See* CONTRACT ACT, 1872, s. 151, 90 P.R. 1900.

Entrusting for repair the driving beam of a sewing machine to coppersmith—Degree of care required of the coppersmith—Burden of proof—*See* CONTRACT ACT, 1872, ss. 151, 152, 154, U.B.R. 1908, 1st Quarter, Contract, p. 11.

See CONTRACT ACT, 1872, s. 178, 3 C. 251.

Currency notes entrusted for a specific purpose—Notes lost by gambling—Trover—Loan—*Bona fide* holder for value—Costs—*See* GAMBLING, 6 B.L R. 581.

See HOTEL KEEPER AND GUEST, 22 A. 164 = A.W.N. 1900, 3.

Bailee when not liable for loss of thing bailed — *See* JURISDICTION — CAUSES OF JURISDICTION, 70 P.R. 1906.

See MASTER AND SERVANT, L.B.R. 1893—1900, 67.

Bairagis.

In Karnal, not an agricultural tribe—*See* EVIDENCE—ACCOUNTS, 4 Ind. Cas. 495 = 51 P.W.R. 1909.

Hindu Law—Bairagi's rights—*See* HINDU LAW—GENERAL, 1 B. L. R. A. C. 114 = 10 W.R. 172.

Application for, by his preceptor's preceptor—Custom, proof of—*See* LETTERS OF ADMINISTRATION, 28 C. 608 = 5 C.W N. 873.

Baj Rojgar.

Gift for performing the ceremony of, is not valid and is therefore unenforceable at law—*See* DEED—CONSTRUCTION OF DEEDS, 7 Bom. L.R. 324.

Balance.

(1)—*Balance—Acknowledgment—Basis of suit—Examination of previous dealings—Amendment—Interest — Equitable claim — Laches—Revision (Civil)—Failure to exercise jurisdiction—Narrow interpretation of rulings — Punjab Courts Act (XVIII of 1884), s. 70 (1) (a).*—A brought a suit on a balance claiming the amount acknowledged as due as well as interest. The first Court held that the plaint should be considered as amended so as to include the previous dealings between the parties, and the previous accounts were filed to enable the Court to deal with the claim. The Appellate Court, on the authority of certain rulings, dismissed the suit as not maintainable being on the basis of a balance. *Held*, (1) that the Appellate Court was in error in holding that it was bound to dismiss the suit; (2) that the narrow interpretation of the rulings by the appellate Court amounted to a refusal to exercise jurisdiction

Balance—*concluded.*

which justified revision under cl. (*a*) of s. 70 (1) of the Punjab Courts Act; (3) that, as the balance included a good deal of interest and A allowed nearly the full term of six years to run before putting defendant in Court, A was not equitably entitled to charge interest on the balance. There is no hard and fast rule that a suit brought on a balance is in all circumstances not maintainable. The striking of a balance may in itself merely serve to bring a claim within limitation. But in each case it will be a matter for consideration whether the form of suit requires the Court to go behind the balance and to determine whether the items from which it was made up should be examined. Where the first Court considers a suit brought on a balance as amended so as to include the previous dealings, the suit should not be dismissed as not maintainable. AMIR CHAND v. SUNDAR MAL, **7 P.L.R, 1912.** (68 P R. 1904 =123 P.L.R. 1904, 119 P.R. 1908, *Expl.*)

Balance-sheet.

Nikash or— Admissibility in evidence—*See* STAMP ACT, 1879, sch. I, art. 1, 15 C. 162.

Balcony.

Removal of—When once the balcony is built in defiance of the orders of the Municipality, the person putting it up cannot obtain injunction from the Civil Court restraining the Municipality from removing the same—*See* BOM. ACT VI OF 1873, s. 33, 2 Bom. L.R. 572.

Erection of, without permission of the Municipality, prosecution for—*See* BOM. ACT III OF 1888, ss. 308, 309, 342, 4 Bom. L.R. 575.

Projection of, over one's own ground or over Municipal ground, so as to overlook another's windows gives a cause of action to the latter for infringement of his easement—*See* EASEMENTS ACT, 1882, ss. 15, Expl. 1, 16, 17, 18, 2 Bom. L. R. 454.

Abutting of, on a private street and constructed in defiance of the orders of a District Municipality can be removed by the Municipality—*See* BOM. ACT VI OF 1873, s. 33, 5 Bom. L.R. 48=27 B. 221.

Banco.

See BENCH, 24 P.R. 1868.

Bandhus.

See HINDU LAW—INHERITANCE, 22 C. 339.

Bania and Zamindar.

Contract between — Grounds on which a Court can alter such a contract—*See* CONTRACT —ALTERATION OF CONTRACTS, 13 P.R. 1905=80 P.L.R. 1905.

Banian.

In the case of— *See* LIEN, 30 C. 937= 7 C.W.N. 799.

Banian of a firm.

Lien in the case of a banian of a firm—*See* LIEN, 18 C. 573=18 I.A. 78, P.C.

Banian of a firm—*concluded.*

See PRINCIPAL AND AGENT – DUTIES AND LIABILITIES OF AGENTS, 2 B.L.R. O. C. 7.

Bank.

See BANKER AND CUSTOMER.

Spoliation of —Books—*See* ACCOUNTS— MISCELLANEOUS, 10 M.I.A. 490.

Receipt—given by—for amount of loan deposited—Terms of contract of loan contained in receipt—Production of receipt whether could be insisted on before payment by—*See* CONTRACT—CONDITIONS PRECEDENT, 14 B. 498.

See DECLARATORY DECREE, SUIT FOR —WHEN DECLARATORY SUITS LIE, 2 B.L. R.A.C 212=11 W.R. 40.

Suit by bank in liquidation— Bank the proper plaintiff in—*See* PLAINT—FORM AND CONTENTS OF PLAINT, 17 A. 292=A.W.N. 1895, 81.

Duty of—to disclose guilt of person for whom defendant was surety—*See* PRINCIPAL AND SURETY— DISCHARGE OF SURETY, 15 B. 585.

Banker and Customer.

See BANK.

See LIMITATION ACT, 1908, arts. 59, 60.

(1)—*Deposit—Agreement by Banker to buy securities for customer—Failure of Bank—Trust.*—A & Co., Bankers, agreed to buy securities for the respondents, whose moneys they held in deposit. Before doing so, however, they suspended payment. *Held*, that the above agreement did not make A and Co., trustees for the amount in deposit. THE OFFICIAL ASSIGNEE OF MADRAS v. THE SOCIETY FOR PROMOTING CHRISTIAN KNOWLEDGE, **6 Ind. Cas 240=8 M L.T. 52.**

(2)—*Remittance to Banker to purchase shares —Failure of Bank—Trust.*—Respondent remitted to A and Co., Bankers, a cheque to purchase shares in certain companies. A & Co. bought some shares, and before completing the purchase they failed. *Held*, that A & Co. stood in the position of trustees to the respondent, and the latter was entitled to a refund of the unspent balance of the money. THE OFFICIAL ASSIGNEE OF MADRAS v. J. W. IRWIN, **6 Ind. Cas. 250=8 M.L.T. 99.**

(3) — *Deposit — Agreement by Banker to purchase Government promissory notes—Failure of Bank—Trust.*—A & Co., Bankers, agreed to purchase Government promissory notes for an amount held by them in deposit on behalf of the respondents, but before they could do so, they suspended payment. *Held*, that no fiduciary relation was created so as to entitle respondents to claim return of the deposit. THE OFFICIAL ASSIGNEE OF MADRAS v. THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL, **6 Ind. Cas. 212=8 M.L.T. 80.**

(4)—*Fixed deposit—Expiry of period—Bank, whether trustee or debtor.*—K had Rs. 1,500 on fixed deposit with A and Co., from 17th

Banker and Customer—*continued.*

October, 1905 to 17th October, 1906, the conditions being that, after the 17th October, 1906, no interest should be payable unless the deposit was renewed. After 17th October, 1906, K sent up his deposit receipt on due course for re-payment of the money, but before re-payment was made, A & Co. failed. *Held*, that the money continued to remain as a deposit after 17th October, 1906. A creditor cannot transform his debtor into a trustee by demanding the re-payment of the debt. THE OFFICIAL ASSIGNEE OF MADRAS v. N. KRISHNA BHATTA, **7 M L T. 416, F.B.**

(5)—*Remittance to Bank to the credit of payee—Payee not customer—Absence of instructions from payee—Nature of payment—Failure of Bank—Effect.*—M. R. Co. remitted money to A & Co., to the credit of R, the payee. A. & Co. informed R, who was not one of their customers, that this had been done, and asked for his instructions. Before R could instruct, A & Co. suspended payment. *Held*, that it cannot be presumed that A & Co., received or were intended to receive the remittance as Bankers. THE OFFICIAL ASSIGNEE OF MADRAS v. D. RAJAM AIYAR, **7 M.L.T. 401, F.B.=6 Ind. Cas. 383=33 M. 299=8 Ind. Cas. 138.** (32 M. 68, *Not Appl.*)

(6)—*Money paid under suspense account pending settlement of terms of investment—Nature of payment—Ownership—Meaning of 'in suspense.'*—M remitted money to A & Co. As M. and A & Co. could not agree as to the terms on which the latter were to hold the money in deposit, and pending further instructions from M.A. & Co., said they would hold the money in suspense account. *Held, per Miller, J. (Munro, J., agreeing)*, that, when a man pays money into a Bank, whether he is a customer or not, the presumption, in the absence of other evidence, will be that he pays the money in to be held by the Banker, as Bankers ordinarily hold the moneys of their customers, irrespective of the fact that the claimant could have withdrawn the money if he could not come to terms of interest, period, or minimum amount of fixed deposit (32 M. 68. *b'.*) Money "in suspense" means no more than that the exact terms as to interest and period of deposit were not fixed, and that, once those were fixed, the arrangement would take effect from that date or possibly from the date of remittances. *Held, per Abdur Rahim, J. (contra)* that money held by a banker to a special suspense account, even though under an agreement which entitles the banker to appropriate the money to his own use whenever he chooses, does not amount to payment to the banker, if the latter has not, in fact, appropriated the money to his own use. THE OFFICIAL ASSIGNEE OF MADRAS v. MELLAPARANGAVUR SARVAJANA SAHAYA NIDHI, LD., **7 M.L.T. 402, F.B. =6 Ind. Cas. 427.**

(7)—*Money in fixed deposit—Demand at maturity — Whether Banker a trustee for the creditor.*—*Per Munro, J.*—When a person

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pays money into a Bank, then, if nothing further appears, the money becomes the money of the Banker, who is entitled to mix it with his other money and use it as his own, but is bound to return its equivalent by paying a similar sum to that deposited with him when he is asked for it. In such a case, the relationship between the Banker and the person paying the money is that of ordinary debtor and creditor. The person paying the money, may, however, at the time of payment, give directions to the Banker, which put the relationship upon a different footing and give it a fiduciary character. When this is the case, the money does not become the money of the banker. He is not entitled to mix it up with his own money and use it, and if he does so and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use, rather than the money which he had the right to dispose of. It is on this principle that money held by a Banker in a fiduciary capacity may, if he fails, be recovered in full out of the general assets. Such directions as would cause the banker to hold the money in a fiduciary capacity may be given either at the time of payment or subsequently with the same result. *Held*, that, when a banker receives a customer's demand for re-payment, it was his duty to remit the money at once. After the demand, the Banker held it in the same way as if, on the day the demand was made, the customer had received the money and had then handed it back and asked the Banker to hold the money for him in trust, pending remittance to him at a future date. *Per Abdur Rahim, J.*—Ordinarily money paid into a Bank on current or deposit account is no longer the customer's money but the Banker's. The banker is a debtor in respect of such moneys, and not a trustee. A creditor is not competent, simply by making a demand for his debt, to turn his debtor into a trustee with respect to the amount, without the debtor having ever at any time accepted such a position. The relationship of debtor and creditor must be taken to continue until it is terminated by payment, unless there is an agreement to hold the amount in trust for the customer, or to apply it in a particular manner as his agent, and something is done towards effectuating the trust or applying it for the specified purpose, and a new and different kind of relationship would be established between the parties in substitution of the old. The position of Bankers and Customers, *inter se*, discussed. OFFICIAL ASSIGNEE OF MADRAS v. RAMACHANDRA IYER, **7 M.L.T. 214=33 M. 134=5 Ind. Cas. 974.**

(8)—*Direction by customer to purchase Government promissory note with money to his credit with the Bank, and promise by Banker accordingly—Bankruptcy—Insolvency—Banker whether a trustee—Failure by Banker to purchase—Effect.*—L had, on the 5th August, 1906, Rs. 600 standing to the credit of his current account with A & Co. On the above date he wrote to A. & Co. requesting them to buy on his

Banker and Customer—*continued.*

behalf a Government promissory note for Rs. 1,000 when the amount of his current account reached that sum. On the 30th September, 1906, L again wrote requesting A & Co. to buy the promissory note as there was then Rs. 1,000 to his credit. On the 10th October, he, not having received any reply to his letter, interviewed some of the officers at the Bank who told him that no reply was necessary as his instructions would be carried out in due course. But in fact A & Co., never brought any promissory note before they suspended payment on the 22nd October, 1906. *Per Munro, J.*—It was competent to L to give such directions, as would thereafter cause A & Co. to hold the money in a fiduciary capacity. In the face of L's specific directions, A & Co. were not entitled to use the money as their own, but held it in a fiduciary capacity. When money is handed to a Banker for the specific purpose of purchasing securities, the Banker has only a special property in the money so handed to him, and if he became a bankrupt while securities were unpurchased, the money would not go into the general account in the bankruptcy, but the whole amount must be paid to the customer. *Per Abdur Rahim, J. (contra).* A mere direction by L to A & Co. to buy Government promissory note, followed by a promise on their part to carry out the directions, cannot have the affect of making A & Co., bankers or trustees with respect to the amount in question, without an entrustment or bailment. Some unequivocal act on the part of the debtor is necessary, showing that he had changed his position into that of a bailee with respect to the money due from him. A mere promise to carry out the directions of the customer, so long as he does nothing towards appropriating the money to any specific purpose, will not suffice, for such a promise can have no higher legal effect than a promise to pay the debt. Something has to be done, which would enable the Court to say that a particular sum is held by the Banker as trustee or agent for some specific purpose, and which he is bound to keep apart from his own money. An entry to that effect in the Banker's book might be a sufficient act of separation or appropriation. THE OFFICIAL ASSIGNEE OF MADRAS v. LUPPRIAN, **7 M L T. 151 =5 Ind. Cas. 312 = 33 M 145 = 20 M.L.J 428.**

(9)—*Honouring a draft genuine to all appearance—Suit by customer for recovery of money—Burden of proof—Forged draft—Plaint, amendment of—Inconsistent pleadings—Handwriting—Value of expert evidence—Principal and agent—Default of principal misleading agent into doing something—Negligence—Signing a blank from—Fraudulent conversion of the form into a cheque—Liability of Banker for honouring such a cheque.*—Where a banker pays money on a draft, signed by his customer, and the draft and the signatures thereon are to all appearance in order, the burden of proving, in a suit by the customer to recover the money from the Banker, that the draft

Banker and Customer—*continued.*

was a forgery, lies on the customer. The plaintiffs sued the defendants for the recovery of certain money paid by the defendants on a draft, the signatures on which plaintiffs alleged, were forged. After the plaintiff's case was nearly concluded, the plaintiffs asked for leave to amend the plaint and to raise a plea to the effect that, even if the signatures on the draft were genuine, the draft was not issued by the plaintiffs and was thus not a proper draft. *Held*, that the amendment could not be allowed, as it would have the effect of putting forward an entirely new case for the plaintiffs inconsistent with the plaint as orginally framed. The opinion of an expert in handwriting should be received with great caution and should not be relied upon unless corroborated. A principal, who has misled his agent into doing something on his own behalf, which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done. The question to be determined in such cases is whether the agent was misled into doing the act by the default of the principal. (15 W.R. 152, *Rel on.*) If A employs B on his behalf to deal with articles of a certain description in a particular way, and then A, through inadvertence or otherwise, introduces among the articles with which B is to deal a dangerous counterfeit, not distinguishable in appearance from its companions, A is bound to indemnify B against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment. As between a customer and a banker, who is his mandatory, the duty on the part of the customer arises directly out of contractual relations subsisting between them to take care that any cheque which he should buy him is not in such a form as to offer facilities for being filled up in a way which would mislead the banker if reasonably vigilant. It is negligence to sign a document which somebody else may convert into a negotiable instrument for the honouring of which the banker is to be held liable. The defendants were authorized by plaintiffs to accept and honour cheques signed by M. M left in his office blank forms of drafts signed by him. Another person duly filled up a blank signed form and had the cheque cashed at defendants. Plaintiffs sued defendants for the recovery of the money paid on the cheque. *Held*, the defendants were not liable. PUNJAB NATIONAL BANK, LTD. v. MERCANTILE BANK OF INDIA LTD., **8 Ind. Cas. 98.**

(10)—*Current account deposit—Direction to banker to purchase Government pro-notes—Suspension of the Banker before purchase—Fiduciary relation, whether created—Indian Insolvency Act. s. 73—Letters Patent, ss. 15, 18—Appeal from order of Insolvency Commissioner—Division of opinion between Judges hearing appeal—Further appeal, whether lies.*—Where the Judges of the High Court, hearing an appeal from an order of the Commissioner in Insolvency, do not agree in their opinion, a further appeal lies under s. 15 of the

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Letters Patent. S. 18 of the Letters Patent confers the power which is given by s. 73 of the Indian Insolvency Act, but that does not of itself deny the right of further appeal, and there is nothing in the Letters Patent to prevent the application of s. 15. A mere direction by a customer to his banker to apply money at his credit in a particular way does not alter their relation of banker and customer. There must be something to show that the banker not merely undertook to change his position in the future, but that, by taking some step to apply the money or otherwise, he did effect a change of position. The respondent who had a sum of money in current account with A & Co, Bankers, instructed them to purchase Government pro-notes for the amount. A & Co. replied that they would do so in due course. In the meantime they suspended payment: *Held*, that the relationship of debtor and creditor was not affected, and that A & Co. did not become trustees to the respondent for the amount. THE OFFICIAL ASSIGNEE OF MADRAS v. A. E. A. LUPPRIAN, **6 Ind. Cas. 387 = 8 M.L.T. 101.**

(11)—*Banking, nature of—Relation between banker and customer.*—Money deposited in a bank is one lent to the banker by the depositor with this condition, that it is to be re-paid whenever called for by cheque. The transaction is one of *mutuum*. Either party has the right to put an end to the relation of debtor and creditor. The lender has the right to recover the money by drawing a cheque for the amount and presenting it for payment. The borrower can re-pay the money or tender the same whenever he pleases. BRADLEY v. AGRA BANK, **191 P.R 1885.**

(12)—*Bankers and banking—Insolvency—Fiduciary relationship between banker and customer, when arises—Portion of money to be placed in a fixed deposit, paid in—Failure of Bank before balance sent—Right of depositor to recover portion paid in—Capacity in which Bank receives money from customers in the ordinary course of business.*—Where a bank receives money in a fiduciary capacity and is under a duty to keep it separate from its own moneys, and not use it, then, even though the bank, in fact, mixed it, with its own moneys, it can be recovered out of the general assets, in the event of its insolvency, on the principle that, where a person mixed money, which it was his duty to keep separate, with his own money, and afterwards fails, the unspent money in his hands must be taken to include the money which it was his duty to keep separate, and not to use it, rather than the money which he had right to dispose of. In the ordinary course of business a banker is entitled to use moneys paid into his bank as his own, unless there is what amounts to a direction to the contrary, *viz*, that the money should be held in a fiduciary capacity. S wrote to A & Co., Bankers, enclosing a cheque in his favour for Rs. 627, and asked them to receive the amount in fixed deposit together with Rs. 573 wich he would remit

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on receiving their acknowledgment, the whole amount to be treated as a fixed deposit for one year, payable to S or Mrs. S either or survivor. A & Co. wrote in reply acknowledging the cheque and stating that, on receipt of the further sum, they would place the total amount in fixed deposit as desired. Before the further sum of Rs. 573 was sent, A & Co., became insolvent. S claimed to be paid the Rs. 627 out of the general assets in the hands of the Official Assignee. It was found that A & Co. had mixed the proceeds of the cheque with their own moneys. The Commissioner allowed the claim holding that the sum of Rs. 627 cannot be regarded as having been placed in fixed deposit so as to disentitle S to withdraw it before the expiry of the period or to entitle him to interest thereon, and that A & Co. received the amount in a fiduciary capacity, and were not entitled to use it, but were under a duty to keep it separate until the balance was received and the whole placed in fixed deposit. *Held* (reversing the decision) that, under the circumstances, the moneys in question were not held by A & Co., in a fiduciary capacity, and that S was not therefore entitled to recover. THE OFFICIAL ASSIGNEE OF MADRAS v. G. SMITH, **5 M.L.T. 164 = 32 M. 68 = 1 Ind. Cas. 712.**

(13)—*Relationship between - Plea of limitation.*—The relationship between banker and customer is that of debtor and creditor and the right of the customer to recover a deposit could become barred by time. BHOWANI DASS v. BHAI NUNDGOPAL, **17 P.R. 1869.**

(14)—*Draft—Presentation of forged draft for payment—Banker paying the draft—Forgery committed owing to customer's negligence—Banker's negligence in accepting forged draft—Liability of Banker.*—The plaintiffs, a banking company carrying on business in various places in Northern India, opened in November 1904, a current account with the defendants, a banking company in Bombay. It was agreed (*inter alia*) that the account could be drawn on by the plaintiffs' branches at Lahore, Amritsar, and other places. The plaintiffs sent to the defendants a list of officers authorised to sign for the plaintiffs and the specimen of their signatures. The plaintiffs' branches thenceforward began to operate on the account by drawing order drafts on forms printed for the purpose. In April 1904, MR, the manager of the Lahore branch, left blank advices and drafts signed by him with the accountant to be filled in and issued in case of need during his temporary absence. On his return, he neglected to recover or destroy the said blank forms. M R was later on transferred to the Amritsar branch. During this period, an employee of the Amritsar branch fraudulently got possession of the said blank forms. The word "Lahore" which was printed on them was re-placed by "Amritsar" in rubber stamp; the year date was altered from 4 to 5; the draft was made payable to "bearer" in place of "order;" and the manager's initials below it were forged. The draft form was then

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filled up for Rs. 10,000 in favour of N, a fictitious name. On the 2nd October, 1905, the defendants received a letter of advice purporting to come from the Amritsar branch of the plaintiffs and to be signed by the manager and accountant of the branch, advising that a draft of Rs. 10,000 was drawn by the said branch in favour of N. On the same day, the draft purporting to be signed by the manager and accountant aforesaid and made out in favour of N or bearer was presented to the defendants for payment. The defendants paid the amount to the person presenting the draft and debited it to the plaintiffs. When the plaintiffs saw the debit in their pass-book on the 17th idem, they made inquiries and came to know that both the letter of advice and draft were forgeries. This they forthwith communicated to the defendant and informed them that they (the plaintiffs) were not liable to be charged with the amount, as the defendants were guilty of negligence in making the payment. The defendants attributed negligence to the plaintiffs. The plaintiffs sued to recover the amount from the defendants: *Held*, (1) that the plaintiffs were not estopped from contending that the completed draft presented to the defendants was not the draft of the plaintiffs. (2) That the negligent act alleged against the plaintiffs was not the proximate cause of the loss. (3) That the proved facts did not bring the case within the principle of estoppel, which arose when the maker of a completed instrument completed it in a negligent manner and voluntarily parted with it and it was fraudulently altered by the person to whom it was handed. (4) That the signing of a paper in blank and its delivery to an agent with instructions to fill it in and negotiate it under certain specified conditions would not estop the signer from repudiating liability, if the agent, in the absence of the specified conditions, fraudulently filled it and negotiated it. THE PUNJAB NATIONAL BANK LTD. v. THE MERCANTILE BANK OF INDIA, LTD., **18 Bom. L.R. 835.**

Relationship between—Current account—*See* LIMITATION ACT, 1908, ss. 19, 20, arts. 59, 60, 4 A.L.J. 628=A.W.N. 1907, 263=29 A. 773.

See LIMITATION ACT, 1908, art. 145, 74 P.R. 1882, Note.

Lien of bankers for general balance of account under s. 171, Contract Act—*See* ST. 11 AND 12 VIC., C. 21, s. 39, 33 M. 53=5 Ind. Cas. 845=8 M.L.T. 83.

Bankers.

(1)—*Purchase of shares through misrepresentation—Fraud—Repudiation.*—When a person is induced by fraud to buy shares in a Bank, he is at liberty to avoid the same when the fraud becomes known to him. But, if he does not do so within a reasonable time, he must be held to be responsible for the shares standing in his name and for the promissory notes given

Bankers—*continued.*

by him to the Bank. MAHARAJA SIR PARTAB SINGH v. PROVINCIAL BANK OF INDIA, **72 P.R. 1891.** (14 C. 457, *F.*)

(2)—*Bank—Misrepresentation and fraud of director, how far binds Bank.*—Where a party is led by misrepresentation or fraud to enter into a contract, it is open to him to repudiate the same on discovering such misrepresentation or fraud. If, after the discovery of the fraud, he takes no steps to avoid the transaction, it will amount to a tacit acceptance and affirmation of the same. The misrepresentation or fraud of the director of a bank cannot affect the Bank, as he is not their agent. PROVINCIAL BANK OF INDIA v. RAO RAJA TEJ SINGH, **127 P.R. 1889.** [*R.*, 72 P.R. 1891.]

(3)—*Indian Contract Act, s. 171—Banker's lien.*—When a person obtains a loan from a bank on the security of certain jewels which he pledges with it and afterwards becomes otherwise indebted to it, he is not entitled to claim the return of the jewels by merely discharging the loan for which they were security, when there are other debts outstanding, unless there is a contract by which the bank has agreed to give up its general lien which it possesses under s. 171, Contract Act. KUNHAN MAYAN v. THE BANK OF MADRAS, **19 M. 234.**

(4)—*Loss of hundi—Neligence—Criminal act of Bank servant.*—A sent a hundi by post to a bank. The bank presented it for payment by one of its servants, B, who brought it back, reporting that payment had been refused. The manager of the bank, with the intention of returning it to A, placed it in an envelope, sealed and stamped, which was laid upon the table ready for the post, it being the custom of the bank to post all letters in that manner. The hundi did not reach A, and it afterwards appeared that B presented it for payment the following day, and obtained cash for it. *Held* that the bank was guilty of such neglect as to render it liable to A for the amount of the hundi. PEOPLE'S BANK v. OBBARD, **2 Hyde 57.**

(5)—*Bankers and agents—Moneys of constituent ordered to be invested, mixed with their own funds before insolvency—No breach of trust.*—Where the insolvents, carrying on business as bankers and commission agents invested a portion only of the moneys of one of their constituents in securities and satisfactorily explained their not having invested the remainder also as required by the constituent, it was held they held the money as bankers and not as agents and that they were in consequence, justified in not having kept the money separate from their own funds. *In the matter of the petition of* D. COWIE, **6 C. 70=7 C.L.R. 19.**

(6)—*Customer—Entry in the pass-book of the cheque as cash—Notice of dishonour—Estoppel.*—The plaintiff sent a cheque to his bankers for being cashed and credited to his accounts. The bankers, in their usual course of business initialled the receipt of the cheque in the slip book and also certified the credit of the cheque

Bankers—*concluded.*

as in cash in the pass-book before the cheque was actually cashed by them. The cheque was, when presented by the bankers for payment, dishonoured by the drawee, whereupon they notified the dishonour to the plaintiff. The plaintiff, relying upon the entry in the pass book, in the meanwhile delivered a portion of the goods sold by him in consideration of the cheque, and even after the notice of dishonour of the cheque by the bankers continued to deliver the rest of the goods sold: *Held*, that the bankers were not liable to make good to the plaintiff the amount of the cheque, because the plaintiff's conduct, subsequent to the notice of dishonour, showed that the entry in the pass-book by the bankers did not mislead him to any appreciable extent. Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit, etc., for, by entering the sums to the customer's credit, they lead him suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass book is only *prima facie* evidence against him. MOWJI v. NATIONAL BANK OF INDIA, **2 Bom. L.R. 1041=25 B. 499.**

(7)— *Cheque — Post-dated.* — A post-dated banker's cheque is available in the hands of its holder and is admissible in evidence with only a one anna stamp. MOTILALL v. JAGMOHAN DAS, **6 Bom. L R. 699.**

Payment on forged cheque—Discharge of—*See* NEGOTIABLE INSTRUMENTS—CHEQUE, 31 C. 249.

See STAMP ACT, 1879, *ss.* 3 (6), 34, 17 B. 694, F.B.

Bankers' Books Evidence Act.

See ACT XVIII OF 1891.

Bank Memorandum.

See STAMP DUTY, 4 C. 829.

Bank of Bengal.

See BEN. ACT IV OF 1862.

(1)—*Public debt, branch of Bank of Bengal, a Government Office.*—The public debt branch of the Bank of Bengal is as much a Government Office as it was under the separate management of direct Government officer; so that the Bank cannot, in its private capacity, take out of the hands of the Public Debt Office a stolen Government pro-note detained by the Superintendent of the Public Debt Office and held by him as agent of the Government. THE BANK OF BENGAL v. MEN DES, **5 C. 684 =5 C.L R. 586.**

(2)—*Right to refuse to register a transfer of shares—Act XI of 1876, s 17—Construction.*—The Bank of Bengal is entitled, especially after a public notification to that effect, to refuse to register a transfer of shares when the application is made during the time the transfer-books

Bank of Bengal—*concluded.*

of the Bank are closed under the powers given by s. 21, Act XI of 1876. Although the Bank did not, when the application for transfer of shares was made, assigned the reason mentioned above for the transfer, *held*, that it was competent for the Bank to avail itself of the plea when a suit was brought subsequently. [*R.*, 26 C. 142.] S. 17 of the Act, entitling the Bank to refuse to register the transfer of shares until payment of any debts due by the shareholder, refers only to debts which are presently payable. MOTHOORMOHUN ROY v. THE BANK OF BENGAL. **3 C. 392=1 C.L.R 507.**

See ACT XI OF 1876, s 4, 8 C. 300=11 C.L.R. 274.

Poddar of the—not a public servant—*See* PODDAR OF THE BANK OF BENGAL, 4 C. 376.

Bank of Bombay.

A share-holder has not an unlimited right to inspect register of share-holders—*See* CORPORATION, 10 Bom. L.R. 636=12 C.W.N. 825=32 B. 466, *reversing* 9 Bom. L.R. 165.

Bank, Presidency Act.

See ACT XI OF 1876.

Bankruptcy.

See INSOLVENCY.

(1)—*Assumpsit by the surviving assignee of a bankrupt, under an English Commission, against a debtor, a native of India, and resident within the jurisdiction of the Supreme Court of Calcutta.—Plea.*—Two days after issue joined, the defendant gave notice that he intended to dispute the trading, petitioning creditor's debt, and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the commission, adjudication and assignment to the plaintiff, and his co assignee, which purported to be certified by the Clerk of the Enrolments, and to be under the seal of the Court of Bankruptcy in England, pursuant to the 2nd and 3rd Will. IV. c. 114. s. 9, were given in evidence; but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in England. A verdict was given for the plaintiff, liberty being reserved for the defendant to move for a nonsuit. A rule nisi was afterwards granted and, after argument, made absolute, and the verdict set aside, and judgment of non-suit entered for the defendant on the grounds that there was no evidence of an act of Bankruptcy,—of trading subsequent to the passing of the 6th Geo. IV. c. 16, and that neither that Act, nor the 2nd and 3rd Will. IV, c. 114, extended to India: *Held*, on appeal, affirming the judgment of the Court below.—That the plea of the *non assumpsit* put the bankruptcy and assignment at issue sufficiently without any notice. That the form of the plea "Assignee as aforesaid" was not an admission of the plaintiff's title as assignee of the Bankrupt, but only used in reference to the description the plaintiff had given of himself in the declaration. That the statutes, 6th Geo.

Bankruptcy—*concluded.*

IV. c. 16. and the 2nd and 3rd Will. IV. c. 114. made to facilitate the proof of bankruptcy and assignment in England, did not extend to the Courts in India, and that in those Courts such evidence of the bankruptcy must be given, as would have been required to prove the fact, if no statutory regulations had been made. CLARK v. MULLICK. **2 M.I.A. 263=3 Moo.P.C. 252=Morton 430=1 Sar. 188.**

Order of — Composition deed relating to property in British India governed by the *lex loci rei sitae*—Composition-deed exempt from registration—*See* DEBTOR AND CREDITOR, 16 M. 85=3 M.L.J. 30.

Baptism.

Register of — Statement of date of birth in a, how far evidence of age—Attestation of a sale-deed, when operates as estoppel — *See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 2 N.L.R. 34.

Baqquals.

See HINDU LAW—ADOPTION, 15 A. 327=A.W.N. 1893, 110.

Baran Land.

See PUN. ACT XVI OF 1887, s. 16, 3 P.R. 1899, Rev.

Baroda.

—Testator subject to—State—Will executed at Baroda—Disposition of immoveable property in British India—Jurisdiction of Court in British India—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 56, 57, 20 B. 607.

Barred Debt.

See CONSIDERATION, 6 M. 351.

See CONTRACT ACT, 1872, s. 25 (3), 23 M. 94.

Barred Decree.

(1)—*Order for execution by competent Court—Validity of.*—Though the execution of a decree may have been barred at the time of the application, an order for execution, if regularly made by a competent Court having jurisdiction to try the question, is valid if unreversed. MUNGUL PERSHAD DICHIT v. GRIJA KANT LAHIRI, **8 C. 51, P.C.=11 C.L.R. 113=8 I.A. 128=4 Sar. 249.** [*F.*, A.W.N. 1882, 151, 7 A. 282, 19 M. 54, 24 M. 669, 24 M. 683=11 M.L.J. 432, 47 P.R. 1906; *Appl.*, 6 B. 586, 8 A. 492=A.W.N. 1886, 156, 13 A. 564=A.W.N. 1891, 164, 3 Bom. L.R. 416, 24 A. 282; *Rel. on*, 2 C.L.J. 584, 14 Bur. L.R. 35=U.B.R. 1907, 1st Quarter, C.P.C., 1; *R.*, 6 B. 54, 9 C. 65, 6 A. 269=11 I.A. 37, P.C., 7 B. 341, 9 B. 328, 11 C. 376, 13 C. 257, 11 B. 537, 14 B. 206, 15 B. 25, 15 B. 242, 13 M 347, 20 C. 551, 15 A. 84, F.B., 16 A. 443, 89 P.R. 1894, 23 C. 374, 25 C. 789, 27 C. 210, 4 O.C. 333, A.W.N. 1901, 32, 90 P.R. 1902, 31 C. 822, 1 C.L.J. 500, 2 C.L.J. 499, 3 C.L.J. 240=10 C.W.N. 209, 4 C.L.J. 573=34 C. 13, 14 C.W.N. 114, 47 P.R. 1906=86 P.L.R. 1907; *D.*, 7 B. 316, 10 A. 51, 22 B. 83, 28 C. 122=5 C.W.N. 80, 6 O.C. 44, 2 C.L.J. 384=9 C.W.N. 956, 11 C.W.N. 236, 17 M.L.J. 201=2 M.L.T. 167=30 M. 255, 35 C. 1060=8 C.L.J. 193=12 C.W.N. 216, Note.]

Barristers.

See LEGAL PRACTITIONERS—BARRISTERS

Bar to Suit.

See CIV. PRO. CODE, 1908, O. II, rr. 1 and 2.

Decision as to title in proceeding in execution—Fresh suit not maintainable in respect of title—*See* CIV. PRO. CODE, 1908, s. 47, 9 B. 458.

Basee Grant.

See GRANT—MISCELLANEOUS, 1 P.R. 1870.

Bastu Land.

Deposit of rent by *raiyat* — Suit by rival landlords for rent against the *raiyat*, maintainability of—*See* BEN. ACT VIII OF 1885, ss. 61, 182, 9 C.W.N. 416.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 6 W.R. Act X, Rul. 92.

In a Municipality, to which Bengal Tenancy Act does not apply — Notice to quit or to pay enhanced rent not given—Suit for enhancement of rent must fail—*See* LANDLORD AND TENANT—TENANTS LIABILITY FOR RENT, 9 C.W.N. 303.

Bathing Ghat.

See DECLARATORY DECREE, SUIT FOR—ENDOWMENT, 1 A.L.J. 44.

Prescription — Bathing ghat dedicated to public—*See* RIGHT OF SUIT—CUSTOMARY RIGHTS, 20 A. 200=A.W.N. 1898, 25.

Batta.

Claims to Company's batta, whether *abwab*—*See* ABWABS, 6 C.L.J. 667.

Whether an *abwab* — Whether claim for, enforceable at law—*See* SANAD, 7 C.L.J. 202.

Batwara.

Collector's notice — *See* ACT XI OF 1838, 5 B.L.R. 135=13 W.R. 381.

See JURISDICTION OF CIVIL COURTS, 6 B.L.R. 658=15 W.R. 471.

Batwara Law.

Award — Decision under Batwara Law—*See* BEN. ACT XIII OF 1848, W.R. F.B. 12=1 Ind. Jur. O. S. 5=Marsh 37.

Bazaars.

(1)—*Reg. XXVII of 1793*—Hauts *and* bazaars.—Regulation XXVII of 1793 applies only to *hauts* and *bazaars* which were in existence when it was enacted, not to those of a later date. CHUNDER NATH ROY v. MOONSHEE ZEMADAR, **16 W.R. 268.**

See CONTRACT—MISCELLANEOUS, 3 C.W.N. 182.

See BEN. REG. XXVII OF 1793, s. 5, 15 W.R. 48.

Transfer of rights in a — by some only of the co-parcenary body to which the bazaar belonged—*See* TRANSFER OF PROPERTY ACT, 1882, s. 44, A.W.N. 1900, 81.

Beam.

(1)—*Right to project a—Construction over the projection.*—Where a person acquires the right to project a beam upon another's lands, he has no right to prevent the other from rearing a construction in his own land which overhangs the beam. RANCHHOD v. ABDULA-BHAI, 6 **Bom. L.R. 356=28 B.428.**

Beawar.

Trade, custom of — *See* GUARANTEE, 5 C. 421, P.C.=6 I.A. 238.

Begar.

Nature of—Suit for — *See* C. P. ACT XVIII OF 1881, s. 4 (3), 6 N.L.R. 117=5 Ind. Cas. 276.

Behar.

Law of pre-emption — *See* MAHOMEDAN LAW — PRE-EMPTION — NATURE AND EXTENT OF RIGHT, 15 C. 224.

Belchambers Rules and Orders.

(1) *See* EXECUTION OF DECREE—MODE OF EXECUTION, 2 C.W.N. 33.

(1-*a*) *See* PRACTICE AND PROCEDURE, 24 C. 437=2 C.W.N. 57.

(2)—R. 93—*See* SANCTION TO PROSECUTE, 3 C.W.N. 579.

(3)—*R. 329—Right of party to present application in person where there is an attorney.*—Where there is an attorney on the record, the party cannot present any application in person, even with the consent of the other party. PANCHANON SINGH v. JEEBUN KRISTO BOSE, **1 C.W.N. 303.**

(4)—*Rule 436—Meaning of "conveyance."*—The word "conveyance" in the above Rule means an instrument necessary to transfer the estate, if any, belonging to the party on whose behalf the Registrar executes the transfer to the purchaser. RAM CHUNDER DUTT v. DWARA-KANATH BYSACK, **16 C. 330.**

(5)—Rules 476, 477, 605—*See* INTEREST—SPECIAL CASES, 6 C.W.N. 769.

(6)—*Rules 615, 617 (Original Side, 1900) Report to Registrar, effect of mere filing of—Rule to be strictly followed, to vary or discharge Registrar's Report—Practice—Fraud, surprise, or mistake or such other grounds, meaning of—Mistake in not complying with procedure in r. 615.*—The mere filing of exception to a Registrar's Report cannot be taken and deemed to be due notice, under r. 615. If it is desired to discharge or vary a Registrar's report, the procedure laid down by r. 615 must be strictly followed. The party so desiring must apply by motion upon notice to be given within the time prescribed by the Rule. The words "fraud, surprise, or mistake or other special ground" in rule 617, refer to fraud, surprise, or mistake or some other special ground incident to, or connected with, or which has resulted in the

Belchambers Rules and Orders—*concluded.*

making of, the certificate or report itself and not to something which has occurred quite outside and independent of the certificate or report. A mistake, though *bona fide*, in not complying with the procedure laid down in Rule 615, is not a special ground for re-opening the report, under Rule 617. THE ROYAL INSURANCE COMPANY v. AUKHOY KUMAR DUTT, **28 C. 272=5 C.W.N. 337.**

(7)—Rule 617 — *See* APPEAL TO PRIVY COUNCIL—GENERAL, 6 C.W.N. 41.

(8)—Rules 780, 785—*See* PRACTICE AND PROCEDURE, 33 C. 827.

Belief.

Meaning of "belief in good faith" — *See* HINDU LAW—WIDOW, 13 C.W.N. 931=3 Ind. Cas. 415.

Benamidar.

See BENAMI TRANSACTION.

(1)—*Father, the purchaser—Sons' right to maintain suit for possession from vendors.*—Where the father is real purchaser of a certain property, his sons having waived his right to be made a party, have a right to maintain a suit for possession from the vendors. MUHAMMAD ISMAIL v. ABDUL RAZAK, **83 P.R. 1883.**

(2)—Benamidar, *right of suit of for possession.*—A *benamidar* has no right to sue to recover lands. BARODA SUNDARI GHOSH v. DINA BONDHU KHAN, **3 C.W.N. 12=25 C. 874.** (16 C. 364, 25 C. 98, *F*; 18 A. 69, *Diss.*; 10 C. 697, *D.*)

(3)—*Right of suit—Right of* benamidar *to maintain suit for ejectment.*—A *benamidar* cannot maintain a suit for possession of immoveable property. A person who is only a benamidar cannot maintain a suit for ejectment. He has neither title nor possession. ISSUR CHANDRA DUTT v. GOPAL CHUNDRA DAS, **25 C. 98=3 C.W.N. 20.** (16 C. 364, *F.*; 18 A. 69, *Not F.*) [*F.* 25 C. 874, 7 C.W.N. 229; *Appr.*, 30 C. 265, 30 M. 245=17 M.L.J. 174; *Diss.*, 21 A. 380=A.W.N. 1899, 190, 13 C.P.L.R. 33.]

(4)—*S. 310-A, Civ. Pro. Code, 1882 (=O. XXI, r. 89, present Code)—Deposit by benamidar, good deposit.*—A *benamidar* of a person whose immoveable property is sold has a right to apply to have the sale set aside under s. 310-A, Civ. Pro. Code, 1882. BASI PODDAR v. RAM KRISHNA PODDAR, **1 C.W.N. 133.** [*F.*, 8 C.L.J. 305; *Appl.*, 29 C. 1, F.B.=5 C.W.N. 821.]

See BEN. ACT VIII OF 1885, s. 60, 8 C.W.N. 695.

Execution—Sale for arrears of rent under Bengal Tenancy Act—Purchaser found to be a mere— for judgment-debtor—Sale voidable—*See* BEN. ACT VIII OF 1885, s. 173, 21 C. 554.

Benamidar—*concluded.*

See CIV. PRO. CODE, 1908, O. XXI, r. 16, 20 C. 388.

See ESTOPPEL—DENIAL OF TITLE, 7 B. L.R. 720=16 W R. 186.

Application for execution by—of purchaser of rights of decree-holder—Right of judgment-debtor—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWER OF COURT, 7 O.C. 229.

Application by—for execution—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 16 C. 355.

Execution application by — *See* LIMITATION ACT, 1908, ART. 182—STEA IN-AID OF EXECUTION, 9 C. 633=12 C.L.R. 146.

See PARTIES TO SUITS — GENERAL, 21 A. 380.

Suit against a—Real owner made party—Nature of suit not changed—*See* PRE-EMPTION—MISCELLANEOUS, 4 Ind. Cas. 488.

Suit for redemption by—Dismissal of suit—Second suit by beneficiary—Civ. Pro. Code, s. 13—*See* RES JUDICATA—PARTIES, 3 L.B. R. 18.

See RES JUDICATA — PARTIES, 15 M. 267=2 M.L.J. 93.

Purchaser from a, the doctrine of purchaser for value without notice applies to — *See* TRANSFER OF PROPERTY ACT, 1882, s. 41, 9 Bom. L.R. 388.

Benami Transaction.

1.—GENERAL.

2.—CERTIFIED PURCHASERS.

3.—MISCELLANEOUS.

See BENAMIDAR.

——1.—General.

(1)—Benami *transactions, enforceability of.*—*Benami* transactions are not illegal, and effect should be given to such transactions. SHEORAJ SINGH v. AMIR-UD-DIN KHAN, **20 A. 539=A.W.N. 1898, 145.**

(2)—Cestui que trust—*Act XIV of 1859, ss. 1, 2.*—A *benami* transaction does not create the relationship of trustee and *cestui que trust* between the *benamidar* and the real principal. It would be dangerous to hold that a *benamidar* is a trustee for the real owner within the meaning of s. 2, Act XIV of 1859. UMA SUNDARI DASI v. DWARKANATH ROY, **2 B.L. R. A.C. 284=11 W.R. 72.**

(3)—*Deeds—Estoppel—English and Indian laws*—Benami *transactions.*—In England where the usage denoted by *benami* transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn transactions and they

——1.—General—*continued.*

***Benami Transaction*—continued.**

are executed after considerable deliberation and under the guidance, and with the advice of able legal advisers. Under such circumstances, it is right to suppose that what is stated in deeds and other similar documents represents the true state of things, and consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country, it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons made statements wholly regardless of the truth, for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents and to apply the technical doctrine of estoppel in the manner in which the doctrine is applied in cases governed by English law. The tendency of the Privy Council decisions has been to make the law harmonize with justice in each case, and it would be departing from this wholesome and beneficial rule to apply the doctrine of estoppel to cases which are not governed in this country by English law. B. DONZELLE v. KEDARANATH CHUCKERBUTTY, **7 B.L R. 720=16 W.R 186.** [*R.*, 3 C.L.R. 9.]

(4)—Benami *transaction—Estoppel.*—Where a person apparently holds a tenure in a zemindaree, is recorded in the serishtah, and is nominally in possession, though in a suit for rent, or as to the state of the property, the zemindar is, at any particular time, unable to prove that such person is a mere name, holding *benami* for some other persons really interested, or if, in any future years, such zemindar can show that these persons are then really enjoying the profits, paying the rents, and acting as owners, he is not prevented by a decision as to the rents or title in former years from showing what is the state of things in any subsequent years. RAM DHUN MOOKERJEE v. MONEE KORNICA DEBEE, **6 W.R. 266.**

(5)—*True criterion in* benami *transactions—Funds out of which purchase-money paid—Possession or receipt of rents of property.*—Generally, in very many instances of alleged *benami* transactions, the true criterion is to ascertain from whose funds the purchase-money proceeded. But it is not the only criterion, where, as in this case, that fact is consistent with the defendant's case, which was that the plaintiff purchased the village for him and intended it to be a gift in return for his services. In such a case, a much more important fact is, the actual possession or receipt of the rents of the property. RAM NARAIN v. MUHAMMAD HADI, **26 C. 227, P.C.=26 I.A. 38=3 C.W.N. 113=7 Sar. 425.** [*Appr. & D.*, 29 B. 306=6 Bom. L. R. 975 ; *R.*, 37 P.R. 1909=38 P.L.R. 1909, 158 P.L.R. 1908.]

(6)—*Principle of the law of* benami.—The law of *benami* is founded on principles which are not limited to India : it is nothing more or

Benami Transaction—continued

—1.—General—*continued.*

less than an application of the equitable rule that where there is a purchase by A in the name of B there is a resulting trust of the whole to A. It is an accepted rule of guidance in reference to *benami* transactions to see from what source the purchase money has proceeded; and it must be shown that the person whose money has gone to effect the purchase, furnished it as purchaser. The *benami* character of a transaction, if it exists, must be legally established DE SILVA v. DE SILVA, **5 Bom. L.R. 784**. [*F.*, 7 Bom. L.R. 293.]

(7)—*Beneficial ownership—Test—Source of purchase-money.*—In *Benami* purchase in India, the criterion of beneficial ownership is the source from which the purchase-money is derived. AKBUR ALI v. MAHOMED FAIZ BUKSH, **15 W R. 12.**

(8 and 9)—*Test of* benami.—*Held* that the apparent passing of consideration-money from hand to hand is not sufficient to establish the *bona fide* character of a sale. It is necessary to see that it is actually the money of the alleged vendee that is really paid to the vendor. MUSSAMUT LUCHMEE KOOAR *alias* BHUGOBUTTY v. FUTTEH SINGH, **24 W.R. 400.**

(10)—*Sale for arrears of revenue*—Benami *purchaser—Effect—Re-purchase by manager of joint Hindu family — Presumption.* — Under Reg. XI of 1822, a *benami* purchase for the defaulting proprietors at a sale for arrears of revenue is not *ipso facto* illegal and void. Where the manager of a joint Hindu family re-purchases *benami*, the presumption is that the property so re-purchased is held by him for the benefit of the joint family. KALEE DOSS MOOKERJEE v MOTHOORANATH BANERJEE, **5 W.R. 164.**

(11)—Benami *purchase—Use of furzee name—Long possession by beneficial owner.*—The use of the furzee name is sufficiently disposed of, if the party sets up no claim, and there appears to have been long continued possession on the part of the person claiming to be beneficial owner. MUSSAMUT HOYMOBUTTY DOSSEE v. SREEKISHEN NUNDEE, **14 W.R. 58.**

(12)—*Title to benami property—Proof.*—To make out a title to property, it is necessary for the plaintiff to establish either the alleged *Benami*, or a subsequent conveyance from the alleged benamidar. MUSSAMUT FUREE DOONISSA v. RAM ONOORA SINGH, **21 W.R. 19.**

(13 and 14)—*Parties dealing with ostensible owner of property in good faith—Acquiescence of real owner—Effect.*—If the parties will stand by and permit another to hold himself out to the world as the real proprietor of an estate, when he in reality is not so, and thus induce persons innocent of the fraud to lend their money upon such faith, they are not entitled to any consideration from a Court of equity and good conscience. NUNDUN LAL v. MR. WILLIAM TAYLER, **3 W.R. 37=1 Ind. Jur. N.S. 56.**

Benami Transaction—continued.

—1.—General—*continued.*

(15)—*Purchase by father in name of son*—Benami *purchase—Presumption.*—In India, when a piece of land is bought by a parent in the name of his son with his own money, the *prima facie* presumption is that it was bought *benami* in the name of the son, and if it is alleged to have been purchased for the advancement of the son, the burden of proving that fact lies on the party asserting it. MEEYAPPA CHETTY v. MAUNG BA BU, **8 Ind. Cas. 450.**

(16)—*Purchase in the name of son—Presumption.*—The principle with respect to *Benami* purchases between Hindus, laid down in *Gopeekrist Gossain* v. *Gungapersaud Gossain* (6 M.I. A. 53) is equally applicable to similar transactions between Mahomedans. Lands purchased in the name of a son, *held*, on the evidence, *Furzee* or *Benami*, in trust for his father, who paid the consideration-money for the purchase and was in possession. *Semble*:—There is no presumption of an advancement, by the name of the son being used as purchaser, other than in the case of a stranger being used. MOULVIE SAYYUD UZHUR ALI v MUSSUMAT BEBEE ULTAF FATIMA, **13 M.I.A 232.**

(17)—*Property purchased by Hindu father in minor son's ame—Presumption—Father's death.*—Property purchased by the father of a joint Hindu faimly in the name of his minor son is presumed to be benami, and on the father's death becomes the property of the family. BHAGHUT CHUNDER DEY v. HURO GOBIND PAL, **20 W.R. 269.**

(18)—*Husband and wife—Purchase by husband in the name of wife—Presumption of advancement—Gift.*—According to the law as prevailing in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. MOTIVAHU v. PURSHOTUM, **6 Bom. L R. 975=29 B. 306.**

(19)—Benami *purchase in the name of Hindu wife.*—Finding by the Privy Council, contrary to that of the High Court, that a certain purchase in the name of a Hindu wife was *benami* and that the husband was, in fact, the purchaser. DHARNI KANT LAHIRI CHOWDHRY v. KRISTO KUMARI CHOWDHRAIN, **13 C. 181 =13 I.A. 70, P.C.=4 Sar. 709.**

(20)—*Lease in the name of wife and son—Gift.*—Where a father, paying the consideration-money out of his own funds, obtains a lease in the name of his wife and son, and, on the decease of the former, in the joint names of the same son and his daughter by the deceased: *Held* that the property was given to his wife and children for their maintenance. ZEEMUT ALI v. MUSSAMAT ALIMOONISSA, **10 W.R. 277.**

(21)—*Wife ostensible owner—Property husband's*—Bona fide *purchase.*—The purchase of property from a wife as ostensible owner, where the husband consents to the sale and the

***Benami Transaction*—continued.**

——1.—General—*continued.*

transaction is *bona fide* on part of purchaser, is good, even if the property is the husband's. SHAIKH GOLAM RUSSOOL v. SHAIKH ABDOOL RUHEEM, **15 W.R. 19.** [*D.*, 7 C.L.R. 560.]

(22)—*Husband and wife—Husband allowing wife to appear as true owner — Subsequent allegation of benami title—Estoppel.*—A husband who puts his wife into the position of being the true owner of an estate, and allows her to deal with the world as the true owner, deprives himself of the right to set up, or rely on, his benami title. NIDHEE SINGH v. BISSO NATH DASS, **24 W.R. 79.**

(23)—*Property in wife's name—Mortgage by wife to satisfy decree against husband—Sale of property.*—Property standing in the name of a wife, and mortgaged by her, may be sold by mortgagee in satisfaction of a decree against deceased husband, even after mortgage-debt has been paid off, if discovered to be really the husband's. AMEEROONNISA BEEBEE v. BINODE RAM SEIN, **2 W.R. 29.**

(24)—*Mahomedan woman acquiring property in wedlock—Title-deeds with lady—Presumption*—Benami *purchase.*—Where property is acquired by a Mahomedan lady in wedlock, and by the daughter, very little evidence suffices to dispose of the presumption from the fact of the title-deeds being with the lady, against the supposition of a benami purchase. MUSSAMUT KUDEERUN v. MUSSAMUT LALLUN, **14 W.R. 366.**

(25)—Benami *purchase—Purchase in name of mistress—Not sufficient proof that she was intended to be benefited—Title of mistress—Evidence—Proof—Circumstances.*—Where money was advanced by a person for the purchase of a certain property, the mere circumstance that the conveyance was made out in the name of his mistress, living under his protection, is not sufficient to raise the inference that he intended to benefit the woman. (25 C. 227, P.C., 26 I.A. 38, 3 C.W.N. 113, 10 C.W.N. 570, P.C., 3 A.L.J. 353, 3 C.L.J. 484, 8 Bom. L.R. 379, 16 M.L.J. 166, 1 M.L.T. 137, 33 C. 773, *R.*) But the circumstances that the property was registered in the name of the woman who was, therefore, the only person legally entitled to collect the rents, that the person advancing the money possessed a number of other properties none of which was put in the name of the woman, that the value of the property in the woman's name was very small and that the woman's right to the property was not disputed until some six years after the man's death, are enough to show that the title passed to the woman. JITAN PRASAD v. MUSSAMMAT MANBARTA KUER, **5 Ind. Cas. 85.**

(26)—*Construction of Act, I of 1845, ss. 20 and 21.*—*Held* not to raise a presumption of law against a *benami* purchase by a Hindu widow in trust for her husband. A *Hibbanamah* (deed of gift), by a Hindu widow (a *Purdha* woman) of real estate, purchased by her out of her *stridhun*, of which she had a dispos-

***Benami Transaction*—continued**

——1.—General—*continued.*

ing power, when in a state of ill-health and shortly before her death, in favour of her brothers, in their wives' names, to the exclusion of her husband's adopted sons; in circumstances raising suspicion of fraud, and in the absence of satisfactory proof that she knew the nature of the deed, pronounced against. GERESH CHUNDER LAHOREE v. MUSSMMAT BHUGGO BUTTY DEBIA, **14 W.R. 7. P.C. = 13 M.I.A. 419 = 2 Sar. 579— 2 Suther. 339.**

(27)—*Purchase in name of daughters—Right of* bona fide *purchaser from daughter.*—A, having two daughters, B and C, granted a *patni* taluk of certain lands in his zamindari to them in their infancy, and transacted the business connected therewith as manager down to the time of his death. After his death, B sold her interest to her sister C, and C sold the patni taluk to D. The heirs of A brought a suit against D for the lands. *Held* that the lower Court might, upon these facts, infer that the grant of the patni taluk by A to his daughters was by way of provision for them, and that it was not a case in which the daughters held *benami* for the father. Secondly, that even if it were so, D, acquiring by a *bona fide* purchase and without notice, had a good title against the heirs of A, since they claimed through the person by whose act the apparent ownership was vested in his vendor. OBHOY CHURN MOOKERJEE v. PUNCHANUN BOSE, **Marsh 564 = 2 Hay 630.**

(28)—*Purchase in the name of uncle and nephew by funds of uncle—Advancement—Presumption.*—A purchase with A's funds, in the name of B, will be presumed to be for the benefit of A, the presumption of the English law as to their being an advancement in favour of B being inapplicable in India. A purchase with the funds of an uncle in the names of the uncle and nephew in equal shares will, in the absence of sufficient evidence, be presumed to be wholly in favour of the uncle. BURA MAL v. BHAGWAN DAS. **61 P.R. 1889.** [*R.* 37 P.R. 1909.]

(29)—*Transaction between near relations—Possession with owner*—Benami *transaction*—Where parties to a transaction are very near relations to each other, and where possession remains with the owner of an estate, these are facts which go to show that the transaction is a benami transaction. ROOP DHAREE SINGH v. NARAIN SAHOO, **1 W.R. 217.**

(30)—*Purchase from an ostensible owner—One beneficial owner, a minor—Knowledge of vendee*—Bona fide *purchaser.*—A purchaser from an ostensible owner who was aware of the fact that one of the beneficial owners was a minor at the time of sale and who, in order to remedy the flaw in the ostensible vendor's title secured the consent of the other beneficial owner who was a major, is not a *bona fide* purchaser. CHUNDEE CHURN DEY v. HURO MOHUN DEEGHAL, **1 W.R. 324.** [*R.*, 6 W.R. 30.]

Benami Transaction—continued

——1.—General—*continued.*

(31)—*Gift—Sale—Intention—Imaginary consideration inserted in a deed of gift—Evidence of intention—Evidence Act (I of 1872), s. 92—Mother and daughter—Undue influence—Presumption—Unsoundness of mind—Pleadings—*Pardanashin, *who is.*—The question whether a transaction, which, on its face, purports to be a gift or a sale, is really a benami transaction, is purely one of intention. Notwithstanding that a transaction purported to be a sale and a price was mentioned in the conveyance, it was *held*, on the evidence to be a gift and not a sale—the question being regarded as purely one of intention. When transfers of property, made by a mother in favour of a daughter, were challenged on the ground of the unsoundness of mind of the donor, but no case of undue influence exercised by the donee on the donor was raised in the pleadings, and evidence was given with reference to the question of unsoundness of mind only:—*Held*, that the question of undue influence could not properly be discussed and considered upon such evidence. The mere relation of daughter to mother in itself suggests nothing in the way of special influence or control. Their Lordships of the Judicial Committee did not treat, as *pardanashin*, a lady, who had no objection to communicate when necessary, in matters of business, with men other than members of her own family, who was able to go to Court to give evidence and to attend at the Registrar's Office in person to acknowledge her deeds for the purpose of registration. ISMAIL MUSSAJEE MOOKERDUM v. HAFIZ BOO, **10 C.W N. 570 P.C.=3 A.L J. 353=3 C.L.J. 484=8 Bom. L R. 379=16 M.L. J 166=1 M.L.T. 137=33 C. 773=33 I A. 86.** [*R.*, 3 Ind. Cas. 330=12 C.L.J. 115, 5 Ind. Cas. 85.]

(32)—Benami *possession—Cause of action.*—Where the property of one family is conveyed to another by a deed securing the profits to the former, the possession of the latter family is on behalf of the former till, by some unequivocal act, the latter evince an intention to hold on their own behalf. JUGGUNNATH PERSHAD DUTT v. C. S, HOGG, **12 W.R. 117.**

(33)—*Criterion*—Onus *of proof.*—*Held*, that the criterion in the case of a *benami* transaction in India is to consider from what source the consideration-money came. (61 P.R. 1889, *F.*; 26 C. 227, P.C., *R.*) *Held*, that the *onus* lies on the person alleging himself to be the real owner to prove that the deed was executed *benami* in favour of another. SHAM LAL v. JOHRI MAL, **37 P.R. 1909=38 P.L.R. 1909=50 P.W R. 1909=1 Ind. Cas. 732.** (43 P.R. 1882, *F.*)

(34)—*Burden of proof in cases of.*—The burden of proof is on the plaintiff, who seeks to give to a purchase a different meaning and complexion from those which it bears on its face. This burden must be strictly discharged; in other words, the plaintiff, in order to succeed must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture. RAMABAI v. RAMACHANDRA, **7 Bom. L.R. 293.**

(35)—*Benami transactions, Purchaser in—Burden of proof.*—The *benmi* system being one of the recognised institutions of the country, a purchaser does not discharge himself of the *onus* which lies upon him, by looking only to the apparent title. Nor is the *onus* discharged by the mere fact of the name of the defendant's vendor being alone registered in the zemindar's books as the exclusive owner of the putnee, or of the vendor being only sued by the zemindar for the rent of the putnee. BIBEE JEEBUNISSA v. UMUL CHUNDER CHACKLANUVIS, **18 W.R. 151.**

(36)—*Assignee decree-holder—Allegation of benami against such holder—Duty of Court.*—Allegation of *benami* ought to be carefully tested before shutting out decree-holder who has taken by assignment. KHAJAH MAHOMED ISSA KHAN v. P. O. ONARET, **8 W.R. 26.**

(37)—*Claim by father against the execution-creditors of his son, on the ground that his son held the estate* benami *for him, dismissed.*—The Courts look with jealousy on *benami* transactions, and require from one claiming under such title, strict proof, and he can only recover on the strength of the case he asserts. NAWAB AZIMUT ALIKHAN v. HURDWAREE MULL, **14 W.R. 14, P.C.=13 M I A. 395=5 B.L.R.P. C. 578=2 Suther. 343=2 Sar. 571.**

(38)—*Presumption in favour of—Against apparent ownership.*—Although the habit of holding land *benami* is prevalent in India, every presumption of such holding against such fact does not justify the Court in making apparent ownership. MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM **8 W R. 3, P.C.=11 M I.A. 551=2 Suther. 59=Sar. 259.**

(39)—*Allegation that a lease* is benami—Onus *of proof.*—Where there is an allegation that a lease is held *benami*, it is not sufficient for the party in whose name the lease is drawn out to produce the document, but it is necessary for him to prove that he has the beneficial interest in the property. SARODA MOHUN ROY CHOWDHRY v. SHAMA SOONDUREE DOSSIA, **7 W.R. 209.**

(40)—*Burden of proof—Evidence—Transfer by registered deed—Benami transaction allegation of.*—The system of putting property *benami* is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction. A transfer by a

Benami Transaction—continued

——1.—General—*continued.*

registered deed, admitted to have been executed, but alleged to have been *benami* and merely colourable, was held, on the evidence, to have been valid and effective, in the absence of evidence showing the contrary. UMAN PARSHAD v. GANDHARP SINGH, **15 C. 20=14 I.A. 127, P.C.=5 Sar. 71=R & J's No. 98.** [*R.*, 7 O.C. 134, 8 O.C. 94, 3 C.L.J. 594=3 A.L.J. 415=10 C.W.N. 730=8 Bom. L.R. 402 =28 A. 488=1 M.L.T. 171=33 I.A. 97, P.C.]

(41)—*Transaction, whether* benami—*Oral evidence unsatisfactory—Surrounding circumstances and considerations of probability to be looked into.*—Where the question was whether a document, which, on its face, was a mortgage-bond, was a genuine or a fictitious transaction, but at the trial persons, who might have been expected to be prominent witnesses, were not called, and the evidence that was called was open to much adverse criticism. *Held* that, in the circumstances, it was necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct. DALIB SINGH v. CHAUDHRAIN NAWAL KUNWAR, **12 C.W.N. 609, P.C.=10 Bom. L.R. 600 =14 Bur. L. R. 151=4 M.L.T. 141=30 A. 258 =35 I.A. 104.**

(42)—Benami—*Evidence—Suspicion.*—Suit by A to establish his right to execute decrees, against B and another, by attachment and sale of lands in the possession of C, B's son, on the ground that the lands were held by C *benami*, to defeat B's creditors. Evidence was given that C was the real purchaser of the property sought to be attached and not a *benami* holder for B. Nothing but hearsay evidence was given by A that it was a *benami* transaction. *Held*, by the Judicial Committee, that although there may be, with respect to *benami* transactions, circumstances which might create suspicion and doubt as to the truth of the case, yet that the appellate Court will not decide upon mere suspicion, but upon legal grounds established by evidence, and that, from the evidence in the suit, a *bona fide* purchase by C was established. FAEZ BAX CHOWDHRY v. FAKIRUDDIN MAHOMED AHASAN CHOWDHRY, **9 B.L R. 456, P.C.=14 M I A. 234= 2 Sar. 733=2 Suther. 490.** (11 M.I.A. 43, *F.*)

(43)—*Apparent title in one person—Beneficial title in another, how proved—Burden of proof—Acquisition out of funds supplied by alleged beneficiary, necessity to prove.*—Plaintiffs brought this suit to recover a certain coffee garden from their paternal uncle, the defendant. Plaintiffs' father and the defendant had separated and partitioned their ancestral property in 1870, but after their father's death in 1886, the plaintiffs who were very young had lived in the defendant's portection. The plaintiffs' case was that the disputed garden had belonged to their father. Previous to the suit, one of the plaintiffs alone, but describing himself as the guardian of his minor brother, had executed a sale-deed in favour of the defendant, in which the disputed property was described as having been enjoyed by plaintiffs' father and as belonging to the plaintiffs after his death. It was nobody's case that this was a real sale. The High Court, in decreeing the suit in plaintiffs' favour, relied *inter alia* on this document as containing an important admission of plaintiffs' title in the property. *Held* that the High Court was right in so using the document. *Held* also that in order to displace this apparent title in the plaintiffs and to establish a beneficial interest in himself, it was incumbent upon the defendant to show by satisfactory evidence that the funds out of which the garden was purchased and developed were his own funds. PULIYAMPATTI NARANIER v. KUPPIER, **9 C.W.N. 89 P.C.**

(44)—*Attachment of property in wife's name*—Onus *of proof—S. 106, Evidence Act.*—A decree-holder attached, in execution of his decree, properties standing in the names of the judgment-debtor's wife and certain other person. The latter put in a claim petition and, on its rejection, instituted a suit. The question to be decided in that suit was whether certain property, which stood for many years in the name of the wife, and which now stood in her name and also in another's name, was held *benami* for her husband. *Held* that, under s. 106 of the Evidence Act, the *onus* lay on the plaintiffs to show that the purchase-money was supplied by the wife, the first plaintiff, and that the properties had been in enjoyment of the plaintiffs, as these were matters peculiarly within the knowledge of the plaintiffs; and that, as they had failed to discharge the *onus*, it should be taken that the purchase-money was supplied by the husband and that the properties had all along been in his enjoyment. SANJIVAROYA PILLAI v. BALAMBIKA AMMAL, **17 M.L.J. 339,** (6 W.R. 312, 8 C. 545. *R.*)

(45)—*Presumption—Burden of proof*—Benami *transactions among Mahomedans.*—Suit in ejectment by the ostensible owners. It was alleged by the plaintiffs that the property in dispute was purshased by their father. The defendant contended that the purchase was made out of his funds, but in the name of plaintiff's father. It was found as a fact that the purchase was made by the defendant with his funds. The parties were Mahomedans. *Held* that, in *benami* transactions in India, the criterion, for finding who the real owner is, is the source from which the purchase-money has come, the presumption being that a purchase made by A with his money, but in the name of B, is for the benefit of the former, and that, from the purchase by a father, whether a Hindu or Mahomedan, with his money but in the name of his son, no presumption, such as the English Law would draw, of an advancement in favour of the son, can be drawn. The party, therefore, who wishes to succeed as real owner, must prove that the purchase-money belonged to him. (6 M.I.A., *Appl.*) SAYYUD

Benami Transaction—continued

—1.—General—*continued.*

UZHUR ALI v. BEBEE ULTUF FATIMA, **13 W.R 1. P.C.**

(46)—Benami *Purchase*—Onus probandi—*Life-interest.*—Plaintiff sued for the recovery of certain property on the allegation that, though the property was purchased by A, his adoptive mother, *benami* in the name of B, yet that she purchased it out of her own separate income so as to make it her property, and that plaintiff, as her heir, was on her death entitled to the property. The defendant denied that the purchase was made with the money of A, and averred that the property was purchased with the money of B, the person in whose name the purchase stood. *Held* that the defendant's answer was substantially an argumentative traverse of the truth of the plaintiff's story, and that the material issue was, not whether the defendant's averment of purchase with the money of B was made out, but whether the plaintiff's story of purchase by A, with her own money *benami* in the name of B was true. *Held*, further, that, even if A purchased the property with her own money, yet nevertheless, if she purchased it with the express intention at the time that, after her death, it should go to B, in whose name she purchased it, that it would not be a purchase *benami* within the meaning of the real issue in the case, and that it would make no difference in point of law whether A did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. RAJAH CHUNDERNATH ROY v. RAMJOY MOZOOMDAR, **15 W.R. 7, P.C. = 6 B.L.R. 303 = 2 Sar. 613.**

(47)—*Sale to wife*—Benami—Onus *of proof* —*Purchase without enquiry from Hindu widow* —*Validity.*—In a suit for a declaration that certain sales were *benami* where the property of a husband was sold to realise a fine and passed from hand to hand until it was finally sold to the wife who moreover was in possession of the property when the sale of the husband's rights and interests took place, it was held that the plaintiff was entitled to a clear finding as to whether the wife held the property in her own right or as a trustee for her husband. *Held*, further, that the *onus* of proving from what source the money came lay on the wife. An enquiring purchaser from a Hindu wife, her husband living at the time of the purchase, is in no sense a *bona fide* purchaser without notice. BINDOO BASHINEE DEBEE v. PEAREE MOHUN BOSE, **6 W.R. 312.**

(48)—*Purchase in name of son by Hindu or Muhammadan father—Presumption of* benami *purchase*—Onus *of proof to the contrary.*—When a purchase is made by a Hindu or Muhammadan in the name of his son, the presumption is in favour of its being a *benami* purchase, and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. It is possible that the transaction

Benami Transaction—continued

—1.—General—*continued.*

was a real one, and that the purchase was intended for the benefit of the son; but the burden of proof lies with more than ordinary weight on the person alleging the *bona fides* of such a transaction, and, when the rights of creditors are in issue, very strict proof of the nature of the transaction should be required from the objector to such rights. NAGINBHAI v. ABDULLA, **6 B. 717.**

(49)—Benamidar—*Right of suit.*—A person to whom a debt has been assigned, though he is a *benamidar* for somebody else, may sue in his own name to recover the debt. Provided that the defendant is not in any way prejudiced and is allowed to raise any defence which would avail him against the person really entitled, there is no objection to such a suit. SIVASANKARAM PILLAI v. PANCHAMI KESIYAR, **8 M. L.J. 302.**

(50)—*Right of* benamidar *to sue in his own name.*—A *benamidar* is entitled to sue in his own name, unless there are special circumstances on account of which he ought not to be permitted to sue. THAKUR ROHINI SINGH v. VISHWANATH BRAHMIN, **13 C.P.L.R. 33.** (22, B. 820, *F.*)

(51)—Benamidar's *right to sue or execute a decree.*—A *benamidar* is not entitled to sue, nor can he apply to execute a decree on the basis of an assignment in respect of which he is a *benamidar* for another person. *In re* MUTHU KUMARA ASARI, **9 Ind. Cas. 40 = 9 M.L.T. 137.**

(52)—Benamidar—*Right of suit—May bring suit on contract or mortgage, but not title-suit—Person using fund in his hand, not a* benamidar.—A person suing on a title to immoveable property, who is really a *benamidar* and has no legal or equitable title in the property, cannot maintain the suit. But a person, who enters into a contract with another who lends him money, and in pursuance of that contract gives him a lien on his own immoveable property, cannot be heard to say that somebody else supplied the funds which were lent to him. Therefore, a suit for recovery of money due on a mortgage may be brought by the person named in the mortgage-deed, although he be in fact only the *benamidar* of the beneficial owner. A person is perfectly at liberty to use the funds in his hands, whether they belonged to the joint family of which he is a member or to anybody else, and if he invests the funds in mortgages, it cannot be said that he is a *benamidar.* HARA GOBIND SAHA v. PURNA CHANDRA SAHA, **1 Ind. Cas. 522 = 11 C.L J. 47.** (24 C. 644, *F.*; 30 C. 265, *Expl. & F.*)

(53)—*Suit for land—Right of suit—Limitation Act, art. 149—Suit by assignees from Government—Applicability of article to such a suit.*—The question, whether a *benamidar* should be allowed to sue or not, cannot be made to depend upon the question whether the subject-matter of the suit is land or not, but

Benami Transaction—continued

—1.—General—*continued.*

must depend upon his showing whether the facts of the case are such as to give him some right to sue under the general Law, *e.g.*, it may be shown that the facts are such as to entitle him to sue as an agent of an undisclosed principal on a contract made by him or the facts may be such as to constitute him a trustee for the real owner. Where the legal estate is vested in the *benamidar*, he is in fact a trustee and as such entitled to sue. The mere fact that a purchase of land is in the name of a certain person is not sufficient to vest the legal estate in the *benamidar* and constitute him a trustee, *viz.*, where land is purchased *benami* in the name of a minor the land is not vested in him as trustee. (15 M. 54, 21 M. 30, 3 W.R. 159, 25 C. 98, 30 C. 265, 15 M. 261, 30 M. 88, 16 C. 365, 25 C. 874, 18 A. 69, 19 M. 154, 31 I.A. 203, 28 M. 505, *R.*) Art. 149 of the Limitation Act does not apply, where the plaintiff derives his title by purchase from Government. KOOTHAPPERUMAL RAJAH v. SECRETARY OF STATE, **17 M.L.J. 174=30 M. 245.** [*F.*, 31 M. 461; *R.*, 12 C.L.J. 357=7 Ind. Cas. 166.]

(54)—Benamidar, *right of suit by—Mortgage—Conveyance without consideration, test of.*—A *benamidar* cannot bring a suit for recovery of a mortgage-debt. A mortgagee assigned over his interest under the mortgage to the plaintiffs, who instituted the present suit against the mortgagors for recovery of the mortgage-debt. It was found that the assignment was a *benami* transaction and was intended to put the mortgagors into difficulty. *Held*, that the plaintiff's suit was rightly dismissed. (9 C.W.N. 477=32 I.A. 113=27 A. 271, *D*; 6 M.I.A. 53, P.C., 16 C. 364, 30 C. 265, 15 B. L.R. 10=2 I.A. 113, *R.*) The mere non-passing of consideration is not sufficient to show that a transaction is *benami*. MUNSHI BASIRUDDIN AHMED v. MAHOMED JALISH PATWARI, **12 C.W.N. 409.**

(55)—*Right of suit of* benamidar *for recovery of possession.*—In the mofussil and generally in the Courts of this country, the *benamidar* is treated merely as a person in whose name any property stands, without his having any legal or equitable title in the same. A *benamidar* as such is not entitled to maintain a suit for recovery of possession of immoveable property, of which he is merely a *benamidar*. MOHENDRA NATH MOOKERJEE v. KALI PROSHAD JOHURI, **30 C. 265=7 C.W.N. 229.** (6 M.I.A. 53, *R.*; 16 C. 364, *Expl.*; 24 C. 34, 22 B. 672, *D*; 18 A. 69, 21 A. 380, *Diss.*; 3 W.R. 159, 10 W. R. 469, 25 C. 98, 874, *F.*) [*Expl.*, 30 M. 245 =17 M.L.J. 174; *R.*, 10 O.C. 263, 12 C.W.N. 409.

(56)—*Claim based on title for possession of immoveable property—Right of* benamidar *to sue in his own name*—Res judicata.—There is nothing in law to prevent a *benamidar* from suing in his own name for the recovery of immoveable property on title. Such a suit is permissible, and when it is so instituted by the *benamidar*, it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as *res judicata*. In the absence of evidence to the contrary, it is to be presumed in the case of a suit by a *benamidar*, that it had been instituted with the full authority of the beneficial owner, and that any decision come to would have the effect of *res judicata* as against the real owner. NAND KISHORE LAL v. AHMAD ATA, **18 A. 69=A.W.N. 1895, 160.** (3 W.R. 159, 16 C. 364, 10 W.R. 469, 10 W.R. 220, 6 M.I.A. 53, 18 W.R. 454, 10 C. 697, 15 M. 267, *R.*) [*Diss.*, 25 C. 98=3 C.W.N. 20, 25 C. 874; *F.*, 21 A. 380, 28 A. 44=A.W.N. 1905, 173=2 A. L.J. 702; *Appr.*, 28 A. 44=2 A.L.J. 702=A. W.N. 1905, 173, 3 L.B R. 18; *R.*, 1 O.C. 10, 22 B. 672, 22 B. 820, 13 C.P.L.R. 33. 4 O.C. 100, 30 C. 265, 17 M.L.J. 174=30 M. 245, 10 O.C. 263.]

(57)—Benamidar, *sale by—Suit for declaration by real owner.*—Where certain decrees which had been assigned to a servant were executed by him a number of times and were sold by him, and the master sued for a declaration that he was the real purchaser of the decrees and that the servant was only a *benamidar* for him, *held* that the questions to be tried in such a case were: (1) Who was the real purchaser? (2) By whose funds where the decrees purchased? (3) Did the master, by any acts, declarations or omissions known to the vendees, intentionally cause, countenance or favour the belief before the date of the purchase by them, that not he, but his servant was the real, as well as the ostensible, owner of the decrees? MADAN GOPAL v. PARSHADI RAI, **A.W.N. 1881, 126.**

(58)—Benamidar, *holder of—Promissory note entitled to sue on.*—The holder and payee of a negotiable instrument ought not to be put to proof as to whether the money advanced was his own. The payee and holder of a promissory note, therefore, is not to be debarred from suing on it merely by reason of the fact that a third person is really interested in it. BOJJAMMA v. VENKATARAMAYYA, **21 M. 30.** [*Appr.*, 30 M.88=16 M.L.J. 508= 1 M.L.T. 377, F.B.; *R.*, 28 M. 205=15 M.L.J. 249, 10 O.C. 263; *D.*, 30 M. 245=17M.L.J.174.]

(59)—*Suit for rent.—Benami* purchasers of land cannot intervene in a suit for rent brought by the persons in whose name the purchases were made. WILLIAM SMITH v. MOKHUM MAHTOON, **18 W.R. 526.** [*Diss.*, 22 W. R. 440.]

(60)—Benamidar—*Right of suit—Suit for possession by one co-sharer of his share, if maintainable—Evidence Act (I of 1872), ss. 32 (5) 90, 115—Statements about birth and death of relatives admissible—Presumption in favour of old documents—Copies, whether presumption applicable to copies when originals destroyed—Adverse possession—Assertion of absolute title by*

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——1.—General—*continued.*

life-tenant—Estoppel—Contract without power of performance—Subsequent acquisition of power—Lessee having notice of deed forming part of title of lessor—Constructive notice of contents of deed—Transfer of Property (Act IV of 1882), s. 43—Specific Relief Act (I of 1877), s. 18.—A *benamidar* cannot maintain a suit for the recovery of the property. (16 A. 364, 25 C. 98, 3 C.W.N. 20. 25 C. 874, 3 C.W.N. 12, 30 C. 265, 7 C.W.N. 229. *F.*) A suit, which is not really for setting aside alienations, but for recovery of property on the ground that the life-tenant could not confer any title that would subsist after her death, and that the plaintiffs are entitled to possession since her death, is maintainable by one co-sharer for his share only. The wording of s. 32 (5) of the Evidence Act, "relation to the existence of any relationship" is wide enough to include statements about the birth and death of relatives, which events either commence or terminate the relationship. (20 C. 758, 24 C. 265, 1 C.W.N. 370. *F.*) The terms of s. 90 of the Evidence Act are wide enough to include copies within its mischief; therefore the presumption allowed by the section may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available (5 C. 886, 6 C.L.R. 199, 22 A. 294, *F.*) An assertion of absolute title by a life-tenant does not constitute adverse possession against the reversioners. (27 C. 156, P.C., 26 I.A. 216, 4 C.W.N. 274, *F.*) A person, who enters into a contract without the power of performing it at the time, is bound to perform it if he subsequently acquires the power. (8 C. 138, 10 C.L.R. 66, 2 C.L.R. 382, 5 C. 252, 4 C.L.R. 150, 4 B. 34, 3 A 805, *R.*) A lessee or a purchaser having notice of a deed forming a part of the chain of title of his lessor or vendor, has constructive notice of the contents of such deed. SHEO LAL SINGH v. CHOWDHRY GOOR NARAIN, **7 Ind. Cas. 218.** (16 M. 301, 19 I.A. 221, 20 C. 1 *Rel. on.*)

(61)—*Suit by* benamidar—*Decision therein binding upon beneficial owner.*—So long as the *benami* system is to be recognised in this country, the proper rule is that, in the absence of any evidence to the contrary, it is to be presumed that the *benamidar* has instituted a suit with the full authority of the beneficial owner, and the decision in the suit would be as much binding upon the real owner as if the suit had been brought by the real owner himself. GOPINATH CHOBEY v. BHUGWAT PERSHAD, **10 C. 697.** (10 W.R. 220, 19 W.R. 434, 5 C.L.R. 102, *Discussed.*) [*Appr.*, 20 C. 418; *R.*, 13 C.P.L.R. 33, 15 M. 267=2 M.L.J. 93, 18 A. 69=A.W.N. 1895, 79, 21 A, 380=A.W.N. 1899, 130, 4 C.W.N. 283, *D.*, 25 C. 874, 11 C.W.N. 215.]

(62)—*Decree against* benamidar.—*Beneficial owner—Bound by the decree—Subsequent suit for redemption.*—A decree passed against a *benamidar*, in a suit brought against him, binds the beneficial owner, just in the same way as a decree in a suit brought by a *benamidar*. Where a decree gave the *benamidar* an opportunity to redeem, and he did not avail himself of it, *held*, that the beneficial owner could not maintain a suit to redeem. KANIZ FATIMA v. WALI-UL-LAH, **4 A.L.J. 689=A.W.N. 1907, 272=30 A. 30.** [*R.*, 2 Ind. Cas. 990, 5 A.L.J. 167. Note.]

(63)—Benami *transaction—Heir when bound by act of ancestor.*—In some cases the heir of one who purchases *benami* may be bound, as between him and a *bona fide* purchaser without notice from the *benamidar*, by that act of his ancester, irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser. CHUNDER COOMAR v. HURBUNS SAHAI, **16 C. 137.**

(64)—*Sudder Court's Circular Order of 29th July 1809—Effect of, on* benami *transaction.*—The Sudder Court's Circular Order, dated 29th July, 1809 was intended to discourage the institution of suits under names purely fictitious, but does not apply to cases in which property in question belonged to a third party who distinctly repudiated all interest therein. SYUD MAHOMED JAWAD ALI v. SYUD SAIF ALI, **4 W.R. 102.**

(65)—*Vendor and purchaser—Covenant by* benamidar—*Liability on covenant.*—When a *benamidar* and the real owner execute a sale of certain property, and give a covenant for quiet enjoyment in these terms "should there be any hindrance in your enjoying the same, we shall settle and remove such hindrance," and the vendee is sued in enjectment and has to settle with the plaintiff who has obtained a decree, the vendee is entitled to proceed against the *benamidar* on the covenant. SOMASUNDRAM AYYAR v. FISHER, **19. M. 60=5 M.L.J. 222.**

(66)—*Covenant by* benamidar—*Bindingness on real owners.*—All the covenants made by a *benamidar* in the sale of a property are not necessarily binding upon the true owners; though there may be circumstances in which a person whose name does not appear upon a contract may be liable to perform its conditions. BISSESSUREE DEBIA v. GOBIND PERSHAD TEWARE, **21 W.R. 398.**

(67)—*Decree—Assignment* benami—*Execution by* benamidar.—The mere fact of a decree being assigned to A for his benefit, although by agreement the name of B was used, will not prevent execution being taken out in the name of the ostensible decree-holder. PURNA CHANDRA ROY v. ABHAYA CHANDRA ROY, **4 B.L.R. App. 40.** [*Not F.*, 16 C. 355; *R.*, 2 C.P.L.R. 45, 10 C.C. 263.]

(68)—*Property really conveyed for support of judgment-debtor—Purchase in son's name—Effect.*—Property substantially conveyed for the benefit and support of a judgment-debtor and his family is liable for his debt even

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——1.—General—*continued.*

though it was purchased in the name of his son. FUKEEROODDEEN MAHOMED AHSAN CHOWDHRY v. KURREEM BUKSH CHOWDHRY, **5 W.R. 43.**

(69)—Benamee *purchase—Alienation—by* benamidar—Indicia *of ownership.*—A decree of foreclosure in respect of property mortgaged by a *benameedar* by conditional sale is good and binding against the auction-purchasers of the rights and interests of the real owner, unless they can show fraud. If property is purchased in the name of a *benameedar*, and the *indicia* of ownership are in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of the fact. BHUGWAN DOSS v. UPOOCH SINGH, **10 W.R. 185.**

(70—*Suit by woman for money on bond in her name—Plea that woman did not lend, Validity of.*—Where a woman sues to recover money advanced on a bond executed in her name, it is open to the obligee to plead that the money was not lent by the woman, but that the bond was merely an acknowledgment of indebtedness from him to her husband. BHOOBUNESSUR ROY CHOWDHRY v. JUGGESSUREE CHOWDHRAIN, **22 W.R. 413.**

(71)—*Suit on bond—Plea as to execution in favour of stranger—Procedure.*—In a suit upon a bond where defendant pleads that the bond, though executed in the name of the plaintiff, was really executed in favour of a third party, if it is found that plaintiff is not the real holder, the suit must be dismissed. JUDOO NATH DEY v. GIRIJA BHOOSAN MITTER, **23 W.R. 446.** [*R.*, 3 C.L.R. 9.]

(72)—*Decree for costs—Mortgage-decree—Benami purchase by judgment-debtor*—Lis pendens—*Charge.*—P L brought a suit against H, and, while it was pending, executed a bond in favor of R C hypothecating the property in dispute. The suit was dismissed with costs; and another suit was brought by one P M upon the bond, and while it was pending, the property in dispute was sold in execution of H's decree for costs, and purchased by S. The day after this, *i.e.*, on 10th November, 1868, P M obtained a mortgage-decree which he transferred to R B, who executed it and attached the property in dispute, when S intervened, objecting that the mortgage, the mortgage-decree and the transfer of the decree were all fictitious and collusive, and brought about by P L. This objection having been rejected, a suit was brought on the same ground against R B, P M and the widow of P L to establish S's rights, and to stop the pending sale. The property was, however, sold and purchased by D, who was then made a defendant in the suit. After this D instituted a suit for confirmation of possession. Both the Lower Courts found that R B was a benamidar for P L, and upheld the title of S in preference to that of D. *Held* that if D had not been made a defendant, he would have been bound by the doctrine of *lis pendens* by the decree passed in the suit, and that although S by virtue of his auction-purchase was not entitled to the property in dispute, yet he was entitled to a declaration that, so far as the amount of his purchase-money went to satisfy the decree of November 1868, it should be considered a charge on the property. DHONDHAI SINGH v. SHAIKH SULEEMOODDEEN HUSSEIN, **24 W. R. 359.**

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——1.—General—*continued.*

(73)—*Party allowing purchase from him in third party's name—Ownership not disclosed—Right to relief. Onus of proving*—A person suffering purchase of property for him in another's name and taking no steps to show to the world that he is the owner must prove a clear right to relief against any one who purchases that property *bonâ fide* from the ostensible owner. NIDRA DASEE v. ABDOOL WAHED, **25 W.R. 532.**

(74)—*Estoppel*—Benamee—*Bond for money lent*—Bona fide *purchaser of bond without notice*—Where in a bond given by A to secure the re-payment of money lent by B to A, it is stated that the money was lent by C, it is no answer to a suit on the bond brought against A by a person who has purchased the bond from C *bona fide*, without notice, that the money advanced belonged to B. A person who lends money in the name of another must accept the consequences, if an innocent purchaser deals with the person whose name appears on the document as the party entitled to the receipt of the money. DOCHINA KALLY DEBEE v. DINA NATH ROY CHOWDHURY **3 C.L.R. 9.**

(75)—*Purchase of land in name of* benamidar—*Declaratory suit maintainable by real owner—Specific Relief Act (I of 1887), s. 42.*—Where the plaintiff, a Government Official, acquired lands *benami*, in the defendants name, intending to conceal his purchase from the Government authorities, although he might have thereby acted dishonestly and in contravention of the departmental rules, he could not be said to have acted illegally, so as to bring his case within the rule of law that a man is precluded from obtaining relief in respect of transaction, the purpose of which was illegal and has been accomplished. Consequently, in the absence of any assertion of possession of the land on the part of the defendant, a suit is maintainable by the plaintiff for the mere declaration of his title to such land. LOBO v. BRITO, **21 M. 231.** [*R.*, 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22.]

(76)—*Revenue Recovery Act Madras Act II of 1864, s. 38 and Madras Act* III *of* 1884, *s. 1 (5)—Revenue sale*—Benami—*Analogy*—Onus *of proof*—Benamidar—*Suit in ejectment on his own account.*—In a suit by nominal vendees of a purchaser at a revenue sale, to eject tenants in possession, it is open to the latter to raise the contention that the purchase at the revenue sale was *benami* for the benefit of the original

Benami Transaction—continued.

— 1.—General—*continued.*

landlords (registered *hakdars* of a separately assessed chatram endowment). Though Act III of 1884 provides that a certificate issued to the auction-purchaser under the Act shall be conclusive evidence of title in all Courts, the effect of this provision cannot be greater than that of s. 317 of the Civ. Pro. Code under which third parties are not precluded from setting up the *benami* character of the sale. [*F.*, 28 M. 526=15 M. L. J 419, 29 M. 473. F. B.=16 M.L.J. 505=1 M.L.T. 234; *Expl.*, 25 M. 655.] *Benamidars* or their nominal vendees cannot maintain suits in ejectment on their own account. The burden of proving the *benami* nature of a transaction is on the person who alleges it. TIRUMALAYAPPA PILLAI v. SWAMI NAICKER, **18 M. 469.**

(77)—*Sale by real owner under fictitious deeds—Purchase by third person from the fictious vendees with consent of, and on representations made by, the real owner—Real owner's right to set up his title against second purchaser—Estoppel.*—The real owner of some property conveyed the same to his wives under fictitious sale-deeds, and then brought about a sale of the same properties by his wives (the vendees under the fictitious deeds) in favour of a third party, who purchased the same on the representations made by the real owner and on the latter's attesting the sale-deeds. *Held*, under the circumstances, that the real owner was precluded from setting up his title against the last purchaser; the sale to the latter had the effect of conveying to him the interests of the real owner, which he had purported to convey to his wives under the fictitious deeds of sale and this even as against the holder of a decree against him (the real owner). In such a case, it would be necessary to find whether the last purchaser was a purchaser for valuable consideration and whether he purchased on the strength of the representations made by the real owner and by reason of his assent to the transaction. TULSHI RAM v. MUTSADDI LAL, **2 A.L.J. 97.**

(78)—*Fraudulent* benami *deeds by predecessor in-title—Relief.*—It is always open to a party to show that a decument simply executed but not carried into effect is a *benami* and colorable document and to recover possession of property against the party claiming under such document. SHAM LALL MITRA v. AMARENDRO NATH BOSE, **23 C. 460.** (18 W.R. 485, 20 W. R. 112. 21 W.R. 422, 24 W.R. 391, 9 C.L.R. 64, *R.*, 13 W.R. 87, *Diss*; 18 M. 378, 11 B. 708 *D.*) [*R.*, 20 M. 327, 20 M. 333, 23 B. 406, 28 C. 370, 8 O.C. 278, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22, 4 N.L.R. 26; *cited*, U.B.R. 1897=1901, Vol. II, 544.]

(79)—*Distinction between fraud attempted and fraud accomplished—Transaction* benami. —There is a distinction between those cases, in which the fraud was only attempted, and those in which it was actually carried into effect; in the latter class of cases, the Court would, by

Benami Transaction—continued.

—1.—General—*continued.*

granting relief to the wrong-doer, by making itself a party to the fraud. So, a person, who executed the fraudulent conveyance of the property to another person, cannot afterwards sue to recover the property and the transferee will not be disturbed in his possession. GOBERDHAN SINGH v. RITU ROY, **23 C. 962.** (21 W. R. 422, *F.*) [*Appr.*, 23 B. 406; *R.*, 63 P.R. 1898, 1 O.C. 198, U B R. 1897—1901, Vol. II, 544, 27 C. 231, 28 C. 370, 8 O.C. 278. 33 C. 967=10 C.W.N. 650, 4 C.L.J. 22, 31 M. 97=18 M.L.J. 251=3 M.L.T. 246; *D.*, 3 P.R. 1906 =109 P.L.R. 1906.]

(80)—Benami *transaction--Colorable transfer in fraud of creditors—Fraudulent purpose given effect—Distinction between fraud attempted and fraud accomplished.*--There is a distinction between a case in which the fraud is only attempted and a case where it has been actually carried into effect, (21 W.R. 422, *Expl.*) Where there is a colorable conveyance in fraud of creditors, and the fraud has been carried into effect, the Court will not permit the real owner to maintain a suit for recovery of the property. KALI CHARAN PAL v. RASIK LAL PAL, **23 C 962, Note.** (20 W.R. 112, 21 W.R, 422, 9 C.L.R. 64, 18 B. 372, *Diss.*) [*F.*, 23 C. 962.]

(81)—Benami *transaction fraudulently entered into—Fraud accomplished—Effect.*—A party cannot ask the Court to relieve him from the consequences of an accomplished fraud. Fraud is accomplished, if after the attachment, by the decree-holder, of property fraudulently conveyed, by the *benamidar*, the latter succeeds in the claim permitted to be preferred. So, where a fictitious transaction has been used to *accomplish* an intended fraudulent purpose, no suit lies afterwards for a declaration that the transaction is fictitious. BANKA BEHARI DASS v. RAJ KUMAR DASS, **27 C. 231=4 C.W N. 289.** (11 B. 708, 18 M. 378, 23 C. 962, Note, *F.*, 6 W. R. 287, 13 W.R 87, *Cited*; 18 W.R. 493, 20 W.R. 112, 21 W.R. 422, 23 W.R. 42, 24 W. R. 391, 12 C L.R. 64, 13 M.I.A. 551, 585, *R.*) [*R.*, 28 C. 370, 8 C.W.N. 620, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(82)—*Fraud—Colorable conveyance in fraud of creditor—Fraud, absolutely defeated—Suit by real owner against* benamidar—*Right of real owner to recover possession of his property—The same not barred by not having first the colorable conveyance set aside—Indian Limitation Act (XV of 1877), sch. II, arts. 91 and 144.* —A *benami* conveyance is not intended to be an operative instrument. Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he

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has not defraud any one, there can be no reason why the Court should punish his intention by giving his estate away to another, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies. *In Pari delicto potior est conditio possidentis.* The Court will help neither party. Let the estate lie where it falls. To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected. Then, alone, does the fraudulent grantor or giver, lose the right to claim the aid of the law to recover the property he has parted with. The purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of his property. T. P. PETHERPERMAL CHETTY v. R. MUNIANDY SERVAI, **10 Bom. L.R. 590=12 C.W.N. 562=5 A.L.J. 290=7 C.L.J. 528=14 Bur. L.R. 108=35 C. 551, P.C.=35 I.A. 98=18 M.L.J. 277=4 M.L.T. 12=4 L.B.R. 266.** [*D.*, 31 M. 485=18 M.L.J. 576=4 M.L.T 331; *F.* 30 A. 375=5 A.L.J. 421=A.W.N. 1908, 156.]

(83)—*Fraud, plea of, defendant cannot plead fraud as an answer to claim to immoveable property conveyed by him to a.*—When a fraud has been carried into effect, a party to it cannot, as plaintiff, plead the fraud to vitiate the transaction. Nor is it open to him, as defendant, to plead his own fraud as an effective answer to a claim to immoveable property conveyed by him to a *benamidar*. SHIDLINGAPPA v. HIRASA, **9 Bom. L.R. 542=31 B. 405.** [*D.*, 31 M. 97=18 M.L.J. 151=3 M.L.T. 246.]

(84)—Benami *transaction—No fraud committed in pursuance thereof—Avoidability.*—Where a release deed was executed with the sole object of preventing the creditors of the executant from attaching his share in the property covered by the deed, and was neither acted upon nor intended to be acted upon, and where the intended fraud was not actually carried out, *held*, that, as the fraud though intended was not actually carried out, relief may be given to the party to the fraud, where no interest of third parties is involved. FATIMA BIBI v. S. N. MAHOMED MOIDEEN. **U.B.R. 1908, 3rd Qr., Benami Transactions, 1.** (U.B.R. 1897—1901, Vol. II, 544, *F.*; 13 M.I.A. 551, 3 L.B.R. 245, *R.*)

(85)—Benami *transfer for illegal purpose of defrauding creditors—Such purpose not carried out—Suit for specific performance of contract to sell property to third person—Right of transferor to resist such suit on the ground that transfer was* benami.—Where the owner of property transferred it, *benami*, to another for an illegal purpose, *e.g.*, that of defeating creditors, and such purpose was not carried out into execution, *held*, with reference to s. 84 (33 C. 976, *R.*; 31 B. 405, *D.*; 20 M. 326, *Cons.*) of the Indian Trust Act, 1882, that a suit for specific performance of a contract by the transferee to sell the lands to a third person can be successfully resisted by the transferor, on the ground that the transfer was a mere *benami* transaction. MUNISAMI MUDALIAR v. SUBBARAYAR, **3 M.L.T. 244=18 M.L.J. 151=31 M. 97.** (18 M. 378, *F.*; 23 C. 962, *R.*)

(86)—Benamee *transfer—Fraudlent intention not carried into effect—Suit to recover from* benamidar—*Estoppel.*—When, in order to save his properties from being sold in execution of a decree, from which he had preferred an appeal, the owner executed a deed of relinquishment in favour of another, but, being successful in the appeal, sued the latter for a declaration that the deed of relinquishment was colourable and did not convey title: *Held*, that the plaintiff was entitled to succeed. When the fraudulent object of a *benami* transfer has not been carried into effect, the beneficial owner is not precluded from showing the real nature of the transaction. There is no estoppel in such a case. The authorities on the point reviewed by *Mookerjee, J.* JADU NATH PODDAR v. RUP LAL PODDAR, **10 C.W.N. 650=4 C.L.J. 22=33 C. 967.** [*Cons.*, 31 M. 97=18 M.L.J. 151=3 M.L.T. 244; *Diss.*, 3 L.B.R. 245.]

(87)—Benamidar—*Suit by or against—Beneficial owner bound by decree—Presumption—Fraud.*—When a *benamidar* institutes a suit for recovery of possession of the property, there is a presumption that he has instituted the suit with the full authority of the beneficial owner. (10 C. 697, *F.*) That principle has been extended to cases where the suit is against the *benamidar*. Therefore, the beneficial owner cannot plead that the decree which was passed against his *benamidar* is a fraud upon her. FAKIR SHAI MONDAL v. CHANDMONI DASSYA. **2 Ind. Cas. 990.** (20 C. 418, 30 A. 30, 4 C.W.N. 283, *F.*)

(88)—Benami *transfer—Transfer in fraud of creditors*—Benamidar's *suit for possession—Plea of transfer being* benami.—In a suit by the *benamidar* for possession of immoveable property, the plea by the defendant that the transaction is *benami* is good notwithstanding the fact that he has defrauded his creditors by such *benami* transaction It is competent to him to show the real nature of the transaction in order to defend his possession. Where a plaintiff asks for relief alleging that the transfer on which the defendants relied was a *benami* transaction, he is precluded from alleging the transaction to be *benami* and obtaining relief, if he had successfully set up the *benami* transaction to defeat or defraud creditors. PREO NATH KOER v. KAZI MAHOMED SHAZID, **8 C.W.N. 620.** [*F.*, 5 N.L.R. 146; *R.*, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

Benami Transaction—continued.

—1.—General—*continued.*

(89)—*Judgment-creditor refused leave to bid at execution sale—Purchase by him* benami, *invalidity of—Civ. Pro. Code, 1882, s. 294.*—Where the holder of a mortgage-decree was refused leave to bid for the mortgaged property at the execution sale, but nevertheless purchased it *benami, held*, he could not sue to enforce the sale. MAHOMED GAZEE CHOWDHRY v. RAM LALL SEN, **10 C. 757.** [*R.*, 5 C.W.N. 265, 23 A. 478; *D.*, 21 C. 554; *F.*, 32 M. 242=5 M. L.T. 248.]

(90)—*Evidence—Sale in execution*—Benamee—*Purchase for judgment-debtor.*—Where the plaintiff's vendor who bought property in Court auction, knowing that the property was sold a second time in Court-auction to the defendant, lay by and did not bring any action for nearly nine years after the defendant had been put into actual possession of the property under his purchase, *held* that the plaintiff was not entitled to recover possession, as the above facts coupled with other circumstances, went to show that the plaintiff's vendor was only a *benamidar* for the judgment-debtor. RAM CHUNDER BYSACK v. DINONATH SURMA SIRKAR, **5 C.L. R. 470, P.C.**

(91)—Benami *transfer--Purchase for valuable consideration.*—A purchaser for valuable consideration may avail himself of the argument that deeds executed *benami* in fraud of creditors are good between the parties and their heirs if he has no notice of the nominal nature of the original transfer. But it cannot avail a person who knows of the nature of the transaction and makes use of his knowledge to perpetrate a fraud on other minor heirs. RUTTUN DYEE v. ROY GOWREE SUNKUR, **4 W.R. 72.**

(92)—Benami *lease—Liability of beneficial lessees for rent.*—Where the ostensible lessees stood in the position of wives to the beneficial lessees, and it was improbable that three ladies (of whom one was a stranger) should pay a large bonus; and as the ostensible lessees were found not to have paid the consideration-money, the case was held to be *benamee*; and when the tenure passed away by an execution-sale to a third party, the lessor was entitled in equity to claim the rent from the beneficial lessees. PITAMBER SEN v. DEBNATH ROY CHOWDHRY, **18 W.R. 132.**

(93)—*Suit on* hat-chittah—*Allegation of* benami.—In a suit on a *hath chitta* bond, where defendant pleads that plaintiff is only a *benamidar* for another party who advanced the money, if the bond is not denied, the plaintiff ought to have a decree, others interested being left to proceed against him. But if the case has been tried on the issue whether the money was the plaintiff's or the other party's and plaintiff has failed to prove that the money was his, he may be rightly refused a decree even if there are doubts as to the whole of the money having belonged to the third party. SHAIKH NUBEE BUKSH v. HAZEE TUMEEZOODDEEN, **18 W.R. 125.**

Benami Transaction—continued.

—1.—General—*continued.*

(94)—*Transaction proved to be benami—Benamidar's name in records—Effect.*—A transaction being once established as benamee, the fact that the deeds and proceedings involved bear the benameedar's name is of no essential weight with reference to the question who is the principal. ROHEE LALL v. DINDYAL LALL, **21 W.R. 257.**

(95)—*Debtor and creditor—Relation between* benamidar *of creditor and debtor.*—The debtor should not be involved in any trust that might exist between his creditor and a third party. But, where the debtor knows that the trustee or the *benamidar* when he gets money into his hands, intends to apply it to a purpose not legally authorised, and so to commit a breach of trust, he is not justified to paying the trustee or *benamidar*. But to make good a case of this character it is necessary to bring home clearly knowledge of the contemplated breach of trust to the person making payment, so as to make him *particeps criminis* and a privy to the breach of trust. SHIVRAM v. AMBAJI, **5 Bom. L R. 315.**

(96)—*Benamidar plaintiff honestly coming into possession, Suit by—Civ. Pro. Code, 1882, s. 317—Bombay Land Revenue Code, s. 182.*—S. 317 of the Civ. Pro. Code, 1882, and s. 182 of the Bombay Land Revenue Code do not bar a suit where the plaintiff, although originally a *benamidar*, came honestly in its possession. RAGHO v. VISHNU, **5 Bom. L R. 329.**

(97)—*Mortgage*—Bona fide *purchaser without notice—Right of real owner against property in the hands of—Suit against* benamidar *for money in his hands—Nature—Limitation Act (XV of 1877), arts. 132 120, 62.*—Where a stranger, who purchased immoveable property subject to a mortgage paid the mortgage money, *bona fide* and without notice of the nature of the transaction, to mortgagees who were simply *benamidars* for the real mortgagees. *Held*, that the mortgage security can no longer be enforced by the real mortgagees against the immoveable property in the hands of *bona fide* transferees. *Held*, that the money retained and received by the *benamidar* is the mortgage-money, representing an equivalent of the real owner's charge on the immoveable property, and can be followed as such in the hands of the person (*benamidar*) alleged to be wrongfully withholding the same, *held*, also, that suit to recover such money from the *benamidar* is not one to enforce a personal claim (8 A. 503, 55 P.R. 1884, *Not Appl.*) but one, in effect, "to enforce payment of money charged on immoveable property," and that the suit is governed by art. 132, sch. II, Limitation Act (XV of 1877) or, in the alternative, by art. 120 but not by art. 62. SHAM LAL v. JOHRI MAL, **37 P.R. 1909=38 P.L.R. 1909=50 P.W.R. 1909=1 Ind. Cas. 732.** (6 A. 442, 6 M. 402, 24 C. 309, 3 A. 170, 15 B. 438, 25 M. 396, 1 A. 333, 25 A. 62, 2 C. 393; *D.*, 33 C. 92; 27 C. 180, 5 C. 597, *Appl.*)

Benami Transaction—continued.

—1.—General—*continued.*

(98) — *Decree-holder, whether* benamidar *or not—Question cannot be gone into in execution proceeaings.*—The question whether a decree-holder is only a nominal decree-holder for the benefit of somebody else cannot be investigated in execution. VEERABHADRA RAZU v. JAGANNADHA RAZU, **3 M.L.J. 220.**

(99)—*Limitation Act (XV of 1877), sch. II, art. 62—Right of beneficiary in money paid over by* benamidar *to another in adjustment of another claim.*—A, a *benamidar* and who had realised the money due under a bond in which B and C were beneficially interested, in a suit by B's representative on the basis of his being solely entitled thereto, compromised the claim, treating such money as B's assets in which A was also interested, and paid a portion thereof to B's representative reserving a portion for himself. In a suit by C against B's representative for recovery of his share of the money due under the bond, *held* that, though the defendant must be treated as having received the entire sum of the bond from the *benamidar* under the above transaction, yet it was not obtained for the plaintiff's use, but as assets of the defendant's father's estate, and that, since he received it *bona fide* and without any knowledge of C's interest, C was not entitled to follow the money in his hands. SUNDAR LAL v. FAKIR CHAND, **25 A. 62=A.W.N. 1902, 185.** [*R.*, 8 P.W.R. 1908.]

(100)—Benami—*Mortgage with consent and for benefit of real owner—Discharge of mortgage by* benamidar—*Right of* benamidar *to charge on porperty for amount paid.*—Where, with the consent and for the benefit of the real owner, the *benamidar* executed a mortgage-deed and subsequently discharged the mortgage by his own money, the *benamidar* could not be regarded as having paid the mortgage-debt officiously or as a mere volunteer, and was entitled in equity to have it declared that the amount paid by him was a charge upon the property. SUBBAMMAL v. MUTHU PATHAN, **13 M.L.J. 228.**

(101)—*Contribution—Mortgage by* benamidar *with consent of and for benefit of real owner—Discharge of Mortgage debt by* benamidar—*Liability of real owner to pay amount so paid—Right of* benamidar *to claim charge on property for amount paid by him.*—The *benamidar* of a property mortgaged it with the consent and for the benefit of the real owner. He discharged the mortgage-debt and sued the real owner to recover the sum so paid as a charge upon the said property. *Held*, that as between the plaintiff and the defendant, the latter was bound to discharge the mortgage-debt and she not having done so the plaintiff discharged the obligation he was under to the mortgagee; and by such payment relieved the property, for the benefit of the defendant, from the incumbrance. Consequently, plaintiff was entitled in equity to have it declared that the amount claimed by him was a charge upon the property. SUBBAMMAL v. MUTHU PATHU, **26 M. 686, Note.** [*R.*, 26 M. 686.]

Benami Transaction—continued.

—1.—General—*continued.*

(102)—Benami *purchaser -Source of purchase-money—Evidentiary value—Mahomedan grandfather purchasing in the name of grandchild—Father of latter alive—No presumption of advancement—Property admitttedly not purchased for purchaser—Person named in the deed—Beneficiary,* prima facie.—The source of the purchase-money is a very important fact in cases of alleged *benami*, but it is not the only criterion. (26 C. 227, 5 Ind. Cas. 85, *R.*) Actual possession or receipt of rents of the property is a much more important fact. Where a Mahomedan grandfather purchases property in the name of his grandchild whose father is alive, it cannot be presumed that the purchase was made for the grandchild. There can be no presumption of advancement as between a grandfather and a grandson, the father being alive. But where once it is admitted that the purchase was made not for the benefit of the purchaser himself but for another, then that other would *prima facie* be the person who is named in the deed. ABID ALI v. ASGAR ALI, **7 N.L.R. 159.**

See BEN. ACT XI OF 1859, ss. 37, 53, 15 C. 350.

Purchase of land by agriculturist *benami* for non-agriculturist—Maintainability of suit for redemption by *benami* purchaser in his own name—Court fees to be paid as if real purchaser was actual plaintiff—*See* BOM. ACT XVII OF 1879, 22 B. 820.

Suit against a certified purchaser at a revenue-sale—Real purchaser not precluded from adducing proof as to defendant being a mere *benamidar—See* MAD. ACT II OF 1864, s. 38, cl. 5, s. 39, 15 M.L.J. 419=28 M. 526.

Purchase at revenue-sale, *benamee* for another, effect of—*See* MAD. ACT II OF 1864, s. 38, cl. (5), s. 39, 1 M.L.T. 234=29 M. 473=16 M.L.J. 505.

Plea of, how far it avails against the principle that an assignee of a debt suing the debtor cannot be defeated by a plea of the latter that the assignment is without consideration—*See* ASSIGNMENT, 9 Bom. L.R. 462.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 43 P.R. 1882.

Suit for possession—Allegation by defendant of *benami* purchase for him by plaintiff—Onus of proof—*See* BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 8 C. 759.

See BURDEN OF PROOF—MISCELLANEOUS, 1 C.L.R. 466.

Suit based on the ground that the certified purchaser is not the real purchaser—*See* CIV. PRO. CODE, 1908, s. 66, 27 A. 194=A.W.N. 1904, 273=1 A.L.J. 646.

See CIV. PRO. CODE, 1908, O. XXI, r. 16 20 C. 388, 21 M. 388=8 M.L.J. 48, 2 C.P.L.R. 45.

Benami Transaction—continued.

——1.—General—*continued.*

Decree-holder bidding through a *benamidar*—Misrepresentation of value—Substantial injury—Fraud—Setting aside sale—*See* CIV. PRO CODE, 1908, O. XXI. rr. 66, 70, 90, 6 Ind. Cas. 135.

Effect of—Rights of *benamidar*—*See* CIV. PRO. CODE, 1908, O XXI, rr. 84 to 88, 90 to 94, ss. 65, 66, 8 M.L.T. 154.

Beneficial owner entitled to apply for setting aside of a sale in execution of a decree for money against *benamidar*—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 8 C.L.J. 305.

Pro-note—Plea of execution as *benamidar*—Validity—*See* CONTRACT ACT, 1872, s. 2 (*d*), 7 M.L.T. 85=20 M.L.J. 144=5 Ind. Cas. 757.

Purchase of land by public officer *benamee*—Agreement opposed to public policy—*See* CONTRACT ACT, 1872, s. 23, 27 A. 73=1 A.L. J. 412.

Sale of putni taluq for arrears of rent—Payment by mortgagee—Purchase of mortgagor's interest *benamee*—Suit for contribution against such purchaser—*See* CONTRACT ACT, 1872, s. 69, 34 C. 92.

Benamidar—Right of suit—*See* CO-SHARERS—GENERAL, 9 Ind. Cas. 487.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 21 M. 373.

Purchase of decree—Declaration that defendant is *benamidar* for plaintiff—Omission to ask for injunction—S. 42, Specific Relief Act, 1897—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 25 C. 49=2 C.W.N. 76.

Sale-deed—Vendee described as guardian of minor—*Benamidar*, right of, to sue or appeal in his own name—*See* DEED—CONSTRUCTION OF DEEDS, A.W.N. 1905, 173=2 A.L.J. 702=28 A. 44.

See ESTOPPEL—ESTOPPEL BY CONDUCT, A.W.N. 1881, 67, Marsh 569, Marsh 293=2 Hay 157, 16 C. 148.

Tenant—*Benami* sale to tenant—Landlord whether estopped from asserting tenancy—*See* ESTOPPEL—ESTOPPEL BY DEEDS, 10 C.L.R. 199.

Admissibility of parol evidence among Hindus to show *benami* character of conveyance—*See* EVIDENCE—PAROL EVIDENCE, 2 M. H.C. 26.

Benami purchase—Purchase by husband in name of wife—Sale of property in action against husband—Claim by assignee from wife—Proof of collusion between husband and assignee—Validity of claim—*See* EVIDENCE—PAROL EVIDENCE, 2 M.H.C. 27, Note.

See EVIDENCE—MISCELLANEOUS, 26 C. 11, P.C.=25 I.A. 225.

Benami Transaction—continued.

——1.—General—*continued.*

Proof of real transaction—Admissibility of oral evidence—*See* EVIDENCE ACT, 1872, s. 92, Provisos (1), (2), 9 Ind. Cas. 161=15 C.W.N. 408.

Whether application by, *benamidar* saves limitation—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 10 C.C. 263, B.

Execution against stranger on the ground that judgment-debtor was *benamidar* for him—Legality—*See* EXECUTION OF DECREE—MISCELLANEOUS, 14 C.W.N. 774=6 Ind. Cas. 414.

Sale *benami* in name of third person—Intention to defraud creditors of real purchaser—Collusive decree obtained by *benamidar*, whether could be set aside by real owner—*See* FRAUD—EFFECT OF FRAUD, 11 B. 708.

Suit for possession of land based on sale—Plea that sale was a sham transaction—Defrauding of creditors—Validity of plea—Rights of vendor—*See* FRAUD—PLEADINGS AS TO FRAUD, 18 B. 372.

Right to set aside fraudulent transfer on ground of *benamee* — *See* FRAUDULENT TRANSFER, 3 L.B.R. 245.

See HINDU LAW—ALIENATION, 6 P.R. 1893.

Gift of share in a village by husband to wife—No actual deed—Mutation of names in settlement record—*Stridhan*—Transaction not *benami*—*See* HINDU LAW—STRIDHANAM, 10 A. 197, P.C.=15 I.A. 29.

Mortgage created *benami* for real mortgagee—*Benamidar* obtaining decree—Suit by real mortgagee against, for declaration and injunction—*See* INJUNCTION—SPECIAL CASES, 21 M. 353=7 M.L.J. 279.

Suit for rent—Tenant's defence that plaintiff is — Estoppel — *See* LANDLORD AND TENANT—MISCELLANEOUS, 7 Ind. Cas. 846 =12 C.L.J. 428.

Right of, to sue—Adverse order under s. 335, Civ. Pro. Code—Limitation—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 8 M.L.T. 377=8 Ind. Cas. 264.

See LIMITATION ACT, 1908, art. 47, 2 B. L.R. S.N. 1 (*b*).

See LIMITATION ACT, 1908, art. 62, 25 A. 62=A.W.N. 1902, 185.

Suit against *benamidar* for recovering rent received—*See* LIMITATION ACT, 1908, arts. 62, 120, 17 M.L.J. 224=30 M. 298=2 M.L.T. 332.

See LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 5 C.L.R. 253.

Suit to set aside—Conveyance by a Mahomedan purporting to be for value, but in reality one for no consideration—*See* MAHOMEDAN

***Benami Transaction*—continued.**

——1.—General—*continued.*

LAW—GIFT, 10 C.W.N. 706, P.C.=3 A.L.J. 405=8 Bom. L.R. 387=28 A. 439=9 O.C. 106 =1 M.L.T. 163=4 C.L.J. 295.

See MAHOMEDAN LAW—GIFT, 19 A. 267, P.C.=24 I.A. 1.

Purchase by *benamidar* at revenue sale—Whether can be questioned by the real purchaser—*See* MORTGAGE—GENERAL, 9 Ind. Cas. 136=9 M.L.T. 136.

Purchase by mortgagee, effect of— *See* MORTGAGE—REDEMPTION, 9 C.W.N. 201, P.C.=2 A.L.J. 71=7 Bom. L.R. 1=1 C.L.J. 584=32 C. 296.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 1 A.L.J. 486.

Mortgage by ostensible owner of property —Transfer by *benamidar*, was not voidable—Notice of *benami* purchase—*See* MORTGAGE —MISCELLANEOUS, 4 O.C. 192.

Benamidar, promissory note executed in the name of—Suit against executant and *benamidar*—*See* NEGOTIABLE INSTRUMENTS —PROMISSORY NOTES—GENERAL, 7 M.L.T. 178=20 M. L. J. 369=5 Ind. Cas. 927.

S. 85, Tr. P. Act. 1882—Suit by *Benamidar* for foreclosure of mortgage, maintainability of—*See* PARTIES TO SUITS—GENERAL, 24 C. 644.

Benamidar's right to sue for land—*See* PARTIES TO SUITS—GENERAL, 25 C. 874=3 C.W.N. 12.

Benamidar's suit in sole name of—*See* PARTIES TO SUITS—GENERAL, 5 C.L.R. 102.

Benamidar—Right to sue—Disclaimer of real owner—Parties—*See* PARTIES TO SUITS —GENERAL, 16 C. 364.

See PARTIES TO SUITS—GENERAL, 10 W.R. 220.

See PLAINT—VERIFICATION AND SIGNATURE, 1 B.L.R. A.C. 100=10 W.R. 145.

See PLAINT—MISCELLANEOUS, 3 I.A. 194.

Benamidar mortgagee—Right of suit—*See* PLEADINGS, 7 Ind. Cas. 167=12 C.L.J. 357.

Purchase with one's own funds—Right to possession—*See* POSSESSION—SUITS FOR POSSESSION, 8 M.L.T. 283=8 Ind. Cas. 283.

See RENT, SUIT FOR, 5 B.L.R. 234=14 W. R. 12, 2 B.L.R. A.C. 237=11 W.R. 103.

See RES JUDICATA—PARTIES, 5 B.L.R. 321=13 W.R. 157.

Purchaser buying from one in whose name the title-deeds were made out—Possession of the lands with another person—*Benamidar*—Purchaser's suit for possession—Duty of purchaser—*See* SALE—GENERAL, 13 Bom. L.R. 256.

***Benami Transaction*—continued.**

——1.—General—*concluded.*

See SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 14 C. 109, P.C.=13 I.A. 160.

See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 4 W.R. 87, P.C.=6 M. I.A. 510.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 23 A. 478= A.W.N. 1901, 175, 24 C. 707=1 C.W.N. 534.

See VENDOR AND PURCHASER—POSSESSION, 10 W. R. 449.

——2.—Certified Purchasers.

See CIV. PRO. CODE, 1908, s. 66.

(1)—Benami *purchaser—Sale for arrears of revenue—Title—Act I of 1845—Issue—Source of purchase-money.*—The full Bench Ruling (11 W.R., p. 16), that a *benamee* purchaser cannot set up his title in opposition to a certified purchaser, does not apply when a certified purchaser has bought at a sale for arrears of revenue under Act I of 1845. In a suit by a certified purchaser at a sale for arrears of revenue, it is not a principle of law to frame the issue as to the source from which the purchase-money came. BRIJO BEHAREE SINGH v. SHAH WAJED HOSSEIN, **14 W.R. 372**. [*Appr.*, 12 C. 302.]

(2)—*Purchase in stranger's name—Beneficial owner, effect of decree on.*—A purchase made in the name of a third party does not protect beneficial owner from the operation of a decree. AMEEROONNISSA-BEEBEE v. BINODE RAM SEIN, **2 W.R. 29.**

(3)—*Possessory suit — Ostensible allowing defendants to remain in possession—Effect—S. 21, Act I of 1845.*—In a possessory suit when the ostensible purchaser under Act I of 1845, stands by ever since his purchase, and for 11 years allows defendants to remain in possession, the *onus* was held to lie on the plaintiff. 5 W.R. 16 and 11 W.R., Full Bench 16, considered and applied to a case under s. 21 of Act I of 1845. SHAIKH JOHUR ALI v. BINDABUN CHUNDER, **14 W.R. 10.**

(4)—*S. 21, Act I of 1845—Sale Law.*—S. 21, Act I of 1845 is inapplicable to a suit brought to make void a patta granted by the mother of a certified purchaser. BISSONATA SURMA BHUTTACHARJEE v. MR. MORAN, **W.R. 1864, 353.**

(5 & 6)—*Act XII of 1841, s. 22—Act I of 1845 s. 21—Certified purchaser—Managing member of Hindu family.*—The repeal of Act XII of 1841 by Act 1 of 1845 took away the defence which the nominal purchaser at a sale for arrears of revenue would have had under the former law in a suit by the real purchaser. A purchase at a sale for arrears of revenue under Act I of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf

Benami Transaction—continued.

—2.—Certified Purchasers—*continued.*

of the joint family, is not affected by s. 21 of that Act; and notwithstanding anything contained therein, the members of such joint family may sue to enforce rights acquired by them, under such purchase, as against the managing member, though he is the sole certified purchaser. BABOO TUNDAN SING v. BABOO PUKH NARAYAN, **5 B. L. R. 546 = 13 W.R. 347.** [*Affirmed*, 22 W.R. 199, P. C. = 1 I.A. 342 = 3 Sar. 390.]

(7)—*Beneficial purchaser—Long possession of property purchased* benami—*Effect—S. 21, Act I of 1845—S. 36, Act XI of 1859—Act XII of 1841.*—Possession for more than 12 years by a beneficial purchaser of the property purchased *benamee*, not only extinguishes the nominal purchaser's title, but creates a title which may be inherited by heirs and representatives. S. 21, Act I of 1845, and s. 36, Act XI of 1859, do not apply to a purchase under Act XII of 1841. BOOA RUSSOOLEE v. THE NOWAB NAZIM OF BENGAL, **11 W.R 382.** [*Appr.*, 13 W. R. 347 = 5 B. L. R. 546; *R.*, 13 W. R. 310.]

(8)—*Act XI of 1859 (Revenue Sale Law), s. 36—Construction*—Benami *property, liability of.*—S. 36 of Act XI of 1859 only prohibits a suit by the true owner disputing the title of his *benamidar*; it does not preclude a third party from enforcing a claim against the true owner in respect of the *benami* property. All the previous authorities reviewed. CHANDRA KAMINY DEBEA v. RAMRUTTUN PATTUCK, **12 C. 302.** [*R.*, 21 A. 29 = A. W. N. 1898, 187.]

(9)—*S. 36, Act XI of 1859—Arrears of revenue—Sale—Attempting to oust certified purchaser.*—S. 36, Act XI of 1859, should be construed strictly and literally. (14 M.I.A. 496, P.C., 2 I.A. 154, P.C., *R.*) S. 36 of Bengal Act XI of 1859 (which is very similar to s. 260 of the old Civ. Pro. Code, Act VIII of 1859), *held*, inapplicable, where the real purchaser, being in possession, brought a suit against the certified purchaser's brother, who was managing the property for the plaintiff for an account, and for delivery of certain papers connected with the estates. BRINDABUN CHUNDER NUNDI v. RAM SUNDER MOZUMDAR, **21 C. 375.** (2 I.A. 154, P.C., 14 M.I.A. 496, P.C., *R.*)

(10)—*Suit against certified purchaser at revenue sale with only symbolical possession to reconvey estate as per contract—Act XI of 1859, s. 36—Civ. Pro. Code, s. 317.*—Where the certified purchaser of a taluk at a revenue sale, who had obtained symbolical possession, had agreed with the former owner, who continued in actual possession, to re-convey it to him after the completion of the sale, and the former owner sued for specific performance of the contract, *held*, the suit, not being one to oust the certified purchaser from possession, was not barred by s. 36 of Act XI of 1859. It was also held that S. 317 of the Civ. Pro. Code, which governed

Benami Transaction—continued.

—2.—Certified Purchasers—*continued.*

only sales in execution of decrees of Civil Courts held under the Procedure Code, had no application to the case. FAZAL RAHAMAN v. IMAM ALI, **14 C. 583.**

(11)—*Civ. Pro. Code, 1859, s. 260—Party not a certified purchaser.*—S. 260 of Act VIII of 1859 does not preclude a person purchasing *benami* from setting up his title against a person not being the certified purchaser or person claiming through him. SHOROSUTTY DASSEE v. GOPEESOONDARY DASEE, **Marsh 423 = 2 Hay 512.**

(12)—*Suit for possession—S. 260, Civ. Pro. Code, 1859—Plaintiff's title impugned as fraudulent and fictitious—Scope of section.*—In a suit for possession, s. 260 does not prohibit a defendant from questioning plaintiff's title on the ground of fraudulent and fictitious purchase. It provides for dismissal of a suit brought to question the title of a certified purchaser, but does not prohibit defendant from questioning that title when an auction-purchaser seeks to oust him. MIRZA RHYVAT ALI v. MIRZA SYFOOLAH KHAN, **8 W.R. 130.**

(13)—*Auction-purchaser*—Benamee *transaction.*—Under s. 260, Act VIII of 1859, a suit by a party claiming to be the real purchaser of immoveable property sold in execution cannot be brought against the certified auction-purchaser. BYKUNT CHUNDER MOOSTAFEE v. KHEMA MOYEE DEBIA, **9 W. R. 360.**

(14)—*Suit between* benamidar *and beneficial owner—Act VIII of 1859, s. 206 (Civ. Pro. Code).*—S. 260 of the Code of Civil Procedure refers only to suits between a *benameedar* and the beneficial owner, and not to cases where a gross fraud has been practised upon a third party. SHEETANATH GHOSE v. MADHUB NARAIN ROY CHOWDHRY, **1 W.R. 328.**

(15)—*Purchase of judgment-debtor's property in the name of another at a Court's sale for benefit of judgment-debtor—Right of judgment-debtor's creditors to such property in execution.*—The immoveable property of A at a Court's sale was purchased by B with the money and on behalf of A B subsequently conveyed the property to C for the benefit of A. *Held* that the property could be taken in execution by the creditors of A. *Quære*—Whether but for the subsequent conveyance, B, under the operation of ss. 259 and 260 of the Civ. Pro. Code, would not have had a good title against the creditors of A. SATAPPA *valad* DAU DONGRE v. KARBASAPPA *et al*, **7 B.H.C.A.C. 21.** [*R.*, 22 B. 672]

(16)—Benami *transaction—Certified purchasers—Certified purchaser of property—Act VIII of 1859, s. 260.*—The certified purchaser of property, which had been a second time attached and sold in the execution of a decree as the

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property of the judgment-debtors, sued to be confirmed in possession of the property by virtue of his certificate of sale, and to obtain the cancelment of the second sale and the order disallowing his objections to that sale. *Held*, that the provisions of s. 260 of Act VIII of 1859 did not prohibit the consideration of the circumstances of the first sale, when the question for determination was whether, at the time of the second attachment the judgment-debtors were in possession as owners of the property or merely as lessees of the certified purchaser. GANESH PERSHAD v. SHEO CHURUN LALL, **6 N.W.P. 197.**

(17)—*Civ. Pro. Code, 1859, s. 260—Execution of decree—Claim to attached property by certified purchaser—Suit by decree holder against certified purchaser*—Benami.—S. 260 of Act VIII of 1859, permits the Courts to entertain a suit by a decree holder against the certified purchaser of property to bring the property to sale in execution of his decree as the property of his judgment-debtor, on the allegation that the certified purchaser had purchased the property *benami* for the judgment-debtor, who had remained in possession as owner from the date of the purchase, and was in possession as such at the time of the attachment. SOHUN LALL v. LALA GYA PERSHAD, **6 N.W.P. 265.** [*Appr*, 18 A. 461, 12 C. 302; *F.*, 21 C. 519, 1 A. 235; *D.*, 21 A. 29=A.W.N. 1898, 187; *R.*, 17 M. 282.]

(18)—Benamee *sale—Long possession—Burden of proof—Act VIII of 1859, ss. 259, 260.*—Where the heir of an ostensible auction-purchaser seeks to oust defendant, who has been 12 years in possession, and who pleads that the sale was *benamee*, long possession proves defendant's allegation to be true, and plaintiff must show that his ancestor paid for the property. Ss. 259 and 260, Act VIII of 1859, do not apply to a sale made before that law came into operation. ZOOLFEKAR ALI v. MAHOMED TUKEE, **9 W.R. 438.**

(19)—*Purchase in execution sale—Act VIII of 1859, ss. 259, 260—Mortgage—Redemption.*—Where the purchaser of immoveable property sold in execution of a decree of a Civil Court gets a certificate under s. 259, and sues for possession, defendant (who is in possession) is debarred by s. 260 from pleading that he himself is the real purchaser. The purchaser of an equity of redemption is entitled to redeem, and obtain possession of the land if the mortgage debt has been liquidated before the plaint is signed, or upon paying into Court, within one month, the balance remaining due. JOKHEE LALL v. MUSSAMUT HUNS KOOER, **10 W.R. 167.**

(20)—*Right of father to prevent property going into insolvent son's hands—Conveyance by him to female owners—Son's creditors, right of—Sale certificate containing mother's name as guardian—Effect.*—A father may provide against property, over which he has complete control,

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going into the hands of an insolvent son; but a conveyance to female members, the father continuing absolute owner, and the son entering into possession on his death, cannot exclude the claim of the son's creditors. Where a purchaser is named in a sale certificate as mother and guardian of her infant son, the title to the property is vested in the minor absolutely. HEMANGINEE DOSSEE v. JOGENDRO NARAIN ROY, **12 W.R. 236.**

(21)—*Civ. Pro. Code, 1859, s. 260—Certified purchaser's name inserted by fraud.*—*Held* that s. 260, Civ. Pro. Code, 1859, did not apply where the name of the certified purchaser has been inserted by fraud. MUSSAMUT KOOSUMBA v. TUFUZZUL HOSSEIN, **13 W.R. 85.**

(22)—*Auction-purchaser suing for possession—Purchase by defendant fictitious—Civ. Pro. Code, 1859, s. 260.*—Where in a suit for possession by an auction-purchaser defendant's purchase is shown to have been a fictitious transaction, the case does not come under the purview of s. 260, Act VIII of 1859. TARA SOONDUREE DABEE v. OOJUL MONEE DOSSEE, **14 W.R. 111.** [*Appr.*, 12 C. 302; *D.*, 21 A. 29=A.W.N. 1898, 187.]

(23)—*Execution sale—Fraud—Right of suit—Civ. Pro. Code, 1859, s. 260—Incumbrances.*—Where a *mokurrureedar* of land sold to satisfy a debt sues to obtain possession, and the purchase is found to be not *bona fide* but for the party in actual possession, s. 260, Act VIII of 1859, is no bar to the suit, the ground of fraud alone giving plaintiff right to question the legality of the sale. A purchaser of property in the name of another simply pays the debt which as representative of the mortgagor, he is bound to pay, and he does not alter his position with regard to any incumbrance on the estate before his purchase. MUSSAMUT SHAMA KESHEE v. MUSSAMUT RAJ KISSUR, **14 W.R. 179.**

(24)—*S. 259, Civ. Pro. Code, 1859—Person entitled to sale certificate under—Certified purchaser.*—A person entitled to sale certificate under s. 259, Act VIII of 1859, is entitled to be regarded as "certified purchaser" at any time after acceptance of his bid. BUNDA ALI KHAN v. MUSSAMUT BIBEE AMEERUN, **25 W.R. 493.**

(25)—*Act VIII of 1859, ss. 259, 260*—Benamee *purchase—Ejectment.*—Where a purchaser of immoveable property sold in execution of a decree obtained a certificate under s. 259, Act VIII of 1859, and then instituted a suit to recover possession of the property purchased by ejecting the person who was in possession, *held* (*L.S. Jackson, J., dissenting*) that, unless the latter, the defendant in the suit, was in possession under circumstance which amounted to a transfer to him of the title which the plaintiff derived from the purchase, he was debarred by the general provisions of Act VIII of 1859 from pleading that, although the plaintiff was the certified purchaser, he did not purchase on his

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own behalf, but merely on behalf of and *benamee* for the defendant, and, therefore, that the plaintiff was not entitled to recover possession. MUSSAMMUT BIHANS KUNWAR v. BIHARI LAL, **3 B.L.R. F.B. 15=11 W.R. F.B. 16.** [*Reversed*, 10 B.L.R. 159, P.C.; *Appr.*, 12 C. 302. 28 C. 370; *Not Appl.*, 14 W.R. 372; *Appl.*, 14 W.R. 10; *R.*, 11 M. 234; *D.*, 14 W.R. 111, 14 W.R. 179.]

(26)—*Person not actual purchaser at execution sale — Suit for possession as certified purchaser.*—One who is not the actual purchaser at an execution sale cannot succeed in a suit to recover possession of the property sold, merely on the allegation of being the certified purchaser. MUTHOORA NATH DASS v. RAICKOMUL DOSSEE, **24 W.R. 278.** [*R.*, 1 A. 290.]

(27)—*Person making purchase* benami—*Suit for declaration that he is the real owner—S. 317, Civ. Pro. Code.*—A person who purchases property in the name of another, in a Court auction and is in possession for more than 12 years, is entitled to maintain a suit for declaration that he is the real owner, against a person claiming under the certified purchaser. S. 317, Civ. Pro. Code, is not applicable to such a suit, so as to bar it. KARAMUDDIN HUSAIN v. NIAMUT FATEMA, **19 C. 199.** (14 M.I.A. 496, *Rel. on.*) [*R.*, 22 B. 672.]

(28)—*Civ. Pro. Code, s. 317, suit against representative of certified purchaser not precluded by.*—The provisions of s. 317 of the Civ. Pro. Code, are provisions in restraint of an ordinary right of suit, and since they expressly forbid the maintenance of a suit only as against the certified purchaser, the Courts would not be justified in extending the scope of the section beyond what the language of the section warrants, so as to give it the effect of barring a suit even as against a person who has derived title through the certified purchaser. SIBTA KUNWAR v. BHAGOLI, **21 A. 196=A.W.N. 1899, 30.** [*Not F.*, 31 B. 61=8 Bom. L.R. 873; *R.*, 28 P.L.R. 1904=4 P.R. 1904.]

(29)—*Act VIII of 1859, s. 260—Declaratory suit—Certificate of sale—Fraud.*—A suit for a declaration that the plaintiff is the real purchaser of the property in dispute and that the name of the certified purchaser was inserted in the certificate of sale by fraud on the part of the defendant, and contrary to the wishes of the purchaser, is maintainable and there is nothing in s. 260 of Act VIII of 1859 to prevent the suit from being entertained MUSSAMAT GOSMIAH v TAFFUZZUL HOSSEIN, **4 B.L.R. App. 32.**

(30)—*S. 317, Civ. Pro. Code, scop of.*—S. 317, Civ. Pro. Code, is intended to discourage agreements for the purchase of property, at a Court-sale, in the name of another. It does not prohibit a suit by one, who was no party to the agreement, and whose object is, not to enforce the agreement, but to set it aside as an illegal transaction, made in fraud of his rights,

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as a member of the family to whom the purchase money belonged. NATESA v. VENKATARAMAYYAN, **6 M. 135.** [*F.*, 20 M. 349, 20 M. 362, 9 M.L.J. 298.]

(31)—Benamee *purchaser—Suit against certified purchaser—Grant of certificate after institution of suit—Civ. Pro. Code, s. 317.*—Suit against the purchaser of certain immoveable property, in execution of a decree, for a declaration that such purchase was on behalf of the plaintiff. The sale had taken place and the suit was instituted, before Act VIII of 1859 was repealed and Act X of 1877 came into force. The sale certificate was given to the defendant, after the suit was instituted under s. 317 of the Civ. Pro. Code, 1877. *Held*, that the suit, when instituted, was maintainable as against defendant, who was not then a "certified" purchaser, under s. 260 of the Civ. Pro. Code, 1859, the law then in force. When defendant duly obtained a certificate under s. 317, Civ. Pro. Code, 1877, he became a certified purchaser, and the suit could only be maintainable, if the plaintiff could make out a case falling within the provisions of the last part of s. 317. ALDWELL v. ILAHI BAKHSH, **6 A. 478, F.B. =A.W.N. 1883, 125.** [*R.*, 17 M. 282, 23 A. 175=A.W.N. 1901, 44.]

(32)—*Civ, Pro. Code, s. 317*—Benami *purchase—Whether third party can plead s. 317.*—S. 317 does not render a *benami* purchase at a Court-sale void *ab initio*. Its effect must only be taken to be to enable certified purchasers and those claiming under them, to avoid any arrangement made with them in regard to the purchase in the nature of a trust. Therefore, in a suit by a person claiming to be the real owner, against the purchaser and a third party, for possession of property purchased at a Court-sale, the third party cannot plead the bar of s. 317, when the purchaser himself does not plead it. RAMAKRISHNAPPA v. ADINARAYANA, **8 M. 511.** [*F.*, 31 B. 61=8 Bom. L.R. 873; *R.*, 17 M. 282, 20 M. 362.]

(33)—*Civ. Pro. Code, Act X of 1877, s. 317—Execution sale—Purchase* benami—*Suit for possession by real purchaser—Maintainability.*—The plaintiff, the real purchaser at an execution sale, brought a suit to obtain possession of the property purchased. He made also his *benamidar*, the certified purchaser, a *pro forma* defendant. The latter admitted the allegations of the plaintiff and disclaimed all right in the property. The other contesting defendant pleaded that the suit was barred by s. 317, Civ. Pro. Code, and added that *he* was the real purchaser. *Held* that the suit was not one interdicted by S. 317, Civ. Pro. Code. The matter in dispute was, whether plaintiff or the contesting defendant was the actual purchaser in the name of the *pro forma* defendant. Although the *benamidar* was made a defendant, he really occupied the position of plaintiff inasmuch as he supported the plaintiff. The

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case was within the rule laid down in the case in 14 M.I. A. 496=10 B.L.R. 159 and so not barred. HAZI ARJUN MULLICK v. SHEIKH FARUTULLA, **9 C.L.R. 293.**

(34)—*Civ. Pro. Code, 1882, s. 317, Scope.*—S. 317 of the Civ. Pro. Code, is intended to prevent fraud and would not preclude a suit, by a creditor of the real owner of property, for a declaration that it belongs to his debtor and not to the certified *benami* purchaser. KANI ZAK SUKINA v. MONOHUR DAS, **12 C. 204.** [*F.*, 21 C. 519, *Diss.*, 16 M. 290 ; *R.*, 21 A. 29 =A.W.N. 1898, 187.]

(35)—*Civ. Pro Code (XIV of 1882), s. 317—Purchase at a Court-sale* benami *for judgment debtors—Subsequent purchaser for value, rights of.*—No suit can be maintained by a subsequent purchaser of land against a certified purchaser of the same at a previous Court-sale, on the ground of such purchase having been really made on behalf of some other person. It is not a sufficient reason for not carrying out the express terms of s. 317 of the Civ. Pro. Code, and to do so would be to allow a fraud to be perpetrated. The object of the section is to put a stop to *benami* purchases at execution sales, and this object can only be carried out by enforcing it in all cases without regard to consequences RAMA KARUP v. SRIDEVI, **16 M. 290=2 M.L.J. 173.** (12 C. 204, *Diss.*) [*Diss.*, 21 C. 519 ; *R.*, 17 M 282, 9 C.P.L.R. 55, 20 M. 349, 20 M. 362, 21 A. 238=A.W.N. 1899, 42, 9 M.L.J. 298, 8 O.C. 306]

(36)—*S. 317. Civ. Pro Code, 1882—Suit by creditor for recovery of amount due on a bond from the assets of a deceased debtor—Execution of decree obtained by creditor—Attachment—Release on the claim of another person—Suit by execution creditor for declaration that the property belonged to his deceased debtor.*—The plaintiff lent money to a certain person on a bond and, after the death of that person, sued his sister and heir, for recovery of the amount due on the bond, from his assets, and obtained a decree, in execution of which he attached the property in dispute as the property of his deceased debtor. Thereupon, a claim was preferred to the attached property by another person (the claimant) on the ground that she had purchased it at an auction-sale and obtained certificate for her purchase, and the property, consequently, was released from attachment. Then, the plaintiff sued the heir of the deceased and the certified purchaser (claimant) for a declaration that the property belonged to his deceased debtor and was liable to be sold in execution of the decree obtained by the plaintiff against the representative. *Held*, that the terms of s. 317, Civ. Pro. Code, did not bar the subsequent suit. SUBHA BIBI v. HARA LAL DAS, **21 C. 519.** (12 C. 204, 1 W.R. 329, 8 W.R. 130. 6 N.W.P. 265, 1 A. 235, *F.*, 16 M. 290, *Diss.*) [*Appr.*, 18 A. 461 ; *R.*, 22 B. 271, 21 A. 29=A.W.N. 1898, 187, 5 C.W.N. 341, 26 A. 82, F.B.=A.W.N. 1903, 199.]

***Benami Transaction*—continued.**

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(37)—*Civ. Pro. Code (Act XIV of 1882), ss 244, 317—Purchase by* benamidar *with funds of joint Hindu family—Suit for partition of properties purchased.*—S. 317 of the Civ. Pro. Code does not prevent a co-parcener from showing the real nature of a transaction by which other members of the joint family to which he belongs purchased properties in execution sale *benami* in the name of a third person. Nor does s. 244 prevent such a suit, or prohibit his showing that a transferee of a decree against the family was also a *benamidar*, though the plaintiff had been made a party in the execution proceedings, since he is not a party to the sham transaction by which such *benami* transfer was obtained. MINAKSHI AMMAL v KALIANARAMA RAYER, **20 M. 349 =7 M.L.J. 213.** [*F.*, 9 M L.J. 298 ; *R.*, U.B. R. 1905, Civil Procedure. p. 56.]

(38)—*Civ. Pro. Code (Act XIV of 1882), s 317—Right of third person not claiming through parties to prove purchase* benami.—S. 317 of the Civ. Pro. Code, does not prevent a mortgagee, suing on his mortgage without impleading purchaser of the hypotheca in an execution sale previous to suit, from showing that this sale was *benami* for the benefit of the mortgagor himself. Therefore, an assignee of the mortgagee can also show the *benami* character of such sale. KOLLANTAVIDA MANIKOTH ONAKKAN v. TIRUVALIL KALANDAN ALIYAMMA, **20 M. 362.**

(39)—*Civ. Pro. Code (Act XIV of 1882), s. 317 (=s. 66, new Code), protection given to certified purchaser under, does not extend to his transferee.*—S.317 of the Code of Civil Procedure debars a suit against a "certified purchaser" by a person claiming to be the real purchaser. A transferee from a certified purchaser, however, does not, by reason of the transfer, obtain his transferor's right, under the above section, to object to a suit being maintained on the ground of the purchase having been made *benami*. THEYYAVELAN v. KOCHAN, **21 M. 7 =7 M.L.J. 290.** [*F.*, 26 C. 950=3 C.W.N. 657, 5 C.W.N. 341, 4 P.R. 1904=28 P.L.R. 1904, 18 M.L.J. 305.]

(40)—*Civ. Pro. Code, s. 317—Purchase in execution as judgment-debtor's agent.*—When the purchaser at a Court-sale is the agent of the judgment-debtor, and buys the property as agent, though he advances the money on the understanding that he is to be re-paid, a suit for possession will lie against the certified purchaser notwithstanding s. 317, Civ. Pro. Code. SANKUNNI NAYAR v. NARAYANAN NAMBUDRI, **17 M. 282=4 M L J. 65.** [*F.*, 18 M. 436; *R.*, 20 M. 349, 5 Bom. L.R. 329 ; *D.*, 22 A. 434.]

(41)—*Civ. Pro. Code, Act XIV of 1882, s. 317.*—A obtained a decree on a hypothecation of lands subsequently usufructuarily mortgaged to B. In Court-auction, the equity of redemption was purchased by B's agent with B's money under an agreement to convey the property to B who continued in possession by his

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tenant. It was held that B could sue, when his tenant was ejected by the nominal purchaser, for execution of a conveyance and for possession, and that such a suit was not barred by s. 317 of the Civ. Pro. Code. KUMBALINGA PILLAI v. ARIAPUTRA PADIACHI, **18 M. 436 = 5 M.L.J. 200.** [*R.*, 20 M. 349, 6 C.W.N. 279 ; *D.*, 22 A. 434 = A.W.N. 1900, 152.]

(42)—*S. 317, Civ. Pro. Code, 1882—Person making purchase* benami—*Suit for declaration of his right.*—A suit by a person, who purchases certain property, in the name of another, at an auction-sale and is in undisturbed possession of the lands for 8 years after the sale, for a declaration of his rights and for an injunction to restrain the other person in whose name he originally purchased from interfering with it, is maintainable. The suit does not come within the scope of s. 317, Civ. Pro. Code. SASTI CHURN NUNDI v. AUNOPURNA, **23 C. 699.** (14 M.I.A. 496, *R.*) [*D.*, 23 A. 175 = A.W.N. 1901, 44.]

(43)—*Civ. Pro. Code, s. 317, scope of—Third party alleging certified purchaser not to be beneficial owner, not within the section.*—S. 317 of the Civ. Pro. Code contemplates only a suit between the certified purchaser and the person claiming to be the beneficial owner. It cannot therefore have the effect of barring a suit in which a third party asserts that the certified purchaser is not the beneficial owner. THE UNCOVENANTED SERVICE BANK, LTD. v. ABDUL BARI, **18 A. 461 = A.W.N. 1896. 181.** (N.W.P. 1874, 265, 1 A. 235, 21 C. 519, *R.*) [*Appr.*, 26 A. 82 = A.W.N. 1903, 199 ; *R.*, 21 A. 29 = A.W.N. 1898, 187, 21 A. 238 = A.W.N. 1899, 42, 8 O.C. 306.]

(44)—*Execution-sale — Declaration that a pleader purchased as trustee for plaintiff, suit for—S. 42, Specific Relief Act, 1877—S. 317, Civ. Pro. Code, 1882.*—A suit for a declaration that the pleader of the plaintiff purchased a certain property, at an execution-sale, for the benefit and as trustee of plaintiff, is maintainable notwithstanding s. 317, Civ. Pro. Code. The pleader will not be entitled to maintain the purchase as against this client. AGHORE NATH CHUCKERBUTTY v. RAM CHURN, **23 C. 805.**

(45)—*Civ. Pro. Code, s. 317*—Benami *purchase at execution sale—Suit by creditor alleging certified purchaser not real purchaser.*—The provisions of s. 317 of the Civ. Pro. Code, should not be restricted or qualified beyond the effect of the words found in the section itself. This section does not designate any particular persons or class or persons as being the person or perons who shall not sue. It confines itself to indicating the person who shall not be impleaded as defendant in the suit mentioned therein. The creditor of a judgment-debtor is debarred by s. 317 from suing the certified purchaser on the ground that the latter has merely purchased the property *benami* for some other

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person. The object of the section, namely, the putting a stop to *benami* purchases at execution-sales, can only be carried out by enforcing it in all cases without regard to the question of who the plaintiff might be KISHEN LAL v. GARURUDDHWAJA PRASAD SINGH, **21 A. 238 = A.W.N. 1899, 42.** (21 A. 29, *Appr.* ; 16 M. 290, *F.*; 18 A. 461, 14 M.I.A. 496. *R.*) [*R.*, 26 A. 82 = A.W.N. 1903, 199, 8 O C. 306.]

(46)—*Civ. Pro. Code. s. 317*—Benami *purchase at Court-sale—Suit by real owner.*—When, after obtaining the certificate of sale, the purchaser acknowledges that his purchase is *benami* and gives up possession, or does some act which unequivocally indicates an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that *benami* purchases are not made illegal, though the real purchaser is disabled from maintaining a suit against the certified purchaser at an auction-sale in execution of a decree, on the sole ground that he was only a *benamidar*. MONAPPA v. SURAPPA, **11 M. 234.** [*F.*, 18 M. 436 ; *Appr.*, 13 M.L.J. 354; *R.*, 23 A. 34 = A.W.N. 1900, 190, 4 P.R 1904 = 28 P.L.R. 1904 ; *D.*, 22 A. 434, 23 A. 175 = A.W.N. 1901, 44.]

(47)—*S. 317, Civ. Pro. Code. 1882, scope of—Suit against person claiming through certified purchaser.*—The statutory protection afforded by s. 317, Civ. Pro. Code, to a certified purchaser, does not extend to a person claiming through or under him (*e.g.*, heir or mortgagee). DUKHADA SUNDARI DASI v. SRIMONTO JARDAR, **26 C. 950 = 3 C.W.N. 657.** (14 M. I. A. 496, 2 I.A. 124, *R.* ; 3 C.W.N 433, 21 M. 7, *F.*) [*F.*, 5 C.W.N. 341; *R.*, 8 C W.N. 476, F.B. *Not F.*, 31 B. 61 = 8 Bom. L R. 873.]

(48)—*Judgment debtor's property purchased benami by him—Second sale of such property—Formal possession by new purchaser—Suit by latter against judgment debtor—Right of suit.*—Where a judgment-debtor bought his property *benamee*, and it was sold up a second time, and the new purchaser, instead of taking substantial possession, only took formal possession, and then brought a suit against the judgment-debtor on the ground that he was setting up the ryots against him, *held* that the suit would not lie, it being the duty of the Court to give the auction-purchaser substantial possession. KRISTO GOBIND KUR v. GANGA PERSHAD SURMA, **25 W.R. 372.** [*F.*, 10 C.L.R. 258; *Expl.*, 12 C. 169 ; *Cons.*, 10 M. 53 ; *R.*, 10 C. 402, 11 C. 93.]

(49)—*N.W.P. Land Revenue Act (XIX of 1873), s. 184, scope of*—Benamee *purchaser at revenue sales under Act—Suit by mortgage against mortgagors and certified purchasers alleged to be their* benamidars, *whether precluded by s. 184.*—The words "any suit" in s. 184 of the N.W.P. Land Revenue Act XIX of 1873 are not to be limited or qualified by importation

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of extrinsic matter beyond the words found in the section itself, and with limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. The section cannot be regarded as limited to proceedings between the certified purchaser and the person claiming to be the real purchaser. It would apply so as to preclude a suit between the certified purchaser and a third person alleging that such purchaser had brought the property only *benami* for some other person, as for instance, a suit by a creditor of the real owner of such property for a declaration that it belongs to his debtor and not to the certified auction-purchaser. (*Per Knox, J.*, (14 M.I.A. 496, N.W.P. 1874, 265, 12 C. 204, 12 C. 32, 19 W. R. 111, *R.*) S. 184 of the N W.P. Land Revenue Act contemplates a suit between the person claiming to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor, and that the certified purchaser is only the *benamidar* of the debtor. It does not, therefore, preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. THE DELHI AND LONDON BANK, LTD. v. CHAUDHRI PARTAB BHASKAR, **21 A. 29=A. W.N. 1898, 187.** (14 M.I.A. 496, N.W.P. 1874, 265, 12 C. 204, 12 C. 302, 19 W.R. 356, 23 W.R. 358=2 I.A. 154, 18 A. 461, 1, A. 235, 21 C. 519, 2 W.R. 29 *R.*) [*R.*, 21 A. 238=A.W.N. 1899, 42, 26 A. 82=A.W.N. 1903, 199, 28 M. 526=15 M.L.J. 419, 8 O C. 306.]

(50)—*Civ. Pro. Code (Act XIV of 1882), s. 317*—Benami *purchase—Suit against assignee from certified purchaser.—Held*, that the protection given by s. 317 of the Civ. Pro. Code is limited to the case of the certified purchaser being sued on the ground that the purchase was made on behalf of any other person and does not extend to certified the purchaser's assignee. MUHAMMAD FAROUGH v. ABDUL HAKIM, **28 P.L R 1904=4 P.R. 1904.** (21 M. 7, 21 A. 196, 11 M. 234, 5 C.W.N. 341, 3 C.W. N. 657, 14 M.I.A. 496, *R.*)

(51)—*Purchase* benami—*Revenue sale.*—The law does not preclude a person from contending that the purchase was made for him *benami* by a purchaser of a revenue sale. VENKATACHALAM PILLAY v. PURSHOTAMA NAICKER, **4 M.L T. 316=19 M.L.J. 270=6 M.L.T. 168=3 Ind. Cas. 124.** (29 M. 43, *F*; 25 M 655, *R.*)

(52)—*S. 66, Civ. Pro. Code, 1908 (=s. 317, Civ. Pro. Code, 1882)—Certified purchaser—Interpretation.*—The word "certified purchaser" in s. 317 of the Civ. Pro. Code, include the person standing in the shoes of the Court purchaser. HARI v. RAMACHANDRA, **8 Bom.L.R. 873 =31 B. 61.**

Benami Transaction —continued.

——2.—**Certified Purchasers** —*continued.*

(53)—*S. 66, Civ. Pro. Code, 1908 (=s. 317 Civ. Pro. Code, 1882)*—Benamidar—*Bar of suit.*—The provisions of s. 317 of the Civ. Pro. Code and s. 182 of the Bombay Land Revenue Code are to be construed strictly and they do not bar a suit where the plaintiff, although originally a *benamidar*, came honestly into possession. RAGHO v. VISHNU, **5 Bom. L.R. 329.**

(54)—*Civ. Pro. Code, 1882, s. 317—Suit by real pruchaser against certified purchaser and persons claiming under independent title—No contest between plaintiff and certified purchaser—No bar of suit.*—No suit can be maintained under s. 317 of the Code against the certified purchaser at an auction-sale in execution of a decree on the sole ground that the certified purchaser is only a *benamidar*. So, where there is no contest between the plaintiff (the real purchaser) and the certified purchaser, and the defendants who contest the suit set up an independent title, there is no bar under s, 317 to the maintainability of the suit, even though the certified purchaser happens to be a defendant therein. RAMALINGA CHETTY v. PACHAIPPA MUDALY, **13 M.L.J. 354.**

(55)—*Civ. Pro. Code, Act XIV of 1882, s. 317—Mortgagee claiming that mortgagor is real purchaser at Court-sale—Applicability of section.*—Where a mortgagee in his suit for sale, claimed that a part of the hypotheca, though it did not belong to his mortgagor at the time of the mortgage, was subsequently purchased by him at Court-sale *benamee* in the name of his wife, *held* that the mortgagee, as deriving title through the alleged beneficial owner, was debarred by s. 317 of the Civ. Pro. Code, from setting up this claim against the certified purchaser. RAM NARAIN v. MOHANIAN, **26 A. 82, F.B.=A.W.N. 1903, 198.** (18 A. 461, 21 A. 29, 21 A. 238, *R.*) [*R.*, 8 O.C. 306.]

(56)—*Civ. Pro. Code, s. 317—Suit for declaration against certified purchaser by beneficial purchaser in possession, within prohibition of section.*—The basis of this suit was that the auction-purchase in question was made by the certified purchasers on behalf of the plaintiff. The relief claimed was in express terms a declaration that the plaintiff was the real purchaser, and that the certified purchasers were not the real owners; and the suit was held to come within the mischief against which s. 317 of the Code was directed and not to be one exempt from its prohibition. The only ground of the suit which the section prohibits is that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims, and the section would not apply where the suit was based, not on the ground that the purchase was *benami*, but upon some other independent ground; but it cannot be held that the section would cover only cases where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and that the prohibition therein

Benami Transaction—continued.

——2.—Certified Purchasers—*continued.*

could not extend to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser. The first paragraph of the section is not to be taken as confined to a suit for recovery of possession. There is nothing in the section which makes it inapplicable to a suit for a declaration of right on the ground that the auction-purchaser purchased the property on behalf of the plaintiff or his predecessor-in-title. BESHAN DIAL v. GHAZIUDDIN, **23 A. 175=A. W.N. 1901, 44.** (23 C. 699, 11 M. 234, 5 A. 478, 14 M.I.A. 496, 2 I.A. 154, *R.*,) [*R.*, 27 A. 443 =A.W.N, 1905, 39=2 A.L.J. 111.]

(57)—*Civ. Pro. Code, s. 317—Suit to recover part of property from certified purchaser, whether maintainable.*—In this suit the plaintiffs alleged that the purchase of the property in question was made by the defendant on behalf of himself and on behalf of the mother of the plaintiffs. The defendant pleaded that, with reference to the provisions of s. 317 of the Civ. Pro. Code, the suit was not maintainable and it was held that the suit was barred by that section. The fact that the claim in this case was not for the whole of the property of which the defendant was the certified purchaser did not make any difference. It was sufficient that the suit was against the defendant as the certified purchaser of the property claimed, and that on the allegation that the purchase was made on behalf of some other person. The provisions of s. 82 of the Trusts Act (II of 1882) might have helped the plaintiffs had it not been for the provision to that section which declares that nothing therein shall be deemed to affect s. 317 of the Civ. Pro. Code. DURGA v. BHAGWAN DAS, **23 A. 34=A.W.N. 1900, 190.**

(58)—*Certified purchaser found to be* benami *—His right of appeal against order setting aside sale.*—Though the certified purchaser has been found to be a *benami* purchaser by the lower Courts, he has yet the right of appealing against an order setting aside the sale. ISWARA PATTER v. KARUPPAN, **2 M.L.J. 258.**

(59)—*Civ. Pro. Code, 1882, s. 317*—Benami *purchaser—Co-parcener of real purchaser, suit by.*—S. 317, Civ. Pro. Code, does not debar a co-patcener of the real purchaser from proving that the purchase made in the name of the certified purchaser was really made for the joint family of which he is a member, and from maintaining a suit to recover what belongs to him. *Benami* purchases at execution sales cannot be taken to affect the rights of members of a joint Hindu family who, by operation of law, and not by virtue of and private agreement or understanding, are entitled to treat as part of their common property an acquisition however made by a member of the family if made by the use of the family funds. KRISHNA AIYAN v. RAGHAVAIYAN, **9 M.L.J. 298,** (19 W.R. 356, P.C., 6 M. 135, 20 M. 249, *F.*

Benami Transaction—continued.

——2.—Certified Purchasers—*continued.*

(60)—*Civ. Pro. Code, 1882, s. 317* (=s. 66, *present Code*)—*Suit for establishment of title against attaching decree-holder to property purchased* benami *in name of judgment-debtor—Scope of section—Penal sections, construction of—Bengal Act, VIII of 1885—Sale, void or voidable.*—In execution of a decree for arrears of rent, plaintiff purchased property *benami* in the name of his son R. This property was attached in execution of a decree by the first defendant against R, and the plaintiff preferred a claim which was rejected ; plaintiff brought the present suit to have his title established; R having died his son was made a party. *Held*, that s. 317, Civ. Pro. Code, is no bar to the suit. The protection afforded by s. 317, Civ. Pro. Code, only extends to the certified purchaser and not to one who derives title from him. (3 C. W. N. 657=26 C. 950, 21 M. 7, 2 C.W N. 433, *R.*) [*R.*, 28 P.L.R. 1904=4 P.R. 1904.] Penal sections like s. 317, Civ. Pro. Code, must be construed strictly, and their operation should not be extended beyond what is actually covered by the sections themselves. (2 C.W.N. 343, *R.*) Where the judgment-debtor purchases the property *benami* in the name of his son, the sale even if it be held under the Bengal Tenancy Act, is not void but voidable, and could be set aside only by the Court which held the sale. MOKORI DHUR v. SARUP CHUNDER DEY, **5 C W.N. 341.** (21 C. 519, *F.*)

(61)—Bona fide *holder of property—Pledge—Debtor, benami owner—Rights of creditor.*—Where a creditor innocently holds property in pledge for the payment of his debt, without being aware of his debtor being a *benamee* owner for others, he has a right to maintain his lien on all the property in satisfaction of the debt. BAMA SOONDUREE DEBIA v. RASHMONEE DEBIA, **4 W.R. 36.**

(62)—*Civ. Pro. Code, 1859, s. 260—Sale of property in satisfaction of decree—Offer by purchaser to re-convey in case of money being paid—Contract.*—Where the property of a judgment-debtor is sold under a decree to a *bona fide* purchaser, who undertakes to re-convey the property to the judgment-debtor on being re paid the purchase-money, *held* that if A accept the proposal, s. 260 of the Civ. Pro. Code, 1859, did not preclude a contract from arising. MOR JOSHI v. MUHAMMAD, **10 B H.C. 344.** [*R.*, 22 B. 672.]

(63)—*Execution-sale—Auction—purchaser—Ejectment of person in possession, suit for—Civ. Pro. Code, 1859, ss. 259, 260—Plea.*—A purchaser of immoveable property sold in execution of a decree obtained a certificate under s. 259, Act VIII of 1859, and then sued to recover possession of the property purchased by ejecting the person in possession : *Held* (*L.S. Jackson, J., dissenting*) that, unless the latter, the defendant in the suit, was in possession under circumstances which amounted to a transfer to him of the title which the plaintiff derived from the purchase, he was debarred by

***Benami Transaction*—continued.**

——2.—Certified Purchasers—*concluded.*

the general provisions of Act VIII of 1859, from pleading that, although the plaintiff is the certified purchaser, he did not purchase on his own behalf, but merely on behalf of, and *benamee* for the defendant, and therefore that the plaintiff was not entitled to recover possession. MUSSAMAT BAHUNS KOWAR v. BUHOORY LALL, **11 W.R. F.B. 16.**

(64)—*Rent-suit— Recognised purchaser* — Benami.—Plaintiff, who derived title from A, who was the ostensible purchaser of certain immoveable property at an auction-sale in execution of a decree against B, brought a suit to recover the rent of such property from the talukdars. The appellant was allowed to intervene, alleging that A was the *benamidar* of a third person from whom he himself had purchased the property. The lower Court however refused to try the question of *benami* as not being admissible in a rent suit. On appeal, it was held that the question of *benami* was properly raised in the suit, and ought to have been tried. TARINI KANT LAHIRI v. KRISHNA MONI CHOWDHRANI, **5 C.L.R. 179.** (24 W.R. 349. *D.*)

See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 29 C. 682=6 C.W.N. 706

See CIV. PRO. CODE, 1908, O. XXI, r. 94, ss. 65, 66, A.W.N. 1887, 220.

Pre-emption — Suit against ostensible purchaser — Real purchaser not made party — Suit not maintainable—*See* PRE-EMPTION—MISCELLANEOUS, 8 Ind. Cas. 527.

Release — Document by benami purchaser at Court-sale renouncing his claims in favour of true purchaser—Stamp—*See* STAMP ACT, 1899, sch. I, art. 55. 24 A. 372, F.B.=A.W.N. 1902, 71.

——3.—Miscellaneous.

(1)—*Purchase at Court sale—Purchaser at Revenue sale*—Benamee, *plea of, procedure.*—X, a purchaser of the rights of a judgment-debtor in certain lands at a sale in execution of a decree of a Civil Court found Z in possession, the latter having purchased the same at a sale in the Collector's Court and having been put in possession by that Court and alleged that the possession of Z was merely *benamee* for the judgment-debtor and prayed that he may be put in possession. *Held* that the question cannot be decided summarily but must be decided in a regular suit brought for the purpose. OMESH CHUNDER ROY v. BIBEE ASHRUFOONISSA, **6 W. R. Mis. 122.**

(2)—*Step mother purchasing property in name of third party—Intention to benefit—Life interest reserved—Pleadings*—Benami *purchase*—Onus.—Plaintiff brought a suit for the recovery of certain property on the ground that he was the heir of his step-mother, to whom he had made some very liberal allowances for her support and that the property in question had been purchased by her with money belonging to her, but *benami* in the name of her nephew A, with an intention that the property should go after her death to A and not to her heirs. The defendant set up a case which was not maintained by the evidence at all, that the property had not been purchased with the step-mother's money but had been purchased with the proper money of the person in whose name the purchase was made. *Held* that the defendant's answer was substantially an argumentative traverse of the truth of the plaintiff's story and that the material issue in the case being whether the plaintiff's story was true, the burden of proving that the purchase was made *benami* for her was still upon the plaintiff. *Held* also that though the property was purchased with the money of the step-mother, yet, if she purchased it with the express intention at the time that, after her death, it should go to her nephew A in whose name she purchased it, that would not be a purchase *benami* within the meaning of the real issue in the case, that would not be a purchase on the terms that the property was to be absolutely heirs, but would be a purchase with the intention of benefiting the person in whose name the purchase was made, and it would make no difference in law whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. RAJA CHANDRANATH ROY v. RAMJAI MAZUMDAR, **6 B.L.R. 308, P.C.=15 W.R P.C. 7=2 Sar. 613.** [*R.*, 1 M. 166.]

***Benami Transaction*—continued.**

——3.—Miscellaneous—*continued.*

(3)—*Title*—Benamee *mortgagee—Pleadings.*—Where a plaintiff sued, alleging that a certain deed of mortgage was executed by MB *benamee* for the benefit of HB, through whom the plaintiff claimed, and also alleging that HB had advanced the money for the marriage out of her own moneys, it was held that, if it was to be shown that the money advanced was the money of MB who executed the mortgage, it was immaterial to consider who was the nominal mortgagee, as the plaintiff could not set up in appeal a title inconsistent with the title set up in the Lower Courts. In the absence of proof sufficient to establish the title of HB, and to show that the money was advanced by HB, the plaintiff's suit was dismissed. BHOWUN DOSS v. SHEIKH MAHOMED HOSSEIN, **13 W.R. P.C. 38=13 M.I.A. 346=2 Sar. 560.**

(4)—Benami *transactions—Succession.*—The law as to *benami* conveyances taken by a father in the name of a son, whether in Hindu or Mahomedan families, should be considered in all Courts in India as conclusively settled by the decision of the Privy Council in 6 M.I.A. 53. That case however was not applied to the present case in which it was found that a Mahomedan father, who had purchased property with his own funds, had the conveyance drawn up in his son's name with a view to affect the interests of his daughters, and to vary the rule of succession between sons and

Benami Transaction—continued.

—3.—Miscellaneous—*continued*.

daughters in his family. RUKNADAWA NOWAB AHMED ALI KHAN v. HURDWARI MULL. **5 B.L R. 578, P C.=14 W.R. P C. 14 =13 M.I A. 395=2 Suther. 343=2 Sar. 571.** [*R.*, 6 B. 717, 7 B. 538, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(5)—*Execution-sale—Plea of benami purchase—Burden of proof—Evidence.*—A purchased a talook at a sale, in execuiton of a decree obtained by a judgment-creditor. The assignee of another judgment-creditor, who had obtained a decree in a separate suit against the purchaser sued to set aside the sale, on the ground that the purchase was not *bona fide*, being made in collusion with the judgment-debtors. *Held*, on the review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at Calcutta that it was a *benamee* transaction, or that the purchaser was acting as an agent for the judgment-debtors; and the decree of the Court below reversed. *Held*, further, that the *onus probandi* was on the plaintiff to establish the affirmative issue that the money for the purchase of the *Talook* was supplied by the judgment-debtors, or a third party for them, and not by the purchaser. Evidence, showing circumstance which may create suspicion, is not enough to justify the Court's resting its decree on suspicion only. SREEMANCHUNDER DEY v GOPAULCHUNDER CHUCKERBUTTY, **7 W.R. 10, P C.=11 M.I.A. 28=2 Sar. 215=1 Suther. 651.**

(6)—Benami *transaction*—Onus *of proof*—*Evidence of ownership*—In cases of alleged *benami* sales effect should be given to the evidence of possession and enjoyment since the purchase, as showing who is the substantial owner. The burden of proof lies on the person who maintains that the apparent state of things is not the real state of things, and the apparent purchaser must be regarded as the real purchaser until the contrary be proved. DEO NATH v. PEER KHAN, **3 Agra 16.**

(7)—*Purchase of property in the name of son in a joint family—Presumption that it is father's property.*—Where a purchaser of a real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo Law is in favour of its being a *benamee* purchase, and the burthen of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. Purchase of a Talook in Bengal by a Hindoo in his eldest son's name; the conveyance, though in the English form of lease and release, *held* to be a *benamee* purchase, and the son in whose name it was purchased declared to be a trustee for the father, and the Talook part of the father's estate. GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN, **6 M.I.A. 53=4 W.R. 46, P.C.=2 Suther. 13=Sar. 493.**

(8)—Benami *purchase in name of son—Presumption.*—In *benami* transaction in India, the criterion for finding who the real owner is,

Benami Transaction—continued.

—3.—Miscellaneous—*continued*.

is the course from which the purchase-money has come. The principle which respect to *benami* purchase between Hindus, laid down in 6 M.I.A. 53, is equally applicable to similar transactions between Mahomedans. Lands purchased in the name of a son, whether a Mahomedan or a Hindu, *held* on the evidence, *furze* or *benami*, in trust for his father, who paid the consideration-money for the purchase and was in possession. *Semble*.—There is no presumption of an advancement, by the name of the son being used as purchaser, other than in the case of a stranger being used. MOULVI SYAD AZHAR ALI v. MUSSAMMAT BIBI, ALTAF FATIMA. **4 B.L.R. P C. 1=13 W.R. P.C. 1=13 M I.A. 232.** [*R.*, 10 B.H.C. 344, 5 B. 238, 29 B. 306=6 Bom. L.R. 975.]

(9)—*Transfer* benami, *fraudulent—Intended fraud, wholly or partially carried into effect—Practice of Courts—Real purchaser in possession for 12 years—Suit against certified purchaser for declaration of right and for confirmation of possession maintainable.*—The Courts will assist no man to obtain an advantage from his own fraud. If a colourable conveyance is executed for the purpose of enabling the transferor to defraud his creditors, and if the intended fraud has been wholly or partially carried into effect, the Court will not lend its aid to assist such a transferor, who has defrauded his creditor thus, to get his property back from the transferee, on the ground that the conveyance was colourable. (23 C. 962, note, 27 C. 231. *R.*) [*R.*, 33 C. 967=10 C.W.N. 650=4 C.L.J, 22.] Where the real purchaser has been in possession for more than 12 years, he can maintain a suit against the certified purchaser for a declaration of his right and for confirmation of possession. GOVINDA KUAR v. LALA KISHUN PROSAD. **28 C. 370.** (3 B.L.R. F.B. 15, 14 M.I.A. 496 *Appr.*)

(10)—*Government servant—Acquisition of property in contravention of rules of department—Right to maintain suit against* benamidar *in respect of said property*—Plaintiff, while engaged in Government service, remitted from time to time his savings to the defendant, a relative of his. The latter purchased the plaint-property in his own name with the moneys so received for the former's benefit. Plaintiff, who was in possession, sued for a declaration of his title to the property. *Held*, that, though the plaintiff in concealing the acquisition of the property from the authorities acted dishonestly and in contravention of the rules of his department, he had not acted illegally so as to bring the case within the principle that a man is precluded from obtaining relief in respect of transaction, the purpose of which was illegal and has been accomplished. As plaintiff was in possession of the property, he was entitled to obtain a declaratory decree. MANUEL S. LOBO v. NICHOLOS BRITTO, **7 M.L J. 268.**

(11)—*Maintainability of suit by real purchaser against* benamidar—*No evidence of fraud.*—In execution of a decree against plaintiff's

Benami Transaction—continued.

——3.—Miscellaneous—*continued.*

grandfather, certain property was sold and purchased by defendant's vendor. Plaintiff sued to have it declared that defendant's vendor's purchase was *benamee* for plaintiff's father. There was no evidence of any fraud about the sale. *Held*, that, in the absence of fraud about the sale, it is open to a plaintiff to come into Court for relief against a *benamee* purchaser on the ground that plaintiff was the real purchaser. MUHAMMAD FAROUGH v. GOKAL CHAND. **3 P.R. 1906=109 P.L.R. 1906.** (23 C. 962, 20 W.R. 112, 11 B. 708, *Cited & F.*; 20 M. 323, 20 M, 333, 23 B. 406, 18 B. 372, *R. & D.*)

(12)—*Execution of decree*—Benamee *sale*—*Setting aside of such sale—Resale of the property.*—A *benamee* sale of his property made by a judgment-debtor to defraud his creditor is liable to be set aside, and the property is liable to be re-sold in execution of the decree. THE NAWAB NAZIM OF BENGAL v. MUZHUR ALI *alias* SACTOWREE MEAN, **3 W.R. Mis. 4.**

(13)—*Nominal sale by* benamidars *but really by owner—Debts due to vendee—Consideration—Validity of sale.*—Where property is sold nominally by *benamidars*, but in reality by the real owner, and the consideration is the debts due from him to the vendee, *held* that the sale is perfectly legal as against the real owner, and therefore as against creditors seeking to execute their decree against him after such sale. MONOHUR DOSS v. BHIKHAREE BHAGUT, **24 W.R. 253.**

(14)—*Mahomedan women—Dower—Exclusive ownership — Burden of proof.*— Two Mahomedan women claiming certain properties on the plea that these had been bought with their dower-money, were held to have lost their suit on failing to prove that the money had belonged exclusively to them. ROOP CHAND AOWAL v. MUSSAMUT KARFOOL, **25 W.R. 54.**

(15)—Bona fide *purchaser for value, who is a.*—One who has not obtained either title or possession is not a *bona fide* purchaser for value. BAHADOOR ALLI KHAN v. MEER NASSER ALLE. **1 W.R. 115.**

(16)—Benamee *sale after decree* — Onus *of proof.*—In a case of purchase immediately after a decree, where the vendor is only a *benamidar*, the *onus* is on the vendee to prove to the satisfaction of the Court that he is a *bona fide* purchaser for value exercising due care and diligence. MAN TURUNGINEE DABEE v. BOISTUB CHURN BHUDDER, **1 W.R. 110.**

(17)—*Sale in execution*—Benami *purchase for judgment-debtor — Re-sale to defendants — Suit by plaintiff for declaration that property was purchased for him.*—Onus probandi.—Where a property sold in execution of a decree is believed to have been purchased by the plaintiff *benamee* for judgment-debtor, and is consequently re-sold to the defendants, and plaintiff sues for a declaration that it was bought with

Benami Transaction—concluded.

——3.—Miscellaneous—*continued.*

his own money on his own account, the plaintiff is bound to prove his allegations. MUDDUN MOHUN SHAHA v. BHARUT CHUNDER ROY, **11 W.R. 249.**

(18)—*Intervenor—Sale*—Benamee — *Burden of proof.*—The decision of the Privy Council in the case of *Sreeman Chunder Dey* v. *Gopal Chander Chuckerbutty* (7 Weekly Reporter, p. 10, P.C.), considered. KADERNATH DUTT v. OKHOY KOOMAR BHUTTACHARJEE, **9 W.R. 202.**

(19)—Ism furzi *transaction*—Onus *of proof.*—The burden of proof in an *ism furzi* transaction, is in the first place upon the person who claims against the tenor of the deed. *Held*, on the admitted fact that the narrative of the deed is not in accordance with the facts, and on other evidence of the appellant, that the burden of proof was shifted on the respondent. SULEIMAN KADR BAHADUR v. MEHNDI BEGUM, **25 C. 473 P.C.=25 I.A. 15=2 C. W.N. 186=7 Sar. 254.**

(20)—*Purchase from* benamidar—*Good faith—Burden of proof.*—In a suit for recovery of possession of land on the ground of purchase, when it has been shown that the alleged vendor is not the true owner, the plaintiff can only rely on his claim as purchaser in good faith for value from a person who, by the act of the true owners, had become the apparent owner, and in such cases the burden lies upon the plaintiff. RUTTO SINGH v. BAJRANG SINGH, **13 C. L. R. 280, P.C.**

(21)—*Burden of proof*—Benami *transaction—Certified purchaser.*—He who alleges that a certified purchaser and registered owner is a *benamidar* must give substantial proof of that allegation. BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH, **12 C.L.R. 186 P.C.**

(22)—Benami *sale—Creditors of* benamidar, *right of—Credit given to* benamidar.—A conveyed his property to his son B: the sale was a *benami* transaction and the property was merely placed in the hands of the son for the benefit of his father. C who held a decree against B having attached the said property as if it belonged to the son, the father filed a suit to have it declared that the property was his. C contended that as the *benami* transaction was calculated to deceive the public and had deceived him and other creditors, plaintiff ought not, in point of law, to be allowed as against creditors to say that the property belonged to himself. *Held* that the creditor was bound to prove that he gave credit to B upon the faith that the property did really belong to the latter; in other words, that the acts that had been done *benami* by the plaintiff and his son were calculated to deceive and had, in fact, deceived him in giving credit to the son. GOLUK CHUNDRA DASS v. BHAGMUT DASS, **11 C. L. R. 106.**

(23)—Benami *purchases—Suit and applications.*—In cases of *benami* purchases, s.244, Civ. Pro. Code, 1882 will not bar a separate suit on

Benami Transaction—continued.

—3.—Miscellaneous—*concluded.*

the ground of fraud. A separate suit will lie to set aside the sale. MOHENDRO NARAIN CHATURAJ v. GOPAL MONDUL, **17 C. 769.**

Benami purchase—Fraudulent purchase—*See* EXECUTION OF DECREE—MISCELLANEOUS, L.B.R. 1893—1900, 16.

Presumption in favour of—*See* GOSSAINS, 2 Ind. Cas. 385=14 C.W.N. 191.

When a mortgage does not amount to—*See* LIMITATION ACT, 1908, art. 85, 128 P.L.R. 1909=115 P.W.R. 1909=4 Ind. Cas. 960.

Bench.

(1)—*Trial of reserved cases—District and Cantonment Judges of Small Causes Court not authorised to sit together.*—The District and Cantonment Judges of Small Cause Courts cannot sit together for the trial of reserved cases. DOOLO RAE v. FUIKEERA, **24 P. R. 1868.**

Beneficiaries.

When to be joined as parties—*See* HINDU TEMPLE, 12 C.W.N. 946, P.C.=4 M.L.T. 101 =8 C.L.J. 230=31 M. 236=10 Bom. L.R.781.

See PROBATE AND ADMINISTRATION ACT, 1881, ss. 37, 45, 12 C. 375.

Benefit of doubt.

To be given to defendant—*See* CUSTOM—PUNJAB—ALIENATION, 8 P.W.R. 1910=5 Ind, Cas. 592.

Benefit Society.

See MAD. ACT I OF 1884, s. 103, sch. A, class (A) (B), 11 M. 253.

Bengal, Agra and Assam Civil Courts Act.

See ACT XII OF 1887.

Bengal Alluvial Land Settlement Act.

See BEN. ACT XXXI OF 1858.

Bengal Alluvion and Diluvion Act.

See BEN. ACT IX OF 1847.

Bengal and Assam Laws.

See BEN. ACT VII OF 1905,

Bengal, Bank of, Act.

See BEN. ACT IV OF 1862.

Bengal Calendar.

Suit in time according to—and out of time according to English calendar—*See* LIMITATION ACT, 1908, s. 25, 13 C.L.R. 153.

Bengal Civil Courts Act.

See BEN. ACT VI OF 1871.

Bengal Drainage Act.

See BEN. ACT VI OF 1880.

Bengal Embankments Act.

See BEN. Act VI OF 1873.

See BEN. ACT II OF 1882.

Bengal Excise and Licensing Act.

See BEN. ACT VII OF 1878.

Bengal Excise and Licensing Act (Amendment).

See Ben. ACT II OF 1903.

Bengal General Clauses Act

See BEN. ACT I OF 1899.

Bengal Indigo Contracts Act.

See BEN. ACT X OF 1836.

Bengal Irrigation Act.

See BEN. ACT III OF 1876.

Bengal Will.

Construction of practice — *See* WILL — CONSTRUCTION, 28 C. 621, P.C.=28 I.A. 159=5 C.W.N. 729.

Bengali Year.

See BEN. ACT VIII OF 1885, s. 184, art. 2 (*b*), sch. III, 23 C. 191.

Bengal Land Revenue Resumption Act.

See BEN. ACT VII OF 1862.

Bengal Land Revenue Sales Act.

See BEN. ACT XII OF 1841.

See BEN. ACT XI OF 1859.

See BEN. ACT VII OF 1868.

Bengal Mahomedan Marriages and Divorces Registration Act.

See BEN. ACT I OF 1876.

Bengal Mofussil Law List.

This circular transmits Bengal Mofussil Law List and explains the object of so doing. **Civ. Cir. Letter No. 1863 B. 24 W.R. Rules and Ors. of the H.C , p. 9.**

Bengal Municipal Act.

See BEN. ACT III OF 1884.

Bengal Municipal Amendment Act.

See BEN. ACT IV OF 1894.

Bengal Rent Act.

See BEN. ACT X OF 1859.

See BEN. ACT VI OF 1862.

Bengal Rent Recovery, Under-tenures Act.

See BEN. ACT VIII OF 1865.

Bengal Rent Settlement Act.

See BEN. ACT VIII OF 1879.

Bengal Sanitary Drainage Act.

See BEN. ACT VIII OF 1895.

Bengal Steam-boilers and Primemovers Act.

See BEN. ACT III OF 1879.

Bengal Survey Act.

See BEN. ACT V OF 1875.

Bengal Tenancy Act.

See BEN. ACT VIII OF 1885.

Bengal Tenancy Amendment Act.

See BEN. ACT III OF 1898.

See BEN. ACT I OF 1907.

Bengal Tenancy (Validation and Amendment Act).

See BEN. ACT I OF 1903.

Bengal Zamindari Dak Act.

See BEN. ACT VIII OF 1862.

Bequest.

See PROBATE AND ADMINISTRATION ACT, 1881.

See SUCCESSION ACT, 1865.

See WILL.

(1)—*Succession Act, 1865—Contingent, or executory bequests.*—In regard to contigent or executory bequest, the Succession Act, 1865, has laid down a hard-and-fast rule, which must be applied, whenever it is applicable, without speculating on the intention of the testator. NARENDRA NATH SIRCAR v. KAMALA BASINE DASI, **6 M.L.J 71, P.C. = 23 C. 563 = 23 I. A. 18 = 6 Sar. 667.** [*F.*, 3 C.W.N. 478, 33 C. 947 = 10 C.W.N. 695 = 3 C.L.J. 502.]

(2) — *Charitable, void for uncertainty* —A bequest for "some one or more charitable, educational or other philanthropic institution or institutions" is void for uncertainty. CHADUNBAI v. DADY, **3 Bom L.R. 902 = 26 B. 632.**

Government-securities — Interest accruing before testator's death—*See* GOVERNMENT SECURITIES, 14 C. 222.

To a class—Construction of a clause in a will giving—*See* HINDU LAW—GIFT, 3 Bom. L.R. 785.

See HINDU LAW — PRESUMPTION OF DEATH, 2 B.L.R. A.C. 137, Note.

To eldest son to be born—*See* HINDU LAW —WILL, 3 Bom. L.R. 908.

Direction in will for feeding and paying Brahmins, whether valid—*See* HINDU LAW—WILL, 12 C.W.N. 1083.

Of ancestral property by undivided father, not binding on son—*See* HINDU LAW—WILL, 16 M. 353 = 3 M.L J. 139.

To Dharmada—Validity—*See* HINDU LAW —WILL, 18 B. 136.

Will—to dharam void as indefinite—Claim by reversioner to undisposed of property—*See* LIMITATION ACT, 1908, art. 141, 21 B. 646.

Abatement of legacies—Specific bequest—General bequest—*See* SUCCESSION ACT, 1865, ss. 287, 288, 290, 291, 13 Bom.L.R. 319.

Bequest—*concluded.*

Masses for the deceased in Calcutta, valid —*See* WILL—CONSTRUCTION, 2 B.L.R. O.C. 148.

See WILL—CONSTRUCTION, 4 C. 443 = 1 C.L.R. 566, 15 M. 424.

Berar.

Hindu Law of Mitakshara as interpreted in Bombay, *lex loci* of—*See* HINDU LAW—INHERITANCE, 4 N.L.R. 31.

Berar Inam Rules.

Rule V (2)—Inam to the lineal descendants of grantee for personal maintenance — Nature of interest conferred upon the claimant—Power of alienation.—An Inam granted under Rule V (2) of the Berar Inam Rules, to a grantee and this direct lineal heirs and undivided brothers, confers upon each holder, in turn, an estate for life only, which is absolutely inalienable, by any process which might take the estate out of the family for whose perpetual maintenance it was made, or as to defeat, delay or incumber the enjoyment thereof by any successor after the alienor. KRISTNAJI v. MANWAR ALI, **6 N.L.R. 72 = 6 Ind. Cas. 821.** (2 B. 529, 3 B. 186, *R.*)

Berar Land Revenue Code.

(1)—Pre-emption in Berar is a right created by statute—Co-occupant in survey number, whose interest is sold by auction for satisfying mortgage-decree, not entitled to sue for pre-emption regarding shares so sold—*See* PRE-EMPTION—MISCELLANEOUS, 4 N.L.R. 138.

(2)—*Ss. 4 and 205—Pre-emption—Sale of separate divided share in a survey number.*—The right of pre-emption, under the Berar Land Revenue Code, is not to be limited to cases, where the pre-emptor and vendor are tenants-in-common owning undivided shares of a survey number. It extends also to cases, where the pre-emptor and vendor are owners of separate divided shares in the survey number, if they have their rights derived from a single original title. BAPU v. MARUTI, **3 N.L.R. 135.**

(3)—*Ss. 6, 127 and 7 (f)—Sale of holding for arrears of land revenue under s. 56—Want of preliminary order of forfeiture under s. 121—Validity of the sale—Jurisdiction of Civil Courts, exclusion of, under s. 171 (f).*—Under s. 56, it is the existence of arrears that works a forfeiture and renders the property liable to sale at the Deputy Commissioner's discretion, where a Berar holding was sold for arrears of revenue under s. 56. *Held*, that the fact, that the order of sale did not contain an express declaration of or feiture, as required by s. 127, did not vitiate the sale, since the liability to forfeiture and sale had already attached by the mere existence of arrears under s. 56, and the validity of the sale cannot be questioned in a Civil Court. RAMALAL v. NAGO, **5 N.L.R. 35 = 2 Ind. Cas. 26.** (27 C. 698, 23 C. 775, 20 C. 826, *D.*)

(4)—**S. 7 (*f*)**—*See* **No. 3**, *supra.*

Berar Land Revenue Code—*continued.*

(5)—*S. 56*—Ijara *leasehold—Non-payment of arrears of revenue—Forfeiture — Subsequent grant by Collector of occupancy right under s. 56 —Mortgage of* ijara *standing by and taking no steps to prevent forfeiture—Mortgage not enforceable against occupancy right—Scope of s. 56—Rules under s. 216 (1) (d) not affecting equities —Difference between forfeiture and surrender—Land revenue systems, different in Berar and Central Provinces.*—One B was the recorded *ijaradar* of a village. He was living jointly with his undivided brother D and his wife M. B mortgaged his *ijara* village, by way of conditional sale to A. B failed to pay up arrears of revenue and his *ijara* was forfeited and the village became *khalsa* or unalienated land. The Collector, acting under the powers now repealed in rules under s. 216 (1) (*d*) and (*e*), granted a right of occupancy to D and M. All the while, A stood by and took no steps to prevent the forfeiture of lands by paying up or assisting in paying or by entering into possession himself and paying up arrears of revenue. A instituted a suit on his mortgage against B, D and M had sought to enforce his mortgage on the occupancy rights of D and M. It was found that the mortgage debt was contracted by B for family purposes and was binding on the family. *Held*, that A could not enforce his mortgage rights as against the occupancy rights, unless A could prove that D and M, by availing themselves of their position as *khatedars* gained an advantage in derogation of A's rights, or otherwise by their conduct created an equity in A's favour, and that A was not guilty of contributory negligence leading to the destruction of his security. S. 56 of the Berar Code affords absolute protection against inoumbrances created by the ex-occupant of a forfeited holding, to a purchaser thereof in pursuance of a sale made under the section; but where no such sale is made, the effects of the forfeiture and subsequent acquisition of the forfeited property are to be determined with reference to the ordinary law, and are therefore subject to the control of equities arising out of the conduct of the parties. (30 B. 465, *R.*) No rule under s. 216 (1) (*d*) of the Berar Land Revenue Code can be made in abrogation of such ordinary law. The systems of land-revenue are so widely different in the Central Provinces and Berar, that no safe analogy can be drawn from the case-law of the former for the decision of cases in the latter. (17 C.P.L.R. 33, 2 N.L.R. 170, 4 N.L.R. 57, *R.*) Forfeiture implies the loss of a legal right by reason of some breach of obligation. The conduct of a party who wilfully surrenders is usually different from that of a person who forfeits the estate which he has mortgaged, regarded as a basis for the building up of equities for the mortgagee against the mortgagor. DEORAO v. MT. BANAI, **7 N.L.R. 2.**

(6)—S. 56—*See* CO-SHARERS—GENERAL, 7 N.L.R. 11.

(7)—*Ss. 69 and 205—Exchange—"Relinquishment for valuable consideration"—Right of pre-emption.*—Where a co-occupant transfers his share, partly in exchange for another field and partly for cash, the transaction, both according to Hindu Law and the Transfer of Property Act, is an exchange. "A relinquishment in favour of a specified person for valuable consideration," in s. 205 of the Berar Land Revenue Code, means a transfer for valuable consideration of the kind described in s. 69. Such a transfer is usually described as a transfer by Razinamah and Kabuliat. A suit for pre-emption on a transfer by way of exchange of a divided share in a survey number does not lie. BABU v. MARUTI, **3 N.L.R. 138.**

(8)—S. 78, landlord's duty to give notice under, before enhancing rent—*See* RENT, 2 N.L.R. 145.

(9)—*S. 78, cl. (2)—Berar Jagir estate tenants in—Annual tenant paying rent at a fixed rate for three years after notice to pay enhanced rent.*—Where the defendants, annual tenants, paid at the previous rate for two years even after notice to pay enhanced rent was given by the Jaghirdar. *Held*, that the tenants can either be ejected under s. 78 (2) or their rent could be enhanced by proceeding under s. 78, cl. (4) of the Berar Code. MARUTI v. JAGANNATH, **5 N.L.R. 100=2 Ind. Cas. 996.** (5 Berar L.J. 10, *R.*)

(10)—*Ss. 78 (2), 223—Ejectment—Presumption.*—In this case, a *jaghir* was conferred in the 17th Century by Emperor Aurangazeb and the grant was confirmed by the British Government, and a tenancy of lands situated within the *jaghir* estate commenced 40 years before suit brought by the *jaghirdar* to eject the tenant. *Held*, that s. 223 of the Berar Code did not apply and no presumption arises under s. 78 (2). PANDU v. RAJA UDHOJI RAO, **7 N.L.R. 100.**

(11)—*S. 79—Ejectment suit—Notice to quit—Compliance with section—Whether plaint itself can be accepted as notice—Rights of a party to suit, how ascertained.*—The requirements of s. 79 as to notice must be strictly complied with, before a landlord will be entitled to sue to eject his tenant. (8 B. 228, 9 C. 48, 24 C. 720, 27 C. 570, *R.*) A plaintiff must succeed on the basis of his rights as they stood at the time he filed his suit, and not on rights subsequently acquired. (21 M. 288, *F.*) So where notice is necessary in a suit by a landlord to eject his tenant, the suit in itself will not be regarded as a notice. UDEBHAN v. JAGANNATH, **6 N.L.R. 17=5 Ind. Cas. 699.** (25 W. R. 329, *Appl.*; 20 W.R. 401, 23 W.R. 400, *R.*)

(12) S. 127—*See* No. 3, *supra.*

(13)—S. 205—Co-occupant of land in Berar —When a co-sharer loses his right of pre-emption. *See* PRE-EMPTION — MISCELLANEOUS, 6 N.L.R. 86=6 Ind. Cas. 930.

(14)—S. 205—*See* NOS. 2,7, *supra.*

(15)—*Ss. 206 and 211, sub-s. 1, cl. (a)—Pre emptor—Notice of for closure — Person entitled to such notice—Objection raised by mortgagor for want of notice to co-owner.*—The only

Berar Land Revenue Code—*concluded.*

person, who has a right to object to the failure to give notice, under s. 206 of the Berar Land Revenue Code, in the chapter relating to pre-emption, is the person having the right of pre-emption. Where a mortgagee, having foreclosed, neglects to give the required notice to a co-occupant of the mortgagor, the latter can sue for pre-emption under cl. (*a*) of sub-s. 1 of s. 211. But the mortgagor, cannot plead a want of notice to the co-occupant as a bar to the foreclosure decree being made absolute. GANGOO v. SAKARAM, **3 N.L.R. 84.**

(16)—S. 211, sub-s. (1), cl. (*a*)—*See* NO. 15, *supra.*

(17)—S. 223—*See* NO. 10, *supra.*

Berar Patels and Patwaries Law.

(1)—*S. 20—Proviso—'Social rights, meaning of a—Suit for a declaration as to propinquity of relationship to a patel, not maintainable.*—The words "social rights" in s. 20 (proviso), do not include rights of precedence and the like enjoyed by a patel as such, but are intended to indicate such matters as adoption and legitimacy, and the right view is that no one is to be precluded, by the fact that there is a patelship in his family, from getting such questions decided by the Civil Courts, to the same extent and under the same circumstances as he could claim decision of them, if there was no patelship in his family. 3 N.L.R. 131, 22 B 344, *F.*; 1897 Berar L.J. 13, *D.*) A suit for a mere declaration that the plaintiff is a nearer heir than a third person to the patel, is barred by s, 20. VESHWANTA v. SITARAM, **5 N.L.R. 79=2 Ind. Cas. 242.**

Betrothal.

See MARRIAGE.

(1)—*Breach of contract—Money paid under void agreement—Promise to do things legal and also other things illegal—S. 57, Act IX of 1872.*—On the failure of the holder's father to perform his part of the contract, the bridegroom brought a suit to recover back the money paid by him to the bride's father in consideration of the marriage of the latter's daughter. *Held* that the suit was maintainable. The transaction between the parties comprise two distinct and separable sets of a promises within the meaning of s 57 of the Contract Act and while one set that relating to the marriage is lawful, and amounts to a contract, the other set that relating to the pecuniary consideration may be unlawful as opposed to public policy and therefore a void agreement. But whether such agreement be void or not, the person who paid the money is in either case entitled to recover it back in the event of the father of the girl refusing to celebrate the marriage. KAHNA v. KAHN SINGH. **106 P.R. 1879.** [*R.*, 82 P. R. 1904, 50 P. R. 1903=95 P. L. R. 1903. 128 P. R. 1889, 46 P. R. 1887; 63 P. R. 1898; *Cited and Appr.*, 194 P. R, 1882; *F.*, 141 P. R. 1890; *Cited and F.*, 50 P. R. 1880.]

Betrothal—*continued.*

(2)—*Suit for breach—Plea of plaintiff's marriage to another woman after contract—Suit not barred by the plea—Mitigation of damages.*—In a suit by the plaintiff for damages for breach of betrothal contract, the defendant pleaded that as the plaintiff had married another woman, he refused to complete his part of the contract. *Held* that by law and custom the plea was not a valid one though it may go in mitigation of damages. KANDLAL v. LAHIA **59 P.R. 1876.**

(3)—*Suit to recover ornaments presented to betrothed, maintainable—Suit to recover consideration money paid to obtain consent, not maintainable*—Under the Punjab Civil Code, a suit will lie to recover ornaments presented by a man to his betrothed in contemplation of marriage but a suit will not lie to recover the consideration money paid to the parents of the bride elect to obtain their consent to the betrothal. GAMAN v. KABOOL. **69 P. R. 1868.**

(4)—*Money obtained for the purpose of procuring a wife—Contract not performed—Suit to recover money, sustainable.*—In a suit by plaintiff to recover money paid to the defendant who agreed in consideration of receiving Rs. 200, to find a wife for plaintiff but did not perform his contract, the Court having found that the defendant never intended to procure a wife for the plaintiff but obtained the money on false pretences. *Held*, (*Boulnois & Lindsay, JJ., dissenting*) that a suit to recover back the sum of Rs. 200 was maintainable. GAHU v. HAKU, **86 P. R. 1875.**

(5)—*Parent making a betrothal contract—Guardian not empowered to make another after parent's death.*—Where a parent makes a betrothal contract for his child and dies, the guardian is prevented by the contract from making another for the child. RAM CHUND v. LALJEE, **21 P.R. 1868.** [*Cited*, 197 P.R. 1882.]

(6)—*Money paid for the purchase of a bride—Money recoverable by suit—Purchase of a wife not* malum in se.—In a suit to recover money paid by plaintiff on account of defendant as a consideration for a bride for defendant the plaintiff knowing for what purpose the money was required, *held*, that he might recover the money paid, the purchase of a wife not being *malum in se* and being *malum prohibitum* by the Punjab Civil Code only as between the parties, to the sale. SHAH GOOB v. IKRAM, **88 P.R. 1867.**

(7)—*Procuring breach of contract—Suit for damages—Husband not a proper party.*—In a suit for damages for breach of betrothal contract, cause of action arises against the parents of the girl and not against the girl's husband. JHANGIE RAM v. DASS RAM, **83 P.R. 1870.**

(8)—*Betrothal contract entered into by parent alone—Suit for breach—Parties to suit.*—Under the Punjab Code, a suit for breach of betrothal contract entered into by a parent on behalf of his child should be brought against the parent

Betrothal—*continued.*

alone and not against both parent and child. MAHOMED BUX v. MUSSAMMAT JEEUNT BEEBEE, **59 P.R. 1866.**

(9)—*Contract in regard to a child unborn, effect of.*—A betrothal contract made in regard to a girl not born at the time of the contract is null and void. DIYALA v. BHAMA, **60 P.R. 1866.**

(10) *Injured feelings not an independent wrong—All presents included in expenses incurred in gifts.*—Damage for injured feelings is not an independent personal wrong, but the consequential damage of the breach of contract. Indemnifications for expenses incurred in gifts relates to all presents made in consequence of the betrothal and no such distinction can be made as that some are given "socially" and others "ceremonially." NUBEE BUKSH v. SUDDEEK, **22 P.R. 1869.**

(11)—*Breach of marriage contract—Suit for damages—Money paid under agreement.*—A suit for damages, arising from the breach of a contract of betrothal will lie, and in calculating damages, money advanced to the girl's father may be taken into account. JESA RAM v. GHAUSAM, **141 P.R. 1890.** (128 P.R. 1889, *Expl. & D.*; 106 P.R. 1879, *F.*)

(12)—*Breach of marriage contract—Suit for damages for such breach—Custom of Aroras*—Riwaj-i-am.—According to a custom embodied in the *Riwaj-i-am* a party to a betrothal (the parties in this particular case being Aroras), is at perfect liberty to cancel the same, if, after betrothal, the boy or girl contracts any disease by which his or her health is permanently impaired. But the *onus* in such cases lies on the party who asserts such custom and permanent failure of health. CHANDAN MAL v. MITTA RAM, **132 P.R 1888.**

(13)—*Breach — Damages — Bridegroom — Gambler etc., whether a justification.*—A person is justified in breaking a contract of betrothal which offered no prospect of a suitable husband for his daughter when he has taken every means to bring about a suitable agreement. DHOND v. ISHAR DAS, **174 P.R. 1882.** [*R.*, 83 P.R. 1909.]

(14)—*Breach by guardians—Betrothal entered into by others.*—The parents of a girl having betrothed her to the plaintiffs died. The guardian of the girl then broke the contract and pleaded they were no parties to the same and not bound to keep the agreement. *Held* that they were liable for damages. GANDU v. ISHARDAS, **197 P.R. 1882.** (21 P.R. 1868, 7 P.R. 1880, *Cited.*)

(15)—*Parties—Suit for damages for breach of a contract of betrothal.*—Where the minor plaintiff sued through his next friend for breach of a betrothal contract entered into between the plaintiff's father and the defendants, the father and uncle of the girl betrothed, *held*, that the minor plaintiff, for whose benefit and on whose behalf the contract was made, could sue for damages in respect of that breach.

Betrothal—*concluded.*

(3 P.R. 1909, 174 P.R. 1882, 21 B. 23, 49 P.R. 1905, *F.*) *Held*, also, that the party against whom the suit lay was the father of the girl, and not the girl herself, as she was no direct party to the contract, and the person guilty of the breach was the father. NABI BAKHSH v. RAHIM BAKSH, **83 P.R. 1909=42 P.L.R. 1910=133 P.W.R. 1909=3 Ind. Cas. 595.**

(16)—*Betrothal under Hindu Law—Nature of contract—Specific performance.*—Betrothal, under the Hindu Law, is not an irrevocable and binding contract, of which the Court can grant specific performance. *In the matter of* GUNPUT NARAIN SINGH, **1 C. 74.** [*R.*, 21 B. 23.]

Betrothal for marriage — Reciprocal promises of giving girls in marriage, not a reciprocal contingent contract—Damages awardable for breach of each promise—*See* CONTRACT—BREACH OF CONTRACT, **11 B. 412.**

See CONTRACT—BREACH OF CONTRACT, 69 P.R. 1866.

See CONTRACT — ILLEGAL CONTRACTS, 19 P.R. 1867.

Effect—Leprosy of father—Right to dispose of girl in marriage—Marriage—No consent of proper guardian—Effect—*See* HINDU LAW—MARRIAGE, 64 P. R. 1884.

Contract of—for marriage—Suit for damges for breach for contract—Suit for declaration that it was void—Liability of father of girl betrothed—*See* HINDU LAW—MARRIAGE, **21 B. 23.**

See HINDU LAW—MARRIAGE, **1 C. 74.**

See JURISDICTION—CAUSES OF JURISDICTION, 147 P.R. 1882.

Suit to establish right to betrothal and marriage of minor—*See* MINOR—GENERAL, 10 P.R. 1904.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 35 P.R. 1875.

See SPECIFIC PERFORMANCE, 24 W.R. 207.

Bettiah Raj.

Right to Saltpetre Mehal — *See* NIMAK SAYAR MEHAL, 13 C.W.N. 454=36 C. 267=1 Ind. Cas. 967.

Bhag.

Alienation previous to Act — Dismemberment of Bhag—*See* BOM. ACT V OF 1862, 5 B. 77.

Sale of—*See* BOM. ACT V OF 1862, ss. 1. 2, 13 B. 203.

Bhagdari and Narwadari Tenures Act.

See BOM. ACT V OF 1862.

Bhagdari Lands.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 12 B. 363.

Bhagdari Lands—*concluded*.

See MORTGAGE—CONSTRUCTION OF MORTGAGE-DEEDS, 18 B. 283.

In Broach District — Succession — Special custom—Males and females, preference between—Hindus and Mahomedans—*See* SUCCESSION, 5 B. 482.

Bhagdari Tenure.

(1)—*Collector incompetent to assign lands in a Bhagdari village.*—*Held* that any interference by the Collector to assign, of his own authority, lands in a Bhagdari village to a tenant for cultivation, is irregular and unauthorised. RAIJI NAROTTAM v. PURUSHOTTAM GIRDAR *et al*, **2 B.H.C. 231.**

See CUSTOM, 5 B.H.C. A.C. 123.

See LANDLORD AND TENANT—MISCELLANEOUS, 4 B.H.C. A.C. 46.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 6 W.R. Act X, Rul. 17.

Bhagdari Village.

See BOM. ACT V OF 1862, s. 3, 1 B. 601.

Bhajan.

Performance of, how far a nuisance—*See* PUBLIC NUISANCE, 8 Bom. L.R. 89.

Bhatta.

(1)—*Payment of—Time from which limitation runs—Limitation Act, sch. II, art. 179 (4).*—Payment of bhatta is not sufficient to constitute the time from which the period of limitation would begin to run under the Limitation Act, sch. II, art. 179 (4). MALUCKCHAND v. BECHAR, **3 Bom. L.R. 275=25 B. 639.** [*D.*, 28 M. 399; *R.*, 11 Bom. L.R. 729.]

Need not be paid to a defendant summoned under s. 7 of the Dekkhan Agriculturists Relief Act—*See* BOM. ACT XVII OF 1879, s. 7, 10 Bom. L.R. 1163=33 B. 249.

Bhet Begari.

See CO-SHARERS—SUIT BY CO-SHARERS, 15 C.P.L.R. 14.

Bhoomear Tenures.

See SERVICE TENURE 6 W.R. 137.

Bhopal.

Governor-General's Agent in Bhopal, decision of—Whether appeal lies to Privy Council—*See* ARBITRATION--MISCELLANEOUS, 12 C. W.N. 585, P.C.=7 C.L.J. 520=138 P.L.R. 1908=10 Bom. L.R. 581=18 M.L.J. 266=99 P.W.R 1908=14 Bur. L.R. 146=4 M.L.T. 25=80 P.R. 1908=35 C. 648=35 I.A. 83.

Bhowli Lands,

Lodgment of returns — *See* BEN. ACT X OF 1871, s. 5, 9 C. 62=11 C.L.R. 100.

Bhowli Rent.

In kind Bhaoli—*See* BEN. ACT X OF 1859, ss. 3, 4, 1 A. 301, F.B.

See BEN. ACT VIII OF 1869, ss. 2. 21, 22, 52, 2 C. 374.

Commutation of, into Nakdi rent—Power of Court of Wards—Annulment of commutation, right to — *See* COMMUTATION OF RENT, 6 C.L.J. 727.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 6 B.L.R. App. 25=14 W.R. 388.

Valuation of crop—*See* RENT, SUIT FOR, 2 B.L.R. App. 27=11 W.R. 151.

Bhowli Tenure.

(1)—*Bhowli land, admittedly held by defendant—Plea of diluviation—Effect of defendant's admission on his liability to pay rent.*—Where defendant admits having held certain *bhaolee* land, but pleads that it was washed away, and the first Court regards the plea as untenable, *held* that this is not an absolute finding that there has been no diluviation, and the Court is not bound to fix on defendant's statement and hold him liable for rent of the *bhaolee* land. CHAMROO SINGH v. TOTA ROY, **19 W.R. 430.**

Bhuinhary Register.

Ben. Act II of 1889, s. 26—Bhuinhary Register prepared under—Not conclusive evidence of title of person recorded in it—*See* EVIDENCE—MISCELLANEOUS, 18 C. 91.

Bhutan Duars Act.

See BEN. ACT XVI OF 1869.

Bhutan Duars Repealing Act.

See BEN. ACT VII OF 1895.

Bible.

Evidence—Oath — Conscientious objections to take oath on—by member of Church of England—Admissibility of evidence not given on such oath—*See* OATH, 2 M.H.C. 246.

Bicycle.

Vehicle tax — *See* MAD. ACT I OF 1884, sch. B., 19 M. 83=4 M.L.J. 293.

Bid.

Court-sale—Acceptance of bid by Officer of Court—Effect—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 84 to 88, 90 to 94, ss, 65, 66, 8 M. L. T. 154.

Arrangement between persons not to bid against each other—No fraud—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 150 P.W.R. 1909.

Bidders.

Combination among — Irregularity— Fraud—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—SETTING ASIDE SALE AND ITS EFFECT, 13 C.L.R. 1.

Bidding at Auction.

(1)—*Court auction—Withdrawing from bid.*—A bidding at an auction is a mere offer which may be detracted before the hammer is down. In the absence of any law or rule to the contrary, this rule applies to Court-auction also. AGRA BANK v. HAMLIN, **14 M. 235.**

Bigamy.

See ACT IV OF 1869.

See MARRIAGE.

Hindu Christian convert relapsing into Hinduism—Marriage of a second wife—No—*See* CONVERSION, 3 M.H.C. App. 7.

Bigamy — Conversion of Hindu wife to Mahomedanism — Marriage with Mahomedan —*See* Hindu LAW—MARRIAGE. 18 C. 264.

Bill.

Contingent Bills, **Clr. No. 8, dated the 13th May, 1865, 3 W.R. Civil Circular Orders, p. 1.**

Printed heading to a—Interest—Notice—*See* ACT XXXII OF 1839, A.W.N. 1887, 287.

Bill of Costs.

Delivery of—Maintainability of suit by executor of attorney—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 3 B.L.R O.C. 96.

See LIMITATION ACT, 1908, art. 84, 1 B. 253.

Bill of Exchange Act.

Ss. 2, 7 (1) 23, 59—Rights of holder of the Bill—Non-liability of an undisclosed principal —*See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 8, 27, 78, 1 M.L.T. 377, F.B.=16 M.L.J. 508=30 M. 88.

Bill of Lading.

(1)—*Varying bill of lading—Shipping order —Custom.*—In a suit instituted by a shipper to obtain bills of lading from the captain, in accordance with terms of the order granted by the ship's charterers: *Held* that the captain was entitled to vary the bills of lading in respect of any excess of measurement over the dimensions specified in the order, and that an alleged custom, precluding such variation, after the goods have been received on boardship, was contrary to law. It is the duty of the shipper to comply strictly with the terms of the shipping order. GENTLE v. THOMSON, **1 Ind. Jur. O.S. 69.**

(2)—*Construction—River navigation in India —Difficulties or casualties of navigation.*—Plaintiff sued to recover the value of certain hides which were lost in defendant's flat. The bill of lading contained, among other exceptions, the words "difficulties or casualties of navigation and all and every danger and accident of the river and navigation whatsoever." In evidence it was proved that the flat was destroyed by some projection embedded in the river. *Held* that the casualty was comprised among the exceptions in the bill of lading, and further that, having regard to the dangerous navigation of Indian rivers, parties entering into contracts of a similar nature should protect themselves by insurance. DHAUNSEE v. INDIA GENERAL STEAM NAVIGATION CO., **1 Ind. Jur. O. S. 125=1 Hyde 283.**

Bill of Lading—*continued.*

(3)—*Burden of proof as to insufficiency of packing—Damages.*—The defendants, by a condition annexed to their bill of lading, stipulated that they should not be responsible for leakage or breakage or other consequences arising from the insufficiency of the address or package. The plaintiff shipped, for conveyance from Hongkong to Bombay, certain goods on board a steamer of the defendants, in packages which were proved to be insufficient. The goods in accordance with a condition to that effect contained in the bill of lading, were transhipped at Galle. On their being landed in Bombay it was found that all the packages were broken, and in a much more damaged condition than is usual in the case of such goods carried from Hongkong to Bombay in similar packages. The contents had to a large extent, escaped from the packages, but were otherwise uninjured. *Held* that, under a bill of lading in the above form, the *onus* of proving that the packages were insufficient, and that the injury which they had sustained was the consequence of such insufficiency, lay upon the defendants, but that when the result of the evidence on both sides was to leave it in doubt whether the injury was caused by negligence, or was the consequence of the insufficiency of the packages, the plaintiff was not entitled to recover. THE PENINSULA AND ORIENTAL STEAM NAVIGATION COMPANY v SOMAJI VISHRAM, **5 B.H.C.O.C. 113.** [*R.*, 3 B. 120, 2 C.P.L.R, 141.]

(4)—*Steam Navigation Company employed to carry and land cargo—Cargo damaged owing to swamping of boat—Liability carriers.*—A Steam Navigation Company was employed by plaintiff to carry cargo from Calcutta to Rangoon and to deliver it into the receiving ship, or to land it at the consignee's expense, their liability ceasing as soon as the goods were free from the ship's tackle. When the ship arrived at port, the consignee not having had his own boats alongside, the goods were put into other boats, one of which, through the negligence of the boatmen, was swamped and the contents damaged. Plaintiff claimed damages. *Held* that, as defendants were not shown to have neglected the duty of taking reasonable and proper care in the selection of boats, they were not liable for the loss incurred. BULLOCK BROTHERS AND COMPANY v. TOAY AUNG, **24 W.R. 74.**

(5)—*Goods destroyed by carelessness of carrying Company's servants, suit to recover—Bill of lading, exemption from damage in.*—Where the plaintiffs, in shipping glass cases by a steamer of the defendant company, who were not subject to the Carriers' Act, signed a bill of lading with the clause " . . . . loss or damage for any act, neglect or default whatsoever of the pilot, master or mariners or other servants

Bill of Lading—*continued.*

of the company, excepted," *held*, in a suit on an entire destruction of one of the cases owing to the carelessness of the company's servants, the defendants were protected from liability by their bill of lading. The defendants have a right to impose upon shippers any terms, however unreasonable, which the latter think proper to accept. They may thus free themselves from the consequences of their own negligence or default, however gross or wilfull. JELLICOE v. THE BRITISH INDIA STEAM NAVIGATION CO., **10 C. 489**. [*F*., 30 M. 79=1 M.L.T. 387 =16 M.L.J. 573; *R*., 32 M. 95=18 M.L.J. 497=4 M.L.T. 110.]

(6)—*Exemptive clause in bill of lading—Effect—Shipping—Negligence of servants of ship—Period of loading—Fitness of the ship.*—Certain bags of sugar were imported by the plaintiffs on the 11th and 12th November, 1887 on board the *Byculla* (which belonged to the defendants) for being conveyed to Bombay. No mate's receipt was given to the shippers at the time of shipment, owing to a dispute as to the exact number of bags put on board. A bill of lading was signed by the defendants on 28-11-1887, which contained an exemptive clause in these terms. "The act of God, the Queen's enemies, and all the perils, dangers, accidents of the sea, and accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, or from any deviation excepted." The *Byculla* started on 15-11-1887 and duly delivered the sugar in Bombay, which was found to be wet on its arrival. A suit was instituted by the plaintiffs against the defendants for the damage caused to the sugar. The defence set up was that the exemptive clause in the bill of lading gave protection from liability. On the part of the plaintiffs, it was contended that the bill of lading did not relate to the period of loading that, even if it did, the exemptive clause in the bill referred only to negligence subsequent to the time when the voyage commenced and that the ship was not one "reasonably fit for voyage" according to the ruling in *Steel* v. *The State Line Steamship Company*, 3 A. C. 72. *Held* (1) that, there being no defect inherent in the ship and the case being one of negligent and improper storage, the rule laid down in 3 A.C. 72 did not apply, (2) that the reasonable mode of construing the contract contained in the bill of lading was to treat the exceptions as co-extensive with the liability, and (3) that the defendants were entitled to claim protection under the exemptive clause in the bill of lading because the bill covered the goods from the time when they were put on board to be loaded. HASSANBHOY VISRAM v. THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, **13 B. 571**. [*R*., 19 B. 639, 1 M.L.T. 387=16 M.L.J. 53=30 M. 79, 18 M.L.J. 497=32 M. 95=4 M.L.T. 110]

(7)—*Contract—Liability.*—A and Co. at Madras shipped by the B. I. S. N. Steamer "Mahratta" a box of coral to be delivered to their Agent, M at a place B. At the time of shipment, they declared the value and paid

Bill of Lading—*continued.*

enhanced freight on account of such value. By the bill of lading, the Company undertook to deliver the case in good order at B to the consignee M, subject to certain conditions annexed. By one of these conditions, if the consignee did not take delivery when the ship was ready to discharge, the goods might be warehoused at the merchant's risk, and the Company's liability was to cease when the goods left the ship's side. The consignee did not take delivery at the ship's side, and the Company's Agent at B, took the case to the custom-house, as he was bound to do so by the Regulations of the Port. If the Superintendent of the Custom house had been aware that the case contained corals, it would have been placed in an inner room and taken great care of; but the Company's Agent did not know that the case contained corals, and therefore he was unable to give any such information to the Superintendent of the Custom-house. While the case was lying at the Custom-house application was made on behalf of A and Co. to the Company's Agent for delivery of the case upon the usual guarantee. The Agent refused to deliver the case without the production of the bill of lading. Afterwards, the bill of lading was received from Madras and the case was delivered up. In the meantime, while lying at the Custom-house, the case had been opened and a portion of the contents stolen. *Held* that the Steam Navigation Company were not liable. MACKINNON AND CO. v. MINCHIN, **6 M.H.C. 353**. [*R*., 19 M. 169.]

(8)—*Declaration of value and nature of contents.*—A was the consignee and holder of a bill of lading by B at Bombay, as master of the steam-vessel *John Bright*, for the safe carriage and delivery of a box addressed to A, which in fact contained diamonds of the value of Rs. 11,670, three rubies, and three emeralds in all of the value of Rs. 15,940. On the face of the bill of lading was printed, "This bill of lading is issued subject to the following conditions." One condition was that a "written declaration of the contents and value of the goods is required by the owner, and must be delivered by the shipper to the owner's agents with the bills of lading. A wrong description of contents or false declaration of value shall release the owner from all responsibility in case of loss, etc., and the goods shall be charged double freight on the real value, which freight shall be paid previous to delivery." The declaration in this case was contained in the following letter from the shipper to the agent of the shipowner:—"Dear Sir, Be good enough to give me an order for a small box containing diamonds to the value of about Rs. 14,000, to be shipped on board the steamer *John Bright* for Calcutta, Yours, etc." The box was lost by the negligence of B or his servants. In a suit by A to recover "the value of the goods, *viz.*, Rs. 14,000: *Held* that all the shipowner was entitled to was that the shipper should make a declaration of what *bona fide* he believed to be the value. The declaration as to contents was not vitiated by

Bill of Lading—*continued.*

the omission to enumerate all the different species of articles contained in the box. Upon the evidence, the declaration as to the value and nature of the contents was *bona fide*; therefore A was entitled to recover the value of the diamonds lost. DHUNJEEBHOY BYRAMJEE METHA v. BETHAM, **2 Ind. Jur. N.S. 305.**

(9)—*Exceptions in—Damage of goods by oil and chafing—Absence of evidence as to how damage caused—Leakage, meaning of.*—The exceptions in a bill of lading under which piece goods were carried from London to Bombay protected the master from *leakage, breakage* rust, decay, *loss, or damage from* machinery boilers * *misfeasance error in judgment, neglience or default* * * * *persons in the service of the ship* * * * and the ship not being liable for any consequences of causes therein excepted however originating." The piece goods, on their arrival in Bombay, were found to be damaged by oil and by chafing, *i.e.*, by rubbing against other goods in the hold, but evidence to show how such damage was occasioned was not to be had. *Held* that the term "leakage" did not include leakage from other goods on to the piece goods, nor did "breakage" include damage caused by chafing and that, as no negligence was proved, the master was not protected by the exception "damage from negligence." GRAHAM v. HILLE **10, B.H.C. 60.**

(10)—*Shipping — Seaworthiness — Leakage while ship in dock—Damage to goods—Bill of lading—Exception—Implied warranty.*—About 16th March, 1893, plaintiff shipped certain goods on board the defendant Company's S. S. *Mobile*, then lying in dock. At that time, the ship was apparently in a sound, seaworthy condition. On the 18th March, 1893, after plaintiff's packages had been loaded, the ship sprung a leak and a considerable amount of water came into the hold and damaged the plaintiff's goods. The ship was at once taken into the dry dock, the cargo was shifted and the leak repaired. It appeared that the leak was caused by the fact that the plate of the ship had been gradually worn thin in one particular spot, so that when from 16th to 18th March, 1893, cargo was loaded, and the ship lay deeper in the water, the pressure became so strong that a hole was made and the water rushed in. The plaintiff sued the defendants for damages. The defendants denied their liability on two grounds, *viz.*, (1) that the ship was in a seaworthy condition when the goods were put on board (2) that they were protected by the bill of lading which contained the following exception, *viz.*: "Accident, loss and damage from vermin, barratry, jettison, collison, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land, carriage and steam navigation of whatever nature and kind and accident, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company or from any deviation." *Held* that the defendants were liable. While the ship was in dock it was not seaworthy, and the

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exception in the bill of lading did not limit the implied warranty of seaworthiness. VITHULDAS GOBER v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, **19 B. 639.**

(11)—*Loss of goods by fire—Exception in bill of leading.*—Where goods were landed, with the consent of the consignees, at the godowns though strictly against the terms in the bill of leading, and the bill of lading had exempted the ship-owners from liability for loss by fire, they were not held responsible for loss of the goods by fire at the godowns, either as carriers or as wharfingers; as, in the former case, they were protected by the clause in the bill of lading and as, in the latter, the destruction by fire was not due to any default on their part. CHIN HONG &C. CO v. SENG MOH &C. CO., **4 C. 736=3 C.L.R. 585.**

(12)—*Construction of—Shipowner and consignee.*—Where a bill of lading provided that, on failure by the consignees to remove the goods as fast as they are discharged by the steamer, the steamer's agents could land the goods, all the costs being borne by the consignees, *held*, that the consignees were to be allowed a reasonable time to take the goods before they could be charged for landing and wharfage. For the speedy discharge of their vessel the shipowners were entitled to land and wharf the goods, though not to charge for landing and wharfage, unless the plaintiff had had an opportunity of landing the goods himself. COSSIM HOSSEIN SOORTU v. LEE PHEE CHUAN, **5 C. 477.**

(13)—*Time for commencing to land cargo—Reasonable time after arrival of ship—Forty-eight hours in case of sailing vessel—Landing of goods at Custom House or other place set apart—Whether such landing is delivery—Course of legislation with regard to landing of goods—Master whether carrier or warehouseman—Liability of master for accidents.*—Neither by the custom of the port of Bombay, nor by the provisions of the Customs Act, is the master of a ship bound to wait fifteen days before commencing to land his cargo; but within a reasonable time after the arrival of his ship, forty-eight hours in the case of a sailing vessel, and somewhat less in the case of a steamer, he is at liberty, if the consignee has not then sent boats for them, to land the goods at the Custom House Bandar or other place sanctioned by the Custom authorities; and such landing is not unlawful, or a breach of contract as carrier, on the part of the master. The landing of goods under the above circumstances, and setting them apart on the Custom House Bandar for the consignee, do not constitute a delivery of them to the consignee; but such goods after being so landed, continue in the possession of the master as carrier. Course of legislation with reference to the landing of goods on the Custom House Bandar reviewed. *Quære*:—Whether (under the special circumstances of this case stated in the text) the goods when so landed remained in the custody of the master in his capacity of

Bill of Lading—*continued.*

common carrier or as a warehouseman. The Master of a vessel who receives goods on board under a bill of lading which exempts him from liability from the loss occasioned by the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsover nature or kind, and lawfully lands the goods at the port of discharge, is, so long as the goods remain in his custody after being so landed, protected from liability from loss by fire under the above exemption in his bill of lading. THE HONKONG AND SHANGHAI BANKING CORPORATION v. BAKER, **7 B.H.O.C. 186.**

(14)—*Bill of lading, 'landing or cranage charges' under, payable by ship-owner not the consignee—Recovery, the charges from consignee—Ultimate liability of ship owner to consignee.*—Plaintiff, in this case, sought to recover from the defendants, as agents for and representing certain steamers, certain sums of money on the ground that they were paid in respect of charges which he had to pay but which were properly payable not by him, but by the owners of the said steamers, before they could give him complete delivery of the boilers under the terms of his bills of lading. The only ground of defence pressed was that there had been a complete delivery to the plaintiff under the terms of the bills of lading. The Small Cause Court passed judgment for the plaintiff subject to the opinion on the question, whether on a true construction of the bills of lading held by the plaintiff, the delivery under the circumstances was a complete delivery to the plaintiff, in accordance with the terms of the bills. The High Court was of opinion that the answer to the question referred to them depended on whether certain charges, called "landing charges," or "cranage charges," which the plaintiff, the consignee, was required by the Port Trust to pay before he could remove his goods, were charges which, as between the consignee and the ship-owner, the ship-owner and not the consignee, was bound to pay, and it was held that, under the provisions of the bills of lading in question and under the circumstances of the case, those charges were charges which the ship-owner and not the consignee was bound to pay, and that therefore the judgment of the Small Cause Court in favour of the plaintiff was right. JAMES SCOTT v. JAMES FINLAY, **7 B. 386.**

(15)—"*Weight, contents and value unknown—Suit against master—Assignee for value of Bill—Construction of Act IX of 1865, s. 3.*—Where a bill of lading purported to be for 50 tons of coals and contained a printed clause "weight, contents and value unknown" and similar words written above the signature of the Master, *held* that it did not amount to an admission by the Master that he received 50 tons of coal on board. Under the Bills of Lading Act (IX of 1856), s. 3, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against

Bill of Lading—*continued.*

the Master of the shipment of 50 tons. W. NICOL AND COMPANY v. J.S. CASTLE, **9 B H. C. 321.**

(16)—*Ship—Bill of lading—Charter party—Incorporation in bill of lading of terms of charter party—Cargo—Freight payable on intake measurement—Discrepancy between intake measurement and measurement at port of delivery—Suit by consignee for excess freight—Evidence—Burden of proof.*—K. V., at Moulmein consigned to the plaintiff in Bombay 135 logs of teak timber, shipped on board the defendants' ship, and covered by a bill of lading signed by the defendant. The bill of lading described the 135 logs as marked K. V., and measuring tons 115 12-10, and provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, to the following effect: "Marks, number, quantity and measurement unknown: all other conditions as per charter party." The charter party was expressed to be between the owners of the ship and the firm of B of Rangoon as charters of the whole ship, and provided (*inter alia*) for the payment of freight at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half freight, *by intake measurement.* On arrival of the ship at Bombay, the plaintiff as endrosee and holder of the bill of lading and consignee of the goods mentioned therein, paid to the defendant Rs. 1,500, on account of freight, and took delivery of the 135 logs. On measuring them, however, he found that, according to his method of measurement, which was to measure the length, breadth and thickness of each log separately, making no deduction for holes or fractures, the total measurement of the 135 logs came only to tons 58-27-11-6, and not tons 115-12-10, as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity, Rs. 995-8-0 and to recover from the defendant the difference between that sum and Rs. 1,500 paid on account—Rs. 504-8-0—as for an over-payment of freight. It was proved that the ship took no part in the measurement of the timber at Moulmein, but that all the timber put on board was measured by an employee of the charterers acting apparently as the agent of all the different shippers, and that the measurements in the bills of lading were those supplied by this person to the defendant as the measurements of the different consignments. It was also found that the 135 logs measured by the plaintiff in Bombay were the same 135 logs as were shipped under this bill of lading, and that his measurement of them was correct according to the mode of measurement which he followed. There was no evidence as to what the mode of measurement followed at Moulmein was; nor, except the statement in the bill of lading, as to what was the actual intake measurment thereof this particular consignment. *Held* that the effect of the last clause of the bill of lading was to incorporate into it the various

Bill of Lading—*continued.*

conditions of the charter party, and as the bill of lading only provided that the freight shall be payable at Bombay at the rate of Rs. 17 per ton for fifty cubic feet without stating anything as to the mode of measurement or as to where the measurement was to be ascertained, the charter party should be looked into, where it was expressly provided that the freight was to be payable "by intake measurement," *i.e.*, the measurement actually taken at the port of shipment. *Held* further that the burden of proving what the intake measurement was lay upon the plaintiff; and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber. CURSETJI RUSTOMJI SETNA v. THOMAS WILLIAMS, **5 B. 313.**

(17)—*Freight, payment of — Lien of ship-owner.*—Where a bill of lading, dated at the port of shipment, contains the words "freight for the said goods being paid, here" it operates as a receipt for the freight. The ship-owner is not bound to deliver the same to the shipper until payment of the sum to be charged for the carriage of the goods; but such sum is not freight, and the ship-owner has no lien for the amount upon the goods, nor the bill of lading which represents them. SOOMAR JAFFER v. ABDOOL KURREEM, **1 Ind. Jur. N.S. 230.**

(18)—*Freight, lien, for, on cargo—Advances on account of freight—Master's lien for freight—Charter-party.*—By a Charter-party made in London, the ship W was chartered to carry a cargo from Liverpool to Calcutta, where she was to load from the factors of the charterer a full homeward cargo to be carried by her to Europe. Freight for the whole round, out and home, was made payable on safe delivery of the homeward cargo, but at so much per ton of the outward cargo delivered in Calcutta. The master was to have a lien on the cargo for freight, etc, cash not exceeding £800 was to be advanced to the ship in Calcutta on account of freight, but subject to insurance, and £600 was to be advanced by the charterer's acceptance at three months, or in cash under discount, at charterer's option, on the sailing of the vessel from Liverpool, less five per cent. for insurance. The charterer himself loaded the ship, and the master signed a bill of lading which declared the cargo to be shipped by the charterer to be delivered at Calcutta, as the agents of the charterer might direct, unto order or to his assigns, freight, to be paid as per charter-party. In the margin of the bill was written, "Received in advance of the within freight £600 as per charter-party." The £600 had been paid, not in cash, but by the charterer's bill at three months. The charterer became bankrupt and the bill was dishonoured and the fact of the bankruptcy and dishonour was known in Calcutta when the ship arrived there. On the ship's arrival in Calcutta, J. O. & Co., who were the holders for value of the bill of lading, demanded delivery of the cargo.

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The master claimed a right of lien, and refused to deliver unless J. O. & Co. would pay the £600 bill which had been dishonoured, and would further advance £800 for the ship's use, and load a homeward cargo, according to the terms of the charter-party. *Held* that J. O. & Co. took the bill of lading with notice of the charter-party, but that, under the circumstances, the master had no lien, and was bound to deliver the cargo to J. O. & Co. OGLE v. NASHHOLM, **Bourke O.C. 171.**

(19)—*Freight, lien-for, on cargo—Advances on account of frieght, lien of owners.*—Goods were shipped deliverable to the order of the shippers or their assigns. The bill of lading stated that "freight for said goods was to be paid as per charter-party, with average accustomed, reserving lien in full on cargo for full amount as stipulated therein." The charter-party showed "that H and Co., undertook to supply a full cargo for the ship, and that R H, agent for the ship, agreed with H and Co. that the said ship should proceed to London dock, or any other suitable dock, for loading salt at party's option, or so near thereto as she can safely get, to be at all times afloat and in safety, and then load for the charterer's agent a full and complete cargo of salt, not exceeding what the master considers sufficient cargo, which the charterers engage to ship, not exceeding what she can reasonably carry with her stores, provisions, and furniture, and being so loaded shall therewith proceeed to Caloutta, or so near thereto as she may safely get, and there deliver as per bills of lading and on being paid freight at the rate of twenty-three shillings per ton. "The freight to be paid thus" £ 500 by charterer's acceptance at two months on sailing, less 2½ per cent. insurance; or cash on sailing, less 5 per cent. interest, and insurance at charterer's option, and the balance in cash on delivery as master requires, at current rate of exchange; 2 per cent. commission to charterers in lieu of consignment. *Held* that "a sum of money payable before the arrival of the ship at her port of discharge and payable by the shippers of the goods at the port of shipment, is not freight in the strict legal acceptation of the term, with all the incidents of freight in giving the ship-owner the right of lien, unless it is stipulated for." Here the owners had a lien upon the goods for freight, notwithstanding that bill of exchange for £ 500 had been given. THOMAS v. OGLE, **Bourke, O C. 100.**

(20)—*Freight, lien for, on cargo—Advance on account of freight—Dishonour of bills.*—The captain of a ship has no lien on the cargo in respect of a portion of the freight stipulated to be advanced, and advanced by bills afterwards dishonoured, nor in respect of a portion of the freight stipulated to be advanced at the port of discharge. A lien cannot arise in any case when the master has not a right to retain the goods till the freight is paid. Such advances are not freight, but advances to be made under discount, and upon the security of the captain's

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bill on the freighter. The master has no lien at law or in equity in respect of breaches of covenants in the charter-party, other than those relating to the payment of freight for goods actually carried. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY v. SMALL. **Brouke O.C. 309.**

(21)—*Construction of bill of lading.*—Where a bill of lading provides that all claims must be made at the port of Calcutta, the preferring of a claim in Calcutta is precedent to a suit in the Court of the Recorder of Rangoon. MAHOMED ISMAILJEE NADA v. THE BRITISH INDIA STEAM NAVIGATION COMPANY, **9 W.R. 396.**

(22)—*Damages.*—Damages from leakage of boiler to goods shipped by steamer is within the exceptions in the bill of lading. Whether, in case of damage to goods conveyed by steamer, defendants, notwithstanding exceptions in bill of lading, may not be made liable on the implied warranty. Provision in a bill of lading that any claim for short delivery or damage to goods should be made at the port of Calcutta, and not elsewhere, does not affect plaintiff's right of suit in the Court of Rangoon. Objection on this ground cannot be taken for the first time at hearing of appeal. THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM MOOSUN, **8 W.R. 35.**

(23)—*Cargo unclaimed on arrival of ship—Rights of ship-owner.*—The master of a ship on its arrival in port is not bound to seek out the consignees of cargo, nor is he bound to wait more than a reasonable time before unloading. If a consignee is not in a position to take delivery in the ordinary way, the master has the option of landing the goods and warehousing them. When he has done that, he can be rendered liable for loss or damage to cargo on two grounds, *viz.*, when negligence can be proved against him, or when it is charged that he has failed to deliver the goods. THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN, **19 M. 169.**

(24)—*Stipulation relieving ship-owner from liability as soon as goods free of ship's tackle, and before delivery, if enforceable—"Landing agents" at Penang, how far agents of ship owners—Loss of goods after delivery to landing agent but before delivery to consignee.*—Where the bill of lading providing that "in all cases and under all circumstances, the liability of the ship-owner shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk, for all purposes and in every respect, of the shipper or consignee" and the goods were delivered overside into lighters and taken to the wharf and kept by a "landing agent," and then disposed of without the production of a bill of lading or a delivery order in fraud of the persons entitled, *held*, that there was no reason why the clause providing for cessor of liability of the ship-owner on the goods being free of the ship's tackle should not be held operative and effectual, although they might have been

Bill of Lading—*continued.*

lost before delivery to the person entitled. The stipulation was one which the parties were perfectly free to make, unembarrassed by any implied condition or any original underlying obligation, such as exists when a ship-owner seeks to relieve himself of liability to the shipper in case his vessel should be found to have been unseaworthy. The position of the "landing agents," at the port of Penang indicated. *Semble.*—They are intermediaries owing duty to both parties—agents of the shipowners as long as the contract of a freightment remains unexhausted, agents for the consignees as soon as the bill of lading is produced with delivery order endorsed. THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. THE BRITISH INDIA STEAM NAVIGATION CO., **13 C. W.N. 733, P.C. = 6 M.L.T. 11 = 19 M.L.J. 316 = 4 Ind. Cas. 475.**

(25)—*Bill of lading—Interpretation—"Not responsible for marks"—Effect and meaning—Endorsement in blank—Negotiability—Bill of Lading Act—Object of—Whether affects other rights.*—Plaintiff ordered from T. & Co., 165 Austrian Rough Boards of different sizes. The goods were shipped to Karachi per S.S. "Gisela." The bill of lading showed that the goods were consigned by T & Co. "To order," and described the goods as "165 pieces white woods planks "marked" 025 imported by E. A. Nathani, Karachi, produce in Austria." Added to the description are the words "Not responsible for marks" printed conspicuously in violet ink. The Bill is endorsed in Blank by T. & Co. On the arrival of the ship at Karachi, several consignment of white wooden planks besides that of the plaintiff were delivered to the Port Trust, which granted receipts showing that altogether 803 "loose wooden pieces" with "marks various" were landed. The plaintiff obtained the bill of hading in respect of his goods from the Bank on payment of the money due to the shipper, and caused his name to be written on the back of the Bill. On presenting the Bill, he obtained delivery of 162 planks bearing his mark, and was offered 3 more not bearing his mark. The plaintiff refused to take delivery of the three planks and sued the Port Trust and the ship for the value of the planks. *Held*, that by endorsing the bill of lading in blank, T. & Co., rendered it a negotiable instrument, and it could pass from hand to hand by mere delivery, so as to affect the property in the goods, and that the plaintiff who obtained delivery of the bill accompanied by an endorsement became the owner of the goods and was entitled to sue. *Held*, also, that, as owner of the goods, the plaintiff had open to him, under the Common Law, all the several forms of suit in tort. He could sue the Port Trust in "detinue" for wrongfully retaining the possession of the goods or for "conversion" if they had given to any other consignee. The Bill of Lading Act was intended to meet the case where the goods in respect of which bills of lading purport to be signed, have not been laden on board, and does not affect the rights such as those of the plaintiff. *Held*

Bill of Lading—*continued.*

also, that the object of inserting the proviso "not responsible for marks" is to prevent the bill of lading having its ordinary effect of being evidence against the ship that goods marked as stated in the body of the bill were actually shipped, and it lies on the plaintiff to prove that the three planks bearing his mark were actually committed to the custody of the Port Trust or were delivered to some other consignee. THE KARACHI PORT TRUST v. ISMAILGI AMEEJI, **3 S.L.R. 203=6 Ind. Cas. 848.**

(26)—*Carriers by sea—Bill of lading, construction of—Loss by fire—Liabilities of ship-owners for goods after being landed—Ship-owners—Right to charge for lading and wharfing.*—Goods were shipped in the defendant's steamer, under a bill of lading which contained a clause protecting the chip-owners from loss occasioned by fire, and a further clause to the effect that the goods "are to be landed from the steamer's tackle by the consignees as fast as the steamer can discharge, failing which the steamer's agents are to be at liberty to land them into godowns—the cost of lighterage, godown rent, etc., thereby incurred to be borne by the respective consignees." The steamer duly arrived at its destination on the afternoon of the 11th December, and at once proceeded to discharge its cargo. It does not appear that notice of the arrival was given to the plaintiff, who was the consignee of the goods. On the 12th, the plaintiff applied for delivery, but was informed that the goods had been landed into the godowns and delivery could not be given, as they were covered up by other cargo. On the evening of the 12th, the godowns were burned down and the goods destroyed. In a suit by the plaintiff for damages for short delivery, *held* that the defendants were entitled, under the bill of lading, for the speedy discharge of the steamer, to land the goods, and that a reasonable time for delivery not having elapsed before the fire, they were also protected from the loss occasioned thereby, the goods being still in their custody as carriers. *Per Pontifex, J.*—The ship-owners though entitled to land the goods, were not entitled to charge for landing and wharfing unless the plaintiff had had an opportunity of landing the goods himself. *Per Garth, C. J.*—If the defendants were at liberty to discharge the goods into the godown, they were also entitled to charge wharfage dues. LEE PHEE CHUAN v. CASSIM HOSSEIN SOORTY, **5 C.L.R. 187.**

(27)—*Delivery—Bill of lading, exemption in—Shipping Company—Effect.*—The obligation of a shipping Company to properly deliver the goods shipped with them, under a bill of lading, is subject expressly to the condition inserted in the bill. Loss of the goods shipped under a bill of lading, containing the words "not responsible for condition and contents," could not be recouped from the shipping Company. CUTLER PALMER AND CO. v. THE BRITISH INDIA STEAM NAVIGATION CO., LTD., **25 C. 654=2 C.W.N. 428.**

Bill of Lading—*concluded.*

Liability of carrier for negligence. Effect of conditions in, claiming exemption form liability—*See* CARRIERS, 4 M.L.T. 110=32 M. 95 =18 M.L.J. 497=1 Ind. Cas. 977.

Provision in the, as to exemption of carriers from liability, effect of—*See* CARRIERS, 1 M. L.T. 387=16 M.L.J. 573=30 M. 79.

See CARRIERS, 6 B.H.C.O C. 71, 22 W.R 39.

Delivery of cargo not conditional on payment of freight—Insolvency of charterer—Right of Captain of ship to retain cargo for freight due—*See* CHARTER PARTY, 2 M.H.C. 88.

See EVIDENCE—MISCELLANEOUS DOCUMENT. 4 B.H.C. O.C. 169.

See STAMP ACT, 1899, ss. 2, 7, sch. I. art. 47-A, 30 C. 565.

Bill of Lading Act.

Object of.—*See* BILL OF LADING, 3 S.L. R. 203=6 Ind. Cas. 848.

Bill of Sale.

(1)—*Bill of sale—Endorsement—Act XIV of 1859, s. 15—Suit under—Registration*—Onus.—The plaintiff executed a bill of sale of a moiety of her *mourasi* tenure and an *ijara patta* of the other moiety, in favour of Mr. Wise. On the strength of the bill of sale and *patta*, Mr. Wise sued the defendant under s. 15, Act XIV of 1859, for possession of the property in dispute, but it was dismissed, whereupon Mr. Wise returned the document to the plaintiff with an endorsement under his signature in these words, "returned, no claim." The plaintiff brought the present suit to recover possession of the said property. The defendant set up in his defence that the plaintiff had no right to sue for a moiety of the property, in consequence of the sale to Mr. Wise; and that the endorsement of the deed of sale "returned, no claim" was not admissible in evidence, as the same had not been registered. *Held* that the entry was only evidence that the transaction was inchoate and not final, as the same had not been registered, and that the *onus* was on the defendant to prove his purchase. GIRISH CHANDRA ROY CHOWDRY v. SRIMATI AMINA KHATUN, **3 B.L.R. App. 126.** (1 B.L.R. F.B. 58, **11 W.R.** 280, *R.*)

Hindu Law — Sale by vendor without possession—Purchaser not entitled to sue in ejectment—Intention to sell mere right of entry, effect of, on purchaser's rights—*See* VENDOR AND PURCHASER—POSSESSION, 6 B. 380, F.B.

Bills in Council.

Construction of Act—Debates in Legislative Council on the Bill, whether may be referred to—*See* STATUTES, CONSTRUCTION OF, 18 B. 133 =P.J. 1893, 42.

Binna Gotra Sapindas.

Hindu Law — Inheritance —Samanodakas, who are—Conflict between Samanodakas and bandhus, or Bhinna *gotra sapindas*—Priority—*See* HINDU LAW—INHERITANCE, 10 B. 372.

Biraja home ceremony.

Whether usual in case of minors—*See* HINDU LAW — RELIGIOUS ENDOWMENT, 7 C.W.N. 145.

Birbhum.

Ghatwali tenure South of Bhirbum, nature of — Liability for predecessor's debts — *See* GHATWALI TENURE, 5 C. 389=4 C.L.R. 583.

Birt.

(1)—*Birt or Birt-Zamindari—Oudh* Talukdar—*Rights of person holding under it.*—In Oudh, *birtias* who could show themselves to come with the benefit of the policy of the Government announced in the Circular known as the Record of Rights Circular, No. 2 of 1851—namely, that the Chief Commissioner is clearly of opinion that the *birtias* who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the *Talukdars*, must be maintained in the full enjoyment of their rights, in subordination to the *Talukdars*—acquired, upon the annexation of Oudh by the British Government, absolute under-proprietary rights as against the *talukdar* in the villages in respect of which the *birt* had been created. RAJA MAHAMMAD v. MURAD BAKHSH, **9 Bom. L.R. 851=11 C.W.N. 931=6 C.L.J. 693=17 M.L.J. 400=4 A.L.J. 737=2 M.L.T. 402=10 O.C. 318=29 A. 708, P.C.=34 I.A. 142.**

Meaning of —Registration of *birt* deed—*See* REGISTRATION, 8 Ind. Cas 725.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 32 P.R. 1877.

Birth.

(1)—*Date of—Amount of proof.*—In India it is difficult to prove facts such as the date of birth, after a lapse of many years, and it is unreasonable to require such a class of evidence as will justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind. NAWAB SHAH v. NANHI BEGAM, **9 Bom. L.R. 80=11 C.W.N. 130=5 C.L.J. 4=1 M.L.T. 429=17 M.L.J. 32=29 A. 29, P.C.=34 I.A. 1.**

See EVIDENCE—HEARSAY EVIDENCE, 13 C. 42, 20 C. 758.

'Birt' tenures.

See LAND TENURE—IN BENGAL, 6 C. 218 =6 C.L.R. 146=7 I.A. 17, P.C.

Right of pre-emption on creation of—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 8 C. C. 121.

Biswadar.

See CESS, 2 Agra 325.

Blacksmith.

Inam granted as emolument to village—Limitation or prescription by adverse possession in case of proceedings regarding—*See* JURISDICTION OF CIVIL COURTS, 21 M. 134=7 M. L. J. 196.

Blank paper.

Signing a — Authority to engross on the paper — *See* DEED — CONSTRUCTION OF DEEDS, 6 C.W.N. 329.

Blank spaces.

Alterations and erasures — Presumption—*See* WILL—MISCELLANEOUS, 16 B. 652.

Blank stamped paper signed by party.

Stamped paper signed in blank—Liability of obligor—*See* ESTOPPEL — ESTOPPEL BY CONDUCT, 5 C. 39.

Blindman.

See WILL—ATTESTATION, 16 C. 19.

Blindness.

When a disqualification—*See* HINDU LAW —INHERITANCE, 1 B. 177.

See HINDU LAW — INHERITANCE, 1 B. 557, 2 B.L.R. F.B. 103=11 W.R. O.C. 11.

See MALABAR LAW—JOINT FAMILY, 12 M. 307.

Malabar Law—Disqualification for office of Karnavan — *See* MALABAR LAW — JOINT FAMILY, 15 M. 483.

Board Circulars.

(1)—*4—IX para. 27—Rule 38 of the Judicial Commissioner's Court—Application for copy—Copy to be sent by post—Deduction of time for obtaining copy—Limitation Held*, that, where a person applies for a copy to be sent by post, he is entitled to have his wish complied with, and if, instead of complying with his request, a notice is posted on the board to the effect that the copy is ready, and that, if the applicant comes within any reasonable time from the date of his application to make inquiries, he is entitled to have the time, up to the delivery of the copy to him personally, deducted from the period of limitation for filing his copy. MUSSAMMAT FATIMUNNISSA v. AJMAD ALI KHAN, **8 O.C. 150.**

Board of Examiners.

(1) *Duty of, for pleadership examination, on application by a candidate.*—Where a candidate applies, to the Board of Examiners for pleadership, to be allowed to present himself for the examination, the Board, for the time being, should form its own opinion as to the fitness of such applicant, and should not reject his application on the mere ground that a previous application by him in some past year had been rejected. In such cases, it is competent for the High Court to order the Board to consider his present fitness for admission, and, if satisfied that he possessed the qualifications prescribed by the rules, to allow him to present himself for the examination. *In the matter of* RUDRA NARAIN ROY, **28 C. 479.**

Pleadership examination — Board of Examiners—Standard of marks required for pass certificate raised without notice to candidates

Board of Examiners—*concluded.*

—Application by unsuccessful candidates for revision of list of successful candidates—*See* PLEADERSHIP EXAMINATION, 9 A. 611, F.B. =A.W.N. 1887, 148.

Board of Revenue.

Application for sanction to institute suit—Proof of control of Board of Revenue not necessary—*See* ACT XX OF 1863, s. 18, 26 M. 166.

Rules framed by—in furtherance of Act I of 1894 not *ultra vires*—*See* ACT I OF 1894, s. 55, 30 C. 36=7 C.W.N. 249.

See BEN. ACT IX OF 1847, ss. 1, 6, 14 C. 67, F.B.

See BEN. ACT XI OF 1859, s. 5, 5 B.L.R. 135=13 W.R. 381.

Rule of, regarding assessment of *haths ultra vires*—*See* BEN. ACT IX OF 1880, s. 4, 5 Ind. Cas. 254.

See MAD. ACT I OF 1876, s. 7, 26 M. 389.

Powers of—to interfere, in revision, with orders of Assistant Collector in execution under Act II of 1901—*See* U.P. ACT II OF 1901, ss. 177, 185, A.W.N. 1905, 119=2 A.L.J. 331.

Letter from, showing that jagirs are resumable on the death of grantee—Admissibility in evidence—*See* EVIDENCE ACT, 1872, ss. 13, 65, 66 (2), 7 C.L.J. 90.

Authority from—to Collector to raise loan on mortgage—Power of Collector to delegate the authority—*See* GUARDIAN AND WARDS ACT, 1890, s. 23, 3 C.L.J. 165.

See JURISDICTION OF CIVIL COURTS, 17 C. 590=17 I.A. 40.

See RIGHT OF OCCUPANCY—MISCELLANEOUS, 18 P.R. 1885.

Boats.

Hire of Boats—Damages—Liability of bailee—*See* NEGLIGENCE, 2 Hyde, 79.

Right of way for boats in the rainy season—Extent of right—Analogy to right of way over land—Direction of right—*See* PRESCRIPTION—EASEMENTS—WAY, RIGHT OF, 7 C. 145=8 C.L R 375.

Bohra Brahmans.

Custom among Bohra Brahmans of adopting sister's son—*See* HINDU LAW—ADOPTION, 14 A. 53=A.W.N. 1891, 222.

Bombay.

See POSSESSION—GENERAL, 2 B. 299=P.J. 1880, 57.

Bombay Abkari Act.

See BOM. ACT V OF 1878.

Bombay Adultery Act.

See BOM. ACT II OF 1845.

Bombay Cantonment Act.

See BOM. ACT III OF 1867.

Bombay Civil Courts Act.

See BOM. ACT XIV OF 1869.

Bombay Coasting Vessels Act.

See BOM. ACTXIX OF 1838.

Bombay Disputes.

Headman of village—Acts of, to bind co-sharers—*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Agra, F. B. 31=Ed. 1874, 23.

Bombay District Municipal Act.

See BOM. ACT VI OF 1873.

See BOM. ACT III OF 1901.

Bombay District Municipal Act Amendment.

See BOM. ACT II OF 1884.

Bombay District Police Act.

See BOM. ACT VII OF 1867.

See BOM. ACT IV OF 1890.

Bombay Hereditary Officers Act.

See BOM. ACT XI OF 1843.

See BOM. ACT III OF 1874.

Bombay Hindu Heirs Relief Act.

See BOM. ACT VII OF 1866.

Bombay Insolvent Traders Act.

See BOM. ACT XXVIII OF 1865.

Bombay Irrigation Act.

See BOM. ACT VII OF 1879.

Bombay Joint Police Officers Act.

See BOM. ACT XV OF 1855.

Bombay Land Record of Rights Act.

See BOM. ACT IV OF 1903.

Bombay Land Revenue Code.

See BOM. ACT V OF 1879.

Bombay Legislature.

Power of, to amend the Probate and Administration Act, 1881, providing certain class of appeals to go to the District Court—*See* BOM. ACT XIV OF 1869, s. 16, 10 Bom. L. R. 924=32 B. 634.

Bombay Levy of Haqqs, Etc. Act.

See BOM. ACT XX OF 1339.

Bombay Local Boards Act.

See BOM. ACT I OF 1884.

Bombay Local Funds Act

See BOM. ACT III OF 1869.

Bombay Minors Act.

See BOM. ACT XX OF 1864.

Bombay Municipal Act.

See BOM. ACT II OF 1865.

See BOM. ACT III OF 1872.

Bombay Municipal, City of, Act.

See BOM. ACT III OF 1888.

Bombay Port Trust Act.

See BOM. ACT I OF 1873.

See BOM. ACT VI OF 1879.

Bombay Presidency.

Manu, Mitakshara and Mayukha, how far authorities in Bombay Presidency—*See* HINDU LAW—AUTHORITIES, 2 B. 388=7 I.A. 112.

Bombay Revenue Jurisdiction Act.

See BOM. ACT X OF 1876.

See BOM. ACT XV OF 1880.

Bombay Salt Act.

See BOM. ACT VII OF 1873.

See BOM. ACT II OF 1890.

Bombay Salt Duties Act.

See BOM. ACT XVI OF 1844.

Bombay Suits Act.

See BOM. ACT XVI OF 1838.

Bombay Survey and Settlement Act.

See BOM. ACT I OF 1865.

Bombay Town Duties, Abolition of, Act.

See BOM. ACT XIX OF 1844.

Bombay Tramways Act.

See BOM. ACT I OF 1874.

Bombay University Act.

See BOM. ACT XXII OF 1857.

Bombay Village Police Act.

See BOM. ACT VIII OF 1867.

Bona fides.

(1)—Bona fide *claim.*—The fact that a person adds on to an honest claim based on a substantial foundation, a claim of a disputable character would not go to show that the whole claim is not brought in good faith and, in the plaintiff's estimation, with some prospect of success, so that it could not be said that the claim is not a *bona fide* one. PROBODE CHUNDER MULLICK v. M. DOWEY, **14 C. 695.**

(2)—*Meaning of, in its legal acceptation—Purchase from childless widow.*—Good faith in its legal sense means much more than mere absence of bad faith. A purchase from a childless widow, who sells without sufficient necessity, cannot be said to be made in good faith. Nothing can legally be said to be done or believed in good faith which is done or believed without due care or attention. If a purchaser from a widow and of a purchaser from such a purchaser does not satisfy himself as to her right to sell he does not act with due care or attention in the matter and therefore does not act in good faith. RAM DHONE BHUTTACHARJEE v. ISHANEE DABEE, **2 W.R. 123.**

(3)—*Passing of money between parties—Test of* bona fides.—The mere fact of the passing of money from one to another does not constitute

Bona fides—*concluded.*

such a transfer of interest as would indicate *bona fides.* BROJO LALL SANDYAL v. BHOBO SOONDUREE DEBIA CHOWDHRAIN **17 W.R. 499.**

(4)—*Mortgage deed—Attestation by Registrar—Proof by witnesses.*—A finding that a mortgage-deed has been attested by the Registrar of Deeds, and proved by witnesses, is sufficient to prove the *bona fides* of the deed. MOORUL SINGH v. MOHUN KOER, **9 W.R. 167.**

(5)—*Motion not* bona fide—*Effect.*—Where a motion is not *bona fide*, the party moving cannot benefit by the Court's action upon it. BHAROTEE DEBEA v. KURROONA MOYEE DASSIA, **10 W.R. 229.**

(6)—*Condition in bond for money lent—Right of suit.*—An agreement to put a party in possession of certain lands if default be made in the payment of money lent does not preclude that party from suing for the money lent if he elect to do so. ANNASAMI v. NARAYANEN, **2 Ind. Jur. O.S. 12.**

Bond.

See INSTALMENT BOND.

(1)—*Contract — Bond —Agreement to relinquish portion of claim on payment of certain sum within specified time—Right to claim entire amount due under bond on obligor failing to fulfil condition.*—Where it was admitted that the full sum specified in a bond was actually due, the fact of the obligee having, on condition of the payment of half the amount by a certain day, agreed to remit his claim for the other half, could not affect his right to recover the entire sum due on the defendant failing to fulfil the condition. VENGAPPAIYAN v. RAJAPAIYAN, **1 M.H.C. 208.**

(2)—*Lease from obligor after execution of bond—Collateral security—Right of suit.*—Where, subsequent to the execution of a bond, plaintiff takes from the obligor an ijara and a durijara, and executes ijara-kubooleuts, agreeing to accept payment of the bond by setting off the rents due on the kubooleuts, and arranging that at the end of the term of the ijara, accounts should be settled, neither party being free to put an end to the lease; *Held* that, till the termination of the lease, plaintiff cannot sue on the bond. DYA CHAND OSWAL v. MOOKTEDA DABEE, **13 W.R. 24.**

(3)—*Bond-debt—Suit by representatives of original bond-holder—Limitation.*—In a suit to recover a sum of money alleged to be due on a bond, and brought by the representatives of the original bond-holder against a party to whom the obligor's estate has descended by inheritance, *held* that the plaintiff's right of suit first arose from the time when the debt became due under the terms of the bond. RAJKRISTO SINGH BAHADOOR v. HURO SOONDUREE CHOWDHRAIN, **13 W.R. 313.**

(4)—*Bond—Operation suspended until dishonour of* **hundi**—*Effect on nature of instrument.*—**An instrument, which is in the nature**

Bond—*continued.*

of a bond, is not the less a bond because it does not come into operation unless and until the *hundi*, in respect to which it is passed, has been dishonoured. In a suit on a *hundi* for the recovery of money, plaintiff claimed interest at a certain rate on the amount of the *hundi*, and produced in support of the claim for interest, an unstamped document which was a receipt passed by the defendant and containing an agreement on his part to pay interest at a certain specified rate. The Court *held* that this document was in the nature of a bond and required to be stamped as such before it could be admitted in evidence. LAKSHMANDAS v. RAMBHAU, **20 B. 791.**

(5)—*Bond—Denial of execution by defendant—Suit before specified time*—Where a defendant denies the execution of a bond, and plaintiff sues for payment before the specified time, the suit cannot be maintained. SUJEEWUN SINGH v. RUNPAL SINGH, **10 W.R. 351.**

(6)—*Obligor fraudulently withholding delivery of bond after receipt of money—Obligee's right to sue for refund of money.*—If an obligor fraudulently withholds delivery of a bond which has been executed within a reasonable time after receipt of the money, the obligee has a right to sue for the return of the money before the time fixed for payment. SREEMUTTEE PEAREE MONEE DOSSEE v. THAKOOR DOSS DUTT, **21 W.R. 443.**

(7)—*Suit by obligee against some persons jointly liable to him—Bond taken from other persons liable for share due by them—Effect of such bond on joint liability and on right to contribution inter se.*—Where an obligee sues some of the persons jointly liable to him under a bond, and takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them (they not being sureties) destroy the joint liability. SHUSHEE MOHUN PAL CHOWDHRY v. RAM KOOMAR KOONDOO, **22 W.R. 193.**

(8)—*Money raised on bond paid for debt due by stranger—Liability of stranger to person executing bond.*—The fact that the money raised on a bond is used to pay a debt due by a third party does not make the latter liable to the party who executed the bond, unless this party joined in the bond at the request of the third party or of some one acting under his authority. GOUR KISHORE DUTT CHOWDHRY v. OZEER ALI, **24 W.R. 99.**

(9)—*Civ. Pro. Code, ss. 268, 274—Sale of mortgagee's interest in a hypothecation-bond.*—Where the interest of the mortgagee in a hypothecation-bond, by which certain land was made security for the debt, was attached under s. 274, Code of Civil Procedure and sold, the fact that the bond was not also attached as a debt under s. 268 is no bar to a suit by the purchaser of the bond. SAMI v. KRISHNASAMI, **10 M. 169.**

Bond—*continued.*

(10)—*Hypothecation-bond fraudulently altered—Suit to enforce lien.*—Where the obligee of a hypothecation-bond fraudulently made a material alteration in it by increasing the extent of the property hypothecated, a suit brought by him for the recovery of the money due on such bond by sale of the increased extent of land, was held liable to be dismissed in the form in which it was brought, inasmuch as the bond on which he based his suit had to be rejected, being a forgery, and it was unnecessary to consider in such suit whether he was entitled to any and what relief as regards his claim for money. GANGA RAM v. CHANDAN SINGH, **4 A. 62.** [*Appr.*, 35 P.L.R. 1901; *Cons.*, 9 M. 399, F.B., 25 A. 580, F. B.= A.W.N. 1893, 122.]

(11)—*Presumption of payment of bond—Parties between whom presumption is raised.*—The general presumption of payment of a bond, arising from its possession by the obligor, has much less force when raised between the debtor and the purchaser of the debt at an execution-sale, than when raised between the original creditor and the debtor. DEBENDRA KUMAR MANDEL v. RUP LAL DASS, **12 C. 646.**

(12)—*Stipulation in bond—Payment—Evidence.*—The stipulation in a bond that payments are to be evidenced only by an endorsement on the back of it or by receipt, is objectionable and ought not to be enforced: and the Court may receive oral evidence to prove payments which are not so evidenced by endorsement or receipt. NARAYAN UNDIR PATIL v. MOTILAL RAMDAS, **1 B. 46.** (5 M.H.C. 451, Bom. Sp. Ap. 438 of 1872, 1 N. W. P. 146, *Appr.*) [*F.*, 3 M.L.J. 9, 3 Ind. Cas. 291.]

(13)—*Contract—Execution of bond under misapprehension—Failure of consideration—Suit on bond—Maintainability.*—The plaintiff sued on a bond for Rs. 67,000 obtained from the defendant, a zemindar, in the following manner. In July, 1864, the late Zemindar died leaving three widows but no issue, and, in September 1864, the Government, with the consent of the widows, recognized the defendant, who was then a minor, as successor to his step-brother, the deceased Zemindar. The widows afterwards became dissatisfied and, in December 1866, executed a bond in plaintiff's favour, by the terms of which they bound themselves to prefer suits and claims with a view to obtain possession of the Zemindari on their own account by ousting the minor, and the terms upon which they agreed to take this action were these:—The plaintiff was to conduct the suit entirely at his own expense and, as soon as the Zemindari should be handed over to the widows, they were to pay the plaintiff one lac of rupees out of the income of the estate as a reward for his pecuniary and other services in assisting them to obtain it; together with a moiety of the savings which the Court of Wards might have effected during the management of the estate, which estate

Bond—*continued.*

the plaintiff was moreover to keep under his own management, by appointing an agent to superintend it, until the widows should have redeemed it by the payment of the lac of rupees promised ; failing in which, the widows bound themselves and heirs to make a lump payment out of their own funds to the plaintiff of one lac of rupees with interest, together with a moiety of the Court of Wards' savings. Accordingly, in September 1868, the plaintiff brought a suit in the name of the senior widow against the Collector for the Zamindari, and, the minor, on attaining majority, was made the second defendant in the suit by the plaintiff. Before the day fixed for the final hearing of the suit, the widow proposed a compromise with the second defendant on the terms that the widows should have three villages and that the second defendant should settle the present plaintiff's "small" account. A *razinama* to this effect was drawn up and the young Zamindar (second defendant) was persuaded, by threats of ruining him with litigation, if he did not comply, to sign it, and to give a note of hand for Rs. 62.000. The *razinama* was on presentation rejected by the Court, the suit proceeded to judgment and decree, and, at the time the present suit was brought, was under appeal. The Civil Judge found that the bond was obtained under undue influence and by threats, and that the defendant received no consideration for it. The suit was accordingly dismissed. *Held*, on appeal, that, without dissenting from the judgment below on the ground of vicious grounds of determination of the defendant's will, the judgment of the Court might be put on different grounds ; that the contract was made with the woman ; that there was a promise to pay this sum to the plaintiff whom she believed to be her creditor ; that, in pursuance of that arrangement, the document was given. The cause of giving it was the compromise of the suit. That cause had wholly failed. It was a case therefore of suing for the money which, if it had been paid, the defendant could have recovered (*Ob causam datorum*). CHIDAMBARAM CHETTI v. MUTHUVIRA PUCHAYA NAIKAR, **7 M.H.C. 85**, *affirmed on appeal*, **13 B.L.R. 509, P.C. = 22 W.R. 148 = 1 I.A. 241.**

(14)—*Presumption—Bills of exchange—Mortgage-bond — Novation — Collateral security.*—Where a person, who is indebted on certain bills of exchange accepted by him, gives a bond for securing payment of the whole amount with interest, by instalments, the fact that the bills were not to be given back until all the instalments should be paid, raises a presumption that the bond was only intended to be a collateral security, and not a substitution for the obligation arising from the bills of exchange. Such a presumption may be impliedly rebutted by other circumstances. RADHA GOBIND SHAHA v. THE BANK OF BENGAL, **2 C.L.R. 565.** (*Weston* v. *Foster*, 2 Bing. N.C. 693. *Cited.*)

(15)—*Instalment-bond—Suit for realization of money under decree—Limitation.*—Where an agreement is entered into to pay off money

Bond—*continued.*

due under a decree by monthly instalments, each monthly instalment, becomes a separate cause of action, and limitation applies to each instalment separately. Where a decree-holder, after taking out execution, accepted from his judgment-debtor an instalment-bond covenanting to pay a fixed sum monthly for a certain period and providing that, if within that period two consecutive instalments remained unpaid, the judgment-creditor should have power to call for payment of the whole amount due under the bond, and to proceed against any of the debtor's property in satisfaction, *held* that, on the judgment-debtor's failure to pay five consecutive instalments, it was not imperative on the decree-holder to sell them up at once ; but he might, if he chose, receive payment month by month, and that non-payment of instalments was a constantly recurring cause of action, operative within a limit of three years. MUSSAMAT KHEDU v. KALU SAHU, **3 B.L.R. App. 112 = 12 W.R. 71.**

(16)—*Limitation Act, XIV of 1859, s. 1, cls. 10, 16—Simple bond payable by instalments—Covenant to pay entire sum on default in payment of single instalment—Accrual of cause of action.*—Where a simple bond payable by instalments contained a condition that, on default in the payment of a single instalment, the whole principal sum secured by the bond immediately became due and recoverable with interest, the cause of action for a suit upon the bond arose at the time of failure to pay the first instalment, and the suit was governed by cl. 16 and not by cl. 10 of s. 1 of Act XIV of 1859. KARUPPANNA NAYAK v. NALLAMMA NAYAK, **1 M.H.C. 209.**

(17)—*Bond for payment by instalments—Default—Suit—Limitation.*—*Quære*, whether a suit on a bond for payment by instalments, with a clause making the whole amount payable on default in payment of any instalments, must be instituted within 3 years from the time of the first default. Payments made and accepted afterwards may operate to waive the effect of a default, and to restore the provision for payment by instalments. HULLODHUR BENGAL v. M.R.C.S. HOGG, **1 W.R. 189**. [*F.*, 5 W.R. 45.]

(18)—*Payments by debtor under an instalment-bond—Appropriation by creditor — Cause of action—Endorsement without signature—Valid.*—Where there is nothing to show that a payment made by a debtor is for any particular instalment under on a bond executed to his creditor or that it is to be credited for any particular part of the general debt, it is open to his creditor to credit such payments made by him (debtor) in one year to a previous year. Such a payment is an acknowledgment sufficient to give the obligee his cause of action. An endorsement without signature cannot be deemed a written engagement which could be registered within the meaning of cl. 10, s. 1, Act XIV of 1859. SHUNBOO CHUNDER SHAHA v. BARODA SOONDEREE DEBEA, **5 W.R. 45.**

Bond—*continued.*

(19)—*Instalment-bond given for decree-amount—Suit on bond.*—On the 4th August, 1864, A obtained a decree for money, without interest, against nine persons. In execution of the decree, seven out of the nine judgment-debtors filed an instalment-bond, with A's consent. The decree-holder not having taken proper steps, the application for execution was struck off on the 5th July, 1867, the date on which the instalment-bond was filed. On the 27th June, 1870, the decree-holder A again put in an application for execution and the application was dismissed as barred by time. In a suit brought by A for the recovery of the amount due on the instalment-bond against seven of the judgment-debtors who were parties to it, *held* that the suit was maintainable. ASHIAHARI CHOWDHRY v. JAGESWAR KUMAR, **6 B L.R. App. 32=14 W R. 430.**

(20)—*Bond payalle in instalments—Election—Limitation.*—In a suit brought in 1873, for principal and interest due on a bond executed in 1850, by which the debt was payable by eight annual instalments, on failure of any one of which the whole amount was to be payable on demand, where it appeared that no instalment was paid, and the plea of the defence was that the suit was barred as three years had elapsed from the date on which the last instalment became due, *held* that the usual clause, that on failure to pay one instalment the whole amount shall be payable on demand, gave a mere election to plaintiff by his act of converting the obligation into a different one; that that election was never exercised, and that the document continued one securing the payment of a debt by instalments as to all of which the action had long been barred; and that it was unnecessary, therefore, to consider whether, in the present case, "on demand" must not be construed according to its meaning at the period at which the words were written. ETHAMUKALA SUBBAMMAH v. RAGIAH, **7 M.H.C. 293.**

(21)—*Instalment-bond—Whole amount becoming due on default in one instalment—Acceptance after default—Waiver of condition.*—When a sum of money is payable under a bond by instalments with a condition that, on default in paying one instalment, the whole amount shall then become due, and default is made, but the obligee subsequently accepts payment of one or more sums as an instalment or instalments due under the bond, such acceptance amounts to a waiver of a condition of forfeiture and puts an end to the cause of action which had accrued, so that the bond is set up again as a bond payable by instalments, and no cause of action under the condition arises until some fresh default is made in the payment of a subsequent instalment. SRI RAJA PAPAMMA ROW GARU v. TOLETI VENKAIYA, **5 M H.C. 198.** [*Appr.*, 12 M. 192; *R.*, 3 M. 61, 20 B. 109.]

(22)—*Condition of payment by instalments—Default—Penalty.*—Where, after default in payment of an instalment upon a bond conditioned that upon such a default the whole amount of the bond should become due, the acceptance on the part of plaintiff, of payment of such instalment, as also of several subsequent ones: reverted the parties to the old arrangement for payment by instalments, or made a new one to the same effect, and that the penalty occasioned by the first default could not be enforced. GYAE CHUND v. JAWAHUR, **2 N.W.P. 83.** [*F.*, 5 A. 289.]

(23)—*Act XX of 1866, s. 53—Procedure—Jurisdiction.*—The obligee of a bond specially registered is entitled, on production of the obligation and agreement, to a decree for the amount due, and the Court has no jurisdiction to alter the terms of the deed, *e.g.*, to declare that such amount shall be paid by instalments instead of all at once. KHETTRA MOHAN BABOO v. RASHBEHARI BABOO, **5 B.L.R. 167 =13 W.R. 252.**

(24)—*Bond payable by instalments—Stipulation to pay double the amount of debt in default of any instalment—Penalty.*—A stipulation in an instalment-bond by which, on default of payment of any one instalment, double the entire amount of the debt is to become payable at once, is in the nature of a penalty. JOSHI KALIDAS v. KOLE DADA ABHESANG, **12 B. 555.**

(25)—*Bond—Registration—Evidence.*—The mere circumstances of a bond not being registered is not sufficient by itself to counterbalance the evidence if it is generally satisfactory in proof of the validity of the bond. GANGA PRASAD v. MAWJI LAL, **9 B.L.R. 426, P.C.= 16 W.R. 30.**

(26)—*Agreement by plaintiff to advance moneys to defendant to recover defendant's property by litigation—Untrue recital of cash payment in bond—Right to recover money actually advanced—Rate of interest.*—Where it was found that the consideration for the bond in question was not paid to the defendant in cash, but that monies were advanced by plaintiff to various persons on behalf of the defendant to recover the defendant's property by litigation, *held*, that plaintiff was entitled to recover the amounts actually advanced for and on behalf of the defendant; and that, as the recital of cash payment made in the bond was untrue, the plaintiff is not entitled to recover the higher rate of interest provided therein in case of default of payment of principal and interest. MEENAKSI AYEE v. ANDI NADAN, **10 M.L.T. 18.**

(27)—*Endorsement on bond 'the balance due should be paid into the hands of my son'—Whether can be treated as assignment of bond—Assignee's right of suit.*—An endorsement on a bond "that the balance due should be paid into the hands of my son" operates as an assignment, so as to entitle the assignee to sue thereon. SAMINATHA PILLAI v. DORASWAMY NAICK, **1 Ind. Cas. 212.** (30 M. 75=1 M.L.T. 813=16 M.L.J. 564, *F.*)

Bond—*continued.*

(28)—*Suit for money on bond praying for decree for sale of mortgaged property—Suit filed three years after money became repayable—Limitation,*—A suit for realization of money due on a bond by a decree for sale of the property mortgaged by the bond was held not barred, though brought later than three years from the time when the money became repayable and was not re-paid. MUSSAMUT CHOHARO DNAMIN v. CHUMUN LALL *alias* CHUMARI LALL, **21 W.R. 185.**

(29)—*Bond-suit—Plea of satisfaction from purchase money of property sold to plaintiff by defendant — Plaintiff impeaching sale as bad —Question as to nature of sale to be tried in suit.*—Where in a suit on a bond, defendant answers that the amount should be satisfied out of the purchase-money of property sold to plaintiff, and the latter claims to avoid the sale as bad. *Held* that the Lower Courts are bound to try the question in this suit. MOHUN SENEE v. BAHADOOR SINGH, **18 W.R. 394.**

(30)—*Bond suit—Decision based on* solehnamah *whereby creditor obtained land in lieu of money —Nature of suit not changed—S. 27, Act XXIII of 1861.*—Where the original suit was for money on a bond, the fact of its having been decided on a *solehnamah* by which the creditor obtained land in lieu of money does not change the nature of the suit with reference to s. 27, Act XXIII of 1861. TALUN BIBEE v. TENOO BIBEE, **15 W.R. 65.**

(31)—*Recital in bond—Burden of proof.*—In a suit on a bond which recites the fact of due consideration having been paid at the time of execution, defendant denying the payment, defendant should prove his allegation. MANICK LALL BABOO v. RAM DOSS MOZOOMDAR, **10 W.R. 132=1 B.L.R.A.C. 92.**

(32)—*Creditor lending money on security—Principal and surety—Arrangement between.*—A creditor lending money on a joint bond or on several bonds, exercising the right which he possesses to resort to all his security till the debt is re-paid, is not fettered by any arrangement between the principal and the surety or sureties as to the mode in which the principal shall indemnify the surety. NUFFUR CHUNDER MUNDUL v. KISTO CHYTUMRO MOJOOMDAR, **11 W R. 460.**

(33)—*Witnesses attesting signatures—Proof of bond.*—Witnesses simply attesting their own signatures do not legally establish the identity of a bond. RUTTON CHAND BYSACK v. BOCHA BIBEE, **12 W.R. 529.**

(34)—*Suit for unpaid balance on bond—Plea of benami lease to third party—Bona fides of plaintiff's lease — Issue.*—In a suit for a balance on a bound, where defendant's plea was that he had given plaintiff a lease in the name of a third party, *held* that it was a necessary issue whether the plaintiff was, or was not, to be *bona fide* lessee. SHEIKH MISRAOODDEEN MAHOMED *alias* JUROO MEAH v. SHEIKH NAEGLOAR HOSSEIN AND HEIKH ATTUR RUHUMUN. **2 W.R. 39.**

Bond—*continued.*

(35)—*Suit to recover a bond—Plaintiff being security for payment—Satisfaction by usufruct of farm—Recovery of bond.*—Plaintiff sued to recover a bond. He was security for payment of the bond on hypothecation of usufruct of a farm; and as the bond (save a few rupees) had been satisfied by that usufruct, the plaintiff was held absolved from liability, and the bond was directed to be made over to him on payment of the balance due. KINNO SINGH v. AMEENOODDEEN MAHOMED CHOWDHRY, **1 W.R. 245.**

(36)—*Native date used in—Calculation according to Native calendar.*—Where a bond, by which money lent was agreed to be re-paid within one year, bore a native date only, *it was held* that the year was to be calculated according to the native calendar of which the bond bore the date. LALJI VIJNATH v. RAVJI ABANI, **6 B H C.A.C. 186.**

(37)—*Instalments.*—Suit upon a bond executed by the defendants to the plaintiff for the payment of a sum of money by instalments. The bond contained a proviso that on default being made in the payment of any one instalment the whole amount should become due. Default was made in the payment of several instalments, but subsequenty payments were made by the defendants and accepted by the plaintiff on account of the unpaid instalments. The defendants pleaded the law of limitation. The suit was brought more than three years after the first default in payment of an instalment had been made, but within three years from the time when, taking into account the payments that had been made, the first instalment claimed became due. *Held* that these payments as regards both parties must be considered as if made at the time fixed; that the defendants could not rely upon the stipulation as making the whole debt due, and fixing the period from which the time of limitation ran; and that the first of the instaments claimed having become due within three years, the suit was not barred. RAMAKRISHNA MAHADEV v. BAYAJI *bin* SANTAJT *et al*, **5 B.H. C.A.C. 35**. [*Overruled*, 1 B. 125, F.B; *Not F.*, 3 A. 514; *F.*, 5 N.W.P. 35; *R.*, 7 B.H.C. 125, Rat. Un. Cr. C. 908, 27 B. 1, F.B.=4 Bom. L.R. 688]

(38)—*Stamp Act, s. 3, cl. 4 (b)—Document, Definition of.*—A document is a bond which contains a promise to pay a certain sum on demand, not made payable to bearer or order, and in which the signature of the obligor is attested by a witness. REFERENCE UNDER STAMP ACT, s. 49, **10 M. 158 F.B.** [*F.*, 13 M. 147; *R.*, 3 P.L R. 1902.]

(39)—*Stamp Act, s. 3—Bond.*—A document which contains a promise to pay, on demand, a certain sum with interest and which bears the signature of the writer and some others as witnesses, is a bond, and liable to stamp duty as such. REFERENCE UNDER STAMP ACT, s. 49, **13 M. 147, F.B.**

(40)—*Suit to recover principal and interest on two several bonds—Issues as to validity of bonds —Opening of, and founding decree upon settled*

Bond—*continued.*

amounts—Necessity for proof of consideration of bonds—Right of obligees and their representatives.—In a suit to recover the amount of principal and interest due upon two several bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand of the obligor, the issues, settled and recorded by the Court below for trial were, first, whether the first bond was the deed of the deceased obligor, and secondly, whether the note of hand was under the seal of the obligor and if so, whether it was a valid acknowledgment of the debt claimed on the second bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first bond actually proved purported to have been given on an account settled, allowed evidence of the accounts and dealings between the obligor and obligees previous to the execution of both bonds, and having referred the same to an Accountant, repudiated the bonds, but decreed the plaintiffs entitled to a considerable sum, with interest upon the account thus taken: *Held*, on appeal, by the Judicial Committee, that the Courts below had miscarried, first, in allowing the opening of and founding the decrees upon settled amounts, the only question upon the issues recorded for their judgment being the validity of both bonds, of which they were satisfied, and secondly, that from the frame of the issues, neither the obligees nor their representatives were bound to prove the consideration for the bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect. SAHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN, **11 M.I A. 120=2 Sar. 239=R. & J's. No. 6 (Oudh).**

(41)—*Suit to set aside a bond—Burden of proof—Failure of consideration.*—Suit to set aside a *zur i-peshgi* (usufructuary mortgage) of certain *mouzahs*, part of the Raj of the mortgagor, for securing re-payment of Rs. 49,453, under which the mortgagees had been put in possession. The plaintiff admitted his execution of the deed, but alleged that it was executed to secure the amount of a bond previously executed in favour of the mortgagees, as a further security, to indemnify a third party, and security for him for advances in the prosecution of his claim to the Raj; that the conditions of the bond to the mortgagees not having been complied with, there was no sufficient consideration for the bond and deed which he had been fraudulently induced to execute. *Held*, that, in the first instance, it lay on the plaintiff, who sought to set aside a deed executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the defendants the burthen of proving the consideration for the deed. In the absence of clear and consistent evidence on the plaintiff's part, establishing that the deed was obtained fraudulently and without consideration, such deed sustained. KALEEPERSHAD TEWARREE v. RAJAH SAHIB PERHLAD SEIN, **12 W.R. 6, P.C.=2 B.L.R. 111, P.C.=12 M.I.A. 282=2 Suther. 225=2 Sar. 429.**

(42)—*Bond—Obligee altering endorsement of payment—Effect.*—*Held*, that the ruling in *Sheodin* v. *Ganeshi Lal* (N.W.P.S. D. A. Rep., 1859, 73) did not apply to a case where the endorsements of payments in satisfaction of the bond and not the terms of the bond itself, were found to have been altered by the obligee. In the present case, the bond itself was admitted and the defendant confessed his liability for a certain amount. The lower appellate Court was, therefore, wrong in dismissing the suit *in toto*. KALLU MAL v. KALLU, **A.W.N. 1881, 119.**

(43)—*Bond—Non-production of original—Allegation of part-payment—Burden of proof—Right to begin.*—The plaintiff sued upon the copy of a bond for Rs. 1,200. He alleged as to the non-production of the original document that the original obligor and obligee were both dead; that he by adoption represented the latter and the defendants where the heirs of the former; that the defendants had colluded with the widow of the deceased son of the obligee who was in possession of the bond, and refused to give it up. The defendants admitted execution of the bond, but pleaded that the original obligor had made four part-payments amounting in all to Rs. 1,084 which were endorsed upon the bond, and that this was the reason of the non-production of the bond by the plaintiff. The lower appellate Court *held* that the plaintiff must either produce the bond or prove that it was lost, before he could be allowed to sue on a copy, and as he had done neither, dismissed the suit. *Held*, on second appeal, that the bond being admitted, there was no obligation on the plaintiff primarily to produce it; on the contrary, it was for the purposes of the defendant's case that the production was required, in order, by the alleged endorsements on the back of it, to prove the payment said to have been made by the original obligee, and that the non-production of the bond by the plaintiff was not in itself, a sufficient ground for summarily dismissing the suit to the exclusion of the consideration of the case on the merits. Even if the allegations of the defendants were true, the plaintiff was entitled to the balance due after crediting the defendants with the four payments set up by them. KARORI MAL v. GHULAM AKHBAR, **A.W.N. 1884, 78.**

(44)—*General hypothecation of moveable and immoveable property, not a mortgage.*—A bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realised from the moveable and immoveable property of the debtor cannot operate as a mortgage. MAHAMADGU v. JAI RAM, **74 P.R. 1878.**

(45)—*Bond-paper, whether obligor has a righ of property in—Obligor entitled to cancellation o*

Bond—*continued.*

the bond.—The obligor of a bond has not a right of property in the bond-paper and cannot on payment of the debt recover the document from the obligee. But to prevent fraud the obligor may be entitled to have the bond cancelled. MIRAJDEEN v. MAHOMED BUKSH, **8 P.R. 1869.** [*F*, 69 P.R. 1886.]

(46)—*Bond payable within one year.*—Where defendant executed a registered bond on 15th March 1873 by which he agreed to re-pay the loan within one year and plaintiff sued on the bond on the 14th March, 1874, it was held that limitation ran from the end of the year and that the suit was within time. SHER JANG v. PARTAB SINGH, **79 P.R. 1875.**

(47)—*Bond payable within 6 months, on condition of not being paid by another.*—Defendant executed a bond to plaintiff on the 29th April 1869, on condition of plaintiffs releasing S from arrest against whom plaintiff had a decree and the bond was payable within 6 months, if S did not pay in the meantime. Plaintiff brought a suit on the bond on the 5th May, 1873, contending that there was litigation between himself and S till 26th October, 1871, in respect of execution of decree and time should run from that date. *Held* that the suit should have been brought within 3 years after the expiry of the six months. BHAI SAWAYA SINGH v. HIRA NAND, **58 P.R. 1874.**

(48)—*Bond payable on demand.*—When a bond is payable on demand, limitation runs from the date of demand, and not from the execution of the bond. The first and only demand may be with the suit or suit itself. JIWAN SINGH v. ANWAR KHAN, **26 P.R. 1873.**

(49)—*Bond payable by instalments—Judicial Commissioner's Circular No. 83 of 1859.*—Where a bond was payable by instalments and there was no condition that default in the payment of one instalment should entitle plaintiff to sue for the whole, *held* (*overruling* circular mentioned above) that the plaintiff's cause of action in respect of each instalment arose on the date on which each became due and not from the date of the bond. RAM DASS v. MOHUR SINGH, **64 P.R. 1869.**

(50)—*S. 257-A—Civ. Pro. Code, 1882—Bond in satisfaction decree—Effect.*—A bond executed in satisfaction of a decree will be the basis of a fresh suit, though satisfaction of the said decree was not certified. SUKHU RAM v. UMED, **16 P.R. 1900=20 P.L.R. 1900.** (16 C. 504, 15 B. 419, 17 M. 382, *F.*) [*R.* 29 P.R. 1908=71 P.W.R. 1907=61 P.L.R. 1907; *D.* 88 P.R. 1904; *Overruled*, 61 P.L.R. 1907, F.B.]

Suit upon—Place of execution of document to be distinctly stated—*See* ACT XXIII OF 1861, s. 4, 7 M.H.C. App. 34.

Kistbandi or instalment — for arrears of rent, suit on, not one for rent but for money due under the contract—*See* BEN. ACT VIII OF 1885, s. 65, 4 C.L.J. 219=33 C. 985.

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Recital as to receipt of consideration—Onus —*See* BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS, SUITS, 4 B.L.R. F.B. 54=12 W.R. 25.

See BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS, SUITS, 4 C.W.N. 82, P.C., 80 P.R. 1868.

Alteration of—When is said to be material so as to vitiate it—*See* CONTRACT—ALTERATION OF CONTRACTS, 3 C.L.J. 363=10 C.W.N. 788 =33 C. 812.

See CONTRACT—ALTERATION OF CONTRACTS, A.W.N. 1885, 269.

Money—Payment of debt by ijarah lease—Reduction of principal—*See* CONTRACT—CONSTRUCTION OF CONTRACTS. 2 C.L.R. 138.

Balance of account struck—Promise to pay interest—Bond—*See* CONTRACT ACT, 1872, s. 25 (3), 135 P.W.R. 1910.

See CONTRACT ACT, 1872 s. 74, A.W.N. 1884, 280.

See ESTOPPEL—ESTOPPEL BY DEEDS, 8 W.R. 316.

Suit for principal and interest under—Assignment of rent due to obligor in lieu of interest, interest not claimable by obligee—*See* EVIDENCE—PAROL EVIDENCE, 9 A. 249=A.W.N. 1887, 27.

Partner signing, signed for himself and as agent of another partner, admissibility of oral evidence as to whether—*See* EVIDENCE ACT, 1872, ss. 91, 92, 18 M.L.J. 1=3 M.L.T. 259=31 M. 45.

See EVIDENCE ACT, 1872, s. 114, 22 W.R. 265.

See HINDU LAW—WIDOW, 18 W.R. 121.

Payable in instalments—Default—Waiver —Election—*See* INSTALMENTS, 3 M. 61.

See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 3 A. 260, F.B.

See LIMITATION ACT, 1908, s. 20, 5 N.W.P. 35.

Payable by instalments — Default — *See* LIMITATION ACT, 1908, art. 75, 3 A.L.J. 463 =A.W.N. 1906, 193.

See PRESUMPTION, 25 A. 155=A.W.N. 1902, 216.

See REGISTRATION ACT, 1866, ss. 52, 53, 2 B.L.R. O.C. 151=11 W.R. O.C. 24.

See REGISTRATION ACT, 1908, s. 49, 9 W. R. 111.

See REGISTRATION ACT, 1908, s. 50, N.W. P. 37.

New bond in cancellation of old bonds—Registration refused—Suit on original bonds—Novation — *See* REGISTRATION ACT, 1908, s. 77, A.W.N. 181, 98.

Bond—*concluded.*

See SPECIFIC PERFORMANCE, 5 A. 591=A.W.N. 1883, 142.

Agreement with covenant sounding in damages is not a—*See* STAMP, 8 C. 284=10 C.L.R. 319.

See STAMP, 82 P.R. 1870.

See STAMP ACT, 1862, art. 10, 2 Ind. Jur. N.S. 203.

Debt—Containing distinct agreement, stamp duty chargeable on—*See* STAMP ACT, 1869, s. 14, sch. II, art. 11, 4 B. 19.

Written partly on one and partly on another stamp paper—Admissibility in evidence—Stamp duty and penalty—*See* STAMP ACT, 1869, s. 49, 7 M.H.C. App. 36.

See STAMP ACT, 1879, 8 B. 297. F.B.

Instrument evidencing a loan of grain—*See* STAMP ACT, 1879, s. 3 (4) (*b*), 7 B. 137.

Agreement with a penal clause—for amount of penalty — *See* STAMP ACT, 1879, s. 7, sch. I, No. 5 (*c*), 2 A. 654, F.B.

For re-payment of double the amount borrowed—*See* STAMP ACT, 1879, s. 23, 26 C. 179.

See STAMP ACT, 1879, sch. I, art. 11, 8 M. 87, F.B.

See STAMP ACT, 1899, s. 2 (22), 3 P.L.R. 1902=14 P.R. 1902, F.B.

See STAMP ACT, 1899, s. 2 (5) (*b*), 6 Bom. L.R. 841=29 B. 82.

Bond-debt.

See BEN. REG. XV OF 1793, 8 B.L.R. 110, P.C.

Bonus.

Attachment of.—A bonus granted by Government is not a pension and if proceedings in execution had commenced prior to 1st June, 1882, the bonus is attachable. KHASIM v. CARLIER, **5 M. 272.** [*R.*, 30 M. 153=2 M.L.T. 33.]

Books.

See EVIDENCE—MISCELLANEOUS. 15 M. 241.

Books of Account.

Of a Corporation, a share-holder has no unlimited right to inspect—*See* CORPORATION, 10 Bom. L.R. 636=12 C.W.N. 825=32 B. 466, *reversing on appeal*, 9 Bom. L.R. 165.

Books of Science.

—*Evidence Act (I of 1872), ss. 57, 60 — Science, Evidence of books of* —Under the provisions of the penultimate paragraph of s. 57 and the first proviso of s. 60 of the Evidence Act, Taylor's Medical Jurisprudence may be referred to. HATIM, **12 C.L.R. 86.**

Books, Press, Registration of, Act.

See ACT XXV OF 1867.

Books regularly kept in course of business.

See EVIDENCE—ACCOUNTS AND ACCOUNT BOOKS, 4 B. 576.

Bottomry Bond.

(1)—*Priority of shipmaster's lien to that of bottomry-bond holder.*—A master of a ship has a lien, on the proceeds of a sale of ship, for wages due to him at the time of the sale, prior to that of a bottomry-bond holder. *In the matter of* THE SHIP "PORTUGAL," **5 B.L.R. 238.**

(2)—*Ordinary bottomry-bond by shipmaster—Suit on bond against shipowner—Judge of Moulmein, Jurisdiction of Court of—Admiralty jurisdiction—Vesssel, Liability of.*—A suit will not lie on an ordinary bottomry-bond given by the master of a vessel against the owner to recover the amount thereof. Such a suit cannot be brought in the Court of the Judge of the town of Moulmein, which has no admiralty jurisdiction, against the owner personally; and the vessel cannot be declared to be primarily liable or be sold8to satisfy the amound of the bond. GLADSTONE WYLLIE & CO. v. J.W. HARRISON, **24 W.R. 50.**

(3)—*Hypothication of vessel—Covenant to pay—Uncertainty of agreement—Right to enhanced interest — Construction.* — Suit on a bond hypothecating a vessel. The material portion of the bond was as follows:—"You have no connection with the security or seaworthiness (*yogyam*) of the said ship up to the above stipulated time. If the money is not paid in the said stipulated time, we shall add *vattam* at Rs. 20 per cent. per annum on the amount of principal and interest accruing on that date, adding *vattam* once in twelve months until date of payment after the said stipulated time on the hypothecation-security (*adamana yogyam*) of the said ship, and shall get back this mortgage bond." Default was made in payment on the due date, and the vessel foundered in port sometime after. *Held*, that the document was not a bottomry-bond. Plaintiff was not entitled to interest at the enhanced rate inasmuch as the portion of the instrument dealing with it was void for uncertainty. ASAN KUTHU SAHIB MERCOYAR v. RAMANATHAN CHETTI, **22 M. 26=8 M.L.J. 159.** [*R.*, 25 M. 561.]

(4)—*Advance for repair of ship—Master's lien for wages—Priority.*—A, the agent for a ship in port at Bombay, lent the master money on a bond, in the nature of a bottomry-bond, which he obtained from the master under pressure of necessity. It appeared that A, at the time of the making of the bond, had funds of his principal's in hand. *Held* that the master's lien for wages has priority over the bond-holder. *In the matter of the* "GOOD SUCCESS" MACQUEEN v. FUZZUL MAHOMED ESSAN, **1 Ind. Jur. N.S. 303.**

See JURISDICTION — ADMIRALTY AND VICE ADMIRALTY JURISDICTION, 5 B.H.C. O.C. 64.

Bottomry Bond—*concluded.*

Ship—Maritime lien—Master's lien for wages and disbursements—Towage—Priority of lien—*See* JURISDICTION—ADMIRALTY AND VICE ADMIRALTY JURISDICTION, 6 B.L.R. 323.

Bought and Sold Notes.

(1)—*Bought and sold notes.*—Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta. So parol evidence was not admissible to vary or add to the terms of the contract which had been thus reduced to writing. JADU RAI v. BHUBOTARAN NANDY, **17 C. 173.**

(2)—*English law—Brokers' notes—Evidence—Bought and sold notes.*—Brokers' notes, as a memorandum, may satisfy the Statute of Frauds, but not exclude parol evidence. Bought and sold notes, unobjected to, may be evidence of the contract, but they do not necessarily constitute the whole contract. JUMNA DOSS v. SRINATH ROY, **17 C. 176, Note.**

Of sale of goods—Parol evidence—Fraud—*See* CONTRACT—GENERAL, 31 C. 614, P.C. =31 I.A. 122=8 C.W.N. 489=6 Bom. L.R. 498=14 M.L.J. 196.

See CONTRACT—MISCELLANEOUS, 20 C. 854. 3 M.I.A. 448.

Broker's—*See* CONTRACT—MISCELLANEOUS, Bourke, O.C. 254, 2 Ind. Jur. N.S. 221.

See EVIDENCE—PAROL EVIDENCE, 9 B.L.R. 245=16 W.R. 414.

See SHARES, 1 Ind. Jur. N.S. 393.

Boundaries Act.

See ACT I OF 1847.

Boundaries Act, Burma.

See BUR. ACT V OF 1880.

Boundary.

(1)—*Suit by lessee to recover land from neighbour—Both lessees deriving under one zemindar—Survey—Question in suit.*—In a suit by the lessee of a mouzah to recover land from a lessee of an adjoining mouzah, both making title under one zamindar, and where a survey took place when both mouzahs were in his possession and, neither of the leases, was in existence: *Held* that the suit involved simply a question of boundary. AMEREE BEGUM v. GOBIND PANDEY, **15 W.R. 35.**

(2)—*Decree directing boundary pillars to be erected per* khusrah—*Reference to other similar decrees in construction.*—Where a Court finds it very difficult to execute a decree, declaring decree-holder entitled to erect boundary pillars according to a certain *khusrah*, it is not precluded from taking into consideration other decrees between the same parties in explanation and support of its views as to what the *khusrah* boundaries were. MAHARAJAH RA-

Boundary—*continued.*

JENDRO KISHORE SINGH BAHADOOR v. HYABUL SINGH, **17 W.R. 379.**

(3)—*Description of property by boundaries.*—Where a whole estate, bearing a name, is sued for, it need not be described by boundaries. RAMDYAL KHAN v. AJOODHIA RAM KHAN, **2 C.1=25 W.R. 425.**

(4)—*No claim for declaration of title or for possession—Maintainability of suit—Suit for removal of boundary marks.*—This was a suit for the removal of certain boundary marks whereby the plaintiff alleged "hundreds of *bighas* of land owned and possessed by him and included in his zemindair land passed into the village of the defendant." *Held* that the suit was brought was unsustainable, seeing that the plaintiff cannot sue for the removal of the pillars without asking for a declaration of right and for maintenance of possession. THAKURI RAI v. MUHAMMAD SAYYID, **A.W.N. 1884, 4.**

(5)—*Sale of land—Land to pass according to*—Where land is described in a document by boundaries and the area is wrongly specified, the land within the boundaries will pass whether it be less or more than the quantity specified. BHAYALAL v. DWARKA PERSHAD, **15 C.P.L. R. 163.** (15 W.R. 394, 16 W.R.P.C. 5, 18 W. R. 25, *R.*)

(6)—*Survey map—Limits of permanently settled estate.*—The Revenue authorities cannot go behind a survey map and question the boundaries of a permanently settled estate as fixed therein. SARAT SUNDARI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **11 C. 784.** [*R.*, 30 C. 291.]

(7)—*Decree for possession—Boundary.*—Where a decree directed that plaintiff should obtain possession of land according to the boundaries given in the plaint, and also specified the quantities of land of which he was to obtain possession, and it turned out that those quantities were not strictly accurate, it was *held* that the decree should be interpreted as if it were a conveyance of land, stating the boundaries, and then saying that it contains so many acres; and that the plaintiff was entitled to all the land contained within the boundaries stated in the plaint, the mistake in the quantities stated in the decree being merely a false description. PAHALWAN SINGH v. MAHARAJA MUHESSUR BUKHSH SING BAHADUR, **9 B L.R. P.C 150= 16 W.R. 5, P.C.=2 Sar. 683=2 Suther. 442, 660.**

(8—9)—*Question of—Judicial Committee not interfering on questions of fact—Award of Revenue officers*—Onus *of proof.*—In a question of boundary the Judicial Committee, the Court of last resort, is extremely reluctant to reverse the judgment of an Indian Court, and will not do so, unless they are, upon the facts and evidence, satisfied that the decision of the Court below was clearly wrong. There is a strong presumption against a plaintiff who seeks to set

Boundary—*continued.*

aside an award made by Government Officers on a revenue survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the award was wrong lies on the party impeaching it. RAJAH LEELANUND SINGH v. RAJAH MOHENDERNARAIN SINGH, **13 W.R. 7 P.C. = 13 M.I.A. 57 = 2 Sar. 482 = 2 Suther. 286.**

(10-11)—*Disputed boundary-Claimant in possession under Magisterial order—Act IV of 1840*—Onus *of showing better title than that of person in possession.*—In a case of disputed boundaries where one of the claimants is in possession by virtue of a Magistrate's order, under Act IV of 1840, it lies on the party seeking to oust him to show a better title to the land claimed than that of the party in possession, RAJAH BURODACANT ROY v. BABOO CHUNDEE COOMAR ROY, **11 W.R. 1, P.C. = 2 B L.R. 1. P.C. = 12 M.I.A. 145 = 2 Surther. 169 = 2 Sar. 402.**

(12)—*Suit relating to—Of land—Doubt as to identity of land Duty of Judge—Procedure to be followed—Inspection of land—Issuing commission under Civ. Pro. Code, 1882, s. 392.—Witnesses to be called by Court under s. 171, Civ. Pro. Code. 1882.*—In case of a boundary dispute, or when there is any doubt about the identity of the land in suit, the Judge should first insist on a good plan, then proceed to the land and require the parties and all witnesses, who will speak about the land, to attend on the spot, or, in some cases, he might issue a commission under s. 392, Civ. Pro. Code, for the local investigation. Proper procedure to be followed in such cases explained. PO GYI v. MAUNG PAW, **6 L. B. R. 1 = 2 Ind. Cas. 347.**

(13-14)—Mokurari, pattah, *construction of—Conflict between area and boundaries—It is only when the boundaries of a land can be ascertained with perfect certainty that an intention to convey all lands comprised within those boundaries can be inferred; if the boundaries are uncertain the intention should be taken to be to convey the specified quantity of land within those boundaries.*—*Held*, upon a construction of the *pattah* in the case, that the dimension specified were an essential part of the description of the land conveyed and not a cumulative description of it which was to be governed by the boundaries; *Held* further that in the circumstances of the case the intention should be inferred to have been to pass the specified quantity of land only. KUMAR RAMESHAR MALIA v. RAM TARAK HAZRA, **14 C. W.N. 268 = 1 Ind. Cas. 650.**

(15)—Onus *of proof—Disputed boundary—waste and jungle land*—Where the lands in question are waste and jungle lands and are situated on the borders of the taluks of the plaintiff and the defendant, and no party has been exercising any act of possession for more than twelve years before the suit: *Held*, that

Boundary—*continued.*

the ordinary rule regarding the *onus* incumbent on the plaintiff has no application, that the parties are in the position of counter-claimants, that it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary, and that it is necessary for the Court to take into consideration the evidence adduced by both sides. RADHA KANTA BASAK v. AKHOY CHUNDER DEY. **7 Ind Cas. 165.** (21 C. 504. P.C. = 21 I.A. 39. *Rel. on.*)

(16)—*Thak or survey map—Presumption—Dried up bed of river—Isolation from river—Fishery right—Civ. Pro. Code (Act XIV of 1882) s. 13—Changed state*—It cannot be presumed as a matter of law that the boundaries of an estate as shown on the thak or survey map are identical with the boundaries as they stood at the time of the Permanent Settlement; but it is open to the Court to presume, in the circumstances of a particular case, that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue Survey. (30 C. 291 = 30 I.A. 44 = 7 C.W.N. 193 = 5 Bom. L.R. 1. *R.*) The dried up bed of a public navigable river, if not originally part of public domain, becomes private property so as to entitle the owner of the soil to all *beels* left therein completely isolated from the new course of the river. As the right of fishery, in ordinary course follows the title to the soil, a stranger cannot claim a right of fishery in an inland sheet of water, the bed whereof is in private ownership. The authorities on the subject of how far a right of fishery is affected by a change in the course of river, *reviewed*. SARAT CHANDRA SINGH v. KSHITIS CHANDRA ROY, **12 C.L.J. 216 = 7 Ind. Cas. 140.**

(17)—*Suit for possession by fixing boundaries—Court's power to issue commission—Confusion of boundaries—No equity shown by plaintiff.*—The plaintiffs sued for recovery, from the defendants, of possession, by severance and demarcation, of a certain extent of land out of the area described in the plaint, allowing the defendants to retain possession of as much land thereout as they can possibly retain consistently with it. The plaintiff could not say himself where the boundary was. Nor did he make out a right in himself to come into Court and ask that the boundaries might be ascertained and possession given to him according to that ascertainment. It was found that, out of a definite plot of land, a certain extent was granted to the plaintiff's ancestor, and a larger extent to the defendant's predecessor-in-title, a long time ago; and it could not be ascertained what the standard of the measurement then was. *Held*, seeing that the litigants were independent proprietors, and it being impossible to regard them as individuals having such relations, the one to the other, as would entitle the Court to treat the whole and in their possession as a common fund capable of adjustment in the way the plaintiff claimed and finding that the plaintiff had not shown a suffi-

Boundary—*continued*.

cient equity in himself as against the defendant, no circumstances of fraud or confusion having been made out by the plaintiff, his suit was liable to dismissal. Under the circumstances, the Court could not grant any commission for fixing or adjusting the boundaries. KAVASJI v. HORMASJI, **29 B. 73=6 Bom. L.R. 782.**

(18)— *Confusion of boundaries.* — Where, owing to the negligence of the tenant, the land demised becomes confounded with other lands the tenant, unless he can ascertain the former is bound to make good to the landlord the quantity of the land to which the latter is entitled. ISMAIL KHAN MAHOMED v. L.P.D. BROUGHTON, **5 C.W.N. 846.** (9 W.R. 94, 6 M. 263. *R.*)

(19)—*Adjudication as to district boundaries—For settlement purposes — Effect — Commissioner's final order—Nature of—Civ. Pro. Code. 1859, s. 14.*—An adjudication for the purposes of settlement and assessment is not authoritative as to civil jurisdiction or proprietary right. The final order of Commissioner of Revenue in respect of resumption, settlement or assessment, is not that of a competent authority within the meaning of s. 14 Act VIII of 1859. G. N. POGOSE v. THE COLLECTOR OF SYLHET, **12 W.R. 150.** [*R.*, 18 W.R, 274.]

(20)—*Question of disputed boundaries*—Onus —In a question of disputed boundaries between the permanently assessed *mouzah* of a neighbouring zemindar, adjoining the *Sunderbuns*, the Zemindar having taken a lease from Government of part of the lands as within the limits of the *Sunderbuns* but afterwards claimed by him as part of his *mouzahs* the *onus* upon him to identify the lands so claimed as forming part of his settled estate. RAJA BARODAKANT ROY v. THE COMMISSIONER OF THE SUNDERBUNS. **2 B.L.R. P.C. 33=12 M.I. A. 225=11 W.R. P.C. 14=2 Suther. 184=2 Sar. 413.** [*Reversed on appeal in* 12. M I.A. 242.]

(21)—*Suit for declaration of title to purchase lands—Plaintiff entitled to decision merits—Decision on grounds of expediency.*—In a suit for a declaration of title purchased land lying between plaintiff's and defendant's houses, the plaintiff has a right to a decision as to his title, and it is not for the Courts to decide on grounds of expediency and convenience. AKA ALI MAHOMED v. FURZUND ALI KHAN, **24 W.R. 141.**

(22)—*Assessment by landlord—Liability of landlord to point out the lands.*—*Held* that it is incumbent on a landlord, who wishes to assess the lands, to point them out by some definition or boundaries. HURRI MOHUN BANERJEE v. MAHARAJAH SUTIS CHUNDER ROY BAHADOOR, **W.R. 1864, Act X, Rul. 124.**

(23)—*Plaintiff and defendant purchasers from one vendor—Purchase in Collector's sale—Adjoining lands—Unascertained boundary—Right of suit.*—Where plaintiff and defendant were in one sense purchasers from the same

Boundary—*continued*.

vendor, although acquiring their titles from sales by the Collector, and defendant was in possession of the original talook, together with the *halabadee mehal* belonging to the plaintiff, the latter was held entitled to demand as against the defendant an adjudication of a line of boundary. BRIJO MOHUN DOSS v. SHAMANAND SARMAH, **17 W. R. 26.**

(24)—*Principle of proportion—Jumma.*—Where the boundaries of separate talooks held by a tenant or copyholder are unsettled and confused they should be fixed, so that the produce of the land in each should be to the jumma payable thereon as the produce of the whole of the said lands is to the total of the jummas payable. KHEMAMOYEE v. SHUSHEE BHOOSUN GANGOOLY, **9 W.R. 94**, [*R.*, 5 C.W.N. 846.]

(25)—*Boundary-suit—Previous decision of Privy Council—Subsequent appeal to same—Procedure—Power of Indian Courts—Fresh evidence*—In a suit which was one of boundary and which had, after many years litigation, gone up before the Privy Council, *held* that the first thing to be found was what had then been decided by Privy Council, since no Indian Court could go behind such decision: that so much of the judgment of Calcutta Court as reopened what had been then settled must be set aside; but that fresh evidence on points not thus settled was entitled to consideration. THE COURT OF WARDS v. RAJA LEELANUND SINGH, **25 W.R. P.C. 157.**

(26)—*Boundary dispute, meaning of—Bom. Act I of 1865—Proper officer to decide dispute—Collector — Encroachment — Jurisdiction of mamlatdar and of Civil Courts—Collector's decision, evidence.*—"Boundary dispute," as used in the Survey Act (Bombay Act I of 1865), means a contention between two neighbouring land-proprietors as to where a boundary line or boundary marks has or have been fixed by the Survey officers. After the functions of the latter officers have ceased in a district, the Collector, acting under Act III of 1846, is the proper officer to determine such a dispute, and fix the proper position of the boundary marks. But where a landholder claims to recover from a neighbouring holder land alleged to have been usurped or encroached upon by the latter, the person aggrieved must file his plaint in Court (which, in the case of a claim for mere possession, may be the Court of the Mamlatdar or the ordinary Civil Court), where the determination of the Collector as to the proper position, of the boundary line or marks (although it of itself confers or withdraws no right of possession) affords valuable evidence in adjudicating upon the rights of the parties. PITAMBER DHARI v. SAMBHAJIRAV, **8 B.H.C. A.C. 185.** [*R.*, 10 B. 456.]

(27)—*Suit relating to disputed boundaries—Appellant's duty.*—In suits relating to disputed boundaries, where the decision of the lower Court as to the ownership involves question

Boundary—*continued.*

of the correctness of surveys, maps, recorded description, and such other evidence, the appellant should do more than show points requiring explanation. He should be prepared to show in what respect the decision has been wrong in regard to the evidence, and what other course would be right. RAJKUMAR ROY v. GAVIND CHUNDER ROY, **19 C. 660, P.C. = 19 I.A. 140 = 6 Sar. 140.**

See BEN. ACT V OF 1875, s. 40, 21 C. 935.

See BEN. ACT V OF 1875, ss. 45, cl. (b), 62, 6 C. 453 = 7 C.L.R. 491.

See BEN. ACT V OF 1875, s. 62, 13 C. 280.

See BEN. ACT VIII OF 1885, s. 103, 19 C. 643.

Rent-suit—Plaint whether to contain exact extent and boundaries of lands—*See* BEN. ACT VIII OF 1885, s. 148, cl. (b), 5 C.W.N. 121.

See BEN. ACT VIII OF 1885, s. 158, 17 C. 277.

See BOM. ACT V OF 1879, ss. 119, 121, 10 B. 456.

Dispute—Arbitration—Award—Ambiguity—Acceptance—*See* AWARD, 13 C.L.R. 26, P.C.

Dispute—*See* BURDEN OF PROOF—BOUNDARY, 21 C. 504, P.C. = 21 I.A. 39.

Privy Council—Procedure— Question as to —*See* BURDEN OF PROOF—BOUNDARY, 10 C. L.R. 169, P.C.

See BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 2 Agra 177.

See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 9 W.R. 426.

See DECREE—DECREE, FORM OF, 4 C. 69.

Erroneous boundary — Acquiescence — Estoppel—Adoption of boundary in settlement of dispute—Effect—*See* DEED—CONSTRUCTION OF DEEDS, 6 Ind. Cas. 467 = 12 C.L.J. 378.

Sale-deed — Construction — Property specified by boundaries—Area specified—Mistake—Intention — *See* DEED—CONSTRUCTION OF DEEDS, A.W.N. 1883, 38.

Conveyance—Grant—Construction — Boundaries — Certain definition — Inaccuracy of dimensions—*See* DEED—CONSTRUCTION OF DEEDS, 1 Ind. Cas. 650 = 14 C.W.N. 268.

See EVIDENCE—MAPS, 16 C. 186.

See EVIDENCE—PAROL EVIDENCE, 9 W.R. 125.

Jungle land—Duty of Court to settle boundary, when evidence insufficient — *See* EVIDENCE ACT, 1872, s. 36, 11 C.W.N. 230 = 9 C. L.J. 415.

Boundary—*concluded.*

See GRANT—CONSTRUCTION, 22 A. 96 = A. W.N. 1899, 194.

Effect of boundaries being set forth in a deed —*See* LANDLORD AND TENANT—GENERAL; 13 C.W.N. 702 = 9 C.L.J. 585 = 2 Ind. Cas. 123.

See LANDLORD AND TENANT—TENANT TO KEEP HOLDING DISTINCT, 9 W.R. 94.

Not mentioned in plaint — *See* PLAINT—FORM AND CONTENTS OF PLAINT, 2 C.L.R. 134.

Description of property—Indistinctness of boundaries—Civ. Pro. Code, 1859, s. 26 — *See* PLAINT—FORM AND CONTENTS OF PLAINT, 1 Hay 555.

Jalkar lands—*Onus probandi*—Magistrate's award—Act XIV of 1840—*See* POSSESSION—SUITS FOR POSSESSION, 2 B.L.R.P.C. 1 = 12 M.I.A. 145 = 11 W.R. 1, P.C.

See RES JUDICATA — GENERAL, 19 C. 312, P.C. = 19 I.A. 69.

Quantity of land sold exactly described—Boundaries uncertain—Intention of parties—*See* SALE—GENERAL, 7 Ind. Cas. 574.

See SUNDERBANS, 2 B.L.R. P.C. 33 = 12 M.I.A. 225 = 11 W.R. 14.

See TITLE, 10 M.I.A. 47.

See WITNESS — SUMMONS TO AND ATTENDANCE OF WITNESSES, 16 W.R. 109.

Boundary Dispute.

Power of the Collector to determine — *See* BOM. ACT V OF 1879, s. 121, 2 Bom. L. R. 1083 = 25 B. 312.

Decree of Civil Court defining such boundary —Magistrate, duty of—See CRIM. PRO. CODE, 1898, s. 145, 6 C.W.N. 161.

Boundary Marks Act.

See ACT XXVIII OF 1860.

Brahmos.

(1)—*Marriage — A person having one wife cannot marry another.*—A person having already a wife living is not competent, according to the tenets of the Progressive Brahmo faith, to contract a valid marriage with another woman. SONALUXMI v. VISHNUPRASAD, **6 Bom. L R. 58 = 28 B. 597.**

(2)—*Brahmos, whether Hindus—Unorthodox practice—Effect — Act V of 1881.*—A Sikh or Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he was born. Lapses from orthodox practice in matters of diet and ceremonial observances cannot have the effect of excluding from the category of "Hindu" in Act V of 1881 one who was born within it, and who never

Brahmos—*concluded.*

became otherwise separated from the religious communion in which he was born. BHAGWAN KOER v. BOSE, **31 C. 111, P.C. = 30 I.A. 249 = 7 C.W.N. 895 = 5 Bom. L.R. 845 = 13 M. L.J. 381 = 84 P.R. 1903 = 135 P.L.R. 1903 = 8 Sar. 543.**

Son of a—Adopted by Hindu Widow—*See* HINDU LAW—ADOPTION, 30 C. 999 = 7 C.W. N. 784.

See WILL—EXECUTION, P.L.R, 1900, p. 251.

Branches.

Right to cut branches over-hanging one's roof — Tree held sacred by neighbour's — Whether right affected—Injunction—*See* INJUNCTION—SPECIAL CASES, 24 A. 499 = A.W.N. 1902, 169.

Breach of Contract.

See CONTRACT—BREACH OF CONTRACT.

See CONTRACT ACT, 1872, 1 L.B.R. 21.

See DAMAGES—MEASURE AND ASSESSMENT, 5 A. 238 = A.W.N. 1882, 2, 1 L.B.R. 146.

See DECREE—DECREE, CONSTRUCTION OF, 28 C. 557, P.C. = 28 I.A. 89 = 5 C.W. N. 536.

See LIMITATION ACT, 1908, arts. 30, 115, 12 C. 477.

See LIMITATION ACT, 1908, arts. 66, 116, 3 A. 276.

Vendor and purchaser — Agreement by vendor to refund purchase-money in case of land or rent proving deficient—Suit for refund—Suit for compensation for breach of contract—*See* LIMITATION ACT, 1908, art. 176, 3 A. 712 = A.W.N. 1881, 67.

See PORT OF CALCUTTA, Bourke O.C. 41.

See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF AGENTS, 2 Hyde. 289 = Cor. 83 = Bourke O.C. 1.

Suit for damages for against Secretary of State for India—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 3, 5 O.C. 403.

Carriers—To convey passengers—Damages —*See* RAILWAY COMPANY, 26 C. 465 = 3 C. W.N. 781.

Suit for damages for—Arrest under s. 477, Civ. Pro. Code, 1882, of defendant before judgment—Summons not served on defendant—Application for withdrawal of suit under s. 373, Civ. Pro. Code, 1882—Objection by defendant—Procedure—*See* WITHDRAWAL OF SUIT, 15 B. 160.

Breach of Contract Act, Workman's.

See ACT XIII OF 1859.

Breach of the Peace.

Procession likely to cause — Removal of banners—Suit for damages—*See* MAD. ACT XXIV OF 1859, ss. 21, 49, 17 M. 37 = 3 M. L. J. 276.

Breach of Statutory duty.

See STATUTORY DUTIES, 5 Bom. L. R. 405 = 27 B. 344.

Breach of Trust.

See TRUST.

(1)—*Trustee—Breach of trust—Declaration of liabilities.*—The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the breach may have been beneficial to the trust estate. JOHN BOYLE BARRY v. OCTAVIUS STEEL, **1 C.L.R. 80.**

(2)—*Breach of trust—Justification—Consent of* cestui que trust—*Damages for breach of trust—Prospective.*—The consent or approval of the community interested in the temple affords no justification for acts of breach of trust, though it may perhaps be evidence of the propriety of the act charged. Prospective loss should also be taken into account in assessing damages for breach of trust. RANGA PAI v. BABA, **20 M. 398.**

Liability of Administrator-General in respect of — By intestate executor—*See* ADMINISTRATOR-GENERAL, Cor. 97 = 2 Hyde 3 = Bourke, O.C. 11.

See COMPROMISE—GENERAL, 11 W.R. 31, P.C.

See ESTOPPEL—GENERAL, 15 B. 625.
See LIMITATION ACT, 1908, s. 10, 20 M. 398.

Trustees claiming trust property as their own—Breach of trust—*See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, 15 B. 612.

See TRUSTEE, 9 B.H.C. 333.

Breach of Warranty.

See DAMAGES—DAMAGES, SUITS FOR, 29 C. 323 = 6 C.W.N. 495.

Breeze.

Right to south — *See* PRESCRIPTION — EASEMENTS—LIGHT AND AIR, 14 C. 839.

Bribe.

Advice to bribe to keep back unfavourable evidence—*See* ACT XVIII OF 1879, ss. 13, 14, 5 C.W.N. 45.

Effect of giving—*See* LEASE—GENERAL, 3 Ind. Cas. 316 = 37 C. 81 = 14 C.W.N. 101.

Suit to recover money paid as—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 9 Ind. Cas. 623.

Bridge.

Re-building of—Bridge connecting houses situated on opposite sides of a lane— *See* EASEMENT, 9 P.L.R. 1911=9 Ind. Cas. 402=51 P.W.R. 1911.

Bridge Act, Howrah.

See BEN. ACT IX OF 1871.

Bridges and Roads Act, Tolls on.

See BOM. ACT III OF 1875.

British born Subjects.

Statute of Frauds, s. 4—Applicability to —*See* ST. 29, CAR. II, C. 3, 1 M.H.C. 27.

British Courts.

—*Courts in Kathiawar and Rajkot, whether British Courts.*—The Civil Courts in many of the States of Kathiawar, including the State of Rajkot, are purely Native Courts entirely independent of the Courts of British India, over which neither the Government of India nor the Government of Bombay assumes to exercise any control except indeed as an act of State. GHAMSHAM LAL v. BHANSALI, **5 B. 249.**

Attachment of debt arising out of claims over which have no jurisdiction—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 5 B. 249.

British India.

(1)—*S. 380, Civ. Pro. Code, 1882—British Cantonment of Secundrabad.*—For the purpose of s. 380, Civ. Pro. Code, the British cantonment of Secundrabad must be regarded as being a place out of British India. HOSSAIN ALI MIRZA v. ABID ALI MIRZA, **21 C. 177.**

(2)—*Tributary Mehals of Orissa—Mayoorbunj.*—The tributary mehals of Orissa, of which Mayoorbunj is one, do not form part of British India. RATAN MAHANTI v. KHATOO SAHOO, **29 C. 400=6 C.W.N. 573.**

Jurisdiction—Marriage out of— Validity—Suit for dissolution—*See* ACT XV OF 1865, ss. 3, 26, 30, 53, 16 B. 136.

Attachment of pension payable in British India to descendants of former Royal family in Ceylon—Validity of attachment—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 26 M. 423.

Jurisdiction— Religious endowment — Property in—Of temple outside British India—Right to officiate in temple—Right to share in property—*See* HINDU LAW— RELIGIOUS ENDOWMENT, 20 B. 495.

Testator subject to Baroda State—Will executed at Baroda—Disposition of immoveable property in jurisdiction of Court in British India—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 56, 57, 20 B. 607.

See TRIBUTARY MEHALS, 7 C. 523=9 C.L.R. 93.

Brit jajmani bahis.

Suit to set aside sale of—Limitation—*See* LIMITATION ACT, 1908, arts. 49, 126, 6 A.L.J. 614=3 Ind. Cas. 505.

Broach.

Bhagdari lands in—District—Succession—Special custom—Males and females, preference between — Hindus and Mahomedans — *See* SUCCESSION, 5 B. 482.

Broach and Kaira Incumbered Estates Act.

See BOM. ACT, XIV OF 1877.

Broach Thakur's Relief Act.

See BOM. ACT XV OF 1871.

Broker.

(1)—*Guarantee by broker in one transaction, effect of, on subsequent transactions, where signature of broker is forged.*—The signing by a broker of a bought note in which the guarantees the fulfilment of a contract on the part of the seller raises no presumption of law in transactions between the same parties which cannot be contradicted, that subsequent bought notes, to which the signature of the broker is forged, containing similar guarantees were signed with the authority of the broker. MCLAREN MORRISON v. VERSCHOYLE, **6 C.W.N. 429.**

(2)—*Broker, if entitled to commission from both buyer and seller.*—A broker, though often spoken of as an agent of both the contracting parties, is deemed primarily the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage, it must be shown that he has been employed by such party to act for him, or that, on the contract, such party has agreed to pay the brokerage. THE MUNICIPAL CORPORATION OF BOMBAY v. CUVERJI HIRJI, **20 B 124.**

Liability of — Burden of proof—*See* CIV. PRO. CODE, 1908, s. 115, 10 C.W.N. 14.

Position of—*See* CONTRACT — GENERAL, 8 Ind. Cas. 601.

Contract between—To divide profits—*See* CONTRACT—ILLEGAL CONTRACTS, 1 Agra 269.

Bought note—*See* CONTRACT — MISCELLANEOUS, Bourke O.C. 254.

See CONTRACT ACT, 1872, s. 242, 6 C.W.N. 429.

Market-rate—Record by broker—Evidence—*See* EVIDENCE—SECONDARY EVIDENCE, 10 C. 565.

Contract—Suit by—to recover brokerage—*See* PRINCIPAL AND AGENT—GENERAL, 30 C. 204=7 C.W.N. 297.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 8 B.H.C. A.C. 19.

Contract through—*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Bourke A.O.C. 43.

Same broker for both vendor and vendee—Liability of broker—Mistake of renter in transmitting message—Effect—*See* SALE—GENERAL, 8 M.L.T. 353=8 Ind. Cas. 291.

Broker—*concluded.*

Broker's sold notes on agreement by sale—Cancellation of stamps—*See* STAMP ACT, 1879, sch. I, No. 46, sch. II. (cl.) 2, and ss. 11, 34, 14 B. 102.

See ST. 11 & 12, VICT., C. 21, 2 Hyde 177.

Subsequent modification of contract between buyer and seller does not affect commission of —*See* VENDOR AND PURCHASER—GENERAL, 20 B. 124.

Brokerage.

On wagering contract—*See* CONTRACT ACT 1872, 1 L.B R. 128.

Brokerage Contract.

—*Principal and agent—Agent for raising a loan--Capitalist not ready and willing to advance on terms offered by principal—Remuneration of agents—Time, the essence of contract—Contract Act, s. 55.*—Quantum meruit.—Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit for his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent. Where the agency is in respect of raising a loan, it is essential that the agent procures a person ready and willing to make the loan on the terms proposed; it is not sufficient that he procures a person willing to negotiate about the matter. The defendants granted a letter of authority to the plaintiffs to raise a loan of eleven lakhs on a mortgage of their entire estate. The capitalists with whom the plaintiffs entered into negotiations were not ready and willing to advance the money on the terms offered by the borrowers. They imposed a condition as to the margin of security never proposed or accepted by the borrowers. The transaction ultimately fell through: *Held*, that the plaintiffs never earned the remuneration claimed by them. The rule of equity, which is formulated in s. 55 of the Contract Act, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. Where the plaintiffs claimed remuneration according to the contract which failed completely, they are not entitled to remuneration on the basis of *quantum meruit* for their services, which was not the foundation of their claim. KISHEN PRASHAD SINHA v. PURNEUDU NARAIN SINHA, **15 C.L J. 40.**

Brokerage Fees.

Allowance of, in estimating compensation of land compulsorily acquired—*See* ACT I OF 1894, s. 23, 9 Bom. L.R. 1232.

Broker's Notes.

—*English Law—Broker's notes — Evidence —Bought and Sold notes.*—Brokers' notes, as a memorandum, may satisfy the Statute of Frauds, but not exclude parol evidence. Bought and sold notes, unobjected to, may be evidence of the contract, but they do not necessarily constitute the whole contract. JUMNA DOSS v. SRINATH ROY, **17 C. 176, Note.**

Brother.

See U.P. ACT I OF 1869, 7 O. C. 248.

Buddhist.

See SUCCESSION ACT, 1865, ss. 332, 190, 1 L.B.R. 193.

Will of—*See* WILL—FORM OF WILL, 2 B. L.R. A.C. 79=10 W.R. 417.

Buddhist Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—ANCESTRAL PROPERTY.
5.—DIVORCE.
6.—ECCLESIASTICAL.
7.—GIFT.
8.—HUSBAND AND WIFE.
9.—INHERITANCE.
10.—JOINT FAMILY.
11.—MAINTENANCE.
12.—MARRIAGE.
13.—PARTITION.
14.—PRE-EMPTION.
15.—WIDOW.
16.—WILL.

——1.—General.

(1)—*Maiden lady bringing up two girls and a boy—One girl's father administering estate under letters of administration—Other girl suing and getting decree for whole estate as keittima adopted daughter of deceased—Suit on behalf of first girl—Boy put on record as party —Decree against second girl directing her to pay one-third share to first girl and another third share to boy.*--A maiden lady, deceased, had three persons living with her, (1) S, the daughter of B, with whose father the deceased was living, (2) P, a boy, and (3) L, another girl. On her death Y, the father of S applied, as father and guardian of S, for letters of administration to the estate of the deceased, and obtained it from the Court. A similar application was also made on behalf of L, but was refused. L. thereupon, instituted a suit *in forma pauperis* against the estate of the deceased, administrated by Y, for possession of the whole of it, as *keittima* adopted daughter of the deceased. The suit, to which S and P were wrongly not made parties, and which was very badly conducted, was resisted by Y, but was finally decreed in favour of L as the adopted child of the deceased entitled to inherit. Afterwards, the sister of Y, instituted, as next friend of S, the present suit on the ground that, S, not being a

Buddhist Law—continued.

——1.—General—*continued.*

party to the former suit, the decrees in it were not binding on her, and that she alone was entitled to the whole estate. P, who wished to put forward his claim, was permitted to be put on the record as second plaintiff in a suit in which the original plaintiff claimed the whole estate. The suit was decreed in favour of S, who was held by the District Judge to have been adopted by the deceased and not L and P. *Held* that S's right to share in the estate as *keittima* adopted daughter of the deceased had been proved and that L should make or pay over one-third share of the property, which she had obtained or may hereafter obtain from Y under the decee in the former suit, to the properly constituted guardian of S, that L's right to share in the estate as *keittima* adopted child having been established in the former suit where S's claim was represented fully, the question of L's right to share in the estate should not have been gone into in the suit. Regarding P, though the evidence of his having been adopted was not so strong, yet, the deceased having brought him up also, and Y, the person who should have known best the position P occupied in the house, having admitted, shortly after the death of the deceased, that P was one of three children adopted by the deceased, *held*, setting aside the decree of the District Court, that L should make or pay over to P also a one-third share of such property as she had received or should hereafter receive under such decree. MA BU LONE v. MA MYA SIN, **14 Bur. L.R. 9.**

(2)—*Ancestral estate—Co-heirs—Sale of a divided portion of property belonging to the family—Right of pre-emption—The Dhammathats.*—After the division of ancestral estate, the holder of a divided portion is bound (being a member of the family) if he wishes to sell, to offer his share to the original co-heirs; and consequently a sale to strangers, effected without such offer, is invalid if the co-heirs promptly assert their rights. MA NGWE v. LU BU, **L.B.R. 1872—1892, 76.** [*F.*, 14 Bur. L.R. 205=4 L.B.R. 128, 14 Bur. L.R. 91, U.B.R. 1897—1901, Vol. II, 155; *R.*, U.B.R. 1897—1901, Vol. II, 162, 4 L.B.R. 128. U.B.R. 1907, 2nd Quarter, Buddhist Law—Inheritance—Pre-emption, 1; *Cited*, 3 L.B.R. 7; *Cited & R.*, 1 L.B.R.50.]

(3)—*Right of redemption—Burden of proof.*—Where land is handed over in payment of a debt, an option of redemption is left with the original proprietor. When the plaintiff claimed a right of redeeming certain land and the defendant alleged a sale outright, the burden of proof was held to lie on the latter. NGA SHWE KU v. NGA KWYA YWE, **L.B.R. 1872—1892, 78.** [*Rel. on*, L.B.R. 1872—1892, 102; *R.*, L.B.R. 1872—1892, 482, 642, L.B.R. 1893—1900, 65, 461.]

See DAMAGES—MISCELLANEOUS, L.B.R. 1872—1892, 114.

Buddhist Law—continued.

——1.—General—*concluded.*

Ownership of property by married couples—Devolution — Letters of administration whether and when can be granted to any person other than survivor of married couple—Proper person to administer estate—*See* PROBATE AND ADMINISTRATION ACT, 1881, 4 L.B.R. 293.

Object of granting letters of administration—Right of younger daughter of deceased Burman Buddhist to Letters of Administration during the life-time of the mother—Agreement of parties, whether can change personal law—*See* PROBATE AND ADMINISTRATION ACT, 1881, S. 23, 4 L.B.R. 287=14 Bur. L.R. 280.

Suit for redemption—Transfer of Property Act, s. 85—Joinder of parties—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 3 L.B.R. 15.

——2.—Adoption.

(1)—*Evidence of adoption—Adoption taking place long ago—Variation in evidence as to time of adoption, effect of.*—A suit was instituted for a declaration that the plaintiff was, equally with the defendant, the *keittima* daughter of a Burmese lady and, as such, entitled to share in the latter's estate equally with the defendant. The Court of first instance gave a decree to the plaintiff. The Chief Court reversed this decree on the ground, that the evidence adduced by plaintiff as to the time and manner of the alleged adoption varied widely and the publicity of the adoption was proved. On appeal, the Privy Council observed that neither ceremony nor written document being required to constitute, or initiate the relation of, *keittima* adoption, there must be, on the one hand the consent of the natural parents and, on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. On weighing the evidence their Lordships found that the *keittima* adoption had been proved and that, as the adoption took place long ago, the variation in the evidence as to the time of adoption was not very material. MA ME GALE v. MA SAYI, **32 C. 219, P.C.=4 L.B.R. 172=8 Sar. 743.**

(2)—*Burmese law and custom—Adoption—Mode of proof—Publicity—Inferences from the facts of the life of parties—Child—Adult.*—According to Burmese Law, no formal ceremony is necessary to constitute adoption, and, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in the cases of the latter category, when no distinct occasion can be appealed to. In many cases the inferences of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties, apart

***Buddhist Law*—continued.**

——2.—Adoption—*continued.*

from the verbal statements of those concerned. Thus when a child who has natural parents leave those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the persons, friends and acquaintances. But in the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherition of those entitled to succeed by law, it is specially necessary to insist on adequate proof of publicity or notoriety of the relationship. MA YWET v. MA ME, **11 Bom. L R. 1193, P C.=5 L.B.R. 118=10 C.L J. 253=6 M.L.T 302=3 Ind. Cas.797=36 C.978=19 M.L.J. 577=14 C.W.N. 111.**

(3)—*Definition and rights of* keittima *and* apatittha *sons.*—The *keittima* son has the full rights of inheritance of a natural son whereas the *apattitha* son has only partial rights of inheritance. The *apatittha* son has nevertheless rights of inheritance. Looking at the definition of an *apatittha* son in the Digest of Buddhist Law the term would seem to refer to a foundling, a child casually adopted whether its parents and relatives are known or not, a child casually adopted and brought up in the family of the adoptive parents being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted. The principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one, which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents, or some such similar cause. *Held*, in this case, on a consideration of the probabilities and of the manner in which the boy was treated, that the adoption was *keitt ma* and not *apatittha*. TET TUN v. MA CHAIN, **5 L.B.R. 216=8 Ind. Cas. 978.**

(4)—*Some probabilities in favour of alleged adoption—One or two important probabilities against it—Adoption not generally published and not notorious—Valid adopton according to requirements of Burmese Buddhist Law, whether proved.*—The plaintiff, an adult, claimed to have been adopted by its uncle. He was able to adduce, from the relationship between himself and his uncle, from the latter's circumstances, from his uncle's public letters, through witnesses, and from other sources, a good deal of evidence calculated to render his contention probable and successful. It appeared, however, that the plaintiff, when called upon to state his father's name, gave, not his adoptive, but his natural father's name, thus making it doubtful, whether the idea of giving up all his prospective rights in his natural parents' property, as the result of the adoption, presented itself to his mind at the time of the alleged adoption; and, also, that his relationship with his uncle

***Buddhist Law*--continued.**

——2.—Adoption—*continued.*

was not published generally and was not notorious, as it ought to have been, had it been true. *Held*, that he failed to prove that he had been validly adopted according to the requirements of the Burmese Buddhist Law. In the absence of anything to show what is necessary to constitute the adoption of an adult, the general principle is that an adult cannot be adopted without his or her consent. But, as an adult (cannot be deprived of any rights without his or her consent) — an adoption depriving rights of inheritance in natural parents' property—it must appear that he or she consented to renounce all his or her prospective rights in his or her natural parents' property. *Per Fox, C.J.*—Notoriety amongst the people with whom the parties ordinarily mixed in social life is what is required in evidence of the adoption of an adult (11 Bur. L.R. 240=2 L.B.R. 224, *F.*) *Per Hartnoll, J.*—When a person claims a share in an estate on the ground that he was adopted as an adult, the burden of proof lies heavily on him, the more especially as such an adoption is not usual even if it is sanctioned by the *Dhammathats*. MA GYI v. MAUNG PO THA, **14 Bur. L R. 15.**

(5)—*Right to cancel.*—Adoption is an institution of Buddhist Law, and for the incidents that govern it, the Court must look to Buddhist Law or to custom, if custom has modified the law. There is no other means of getting light on the subject. Parents who have given a child in adoption to another, are at liberty until the child has grown up to take the child back when they please. MAUNG SEIN v. MA MON, **U.B.R. 1902—1903, Vol. II, Buddhist Law, Adoption, 1.**

(6)—*Ceremonies, Necessity of—Publicity and notoriety essential*—Keittima *adoption—Proof.*—It has been held that no particular ceremony is required for adoption but there can be no doubt that an essential part of adoption is publicity of the relationship and of the intentions of the adoptive parents in regard to the inheritance of their estate by the adopted child. To establish a *keittima* adoption proof of publicity and notoriety is essential. MA MEIN GALE v. MA KIN, **U B.R. 1892—1896, Vol. II, 34.** (U.B.R. 1892—1896, Vol.II,22, *R.*)

(7)—*What is a* keittima *adopted child*—Manugye Dhammathat (*pp. 314 and 319, 3rd Edition*).—When one party seeks to disturb a decision in revision, it is fair that the other party should be at liberty to put forward grounds of dissatisfaction with it on his side, although he might otherwise have let it stand unchallenged. No particular method of adoption is prescribed by Buddhist Law. Evidence of bringing up and treatment as child of adoptive parents and public recognition as such is sufficient proof of *keittima* adoption. The duties of an adopted child are similar to those of a natural born child, and seperate living may constitute a disqualification to inheritance by the adopted child; but that the question what

Buddhist Law – continued.

—2.—Adoption – *continued.*

constitutes separate living depends upon the circumstances of each particular case. Suggested that possible reason for disqualification may be that separate living on the part of adopted child might indicate severance of the adoption. Ss. 26 & 27 are applicable. MAUNG AING v. MA KIN. **U B.R. 1892—1896, Vol II, 22.** [*R.*, U.B.R. 1892—1896, Vol. II, 34, 176, U.B.R. 1906, 3rd Qr., Buddhist Law — Inheritance, 15, U.B.R. 1897—1901, Vol. II, 135, 142.]

(8) — Keittima *and* apatittha *children* — *Evidence — Letters of administration.* — An alternative claim to the status of adoption either by the *keittima* or the *apatittha* mode may be made in the Court of first instance. Evidence in the case considered, and kinds of evidence necessary to prove adoption discussed with reference to previous rulings. In adoption the publicity of the relationship is the essential point to be established. It has not been laid down at any time that there must be strict proof of a formal and public taking over of the adopted child with a definite pronouncement of the intention of the adoptive parents that the child should inherit, or share in the inheritance of, their estate. If the law required strict proof of the circumstances of the original adoption, proof in these cases, unless there was a formal deed, would usually be a very difficult matter. For, the investigation of these claims is commonly undertaken many years after the date of the alleged adoption. In no case that has been reported in which the adoption has been upheld has there been strict proof of the original giving and taking. No case has been cited in which a child has been taken into a family completely severed from its own family in the life-time of its parents, and openly treated as a child of the adoptive house and not as a mere dependant, and in which it has been held that there has been no intention that such a child should be regarded other than as a waif and stray brought up out of charity. It seems most unlikely that the natural parents would consent to such an agreement. The strictest proof would be required that a son had conducted himself as an enemy to justify a Court in disinheriting him under a law. The mere fact of the institution of a suit by a son to obtain from his mother a share of his father's estate cannot in itself be regarded as unfilial conduct. Nor does the fact that the suit was brought out of time or that a larger share than the law allows was claimed to make it so. Decision between two rival claimants for letters of administration, both legally qualified to obtain them. MA MYE ME v. MAUNG BA DUN, **2 L.B R. 224 = 11 Bur. L R 240.** (U.B.R. 1897—1901, Vol. II, 142. *Cited.*) [*F.*, 14 Bur, L.R. 15; *R.*, 5 L, B.R. 118=11 Bom. L.R. 1193.]

(9)—*Proof.*—Adoption is a mixed question of fact and law. No ceremony or document is required to constitute an adoption, but there must be a r equest from parents and a notorious and public taking and bringing up, in order

Buddhist Law—continued.

—2.—Adoption—*concluded.*

that, or with the understanding that, they, *i e.*, the children may inherit. (L.B.R. 1872—1892, 25, *F.*) There can be no doubt that an essential part of adoption is publicity of the relationship and of the intention of the adoptive parents in regard to the inheritance of their estate by the adoptive child * * * the law thus most properly requires that adoption shall not be a hole-and-corner matter, but a matter of publicity and notoriety, so that there may be no room for questions to be raised and disputes to be encouraged. (*Chan Toon's Leading Cases*, 168, *F.*) Residence together in one house is not sufficient indication of the relation of the parties being that of adopted child and adoptive parent. MA PWA v. MA THE THE, **1 L.B.R. 273.** [*R.*, 5 L.B.R. 118=11 Bom. L R. 1193.]

(10)—*Essentials of valid adoption—Ceremonies —Documentary evidence—Publicity—Intention of publicity.*—To constitute a valid adoption the law requires no ceremony, no written document, nothing indeed but a request from parents, and a notorious and public taking and bringing up, in order that, or with the understanding that, they, i.e., the children, may inherit. Just as an open living together is among Burmans presumptive proof of marriage, so also the open bringing up of a child, and supporting such child for so many years, is presumptive proof of adoption, especially where the parents are childless and the child is a niece. MA GUN. v. MA GUN, **L B.R. 1872—1892, 25.** [*R.*, 1 L. B. R. 273; *R.*, U.B.R. 1897—1901, Vol. II, 142. U.B.R. 1892—1896, Vol. II. 23, L.B.R. 1872—1892, 225.]

(11)—*Adoption by Buddhist having child—Validity.*—A Buddhist can adopt a child, he having a child of his own at the time. MA BWIN v. MA YIN, **L.B.R. 1872—1892, 100.**

(12)—*Adoption—Proof—Two adoptions valid —Evidence of adoption.*—Where it was proved that the plaintiff, who claimed to be the adopted daughter of a Buddhist couple and had lived with the couple from the age of three years, and the plaintiff's mother as well as others has stated that the old couple had told them that they had adopted the plaintiff and that she was generally regarded as their daughter. *Held*, that the adoption had been amply proved. Inasmuch as even children of well-to-do parents often assist in cultivating the family acres, no inference against adoption can be drawn from the fact that an adopted daughter worked in the fields for her adoptive parents. A second adoption during the lifetime of the first adopted child is not prohibited by Burmese Budhist law, though it is unusual. MA SHWE YIN v. MA SHWE NYUN, **11 Ind. Cas 776.**

—3.—Alienation.

(1)—*Sale by wife of joint property—Its validity—Consent of husband—Power-of-attorney—Registration Act, s. 33.*—It is settled law that a

Buddhist Law—continued.

——3.—Alienation—*continued.*

Burmah Buddhist, with the express or implied consent of his wife, may dispose of their joint property. It is a common practice for the husband alone to execute deeds of transfer of joint property. Probably it is unusual for the wife tc do so, but if she has her husband's consent, a sale by the wife would be as valid as a sale by the husband. A deed of sale of joint property executed by the wife alone does not require a registered power-of-attorney under s. 33 of the Registration Act. MAUNG TUN MYAT v. RAMAN CHETTY, **L.B.R. 1893—1900, 37.** (L.B.R. 1872—1892, 403, *R.*)

(2)—*Widow's right of disposal of property.*—By Buddhist law the children have rights in the property as well as the widow. If the children are young and she undertakes to manage for them, she does this under the responsibilities of a trustee. She may use the property for necessary subsistence, but ought not, except for their benefit, to dispose of it otherwise. If however there is family necessity to sell, the sale may be valid as against the children ; but it will lie on the purchaser to prove the necessity. NGA SHWE YO v. MI SAN BYU, **L.B.R. 1872—1892, 108.** [*R.*, L.B.R. 1872—1892, 212, 255, 378, U.B.R. 1892—1896, Vol. II, 171, U.B.R. 1892—1896, Vol. II, 121, 4 L.B.R 256, U.B.R. 1892—1896, Vol. II, 581 ; *D.*, L.B.R. 1872—1892, 115.]

(3)—*Assent of heirs.*—The law contemplates the devotion of a portion of the estate of the deceased to religious offerings. But the Courts cannot uphold a large expenditure on this account incurred without the assent of the heirs. A suit by one of the co-heirs to recover her portion of the expenditure is maintainable. MI MIN GWUE v. MI SAUNG, **L.B.R. 1872—1892, 46.** [*R.*, U.B.R. 1892—1896, Vol. II, 171, 93, L.B.R. 1893—1900, 299, 465, U.B.R. 1892—1896, Vol. II, 397.]

(4)—Poggalika *property of priest—Rights of disposal by other members of the same order for funeral expenses of deceased owner.*—The *poggalika* property of an individual priest, cannot on his death be disposed of by another member of the order unless such sale was necessary to meet the expenses of the deceased priest's funeral. U TE LAW KA v. MAUNG PO KA, **L B R. 1893—1900, 597.**

(5)—*Attachment—Suit to establish right to attach property—Sale before attachment valid, if* bona fide *and for good consideration—Fraud—Burden of proof—Buddhist Law—Sale of his share by co-sharer—One co-heir acting on behalf of all.*—There is nothing to prevent an owner from selling or any one from purchasing property before it is attached, provided the transaction is *bona fide* and for good consideration. The burden of proving fraud rests on the creditor who impeaches the sale. A sharer has an absolute right to dispose of his own share, even while the property is undivided subject to

Buddhist Law—continued.

——3.—Alienation—*concluded.*

the right of pre-emption by co-heirs. (2 L B. R. 167, *F.*) It is common to find one or more co-heirs acting on behalf of the general body of co-heirs. SUBRAMANIAN CHETTY v. MAUNG SHWE THE, **11 Ind. Cas. 781.**

——4.—Ancestral Property.

(1)—*Sister — Division—Ancestral estate.*—The widow is entailed to retain possession against a sister of ancestral estate redeemed by her husband and worked by him, although there has been no actual division by measurement or express agreement. Separate possession and separate living will shift the burden of proving the property to be joint estate on the party alleging the property to be joint. MI PYU v. MI BON DOK, **L B.R. 1872—1892, 35.** [*R.*, U.B.R. 1892—1896, Vol, II, 121, L.B.R. 1872—1892, 74.]

(2)—*Pre-emption sale.*—If ancestral property has passed into the hands of third persons, the heirs of the original owner do not possess an absolute right of buying it back. But if the possessor wishes it to sell, he must offer it first to them who have a right of inheritance in the land. A sharer in undivided ancestral property, if he wishes to sell his share, must first offer his share to his co-heirs, and consequently a sale to strangers effected without such offer is invalid if the co-heirs. promptly assert their rights. NGA MYAING v. MI BAW, **L.B.R. 1872—1892, 39.** [*Cited*, 3 L.B.R. 7 ; *Rel. on*, L.B R. 1872—1892, 76; *D.* L.B.R. 1872—1892, 115 ; *R.*, L.B.R, 1872—1892, 378, 108, 1 L.B. R. 50, U.B R 1892—1896, Vol. II, 383, U.B.R. 1907, 2nd Quarter, Buddhist Law—Inheritance —Pre-emption, 1; *F.*, 14 Bur. L R. 91, 14 Bur. L.R. 205=4 L.B.R. 128, U.B.R. 1897—1901, Vol. II, 155, 162 ; *Diss.*, 1 L.B.R. 144.]

(3)—*Sale—Consent of all the co-heirs is necessary to the sale of undivided ancestral property.*—One co-sharer cannot alienate even his own interest in undivided family estate without consulting has co-sharers and ascertaining their unwillingness to buy him out. This doctrine has its parallel in the rule which prevails in those parts of India which are governed by the strictest Hindu Law where the consent of all the share-holders is necessary even to the alienation of an individual share. MI TE v. PO MAUNG, **L.B.R. 1872—1892, 41.** [*F.*, U.B.R. 1897—1901, Vol. II, 162, 14 Bur, L.R. 91, U.B.R. 1907, 2nd Quarter, Bud. Law—Inheritance—Pre-emption 1; *R* , U.B.R. 1892—1896, Vol. II, 383, 1 L.B.R. 50 L.B.R. 1872—1892, 108 ; *D.*, L.B.R. 1872—1892, 115.]

——5.—Divorce.

See BUDDHIST LAW — HUSBAND AND WIFE.

See BUDDHIST LAW—MARRIAGE.

(1)—*Divorce by mutual consent—Partition of property*—Atet—Lettetpwa *property*—Nissayo *and* Nissito.—In a suit for divorce by mutual consent and for partition of property, *held*, on

Buddhist Law—continued.

—5.—Divorce—*continued.*

the authority of the *Manugye*, Book XII, s. 3, that, where the relation of *Nissayo* and *Nissito* subsists between the husband and the wife with respect to *atet* property, the wife, if she is the *Nissitto*, is entitled to one-third of such property; she is also entitled to a third of the undivided ancestral property, which was inherited by her husband during the marriage. The profits of the *atet* or *pany* property are *letletpwa*, and they inherited a property being itself *letletpwa*, its profits are *letletpwa* also. The partition of such *letletpwa* property should be made equally, if it was acquired by the joint exertions of the married couple. EI MYIN v. NGA TWE. **U B.R. 1906, Buddhist Law—Divore, 19.** (U.B.R. 1892—1896, Vol. II, 121, 10 B L.R. 49, U.B.R. 1897—1901, Vol. II, 146, 39, U.B.R. 1902—1903, Vol. II, Buddhist LAW—Inheritance, 1, *Affirmed.*) [*R.*, 14 Bur. L.R. 117.]

(2)—*Grounds of divorce.*—Before a Court can order divorce against the wish of one party there must be proof either of some fault committed against the other of a sufficiently serious nature to justify divorce according to the Dhammathats, or of some evil deed for which a separation of destinies can take place. Mere willingness on the part of one party to pay ko-bo or the price of the body, will not constitute a ground for divorce. It might equally will be held that willingnees to surrender the whole of the joint property constituted such a ground. MI PA DU v. MAUNG SHWE BAUK, **L.B R. 1872—1892. 607.** (L.B.R. 1872—1892, 391, *R.*) [*Cited*, U.B.R. 1902—1903, Vol. II, Buddhist LAW—Divorce, 6, U.B.R. 1892—1896, Vol. II, 56; *R.*, U. B.R. 1905, 4th Qr., Buddhist Law—Divorce, 3, U.B.R. 1897—1901, Vol. II, 28.]

(3)—*Civ. Pro. Code (Act V of 1908), s. 60—Buddhist law—Divorce—Wife's share in 'let-tet-pwa' property not alienable but attachable with husband's consent—Decree against wife alone.*—The appellant, Maung Lo, in execution of a decree against Ma Aing, wife of respondent, Maung Pyaung, attached a durion garden which stood in the joint names of Maung Pyaung and Ma Aing. Maung Pyaung applied for removal of attachment, alleging that he had been divorced from Ma Aing and that she had no concern with the durion garden in dispute. The application was refused, and Maung Pyaung then brought the present suit for a declaration that the land could not be attached in execution of decree against Ma Aing as it belonged to him. The Township Court found that there had been no proper divorce between Ma Aing and Maung Pyaung. *Held*, that the Township Court had decided it correctly, as it appeared that Maung Pyaung, after a long married life with Ma Aing, had separated from her a few years ago and had since lived apart from her, but that there had been no formal divorce nor any division of property acquired during coverture. The durion garden in suit was admittedly inherited by Maung Pyaung from his parents several years after his marriage with Ma Aing. *Held*, that it was not *payin* but *let-tet-pwa* property and that Ma Aing had a vested interest in it, and that extent of her interest was one-third. (U.B R. 1904—1906, Bud. Law—Divorce, 19, *F.*) *Held*, also, that, if there had been a divorce by mutual consent, Ma Aing would be entitled to receive one-third of the garden as property inherited by her husband during coverture. *Held*, further, that, although a wife could not alienate her share in joint property without her husband's consent, her interest in joint property was attachable. (U.B.R. 1902—1903, Vol. II, Execution of Decree, 1 U.B.R. 1904—1906, Bud, Law—Divorce 1, *F.*) *Held*, therefore, that, although Ma Aing had not "a disposing power which she may exercise for her own benefit" over the one-third share, in the durion garden, that one-third share, nevertheless belonged to her, and that this was sufficient for the purposes of s. 60 of the Civ. Pro. Code, 1908. MAUNG LO v. MAUNG PYAUNG, **8 Ind. Cas. 992.**

(4)—*Adultery—Cruelty—Whether ground for divorce.*—*Held*, that among Burma Buddhists, the mere fact of the husband committing adultery or taking a lesser wife unaccompanied with cruelty does not of itself entitle the wife to claim divorce. The committing of adultery under the conjugal roof is not such cruelty as is contemplated by the Dhammathats, as affording a ground for divorce. MAEIN v. TE NAUNG, **5 L.B.R. 87=3 Ind. Cas. 715.** (4 L.B.R. 340, *R.*)

(5)—*Partition of property on divorce.*—Though it often happens that partition of goods evidences a divorce and a deliberate intention to terminate the status of marriage, it is not essential to the validity of the divorce which may be proved by other evidence of intention showing that a termination of married and not a mere temporary separation was deliberately intended. NGA LON v. MA MYAING, **L.B.R. 1872—1892, 206.** (L.B.R. 1872—1892, 14, 73, *R*: 8 C. 327, *Appr.*) [*R.*, 1 L.B.R. 7.]

(6)—*Husband or wife, right of, to obtain divorce without fault on, or consent of, other party—Necessity of surrender of joint property.*—In this case, the husband sued for divorce. The defendant opposed the suit on the ground that her husband had ill-treated her and forced her to leave him. She also denied that he was entitled to a divorce, by Buddhist Law, and the sole question for decision on appeal was, whether a husband, whatever his own conduct may have been, is entitled, by Buddhist Law, to obtain a decree for divorce against his faultless wife, on condition of surrendering to her the joint property and paying the joint debts. *Held*, on a consideration of the various texts relating to the question, that the texts in the Dhammathats establish the law, that one of the parties to a marriage can separate from the other, even if the latter does not consent,

Buddhist Law—continued.

—5.—Divorce—*continued.*

provided that the properties belonging to both and their liabilities should be divided. There is no insuperable legal bar to divorce against the party desiring it, where that party is prepared to surrender the share of the joint property to which he would, otherwise, be entitled. *Held*, therefore, that the plaintiff, in this case, having offered to resign the jointly acquired property to the defendant, he may be granted a decree for the divorce sought by him. MI-KIN LAT v. NGA BA SO, **U. B. R. 1905. Buddhist Law—Divorce, 3.** (U. B. R. 1897—1901, Vol. II, 28, *F.* 1 L.B.R. 7. U.B.R. 1902—1903, Vol. II, Bud. Law—Divorce, 6, 12, 2 B. 624, *R.*) [*R.*, U.B.R. 1909, Buddhist Law-Marriage, 1 U. B. R. 1910, 2nd Quarter, 30, 5 L. B. R. 114.]

(7)—*Child of divorced couple—Rights of inheritance—Maintenance or renewal of filial relations sufficient to entitle plaintiffs to inherit property acquired during second marriage.*—There seems to be a great weight of authority in favour of the proposition that a child of a divorced couple is entitled to inherit from the parent, with which he or she lives, and is generally not entitled to inherit from the other parent, (when that other parent has married again and has children by the second spouse) property acquired during the second marriage, and that visiting the other parent and receiving presents or even maintenance from him does not constitute a continuance or resumption of filial relations, such as would entitle the child to inherit such property. (U.B.R. 1897—1901, Vol. II, 116, 1 L.B.R. 161, *F.*; L B.R. 1893—1900, 299, 469, *Dist.*; 2 L.B.R. 85, *R.*) The fact that the divorced wife and the children received nothing at the time of divorce makes no difference, at any rate so long as it was not alleged that there was any property to divide. MA PAW v. MA MON, **14 Bur. L.R. 236=4 L.B.R. 272.**

(8)—*Suit for bare divorce—Maintainability.*—A suit for bare divorce, without and as distinct from partition of property, will not lie under Buddhist Law. NGA CHIT NYO v. MI MYO TU. **U.B.R. 1910, 2nd Qr., 30.** (U.B.R. 1897—1901, Vol. II. 28, *Affirmed*; U.B.R. 1902—1903, Vol. II, Bud. Law—Divorce, 6, *Overruled*; U. B.R. 1902—1903, Vol. II, Bud. Law—Divorce 12, *Superseded*; U.B.R. 1904—1906, Bud. Law—Divorce, 3, *R.*)

(9)—*Previously married and not married couple—Iterest in jointly acquired property—Distinction.*—There is no distinction in Buddhist Law as to the interest in jointly acquired property between the cases of a couple who have been previously married and a couple who have not been previously married. MAUNG HMON v. MAUNG MEIK, **U.B.R. 1902. 2nd Qr., Buddhist Law—Divorce, 1.** [*Rel, on*, U.B.R. 1907. 4th Qr., Buddhist Law, Marriage — Joint Property, 1, *R.*, 3 L.B.R, 66.]

(10)—*Civ. Pro. Code, 1882, ss. 42, 43.*—In a suit for divorce the cause of action is concerned with the conduct of the parties and not with the property. In a suit for partition of property the cause of action and the evidence would be entirely different. When under Buddhist law a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property, is maintainable. MAUNG THA SO v. MA MIN GUANG, **U.B.R. 1902—1903, Vol. II, Buddhist Law—Divorce. 12.** (Chantoon's leading cases, Vol. II, 31. U.B.R. 1897—1901, Vol. II, 28, U.B.R. 1902—1903, Vol. II, Buddhist Law—Divorce, 6, 22 M. 24, *R.*) [*Superseded*, U.B.R. 1910, 2nd Quarter, 30; *R.*, U.B.R. 1905, Fourth quarter, Buddhist Law—Divorce, 3; *Diss.*, 5 L.B.R. 114.]

(11)—*Suit for bare divorce without partition—Misconduct of husband.*—The rule laid down in U.B.R. 1897—1901; Vol. II, 28, that under Buddhist law a suit for bare divorce without partition of property will not lie, discussed, modified and partly dissented from. Misconduct on the part of a husband which may not in itself be sufficient to entitle a wife under Buddhist law to divorce may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent. MAUNG PYE v. MA ME, **U.B.R. 1902—1903, Vol. II, Buddhist Law—Divorce**, 6. (U.B.R. 1897—1901, Vol. II, 28, 1 L.B.R. 7, L.B.R. 1872—1892, 607, *Cited*). [*R.*, U.B.R. 1909. Bud. Law—Marriage, 1, U.B.R. 1905, 4th Quarter, Buddhist Law—Divorce, 3, U.B.R. 1902—1903, Vol. II, Buddhist Law—Divorce, 12. 5 L.B R. 114; *Overruled*, U.B.R. 1910, 2nd Quarter, 30.]

(12)—*As by mutual consent—Parties not previously married—Share of property, wife entitled to.*—In the case of a divorce obtained by the wife on account of the misconduct of the husband as by mutual consent, where the husband and wife have not been previously married, the wife is entitled on partition to one-third of property inherited by the husband during coverture and *vice versa* KIN KIN GYI v. MAUNG KAN GYI, **U.B.R. 1902—1903, Vol. II, Buddhist Law—Divorce, 1.** (U.B.R. 1897—1901, Vol. II, Divorce, 39, *F.*) [*R.*, U. B.R. 1902—1903, Vol. II, Civ. Pro. Code, 3; *Affirmed*, U.B.R. 1906, 4th Quarter, Bud. Law—Divorce, 19.]

(13)—*Ground for granting divoree.*—A divorce cannot be granted merely on the ground of an allegation that the destinies of the husband and wife are not cast together. Nor can a divorce be granted merely on the ground that the husband has not supported his wife for a year, the latter having left her husband's protection without reasonable cause. MATHIN v. MAUNG KYAW YA, **U.B.R. 1892—1896, Vol. II, 56.** (19 C. 469, L.B.R. 1872—1892, 391, 607, *R.*) [*R.*, 3 L.B.R. 175.]

(14)—*Legal representative of deceased debtor—Suit against.*—In a suit against the legal representative of a deceased debtor is not necessary to prove that assets have come into the hands of legal representative if there are assets of which he might become possess. But the decree should mention that it is against

***Buddhist Law*—continued.**

——5.—Divorce—*continued.*

legal representative in that character. (8 B. 309, *F.*) Though three years complete separation may of itself effect a divorce without any formal proceeding or declaration at the end of that time, the period could not be reckoned backward beyond the date of the judicial decree, which must be taken as the starting point for the calculation. MAUNG PO MAUNG v. L.H. R.L.P. NAGALINGAM CHETTY, **U.B.R. 1892—1896. Vol. II, 53.** (L.B.R. 1872—1892, 19, 28. 391, 20 W.R. 280, *R.*) [*R.*, 3 L.B.R. 175.]

(15)—*Cruelty.*—Where a suit is brought by wife for divorce with claim for half the joint property on the ground of cruelty by husband in taking a second wife, and in imputing adultery to first wife, decree was passed for divorce as by mutual consent and for equal division of property, *held* that the decree for a divorce as by mutual consent could not be sustained, and that the Court of first instance should have determined, whether the grounds alleged by plaintiff were such as to entitle her to a divorce, and should have granted or refused divorce accordingly. *Held*, also—That whether the matters alleged by plaintiff constituted cruelty or not in general, she had in this instance, by her conduct, acquiesced in or condoned the conduct of the husband and was not entitled to a decree. *Held*, further—that there having been no divorce, the husband was entitled to the custody of the property taken away by the wife. MAUNG KAUK v. MA HAN, **U B.R. 1892—1896, Vol. II, 48.** (4 A. 374, L. B R. 1872—1892, 19, 103, *R.*) [*R.*, 4 L.B.R. 340; *Cited*, U.B.R. 1897—1901. Vol. II, 489.]

(16)—*Execution of decree—Attachment of joint property of Buddhist husband and wife in execution of decree against husband alone—Divorce for purpose of defeating creditor.*—Practically a Burman wife and husband are for many purposes partners, and if the wife is not included in the proceedings along with the husband, it is much as if a decree were obtained against a partner individually and execution were sought against the partnership property as his solely. If it is sought to make both a Buddhist wife, and husband and the whole of the joint property of both liable for a debt, the wife as well as the husband should be made a party to the proceedings. When a Buddhist wife is not a party to a suit against her husband, and the decree is against the husband alone, only the husband's interest in the joint property of his wife and himself is liable to attachment and sale in execution. MA ME v. MAUNG GYI, **U.B R. 1892—1896, Vol. II, 45.** [*Cons.*, U.B.R. 1904. 2nd Qr., B.L.—Divorce, 1; *Rel. on*, U.B. R. 1907, 4th Qr., B.L.—Marriage — Joint Property, 1; *R.*, 3 L.B.R. 66.]

(17)—*Execution of decree—Collusive divorce to avoid attachment of property—Interest of Buddhist husband or wife in property acquired by the other alone upon divorce by mutual consent.*—S. 3, Ch. 12, Manugye says:—"A husband and wife both being noble mutually wish to separate. The husband having been allowed to take the clothes and ornaments of his rank, and the wife the clothes and ornaments of her rank, let the remainder of the property be thus divided; if there is any property that was acquired by the husband alone or by the wife alone, let that party who separately acquired it have two shares and the other one." MAUNG THA DUN AUNG v. MA MING, **U.B.R. 1892—1896, Vol. II. 41.** [*Rel. on*, U.B.R. 1904, 2nd Qr., Buddhist Law—Divorce, 1.]

(18)—Lettetpwa *and* payin *property—Arbitration award.*—Parties who mutually agree to refer questions of the division of property on divorce to the arbitration of *lugyis* are bound by the award of the *lugyis* unless and until it is set aside. MAUNG NYAN GYI v. MA TOK, **U.B.R. 1892—1896, Vol. II, 43.**

(19)—*Divorce on grounds of husband's misconduct—Husband previously married—Wife a maiden at time of marriage — Division of property.*—The rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married, and the other has not been married before. And in that case a wife who obtains a divorce from her husband on the ground of his misconduct is entitled to one-third of his separate property. MA E NYUN v. MAUNG TOK PYU, **U.B.R. 1897—1901, Vol. II. 39.** (L.B.R. 1872—1892, 219, *R.*, [*F.*, U.B.R. 1902—1903, Vol. II, C.P.C. 3.]

(20)—*Restitution of conjugal rights—Divorce by mutual consent.*—Where in a suit for restitution of conjugal rights, the question was whether there had been a divorce, and the Court of first instance held that there had been, while the lower appellate Court held that there could have been no consent to a divorce because the girl's mother had brought pressure to bear, and reversed the decree of the Court of first instance, *held*—in second appeal that what the Court had to decide was whether there was a divorce by mutual consent. It was not necessary that there should be a deed of divorce, or that the divorce should have taken place before elders. MA AMI GYI v. MAUNG HMUT, **U.B.R. 1897—1901, Vol. II, 37.**

(21)—*Rule of Buddhist law with respect to the disposal of property upon divorce on the ground of the wife's adultery, whether the husband and wife had been married from youth, but separated, and subsequently re-united.*—There are two rules of Buddhist Law on the subject of a divorce for adultery, one of them relating to the case of husband and wife married from their youth, and the other to the case of husband and wife where there has been a previous marriage by one or both, or at least by the wife. When a woman has been married before, the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered

***Buddhist Law*—continued.**

——5.—Divorce—*continued.*

into a subsequent union which has to be dissolved. On the other hand, when the woman has been only once married there is no body to be considered but herself and the children, and as the latter are the offspring of the husband, it is probably immaterial, so far as they are concerned, to which parent the property goes, as they would eventually inherit from one or the other. The same, *mutatis mutandis*, would apply in the case of a husband whom the wife was entitled to divorce for misconduct. Where the parties had married no stranger, but only each other, they must be regarded as the husband and wife of youth. MAUNG YIN MAUNG v. MA SO, **U.B.R. 1897—1901, Vol. II, 34.** (U.B.R. 1892—1896, Vol. II, 116, U.B.R. 1897—1901, Vol. II, 28, *R.*)

(22)—*Cause of action.*—Under Buddhist Law a suit for bare divorce without division of property will not lie, MA GYAN v. MAUNG SU WA, **U.B.R. 1897—1901, Vol. II, 28.** (II B. L.R. 129, 10 B. 152, *D.*) [*Affirmed*, U.B.R. 1910, 2nd Qr., 30 *R.*, U.B.R. 1897—1901, Vol. II, 34, 5 L.B.R. 114, U.B.R. 1905, 4th Qr., Buddhist law—Divorce 3, U.B.R. 1902—1903, Vol. II, Buddhist law—Divorce 6, 12.]

(23)—*Suit for divorce—Claim to partition of property—Causes of action distinct.*—A suit for divorce and for division of property do not constitute a single cause of action. (U.B.R. 1897—1901, Vol. II, 1, *Diss.*) Partition of property is not an essential feature of a divorce. The termination of the marriage status in itself appears to be a sufficient cause of action, and till this question is settled the grounds for partition of the property do not arise and may vary according as the decree for divorce is based on findings of fact as to which party is in fault. A suit for divorce need not necessarily contain a prayer for division of the property. MAUNG THA CHI v. MA E MYA, **1 L.B.R. 7.** [*Overruled*, 5 L.B.R. 114, U.B.R. 1905, 4th Qr., Buddhist law—Divorce, 3.]

(24)—*Divorce—Validity.*—The existence of either of the two conditions, namely, either a decree or order of Court, or a written agreement executed by both parties in presence of respectable witnesses, is not essential to the validity of a divorce between Burman Buddhists. MI HNIN NGON v. NGA AUNG, **L.B.R. 1872—1892, 73.** [*R.*, L.B.R. 1872—1892, 206.]

(25)—*Buddhist law according to Ch. V of the Dhammathat regarding a wife who is mad, etc.—Intimation of divorce by writing—Weakness and distraction of mind.*—The mere sending to the wife a writing intimating the intention to divorce her (the wife being at the time out of her mind) does not constitute a valid divorce. MI CHIN MARI v. MITU MA, **L.B.R. 1872—1892, 74.**

(26) — *Second marriage — Polygamy.* — At Buddhist law where no special custom exists, a husband who in the life-time of his first wife marries a second wife, without the first wife's consent, does not thereby commit a fault against the first wife. Such a second marriage does not in itself constitute in Lower Burma a ground for divorce. MA IN THAN v. MAUNG SAW HLA, **L.B.R. 1872- 1892, 103.** [*R.*, L.B.R. 1872—1892, 114, 202, 4 L.B.R. 340, 175 =10 Bom. L.R. 41=12 C.W.N. 220, U.B.R. 1892—1896, Vol. II, 48 ; *F.*, 5 L.B.R. 87.]

(27)—*Re-marriage—Partition of property—Procedure—Finding on issues.*—The presumption in the absence of special facts is that the affairs of people divorcing and re-marrying are settled definitely at the divorce or the re-marriage. (L.B.R. 1872—1892, 14, *F.*) Courts ought to record distinct findings on each issue. MAUNG SHWE LIN v. MI NYEIN BYU, **L.B.R. 1872—1892, 175.** [*R.*, L.B.R. 1893—1900, 662.]

(28) — *Divorce — Inheritance—Children of divorced wife.*—It is a principle of the Buddhist law that the children of the divorced wife shall not inherit the property of the father acquired after his marriage with a second or third wife unless they continue to live and to plan and work with him. MA SHWE GE v. NGA LAN AND NGA ON, **L.B.R. 1872—1892, 296.** [*R.*, U.B.R. 1892—1896, Vol. II, 159 L.B.R. 1893—1900, 469, U.B.R. 1897—1901, Vol. II, 116, 176 ; *Rel. on*, L.B.R. 1893—1900, 299 ; *F.*, 4 L.B.R. 272, 14 Bur. L.R. 236 ; *D.*, 1 L.B.R. 161.]

(29)—*Essentials—Procedure—Plaint— Petition.*—A divorce cannot be had merely because one of the parties has no love for the other, or does not comply with the desires of the other. Desertion according to the Manu Kye, is no doubt a good ground for divorce; but there is this condition attached, namely, during the periods of time prescribed therein the husband should not have supplied anything to the wife. If a plaintiff in a suit to divorce establishes any of the grounds which the Dhammathats recognize as good grounds for divorce he would be entitled to a divorce, even if such grounds are not among those particularized in the judgment of the special Court. In suits for divorces the proper procedure is to present a plaint and not a petition for divorce, the case being not governed by the Indian Divorce Act, and the action being one of a civil nature. Where a petition for divorce is presented with a Court-fee required for a plaint, the Court has power to allow the person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint. MAUNG SO MIN v. MATA, **L.B.R. 1872—1892, 610.** [*R.* U.B.R 1905, 4th Qr. Buddhist law—Divorce, 3.]

(30)—*Suits for divorce between Burman Buddhists—Indian Divorce Act inapplicable—Commencement by plaint—Divorce—Burman Buddhists—Desertion proper by wife, when a valid ground for divorce—Decision of the Special Court in (Nga Nwe v. Mi Su Ma)—Husband entitled to divorce, when—Buddhist*

***Buddhist Law*—continued.**

——5.—Divorce—*concluded.*

Law and authority of Dhammathats.—In suits for divorce, among Burmese Buddhists, the proper procedure is to present a plaint, and not a petition for divorce, such cases not being governed by the Indian Divorce Act, and the suits being of a civil nature. A divorce cannot be had among Burman Buddhists merely because one of the parties has no love for the other, or does not comply with the desires of the other. Desertion, according to the *Manu Kyay*, is not doubt a good ground for divorce, but, there is this condition attached, namely. during the period of time prescribed therein (one year) the husband should not have supplied anything to wife. [*R.*, U.B.R. 1892—1896. Vol. II, 56.] The only deeds on the part of the husband or wife which would justify a divorce among Burmese Buddhists are matricide, parricide, killing, stealing, shedding the blood of Buddah rahan, heresy and adultery. If a plaintiff in a suit for divorce establishes any of the grounds which the Dhammathats recognise as good grounds for divorce, he will be entitled to divorce, even if such grounds are not among those particularised in the judgment of the Special Court above referred to. Texts in the *Munu Kyay* Dhammathat *considered*. MOUNG TSO MIN v. MAH HTAH, **19 C. 469.**

See BUDDHIST LAW--HUSBAND AND WIFE, L.B.R. 1872—1892, 27, 49, 391.

See BUDDHIST LAW—INHERITANCE, L.B. R. 1872—1892, 212.

Husband's suit for divorce—Wife's denial of allegations of misconduct—Cause of action for suits for divorce and for partition—Whether it is necessary to claim partition in the suit for a divorce—*See* CIV. PRO. CODE, 1908, O. II, rr. 1, 2, 8 A.L.J. 739, P.C.

First suit for divorce—Subsequent suit for partition or other remedies—*See* CIV. PRO. CODE, 1908. O. II, r. 2, 5 L.B.R. 114.

Right to guardianship of children after their parents' divorce—*See* GUARDIANS AND WARDS ACT, 1890, ss. 17, 19 (*b*), 5 L.B.R. 133.

——6.—Ecclesiastical.

(1)—Wuttagan *land--Duties of* Thathanabaing—Res judicata—*Limitation.*—A piece of *wuttagan* land was originally the subject of a dedication by plaintiff's grandfather to a monastery and then confiscated and re-dedicated by the Burmese King, and plaintiff, a layman, applied to the *Thathanabaing* for its restoration. The monks in occupation, the defendants, objected pleading the confiscation, and the *Thathanabaing* and his council decided that the land should be restored to the plaintiff. *Held* that the ecclesiastical authorities were competent to make such an order, and the defendants could not object to it, and that questions of *res judicata* and limitation did not arise in such a case. U TEIK KA v, NGA TIN BYU, **U.B.R. 1910, 4th Qr., 78.** (U.B.R. 1897—1901, Vol. II, 52, *R.*)

***Buddhist Law*—continued.**

——5.—Ecclesiastical—*continued.*

(2)—*Civil Court whether can give effect to an order of the* Thathanabaing *or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court.*—A Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court. The decision of the *Taungbyin Sayadau* cannot be treated as if it were a judgment and decree of a Civil Court, and it cannot be executed without even giving the other party an opportunity of showing cause against its execution. So far as the Civil Courts are concerned, the Sanad is merely an authoritative declaration that for the time being the *Taunggwin Sayadau* is the ecclesiastical who has supreme control as *Thathanabaing*. SHIN KUTHALA v. SHIN SANDA, **U.B.R. 1908, 2nd Quarter, Buddhist Law—Ecclesiastical, 1.** [*R.*, U.B. R. 1909, 1th Qr., Buddhist Law—Ecclesiastical, **5.**]

(3)—*Authority of*—Thathanabaing—***Jurisdiction of Civil Courts.***—Where a monastery is *thingika* property which was dedicated to the monastic body before the sect to which the defendants (schismatics) belonged came into existence, *held* that, according to ancient custom, the *Thathanabaing* had authority to decide disputes relating to it. It is not the province of the Civil Courts to decide whether an order of *Thathanabaing* or any other Ecclesiastical authority is strictly in accordance with the *Vinaya* or not. A defendant may object to the jurisdiction of a Civil Court, but if he declines to appear to contest the case on the merits, he does so at his peril, and, if, on appeal, the question of jurisdiction is decided against him, he will not be allowed to re-open the case on the merits. U. KUTHALA v. U. SANDA, **U.B.R. 1910, 2nd Qr. 35.**

(4)—*Civil Courts, duty of — Civil Courts should abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction.*—The Civil Courts are bound by the decisions of the Buddhist Ecclesiastical authorities in matters within their competence and they should also abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. U. WAYAMA v. AHSAYA, **U.B R. 1902—1903, Vol. II, Buddhist Law—Ecclesiastical 1.** (U.B.R. 1897—1901, Vol. II, **42,** U.B.R. 1892—1896, Vol. II, 59, 72, *R.*)

(5)—*Award by ecclesiastical superior—Effect either as order of ecclesiastical authority or as ordinary arbitration award—Buddhist priesthood—Succession of one member to another in respect of religious buildings and other kinds of property—Possession*—*Dispossession — Specific Relief Act, s. 9.*—A dispute having arisen between two Buddhist monks, the appellant and respondent, as to the right of inheritance and possession in a monastery and other property left by a deceased member of priesthood, the matter was referred by the *Thathanabaing* or

Buddhist Law —continued,

——6.—Ecclesiastical —*continued.*

head of the Buddhist *hierarchy* to the *Megwadi Sayadaw* and other *Sayadaws* or high ecclesiastical dignitaries, for decision. An award was given in favour of respondent-defendant, and the appellant-plaintiff was dispossessd irregularly under orders of the district executive authorities. In the litigation that ensued an unsuccessful attempt was made to confine the matter, to begin with, to proceedings under s. 9 of the Specific Relief Act. The action was eventually fought on the question of the validity of the decision of the *Megwadi Sayadaw*, which was impugned as not final on the ground that leave had been given for forther reference on appeal. It was clear enough from the evidence that that award was pronounced by the ecclesiastical authorities appointed by the *Thathanabaing* or head of the Buddhist church for the purpose. *Held.*—If it was an ecclesiastical decision in an ecclesiastical matter, the ruling of this Court in Circulars No. 72 of 1893 and No. 84 of 1895 would apply, and there would be no room for questioning the action of the ecclesiastical superiors of the parties within the scope of their authority. If on the other hand, the award was of a secular nature or partly secular and partly ecclesiastical, it would make little practical difference, for it had been shown that the plaintiff himself agreed to the reference to the arbitrators, or whatever was their proper character, being made. Either way the plaintiff was bound. The only cause he could show against the award now was its alleged want of finality, and this objection was founded on the assertion that leave was given to appeal from the decision. By this was meant apparently not exactly an appeal to higher authority but a reference to some other ecclesiastical law expert to hear and decide the case. Supposing, however, that such leave was given by the *Megawadi Sayadaw*, and that he could give it, which was doubtful from the evidence adduced by the plaintiff himself as to the *Thathanabaing* objecting to order and refusing to return it to plaintiff, still the plaintiff took no advantage of such permission and he could not, of course, be allowed to keep the matter open indefinitely. Apparently, however, the truth of the matter was that the *Thathanabaing* gave the plaintiff fifteen days within which to appeal or make a reference. The plaintiff did nothing, and after the expiry of the time allowed, the order of the *Thathanabaing* was issued to carry into effect the award of the *Sayadaws*. In whatever aspect, therefore, the award was viewed, it would seem that the appellant-plaintiff has no good cause now for challenging its validity. U. OKGANTHA v. U. THIRI, **U. B. R. 1892—1896, Vol. II, 82.** [*Cited*, U.B.R. 1897—1901. Vol. II, 45.]

(6)—*Ecclesiastical jurisdiction of the hierarchical authorities of the Buddhist community —Suit for ejectment from a Kyaung*—Poggalika *and* Thinkiga *gift.*—Where the plaintiff-respondents sued to eviot the defendant-appellant

Buddhist Law—continued.

——6.—Ecclesiastical —*continued.*

from a monastery on the ground that they were the beneficial owners thereof or successors to the original owner to whom the monastery had been given by the King of Burma as a *poggalika* gift; that they were recognised as such by the *Tathanabaing*, and that the defendant declined to leave the monastery though ordered to do so by the *Thathanabaing*, and the defendant denied the status of the appellant and the validity of the *Thathanabaing's* order, *held*—that the plaintiffs were the contituted authorities, that it was for the defendant to obey them, subject to appeal to their ecclesiastical superiors, and that the Court of first instance had rightly evicted him. U. TE ZEINDA v. U TEZA, **U.B. R. 1892—1896. Vol. II, 72.** (U.B.R. 1892—1896, Vol. II, 59, 17 M. 222, *R.*) [*R.*, U.B. R. 1902—1903, Vol. II, Buddhist Law—Ecclesiastical, 1.]

(7)— *Gift* — Poggalika — Thingika — *Gifts having reference to a future state of existence are divided into two kinds*—Poggalika *and* thingika —In *poggalika* gifts, the person to whom the offering is made has a right to keep it. In *thingika* gifts, it becomes the property of the chief of the assembly of priests. After a supporter of religion has made such gifts, he has no right to any further claim on them." MAUNG TALOK v. MA KON, **U.B.R. 1892—1896, Vol. II, 78.**

(8)—*Suit for ejectment from a kyaung*— Poggalika *and* thingika *gifts*—*The ceremony of making a libation of water in the consecration of land and buildings*—*Authority of the* Thathanabaing *and Thudama Council in matters of ecclesiastical discipline and control.*—It is the desire of the British Government to protect the Buddhist faith as far as it is in their power to do so. The orders and proceedings of the Buddhist ecclesiastical authorities so long as they keep within their jurisdiction and do nothing contrary to law, cannot be questioned in the Civil Courts. U. TE ZA v. U. PYINNYA, **U.B.R. 1892—1896, Vol. II 59.** [*R.*, U.B. R. 1892—1896, Vol. II, 72, U B.R, 1903, 2nd Qr., Buddhist Law—Ecclesiastical, 1, U.B.R. 1909, Buddhist Law—Ecclesiastical, 5. U.B. R. 1902—1903, Vol. II, Buddhist Law—Ecclesiastical, 1.]

(9)—*Duly constituted Buddhist ecclesiastical authority—Decision of—Enforceable by Civil Court.*—In dealing with cases of this kind, *viz.*, suits to enforce an order of the *Tabayin Sayadaw*, the Courts have to ascertain that the matter is one within the jurisdiction of the Buddhist ecclesiastical authority and that a duly constituted authority has given a decision. It is not necessary that a decision in a matter within his jurisdiction by a duly constituted Buddhist ecclesiastical authority should be confirmed by a Civil Court. The duty of the Civil Court is to enforce it, if it is shown to be a decision enforceable. WUN CHIT v. U. ZAWTA, **U.B.R. 1897—1901, Vol. II, 52.**

Buddhist Law—continued.

——6.—Ecclesiastical—*concluded.*

U.B R. 1892—1896, Vol II, 59, U.B.R. 1897—1901, Vol. II, 42. 45, *R.*) [*Cited*, U.B.R. 1910, 4th Qr., 78]

(10)—*Ecclesiastical jurisdiction — Suit for ejectment from a monastery—Appointment of* Thathanabaing. In a suit by a pongyi to eject another pongyi from a monastery in accordance with a decision purporting to be that of the *Thathanabaing*, before the Pakan Sadaw, called the Thamudi Thathanabaig and also before 12 Sayadaws, called Thathanabyu Sayadaws, these authorities decided in the favour of plaintiff, the cause being heard *ex parte*. The suit was to enforce these decisions. The defendant among other pleas, denied the jurisdiction of the Pakan Sayadaw and of the Sayadaws who had given the decisions in question and the Lower Courts held that the Pakad Sayadaw had been duly elected and that the Courts should now recognize him as the *Thathanabaing*. *Held*, in second appeal that it was not shown that the Pakan Sayadaw could be recognized by the Civil Courts as *Thathanabaing* of Burma and that it was not shown that the authority of the Sayadaws had been accepted or recognized. The decision of the Lower Courts was reversed. U THANWAYA v. U KETHAYA, **U.B.R 1897—1901, Vol. II, 45.** (U.B.R. 1892—1896, Vol. II, 59, 72, 82, U B.R. 1897—1901, Vol. II, 42, *Cited.*) [*Affirmed*, U.B.R. 1897—1909, Vol. II, 52.]

(11)—*Suit for possession of a* kyaung—*Authority of a Budahist ecclesiastical authorities in ecclesiastical matters.*—Until the contrary is established not only the *Thathanabaing* in Council, but also other Buddhist ecclesiastical authorieies have jurisdiction in eccleslastical matters. This being so, not only should the Civil Courts be bound by the decisions of these authorities in matters within their competence, but they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. U THATDAMA v. U MEDA. **U.B.R. 1897—1901, Vol. II, 42.** (U. B.R. 1892—1896, Vol. II, 59, 72, *R.*) [*Cited*, U.B.R. 1897—1901. Vol. II, 47 ; *Expl.*, U.B. R. 1897—1901, Vol. II, 52.]

——7.—Gift.

(1) — *Death-bed gift.*—Ordinarily Buddhist Law is not applicable to gifts. (U.B.R. 1892—1896, Vol. II, 400, *R.*) A promise to give for no consideration will be valid in Burma without delivery of possession, provided that, in other respects, it fulfils the conditions specified in s. 25 (1), Contract Act. Whatever law may be applied to ordinary gifts, death-bed gifts must be held to be a question of inheritance, to which Buddhist Law is applicable. MA PWA SWE v. MA TIN NYO, **U.B R. 1902—1903, Vol. II, Buddhist Law—Gift, 1.** [*R.*, U.B.R. 1908, 3rd Qr., B.L.—Gift, 7. U.B.R. 1907, 1st Qr. B.L. —Gift, 1, U.B.R. 1902—1903, Vol. II, Probate and Administration, 3.]

(2)—*Gift, revocation of— Buddhist Law not applicable to gifts—Succession—Inheritance—*

Buddhist Law—continued.

——7.—Gift—*continued.*

Meaning of terms—Burden of proof—Settlement of issues—Need for making parties clearly understand points on which evidence is required.—It is undoubtedly the duty of the Courts to see that the issues framed are clearly understood by both parties, and this is particularly necessary when the issues are of a technical character, or are drawn in a technical manner, and when, as is so frequently the case in Upper Burma, the parties are ignorant and inexperienced in our judicial ways. It may easily happen that a party omits to produce essential evidence from sheer inability to comprehend what is wanted, and care should always be taken to point out distinctly the matters upon which the production of evidence is required. S. 53 of the Civil Justice Regulation specially gives ample powers to the Courts to ensure the production of evidence which they themselves deem necessary in the interests of justice even when the parties fail to do what they ought on their own behalf. Suit by Burmese father for recovery of land transferred ten years before to his daughter and her husband, solely enjoyed by them ever since, and entered in their names and as their property in the revenue records. Suit brought on allegation of temporary transfer, but trial of case confined to question of power of father to revoke gift once made to child and followed by delivery of possession. *Held*—that the burthen of proof was entirely on the plaintiff, who was bound to show that the ownership of the land was not that of the defendants in possession, and that the question was not one of succession, inheritance, or a religious usage or institution so as to make Budhist law the rule of decision must be found in some other law, if any, for the time being in force, and otherwise in the principles of equity, justice and good conscience. Such other law would, to some extent, by the Contract Act s. 25 and Expl. 1, under which the gift having been actually made would be valid as between donor and donee in the absence of any incident that could be attached to it not inconsistent with the provisions of the Act. Such incidents could not be inferred from the passages in the Dhammathats permitting parents to recall gifts made to their children those passages being of the nature of religious or moral precepts which could not be applied as binding in the practical affairs of life, unless their general acceptance as having such force were proved as a matter of custom among the people. MAUNG AT GYI v. MA U, ME, **U.B R. 1892—1896, Vol. II. 400.** [*R.*, U.B.R. 1907, 1st Qr., Buddhist Law—Gift, 1, U.B.R. 1897—1901, Vol. II, 421, U.B.R. 1892—1896, Vol. II, 377, U.B.R. 1902—1903, Vol. II, Buddhist Law—Gift, 1.]

(3)—*Possession—What is requisite to transfer possession*—Thingika *gift of mortgaged land—Assent of son to gift by father not necessary—No vested interest possessed by son in father's estate before father's death—Diversion of estate*

from natural heirs to religious endowment should be strictly looked into.—S. 43 of the sixth chapter of the *Manugye Dhammathat* deal with the mutual power over the property of each other pertaining to teacher and scholars, parents and children, husbands and wives, masters and slaves It discusses the case of teacher and scholar and says the others are the same. It is obvious that the case treated of is that of joint property, and the object is to lay down some rules of partnership. There is no authority for holding that a son can exercise any restraint over the alienation of property by his father. It is necessary for the Courts to look strictly into transactions by which the estates of Buddhists are diverted from their families. MAUNG HMON v. UCHO, **U.B.R. 1892—1896, Vol. II, 397.** [*Cited*, U.B.R. 807—1901. Vol, II, 62.]

(4)—*A gift by a Buddhist monk to take effect after his death.*—A gift made by a Buddhist monk, not accompanied or followed by delivery of possession, and intended to take effect only on the death of the donor, is not valid. U THATHANA v. U AWBATHA, **U.B.R 1897—1901, Vol. II. 62.** (U.B.R 1892—1896. Vol II. 397, U.B.R. 1897—1901, Vol. II. 52. L.B.R, 1872—1892, 70, *R.*) [*R.*, U.B.R, 1907, 1st Qr., Buddhist Law—Gift 1.]

(5)—*Gift—Validity—Necessity for strict proof especially of transfer of possession, which is the crucial test.*—Actual parting with possession is the only true test of the completion of a gift, and Burmans evade that final and crucial test if they possible can. The result is that, as a general rule a genuine gift is not commonly made except for religious purposes and under special circumstances. The safest course in all matters of this kind is to insist on strict proof, and in this case, the evidence was most unsatisfactory. MAUNG SHWE THWE v. MA SAING, **U.B.R. 1897—1901, Vol. II, 59.** [*Cited*, U.B.R. 1897—1901, Vol. II. 62.]

(6)—*Gift by Buddhist monk.*—Under Buddhist law a layman upon embracing a religious life becomes *ipso facto* divested of all property, which thereupon vests as it would upon his divorce or decease. MA PWE v. MAUNG MYAT THA, **U.B.R. 1897—1901, Vol. II, 54.** [*Cited*, U.B.R. 1905, 4th Qr., Buddhist Law—Inheritance, 11.]

(7)—Bona-fide *purchaser — Notice* — The Courts will protect a *bona fide* purchaser for value, without notice, against a person claiming under a deed-of-gift not followed by possession. NGA MYAT OK v. NGA BO. **L. B. R. 1872—1892, 11.**

(8)—*Revocation.*—The right in property obtained by gift, where the gift has been accepted under a condition to support the donor, will terminate if the donee neglects to fulfil the condition. Every gift from a parent to a child does not raise by necessity the inference that the child is bound, by a condition of the gift, to support the parent in case of need. In cases other than those of inheritance, succession, marriage, and religious usage, the Court should, before applying the Budhist Law, look at the effects of their decisions and consider whether that law is equitable. Although under Budhist law a donor, who has become poor, may revoke his gift, the Court declined to apply the law where a gift of immoveable property had been perfected by ten years' possession, and where the donee's name had been registered as owner. MRA DO AUNG v. SHWE, **U. L. B. R. 1872—1892, 22.** [*Appl.*, L. B. R. 1872—1892, 197; *R.*, U. B. R. 1892—1896, Vol. II, 400, L.B.R. 1872—1892, 219.]

(9)—*Possession—Revenue Register.*—Except in the special case of gift made to a child on the occasion of entering the priesthood, a gift is not under Buddhist law complete unless it be followed by a transfer of possession, even though there be a written deed of gift, or though the name of the donee at the instance of the grantor be entered in the revenue register. MAUNG NI v. NGA PO MIN, **L B.R. 1872—1892, 44.** (4 B.H.C. A.C. 31, *R.*) [*F.*, L,B.R. 1893—1900, 504; *R.*, U.B.R. 1892—1896, Vol. II, 159, L.B.R. 1872—1892, 70; *Appl.*, L.B.R. 1872—1892, 197.]

(10)—*Priesthood.*—Absence of delivery of possession does not invalidate a gift given on the occasion of the child entering the priesthood. The Courts should not, under this law, decree immediate and exclusive possession of the gift to the donee or his representative, as against his parents, the donors. That is to say, the Courts cannot decree possession of the gift to the donee until the death of his parents. NGA PAN U v. MI KYU, **L.B R. 1872—1892, 30.** [*R.*, U.B.R. 1907, 1st Quarter, Bud. Law—Gift, 1; *Appl.*, L.B.R. 1872—1892, 197.]

(11)—*Possession.*—Where a gift is made for the purposes of evading the ordinary Budhist rules of inheritance, the Budhist Law applies. There is nothing to prevent a man from making a gift to one or more of his children in the absence of others. A gift of property made by a father to his children holds good, and such property is not liable to partition after his death, provided that delivery of possession has taken place. The law requires strict proof of delivery, and delivery cannot be presumed from mere continuance of possession, at any rate in the case of sons actually living with and dependent on an aged father. MAUNG PAN U v. MA KYI NYO, **8 Ind. Cas. 1200** (U.B.R. 1907—1908, Budhist Law—Gift, 4, *R.*; U.B.R. 1897—1901, Vol. II, 59, 3 L.B.R. 8, *F.*)

(12)—*Death-bed gift—Validity.*—*Held*, that, according to the Budhist law the gift of an entire estate to a stranger, made by a person *in extremis*, though accompained by delivery of possession, is void as against the natural heirs. U. NAGA v. MAUNG HLA. **U.B R. 1908, 3rd Qr., Buddhist Law—Gift, 7.** (U.B.R. 1902—1903, Vol. II, Budhist Law—Gift, 1, *R.*)

(13)—*Deed of gift without delivery of possession—Registration of deed, effect of.*—It has been held in this Court, in several cases, that deli-

Buddhist Law—continued.

—7.—Gift—*concluded.*

very of possession is necessary to complete a gift among Buddhists in this province. (L. B. R. 1872—1892, 44, L. B. R. 1893—1900, 9 U B Cir. 87 of 1893, *F.*) *Held* that the deed of gift though duly registered does not become effective if no pessession is given. GURA v. SAN TUN BAW **L.B.R. 1893—1900, 504.** (20 C, 454, *F.*)

(14)—*Gift to priests*—Poggalika *and* Sangika *gifts—Individual and general gifts—Claim on* poggalika Kyaung *by recipient after he has left the priesthood.*—A gift made with a view to future existence, whether *poggalika* or *sangika*, always retains its religious character and cannot be claimed back for secular uses. In the case of *poggalika* gifts the recipient can dispose of the same to any other priest. In the absence of his having specifically disposed of the same to some other priest on his death, the original donor has a right of selecting another individual priest as the recipient of his offering. Failing the exercise of such selection the gift would become *angika*. Property derived from parents or otherwise acquired purely as defined in s. 409 of the Digest does not become *sangika*, but reverts to the natural heirs of the deceased. In the case of *Poggalika Kyaung* the recipient cannot after he has left the priesthood make a gift of it to another priest; it ceases to become his personal property when he leaves the priesthood. MAUNG ON GAING v. U PANDISA, **L.B.R. 1893=1900, 614.**

(15)—*Parents making gift to children at the time of entering priesthood—Delivery of possession also made—Property in donee—Power of disposal.*—Where there has been delivery of possession of the property given to children at the time of entering priesthood, the property passes absolutely to the donee, and the parents have no longer any power of disposal over it. HLA U v. AUNG DUN, **6 L.B.R. 32.** (L.B.R. 1872—1892, 2nd Edition, 30, *D.*)

(16)—*Gift by parent to a Koyin on his entering the priesthood—Possession taken by donee—Gift irrevocable by parents—Subsequent disposition by parents invalid.*—In the case of a gift by parents to their son on his entering the priesthood, the parents can only sell and utilize the property gifted, where delivery of possession has not taken place and where the property given remains in possession of the parents. Where there has been delivery of possession of the property given, the property passes absolutely to the donee and the parents have no longer any power of disposal over it. MA HLA U v. MG AUNG DUN, **11 Ind. Cas. 862.**

—8.—Husband and Wife.

See BUDDHIST LAW—DIVORCE.

See BUDDHIST LAW—MARRIAGE.

(1)—Lettetpwa *and* Hanpazon *property—Property acquired after marriage, interest of husband or wife in—Power of husband to alienate property which he has inherited after marriage.*

Buddhist Law—continued.

—8.—Husband and wife—*continued.*

—The wife or husband has an interest in property acquired by the other by inheritance after marriage, when they are living together and helping each other. In considering what power the husband has of alienating property which he has inherited after marriage, the Court should be guided by the rules applicable to a partition upon divorce when neither party is in fault. The rule as to equal division upon divorce, only applies to property conjointly acquired after marriage. MAUNG PO SEIN v. MA PWA, **L.B.R. 1893—1900, 403.** (L.B.R. 1872—1892, 110, 113, L.B.R. 1893—1900, 295, *F.*)

(2)—*Husband and wife—Power of husband to alienate joint property of himself and wife—Whether alienation, transfer of his share and interest.*—In this case, a Burmese Buddhist husband had executed a deed of sale of the *hanpazon* property of himself and his wife. The lower Courts found that it had not been proved that the wife was aware of, or that she had consented to, the sale. It was, also, clear that the vendee knew that the wife was interested in the land and yet chose to take a conveyance from the husband alone. The following questions had to be decided and they were referred to a Bench of the Court:—(1) whether a Burmese Buddhist husband can validly sell or alienate the *hanpazon* property of himself and his wife without her consent or against her will (2) Whether such a sale by the husband, made without the consent of his wife, constitutes a valid transfer of his share and interest in the property sold. *Held*, that no grounds having been made out for disturbing the decision of Mr. Fulton in the case of Ma Thu v. Ma Bu that a Buddhist husband cannot sell the joint property of himself and his wife without his wife's assent, express or implied, the first question must be answered in the negative; *i.e.* subject to the reservations stated in the above-mentioned Ma Thu's case, a Buddhist husband has no power to make a valid sale of the joint property of himself and his wife without her consent or against her will (L.B.R. 1872—1892, 578, *F.*; L.B.R. 1872—1892, 19, 1 L.B.R. 11 U.B.R. 1892—1896, Vol. II, 303, *R.*,) ; and that in view of the various decisions forming distinct authorities for the position that, under Buddhist law, it is competent for a husband to validly alienate his share alone of his joint property of himself and his wife, the second question must be answered in the affirmative *i.e.* a sale by a Buddhist husband of the joint property of himself and his wife, made without her consent does constitute a valid transfer of his share and interest in the property sold. MA SHAWE U v. MA KYU, **3 L.B R. 66, F.B.** (1 L.B.R. 184, *Overruled* ; U.B.R. 1892—1896, Vol. II. 45, 204, U.B.R. 1902—1903, Vol. II. Ex. of decree 1, U B.R. 1904, Buddhist Law—Divorce 1. 1 L.B. R. 198, 3 L.B.R. 8 B.L.R. 1893—1900, 568, 2 L.B.R. 167, *R.*) [*R.*, U.B.R. 1907, 4th Quarter, Buddhist law—Marriage—Joint Property, 1.]

***Buddhist Law*—continued.**

——8.—Husband and wife—*continued.*

(3)—*Act done by husband in pursuance of common business binding on wife—Sale of immoveable property by husband without knowledge of wife—Apparent acquiescence subsequent to sale, by wife, no proof of consent—Presumption.*—For many purposes Burmese husbands and wives may be regarded as partners, and, where the husband manages a business on behalf of himself and his wife, acts done in pursuance of the common business would no doubt bind the wife; but this principle cannot, we think, be applied to such a transaction as the sale of immoveable property belonging to both. In such a case further evidence is required, besides the fact that the transaction was in some way connected with the business, in which it might perhaps be presumed that the wife made no open protest against the sale. Because a wife consents to or acquiesces in a mortgage the presumption does not arise that she also assents to a sale of the property. Nor should apparent acquiescence subsequent to the sale be regarded as proof of consent by the wife to such sale. MAUNG TWE v. RAMEN CHETTY, **1 L B R. 11.** (L.B.R. 1893—1900, 37, 568, L.B.R. 1872—1892, 578, *R.*) [*R.*, 3 L.B.R. 66.]

(4)—*Divorce—Joint property.*—Where husband and wife both assent to divorce and no fault is proved, each is entitled to take back property brought at marriage, and to an equal division of the property that may have been acquired conjointly during marriage. MI DWE NAW v. MAUNG TU. **L.B.R. 1872—1892, 14** [*R.*, L.B.R. 1872—1892, 175, 206.]

(5)—*Joint property.*—Three years' absence with neglect on the part of the husband to provide the wife with the means of subsistence, is required to give the wife the right of re-marriage. Until the expiration of that period the relation of marriage subsists, unless, of course, it is put a stop to by some formal act of separation. The Burmese law recognizes the husband as the lord of his household. The wife cannot retain possession of joint property in opposition to her husband. So long as marriage subsists the Courts cannot decree an absolute dominion over it to either husband or wife; but the husband, rather than the wife, is entailed to retain possession of it in trust for both. MAUNG KO v. MA ME. **L B R. 1872—1892. 19.** [*R.*, U.B.R, 1892—1896. Vol. II, 48, U.B.R. 1892—1896 Vol. II. 53 3, L B R. 66, 3 L.B.R. 175. L.B.R. 1872—1893, 126, L.B.R. 1872—1892, 578, U. B.R. 1892—1896, Vol. II, 303.]

(6)—*Divorce—Profession of faith—Apostacy—Estoppel under s. 115 of the Evidence Act.*—In a suit for divorce from a Mahomedan husband, brought by a Burmese woman professing the Buddhist faith, but at the time of her marriage simulating conversion to Islam, and married with Mahomedan ceremonies, the Mahomedan Law should form the rule of decision; and the Courts cannot grant a divorce in such a case

***Buddhist Law*—continued.**

——8.—Husband and wife—*continued.*

when no fault is established on the husband's side. KUMAL SHERIFF v. MI SHWE YWET, **L.B R. 1872—1892, 49.**

(7)—*Divorce—Joint Property.*—Where a woman has a separate establishment from her husband and takes no share in the management of his business, and performs the duties of a wife no more than by receiving his visits, is not entitled to hold the property acquired by her husband, who carried on his business in the house of his first wife, as joint property. Where a divorce takes place against the wish and without any fault on the part of the wife, the husband may take back his separate property. MAUNG KYIN v. MA SAUNG, **L.B.R. 1872—1892, 27.** [*R.*, L.B.R. 1872—1892, 103, 110; *Relied on.*, L.B.R. 1893—1900, 295; *Cited*, U.B.R. 1897—1901, Vol. II, 138].

(8)—*Liability of Buddhist wife for obligations contracted by husband—Wife not privy to obligationer benefited by it—Buddhist law, how far binds Courts.*—To hold a wife personally responsible for an obligation contracted by her husband to which it is not shown that she was in any way privy, and from which it is not proved that she received any profit, is certainly not, in accordance with justice, equity, or good conscience. The wife is not personally liable for an obligation contracted by her husband, who had been absent from home three years. In matters other than succession, inheritance, marriage or religious usage, our Courts are only bound by Buddhist Law so far as it is just and equitable. MI NU v. MAUNG SAING, **L.B.R. 1872—1892, 28.** [*R.*, 3 L.B.R. 175, U.B.R. 1892—1896, Vol. II, 53.]

(9)—*Ancestral estate—Widower—Wife's mother.*—On the death of a wife the husband is entitled to retain possession of his wife's share in ancestral estate which has been in their separate possession, to the exclusion of the wife's mother. MI TUN BYU v. NGA YAN, **L.B.R. 1872—1892, 32.** [*R.*, L.B.R. 1872—1892, 74, U.B.R. 1892—1896, Vol. II, 121.]

(10)—*Wife's duty.*—So long as the marriage-bond subsists the "wife is, at Buddhist law, required to do her part in contributing to the joint-comfort and well-being. (Special Court judgment in Civil Appeal No. 10 of 1882, 1, *F.*) The husband is the lord of the wife. There is no authority for the proposition that while the marriage subsists the wife is to have exclusive possession of the husband's property or the joint property. NGA KAN ZA v. MI LE, **L.B.R. 1872—1892, 126.** (L.B.R. 1872—1892, 19, *R.*)

(11)—*Restitution of conjugal rights—Divorce—Rights of divorce on mere caprice.*—A suit between a Burman Buddhist married couple for restitution of conjugal rights will lie. This relief is not lost by the plaintiff's temporary abandonment of the defendant for a

***Buddhist Law*—continued.**

——8.—Husband and wife—*concluded.*

shorter period than that mentioned in Manu Kye Book 5, Chapter 17. NGA NWE v. MI SU MA, **L.B.R. 1872—1892. 391.** [*R.*, 3 L.B.R. 175, L.B.R. 1872—1892, 607, 5 L.B.R. 87, L.B.R. 1872—1892, 610, U.B.R. 1909, Buddhist Law—Marriage, 1, U.B.R. 1892—1896; Vol. II, 53. U.B.R. 1905, 4th Qr., Buddhist Law—Divorce, 3.]

(12)—*Joint property.*—A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will. MA THU v. MA BU, **L.B.R. 1872—1892, 578.** (L.B.R. 1872 — 1892, 19, *R.*) [*R.*, 1 L.B.R. 11. U.B.R. 1892—1896, Vol. II, 121, 303, 1 L.B.R. 184 ; *D* , 2 L.B.R. 324 ; *F.*, 3 L.B.R. 66.]

(13)—*British Burma — Buddhist Law — Maintenance, wife's right to and claim for— Suit by Burmese wife for necessaries and past maintenance—Law applicable—Burma Courts Act. s. 4*—By the Buddhist Law of marriage in British Burma, it is the duty of the husband to provide subsistence for his wife and furnish her with suitable clothes and ornaments. On his failing to do so, he is liable to pay her debts contracted for necessaries, unless she has sufficient means of her own. There is no authority for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so. [*F.*, L.B.R. 1893—1900, 31.] A claim by a wife, married according to Burmese rights and customs in a British Burma Court, for necessaries and for past maintenance, was held to be a question "regarding marriage" under s. 4 of the Burma Courts Act, and the Buddhist Law mentioned above was held applicable to the case, in consequence. *Semble:*—If the above case were to be decided according to the rule of justice, equity and good conscience, the husband would not, in view of the Burmese Law as to the property of married persons, be liable upon the claim. MAUNG HMOON HTAW v. MAH HPWAH, **10 C. 777, P.C. 11 I.A. 109=4 Sar. 505.** [*F.*, L.B.R. 1893—1900, 31.]

——9.—Inheritance.

(1)—*Divorce of parents by mutual consent—Son's right of inheritance.*—The mere fact of a divorce having taken place between the parents by mutual consent, with equal division of the parents' joint property, accompanied by the fact that the son by the first marriage has, during his minority, lived with his divorced mother, does not divest the son of his ordinary legal right of inheritance under Buddhist law expressed in the ordinary rule that "on the death of the father who has married two wives in succession, the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second marriage" as propounded by Sandford, J.C. in Nga Po Thit's case (B.S.J., 18). MAUNG BA KYU v. MA XAN BYU, **L.B.R. 1893—1900, 299.**

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

(2)—*Children of father by a first and second marriage—Division of property inherited from a grand parent after death of father—Limitation.*—Where there are children of one father by a first marriage as well as by a second marriage, the children of the first marriage, should have equal shares with the children of the second marriage in property inherited from a grandparent after the death of the father. MAUNG YE v. MA ME, **L.B.R. 1893—1900, 418.**

(3)—*Legitimate child.*—A child begotten in chance intercourse is entitled to inherit where there are no legitimate children. NGA KA YIN O v. MA GYI, **L.B.R. 1872—1892, 15.** [*R.*, 2 L.B.R. 54.]

(4)—*Mother and children.* — According to Buddhist law on the death of the father no child other than the eldest can claim a share of the inheritance from the surviving mother. The position of children in relation to their parents discussed. MI SAUNG v. MI KUN, **L.B.R. 1872—1892, 115.** (L. B. R. 1872—1892, 39, 108, 41, *R.*) [*R.*, U.B.R. 1892—1896, 138, 581, L.B.R. 1893—1900, 585, 2 L.B.R. 255, L.B.R. 1872—1892, 212, 255].

(5)—*Succession—Parents and children.*—On the death of Buddhist parents who have during their life-time divided the bulk of their property, but reserved a share for their own support, that share should be divided among the children according to the ordinary rules of succession without reference to the fact that the parents lived or died with any of the children. KO TI, MA BI, MAUNG PO. v. MA DUT, BAING SAUK, MAUNG SHWE, O, NGA TI DUT, MI BA, AND MI GUN, **L.B.R. 1872—1892, 170.** [*Appl.*, L.B.R. 1872—1892, 191.]

(6)—*Joint property — Widow—Children by former marriage.*—Where a father on the death of his wife marries again and dies, leaving no issue by the second wife, the children of the former marriage take collectively one-eighth share out of the property acquired during the second marriage ; the widow takes the remaining seven shares. MI SO v. MI HMAT THA AND NGA HMYIN, **L.B.R. 1872—1892 177.** (L.B.R. 1872—1892, 18, 110, *R.*) [*R.*, 2 L.B.R. 174, 4 L.B.R. 189, L.B.R. 1893—1900, 295, 299 ; *F.*, L.B.R. 1893—1900, 361.]

(7)—Kettima *son*—Thabeta *son—Law relating to.*—There is nothing in Buddhist Law to render a child whose parents are dead or unknown, incapable of adoption. This was an appeal to recover a share in the estate of the Pakan Mingyi Kadaw (deceased). The estate is in the possession of the first respondent-defendant, who asserts his right to it as being the *kittima* (adopted) son of the Mingyi Kadaw. The plaintiff-appellant is a relation of the Mingyi Kadaw. *Held* that the respondent Maung Kan Gyi was legally adopted as a *kittima* son and as such was entitled to inherit. That he did not conduct himself as an enemy so as to render himself incapable of

Buddhist Law—continued.

——9.—Inheritance—*continued.*

inheriting. And as it was admitted that a *kittima* son would oust the appellant from a right to succession the appeal was dismissed. MA TIN SHWE v. MAUNG KAN GYI, **U.B.R. 1897—1901, Vol. II, 142.** (U.B.R. 1892—1896, Vol. II, 22, *R.*; L.B.R. 1872—1892, 25, *R.*) [*Cited*, 2 L.B.R. 224.]

(8)—*Child of first marriage.*—On the death of the father, who has married two wives in succession, the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second-marriage. NGA PO THIT v. MI THAING, **L.B.R. 1872—1892, 18.** [*F.*, L.B.R. 1893—1900, 361; *R.*, L.B.R. 1893—1900, 299, L.B.R. 1872—1892, 110, 2 L.B.R. 174, L.B.R. 1872—1892, 103, L.B.R. 1872—1892, 177.]

(9) — *Buddhist Law—Inheritance—Son of divorced wife—Filial relations—Maintenance by father—Revival of lost rights.*—The children of separated parents are included among those children who cannot inherit, and no distinction is made between sons and daughters. The mere fact of a father helping to educate or maintain a son is not sufficient to revive rights which such son had lost in law and intention at the time of his mother's divorce. MI SAN MRA RHI v. MI THAN DA U, **1 L B.R. 161.** (L.B.R. 1872—1892, 184, 206, L.B.R. 1893—1900, 469, Chan Toon 450, *D.*; L.B R. 1893—1900, 299, *Diss.*) [*R.*, 5 L.B.R. 133, 2 L.B.R. 174; *F.*, 14 Bur. L. R. 236, 4 L.B.R. 272].

(10)—*Inheritance—Shares of widow and of childen by former marriages.*—Where the plaintiff-appellant, the third wife (childless) of her deceased husband sued his children by the two former wives for her share in the estate left at his death and there was no evidence regarding the estate of the deceased at the time of, or during the subsistence of, either of the former marriages, *held*, (1) that appellant was entitled to a one-fourth share of her husband's *payin* property possessed by him at the time of her marriage, and to a seven-eighth share of the *letletpwa* property jointly acquired during her marriage; (2) that in the absence of evidence of deceased's estate before his third marriage, his children by the first two marriages shared equally *per capita* in the *payin* and *letletpwa* property remaining after the widow had taken her share; (3) that in cases like the present one, when *payin* property changes its character during a marriage, the presumption is that it had become *letletpwa* of that marriage. The childless widow takes seven-eighths of the property acquired during the third marriage and one-fourth of the property brought by her husband to the third marriage irrespective of the time it was acquired. MA BA WE v. MI SA U, **2 L.B.R. 174, F.B.** (L.B.R. 1872—1892, 177, U.B.R. 1892—1896, Vol. II, 159, U.B.R. 1892—1896, Vol. II, 184, U.B.R. 1897—1901, Vol. II, 126, L.B.R. 1872—1892, 6 L.B.R. 1872—1892, 18, L.B.R. 1893—1900, 361, L.

Buddhist Law—continued.

——9.—Inheritance—*continued.*

B.R. 1872—1892, 110, L.B.R. 1872—1892, 223, L.B.R. 1893—1900, 312, L.B.R. 1893—1900, 418, U.B.R. 1897—1901, Vol. II, 79, 1 L.B.R 161, U.B.R. 1892—1896, Vol. II, 102, *R.*) [*F.*, 3 L.B.R. 8; *R.*, 4 L.B.R. 110.]

(11)—Orasa *son—Partition—Right of grandson to claim a share on re-marriage of grandfather.*—The term *orasa* has two distinct meanings. It applies to all legitimate natural born children as opposed to adopted illegimate children; and it means also the eldest legitimate son or daughter, or as has been said, the eldest legitimate child. It is in the sense of the eldest son or daughter that it is generally used in the reported decisions. The eldest-born son is the *orasa* by right; but he does not obtain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as *orasa*. If, however, the eldest son attains his majority and fulfils the prescribed conditions, and then dies before this parents, his position as *orasa* remains unfilled and the next brother does not succeed to it. These principles are consistent with the previous decisions, and they reconcile the rulings and texts which provide for the evolution of the status of *orasa*, in certain circumstances, and the texts which distinguish between *orasa* and *kanittha* children, even after the death of the *orasa*. It may also be deduced from the texts that it is only when the *orasa* has attained his majority before the death of his father that he can claim his fourth share of the inheritance, unless the mother marries again. There is no authority which recognises the right of an *orasa* son, who is a minor at his father's death, to claim from his mother a share on his attaining majority. The principles set forth above seem also to explain the rules concerning the right of grandchildren, to claim a share on the death of one of their grandparents. TUN MAYING v. BA TUN, **2 B.L R. 292.** (1886, 1 L.C. 258, 1889, 2 L.C 61, 1901, 2 L.C. 207, 1902, 2 L.C. 210, 1 L.B.R. 198, 2 L.B.R. 255, 1902, 2 L.C. 124, 1 L.B.R. 104, *Cited.*) [*R.*, U.B.R. 1905, 4th Qr., Buddhist Law—Inheritance, 11.]

(12)—*Illegitimate step-son.*—In the absence of legitimate children, illegitimate children are entitled to inherit. (2 U. B. R. 1892—1896, Buddhist Law—Inheritance, 141, L.B.R. 1872—1892, 15 *F.*) Step-children inherit from their step-parents to the exclusion of collateral heirs. (U.B.R. 1897—1901, Vol. II, 1, *R.*) Therefore, in the absence of legitimate children a step-son, though illegitimate, may inherit from a step-mother to the exclusion of collateral heirs. MA SEIN HLA v. MAUNG SEIN HNAN, **2 L.B.R. 54.** [*R.*, U.B.R. 1906, 3rd Qr., Buddhist Law—Inheritance, 15.]

***Buddhist Law*—continued.**

—— 9.—Inheritance—*continued.*

(13)—*Children who voluntarily separate from their mother on her second marriage.*—When the children of the mother separate from her on the occasion of her second marriage and take their share of the inheritance of their parents and for many years continue to form no part of the second family, they are not entitled to claim any share in the property jointly acquired by their mother and her second husband. MAUNG SHWE YAN v. MA NGWE, **U. B. R. 1897—1901, Vol. II, 113.** (L. B. R. 1872—1892, 184, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 176.]

(14)—*Descent — Step-children — Step-grand-children—Blood relations.*—Excepting undivided ancestral property, the estate of a deceased step-parent or grand-parent goes by descent to the step-children or step-grand children in preference to collateral relatives by blood. Collateral blood relations, or ascendants, can succeed to an inheritance only when there are no possible heirs in the descending line ; step-children are treated as entitled to some share of inheritance like descendants by blood ; and in the absence of natural descendants step-descendants are classed as heirs entitled to succeed, the bond of blood yielding to the more important consideration of having a descendant heir and representative. The rule as to reaching inheritance or obtaining a vested interest applies only where the claimants to inheritance are of different classes, that is in different degrees of propinquity to the deceased. Thus, if there is no nearer heir than a grand-child, all the grand-children belong to the same class and are on an equal footing as heirs, although their parents have died before reaching the inheritance. Where there are no children, but only grand-children surviving, the latter succeed on the same footing as children, although their parents had died without reaching the inheritance or obtaining a vested interest, the principle of Buddhist law on this point apparently being that this rule is requisite only where a distinction has to be made between the claim of different classes of heirs, and its application unnecessary when the nearest heirs all stand in the same degree of relationship to the deceased owner of the estate to be divided. MA GUN BON v. MAUNG PO KYWE, **U B.R. 1897—1901, Vol. II, 66.** (U. B.R. 1892—1896, Vol. II, 121, *R.*) [*R.*, U.B. R. 1897—1901, Vol. II, 193, 126, 157, 146, U.B.R. 1904, 3rd Qr., Buddhist Law—Inheritance, 1, U.B.R. 1906, 3rd Quarter, Buddhist Law—Inheritance, 15, U.B.R. 1905, 4th Qr., Buddhist Law—Inheritance, 11 U.B.R. 1905, 2nd Qr., Buddhist Law—Inheritance, 7 ; *F.*, U.B.R. 1897—1901, Vol. II. 531.]

(15)—*Question whether mere absence of joint living excludes a child or grandchild from inheritance—Necessity for filial neglect to exclude.*—The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion. (L.B.R. 1872—1892, 170, L.B.R. 1893—1900, 299 *R.*) There must be some filial neglect to exclude. MA TACK MAUNG TE v. MA NYUN, **U.B.R. 1897—1901, Vol. II, 193.** (U.B.R. 1897—1901, 66, 122, 126, U.B.R. 1892—1896, Vol. II, 159, 194, 110 *R.*) [*R.*, U.B.R. 1906, 3rd Qr., Buddhist Law—Inheritance, 15, U.B.R. 1904, 3rd Qr., Buddhist Law—Inheritance 1.]

(16)—*Suit for share of inheritance between second wife of deceased and sons of first wife—Ate Oksa and auk Oksa—Children entitled to three-fourths of the property to which they have a double claim and half of that to which they have a single claim.*—The Burmese lawyers recognised the difficulty of treating property acquired by the father by inheritance during his second marriage as either *atet oksa* or *auk oksa*. They therefore invented the special rule of equal division for it. The three-quarters rule applies to the *atet oksa* only. The principle is, that children should get three-quarters of the property to which they have a double claim, *i.e.*, through both father and mother, and half of that to which they have a single claim. (L.B.R. 1872—1892, 110, *F.*) The second wife held entitled to a half share of her husband's ancestral property inherited during her coverture. MAUNG TUN GYAW v. MA BALO, **U.B.R. 1897—1901, Vol. II, 188,** (U. B.R. 1892—1896, 159, U.B.R. 1897—1901, 126, 461, 469, *R.*)

(17)—*Suit for partition between son of head wife, son and daughter of second regular wife and son of slave-concubine—Shares to which each is entitled—Heirs inherit estate when the person from whom they inherit dies and not when their inheritance is partitioned.*—Property is acquired by inheritance not by partition. Heirs inherit an estate when the person from whom they inherit dies and not when their inheritance is partitioned. For the case where there is one head wife with one son, one free concubine with one son, and one slave concubine with one son, the slave concubine's son is entitled to one and a half shares against the head wife's son's four shares and the free concubine's two shares. The system of multiplying shares explained in s. 2 of the Manu Wunnana and s. 230 of the Attathankepa followed. MAUNG TWE v. MAUNG AUNG, **U B.R. 1897—1901, Vol. II, 176.** (U.B.R. 1897—1901, Vol. II, 113, 116, 126, *R.*)

(18)—*Inheritance— Illegitimate child.*— An illegitimate daughter is entitled to share half of her father's estate with his widow. **MA SHWE ZI v. MA KYIN THAW, 8 Ind. Cas. 991.**

(19)—*Share of child of deceased first wife in property inherited during second marriage.*—A Burman Buddhist had a child by his first wife. After the death of the first wife, he contracted a second marriage, and by the second wife he had another child. During the continuance of the second marriage, he had inherited certain property from his mother. His second wife pre-deceased him. He died last

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

leaving him surviving the two children one by his deceased first wife, and the other by his deceased second wife. *Held*, the two children were entitled each to a moiety in the property inherited by the deceased from his mother. MAUNG GALE v. MAUNG BYA, **4 L B.R. 189.** (L.B R. 1872—1892, Vol. II, 110, 177, 223, 255, L.B.R. 1893—1900, 361, 418, *R.*) [*R.*, 4 L.B R. 256.

(20)—*Eldest representative of eldest child ranking with surviving uncles and aunts.*—In Buddhist Law, a grand-child, whose parents have pre-deceased their parents, is entitled to rank with the surviving uncles and aunts, only if he is the eldest representative of the eldest child, the other grand-children taking only one-fourth of the share that their parents would have enjoyed have they survived. MA THIN v. MA NYEIN, **8 Ind. Cas. 594.** (1 L.B.R. 198, *F.*)

(21)—*Property inherited by Burman Buddhist father after death of first wife and before marrying his second wife—Share of child by deceased wife* —Where a Burman Buddhist inherits property, moveable or immoveable, after the death of his first wife, by whom he had a son, and before his marriage with his second wife, by whom he had children and dies leaving him surviving, his son by his first wife, his second wife, and children by her, it was held that the son by the first marriage is entitled to one-half share of such property. MA LEIK v. MAUNG NWA, **4 L.B R. 110.** (2 L.B. R. 174, L.B R. 1872—1892, 110, 6, 255, L.B. R. 1893—1900, 534, *R.*)

(22)—*Inheritance—Child of a divorced couple.*—The general rule among the Buddhists, which allows the child of a divorced couple to inherit only from one parent, namely the parent with whom he or she lives, and not from the other, is not confined to cases where one or other of the parents re-marries and has issue by the new marriage. It applies with equal force to a case where the father does not re-marry but lives the rest of his life with a child by an earlier marriage. (4 L.B.R. 272. *Appr.*) The mere fact that a daughter is on affectionate terms with her father is not sufficient to establish her contention that the family tie giving her a continued right of inheritance in her father's estate was kept unbroken after her mother's divorce. MA HLA HIN v. MAUNG CHIT PO. **8 Ind. Cas. 1202.** (1 L.B.R. 161, *R.*)

(23)—*Inheritance—Suit by eldest son for one-fourth share—Limitation Act, art 123.*—The Burmese Law of Inheritance, where it conflicts with the Limitation Act, cannot be enforced in the Courts. (L.B.R., 1872—1892, 51, U.B. R. 1892—1896, Vol. II, 9, R.) Art. 123 of sch. II of the Limitation Act applies to a suit by an eldest son for one-fourth share of the estate of his father and mother, on the mother's death. In such a case, limitation begins to run from the date of the mother's death, MAUNG PO MIN v. USHWE LU, **2 L.B.R. 110.** (L.B.R. 1893—1900, 415, L.B.R. 1993—1900, 625, L.B.R. 1872—1892, 378, 1 L.B.R. 23, *R.*).

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

(24)—*Inheritance—Division among children of same parents after parent's death—Division in equal or unequal shares.*—The question for decision in this case, was, whether, under the Buddhist Law, Burmese daughters inherited the estate of their deceased parents in equal or unequal shares. *Held*, on consideration of all the authorities on the subject, that children of the same parents, dividing an inheritance, after their parent's death, take each an equal share. MA KYI KYI v. MA THEIN, **3 L.B.R. 8.** (1 L.B. R. 198, *F.*) [R. 4 L.B.R. 181, 3 L.B.R. 66.]

(25)—Orasa *child—Daughter surviving parents with brother, Whether such daughter*, orasa *child—Share of children of such daughter.*—The plaintiffs sued, as the children of the *orasa* daughter of the original owners, to recover a third of the properties left by them. *Held*, that the plaintiff's position was untenable. The plaintiffs mother was neither the eldest child nor the eldest daughter of the original owners. She was not even the eldest survivor among a family consisting of daughters only, for, at the time of her mother's death, who survived her husband, she had an adult brother. There is no authority for the suggestion that a second daughter, who is also the fifth child can under any circumstances become an *orasa* child so long as there is a brother surviving and competent to assume the headship of the family. As there were two children of the original owners still living the plaintiffs could get only one twelfth and not one-third of the properties of the owners, PO SEIN v. PO MIN, **3 L.B.R. 45.**

(26)—*Suit by children against their widowed mother for protection of joint family property.*—When the mother is alive the children are not entitled to partition of inheritance. On the mother attempting to alienate the property improperly they might possibly be entitled to sue to restrain her from parting with it. MAUNG HMU v. MA MIN DOK **U.B R. 1892—1896 Vol. II, 174.** (L.B.R. 1872—1892, 109, *R.*)

(27)—*Exclusion of illegitimate child—Imperfection of birth is not cured by subsequent regular union of parents.*—When there are regular heirs, there would be no reason for admitting an illegitimate heir. Illegitimate grand-children are excluded from inheritance of grand-parents when the latter have left legitimate children surviving them. MAUNG PYU v. MA CHIT, **U.B.R. 1892—1896, Vol. II, 141.** [*R.*, 2 L.B.R. 54.]

(28)—*Children of first wife—Daughter of subsequent wife—Shares.*—The plaintiff, now respondent, was Ma Meinkale, daughter of one of the wives of Maung Tun E deceased. Maung Tun E left two sons, Maung Chit Saya and Maung Aung Tha, and a daughter Ma Thin On by his first wife, a daughter Ma Meinkale by a subsequent wife, and a widow Ma U Ma without children. The questions that arose in the case were what was the property subject to division, and what share of

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

that property was Ma Meinkale entitled to in accordance with Buddhist law. The Court of first instance, following ss. 7 and 66 of Book X of the Manugye, gave respondent one-fourth of the property after deducting and adding certain items, and the lower appellate Court found the Dhammathats conflicting, but considered respondent entitled to a fourth share of the pay in property. *Held*, that the rule is to divide the property into four shares of which the children of the first marriage received two and the child of the next marriage and the surviving widow, one each. MAUNG CHIT SAYA v. MA MEINKALE, **U.B.R. 1892—1896, Vol. II, 93.** (L.B.R. 1872—1892, 46, 95, *R.*) [*R.*, U.B.R. 1892—1896, Vol. II, 102, 2 L. B. R. 174.]

(29)—*Priority of birth--Rights of eldest son or daughter passing to next eldest as representative of the father or mother.*—According to Buddhist Law priority of birth is recognised and certain duties pass by succession to the next eldest son or daughter. The following are the principles as to the succession of the children on the death of the father. First : The eldest son, if competent, is representative of his father and in that capacity is entitled to one-fourth of the inheritance on the death of the father. Second : Where there are both sons and daughters the eldest competent son is perferred to any daughter, Third : The rights of the eldest son or daughter pass to the next eldest as representative of the father or mother. MA MYA v. MAUNG PO THIN, **L.B.R. 1893—1900 585.** [*R.*, 1 L.B.R. 198 ; *Expl.*; 2 L.B.R. 292.]

(30)—*Divorce— Partition on divorce.*—It is dangerous to hold that an only daughter has, after her father's death and before partition with her mother, an interest in the estate capable of alienation. (L.B.R. 1872.—1892, 108, 115, 123, *R.*) A woman who has obtained a divorce by a decree of the Court cannot be made to relinquished all her property, the forfeiture of property being a punishment for improper desertion. MAUNG PO LAT v. MI PO LE **L.B.R. 1872—1892, 212.** (1 B. 97, *F.*) [*R.*, L.B.R. 1872—1892, 255, L.B.R. 1893—1900, 295.]

(31)—*Succession—Daughter of divorced wife —Joint property.*—Where a husband and wife divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband and did not renew the filial connection with her own father, and where there was no special contract at the time of the divorce to a contrary effect, the daughter is not entitled to share in the *letletpwa* acquired after the divorce by the father and the second wife. MI THAIK v. MI TU, **L.B.R. 1872—1892, 184.** [*Appl.*, L.B.R. 1872—1892, 191 ; *R.*, L.B.R. 1872—1892, 296, 2, L.B. R. 85, U.B.R. 1892—1896, Vol. II, 159, 110, L.B R. 1893—1900, 299, 469, U.B.R. 1906, 3rd Qr., Buddhist Law—Inheritance, 15, 1, L.

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

B.R. 161, U.B.R. 1897—1901, Vol. II, 176, 113, 116 ; *F.*, 4 L.B.R. 272, 14 Bur. L. R. 236 ; *D.*, 1 L.B.R. 161.]

(32)—*Daughter removed from her father's family and continuously resident with her divorced mother—Rights in father's family.*—A child removed from the father's family, and continuously resident with her divorced mother after she is of an age when she might assist in the affairs of her father's family, appears to be in the position nearly of a child *adopted* from the father's family into mother's family and, while she acquires or retains rights in her mother's or new family's property, she loses right in the family whence she came. A person is not obliged to claim all that he is entitled to claim. MAUNG HMAT v. MA PO ZON, **L.B.R. 893—1900, 469.**

(33)—*Share of eldest daughter by second wife.*—Where there is a son competent to assume the parental duty, an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the life-time of her mother. MA ME v. MA MYIT, **L.B.R. 1893—1900, 48.** (L.B.R. 1872—1892, 115, *R.*)

(34)—*Step-daughter—Step-mother* — Hnapazon—*Joint property.*—Property inherited by a father from his ancestor during marriage is not *hnapazon* or joint property of the husband and wife. On his death, leaving a daughter by a previous marriage and a widow, the daughter is entitled to one-half and the widow to an equal share. In deciding such a case the Court must be guided by analogy in applying the rule prescribed by the Dhammathat for the division between a daughter and her step-father of property inherited during coverture by the mother from her ancestors. MAUNG SHWE NGON v. MA MIN DWE, **L.B.R. 1872—1892, 110.** (L.B R. 1872—1892, 18, L.B R. 1872—1892, 27, *R.*) [*R.*, U.B.R. 1906, 2nd Qr. Buddhist Law —Divorce, 13 L.B.R. 1893—1900, 418, 403, 295, U.B.R. 1892—1896, Vol. II, 121, 102, 159, 4 L.B.R. 189, 110, L.B.R. 1872—1892, 184, U.B.R. 1897—1901, Vol. II, 185, 146 ; *D.*, L.B.R. 1893—1900, 295 ; *Disc.*, L.B R. 1872—1892, 177.]

(35)—*Illegitimate daughter — Concubine.*—The Case of the kanina or damsel's son is provided for in the Dhammathats, although not always by mention of the Sanskrit name. When the deceased left legitimate children it was held that his daughter by a damsel not recognized as concubine could not share in the property. MA LE v. MA PAUK PIN, **L.B R. 1872—1892, 228.** (L.B.R. 1872—1892, 114, 184, 1 B. 97, 2 B. 67, 4 B. 656, *R.*) [*R.*, L. B.R. 1872—1892, 235, 3 L.B.R. 175, U.B. R. 1892—1896, Vol. II, 145.]

(36)—*Daughter of divorced husband and wife living with mother and separating entirely from her father.*—Daughters of a divorced wife, who live with their mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

share in his estate when there has been a division of property at the time of the divorce. MA PON v. MONG PO CHAN. **U.B.R. 1897—1904, Vol II, 116.** (U.B.R. 1892—1896, Vol. II, 102, 194, 623, 110, 159, U.B.R. 1897—1901, Vol. II, 104, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 176. U.B.R. 906, 3rd Qr. Buddhist Law—Inheritance, 55, 2 L.B.R. 85; *F.*, 4 L.B.R. 272.]

(37)—*Eldest daughter, claim of, to a share of the general joint estate on the death of the mother—Rights of eldest child—Claim of eldest son to one-fourth share of the general joint estate on the death of the mother, when the father marries again.*—The hasty abuse of a father on a single occasion—conduct which was also forgiven and was not made a ground for any public declaration by the father—is not such conduct as to deprive the plaintiff of any rights he had. The principle that a daughter gets a share on the death of her mother and the son on the death of his father simply because the daughter and son perform the family duties of the mother and father respectively, is not to be found clearly enunciated, although, as noted above, there are indications of such a principle. The son gets the father's official and personal belonging when the father dies, and in a corresponding way the daughter takes her mother's official and personal belongings; but as regards the rest, while some Dhammathats are indefinite, others, notably the Vilasa, Kyetyo, Rasi and Dhammathat Kyaw appear to give rights to the eldest child, because he or she is obtained by the prayers of the parents in early married life and helps the parents before other children can. Occasional passages, however, put the daughter in an inferior position to a son. It may not be very clear from the Dhammathats now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, though this has been held; but we do not think it open to reasonable doubt that when the father does marry again, the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents. MAUNG SEIK KAUNG v. MAUNG PO NYEIN. **1 L.B.R. 23.** [*F.*, 5 L.B.R. 231; *R.*, 2 L.B. *R.* 110, 255 6 L.B.R. 198.]

(38)—*Partition—Rights of single daughter on death of father.*—A daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter re-marries after the father's death. MA THIN v. MA WA YON, **2 L B R. 255.** (L.B.R. 1872—1892, 378, 1 L.B.R. 23. L B.R. 1893—1900, 48, L.B.R. 1872—1892, 115, *R.*) [*Cited*, 2 L.B.R 292, 3 L.B.R. 15; *R.*, 4 L.B.R. 181.]

(39)—*Partition of property between two daughters as sole successors and heirs—What rule of division?—Whether equality or one of the special methods of computation mentioned in the Dhammathats?—If latter, which?—In the absence of proof on this point rule of equality prevalent according to local custom followed.*—When the rules are conflicting and uncertain, when there is no proof as to what Dhammathat ought to be followed or what rule ought to prevail, when it cannot be shown that a particular direction is a living rule and not merely a dead-letter, and when the circumstances of the case are not such as are contemplated by the object of the rule, the Courts may safely accept a custom which there is a reasonable amount of evidence to establish if such custom is consonant with equitable principles. The only rule of Buddhist Law shown to be operative in respect of the partition of inheritance between two sisters on the same footing, except as regards age, is that of equality of partition. MA PO v. MA SWE MI, **U.B.R. 1897—1901, Vol. II, 79.** (U.B.R. 1892—1896, Vol. II, 102, 111, *R.*) [*D.*, U.B.R. 1897—1901, Vol. II, 104; *R.*, U.B.R. 1897—1901, Vol. II, 146, 2 L.B.R. 174.]

(40)—*Eldest daughter's share in property, inherited by her mother from her mother.*—A female Burmese Buddhist inherited some property from her mother. She died leaving a husband and five daughters. *Held*, that the eldest of the daughters was entitled to succeed to one-fourth share of the property. THA TU v. MAUNG BYA. **4 L.B.R. 181.** (3 L.B.R. 8, 2 L.B.R. 255, *R.*)

(41)—*Right of daughter of divorced wife to succeed to her father's property as against his sister.*—Where the husband divorces his wife, after she was conceived, and dies without other wife, child or grand-child, the child by the divorced wife is to succeed to his estate. If the father lived alone, the child succeeds to the whole estate. If the father lived with his co-heirs, the child succeeds to half and the co-heirs to the other half. Therefore, where a person dies leaving only a sister and a daughter by a divorced wife, they share his property equally. The rule that the daughter of a divorced wife, who lives with the mother and does not maintain filial relations with the father, is not entitled to a share of his estate, does not apply to the above case. MI NYO v. MI NYEIN THA, **U.B.R. 1906, Bud. Law, Inheritance, 15.** (U.B.R. 1892—1896, Vol. II, 22, 159. U.B.R. 1897—1901, Vol. II, 116, 135, 193, 166, *R.*)

(42)—*Priority between sister and sister's daughter.*—In this case the question for decision was, whether, under Buddhist Law, the daughter of a deceased sister is entitled to any share in competition with the sister of the owner. *Held*, that, in the case of collateral succession, the general principle of the nearer, excluding the more remote, takes full effect and that, so long as there is a surviving brother, he excludes the children of a previously deceased brother. Applying this principle, the sister excluded the sister's daughter. MA MA GALE v. MA ME, **U.B.R. 1905, Buddhist Law, 3.** (U.B.R. 1897—1901, 172, *D.*) [*F.*, 5 L.B.R. 70.]

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

(43)—*Position of daughter of divorced wife who lives with her mother or mother's family and not her father.*—Under Buddhist Law a child has no vested interest in the father's property and cannot interfere to prevent him from disposing of it, and if that is so it is difficult to see what right there can be to the proceeds of the disposal or what power to control the father's dealing with such proceeds in any way he may think fit. If the father chose to spend all the money obtained by the sale of his property the child could not make him responsible for its reimbursement, and the fact that instead of spending the money the father chooses to keep it or to buy property with it so as to make the money or the property subject to a different rule of inheritance cannot apparently affect the matter. The father might make a gift of such property to the person entitled to inherit it after the conversion, and the person entitled to inherit the original property if it had not been converted could not prevent him. The deceased Maung Myat No left a wife Ma Kywe the defendant, and a daughter by her, Ma U Gywe. He had previously had other wives, of whom one, Ma Kyi Su, was by mutual consent divorced some 16 years before. By Ma Kyi Su he had a daughter, Ma Sein Nyo, the plaintiff, who went to live with her maternal grandmother and mother, who, having re-married, subsequently resided in the same house. Ma Sein Nyo never lived with her father but only visited him from time to time. All Maung Myat No's property was apparently acquired before his marriage with Ma Kyi Su or after his marriage with defendant. His sister Ma Kaung Gywe jointly owned part of the property. She divided it after his last marriage and by an instrument of transfer conveyed her share to him and his wife, the defendant, partly for the purpose of a religious trust, partly in consideration of the payment of debts, and partly as a gift. Plaintiff sued for a three-fourth share of the whole estate. The first Court gave her a half share of the ancestral property and no share of the *hnitpazon letletpwa* property acquired after the marriage with defendant on the ground that she had not duly maintained the filial relation. Defendant did not appeal and plaintiff appealed unsuccessfully. In second appeal by plaintiff, *held*—that plaintiff was not entitled to a three-fourths share of the estate as she was not brought into the second marriage by the father, and probably was not entitled to any share at all, the principle of Buddhist law being, in the absence of testamentary power, that the continuance of the family tie for purpose of inheritance should be manifested by plain and unmistakable outward signs, and there being apparently no clear reason for the distinction drawn as to the right of inheritance in respect of ancestral and non-ancestral property; that, if plaintiff was entitled to any share, it was not necessarily a half, the deceased having left not only a widow but also a daughter by his last marriage; that the trust property was not

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

a part of the estate subject to division; that the property transferred by Ma Kaung Gywe was not ancestral but acquired during the second marriage; that the current income of all property being *hnitpazon letletpwa* any property acquired by the expenditure of such income would be the same. MA SEIN NYO v. MA KYWE. **U. B. R. 1892—1896, Vol. II, 189.** (L.B.R. 1872—1892, 44, 110, 184, 191, 296, U. B R. 1892—1896, Vol II, 194. *R.*) [*R.*, U.B.R. 1st Qr., Buddhist Law—Marriage, 1; *R.*, U. B. R. 1897—1901, Vol. II, 116, 126, 185. 193, U. B. R. 1906, 3rd Qr. Buddhist Law—Inheritance, 15, 2 L.B.R. 174].

(44) — *Husband and wife — Survivorship—Succession Certificate Act, s. 4.*—Husband and wife, under Buddhist Law, always take from each other by succession and not by survivorship. It is necessary therefore for the survivor to obtain a certificate under the Succession Certificate Act, before he or she can recover through the Courts debts due to the deceased. MA NAW ZA v. MA THET PON. **L.B.R. 1893—1900, 334.** (2 Bur. L.R. 50, *R.*)

(45)—*Succession—Distributive shares amongst widows—Alienation of property by a Buddhist before death—Distribution by Budahist Law of the estate of a deceased Buddhist in certain fixed shares.*—A Buddhist cannot dispose of his property by will. MA BWIN v. MA YIN, **L.B.R. 1872—1892, 95.** [*R.*, L.B.R. 1872—1892, 429, L.B.R. 1893—1909, 132, U.B.R. 1892—1896, Vol. II, 93.]

(46)—*Marriage* — Kanwin.—The Buddhist Law favours the equality of the sexes, and in many ways treats marriage as creating a partnership in goods. *Kanwin* is property set apart at the time of marriage by the bridge room or his parents for the joint purposes of the married pair. Where property is not set apart as *kanwin* but is simply entrusted by the parents to the bridge room to manage, he and the parent shall share it equally. If he died without children his widow shall take half and his parents half. MA HLA AUNG v. MA E, **L. B R. 1872—1892, 219.** (L.B.R. 1872—1892, 22, *R.*,) [*R.* U.B.R. 1897—1901, Vol. II, 39.]

(47)—*Succession—Wife's property inherited after marriage—Close analogy of Burmese system with that of Tamil Inhabitants of Jaffna—The question as to the interest taken by a husband in property inherited after her marriage by his deceased wife considered but not decided.*—The Burmese rules about woman's separate property of different sorts are somehow connected with the Hindu law. The closest analogy to the Burmese system is contained in the rules of the Tamil inhabitants of Jaffna in Ceylon, called the Thasaivalamy, compiled by the Dutch rulers in A.D. 1707. About these Mr. J. D. Mayne remarks that they probably contain the customary law of Southern India before British Courts introduced Brahman shastrees to interpret Hindu Law in the Madras Presidency. These rules begin

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

by dividing property into three classes; hereditary, when brought by the husband; dowry, when brought by the wife; and acquisition, if acquired during the marriage. The second rule lays down that property inherited by the husband devolves like his hereditary and property inherited by the wife devolves like her dowry. There are so many resemblances between these rules and those of the Burmans as to induce one to suggest that they should be closely studied when the question of the surviving husband's or wife's interest in property on the death of the other comes up for decision. NGA TUN LU v. NGA PO YAUK AND MI MIN THWE, **L.B.R. 1872—1892, 255.** [*R.*, 4 L.B.R. 110, 4 L.B.R. 189.

(48)—*Husband and wife—On death of one succession of other to inheritance*—The only restriction proved from the authorities to exist in regard to the general rule of inheritance by husband or wife from one another relates to impartible immoveable property and not to ordinary partible estate. Deceased husband or wife may have married before or after death of parents, but must have survived them so as to be in reach of inheritance. "Inanimate property applies to land among other things" MI LAN v. MAUNG SHWE DAING, **U.B.R. 1892—1896, Vol. II, 121.** (L.B R. 1872—1892 32, 35, 105, 110, 578, *R.*) [*R.*, U.B.R. 1906, 4th Qr., Buddhist Law—Divorce, 19, U.B.R. 1897—1901, Vol. II, 79, 66, 146, 164; *F.*, 14 Bur. L.R. 91.]

(49)—*Claim of wife to inherit the property of her deceased husband, to whom she was unfaithful.*—Under the Buddhist Law a wife who was unfaithful to her deceased husband forfeits whatever rights she had to inherit although there may have been no formal divorce. MAUNG TOK v. MA KIN, **U.B.R. 1892—1896, Vol. II, 116.** [*R.*, U.B.R. 1897—1901, Vol. II, 34.]

(50)—*Succession—Act X of 1865.*—The estate of a Burman Buddhist dying in the life-time of his wife includes the whole of the property acquired during his marriage with her. AH FOON v. MI ANYO E, **L.B.R. 1872—1892, 402.**

(51)—*Power of parents to dispose of their property—Partition—Interest of widow in the family property.*—There is, in the parents, an absolute disposing power of the property of the parents, and a parent may even revoke at any time during his child's life, a present given by the parent to the child. On the death of one of the parents the eldest son or daughter may claim his or her share, and the remainder of the property vests in the surviving parent for himself or herself and the remaining children. Although without the consent of the surviving parent the other children cannot obtain their shares, yet the surviving parent may, if so minded, partition the inheritance, retaining his or her share; and as to the part so retained (as the surviving parent's share) it is at his or her absolute disposal. A Burmese Buddhist widow has not an absolute interest in the whole of the family property on the death of the husband, but she has an absolute right in respect of her own share and a life-interest in the remainder, and she has not the right of absolute disposal of the remainder, but only a power of sale in case of necessity. MA ON, MAUNG PYA GYI AND MAUNG GYI v. KO SHWE KO THA DUN, MA WAING, AND MA BWIN, **L.B.R. 1872—1892, 378.** (L.B.R. 1872—1892, 108, *R.*; L.B.R. 1872—1892, 39, *Not F.*) [*R.*, 2 L.B.R. 255, 110, 1 L.B.R. 23, 4 L.B.R. 128, L.B.R. 1893—1900, 312, U.B.R. 1892,—1896, Vol. II, 138, 171, 4 L.B.R. 256, U.B.R. 1892—1896, Vol. II, 400, 581, 14 Bur. L.R. 205=4 L.B.R. 128, *Not F.*; L.B.R. 1893—1900. 65; *F.*, 2 L.B.R. 167, 4 L B.R. 287; *Cited*, 3 L.B.R. 15; *Cited & Rel. on*, 1 L.B.R. 50.]

(52)—*Husband and wife dying without issue—Rights of inheritance to estate of—Divided and undivided ancestral estate.*—*Held* that (1) on the death of a husband or wife without children, the survivor succeeds to the whole of the deceased's estate, including the right of the deceased to a share in undivided ancestral property. (2) The survivor can enforce partition and obtain the deceased's share. (3) If he does so, on his death, his natural heirs alone succeed to the property which fell to his share on partition. (4) If he fails to do so, on his death his heirs are entitled to enforce partition and to obtain two-thirds of the share of the first deceased, whose natural heirs succeed to the remainder. MAUNG WALK v. MAUNG NYEIN, **U.B.R. 1897—1901, Vol II, 146.** (U.B.R. 1892—1896, Vol. II, 121 184, U.B.R. 1897—1901, Vol. II, 79, 8 W.R.P.C. 1, *R.*; L.B.R. 1893—1900. 524.) [*R.*, U.B.R. 1897—1901), Vol. II, 169, U.B.R. 1907, 2nd Qr., Buddhist Law—Inheritance—Pre-emption 1, U.B.R. 1906, 4th Qr., Buddhist law—Divorce, 19, U B.R. 1905, 2nd Quarter, Buddhist Law—Inheritance, 7.]

(53)—*Family of chief wife—Family of lesser wife.*—Case where it was held that the separation of residence affords a presumption that a certain Burmese woman had not the status of one entitled to share in the inheritance and that this presumption has not been rebutted by evidence showing a higher status. MA HMON v. MAUNG PAW DUN, **U.B.R. 1897—1901, Vol. II, 138.** (U B.R. 1892—1896, Vol. II, 194, *Cited*; L.B.R. 1872—1892, 27, *Cited.*) [*R.*, U.B R. 1910, 3rd Qr., Civil 42; *Expl.*, U.B.R. 1897—1901, 160.]

(54)—*Position of concubine or lesser wife living along with head wife, and of child of such concubine living with father—Apparent principle of Buddhist Law with respect to marriage.*—Effect of subsequent regular marriage after death of head wife on position of offspring of concubine or lesser wife. *Held*—that such offspring is not the son spoken of in the Dhammathats as brought by the father with him

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—9.—Inheritance—*continued.*

when he contracts a second marriage. Share of such offspring seems to be provided for by the rules relating to the case of a head wife with a free concubine or lesser wife, (L.B.R. 1872—1892, 225, U.B.R. 1892—1896, Vol. II, 194, *R.*) The provisions of Buddhist law which come nearest this case are those relating to a head wife and a free concubine, and a superior and inferior wife. The former are a little complicated by the introduction of slave concubines, and, any way, the difference between the shares in the two cases is insignificant, only about one-thirty-fifth, so that the proportion of three to two may be accepted. MA SHWE MA v. MA HLAING, **U.B.R, 1892—1896, Vol. II, 145.** [*R.*, U.B.R. 1897—1901, Vol. II, 488; *F.*, U.B.R. 1910, 3rd Qr., Civil, 42.]

(55)—*Exclusion of husband from shares in estate of parents—Law when wife predeceases her parents.*—If a person dies, leaving children, before the death of his or her father or mother the children are entitled to a share in the grandparents' estate and their surviving parent is excluded. NUANG TE v. MA KYU, **U.B.R. 1897—1901, Vol. II, 169.** (U.B.R. 1897—1901, Vol. II, 146, *R.*)

(56)—*Second wife entitled to share in inheritance with first or chief wife when she has clearly the status of a wife.*—A wife of a distinctly inferior class, who is in the position of a concubine and who has a separate establishment, has no claim to inherit a share in her husband's estat; but the mere fact that she lives in a house separate from that occupied by the husband merely raises a presumption that her status is inferior, the presumption being not conclusive but rebuttable. When the husband has lived indifferently with both his wives and when neither of them can really be considered as having lived separately from him, the status of both wives seems to be precisely the same though one may have been the first or chief wife. MA U BYU v. MA HMYIN, **U.B.R. 1897—1901, Vol. II, 160.** (U.B.R 1892—1896, Vol. II, 194, U.B.R. 1897—1901, Vol. II, 138, *Expl.*) [*R.*, U.B.R. 1910, 3rd Qr., Civil, 42.]

(57)—*Property inherited by husband during marriage—Interest of widow—Widow share in the joint property.*—In property inherited by a Burman Buddhist during his marriage, the interest which his widow takes, when children of the marriage survive their father, is the same as her interest in her deceased husband's share of the property jointly owned by him and her, *i.e.*, a life-estate with a power of sale in case of necessity. MA NYE v. MA YAUK, **4 L.B.R. 256.** (L.B.R. 1872—1892, 103, 378, 4 L.B.R. 189, *R.*)

(58)—*Death of husband and wife within a short time of each other—Rights of relatives to succeed to estates.*—Where, on the death of a husband, his wife inherited all his property, as his widow, but within a very short time after his death the widow also died, leaving her surviving

Buddhist Law—continued.

—9.—Inheritance—*continued,*

neither descendants nor ancestors, the relations of both may inherit the estate. As has been observed in 2 U.B.R. 1897—1901, 66, the apparent reason of this distinction seems to be that, when husband and wife die within a short interval of each other, their joint interest in the estate is regarded as predominant, whereas when one lives long after the other, the presumption arises that the joint interest has completely merged in the sole interest of the survivor. MA KADU v. MA JON, **U.B.R. 1905, Buddhist Law, 7.** (U.B.R. 1892—1896, Vol. II, 136, U.B.R. 1897—1901, Vol. II, 66, 146, *R.*)

(59)—*A Methila nun, whether a woman loses rights to property by becoming*—Orasa, *meaning of.*—The question was whether, under the Burmese Law, a woman by becoming a nun renounced her property and died a civil death. *Held*, a nun does not occupy a position analogous to that of a monk. The Methila nuns especially undergo no ceremony of ordination as a nun but are simply lay devotees corresponding to religious laymen. Consequently, there is nothing in the Buddhist Law to support the proposition that a woman loses her rights to the property held by her, by reason of her having joined the order of Methila nuns. *Held*, also, that the eldest born son is the *Orasa* by right and the eldest son (or eldest capable son), whether eldest child or not, clearly has the special privileges possessed by an *Orasa* son under the Burmese Law. MI MIN DIN v. MI HIE, **U B.R. 1905, Buddhist Law—Inheritance, 11.** (U.B.R. 1897—1901, 54, 66, 2 L.B.R. 292, *R.*)

(60)—*Second wife.*—When a husband dies, a second wife has a right to share with a first wife in the property of her husband, although none of it had been acquired since the second marriage. Her share in the joint property of the first marriage will be one-fourth as compared to three-fourths falling to the share of the first wife. MI KA v. MAUNG THET, **L.B.R. 1872—1892, 6.** [*R.*, 4 B.L.R. 110, 2 L.B.R. 774, L.B.R. 1872—1892, 103, U.B.R. 1910, 3rd Qr., Civil, 42.]

(61)—*Succession—Right of parents to a share of the property of their deceased children where such parents and children have been living together.*—The general rule that property shall not ascend is laid down in the Manu Kye Dhammathat, Book X. ss. 1, 18 and 19, but the rule is not without exceptions. Where, after separation from his adopted brothers and sisters, an adopted son lives with his adoptive mother, such mother succeeds to his property on his death to the exclusion of his adopted brothers and sisters. MI SAN HLA ME v. KYA TUN **L.B.R, 1893—1900, 116.**

(62)—*Monugye Book X, s. 29*— ***Ascent of property when there are no direct descendants.***—On the death of a person who leaves no surviving husband, wife, or direct descendants, his

***Buddhist Law*—continued.**

—9.—Inheritance—*continued.*

parents succeed to his estate in preference to all other relatives. MA PO HMON v. MAUNG KAN. **U.B.R. 1897—1901. Vol. II, 157.** (U.B.R. 1892—1896, Vol. II, 184 L.B.R. 1893—1900, 116, 524 U.B R. 1897—1901, Vol. II, 109, 111, 66.) [*F.*, 5 L B.R. 231.]

(63)—*Authority of Manugye Dhammathat Book X. s. 62 denied—Inheritance can ascend when there are no descendants.*—Under ordinary circumstances s. 62, Book X, of the Manugye Dhammathat is unsuited to the conditions of modern life. The rule laid down in Upper Burma Rulings, 1892—1896, Vol. II, p. 184, namely, "that" when it cannot go by descent the inheritance is allowed to ascend" must be taken as a settled principle of law in Upper Burma, MA SA BWIN v MA THI. **U.B.R. 1897—1901. Vol. II, 111.** (U.B.R. 1892—1896, Vol. II, 184, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 157, 172.]

(64)—*Claim to share of inheritance before death of both parents—Waiver of interest in portion of estate by surviving parent.*—It appears clear enough that the parent can only give the children property of which he or she is in possession. As in the case of any other gift, delivery is essential to its validity, and possession cannot be conferred on the child when the possession of the property is not in the parent. Surviving parent cannot give one heir status to sue another for share of inheritance without being in position to put former in possession of share to be claimed. MAUNG PO SAUNG v. MA NGWE SU, **U.B.R. 1892—1896, Vol. II, 138.** [L.B.R. 1872—1892, 115, 378, *R.*]

(65)—*Inheritance—Absence of descendants, husband or wife—Preferential right of parents to succeed—Exclusion from inheritance—Proof of deliberate neglect of ordinary duties of affection and kindred necessary.*—Where a deceased Burman Buddhist has no direct defendants and leaves no surviving husband or wife, the parents should inherit to the exclusion of all other relatives. (L.B.R. 1883—1900, 524, U. B.R. 1892—1896, Vol. II, 184, U.B.R. 1897—1901, Vol. II, 157, *R.*) When desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against any one claiming to inherit, his or her right of inheritance is, under the Burman Buddhist Law, lost. SHWE GON v. HNIN BWIN, **5 L.B R. 231=9 Ind. Cas. 442.** (9 Bur. L.R. 88, 11 Bur. L.R. 228, *R.*)

(66)—*Jointly acquired property*—Payin *property or property anterior to second marriage—Step-father's claim to estate of deceased wife, and to estate of deceased step-daughter—Claim of paternal relatives to latter.*—*Held* that as in this case Ma Ein Nyein admittedly had everything and defendant nothing when she took him as her second husband, and as the property in dispute was land acquired by transfer of the proceeds of disposal of other land, the presumption was that the original fund was preserved, the object of investment only being changed and

***Buddhist Law*—continued.**

—9.—Inheritance—*continued*

that in the absence of proof the burden of which was on defendant, there was no necessary presumption that any of the property was *letletpwa* or jointly acquired after the second marriage under the circumstances. *Held*, also —that the step-father had no good claim as against the relatives of the father of his step-daughter to the estate left by the latter. In the absence of a husband or descendants the estate of the step-daughter must ascend, and her father being dead, must go to the nearest collaterals. The uselessness in general of evidence of the performance of death-bed attentions and funeral obsequies pointed out. When there had been no deliberate and intentional neglect of deceased indicating a severence of the family bond, evidence of that kind may safely be put aside and left out of account. MAUNG CHIT KYWR v. MAUNG PYO, **U.B.R. 1892—1896, Vol. II, 184.** [*F.*, 2 L.B.R. 174, 5 L.B.R. 231; *R.*, U.B.R. 1902—1903, Vol. II, Probate and Administration, 7, U.B.R. 1897—1901, Vol. II, 111, 146, 157, 164, 172; *D.*, U.B.R. 1897—1901, Vol. II, 126, 131; *Cited*, U.B.R. 1897—1901, Vol. II, 131.]

(67)—*Ascent of inheritance when it cannot go by descent—Parents preferred to brothers and sisters, and grandparents to uncles and aunts.*—The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and, in the absence of heirs in that decree, to the grandfather and grandmother and next line of collaterals. MAUNG SHWE BO v. BAUNG PYA, **L.B.R. 1893—1900, 524.** (U.B. Cir. No. 75 of 1895, *F.*) [*R.*, U.B.R. 1897—1901, Vol. II, 146.]

(68)—*Suit for possession of land—Heirs on either side being uncles and aunts or their representatives—Shares to which each entitled.*—Plaintiffs-appellants sued for possession of six plots of land measuring 80 acres to which they alleged they were entitled, as heirs of Tun Maung, deceased. The Court of first instance dismissed the suit on the grounds that defendant-respondent, as the uncle and guardian of Tun Maung and as having paid his funeral expense was entitled to inherit on Tun Maung's death to the estate he left. On appeal the District Judge confirmed this decision. The principal facts were:—(1) That the land in question came from Tun Maung's maternal grandfather and was in fact his mother's (Mi Yan Gyaw's share of the inheritance, which, on the division after his mother's death, was put down as his share; (2) that at this time Tun Maung's father, Yan Aung, was still alive and consequently that the land in question, his wife being dead, was his property, till he died, when it became that of Tun Maung, the only, or only surviving, son of himself and Mi Yan Gyaw; (3) that from, or very soon after, the partition the land in question came into the possession of defendant-respondent on behalf of Tun Maung, then a minor, and that he has

Buddhist Law—continued.

——9.—Inheritance—*continued.*

ever since enjoyed the usufruct of it ; (4) that Tun Maung lived partly at least with defendant-respondent when not in Lower Burma. Both parties claimed to have paid the funeral expenses and defendant-respondent also alleged having paid Rs. 112 during Tun Maung's lifetime to pay for his journeys to Lower Burma. The lower Courts held that it was not proved the plaintiffs-appellants paid the funeral expenses, and that it is proved that defendant-respondent did. On this point it was clear from the evidence taken on commission that the funeral expenses were met by contributions from the relations who happened to be at the place in Lower Burma, where Tun Maung died, including plaintiff-appellant Tun Aung and by the people of the village. *Held*—that defendant-respondent having for many years enjoyed the usufruct of the land in question, could not be allowed to plead payments on deceased's account as a reason for refusing to share the inheritance with any person who might be entitled to share it. *Held* also—that Tun Maung having inherited the land on the death of his father, his relatives on his mother's side had just as much right to inherit as those on his father's. *Held* also—that the plaintiff-appellants represent an uncle and an aunt and are entitled to two shares out of six, the remainder being the shares of the remaining four uncles and aunts or their representatives. MAUNG TUN AUNG v. MAUNG YAN PYO, **U. B.R. 1897—1901, Vol. II. 172.** (U.B R. 1892—1896, Vol. II, 184, U.B.R. 1897—1901, Vol. II, 1113 1 *R.*) [*D.*, U.B.R. 1905, 1st Qr., Buddhist Law—Inheritance, 5.]

(69)—*Step-grandchildren—Original and joint property—Joint living* —Where the question was, to what shares, if any, of the original property of Maung Tun and of the jointly acquired property of Maung Tun and Ma U, the plaintiff-appellant, Ma Kyi Byun, was entitled to, *held*, that the appellant Ma Kyi Nyun was entitled to a share in the estate of her deceased grand-father, whether original or jointly acquired, with her step-grandmother. *Held*—also, that under the circumstances stated, the share of the grandchild in the jointly acquired property is one-eighth. *Held*—also, that the weight of authority inclines to the position that the grandchild's share in the original property is one-half. MA HNIN DOK v. MA U, **U.B.R 1897—1901, Vol. II, 126.** (7 C. 453, U.B.R, 1892—1896, Vol. II, 159, 184, U.B.R. 1897—1901, Vol. II, 122, 66, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 164, 176, 185, 193.]

(70)—*Brothers and sisters already divided—Estate of divided deceased sister—Equal rights of elder brothers or sisters on failure of younger brothers or sisters—Exclusion of children of brother predeceasing his divided deceased sister.* —It is a principle of Buddhist Law that only those closely related should inherit (see Dhammathatkyaw, s. 378, Digest) and that relations of the same degree should inherit to the exclusion of those of a more remote degree,

Buddhist Law—continued.

——9.—Inheritance—*continued.*

that, for instance, children should exclude grandchildren. There are certain exceptions to these rule (*e.g.*, in cases where there has been no division). In such cases elder brothers within reach of the inheritance would share equally, and one brother so within reach dying before distribution, his children would take *per stirpes* and not *per capita*. In cases where there has been division, however, if the eldest brother predeceases his sister, his children cannot succeed to her estate where there is a surviving second brother ; the surviving second brother is the sole heir. In the case of brothers and sisters already divided, the elder brothers or sisters inherit only on failure of younger brothers or sisters ; but the second of such elder brothers or sisters would not exclude one older than himself or herself. The principle that property does not ascend does not operate in such a case, the eldest is not barred from equal rights with the second. MAUNG HMAW v. MA ON BWIN, **1 L.B.R. 104.** [*F.*, 5 L.B.R, 70, U.B.R. 1905, 1st Quarter, Buddhist-Law-Inheritance, 5 ; *Cited*, 2 L.B.R. 292 ; *R. & Overruled*, 1 L. B.R. 198.]

(71)—*Partition of property between grand-children and step-grand parent*—Attathankepa, *s. 226—Manu Gyc X 21.*—On the authority of s. 226 of the *Attathankepa*, grand-children are entitled to inherit specified shares of the estate of their grand-parents. MA SA v. MA THET HNOW, **U.B.R. 1897 — 1901, Vol. II, 122.** (L.B.R. 1893—1900, 299, L.B.R. 1872—1892, 17. *R.*) [*R.*, U.B.R. 1897 — 1901, Vol. II, 126, 193.]

(72)—*Claims to estate of deceased by widow and by grandchild descended from former wives who had been divorced or separated from—Diversity of rules—Paying property—Meaning of.*—*Held* that as it was not proved that any of the estate was *payin* of the grand father in the time of the grandmother of the grand-children, the widow alone was entitled to the property. MAUNG KYA NU v. MA BWIN, **U B.R. 1892—1896, 110.** (L.B.R. 1872—1892. 184, 223, U.B.R. 1892—1896, Vol. II, 103, *R.*) [*R.*, U.B.R. 1892—1896, Vol. II, 116, 193.]

(73)—*Absence of joint living—Ground for exclusion from inheritance of children, grand-children and step-children.*—Mere absence of joint living is not sufficient to exclude a child or grandchild from inheritance and filial neglect must be proved. The same rule applies to step-children. MAUNG KYAW YAN, MA MEIN MA GYI, MATHET TU, MA E ME, MAUNG THET PON, U BYA, MA E MYEIN, MAUNG SHEIN v. MAUNG PO WIN AND MA SAN ME, **U.B.R. 1904, 3rd Qr , Buddhist Law 1.** (U.B.R. 1897 —1901, Vol. II, 193, 379, 66, *F.*)

(74)—*Grand-child of first wife deceased, share of, in the presence of second wife and her child.*—The question in this case was as to the share that could pass on inheritance to a deceased Buddhist's grand-child by his first wife on the one hand, and his second wife

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—9.—Inheritance—*continued.*

and her daughter on the other. *Held* that, under the Burmese Law, a grand-child, whose parents died, after one grand-parent and before the other, are not to receive any share on the death of the surviving grand-parent, only because, and if, their parents had already received their portion. Otherwise, according to the law, nine-twentieths of the *atetpa* property and one-eighth of the *lettetpwa* property of the grand-parent would pass to the grand-child. SEIN TIN v. MI ON KRA ZAU, **3 L.B.R. 219.**

(75)—*Share of grand-daughter in her own grand-parents' estate as against her step-grand-parent.*—As against the step-grandparent the grandchild is entitled to one half of her own grandparents' estate. MAUNG RADO v. MA KYIN, **U.B.R. 1897—1901, Vol. II, 164.** (U.B.R. 1892—1896, Vol. II, 121, 171, 184. U.B.R. 1897—1901, Vol II, 126, *R.*)

(76)—*Parents predeceasing grand-parents—Grand children representing deceased parents, Shares of.*—Among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child; the others only take one-fourth of the share that their parents would have enjoyed had they survived. MA SAW NGWE v. MA THEIN YIN, **1 L.B R. 198.** (1 L. B.R. 50, 23, 93, 104, Chan Too's Rulings 233, 418, L.B.R. 1872—1892, 585. *R.*) [*Cited* 3 L.B.R. 219. 2 L.B.R, 292; *F.*, 3 L.B.R. 8; *R.*, 3 L.B.R. 66.]

(77)—*Partition of property—Intestacy—Testamentary disposition—Gift without possession—Shares among grand children.*—The finding of the lower Courts that a Burman Buddhist has no power to dispose of property by will as she pleases is upheld. The Court refused to uphold an alleged deed-of-gift made by an old woman shortly before her death purporting to convey all her possessions to one member of the family with whom she was living. Under Burmese Law delivery of possession is an indispensable condition to the validity of a gift. MA THI v. MA NU, **L.B.R. 1872—1892, 70.** [*Doubted*, U.B R. 1897—1901, Vol. II, 62 U. B.R. 1892—1896, Vol. II, 561.]

(78)—*Adopted children—Effect of separate living from adoptive parents—Adopted child also a blood relation — Adopted child returning to house of natural parents*—Manukye, *X. 5—26.*—A Burmese Buddhist cannot disinherit his or her children, whether adopted or natural. As regards *keittima* children, the *Manukye* and the *Attathankepa* do not explicitly require joint living of parents and children where there are no direct natural descendants. The requirements of residence might be more safely relaxed in the case of an adopted child who is also a blood relation. (L.B.R. 1872—1892, 8, 191, U.B. Circulars, 35 of 1893, *R.*) The strict letter of the *Dhammathats* is not to be taken as the present rule of law in this matter.

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—9.—Inheritance—*continued.*

Customs and conditions have modified the ancient rule; and there should be some liberality of construction in questions concerning the maintenance of the bond formed by adoption. Where, therefore, an adopted child who was also a blood relation went to live in her natural parents' house, but maintained her relationship with her adoptive parents, *held*—that she did not forfeit any rights that by adoption she may have acquired. MA E v. MAUNG SHWE KAING, **L.B.R. 1893—1900, 520.**

(79)—*Adoption—Gift—Proof of possession—Widow's right of disposal of her share of estate.*—A *kittima* adopted son takes the position of natural son when there are no natural children. On death of father leaving widow with eldest *auratha* son and no other children the widow has an absolute right of disposal over her share of three-fourths of the estate. MAUNG SA SO v. MI HAN, **U.B.R. 1892—1896, Vol. II, 171.** (L.B.R. 1872—1892, 108, 378. *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 164.]

(80)—*Adopted child—Rights of—Whether extend to collaterals of adoptive parents.*—Under the Buddhist Law, the rights of inheritance of an adopted child are not limited to inheritance from his or her adoptive parents, but also extend to inheritance from their collaterals. MA THAW v. MA SEIN, **5 L.B.R. 89=3 Ind. Cas. 716.**

(81)—*Manugye Dhammathat, Book X, s. 29—Manuwunnana, s. 46—Dhamma Vilasa, s. 58—Adoption.*—Adoptive parents stand in the same position as natural parents and have the same rights so long as the relationship constituted by adoption subsists; also parents are entitled to inherit in the absence of direct descendants. MA E DOK v. MAUNG NGWE HLAING, **U.B.R 1897—1901, Vol. II, 109.** (L.B.R. 1893—1900, 116, *R.*) [*R.*, U.B R. 1897—1901, Vol. II, 157.]

(82)—*Adoption.*—An adopted child, by marrying and living separately from his adoptive parents, does not by the mere fact of marriage forfeit his rights of inheritance in his adoptive family. But the burden of proving that he has performed the duties necessary to be performed by an adopted child will be thrown upon him, and, in the absence of such proof, the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his rights of inheritance. NGA MIN GYAW v. ME PI, **L.B.R. 1872—1892, 8** [*R.*, L.B.R. 1872—1892, 225, U.B.R. 1897—1901, Vol. II, 135, L.B.R. 1872—1892, 191, U.B.R. 1892—1896, Vol. II, 22, L.B.R. 1893—1900, 520.]

(83)—*Partition of property—Laws relating to shares awardable to children and adopted children.*—This appeal is based mainly on the grounds that the property in dispute is *lettetpwa* property and not the *payin* or *attetpa* property of the defendants' mother and that the law as to share, awarding plaintiff only one-fourth, has been wrongly applied. The plaintiff-appellant is the daughter of Maung Tha Po, and

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——9.—Inheritance—*continued.*

the defendants respondents are the (adopted) son and daughter of Ma Kywin. Maung Tha Po and Ma Kywin married 25 years or more ago, having at the time the aforesaid children. Maung Tha Po had no property : Ma Kywin owned the land in dispute. Ma Kywin died shortly before Maung Tha Po. Maung Tha Po had no property when he married Ma Kywin and when divorced on two occasions by her, received only small money-payments and no share of land. The lower appellate Court held that the money with which the lands were redeemed could not have been common property of husband and wife, and came to the conclusion that the lands were the *payin* property of Ma Kywin and granted plaintiff a one-fourth share, as the defendants had admitted plaintiff's claim to that share, though otherwise the plaintiff's claim would have been rejected. *Held*—in second appeal, confirming the decree of the lower appellate Court that the lands in question were *atletpta* or *payin* property. *Held*, further, that the one-fourth share which the defendants were willing to allow the plaintiff was all she was entitled to, MA EIN SI v. MAUNG WA YON. **U.B.R. 1897—1901, Vol. II, 181.** (U.B.R. 1892—1896. Vol. II, 184, *D.*)

(84)—*Adopted son—Adoptive parents—Natural parents.*—Although the plain rule of law is that a *keittima* son living apart from his adoptive parents losses his claim to inherit their estate, yet it is to be construed with due regard to the circumstances of each case ; and if it is shown that, though living separately, the adopted son maintained the tie of relation with his adoptive parents, he would not be excluded from the inheritance. MAUNG SHWE THWE v. MA SAING, **U B R. 1897—1901, Vol. II, 135.** (U. B.R. 1892—1896, Vol. II, 22, 176, L.B-R. 1872—1892, 8, 191, *R.*) [*R.*, U.B.R. 1906, 3rd Qr., Buddhist Law—Inheritance, 15.]

(85)—*Adopted child—Second wife.*—A second wife has a right to share in the property of a deceased husband with a first wife and an adopted daughter, although the property had been altogether acquired before the second marriage was contracted. (Special Appeal No. 2 of the 4th Qr. of 1871, *F.*) The publicly adopted child stands in the same position as regards inheritance as the natural child. Where the mother dies, an only daughter is entitled to her mother's personal belongings and also to one-fourth share in the family property while the father lives, and on the death of the father to three-fourths of the remainder. The father's second wife will be entitled to three-sixteenths. MA GUN v. MA GUN, **L.B.R. 1872—1892. 33.** [*R.*, U.B.R. 1892—1896, Vol. II, 153, L.B.R. 1872—1892. 103.]

(86)—*Adopted son—Separation—Undutiful conduct.*—The question whether an adopted son who for many years has lived apart from his adoptive father has been guilty of such negligent and undutiful conduct as to disentitle him to inherit is one of evidence. (L.B.R. 1872—1892, 8, 170, 184, *R.*) The burden of showing that he had not been undutiful lies on the adopted son because of his separate residence for so many years. Such burden would be discharged by giving proof that the father, near his death, acknowledged him as his adopted son and that he acted as such, without dispute, in performing the funeral. A man must not be disinherited on mere suspicion or ambiguous evidence. MAUNG PO SEIN v. MAUNG IN DUN, **L.B.R. 1872—1892, 191.** [*R.*, U.B. R. 1897—1901, Vol. II, 135, U.B.R. 1892—1896, Vol. II, 59, 22, L.B.R. 1893—1900, 520.]

(87)—*Shares of elder and younger brother—Adoption—Shares of adopted and natural child.*—Where land was taken in mortgage and was let out to tenants by one brother or the other, and further advances on mortgage were made sometimes by one brother and sometimes by the other, the general presumption from the circumstances is that all the immoveable property belonged to the joint estate, and the clearest proof is required that any of it was owned otherwise and was separate property. All the immoveable property ought to be dealt with on the same principle, and it is clear that there is every reason to believe that the whole of it was joint, and that the evidence that one brother rather than the other had most to do with any portion of it at any particular time, practically proves nothing contrary to the general ownership in common. In this case what were virtually two suits for partition were dealt with in one action. Plaintiff, Ma Gyan, claimed the shares of her father, Maung San Aung in the undivided estate of himself and his elder brother, Maung Kywin, first defendant ; the question in this first case was whether certain parcels of land belonged to the common estate or were the separate property of one or the other brother and it was held in second appeal that the same principle must govern all the items in dispute, namely, that, as there was a joint estate of which portions were alternately dealt with by one brother or the other, there was no presumption from such dealing at any particular time that there had been a permanent separation of interests, but on the contrary the continuance of the unity of the estate must be presumed in the absence of clear and distinct proof the other way of which there was none. It was agreed in the Courts below that the respective shares of the elder and younger brother were to be calculated in accordance with s. 163 of the *Attathankepa Dhammathat*, namely, 437/729ths and 292/729 ths. In what may be called the second case, the questions were whether Ma Gyi, the daughter of Maung Kywin, had been adopted by Maung San Aung, whether that adoption continued up to the time of Maung San Aung's death, and if so, what share of inheritance Ma Gyi was entitled to. As to the first point, Ma Gyi was taken by San Aung as an infant on her mother's death. No formal document was drawn up-

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

but as the parents were brothers this was considered natural enough. There was evidence that the child was brought up as daughter of the house; she never returned to her own father's house; and it was held that the arrangement would never have been allowed unless it was a *kittima* or full adpotion. With regard to the second point: Ma Gyi married and lived in a different house from San Aung, but the residences were close together, and there was no evidence of interruption of filial relations. It was therefore held that the continuance of the adoptive state must be presumed On the birth of a child of his own, the plaintiff Ma Gyan, a good many years after Ma Gyi's adoption, Maung San Aung might have wished to set aside the adoption, and this he might possibly have done by making suitable provision for Ma Gyi on her marriage, or by arrangement with her own father, or by otherwise coming to an agreement with her in settlement of her claims to inheritance, but, as he had done none of these things, the adoption must be treated as still subsisting. The requirement in the *Dhammathats* as to joint living must receive a reasonable construction adapted to the changed conditions of modern times in the country, the object of the requirement doubtless being to provide a rough and ready means of settling questions of disputed succession turning on the unbroken maintenance of the family tie. The real issue for determination in such cases is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not. The Buddhist in practice has no testamentary power which would prevail against the established rule of inheritance and consequently the conducts of the several parties in their lifetime is of the greatest importance as a guide to what they intended their respective relations should be in respect of rights of inheritance upon the death of the owner of the property to which contending claims are made. MA GYAN v. MAUNG KYWIN, **U.B.R. 1892—1896, Vol. II, 176.** (U.B.R. 1892—1896, Vol. II, 22. *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 135.]

(88)—*Deceased sister's daughter's estate—Exclusion—Surviving brothers and sisters excluding children of deceased brothers and sisters.*—*Held*, that under the Buddhist Law, applying the general principle that only those closely related should inherit and that relations of the same decree should inherit to the exclusion of those of a more remote decree, the surviving brothers and sisters of a deceased sister inherit the estate of the deceased sister's daughter to the total exclusion of the children of the brothers or sisters who predeceased that sister. KAN GYI v. MA NGWE NU, **5 L.B.R. 70=3 Ind. Cas. 680.** (1 L.B.R. 104, U.B.R. 1905, Inheritance, 5, *F.*)

(89)—*Claim to share of joint property of brother and sister working together, both being alive—Law of inheritance not applicable.*—This suit was brought by a young woman against her brother and his wife for a third of their property. Her parents died when she was a little girl, and her brother kindly brought her up and took care of her, and she gave some help in his work as a toddy-tapper. In return for his kindness she has thus put him in Court. The parents not only left no property, but even died in debt, and the plaintiffs' brother had that burden to discharge in addition to her maintenance. *Held*,—in second appeal, reversing the decree of the Courts below, that Buddhist law was inapplicable, the suit not coming under the law of inheritance, but being in fact of the nature of a claim to a share of the profits of a partnership, the existence of which was not proved, and that no cause of action was disclosed by the proceedings. MAUNG TAING GYAW v. MA EIN TA, **U.B.R. 1897—1901, Vol. II. 102.**

(90)—*Manugye Dhammathat, Ch. X, S. 26—Partition of property between brothers and sisters—Equality of shares—Adoption—Child given in adoption loses claim to inherit any share of the estate of his natural parents—Evidence—Burden of proof.*—The adopted child drops out of his own family and is provided for in that adopting him. The expectations and arrangements of the members of the family he has left are framed accordingly, and it would be manifestly inequitable to let the child adopted into another family come back into his own and disappoint the reasonable calculations for the future which have been made therein. The number of prospective co-parceners in the inheritance of the original family is reduced by the adoption, and the adoptee cannot be permitted to come back and, as it were, to be born again. Apparently an adoptee drops even more completely than a deceased child out of the original family, for the deceased may leave children of his own who are admitted to a certain share, which does not seem to be the case with the children of an adoptee. *Held*, that in such cases as the present the burden of proof is shifted by a comparatively small amount of *prima facie* evidence from the claimant to the manager and *de facto* trustee of the estate. There is nothing against partition in equal shares. MAUNG PAN v. MA HNYI, **U.B.R. 1897—1901, Vol. II, 104.** (U.B.R. 1897—1901, Vol. II. 79 *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 116.]

(91)—*Inheritance cannot ascend—Brothers and sisters.*—Elder brothers and sisters are postponed to younger brothers and sisters in the law of inheritance. Except where there are no other relations, inheritance cannot ascend. MI A PRUZAN v. MI CHUMRA, **L.B.R. 1872—1892, 37.** [*R.*, U.B.R. 1897—1901, Vol. II, 22.]

(92)—*Children of brother and sister—Succession among children—Succession* per capita. —The parties in this suit were children of a brother Nga Pa and of a sister Mi Pu. There was another sister Mi U. Maung Pa and Mi Pu predeceased Mi U. The question before the Court was (a difference of opinion regarding

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

some trees having been waived by the applicant) as to the shares which the nephews and nieces of Mi U, who had died leaving property, were entitled to, that is to say, whether they were entitled to equal shares *per capita*, or whether they could claim only to divide what would have been their parents' shares, supposing Maung Pa and Mo Pu had survived Mi U. *Held* that the children of Mi U's brother Maung Pa were entitled to half and the children of Mi Pu were entitled to the other half of Mi U's property. MAUNG KYAW v. MA TU, **U.B.R. 1892—1896, Vol. II, 189.** [U.B.R. 1892—1896, Vol. II, 93, 102, *R.*)

(93)—*Sale of undivided ancestral property—Pre-emption.*—A sharer in undivided ancestral property if he wishes to sell his share must offer it to his co-heirs, and a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their rights. (S.J.L.N. pp. 39, 41, *F.*) The right of pre-emption is in the co-heirs collectively, and there is no law by which a single co-heir can enforce pre-emption unless the consent of the other co-heirs has been obtained. (U.B.R. 1897—1901, Vol. II, 155, *F.*; L.B.R. 1872—1892, 39, 41, 76, *R.*) A co-heir is not estopped from enforcing the right of pre-emption because other parts of the estate have been sold without protest. MAUNG LAW DOK v. MA PO, **U.B.R. 1897—1901, Vol. II, 162.** [*R.*, U.B.R. 1897—1901, Vol. II, 511, U.B.R. 1907, 2nd Qr., Buddhist Law—Inheritance—Pre-emption, 1.]

(94)—*Sale of ancestral property to persons not belonging to the family—Pre-emption—On their failing to agree to purchase it, the owner would be free to sell as he thinks fit.* MAUNG SHWE NYUN v. MA SO. **U.B.R 1897—1901, Vol. II, 153.** (L.B.R. 1893—1900, 26. *R*; L.B.R. 1872—1892, 39, 76, *F.*) [*R.*, U.B.R. 1897—1901. Vol. II, 511, U.B.R. 1907, 2nd Qr., Buddhist Law—Inheritance—Pre-emption, 1; *F.*, 14 Bur. L.R. 91, U.B.R. 1897—1901, Vol. II, 162.]

(95)—*Sale of undivided estate by eldest co-heir in possession—Suit by other co-heirs to recover their shares—Limitation Act, arts. 10, 142, applicability of.*—An undivided estate was in the possession of the eldest of the co-heirs, who sold it without the consent of the other co-heirs. The latter brought the present suit to recover their shares in the estate sold. The question for decision was, whether or not art. 10 of Limitation Act applied to the case. *Held*, that the suit was governed by art. 142 and not by art. 10, for the vendor was in possession of the property on behalf of the other co-sharers and his sale dispossessed them. MA KO U v. TUN E. **3 L.B.R. 7** (L.B.R. 1872—1892, 39 L. B.R. 1872—1892,76 L.B.R. 1893—1900, 26, *R.*)

(96)—*Buddhist Law—Inheritance—Arbitrator's award—Validity and binding effect of award.*—Rights of Buddhist co-heirs to contract between themselves irrespective of rules

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

of Buddhist law. Tendency in favour of equality of sharers. Desirability of collecting instance of partition in practice. MAE MYA v. MA KUN, **U.B.R. 1892—1896. Vol. II, 102.** (U.B.R. 1892—1896, 93 L.B.R. 1872—1892, 110, *R.*) [*R.*, 2 L.B.R. 174.]

(97)—*Consent of both parties is necessary to a valid marriage.*—Among Burmese Buddhists as among other civilised people, a woman, whether a minor or not cannot legally be married without her consent or against her will. MAUNG TAIK v. MA CHO. **U.B.R 1897—1901 Vol. II**, 197. (U.B.R. 1897—1901, Vol. I, 330, *R.*)

(98)—*Land-tax.*—There is no law or rule which gives any title to the person who is in possession of land, and who has failed to pay the tax on it, to remain in possession, to the exclusion of the rights of others. It would be a strange doctrine that a man in possession of land should be able to extinguish the rights of others not claiming through him, by omitting to pay the Government Revenue. He, if any one, should be punished for the omission to pay the revenue; to enable him to take advantage of that omission and defeat thereby the claim of others would be to allow him to take advantage of his own wrong. The fact that no revenue has ever been paid on land will not bar the Courts from decreeing a claim to possession of the land based on the law of inheritance. NAG NWE v. MAUNG THA DUN AUNG, **L.B.R. 1872—1892, 17.**

(99)—*Chinese Buddhist dying in Burma—Law applicable to his estate.*—Where a suit is brought for a share in the estate of a Chinese Buddhist dying in Burma after having acquired a domicile there, *held* that it was for the plaintiff to prove that he is entitled to share under the customary law applicable to Chinese Buddhist. S. 13, Burma Laws Act, 1898, commented upon. FONE LAN v. MA GYEE, **2 L.B.R. 95.** (L.B.R. 1872—1892, 185, 8 W.R. 261, 1 B.L.R. P.C. 26, *R.*) [*R.*, 2 L.B.R. 261, 4 L.B.R. 124.]

(100)—*Family arrangement — Partition.*—Among the Burman Buddhists, the father, foreseeing that the heirs may quarrel about the division of the property on his death, not infrequently arranges a special contract before his death among these heirs, whereby they bind themselves, among themselves to accept a certain proportion, or a specified field, or specified area of land, or a certain number of cattle, or particular chattels. The motive of convenience inducing the heirs to accept such an agreement is often aided by a religious awe of the father and a religious feeling of obedience to his wishes. But such an agreement will not usually give them a cause of action against him during his life. MI THIT MI SIN v. MAUNG TO AUNG AND MAUNG GAING, **L.B.R. 1872—1892, 197.** (L.B.R. 1872—1892, 22, 30, 44, *R.*,) [*R.*, L.B.R. 1893—1900, 469.]

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

(101)—*Funeral ceremonies — Assistance in sickness—Desertion—Will.*—Only when actual neglect or desertion is shown on behalf of those who are entitled to inherit is the person who assists in sickness and buries in death entitled to exclude the heirs from the inheritance. *Quære* :—Whether the Will as known to English law has any place in the Buddhist law. Whether a Will can cause the devolution of property contrary to the law of inheritance. NGA SAN YUN v. NGA MYAT THIN, **L.B.R, 1872—1892, 46.** [*R.*, L.B.R. 1872—1892, 70, 95, L.B.R. 1893—1900, 299, 465.]

(102)—*Hired attendant ministering during illness and performing funeral ceremonies—Right of inheritance in estate of deceased.*—A hired attendant who attends members ofa family during their sickness and buries them with means derived from the family estate does not thereby acquire a right of inheritance in such estate. MAUNG SHWE NO v. MAUNG CHIT TWE, **L.B.R. 1893—1900, 465.**

(103)—*Review of judgment — Sufficient reason.*—Where it is requisite for the ends of justice, a review can be granted where there is an apparent error of law or where the decision has preceded on a mistaken view of law, but not because of a ruling of law later than the decision of the case nor for the purpose of re-arguing the case on previous materials in the mere hope of inducing the same Court to take a different view. The law in question ought to be sufficiently settled and determinate to permit of its definite ascertainment. Where the law itself is so uncertain that it is impossible to say positively what it really is, the remedy of a review can hardly be properly applicable. (6 A. 292, 24 W.R. 186, 382, 1 B. 54, 11 C. 775, 1 C. 184, 7 M. 307, 10 W.R. 143, L.B.R. 1872—1892, 33, 9 A. 36, 10 M. 357, 14 C. 627, *Cited.*) Position of the lesser wife or concubine during the life-time of the chief wife and with her consent considered. Illegitimacy is an ambiguous and inconvenient word to employ in regard to Buddhist law. It does not appear in the original Burmese what is meant by the term is incompetency to inherit under certain conditions, or inferiority and postponement of claims to inherit to those of other heirs. Right of son of lesser wife taken during the life-time of the chief wife and with her consent, brought up by father like the offspring of a regular union to share the inheritance with a second wife and child pointed out. MA HLAING v. MA SHWE MA, **U.B.R. 1892—1896, Vol. II, 153.** [*R.*, U. B.R. 1902—1903, Vol. II, C.P.C., 3 ; *Cited*, U. B.R. 1897—1901, Vol. II, 488.]

(104)—Attetpa *property*—Lettetpwa *property —Out-of-time grandchild, Share of—Estate of grand parents.*—Where the plaintiff sued for three-fourths of the *attetpa* property of her grandparents and one-eighth of the *lettetpwa* property, *held*, that as she was an out-of-time grandchild, *i.e.*, her parents had predeceased

***Buddhist Law*—continued.**

——9.—Inheritance—*continued.*

the grandfather, she was only entitled to one-fourth of the above shares. MA PU v. MA LE, **1 L.B.R. 93.** [*Cited*, 3 L.B.R. 219 ; *R.*, 1 L.B. R. 198.]

(105)—Lettet-pwa—Atet *property—Partition.* —A native Judge interpreting the Buddhist law ought not to ignore its difficulties ; he should give reasons for selecting one rule out of several. On the death of a person leaving no widow but a son by his fourth wife and the daughter of a daughter by his first wife, the daughter of the daughter by his first wife, takes one-eighth and the son seven-eights in the *lettet-pwa*, or joint property acquired during the fourth marriage ; and in the *atet*, or property acquired by the deceased prior to his fourth marriage, the grand-daughter takes four-fifths and the son one-fifth. NGA SAN ON v. MI SHWE DAING, **L.B.R. 1872—1892. 223.** [*F.*, L.B.R. 1893—1900, 361 ; *R.*, 2 L.B.R, 174, 4 L.B.R. 189, U.B.R. 1892—1896, Vol. II. 110.

(106)—*'Kanwin' or marriage portion—Property gifted as, to bride—Death of bride childless—Husband's right to inherit.*—Where a gift of a certain property has been made as 'kanwin' at the time of the marriage ceremony, and such property has been delivered into the possession of the bride, even if the bride dies childless in her parents' house, the husband is entitled to inherit such property as against the parents-in-law. LU GALE v. MAUNG SEIN, 6 L.B.R. 16.

(107)—*Partition—Mother marrying twice—Division on second marriage between herself and children by first marriage—Legality - Property acquired thereafter during second husband's life-time—Property acquired after his death—Children after two marriages Mode of division.*—H, a Burmese woman, married twice. By her first marriage she had four children, and by the second marriage, she had two children. On her second marriage, she effected a division between the children of the first marriage and hereself. She acquired some properties after such division and during the lifetime of her second husband, and acquired some other property after his death. *Held*, that a division on the re-marriage of the mother is authorised ; that the children of the second marriage are entitled solely to the property acquired by the mother after the division and before the death of the second husband ; and that, as regards property acquired after the second husband's death, the children of each marriage take *per stirpes* and not *per capita*. MA WE v. MANG CHEIK, **6 L.B.R. 28,** (4 L.B.R. 110, *R.*)

(108)—*Inheritance*—Orasa *son — Devolution of the status on the next eldest son—Transmission of right.*—If a first-born son dies in infancy, the status of 'orasa' is capable of devolving on the next eldest son and does so devolve when he attains his majority, provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts on the

Buddhist Law—continued.

——9.—Inheritance—*continued.*

subject. He can transmit the superior right of inheritance to his own issue in the same way as an 'orasa,' who is actually the first-born of the family, can do. MA HNIN GAING v. MA THA LI, **10 Ind. Cas. 778.** (L.B.R. 1872—1892, 585, 8 Bur. L. R. 60, 3 L.B.R. 45, 2 L.B.R. 292, *F.*)

(109)—*Buddhist Law—Succession—Husband and wife--Status of lesser wife living separate from the head wife—Association of husband in public—"Mistress" distinguished from lesser wife or concubine—Presumption arising from separate living of lesser wife—Presumption from second marriage—Marrying two sisters.*—In order to get any share in the inheritance, a second wife must prove that her status was superior to that of a lesser wife or concubine. If she succeeds in proving this, she would be entitled to share on equal terms with the chief wife. Separation of residence affords no more than a presumption that the woman has not the status of one entitled to share in the inheritance, which can be rebutted by proof of the existence, of a higher status. (U.B.R. 1892—1896, Vol. II, 194, U.B.R. 1897—1901, Vol. II, 138, 160, *Expl.*) A second contemporaneous wife is not of necessity a lesser wife or a concubine. A lesser wife or concubine, who lives with the husband, gets two-fifths of the inheritance, but when she lives separately, she gets nothing. (U.B.R. 1892—1896, Vol. II, 145, *Rel. on.*) No formal demand in marriage and no ceremony are necessary, or even usual, in the case of persons who have been married before. The chief wife's consent to the second marriage is not required for entitling a second contemporaneous wife to inheritance. There is no such presumption in Burmese Buddhist Law that a Burmese woman, who co-habits with a man who, she knows, is already married, is a mistress and not a wife. There is no prohibition in the Buddhist Law against a man marrying two sisters. It is a mistake to use the word (mistress) with reference to a lesser wife among the Burmans. The Buddhist Law speaks of wives and concubines. The mistress of Western Europe is a different thing from the concubine of the *Dhammathats*. To convert a wife or even a lawful concubine into a mistress seems to be consistent neither with Buddhist Law nor with the cause of religion and virtue. Where it was found that the husband sometimes lived with the head wife and sometimes with the lesser wife, that he lived with both the wives on two occasions for a number of months, that he took the lesser wife also on his visits to Rangoon, Shwezettaw *pagoda*, his oil wells, etc., and where it was abundantly clear from the admitted facts that, during a long course of years, the head wife accepted the relations between the lesser wife and the husband without any sign of dissatisfaction : *Held*, that the lesser wife was satisfactorily proved to be a wife entitled to inherit on an equal footing with the head wife. MI SHWE MA v. MI ME, **12 Ind. Cas. 191.**

Buddhist Law—continued.

——9.—Inheritance—*concluded.*

(110)—*Succesession — Attendance during last illness--Giving expenses for funeral rites—Claim to the property of the deceased.*—A Burman Buddhist died, leaving no wife, children, brothers or sisters ; the plaintiffs who were his younger brother's children brought a suit for the possession of the property : *Held*, that the defendant who lived with the deceased and who admittedly attended him in his last illness and also paid the expenses of the funeral with the evident intention of recouping himself from the estate the whole of which was in his possession, should be preferred to the plaintiffs, who failed to attend or visit deceased in his last illness and whose neglect was not cured by their attempt to borrow money for the funeral. MAUNG SHWE THAUNG v. MAUNG TU, **11 Ind. Cas. 777.**

See BUDDHIST LAW--DIVORCE, L.B.R. 1872—1892, 296.

See PRE-EMPTION — GENERAL, L.B.R. 1893—1900, 26.

Provisional decree — *See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 2 B.L.R. 164.

See TRANSFER OF PROPERTY ACT, 1882, ss. 6 (*a*), 85, 91 (*a*) (*b*), U.B.R. 1892—1896, Vol. II, 581.

——10.—Joint family.

(1)—*Marriage of member of—Separate property—Limitation.*—It is doubtful whether a Burmese Buddhist family is ever a joint family within the meaning of art. 127, Limitation Act. However that may be, a member of the family who marries certainly ceases to be a member of a joint family. Property acquired by a married son or daughter does not become part of the joint family property ; it is the separate property of the married member. MAUNG AUNG GE v. MA HLA WIN **L.B.R. 1893—1900, 415.** (6 A. 442, *R.*)

(2)—*Joint ancestral property—Suit for share of, by joint heirs excluded therefrom against other joint heirs—Limitation—Limitation Act, arts. 127, 142, 144.*—A suit by Burmese Buddhists as joint heirs, against other joint heirs and their alienees, for recovery of a specific share in joint family property, must be brought within 12 years from the time the exclusion from share became known to plaintiff. A suit by a sharer under Buddhist law for a share against alienees from one of the sharers would, if there was a dispossession when the plaintiff was in possession along with the other sharers, be governed by art. 142 and if there was no dispossession, by art. 144. MAUNG TUN v. MA TAW, **L.B.R. 1893—1900, 132.**

See BUDDHIST LAW—HUSBAND AND WIFE, L.B.R. 1872—1892, 578.

See HUSBAND AND WIFE, **1 L B.R. 184.**

——11.—Maintenance

(1)—*Wife having means and maintaining herself—Right of suit for maintenance.*—By Buddhist law, a suit for maintenance will not

***Buddhist Law*—continued.**

——11.—Maintenance—*concluded.*

lie where the wife has means of her own and has maintained herself. KO ONG v. MA YON, **L.B.R. 1893—1900, 31.** (10 C. 777, *R.*)

(2)—*Husband and wife.*—It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessaries; but it appears that this law would not be applicable where she has sufficient means of her own. No authority is found for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during which she has done so. MAUNG HMUN TAW v. MA PWA, **L.B.R. 1872—1892 238.** [*R.*, L.B.R. 1893—1900, 31.]

(3)—*Husband and wife—Maintenance of children.*—Where a plaintiff chooses to live separate from her husband and makes her own arrangements, she is not entitled to claim maintenance of the children. So long as the marriage-bond subsists the wife is by Buddhist law required to do her part in contributing to the joint comfort and well being. MAUNG KIN v. MA HNIN YI. **L.B.R. 1872—1892, 114.** [*R.*, 4 L.B.R. 340, L.B.R. 1872—1892. 126. 2 L.B.R. 46.]

(4)—*British Burma—Buddhist Law—Maintenance, wife's right to and claim for—Suit by Burmese wife for necessaries and past maintenance—Law applicable — Burma Courts Act (XVII of 1875), s. 4.*—By the Buddhist Law of marriage in British Burma, it is the duty of the husband to provide subsistence for his wife and furnish her with suitable clothes and ornaments. On his failing to do so, he is liable to pay her debts contracted for necessaries, unless she has sufficient means of her own. There is no authority for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so. [*F.*, L.B.R. 1893—1900, 31.] A claim by a wife, married according to Burmese rights and customs, in a British Burma Court, for necessaries and for past maintenance, was held to be a question "regarding marriage" under s. 4 of the Burma Courts Act, and the Buddhist Law (mentioned above) was held applicable to the case, in consequence. *Semble.*—If the case were to be decided according to the rule of justice, equity and good conscience, the husband would not, in view of the Burmese Law as to the property of married persons, be liable upon the claim. MOUNG HMOON HTAN v. MAH HPWAH, **10 C. 777, P.C. = 11 I.A. 109.** [*F.*, L.B.R. 1893—1900, 31.]

——12.—Marriage.

(1)—*Seduction—Pregnancy—Damages.*—The Specific Relief Act, which is of greater obligation than the Buddhist Law, says distinctly that a contract to marry cannot be specifically enforced. All persons are supposed to know the law, and women ought to know, that if they consent to sexual familiarity without marriage, they take the risk of the paramour ultimately refusing to marry. If there is no promise to marry, the woman who has consented has no right to sue. If there has been a promise to marry, the Court would look at all the circumstances before awarding damages, and the amount, if any, awarded would depend on the circumstances as the Dhammathats very plainly show. When there has been no promise to marry, a Burmese woman cannot recover damages for seduction resulting in pregnancy. NGA PO THAIK v. MI HNIN ZAN, **L.B.R. 1872—1892, 235.** [*R.*, L.B.R. 1872—1892, 533, 14 Bur. L.R. 139 = U.B.R. 1907, Contract 5; *F.*, U.B.R. 1897—1901, Vol. II. 499; *Cons.*, U.B.R. 1907, 2nd Qr., Contract, 5.]

(2)—*And divorce—Inheritance—Rights of child of wife who has left her husband—Form of suits for share of inheritance.*—Under Buddhist law, a divorce may be effected by the voluntary departure of the wife from the husband for a period of one year. If such departure is without good and sufficient reason, the wife loses all claim on the joint estate. The right of a child of the defaulting wife to inherit her father's estate depends on the special circumstances of the case. L.B.R. 1872—1892, 184. U.B.R. 1897—1901, Vol. II, 55, *R.*) The valuation of an estate upon an application of letters of administration affords no exact criterion of what the share of each person entitled to share in the estate will eventually amount to. Such valuation is a valuation of the property which the applicant expects will come into his hands. Some of the property may never be realized, or perhaps more may come to the administrator's hands. The sharers are entitled to share in what actually does come to his hands. Consequently in a suit by a sharer for his or her share in an estate the taking of an account is almost necessarily involved, and in such a suit there should ordinarily be a prayer asking for an account and for the due administration of the estate under the orders of the Court, as contemplated by s. 213, Civ. Pro. Code, 1882. In such a suit all interested parties should also be joined. MA THET v. MA SAN ON, **2 L.B.R. 85.** [*Overruled.* 3 L.B.R. 175; *R.*, 14 Bur.L.R. 236; *F.*, 4 L.B.R. 272.]

(3)—*Wife living in house different from that of wife with whom husband messes—Right of inheritance after husband's death, Extent of—Living and eating together—Marriage, Essence of—Separation of residence, Presumption arising from.*—Wives who live in separate houses from that of the wife with whom the husband takes his meals are not entitled to obtain, on the death of the husband, anything more than has already come into their possession. Living and eating together is not an essential of marriage, but merely a formal proof of the validity of a marriage. Separation of residence does not afford more than a presumption that the woman has not the status of one entitled

***Buddhist Law*—continued.**

——12.—Marriage—*continued.*

to share in the inheritance left by her deceased husband, a presumption which can be rebutted by proof of the existence of a superior status. MA GYWR v. MA THI DA. **U.B.R. 1892—1896, Vol. II. 194.** [*R.*, 3 L.B.R. 175, U.B.R. 1897—1901, Vol. II, 116, 193. U.B.R. 1910, 3rd Qr., Civil. 42 ; R., U.B.R. 1897—1901, Vol. II, 138; *Expl.*, U B.R. 1897—1901, Vol. II, 160.]

(4)—*Suit by respondent plaintiff as wife of deceased to recover his estate from brothers and sisters.*—When a divorce has occurred strict proof is required of the renewal of connubial relations, when the question is whether there has been a re-union or not, just as clear proof of marriage in the first instance is required when the point in dispute is whether the status of a wife has been acquired or not. In this case the evidence of a re-union is altogether unsatisfactory, and the circumstances go to show that the probability is all the other way. MAUNG LU GYI v. MA NYAN, **U.B.R. 1892—1896, Vol. II, 202.**

(5)—*Ante-nuptial contracts — Proof.*—Buddhist Law recognises certain property as the separate property of the wife. It is called "*thin thi*" and includes what belonged to the wife before marriage, and what has been given specially to her since marriage. It is distinguished from "*kan win*" which is property set apart at the time of marriage for the joint purposes of the married pair, and from "*hnit pason*" which is property acquired jointly after marriage. In ante-nuptial contract, it must be proved by clear evidence that, marriage was the consideration of the promise. On grounds of public policy, ante-nuptial contracts which are not the usual incidents of a Buddhist marriage, must be admitted with caution and only on strict proof. MAUNG BA v. MA OK, **U.B.R. 1902—1903, Vol. II, Buddhist Law—Marriage, 1.** [*Rel. on*, U.B.R. 1904, 1st Qr., Buddhist Law—Marriage, 1.]

(6)—*Suit to recover money raised on mortgage of her separate property and lent to husband.*—A Burmese wife is entitled to sue her husband during marriage to recover, with interest, money raised on mortgage of her separate property and lent to her husband for his separate use. MA MON v. MAUNG SO, **U.B.R 1904, 1st Qr., Buddhist Law—Marriage, 1.** (U.B.R. 1902—1903. Vol. II. Buddhist Law, Marriage, 1. U.B.R. 1892—1896, Vol. II, 159, *R.*]

(7)— *Restitution of conjugal rights—Ill-treatment and desertion.*—Where plaintiff-appellant left the house without any sufficient cause after ill-treating defendant-respondent and since then he has failed to exhibit any sign of affection for her, *held* that plaintiff-appellant is not entitled to a decree for restitution of conjugal rights. Ill-treatment and desertion by petitioner is a valid plea of justification under Buddhist Law. MAUNG SEIN v. KIN THET GYI, **U.B R. 1904, 4th Qr., Buddhist Law, 8.** (10 B. 301, 28 C. 751 L.B.R. 1893—1900, 654, 1 L.B.R. 351, U.B.R. 1897—1901, Vol. II, 488, *R.*) [*R.*, U.B.R. 1909, Buddhist Law—Marriage, 1.]

***Buddhist Law*—continued.**

——12.—Marriage—*continued.*

(8)—*Restitution of conjugal rights, Suit for—Whether lies--Rights and duties during marriage—Right to divorce.*—There is nothing in the Buddhist law (as explained in U.B.R. 1904—1906, Vol. II, Budd. Law, Div., p. 3) as to divorce at the will of one party, without any fault in the other party, on the surrender of all the joint property and payment of all the joint debts. A suit for restitution of conjugal rights naturally lies, and this is not inconsistent with the Buddhist Law. NGA CHIN DAT v. MI KIN PU, **U.B.R. 1909, 1st Qr., Buddhist Law, 1.** (U.B.R. 1904—1906, Vol. II, Budd. Law—Div. 3, *Cons. & Expl.*)

(9)—*Right of wife to mortgage her interest in joint property without her husband's consent.*—The texts declaring that the husband is lord of the wife must be construed in the present day in a strictly limited sense. Practically in respect of their respective rights to property, the Burman Buddhist husband and wife occupy a position of equality. It is settled law that the husband is not at liberty to alienate joint property without his wife's consent, but that he can make a valid transfer of his share and interest in such property. The same rules apply to the case of alienations by the wife. Thus, where a wife mortgaged her interest in a house and land which was *hnaparon letletpwa* without the consent of her husband, it was held, that the mortgage was valid. NGA SAN YA v. NGA SAN YA. **U.B.R. 1907, 4th Qr., Buddhist Law— Marriage—Joint Property, 1.** (3 L.B.R. 66, U.B.R. 1892—1896, Vol. II, 45. 204, U.B.R. 1902—1903, Vol. II, Ex. of decree, 1, U.B.R. 1904—1906, Buddh. Law—Divorce, 1. *R.*)

(10)—*Acquisition of property during marriage—Right of widow to dispose of her share of property after death of husband—Property partitioned between widow and her son.*—Certain property was required during the marriage of M.S. and M.B. On M. S's death, M.B., had an absolute right to dispose of her share in the property. The property was partitioned between her, and her son. What she obtained came to her in her right of widow. Consequently she could dispose of the property without the consent of her grandson. MAUNG PO U v. MA BA LI, **14 Bur. L R. 57.**

(11)—*Husband and wife—Desertion of one by the other for a period, whether dissolves the marriage tie*—Dhammathats, *effect of, custom.*—The point referred to the Full Bench in this case was, whether the desertion of the husband by the wife or *vice versa*, for the period specified in the Buddhist Law Texts has the effect of dissolving the marriage tie ; in the absence of any further and express act of violation on the part of either of them. *Held*, that, even if the actual texts of the *Dhammathats* supported the proposition that marriage is

Buddhist Law—continued.

——12.—Marriage—*continued.*

dissolved by mere desertion, it must be remembered, in applying the personal law, that it is in course of time apt to change by the development of customs inconsistent with such law. Further, it is quite conceivable that a husband and a wife may quarrel and live apart, each on their own means, without the least desire to proceed to the extremity of a divorce and the idea that marriage can be terminated at all, without the wish of one or the other or the parties to it, is contrary to, and inconsistent with, the fundamental principle of the marriage contract. (*Adamson and Irwan, JJ.*) *Held*, however, (*Fox, J. dissentiente*) that the decision should be based only on the correct interpretation of the texts, irrespective of how the Burmese community may regard the matter and such texts have laid it down that, at the end of three years of continued desertion of a wife by a husband or at the end of one year's continued desertion by a wife of her husband, the marriage of the husband and wife is dissolved without any further and express act of violation on the part of either party. THEIN PE v. U PET, **3 L.B.R. 175, F.B.** (2 L.B.R. 85, *Overruled*; U.B.R. 1892—1896, Vol. II. 53, 56, 194, 3 I.A. 259, 14 M.I.A. 570, 10 B.L. R. 132, *R.*)

(12)—*Marriage—Custom—Chinese Buddhits—Validity of marriage with Burmese Buddhist—Necessary facts to be proved.*—Where it is sought to establish a marriage between a Chinese Buddhist and a Burmese Buddhist woman, it must be shown that the practices the husband followed differ from those followed by all Chinese Buddhists and are the peculiar characteristics of Burmese Buddhists. No presumption as to his being a Burmese Buddhist can be drawn from the fact that he bears a Burmese name. For it is a matter of common knowledge and experience that Chinamen, long resident or born in Burma, adopt Burmese names. In such a case the customary law applicable to Chinese Buddhists must be followed. MAUNG TUN THA v. MA PU, **8 Ind. Cas. 452** (2 L.B.R 95, *F.*)

(13)—*Marriage of minor without parent's consent — Subsequent co-habitation in parent's house—Proof of consent* —A, a minor girl, who eloped from her parents' house with B, returned to her parents' house and lived and co-habited there with B, and ate together with him there: *Held*, that it was a perfectly valid marriage according to Burmese Buddhist Law, and that the subsequent consent of the parents may be presumed from their conduct towards A and B. *Quœre*: Whether the consent of the parents is essential to the validity of the marriage of a minor child? MAUNG PHIT PE v. MA TIN, **8 Ind. Cas. 437.** (1 L.B.R. 297, *Doubted.*)

(14)—*Burmans—Inheritance—Wife and concubine — Their rights*—Maya Nge, *whether concubine — 'Letsonmaya,' meaning of the term.*— A Burman Buddhist may have at the same time two or more wives, who are on equal

Buddhist Law—continued.

——12.—Marriage—*continued.*

footing, though one of them may be styled the head wife, and her status may be superior to that of a free concubine. When a *Maya Nge* is mentioned in the *Dhammathats*, it is such a wife that is referred to and not a free concubine. (L.B.R. 1872—1892, 6, U.B.R. 1897—1901, Vol. II, 160, *R.*) In Burma, though polygamy proper is undoubtedly coming to be looked on with more and more disfavour, it is by no means extinct. Of the wives who have borne an equal number of male children, the chief wife is the one first married. A wife who is barren may be "put away" but not divorced, and then another wife may be married without fault, and this rule appears to be the only one according to which a subsequently married wife can be set over a previously married one as his chief wife. The term "letsonmaya" means a wife who lives on terms of equality with her husband. Eating out of the same dish is but one, though perhaps the chief, *indicium* of such equality. A wife living separately from her husband, who is not entitled to inherit, is not at all a wife but a concubine. Separate residence merely affords a presumption, which, however, may be rebutted, that such a woman is a concubine and not a wife. MI KIN GYI v. MI KIN GYI, **U.B.R. 1910, 3rd Qr., 42=8 Ind. Cas. 1169.** (U.B.R. 1892—1896, Vol. II, 145, *Expl*; U.B.R. 1897—1901, Vol. II, 160, U.B.R. 1897—1901, 194, *Rel. on.*)

(15)—*Husband and wife—Husband's right over wife's* payin *property—Distinction between maiden wife and* eindaungy *as regards husband's control over wife's* payin—*Amendment of plaint—When to be refused—Estoppel.*—A Buddhist wife, who is an *eindaungyi*, may alienate her *payin* property in any way she likes, without even consulting her husband, provided that she does not give it to a paramour. An amendment of plaint should not be allowed on second appeal, when such amendment involves fresh issues and fresh evidence. Where a husband allowed his wife to receive certain land in mortgage in her sole name and to take the rent, the mortgagor is justified in the belief that the transaction only concerned her and himself and that she had power to reduce the debt if she wished to do so. The husband is estopped from disputing a redemption by the wife. NGA TAN BAW v. NGA KAN, **12 Ind. Cas. 200.**

Child of divorsed couple—Rights of inheritance—Maintenance of renewal of filial relations sufficient to entitle children to inherit property acquired by the couple during second marriage—*See* BUDDHIST LAW—DIVORCE, 14 Bur. L.R. 236=4 L.B.R. 272.

See BUDDHIST LAW—INHERITANCE, L.B. R. 1872—1892, 219.

Right of female minor to sue for compensation for breach of promise of marriage, independently of contract—*See* CONTRACT ACT, 1872, ss. 2, 10, 10, U.B.R. 1907, Contract, 5.

***Buddhist Law*—continued.**

——12.—Marriage—*concluded.*

Majority Act, 1875, ss. 2 and 3—Burma Laws Act, 1898, s. 13—Manugye Dhammathat, Chs 6. 28, 30—*See* CONTRACT ACT, 1872, S. 11, U.B.R. 1892—1896, Vol. II, 200.

Decree passed against a wife alone—Husband and wife being Buddhists—Attachment by actual seizure of joint property to the extent of the wife's interests lawful—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, U.B.R. 1902—1903. Vol. II, Execution of decree, I.

House built during coverture on land belonging to wife alone—Presumption of ownership—Power of one of parties to marriage to deal with joint property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 41, 8 Ind. Cas. 606.

——13.—Partition.

(1)—*Between father and daughters, the children of successive wives on the former marrying again.*—U Myaing, who had successively married three wives who had pre-deceased him, was on the point of marrying a fourth wife when his daughters by his former wives claimed partition of inheritance. At the time of partition U Myaing had by his first wife two children surviving, by his second wife one child, Ma Tha Zu, and by his third wife Ma E Ma, one child Ma Shwe Sein. There was also a daughter of Ma E Ma by a former husband. All the property to be divided was the jointly acquired property of Ma E Ma and You Myaing. *Held*, that the property should have been divided into nine shares, of which U Myaing should have kept five, and given two to Ma Shwe Sein, the daughter of himself and Ma E Ma, and two to the children of the first two marriages and the step-daughter. MA TA v. MA THU ZA. **L B.R. 1893—1900, 312.**

(2)—*Husband and wife—Partition of divorce—Property inherited by wife* — Payin *and* Lettetpwa *property.*—The distinction between a division of property between husband and wife upon divorce and a succession to property by inheritance being sufficiently obvious, this distinction must be kept well in mind in interpreting the texts and rulings as to the various descriptions of property and the division of inheritance of the same under Buddhist Law. (L.B.R. 1872—1892, 110, *F.*) As between husband and wife property inherited by the wife during coverture is viewed as *letletpwa* and not *payin* when a partition of property is made between husband and wife on divorce. It does not by any means follow that property is to be viewed as joint property of the husband and wife if, on the wife or the husband dying during coverture, the estate of the deceased becomes distributed among the heirs. Property inherited by a wife is acquired during coverture if the income of the inherited share is enjoyed during coverture, whether a distribution of inheritance into separate aliquot shares be made between the heirs before she is divorced from her husband or after such divorce. MA NGWE BWIN v.

***Buddhist Law*—continued.**

——13.—Partition—*continued.*

MAUNG LUN MAUNG, **L.B.R. 1893—1900, 295.** (L.B.R. 1872—1892, 212, *R.*; **L.B.R. 1872—1892, 110, 177, *D.*)**

(3)—*Of property jointly acquired during one marriage between the children by that marriage and the children by other marriages*—Manukye, *X, 66, 67*—The rule for the partition of property jointly acquired during one marriage between the children by that marriage and the children by other marriages is that laid down in paragraphs 66 and 67, Ch. X of the *Manukye's Dhammathat*. The children by the marriage during which property is acquired take double the share taken by the children of any other marriage, MA MIN E v. MA KYAW TAHI, **L.B.R. 1893—1900, 361.**

(3 *a*)—*Burden of proof—Division—Ancestral estate.*—The burden of proving the division of ancestral property lies upon the party asserting division. MA HNIN SI v. MA HNIN YI, **L. B.R. 1872—1892, 22.**

(4)—*Title of eldest son who has obtained his one-fourth share to share thereafter in the remainder of the estate.*—There is no authority for thinking that the eldest son, after taking his one-fourth share of the estate of his deceased father, retains any right to a further future partition or any right in the remainder of the estate, except the right of pre-emption in case of sale by the remaining co-heirs. (L.B.R. 1872—1892, 76, U.B.R. 1897—1901, Vol. II, *F.*) In such a claim for pre-emption the co-heirs would have to be made defendants or joined as plaintiffs. MAUNG HMU v. MAUNG PO THIN, **1 L.B.R. 50.** [*R.*, 1 L.B.R. 198.]

(5)—*Partition—Gift—Mutation of names—Notice to mortgagee of claim—Effect of a subsequent mortgage on family partition—Transfer of Property Act (IV of 1882), ss. 41, 123—Specific Relief Act (I of 1877), s. 42, proviso—Mortgage by third person—Declaratory suit by real owner—Buddhist Law.*—A declaratory suit by the real owner that a mortgage effected by the person in possession does not affect the property is not repugnant to the proviso to s. 42 of the Specific Relief Act. It is not necessary in such a case to seek the cancellation of the mortgage instrument or possession of land. Where a Burman Buddhist, on his second marriage, transferred the joint property of himself and his first wife to their daughter by way of inheritance, evidently with the intention of keeping the land out of the hands of his second wife: *Held*, that the transfer operated as a partition of inheritance and not as a gift. A partition between father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could claim under the ordinary Law of Inheritance, or if the father thinks it expedient to make over the whole of the joint property to the daughter. A transferee cannot be allowed the benefit of the principle contained in s. 41 of the Transfer of Property Act, when the slightest inquiry would have sufficed to acquaint

***Buddhist Law*—continued.**

——13.—Partition—*concluded.*

the mortgagee with the fact that the land stood in the real owner's name in the Revenue maps and registers. MAUNG HMWE v. MA LUN AUNG, **11 Ind. Cas. 855.**

See BUDDHIST LAW—DIVORCE, U.B.R. 1906, Buddhist Law—Divorce, 19.

——14.—Pre-emption.

(1)—*Suit for pre-emption under Chinese Customary Law—Suit by Chinaman—Indian Succession Act, ss.5 and 331—Burma Laws Act. s. 13.*—In a suit by a daughter for pre-emption of certain properties which had belonged to her father, who was a Chinaman, brought under the Chinese Customary Law, it was held, (1) if the father was not a Buddhist, the provisions of the Indian Succession Act applied to him, and not the law of China, (2) if he was a Buddhist his estate would be exempted from the operation of the Indian Succession Act by s. 331 of that Act, and the Buddhist Law would form the rule of decision. In this case, the father being a Chinese Buddhist, it would be necessary for the plaintiff to show that there is a Chinese Buddhist Law in China applicable to Chinese Buddhists only, as apart from the customary law of the country, applicable to all the inhabitants whether Buddhists or not, and that by that law there is a right of pre-emption in respest of the land in dispute. APANA CHARAN CHODRY v. SHWE NU, **4 L.B.R. 124.** (2 L.B.R. 95, *R.*)

(2)—*Pre-emption, widow's right of—Widow's right to inherit.*—According to Buddhist Law, a person selling ancestral property, whether it has been divided or not, must offer it to his co-heirs, before selling it to strangers. A sale to strangers effected without such offer is invalid, if the co-heirs promptly assert their rights. (29 M. 298, U.B.R. 1897—1901, 231, 155, 162, L.B.R. 1872—1892, 39, 41, 76, L.B. R. 1893—1900, 26, 1 L.B.R. 144, 7 A. 775, *R.*) A Buddhist widow is the heir of her husband, whether there are children or not. The eldest son has a right to claim one-fourth on the death of the father, but this fact does not alter the position of the widow. (U.B.R. 1892—1896, 121, 531, U.B R. 1897—1901, 146, L.B. R. 1872—1892, 76, *R.*) Where the widow has inherited her deceased husband's share, and the co-heirs of the husband have sold their shares to strangers, the widow has the right of pre-emption. Such right to pre-empt will be strengthened all the more by the fact that she has a son by her deceased husband. NGA TIN v. NGA SHWE ON, **U.B.R. 1907 Buddhist Law (Inheritance and Pre-emption) 1.**

(3)—*Right of pre-emption—Right of widow to dispose of family property subject to children's right of pre-emption.*—A Buddhist widow has a right of absolute disposal in respect of her own share, after her husband's death, and a life-interest in the remaindar. This decision does not overrule the law relating to the right of pre-emption but is subject to the general rule,

***Buddhist Law*—concluded.**

——14.—Pre-emption—*concluded.*

regarding the right of all co-sharers to pre-emption. Where a mother after the father's death sold her right over joint family property to a stranger, *held*, the son has a right of pre-emption over the whole property. MO THI v. THA KWE, **4 L.B.R. 128=14 Bur. L R. 205.** (2 L.B R. 167, L.B.R. 1872—1892. 378, L.B. R. 1893—1900, 65, *R.*)

——15—Widow.

(1)—*Widow's share of joint property absolutely at her disposal—Division of one-fourth share among the eldest son and his brothers—Division of property between the widow and her children on her re-marrying.*—The widow has absolute power of disposal over one-half of the joint property of herself and her deceased husband. MAUNG HLAING v. MAUNG THA KA DO, **L.B.R. 1893—1900, 65.** (L.B.R. 1872—1892, 121, 378, *R.*.)

——16.—Will.

(1) — *Testamentary power.*— A Burman Buddhist cannot make a will. The testamentary power is not in a Burmese Buddhist. MAUNG ME AND MI MIN NYO v. SIT KIN NGA, **L.B.R. 1872—1892, 429,** [R., L.B.R. 1893—1900. 9, 132.]

(2)—*Ancestral estate.*—The right to share in ancestral estate is not affected by any instructions or Will on the part of a co-heir. LA U v. MI SAUNG MA, **L.B.R. 1872—1892, 12.**

(3)—*Chief Commissioner—Validity of Wills made by Burmese Buddhists*—No will by a Burmese Buddhist having heirs which dispossess of property, moveable, or immoveable, contrary to the Burmese Buddhist Law of Inheritance should be admitted as valid. There may possibly be some family customs in some remote part of the province, which the Chief Commissioner is unacquainted with, where this rule would not lie. In that case, of course, there will be an exception; and it appears probable that in some cases, as for cruelty or for a blow, a father or mother may legally disinherit an heir; but as a general rule, and without some special act of the Legislature, the Courts are bound to decide questions of inheritance, between Burmese Buddhists solely by the Law of Burmese Buddhists or by well ascertained custom, ANONYMOUS, **L.B.R. 1872—1892 430 Note.**

Budget Estimate.

Provision to be made in Budget Estimate for the contribution from Government Estates to the Zemindari Dak Fund. **Rev. Cir. No. 7, 24 W.R. Rev. Cir. p. 24.**

Submission of Budget Estimates by Civil and Criminal Authorities. **Cir. No. 32, dated the 18th November 1864, 1 W.R Civ. Cir. Orders p. 4.**

This circular directs that all bills of Small Cause Court Judges should be transmitted to the Judge of the District for the purpose of

udget Estimate—*concluded.*

being checked ; but the scale of contingent expenditure estimated for yearly to be submitted to the Court for approval and incorporation in the Budget for the year. **Civ. Cir. No. 18, 20 W.R. Rules and Orders of the H.C. p. 8.**

Budget grants.

Additional cl. (5-A) to s. 5, p. 24, Board Rules, regarding applications for extra Budget grants. **Rev. Cir. No. 6, 20 W.R. Cir. p. 2.**

Deduction of probable payments of April 1867 from the Budget Grant for 1866-67—Explanation of the head "Allotment" at foot of monthly Contingent Bill. **Cir. No. 21, dated the 28th May, 1866, 5 W.R. Civ. Cir. Orders, p. 11.**

Budnee Transactions.

See RIGHT OF SUIT—GENERAL, 11 P.R 1866.

Building.

See LANDLORD AND TENANT—COMPENSATION FOR IMPROVEMENTS.

(1)—*Buildings on land in mofussil—Property in.*—Buildings and other such improvements made on land in the mofussil do not, by the mere accident of their attachment to the soil become the property of the owner of the soil. If he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, or to obtain compensation for the value of the building, at the option of the owner. THAKOOR CHUNDER PORMANICK v. RAMDHONE BHUTTACHARJEE, **6 W.R. 228.**

(2)—*Erections on land made when objection raised by co-sharer—Pulling down of.*—Erections on land made after objection was raised by a co-sharer may be ordered to demolished, if made without permission. KALEE PERSHAD DUTT v. GOUREE PERSHAD DUTT, **5 W.R. 108.**

(3)—*Laches—Fraud—Mistake as to title—Duty of real owner.*—When a man builds a house on land supposing it to be his own, or believing he has a good title, and the real owner, perceiving his mistake, abstains from setting him right, a Court of Equity will not allow the real owner to assert his legal right against the other without at least making him full compensation for the moneys he has expended ; the rule of equity being that a Court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title. MUSSAMMAT RANI RAMA v. SHEIKH JAN MOHAMMAD, **3 B.L.R.A.C. 18=11 W.R. 375,** [*Expl.*, 3 C.P.L.R. 1.]

(4)—*Zemindar allowing tenant to build on his sir land—Building being of very small value—Estoppel in equity.*—If a man permits another to erect a valuable building upon his land, and with the knowledge that the building being

——Building—*continued.*

erected, stands by, and does not prevent the other from doing so, then, by the rules of equity which are in this respect the same as the rules of law, he cannot eject that other person. But where a zemindar allowed his cultivating tenant to take up his abode on his *sir* land for eight years and to construct a building on it of very small value (*viz.*, 2 Rs.) no equitable estoppel arose in such a case and the zemindar was entitled to eject the tenant, the latter not having acquired any title by adverse possession. GOPI v. BISHESHAR, **A.W.N. 1885, 100.** [*Overruled*, 21 A. 496=26 I.A. 58; *R.*, 33 C. 1119, 6 A.L.J. 57.]

(5)—*Land belonging to co-sharers—Erection of building on land by one co-sharer without the consent of others—Removal of building—Rights of other co-sharers—Acquiescence.*—In a suit by certain co-sharers against other co-sharers for the demolition and removal of a permanent building which had been erected at considerable cost by the latter, *held* that, though the Court had a discretion to interfere and direct the removal of the building, that discretion need not necessarily be exercised in every case. As a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building and that he took reasonable steps in time to prevent the erection. GIRDHARI LAL v. VILAYAT ALI, **A.W.N. 1885, 277.** [*Appl.*, 9 A. 661.]

(6)—*Sanction by zemindar to use of waste land for religious purposes—Erection of* chabutra *on land—Suit for removal.*—In a suit by a zemindar of a certain village for removal of a *chabutra* erected by the defendants (a Mahomedan community) on certain waste land which has been granted by the plaintiff to the defendants for the purpose of saying their prayers only, the Court granted a decree because the defendants had done something in excess of the user of the land permitted them by the proprietor. REHMAT ULLAH v. BADAM SINGH, **A.W.N, 1885, 325.**

(7)—*Building on land belonging to another—Equitable estoppel.*—In a suit brought to demolish some buildings erected by defendants on open land belonging to the plaintiffs, where it appeared that the principal plaintiff, in the performance of his office as Municipal Commissioner, had to report on the petition of the defendant for permission to build, and he reported to the Municipality that he had visited the spot, and could find no objection to the defendant's application to build, *held* that it was clear that the plaintiffs were well aware of what defendant was doing, and that they never interfered, and that the plaintiffs were under those circumstances not entitled to the relief they claimed. MUNNA v. MADAT ALI, **A.W.N. 1886, 123.**

(8)—*Acquiescence.*—The absence of objection to the erecting of a permanent building by a tenant during the continuance of an *ijara* should not be construed as amounting to acquiescence such as might be inferred where the

Building—*continued.*

land is in direct receipt of rent from the tenant. KRISHNA KISHORE NEOGI v. MIR MAHOMED ALI, **3 C.W.N. 255.** (12 W.R. 495, *D.*)

(9)—*Stranger building on land of another—Right of owner—Acquiescence—English and Indian Law—Delay in bringing suit, effect of.*—It is a well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. (*Ramsden* v. *Dyson*, L.R. 1 H.L. 129 at p. 170; *Plimmer* v. *Mayor, etc., of Willington*, L.R., 9 App. Cas. 699 at p. 710; P.J., 1892, p. 348, *R.*) The same is the law in India also, with the exception that the party building on the land of another is allowed to remove the building. (6 B.H.C. A.C. 80, *R.*) [*F.*, 6 Bom. L.R. 86=28 B. 298, 2 N.L.R. 4, 9 Bom. L. R. 404; *D.*, 32 B. 32=9 Bom. L.R. 1161.] Delay by the owner in bringing the suit, is not, of itself, sufficient to create an equity in favour of the person spending money on the land and to deprive the owner of his strict rights. PREMJI JIVAN BHATE v. HAJI CASSUM JAMA AHMED, **20 B. 298.** (2 M.H.C. 114, *Appr. & F.*)

(10)—*Decree for possession—Leave to remove buildings.*—In a decree to put plaintiff in possession, leave cannot be reserved to defendant to remove buildings, &c., unless they were erected by defendant in good faith. RAM DHONE BHUTTACHARJEE v. ISHAMEE DABEE, **2 W.R. 123.**

(11)—*Building on another person's land by other than a mere trespasser—Notice of adverse claim—Equitable right of removing buildings—Custom of country.*—The law in India is that buildings may be removed if there has been good faith on the part of the builder. Maxim of English law *quad haerot in salo* is not necessarily applicable in this country. MAUNG HNYA v. MA E MYA, **U.B.R. 1892—1896, Vol. II, 214.** (6 W.R 228, 4 A. 55, 2 C. 152, 233, 6 B.H.C. 80, 15 W.R. P.C. 47, W.R. 1864, 20, *R.*)

(12)—*Erection of, by a tenant—Acquiescence.*—The owner of a land cannot sue in ejectment when he sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with a view of claiming the building when it is erected. BENI RAM v. KUNDAN LAL, **1 Bom. L.R 400.**

(13)—*Order directing removal of certain buildings — Obstrction to public way* — Bona fide *question of title--Crim. Pro. Code, Act V of 1898, s 133.*—A Magistrate acting under s. 133 of the Crim. Pro. Code, should first of all satisfy himself as to the *bona fides* of the claim, if any, and then determine whether the parties should be referred to the Civil Court. MATUKDHARI TEWARI v. MADHAB DAS, **9 C.W.N. 72=31 C. 979.** 29 C. 279, 17 C. 562, *R.*)

Building—*continued.*

(14)—*Nature of office — Power of zemindar to dismiss Bulahar.*—The office of a bulahar is an office held only during the zemindar's pleasure, and the person holding such an office is removable by the zemindar. SUNOO KHAN v. OODEA, **2 Agra 140.**

Removal of—*See* ACQUIESCENCE, 1 Agra 244.

Acquisition of part of a house or—*See* ACT I OF 1894, s. 49, cl. 1, A.W.N. 1898, 85.

Compensation given to tenants of land appropriated in respect of buildings owned by them—Claim of zemindars to *haq-i chaharum*—Custom held to be inapplicable—*See* ACT I OF 1894, s. 54, A.W.N. 1903, 5.

Registered lease for—Purposes—Lease not being for agricultural purposes, Tenancy Act inapplicable—*See* BEN. ACT VIII OF 1885, 19 C. 489.

See BEN. ACT II OF 1888, ss. 247, 250, 427, 30 C. 317=7 C.W.N. 329.

See BOM. ACT V OF 1862, 21 B. 588, F.B.

Owner of building required to set it back, Corporation to make full compensation to—Assessment of compensation—*See* BOM. ACT III OF 1872, 14 B. 292.

Notice as to intended—*See* BOM. ACT VI OF 1873, s. 33, 21 B. 187=P.J. 1895, 375.

Proposed — Notice of—Want of notice — Plan not furnished—Building without permission—Demolition of building—*See* BOM. ACT VI OF 1873, s. 33, 19 B. 27.

Suit for injunction to restrain Municipality from removing—Notice of action not necessary under s. 48 of Bombay Act II of 1884—Action under s. 33 of Act VI of 1873—Discretion of Municipality—Jurisdiction of Civil Courts—*See* BOM. ACT II OF 1884, s. 48, 22 B. 230=P.J. 1896, 296.

Taxation—University— Exemption—Charitable purposes—*See* BOM. ACT III OF 1888, ss. 143, 144, 16 B. 217.

See BOM. ACT III OF 1888, ss. 298, 299, 301, 18 B. 184.

See MAD. ACT VIII OF 1865, ss. 1, 11, 17, M. 54.

See MAD. ACT VIII OF 1865, s. 11, 17 M. 73.

Tax on buildings—Standard hypothetical rent—Lying-in Hospital—*See* MAD. ACT I OF 1884, s. 123, 10 M. 38.

License necessary before commencing to erect building—*See* MAD. ACT IV OF 1889, ss. 3, 180, cl. 5, 1 M.L.J. 37.

Sanction for constructing—Implied sanction—*See* PUN. ACT XX OF 1891, ss. 92, 95, 62 P R. 1907=105 P.L.R. 1908=147 P.W.R. 1907.

Building—*continued.*

Revenue Courts if can partition—*See* U.P. ACT XIX OF 1873, s. 124, 22 A. 329=A.W.N. 1900, 116.

Rules framed by Municipal Board of Mussoorie as to within Municipal limits—Order for demolition if erected in contravention of such rules—*See* U.P. ACT XV OF 1883, s. 55, A.W.N. 1900, 8.

Doors and windows of building—Liability for separate attachment in execution—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 11 C. 164.

See CIV. PRO. CODE, 1908, O. VI, r. 17, O. VII, r. 11, O. VI, r. 18, s. 104, O. XLIII, r. 1, 78 P.L.R. 1903.

Erection of—by one — Right of another sharer to sue for demolition—*See* COMMON LAND, 54 P.R. 1892.

Contractor given additional in divisible work—Variation of original contract—Extension of time fixed for completion of original contract—Building owner not to claim penalties for non-completion within time stipulated—Extension of time on account of extra work—Extension not objected to—Acquiescence by contractor—*See* CONTRACT — MISCELLANEOUS, 13 M.L.J. 488.

See CO-SHARERS — ENJOYMENT OF PROPERTY BY CO SHARERS. 12 A 436=A.W.N. 1890, 95, F.B., W. R. 1864, 258.

On common land by one co-sharer—Right of other co sharers to demolish—*See* CO-SHARERS—SUIT BY CO-SHARERS, 2 Ind. Cas. 854.

Co-sharers—Erection of buildings by one co-sharer in spite of protest of others—Right of others to demand demolition of buildings—*See* CO-SHARERS—MISCELLANEOUS, 9 A. 661=A.W.N. 1887, 253.

Right to build on joint land—Consent of co-sharers — *See* CO SHARERS — MISCELLANEOUS, 18 A. 115=A.W.N. 1895, 243.

Erected by stranger on land held by joint owners — Purchase by one of the joint owners—Suit for possession against such purchaser—*See* CO-SHARERS—MISCELLANEOUS, 18 A. 361=A.W.N. 1896, 97.

Suit for removal of structure erected by one of co-sharers of land—Discretion of Court—*See* CO-SHARERS—MISCELLANEOUS, 8 C. 708.

Suit to set aside lease and for demolition of buildings erected by lessees—*See* COURT FEES ACT, 1870, s. 7, art. IV, cl. 4, 4 A. 320, F.B.

Landlord and tenant—Belonging to tenant—Right of tenant to mortgage—*See* CUSTOM (PUNJAB—ALIENATION), 75 P.R. 1897.

Acquiescence—On the land of another—Mere non-interference not sufficient to constitute an estoppel—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, A.W.N. 1899, 191.

Building—*continued.*

Compensation—Ejectment—On land of another—*Bona fides*—*See* IMPROVEMENTS, 3 C.L.R. 194.

See INJUNCTION—SPECIAL CASES, A.W.N. 1883, 249, 6 C.W.N. 308.

Estoppel—Erected on another's land—Acquiescence—Discretion of Court—*See* INJUNCTION—SPECIAL CASES, A.W.N. 1904, 70.

Erection of buildings—Obstruction to light and air—*See* INJUNCTION—SPECIAL CASES, Cor. 9.

Demolition of building—Professional assistance—Practice and procedure—*See* INJUNCTION—SPECIAL CASES, 2 B. 133.

Affected by nuisance and smoke of adjacent mill—Combined relief of injunction and damages to occupier—Specific Relief Act, I of 1877—Plaintiff, when barred by laches—*See* INJUNCTION—SPECIAL CASES, 8 B. 35.

Jurisdiction—Suit to recover land after removing buildings thereon — Not subject-matter of suit—*See* JURISDICTION—GENERAL, 7 M.L.J. 49.

See JUISDICTION OF CIVIL COURTS, 1 B. H.C. 1.

Erection of buildings by tenant — Effect on tenure—*See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 3 C. 696=1 C.L.R. 577.

Grant of land—Presumption as to nature of tenure — Erection of— *See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 8 C. 960.

Non-agricultural land—Tenure unprotected—Right of tenant to raise pucca—*See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 9 C.L.R. 221.

Occupancy—tenant—Right to erect — *See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 10 C.L.R. 25.

See LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 7 M.L.T. 223=6 Ind. Cas. 286.

See LANDLORD AND TENANT—EJECTMENT, 34 P.R. 1882.

See LANDLORD AND TENANT—NATURE OF TENANCY, 11 C.L.R 281.

See LANDLORD AND TENANT—MISCELLANEOUS, A.W.N. 1881, 97.

On anothers's land—Acquiescence—Estoppel—*See* LANDLORD AND TENANT—MISCELLANEOUS, A.W.N. 1908, 282.

Landlord and tenant —Pucca —Raised by tenant—Permanent right to remain on land—*See* LANDLORD AND TENANT — MISCELLANEOUS, 3 C.W.N. 255.

Agricultural land—Erection of buildings on holding by permanent occupancy—tenants—Landlord's remedy — *See* LANDLORD AND TENANT—MISCELLANEOUS, 24 M. 65.

Building—*concluded.*

Upon another's land —Right to compensation—*See* LAND SUIT, 78 P.W.R. 1910.

See LEASE — GENERAL, P.L.R. 1900. 303.

Upon land of another —Estoppel — *See* LIMITATION ACT, 1908, art. 149, 13 Bom. L. R. 92=9 Ind. Cas. 765.

Re-building — What is —*See* MUNICIPALITIES, 6 N.L.R. 53=6 Ind. Cas. 431.

House built by non-proprietor—House falling into ruins — Non-proprietor's right to site—Burden of proof—*See* NON-PROPRIETOR, 3 Ind. Cas. 19.

Presumption of ownership — Adjoining — Walls of adjoining buildings built on same foundation—Light and air—Obstruction—*See* OWNERSHIP, 2 C.L R. 377.

See PRE-EMPTION — SUBJECT OF PRE-EMPTION, 3 Agra 179.

Adjoining each other—Side wall—Right of easement—*See* PRESCRIPTION—EASEMENTS —HOUSES AND OTHER BUILDINGS, 13 B. 79.

Right to have windows closed—Invasion of privacy, comfort, and ventilation—*See* PRESCRIPTION—EASEMENTS—LIGHT AND AIR, 2 Agra 269.

Suburban lands let for—Occupancy-rights—*See* RIGHT OF OCCUPANCY — ACQUISITION OF RIGHT, 16 C. 652.

Holders of adjoining plots of land for building, liability of, in respect of party walls—Suit not maintainable for declaration of ownership of wall and for injunction— Order amounting to decree within the meaning of s. 2 of the Civ. Pro. Code, right of appeal from—*See* RIGHT OF SUIT—BUILDING, SUIT TO RESTRAIN, 9 B. 183.

Erection of public—From subscriptions—Suit for subscription—*See* RIGHT OF SUIT—MISCELLANEOUS, 14 C. 64.

Contract for sale—Building upon it before completion of sale—Rights of vendee—*See* SPECIFIC PERFORMANCE, 1 A.L.J. 688.

Mandatory injunction—Suit for demolition of—Delay in suing—*See* SPECIFIC RELIEF ACT, 1877, s. 55, A.W.N. 1900, 55.

Suit for possession of grove—Permanent on grove—*See* VALUATION OF SUITS, A.W.N. 1886, 106.

Building Lands.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 2 B.L.R. App. 39=11 W.R. 183, 2 C.L.R. 31.

Building Lease.

Of contiguous sites—Undertaking of liability for the cost of party-walls—,common covenant, right of lessees to enforce *inter se*—*See* LEASE—GENERAL, 6 B. 528.

Building on land without title.

See BUILDING.

(1)—*Execution of building by one on another's land—Compensation.*— Where a man builds on the land of another, the builder may be allowed to remove his materials or the owner of the soil may take it over at a valuation or content himself with a ground-rent affording to the circumstances of the case and the conduct of the parties themselves. RAMDHAN v. KURA MAL, **38 P.R. 1889** [*R.*, 91 P.R. 1892.]

(2)—*Erection of building on another's property—Compensation.*—A party in possession erecting buildings upon or making improvements to property, *bona fide* is entitled for compensation for such buildings and improvements from the rightful owner. If such a person has been induced by the owner of the land to build, there may be an equitable transfer of property from the latter to the former. KUNHYA LAL v. KISHEN CHUND, **42 P.R. 1866.** [*Cited.* 2 P.R. 1885.]

(3)—*Erection of a building on another's land—Owner standing by, not preventing—Owner estopped.*—Where the owner of a plot of land standing by does not interfere to prevent others building a house thereon, *held* that he is estopped from demanding that the house be pulled down. BHEEKA SINGH v. HURJUS, **7 P.R. 1866.**

(4)—*Erection of building on land with the consent of proprietors owning half share—Suit to eject by the owner of a fourth share—Defendants entitled to compensation.*—Where plaintiff, the owner of a fourth share in a piece of building ground, sued to eject the defendants, who had built on the land with the consent of the proprietors owning a half share, *held* that plaintiff was entitled to possession of her fourth share on her paying compensation to the defendants. MUSSUMMAT ZUHOORAN v. BUMSEE, **21 P.R. 1867.**

(5)—*Proprietor ousting the occupier at pleasure—Usage.*—According to the general usage in rural villages, the proprietor cannot oust the occupier of a house at pleasure on payment to the latter of the value of the materials of the building. BUKSH v. FEEDA, **20 P.R. 1868.**

(6)—*Occupation by persons without title—Erection of buildings—Delay of owner in bringing suits—Relief to which occupier without title is entitled.*—Mere delay on the part of an owner of land in suing a person in possession without title, who erects buildings on the land he has illegally occupied, does not entitle the possessor to be maintained in possession. The particular relief to which a possessor so situated is entitled must depend upon the circumstances of the case. GOUHAR v. FAZLA, **53 P.R. 1878.** [*Cited*, 121 P.R. 1885.]

See ACQUIESCENCE, 3 W.R. 71.

See PUN. ACT XVIII OF 1884, ss. 3, 40, 20 P.R. 1894.

Building sites.

See BOM. ACT I OF 1865, 4 B. 514, note.

See BOM. ACT IV OF 1868, s. 5, 4 B. 505.

Building Sites—*concluded.*

Building site of houses occupied by agriculturists not liable to attachment and sale in execution of decree — *See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 59 P.R. 1902.

Bullocks.

Impressment of bullocks by village officers for use by Government Abkari Inspector—Suit for damages by owner of bullocks—*See* JURISDICTION OF SUBORDINATE JUDGE, 21 B. 773.

Bund.

Riparian owner—Erection of bund throwing water on land of proprietor on opposite bank—Injunction to prevent erection—*See* INJUNCTION—SPECIAL CASES. 27 M. 409.

Riparian rights—Prescriptive right—Erection of bunds—Cause of action—*See* RIPARIAN PROPRIETORS, 4 B.L.R. App. 30=13 W.R. 48.

Bundlekhand Alienation of Land Act.

See U.P. ACT II OF 1903.

Bundlekhand Incumbered Estates Act.

See U.P. ACT I OF 1903.

Burden of proof.

1.—GENERAL.
2.—ACCOUNTS.
3.—AGENT.
4.—BAILMENT.
5.—BENAMI TRANSACTIONS.
6.—BOUNDARY.
7.—CLAIMS TO PROPERTY ATTACHED.
8.—CONSIDERATION.
9.—CONTRIBUTION.
10.—CUSTOM.
11.—DEBTOR AND CREDITOR.
12.—DECLARATION OF TITLE.
13.—DECREES AND DEEDS, SUITS RELATING TO.
14.—DOCUMENTS RELATING TO LOANS, SUITS RELATING TO.
15.—EASEMENTS.
16.—EJECTMENT.
17.—EXECUTION OF DECREE.
18.—FRAUD.
19.—HINDU LAW.
20.—HUSBAND AND WIFE.
21.—INTERVENORS.
22.—LANDLORD AND TENANT.
23.—LEGITIMACY.
24.—LIMITATION AND ADVERSE POSSESSION.
25.—MORTGAGE.
26.—NEGOTIABLE INSTRUMENTS
27.—PARTITION.

Burden of proof—continued.

——**1.—General**—*continued.*

28.—POSSESSION AND PROOF OF TITLE.
29.—PRE-EMPTION.
30.—RENT, SALE FOR ARREARS OF.
31.—REVENUE, SALE FOR ARREARS OF.
32.—SALE IN EXECUTION OF DECREE.
33.—WILL.
34.—MISCELLANEOUS.

See BENAMI TRANSACTION—MISCELLANEOUS.

See HINDU LAW—JOINT FAMILY.

See LANDLORD AND TENANT.
See MALICIOUS PROSECUTION.
See PARDANASHIN WOMAN.

——**1.—General.**

(1)—*Evidence—Burden of proof—Meaning of the term "burden of proof" explained.*—The terms *onus probandi*, in its proper use, merely means that, if a fact has to be proved, the person, whose interest it is to prove such fact, should adduce some evidence, however slight, upon which a Court could find the fact he desires to have found. It does not mean that he shall call all conceivable or available evidence. It merely means that the evidence he lays before the Court should be sufficient, if uncontradicted, to form the basis of a judgment and decree upon that point in his favour. UNKAR NATH v. MITTHU LAL, **A.W.N. 1898, 107.**

(2)—*Burden of establishing case and duty of introducing evidence—Shifting of burden.*—Burden of proof means the burden of establishing a case and as well as the duty or necessity of introducing evidence. The burden of establishing remains throughout the entire case exactly where the pleadings originally place it. It never shifts. The burden of proof in the sense of introducing evidence may shift constantly as evidence is introduced by one side or the other, as one scale or the other preponderates. BHOLA v. BHAGWANT RAO, **13 C.P.L.R. 159.** [*Expl.*, 15 C.P.L.R. 1, 1 N.L.R. 169 ; *R.*, 2 N.L.R. 10.]

(3)—*Putting greater burden on one party—No prejudice on merits—No ground for reversal of decree.*—The mere putting what is perhaps a greater burden of proof on one party than on the other, is no ground for reversing a decree in special appeal, where the decision on the merits has not been affected. SUROOP NARAIN SINGH v. RAM TOHUL MISSER, **18 W R. 106.**

(4)—*Burden of proof, misplacement of—Remand.*—Misplacement of the burden of proof is only a ground for remanding the case, if the circumstances had been such that, by placing the burden of proof on the wrong party, somebody has been mislead or taken by surprise, or had no opportunity of adducing evidence But, where all the parties have had full warning of the points at issue, and full opportunity of calling witnesses and adducing evidence, then, if the Judge, in his judgment, places the burden

***Burden of proof*—continued.**

——1.—General—*continued.*

on the wrong side, that is no ground for a remand. HUKLAL SUKUL v. RAMGOTI DEY ROY, **11 C.L.R. 581.**

(5)—*Act XXV of 1857, ss. 2 and 8—Queen's Proclamation of 1st November, 1858.*—When the quantum of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence. (3 I.A. 85, 11 A. 438, *R.*) *Held* that a Special Commissioner appointed under Act XXV of 1857, who had made an order under s. 8 of that Act acquitting a person and directing the release of his property, had no power subsequently of his own motion to cancel such order. *Held*, also, that the effect of the Queen's Proclamation of the 1st of November, 1858, was prospective merely and did not operate to restore property which had been confiscated. JANKI PRASAD v. RAI PARTAB CHAND, **A.W.N. 1897, 129.** (2 Ind. Jur. N.S. 124, *R.*)

(6)—*Non-examination of parties in a suit, result of—English and Indian practice—Account books, non-production of.*—The plaintiff brought a suit for the recovery of certain properties, alleging that he was adopted twenty years before the date of the suit. *Held*, the burden of proving that the alleged adoption took place twenty years before the trial rested upon the plaintiff. The presumption that would be drawn in England will be to the detriment of a plaintiff who falls to enter the witness-box and face the ordeal of cross-examination. But in cases between natives tried in India, a species of advocacy is tolerated by the Courts of Law here, in which the unworthy effort of the Advocate on each side is to force his opponent to produce his own client, in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all these tangled transactions which so perplex those who have to decide these cases), are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. It is a vicious practice, unworthy of a high-toned or reputable system of advocacy, tending to embarrass and perplex judicial investigation, and too often enabling fraud, falsehood or chicane to baffle justice. Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the mater in question is entered, by the party in whose possession it is, covers the parties' case with suspicion. MUSSAMAT LAL KUNVAR v. CHIRANJI LAL, **7 M L.T. 57 =14 C.W.N. 285=11 C.L J. 172=12 Bom. L. R. 244=32 A. 140=20 M.L.J. 182=5 Ind.Cas. 549. P.C.**

(7)—*Allegation not traversed.*—A plaintiff is not relieved from the burden of proving his

***Burden of proof*—continued.**

——1.—General—*continued.*

case by the mere fact of an allegation of his not being traversed. MULJI BECHAR v. ANUPRAM BECHAR, **7 B.H.C.A.C.J 136.**

(8)—*Noabad Taluqs, Chittagong—Perpetual or permanent settlements*—Onus *of proving.*—If a person sets up as against the Government a permanent or perpetual settlement, it is incumbent on him to make out that case. PROSUNNO COOMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **26 C. 792 =3 C.W.N.695.** [*F.*, 13 C.W.N. 235=9 C. L.J. 265; *R.*, 8 C.L.J. 470, 11 C.W.N, 928.]

(9)—*Allegation that a contract is different from what it purports to be*—Onus.—When a party to a contract alleges that it is different from what on the face of it purports to be, the burden of proving his case lies on him, since there is a presumption that a transaction is in substance what it is in form. ESHOOR DOSS v. VENKATA SUBBA RAU, **17 M. 480.** [*Affirmed*, 18 M. 306, F.B.]

(10)—*Act making contract impossible of performance.*—The burden of proving that there was an act which rendered a contract impossible of performance lies on the party to the contract who alleges it. WUZEERA v. MOOROODEEN, **77 P.R. 1866.**

(11)—*Limitation—Suit for cancellation of instrument—Proof of knowledge of facts entitling cancellation of instrument.*—When a plaintiff sues for cancellation of an instrument and when he sets out the facts entitling him to have the instrument cancelled and when he alleges that those facts became known to him at a certain time, it is incumbent on a defendant, who pleads limitation, to dislodge the plaintiff from his position and to allege and prove a knowledge prior to the period from which time begins to run. If no evidence were given on either side, the plea of limitation would fail. TANTS v. GAJADHAR, **2 N.L.R. 98.** (26 M. 291, 6 A. 406, 17 B. 341, 17 C.518, 24 B. 260, 22 C. 609, 1 C.W.N. 543, *R.*) [*R.*, 5 N.L.R. 28.]

(12)—*S. 40, Punjab Courts Act—Certificate of appeal given on question of* onus *of proof—Validity.*—A Divisional Judge granted a certificate of appeal under s. 40, Punjab Courts Act, stating that a question of law, *viz.*, as to the *onus probandi*, was involved in the case. But the Chief Court ruled that the Punjab Courts Act did not contemplate the giving of a certificate on the question of *onus* and mode of decision and that the certificate was, therefore, bad. MUSST. NIKKI v. BISHEN DAS, **41 P.R. 1898.**

(13)—Onus *on defendant—Plaintiff producing his evidence without waiting for the evidence of the defendant—Whether plaintiff can rely upon the plea that defendant has not discharged his* onus—*Pleadings.*—Where the *onus* is upon the defendant to prove a certain fact, but the plaintiff, without waiting for the defendant's evidence, takes upon himself to prove it, he

Burden of proof—continued.

——1.—General—*continued.*

cannot subsequently say that the defendant did not discharge his *onus*. SAJAN KUNWAR v. JOTI PRASHAD, **10 Ind. Cas. 223.** (3 A. 824, *F.*)

See ACT XVIII OF 1854, ss. 11, 43, 3 B. 96.

Erroneous description of goods consigned—Loss of goods by fire—Liability of Railway Company—Burden of Proof—*See* ACT III OF 1865, s. 9, 3 B. 120.

See ACT III OF 1865, s. 9, 24 C. 786=1 C. W.N. 200, 26 C. 398, P.C.=26 I.A. 1=3 C.W. N. 145.

Opium—Unlawful possessoin of, by member of joint family—*See* ACT I OF 1878, s. 9, 2 O. C. 99.

See ACT IX OF 1890, ss. 72, 76, 22 A. 361= A.W.N. 1900, 111.

See BOM. ACT II OF 1884, s. 57, 20 B. 732.

See PUN. ACT XVIII OF 1884, s. 40, 45 P. R. 1894, 41 P.R. 1898.

See U.P. ACT XXII OF 1886, s. 108, cl. 15, 4 O.C. 1.

See ADMISSION—MISCELLANEOUS, 10 I.A. 74.

Right to begin—Burden of proof—Irregularity not affecting merits—Powers of appellate Court—*See* APPELLATE COURT—MISCELLANEOUS, 3 A. 824=A.W.N. 1881, 86.

See ABBITRATION—MISCELLANEOUS, 7 M. I.A. 441.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, A.W.N. 1897, 88.

See BILL OF LADING, 5 B. 313.

Suit to set aside a bond—Failure of consideration—*See* BOND, 12 W.R. 6, P.C.=2 B.L.R. 111, P.C.=12 M.I.A. 282.

See CARRIERS, 2 C.W.N. 609.

See CIV. PRO. CODE, 1882, s. 353, 5 C.W.N. 91.

Suit by defeated claimant—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 61, 63, A.W.N. 1887, 71.

Judgment-debtor, application by, to set aside sale on ground of irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, A.W.N. 1887, 117.

See COMMON LAND, 37 P.R. 1887, 105 P.R. 1901.

As to payment — *See* COMPROMISE — GENERAL, 6 W. R. 55, P.C.=3 M.I.A. 347.

See COMPROMISE—SETTING ASIDE COMPROMISE, 2 M.I.A. 181.

See CONSENT DECREE, 6 M.L.J. 131, P.C.

Altered instrument—*See* CONTRACT—ALTERATION OF CONTRACTS, 3 M.H.C. 247.

Burden of proof—continued.

——1.—General—*continued.*

See CONTRACT ACT, 1872, s. 16, sub-s. (3), 5 O.C. 307.

Evidence—Burden of proof—Plea of immoral consideration—Shifting of proof — *See* CONTRACT ACT, 1872, ss. 23, 25 (2), 13 M.L.J. 7.

See CUSTOM—PUNJAB—ADOPTION, 79 P. R. 1901.

See CUSTOM—PUNJAB—ALIENATION, 42 P.R. 1902, P.L.R. 1900, 322, 56 P.L.R. 1904.

See CUSTOM—PUNJAB—CESSES, 53 P.R. 1881.

See CUSTOM—PUNJAB—INHERITANCE, 85 P.R. 1901, 117 P.R. 1901.

See CUSTOM—PUNJAB—PRIVACY, 174 P.L. R. 1901.

See CUSTOM—PUNJAB—MISCELLANEOUS, 111 P.L.R. 1903, F.B.=48 P.R. 1903, F.B.

See DEBTOR AND CREDITOR, 19 C. 174=19 I.A. 33, P.C.

See DECLARATORY DECREE, SUIT FOR—GENERAL, 23 A. 405, P.C.=5 C.W.N. 895= 28 I.A. 136.

See DECREE—DECREE, FORM OF, 6 P. R. 1891.

Evidence necessary where *pardanashin* lady is seeking to set aside a contract made by her which has been carried out—*See* DEED—CANCELLATION OF DEED, A.W.N. 1899, 25.

Injunction granted by lower Court—Appeal—Burden of proof—*See* DISCRETION OF COURT, 12 A. 436=A.W.N. 1890, 95, F.B.

Suit by zamindars to eject defendants as trespassers—Right of zamindars in respect of uncultivated land—*See* EJECTMENT, SUIT FOR, A.W.N. 1904, 71.

See EJECTMENT, SUIT FOR, 10 W.R 31, P.C.=1 B.L.R. 44, P.C.=12 M.I.A. 448, 8 C. 975=11 C.L.R. 399.

See EVIDENCE—MISCELLANEOUS, A.W.N. 1889, 142.

See EVIDENCE ACT, 1872, ss. 13, 40, 41, 42, 43, 3 B. 3.

See EVIDENCE ACT, 1872, ss. 90, 102, 6 O.C. 142.

See EVIDENCE ACT, 1872, s. 110, 11 A. 438.

Coercion, force and undue influence—Burden of proof—*See* EVIDENCE ACT, 1872, s. 111, 1 O.C. 63.

Money advanced to carry on litigation—Active confidence—Of good faith—Mortgagor and mortgagee—*See* EVIDENCE ACT, 1872, s. 111, 8 C.W.N. 569, P.C.=31 I.A. 46=26 A. 180.

See EVIDENCE ACT, 1872, s. 112, 25 A. 403, P.C.=7 C.W.N. 617=5 Bom. L. R. 474=30 I. A. 162.

***Burden of proof*—continued.**

——1.—General—*continued*.

Civ. Pro. Code, 1882, s. 244--Property attached —Representatives of debtor—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 4 C.W.N. 151.

See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1899, 220.

Deed for valuable consideration—Allegation that it was to defeat or delay creditors—*See* FRAUD—FRAUD, ELEMENTS OF AND PROOF OF, 2 C.P.L.R. 63.

See GORABUNDI TENURE, 4 C.L.R. 298.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 11 C. 379. P.C.=12 I.A. 47.

See HOTEL KEEPER AND GUEST, 22 A. 164 =A.W.N. 1900, 3.

See INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 4 C. 888.

Adjudication of insolvency under Statue XI, Vic. C. 21—Suit by creditor alleging equitable mortgage—*Onus* on creditor—*See* INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR, 19 A. 76=23 I. A. 106, P.C.

See JURISDICTION—CAUSES OF JURISDICTION, 6 C.L.R. 417.

See LEASE—GENERAL, 2 Ind. Cas. 168, 5 Ind. Cas. 350, 7 A.L.J. 1205=8 Ind. Cas. 716, 1 I.A. 76.

See LIMITATION—GENERAL, 17 A. 677=A. W.N. 1885, 202, 3 I.A. 85.

See LIMITATION ACT, 1908, s. 28, arts. 91, 135, 147, 83 P.R. 1883.

See LIMITATION ACT, 1908, arts. 46, 142, 144, 41 P.R. 1881.

See LIMITATION ACT, 1908, art. 47, 6 C.L. R. 93.

See LIMITATION ACT, 1908, art. 106, 37 P. R. 1897.

See LIMITATION ACT, 1908, art. 127, 3 Agra 133.

See LIMITATION ACT, 1908, arts. 127, 142, 1 C.W.N. 543.

See LIMITATION ACT, 1908, arts. 134, 148, 8 A. 295=A.W.N. 1886, 98.

Suit between Mahomedans—No presumption of Hindu customs in the absence of allegations —*Onus* of proof—*See* MAHOMEDAN LAW—CUSTOM, 10 A. 562.

See MAHOMEDAN LAW—DOWER, 17 A. 93= L.W.N. 1895, 16.

See MALABAR LAW—JOINT FAMILY, 1 M. H.C. 248.

See MALICIOUS PROSECUTION, A.W.N. 1882, 83, 6 B.L.R. 371=14 W.R. 425, 19 B. 717, 6 C.W.N. 159, 73 P.L.R. 1902=60 P.R. 1902.

***Burden of proof*—continued.**

— 1.—General—*continued*.

See MESNE PROFITS—GENERAL, 5 C.W. N. 720.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 9 C.L.R. 1.

See MINORITY, 25 A. 407, P.C.=30 I.A. 165 =5 Bom. L.R. 478=7 C.W.N. 681.

See PARDANASHIN WOMAN, 5 C.W.N. 505.

Pardanashin women, denial of execution of deed by—Upon plaintiff when pardanashin woman denies execution of deed—Rule regarding case in which pardanashin woman are sued upon deeds alleged to be executed by them—*See* PARDANASHIN WOMAN, 7 O.C. 292.

Plaint, plaintiff how far bound by case set up in his—Declaration of proprietary title and ejectment of tenant. suit by talukdar for—Denial of talukdari title and assertion of adverse title by defendant—*Onus*—*See* PLEADINGS, 6 O.C. 119.

See POSSESSION—ADVERSE POSSESSION, 30 P.R. 1902.

See PROBATE—REVOCATION OF GRANT, 8 C. 880.

Suit for damages against Railway Company-*Onus*—*See* RAILWAY COMPANY, 28 C. 401, P.C.=28 I.A. 144=5 C.W.N. 449.

See REGISTRATION, 31 C. 146.

Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible —Demand by registered notice—Burden of proof—Evidence—*See* BENG. REG. XVII OF 1806, 63 P.L.R. 1902.

See RENT, L.B.R. 1893—1900, 275.

Suit against heir for debts of ancestor—Assets—*See* REPRESENTATIVE OF DECEASED PERSON, 3 M.H.C. 161.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 187 P.R. 1882.

See RIGHT OF OCCUPANCY — MISCELLANEOUS, 7 M.L.J. 1.

See SALE—GENERAL, 91 P.R. 1902.

Mokhassa tenure—Right of Mokhassadars to hold land irrespective of performance of services —Right of zamindar to dispense with service and resume land — Burden of proof in suit for ejectment—*See* SERVICE INAM, 26 M. 403.

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 4 B.H.C.A.C. 98.

See SPECIFIC RELIFF ACT, 1877, s. 9, 24 A. 501=A.W.N. 1902, 139.

See SPECIFIC RELIEF ACT, 1877, s. 42, 24 A. 170.

See St. 11 AND 12, VIC. C. 21, s. 24, A.W.N, 1889, 24.

See TODA GARAS HAK, 7 B.H.A.C. 50.

See TRANSFER OF PROPERTY ACT, 1882 s. 85, A.W.N. 1899, 34.

***Burden of proof*—continued.**

——1.—General—(*concluded.*)

See UNDUE INFLUENCE, 10 A. 535, 8 C.L. R. 419.

See VENDOR AND PURCHASER—INVALID SALES. 21 A. 209=26 I.A. 6 P.C., 4 B. 77, note, 1 B L.R.A.C. 95=10 W.R 128.

See VENDOR AND PURCHASER—NOTICE, 4 C. 897=4 C.L.R. 193.

——2.—Accounts.

See ACCOUNT.

(1)—*Suit for money on accounts—Plaintiff to start case.*—Where a plaintiff sues for a specific sum of money due on a balance of account, he must start his case and prove the amount due on the account, and, till then, the defendant need not be required to rebut him. RUTTON CHAND BYSACK v. BOCHA BIBEE, **12 W. R. 529.**

(2)—*Claim based on account stated—Acknowledgment by defendant*—Onus *on defendant—Duty to produce evidence—Adjournment—Medical certificate.*—Where a claim is founded upon a distinct statement of an account signed by the defendant, in which he acknowledges a particular sum to be due to the plaintiff, *held* that it was for the defendant to produce evidence before the Court rebutting the *prima facie* case made out against him. Where defendant had known for sometime previously that his case was coming on, and what evidence was necessary, a medical certificate to the effect that he was confined to his bed by lumbago, is held to be no sufficient ground for adjournment. SIMON ELIAS v. JORAWAR MULL, **24 W.R. 202.** [*R.*, 31 C. 150.]

(3)—*Re-opening accounts settled—Burden of proof.*—Where accounts have been taken and settled and a party alleges errors in the accounts, the *onus* of proving it rests on that party. KOKOO MALL v. SHEIKH NUTHA, **47 P.R. 1866.**

(4)—*Arrears of rent claimed from defendant—Crediting defendant with rent collection admitted by plaintiff—Burden of proof*—The *onus* is not on the defendant to prove the contrary, but on the plaintiff to prove his allegation that he has in the account, on which he claims arrears of rent from the defendant, credited the defendant with certain collections from the ryots admitted by the plaintiff to have been made by him MAHOMED MOKUREEM v. MR. K. BRODIE, **1 W.R. 219.**

(5)—*Payment by Bank in issue—Evidence of account books—Correctness of account books, Burden of proof as to—Payment endorsed on documents, proof of—Signature, Proof of.*—The fact of payments by a banking firm being distinctly put in issue, the mere general statement of the banker to the effect that his books were correctly kept was held not sufficient to discharge the burden of proof that lies upon him, the books of the firm being at most corroborative evidence, particularly, if he has the means of producing much better evidence. In a suit to recover moneys unaccounted for, where defendants plead payments endorsed on documents, and the endorsements purport to have been signed by the plaintiffs, the formal and regular method of proof is to call on the plaintiffs to admit or deny their signatures, and then to call upon witnesses to state whether they saw the plaintiff sign or could speak to the handwriting or generally what took place. BABOO GUNGA PERSAD v. BABOO INDERJIT SINGH, **23 W.R. 390 P.C.**

***Burden of proof*—continued.**

——2.—Accounts—*concluded.*

Suit for accounts—*See* ACCOUNTS — SUIT FOR ACCOUNTS, A.W.N. 1905, 3=27 A. 374.

Suit for accounts—*Onus* on party having liberty to surcharge—*See* HINDU LAW—PARTITION, 13 C.W.N. 309=9 C.L.J. 133=3 Ind. Cas. 241.

——3.—Agent.

See PRINCIPAL AND AGENT.

(1)—*Suit to recover advances from discharged Gomasta—Burden of proof as to payments and receipts.*—In a suit to recover advances alleged to be due from a discharged gomastha who pleads acquittance, plaintiff is to prove the payments to and receipts from the gomastha. ROBERT WATSON AND CO. v. SREEDHUR MUNDLE, **10 W.R. 421.**

(2)—*Agents collecting monies on account of an insolvent's estate—Bound to prove propriety of expenditure of several items.*—Agents entrusted to collect money on account of an insolvent estate are each of them, bound to prove to the assignee or his representative that the expenditure of the several amounts charged in their accounts has been actually and properly made, and the burden of proof lies on such agents. It is incumbent on such agents to offer proof in support of all the items in their account which are impugned, and the propriety, or the actual expenditure, of such items should form the subject matter of issues properly framed. NUJUF ALI v. PATTERSON, **2 N.W.P. 104.**

(3)—*Principal, suit against, for acts of agent—Authority of agent, proof of.*—In a suit against a principal as liable for the acts of an accredited agent of his, the *onus* lies on the plaintiff to prove that the alleged agent was the duly accredited agent of the defendant in reference to the transaction, the subject of the claim. HATHE RAM v. GOBIND RAM, **3 Agra 131.**

See **ACT IX OF 1890, s. 76, 127 P.R. 1892.**

Contract of Agency—*See* AGENT, U.B.R. 1892—1896, Vol. II, 1.

See CONTRACT ACT, 1872, ss. 151, 152, U.B. R. 1897—1901, Vol. II, 397.

See PLEADER—REMUNERATION, **8 P.R. 1873.**

***Burden of proof*—continued.**

——4.—Bailment.

See BAILMENT.

(1)—*Indian Contract Act (IX of 1872), s. 152—Bailment—Accidental, injury to goods bailed, liability of bailee on negligence.*—In cases of injury to goods bailed, for determining the burden of proof, each case must be looked at from its own particular circumstances. In some cases, the very happening of the accident causing the injury may be *prima facie* evidence that some want of care or some negligence must have taken place to cause the accident and in such cases, it lies upon the defendant to account for the happening of the accident and thus to show that he had not been guilty of negligence, and it is for him to give a *prima facie* explanation in order to shift the burden of proof on the other side. Where he gives such an explanation, which remains uncontradicted by affirmative evidence as to negligence, the mere happening of the accident cannot be taken to establish such negligence as could support a decree against him. SHIELDS v. WILKINSON, **9 A. 398=A.W.N. 188, 44.** [*R.*, U.B.R. 1897—1901, Vol. II, 337, 22 A. 164=A.W.N. 1900, 3.]

(2)—*Responsibility of bailee — Burden of proof.*—When loss of goods bailed is established by the plaintiff, it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. TRUSTEES OF THE HARBOUR, MADRAS v. BEST AND CO., **22 M. 524.**

——5.—Benami Transactions.

See BENAMI TRANSACTIONS.

(1)—*Evidence — Admission of signature — Proof of title-deeds*—Onus *of proof in* benamee *transactions—Declaratory decree, suit for.*—Where, the defendants admitted the execution of a document purporting to be a conveyance by them of certain land to the plaintiff for valuable consideration, but contended that the deed was not intended to have any effect and was merely a *benami* transaction, *held*, in a suit for a declaration of his right by a plaintiff in possession of the land, that under the circumstances of the case, the *onus* was on the plaintiff to show that the deed was what it appeared to be and not a mere paper transaction. MOOKTO KESHEE DEBEE v. ANUNDO CHUNDER CHATTOPADYA, **2 C.L.R. 48.**

(2)—*Burden of proof*—Benami *transaction—Certified purchaser.*—He who alleges that a certified purchaser and registered owner is a *benamidar* must give substantial proof of that allegation. BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH, **12 C.L.R. 186. P.C.**

(3)—*Purchase from* benamidar—*Good faith—Burden of proof.*—In a suit for recovery of possession of land on the ground of purchase, when it has been shown that the alleged vendor is not the true owner, the plaintiff can only rely on his claim as purchaser in good faith for value from a person who, by the act of the true owner, had become the apparent owner, and, in such cases, the burden lies upon the plaintiff. RUTTO SINGH v. BAJRANG SINGH, **13 C.L.R. 280, P.C.**

***Burden of proof*—continued.**

——5.—Benami Transactions—*concluded.*

Purchase in name of son by Hindu or Muhammadan father—Presumption of *benami* purchase—*Onus* of proof to the contrary—*See* BENAMI TRANSACTION—GENERAL, 6 B. 717.

See BENAMI TRANSACTIONS — GENERAL, 13 W.R. 1, P.C., 15 C. 20=14 I.A. 127, P.C.

——6.—Boundary.

See BOUNDARY.

(1)—*Boundary dispute—Waste lands—General rule inapplicable.*—On questions of boundary, where the dividing line in dispute runs through waste lands, which have not been the subject of definite position, the rule as to the burden of proving the affirmative is not applicable. The litigants being in the position of counter-claimants, both parties are bound to do what they can to aid the Court in ascertaining the true line. LUKHI NARAIN JAGADEB v. JODU NATH DEO, **21 C. 504, P.C.=21 I A. 39.** [*F.*, 9 C.L.J. 415=11 C.W.N. 230 : *R.*, 18 A. 290,]

(2)—*Dispute as to direction of boundary—Boundary alleged to be removed by one party—Wrong statement of general direction,* onus *as to.*—In a dispute regarding direction of a boundary removed by one of the parties to a suit, the *onus* of proof that the general direction proved by the other party has been wrongly stated by the other lies on the party who removed it. JUDOONATH MULLICK v. KALEE KRISTO TAGORE, **25 W.R. 524.**

(3)—*Disputed boundaries*—Onus *on plaintiff to prove right to recover—Failure to discharge* onus—*No conclusive force as in ejectment.*—In a question of disputed boundaries, the *onus probandi* lies upon the plaintiff to prove, by independent evidence, his right to recover. But in the circumstances, *held*, that mere failure on the plaintiff's part to support the burden of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment, and the case remitted to India for further inquiries. RAJA LELANUND SINGH BAHADUR v. MAHARAJAH MOHESHUR SINGH BAHADOOR, **3 W.R. 19, P.C.=10 M.I.A. 81.**

(4)—*Privy Council—Procedure—Question as to boundary.*—Where a person appeals to the Privy Council from a decision of the High Court fixing the boundary to a certain estate, the Privy Council would not interfere with the High Court's decision, if the evidence of his boundary was of the vaguest and most untrustworthy description, and in a measure inconsistent with the allegation in the plaint as to the

***Burden of proof*—continued.**

——6.—Boundary—*continued*.

quantity which he originally claimed as his estate. It also lay upon him to show in what particulars and to what extent as regards his estate, the *thakbust* proceedings were wrong. LEELANUND SINGH v. LUCHMUNUR SINGH. **10 C L R. 169, P.C.**

(5)—*Boundary dispute between* lakheraj *and* mal *lands—Burden of proof—Absence of presumption.*—In a question of boundary between a *lakheraj* tenure and a zemindar's *mal* land, there would be no presumption either in favour of one or of the other, but manifestly the plaintiff would have to prove his case. BEER CHUNDER JOOL RAJ v. RAM GUTTY DUTT, **8 W.R. 209.**

(6)—*Suit for land by rectification of survey awards—Failure to prove position of stream forming boundary—Effect.*—Where the plaintiff sued to recover a quantity of land by rectification of certain survey-awards, which he averred demarcated erroneously the boundary between his zemindary and the zemindaries of the defendants, it was held, on a consideration of the evidence, that his suit was rightly dismissed, because he failed to prove the position or existence of a stream, which he stated was the true boundary between the zemindaries. RAJAH LEELANUND SINGH v RAJAH MOHENDERNARAIN SINGH, **13 W.R. P. C. 7.**

(7)—*Burden of proof—Landlord and tenant—Suit for* khas *possession—Encroachment.*—When a landlord sues his tenant for *khas* possession, alleging that the land in dispute had been encroached upon by the tenant beyond his proper boundaries, the burden of proving the encroachment lies on the landlord. RHIDOY KRISTO MISTRI v. NOBIN CHUNDER SEN, **12 C.L.R. 467.** [*F.*, 3 C.W.N. 763; *D.*, 6 C. W.N. 105.]

(8) — *Suit for confirmation of right and possession—Burden of proof.*—In a suit for confirmation of right and possession in respect of lands alleged to be within plaintiff's permanently-settled talook, *held* that plaintiff should prove that lands are within his talook. GUNGAMALA CHOWDHRAIN v. MADHUB CHUNDER NAG, **10 W.R. 413.**

(9)—*Suit for land once forming bed of* nullah *situate in plaintiff's estate.*—In a suit for the possession of land once forming the bed of a *nullah*, but situated in the plaintiff's settled estate: *Held* that the defendants, who failed to prove that their julkur settlements did not extend beyond fishery-rights, were not entitled to recover possession of any land which the drying up of the water may lay bare. MUNOHUR CHOWDHRY v. NURSINGH CHOWDHRY, **11 W. R. 272.** [*R.*, 31 C. 937=8 C.W.N. 804.]

(10)—*Suit for possession—Joint property—Burden of proof.*—In a suit to recover two parcels of land alleged to have been comprehended in one plot, where defendant's case is that the parcels were divisible into two

***Burden of proof*—continued.**

——6.—Boundary—*concluded*.

distinct plots, one held by plaintiff and himself jointly, and the other by himself, exclusively, the burden of proof was held to lie on the plaintiff to show that the plot in dispute formed part of the land held by him and the defendant jointly. GUNGA PERSHAD DUTT v. LOKENATH NUNDEE, **12 W.R. 179.**

See BOUNDARY, 13 W.R. 7, P.C.=13 M.I.A. 57.

——7.—Claims to property attached.

See CLAIM TO PROPERTY ATTACHED.

(1)—*Civ. Pro. Code. 1859, ss 235, 239, 270—Plaintiff claiming priority of attachment—Publication of written order.*—Where plaintiff claimed priority of attachment under s. 270, Act VIII of 1359, held that he was bound to prove that he had obtained a written order under s. 235, and that he had published that order in the manner prescribed by s. 239, Civ. Pro. Code, 1859. KANHYA LALL PUNDIT v. DINONATH SIRCAR, **17 W R. 23.**

(2) *Civ. Pro. Code, 1859, s. 246—Unsuccessful claimant suing for confirmation of possession and title*—Onus—*Question for decision.*—Where an unsuccessful claimant under s. 246, Code of Civil Procedure 1859, sues for confirmation of alleged possession and adjudication of title, *held* that the burden was on the plaintiff at first and that the question of possession at the time of attachment was an important one. TOOFANEE DOSSEE v. MUN RAKHAM BOY, **15 W R. 202.**

(3)—*Act VIII of 1859, s. 246—Execution of decree*—Onus probandi—*Right to begin.*—By the majority of the Full Bench (*Mitter, J., dissenting*):—In a proceeding in execution of a decree under s. 246, Act VIII of 1859, the claimant and not the executing creditor, should begin, and he must prove not the title of any third person, but that the property belonged to him, or was in his own possession. NGA THA YAH v. F N. BURN, **2 B.L R. F.B. 91=11 W. R. F.B. 8.** [*F.*, 20 W.R. 345; *Appr.*, 21 W.R. 409; *R.*, 17 C. 711, F.B., 20 B. 270.]

(4)—*Dismissal of claim—Suit to establish right to attached property*—Onus *of proof of title.*—Plaintiff, in this case, had previously failed in her resistance to the attachment made by defendant of property as that of his judgment-debtor. The defendant having obtained an order maintaining his attachment, it was incumbent on the plaintiff, who impugned that order by the present suit, to prove title under the purchase alleged by her by proving both the payment of the purchase-money and her possession since the purchase, and the lower Court was therefore held to have been wrong in having thrown the burden of proof in the suit on the defendant. GOVIND ATMARAM v. SANTAI, **12 B. 270.** [*F.*, 30 A. 321=A.W.N. 1908, 125 =5 A.L.J. 601, 4 L.B.R. 228; *Appr.*, 6 C.P.L. R. 81; *R.*, 18 A. 369=A.W.N. 1896, 106, 13 C. P.L.R. 69, 25 B. 202, 3 Bom. L.R. 832; U.B. R. 1904, 4 Qr. Civ. Pro. Code, 278=5 A.L.J. 358; *D.*, 2 L.B.R. 152.]

Burden of proof—continued.

——7.—Claims to property attached—*contd.*

(5)—*Civ. Pro. Code, ss. 278, 279—Objection disallowed—Suit by objector*—Onus *of proof.*—Plaintiff had intervened in execution claiming a house attached by the defendant decree-holder as his own on the strength of a sale-deed in his favour. The Court executing the decree found that the deed was without consideration and disallowed the claim. On plaintiff bringing this regular suit thereon, it was *held* that it was for the plaintiff to prove that a real contract of sale had been entered into, plaintiff having, as the intervenor in the Execution Department, failed on account of not having proved consideration, it was for him to prove his title when he brought the regular suit. The finding in the enquiry under s. 279 of the Civ. Pro. Code having been against him, it was for him to get rid of that finding by something more than a mere allegation in his plaint that a certain sale deed had been executed in his favour and registered. RAM NATH v. BINDRABAN, **18 A. 369 = A.W N. 1896, 106.** (12 B. 270, *R.*) [*F.*, 30 A. 321 = A.W.N. 1908, 125 = 5 A.L.J. 601 = 5 A.L.J. 358; *R.*, 12 O.C. 74; *D.*, 2 L.B. R. 152]

(6)—*Act VIII of 1859, s. 246—Suit to set aside summary order*—Onus—*Confirmation of title*—Bona fides.—In a suit to set aside a summary order under the provisions of s. 246, Act VIII of 1859, on the allegation that the order was illegal, it is for plaintiff to prove its illegality. Where a plaintiff alleges that he is in possession of property and asks for a declaration of his title only, the *bona fides* of that title being questioned by the defendant, it is for the plaintiff to make out that that title is really and substantially what it purports to be on the face of the deed on which he relies. MOHIMA CHANDRA KUNDU v. MOULVI NURUDDIN, **3 B.L R, A.C. 70 = 11 W.R. 422.**

(7)—*Order under s. 246, Civ Pro. Code, 1859—Suit to set aside order*—Onus *of purchaser.*—In a suit to set aside an order made under Civ. Pro. Code, 1859, s. 246, the purchaser is bound to prove purchase and possession of property. TULSEE MONEE DASSEE v. PEARY MOHUN BABCO, **25 W.R. 79.**

(8)—*Civ. Pro. Code, 1859, s. 246—Setting aside attachment and sale—Proof of execution of sale deed and passing of consideration.*—Onus probandi.—A plaintiff starts his case sufficiently if, seeking under s. 246 Civ. Pro. Code, 1859 to set aside an attachment and sale, he shows that a deed of sale has been executed in his favour by the judgment-debtors, and that consideration-money has passed and possession been given. The *onus* is on the defendant if he alleges a collusive sale. DIGUMBUREE DOSSEE v. BUNEE MADHAB GHOSE, **16 W.R. 155.**

(9)—*Ejectment—S. 246, Civ. Pro. Code, 1859—Burden of proof on plaintiff suing to set aside sale of land.*—Where the plaintiff filed a suit to set aside a sale of land after he had been unsuccessful in an application made, under

Burden of proof—continued.

——7.—Claims to property attached—*contd.*

s. 246 of the Civ. Pro. Code, to raise an attachment that had been laid on such land: *Held* that the *onus* lay on the plaintiff to prove his title, and not on the purchaser to prove that of the judgment-debtor. NATHU SADASHIV v. RAMACHANDRA ANNAJI, **5 B.H. C.A,C. 76.**

(10)—*Suit to establish title unsuccessfully asserted in execution-case—Property sold to satisfy decree—Plaintiff's claim based on gift—Burden of proof of title*--Prima facie *case insufficient.*--In a suit to establish a title which was unsuccessfully asserted in an execution-case, to property sold in satisfaction of a decree, where the plaintiff's claim is based on a gift and other titles originating with the judgment-debtor, *held* it was not sufficient for the plaintiff to make out a *prima facie* case and leave it for the defendant to demonstrate the fraudulent nature of the transaction relied on, but that the plaintiff must satisfy the Court that there was a genuine *bona fide* transfer of the property in dispute from the debtor to the ostensible owner. RAM KISHORE SINGH v. RAM SURBO CHATTERJEE, **11 W.R. 454.**

(11)—*Attachment of goods—Civ. Pro Code, 1859, s. 246—Release—Suit for value of goods*—Onus—Res judicata.—M to whom C, his judgment-debtor had made over certain goods, attached the same in execution of his decree as the property of his judgment-debtor, but, on a claim being preferred to the goods by D, and B, under s. 246 of Act VIII of 1859, they were ordered to be released from attachment; they remained, however, in the possession of MD, and B having sued M to recover the value of the goods, the lower Court held that, inasmuch as M, failed to sue within a year to set aside the order of the Miscellaneous Department, and to establish his right to take the property in satisfaction of his decree as belonging to his judgment-debtor, the plaintiff's right to it must be admitted without further enquiry or proof, and decreed the claim on the basis of that order, alone. *Held*, in special appeal, that the defendant was not debarred, by that order or by the law of limitation, from disputing the plaintiff's right to the goods, and that the plaintiffs were bound to prove their right to a decree, and that the miscellaneous order was not conclusive proof of their right, and still less such an adjudication on the question as precluded a re-adjudication of it. BABU MADHO PARSHAD v. DURGA PARSHAD, **7 N.W.P. 85.**

(12)—*Exclusion of oral by documentary evidence.*—On a claim being denied, satisfactory proof is required of its genuineness, and the ordinary tests of evidence cannot be dispensed with, because the parties have had certain business relations. JAWAL MALL AND SON v. RAJOO MOODALIAR, **U.B.R 1892—1896, Vol. II, 230.**

(13)—*Suit by defeated claimant under s 283, Civ. Pro. Code.*—When a plaintiff seeks by a suit under s. 283, Civ. Pro. Code, to establish his

Burden of proof—continued.

——7.—Claims to property attached.—*concld.*

right to property, which was attached in execution, after having failed in an attempt to procure the removal of the attachment, the burden of proving that he acquired the property in good faith and for consideration lies on him. NARAYAN GANESH GHATATE v. BHIORAJ, **2 N.L.R. 87.** (6 C.P.L.R. 81, 9 C.P.L.R. 142, *R.*)

Fraud—S. 110, Evidence Act—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, U.B.R. 1904, 4th Qr., Civ. Pro. p. 8.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, 17 B. 94.

Suit by defeated claimant to establish right to property attached—Burden of proving *bona fides* and good faith of the transaction—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 9 C.P.L.R. 142.

——8.—Consideration.

See CONSIDERATION.

(1)—*Proof of consideration*—Onus.—It is the established practice of the Courts in India in cases of contract to require proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not of itself, in India, import that there was a sufficient consideration for the agreement. A plaintiff, however, suing to set aside a security admittedly executed by himself, must make out a good *prima facie* case before the defendants can be called on to prove consideration. KALIPRASAD TEWARI v. RAJAH SAHIB v. PRALAD SEN, **2 B.L.R. P.C. 111=12 M.I.A. 282=12 W.R.P.C. 6.** [*F.*, 12 W.R. F.B. 25; *Appr.*, 8 B.H.C.C. 1, 31 B. 143=9 Bom. L.R. 65; *R.*, 12 M. I.A. 343, 8 B.L.R. 26, 2 B. 273.]

(2)—*Consideration, want of*—Onus *of proof*.—Where, in a suit by the indorsee of a hundi against his immediate indorser, the defendant pleads want of consideration, the *onus* is on him to prove his plea. GOVIND RAM MARWARI v. MANTORA SAHOO, **1 C.L.R. 429.**

(3)—*Redemption—Suit by assignee of equity of redemption—Burden of proof as to receipt of consideration.*—In a suit for redemption by the assignees of the equity of redemption, the *onus* of proving that the mortgagor did not in fact receive the moneys which he acknowledged by his execution of the mortgage-deed to have received, is *prima facie* on the plaintiffs. MUHAMMAD ALLAHYAR KHAN v. MUHAMMAD SAMIUDDIN KHAN, **A.W.N. 1887, 245.**

See CONSIDERATION, 80 P.R. 1868.

Of non-receipt of consideration for a compulsorily registrable registered deed—*See* EVIDENCE—MISCELLANEOUS, 8 P.W.R. 1907.

Bond reciting receipt of consideration—Subsequent denial of consideration—*See* EVIDENCE ACT, 1872, s. 102, **27 A. 71=1 C.L.J. 423.**

Burden of proof—continued.

——9.—Contribution.

See CONTRIBUTION, SUITS FOR.

(1)—*Suit for contribution—Payment of Government revenue by one co-sharer*—Onus.—In a suit for contribution by one co-sharer for recovery of excess payments of Government revenue made on behalf of other co-sharers to save the estate from sale, the *onus* was held to be on the plaintiff to prove their shares and the amount of revenue payable thereon. AGHOREE RAM SAHOY v. RAMOLEE SAHOO, **W.R. 1864, 309.**

(2)—*Suit for contribution of Government revenue—Plea of previous payment to plaintiff—Burden of proof.*—In a suit for contribution for money admittedly paid by plaintiff into the Government Treasury, on account of defendants' share of the revenue, where defendants plead previous payment to the plaintiff, the *onus* of proving such payment lay upon the defendants. MOHADEO MISSER v. LAHOREE MISSER, **24 W.R. 250.**

(3)—*Suit between judgment-debtors for money paid for satisfying decree—Right to possession*—Onus.—Where, in a suit between judgment-debtors to recover money alleged to have been paid in satisfaction of decrees obtained against them by J, who had been wrongfully kept from enjoying his share of the property, B answers that he entered in to possession as plaintiff's mortgagee, and plaintiff maintains that the right of possession terminated before the origin of J's claim, the burden was held to lie on A to prove that it so determined. AFZUL KHAN v. BAHADOOR SINGH, **19 W.R. 156.**

——10.—Custom.

See CUSTOM.

See CUSTOMS—PUNJAB.

(1)—*Suit for maintenance—Custom*—Onus *on whom lies.*—In a suit by a late Raja's brother for maintenance, where it was pleaded that plaintiff's allowance must be diminished, because he was no longer the ruling Raja's brother, *held*, that it was for the defendant to prove a custom entitling him to diminish the allowance heretofore enjoyed in right of plaintiff's position in the family. RAJAH MOKOND NARAIN DEB v. MOORALEE MOHAN BABOO, **6 W.R. 91.**

(2)—*Family custom—Burden of proof—Strict proof.*—A special family custom involving a departure from the ordinary Hindu Law should be properly proved by the person setting it up. GARURUDHWAJA PERSHAD v. SAPARANDHWAJA PERSHAD SINGH, **5 C.W.N. 33=27 I.A. 238=23 A. 37, P.C.**

(3)—*Custom opposed to Hindu Law, Burden of proof as to.*—A custom opposed to the ordinary Hindu Law must be proved by those who assert it. When, however such exceptional custom has been proved or admitted as binding on a particular section of the community, it is

***Burden of proof*—continued.**

—10.—Custom—*continued.*

necessary for those who rely on it as against an individual member of that section to show that such member has not, by his own personal action, excluded himself from its operation. Therefore apart from the general principles that a plaintiff must establish the grounds of his claim, it seems rea onable to require proof that individual members are liable on personal grounds to be exoluded from the operation of a law or custom which regulates the section to which they still profess to belong. GITABAI v. SHIVBAKAS, **5 Bom. L.R. 318.**

(4)—*Custom overriding general law*—Onus probandi.—A custom alleged to exist overriding the general law should be proved by those who invoke it in their favour. MUSST. LATTI BEGAM v. NAWAB MAHOMED AZMAT ALI KHAN, **13 P.R. 1875.** [*R.*, 144 P.R. 1883; *D.*, 71 P.R. 1878.]

(5)—*Hindu Jat—Customary right of representation—Collateral and lineal succession.*—A Hindu Jat of the Umballa District who alleges a customary right of representation, extending to collateral as well as to lineal succession, need not give evidence in proof of such a custom. CHANDA v. MUSSAMMAT GUJAR, **91 P.R. 1879.** [*R.*, 140 P.R. 1908.]

(6)—*Pagvand and Chundavand—Inheritance, General custom as to—Burden of proof.*—The general custom as to inheritance is pagvand, that is, *per capita*, and not chundavand, that is, *per stirpes*. A party therefore, who alleges the special custom of chundavand must prove it. If not, the general custom of pagvand applies. DHAYAN CHAND v. MEHTAB SINGH, **101 P R. 1879.** [*R.*, 125 P.R. 1884, 14 P.R. 1909, 148 P.R. 1908.]

(7)—*Near collaterals excluding daughters—Burden of proving custom.*—According to the customary rule among the Punjabi Hindus, the near male collaterals of the propositus exclude his daughters and their sons. Therefore, the burden of proving that, by custom, daughters and their sons succeed in preference to nephews lies on him who sets up such custom. PREM SINGH v. MUSSAMMAT CHANDI, **150 P.R. 1879.** [*R.*, 9 P.R. 1884, 108 P.R. 1888.]

(8)—*Inheritance—Special family custom.*—It is incumbent on a person relying upon a special family custom, such as that only one son of the last owner, *viz.*, the fittest or the oldest, succeeds to the whole estate, the others getting only maintenance, to establish regarding such custom that it was ancient, invariable and definite. AARIF KHAN v. AMIR KHAN, **85 P.R. 1901.**

(9)—Onus probandi—*Custom—Alienation by occupancy tenant—Right of his collateral to set aside alienation.*—When a collateral of an occupancy tenant seeks to restrain an alienation by that tenant, as to which the landlord has stood completely aside, it lies upon such

***Burden of proof*—continued.**

—10.—Custom—*continued.*

collateral to prove that a custom exists under which he is entitle to do so. FAIZ BAKHSH v. DITTA, **115 P.L R. 1901=115 P.R. 1901.** [*R.*, 98 P.R. 1907, 38 P. R. 1909=60 P.W.R. 1907.]

(10)—*Childless proprietor's right to alienate ancestral immoveable property*—Onus probandi.—A childless proprietor's customary right to alienate ancestral immoveable property in favour of some of his collaterals while other collaterals of equal decree exist must be proved by the person asserting the existence of such custom. AMIR v. MUSSAMUT ZOBO, **42 P. R. 1902.** [*R.*, 35 P.R. 1907, 92 P.R. 1904, 1 P. R. 1907=31 P.W.R 1907; *F.*, 35 P.R. 1902.]

(11)—*Custom whereby widow claims husband's entire estate absolutely—Burden of proof.*—A special family custom under which a widow claims the entire estate of her husband as absolute owner with full power of alienation must be established by the person relying on such a custom. MUHAMMAD ANWAR-UL-HAQ v. HABIB-UL RAHMAN, **74 P.R. 1902.** [*F.*, 54 P.R. 1903, 18 P.R. 1906.]

(12)—*Mortgage—Authority of mortgagor to impose any easement on the property mortgaged whereby the security is rendered in sufficient—Validity of such act—Burden of proof.*—It is incompetent to a mortgagor in possession without the consent of the mortgagee, to do any act likely to prove destructive or permanently injurious to the mortgaged property. The validity of such an act, and the non-deterioration of the security thereby must be proved by the mortgagor or his representative in interest. MUSSAMMAT BHAGWAN DEVI v. BUNYADI KHANAM, **85 P.R. 1902.**

(13)—*Persons not entirely depending on land for support—Custom as to alienation governing such persons, burden of proof as to.*—Persons who do not depend entirely on the land for their support will not to presumed to be subject to the general customs of the Punjab, the burden of proof therefore, that such persons are in matters of alienations or successions, governed by custom must be discharged by the party making such allegations. MOTI RAM v. SANT RAM, **103 P.R. 1902.** [*R.*, 51 P.R. 1903=174 P. L.R. 1903, 63 P.R. 1910, 54 P.R. 1906, 94 P. R. 1907.

(14)—*Setting up custom at variance with ordinary law*—The burden of proof is on the party setting up a custom at variance with the law of the community to which he belongs. MT. RUPA v. MOHANLAL, **9 C.P.L.R. 47.** [*R.*, 16 C.P.L R. 99.]

(15)—*Proof of custom not embodied in* wajib-ul-arz.—If a *malguzar* relies upon a custom, which is not embodied in the current *wajib-ul-arz*, the burden of proving such custom is on him. BHAYALAL v. CHUNNILAL MARWARI, **16 C.P.L.R. 81.**

See BETROTHAL, **132 P.R. 1888.**

See CUSTOM, **5 B. 482, 2 Agra 120.**

***Burden of proof*—continued**

——10 —Custom—*continued.*

See CUSTOM—PUNJAB—GENERAL, 23 P.R. 1897.

See CUSTOM—PUNJAB—ADOPTION, 22 P. R. 1884, 27 P.R. 1884, 130 P.R. 1884, 35 P. R. 1885, 85 P.R. 1886, 58 P.R. 1895, 33 P. R. 1900.

See CUSTOM— PUNJAB — ALIENATION, 2 P.R. 1881, 26 P.R. 1885, 107 P.R. 1885, 7 P.R. 1886, 6 P.R. 1902=P.L.R, 1901, p. 154, 103 P.R. 1902.

Gift of occupancy right by childless occupancy tenant to nephews in presence of brother —Burden of proof —Custom—*See* CUSTOM—PUNJUB—ALIENATION, 12 P.R. 1904.

As to Khatries being governed by Customary law of agricultural tribes—*See* CUSTOM —PUNJUB—ALIENATION, 12 P.R. 1906=103 P.L.R. 1906.

The burden of proving that certain parties are governed by the agricultural custom of the Punjab is on the party who alleges it—*See* CUSTOM—PUNJAB—ALIENATION, 79 P. R. 1909=126 P.L.R. 1909=127 P.W.R. 1909 =3 Ind. Cas. 603.

Sale of ancestral land to pay off debt really due—*Onus* of proving immoral nature of the debts—*See* CUSTOM—PUNJAB—ALIENATION, 55 P.R. 1908=105 P.W.R. 1908.

See CUSTOM—PUNJAB—CESSES, 49 P.R. 1879.

In matter of title to succeed to religious institutions — *See* CUSTOMS — PUNJAB—INHERITANCE, 143 P.L.R. 1906.

Burden of proof regarding alleged customs among Chima Jats of Deska Tahsil of Sailkot, that adopted son can succeed collaterally in his adoptive father's family —*See* CUSTOM — PUNJAB — INHERITANCE, 67 P.L.R. 1908= 50 P.R. 1908=104 P.W.R. 1908.

Persons setting up custom opposed to personal law must prove that custom—*See* CUSTOM—PUNJAB—INHERITANCE, 86 P.R. 1908 =146 P.W.R. 1908.

See CUSTOM —PUNJAB — INHERITANCE, 101 P.R. 1879, 150 P.R. 1879, 77 P.R. 1881, 149 P.R. 1888, 74 P.R. 1902.

The onus of proving that a particular form of vicinage gives a preferential right of pre-emption rests on the person asserting it—*See* CUSTOM —PUNJAB—PRE-EMPTION, 67 P. R. 1906=88 P.L.R. 1907.

See CUSTOM—PUNJAB—PRE-EMPTION, 17 P.R. 1903.

Of a special custom inconsistent with ordinary rules of inheritance—*See* CUSTOM—PUNJAB—MISCELLANEOUS, 18 P.R. 1906= 124 P.L.R. 1906.

See EVIDENCE ACT, 1872, ss. 32, 49, 60, 23 A. 37, P.C.=27 I.A. 238=5 C.W.N. 33.

***Burden of proof*—continued.**

——10.—Custom—*concluded.*

See HINDU LAW—ADOPTION, 10 B.H.C. 241.

Custom at variance with Hindu Law—Burden of proof—*See* HINDU LAW—CUSTOM, 3 B. 34.

Evidence of family or local custom—Onus of defendant—*See* HINDU LAW—CUSTOM, 4 B. 494, P.C.=7 C.L.R. 1=7 I.A. 162.

See HINDU LAW—INHERITANCE, 29 C. 828, P.C.=29 I.A. 78=7 C.W.N. 57=178 P.R. 1902.

As to custom invalidating marriage of *Rajput* with *Khatrani* woman—*See* HINDU LAW—MARRIAGE, 64 P.L.R. 1908=72 P.R. 1908=47 P.W.R. 1908.

See INJUNCTION—SPECIAL CASES, 3 B. 232.

Khoja Mahomedans — Presumptions and rules of Hindu Law applicable—Son entitled to sue father for partition—Burden of proving, custom to contrary—*See* KHOJA MAHOMEDANS, 12 B. 280.

——11.—Debtor and Creditor.

See DEBTOR AND CREDITOR.

(1)—*Debtor pleading tender of payment—Interest*—Onus *of proof.*—When a debtor pleads tender of payment as a ground for not being saddled with interest, it is for him to prove such tender. RANEE SHURUT SOONDUREE DEBIA v. THE COLLECTOR OF MYMENSING, **5 W.R. Act X, Rul. 69.**

(2)—*Creditor agreeing to an arrangement releasing certain partners of the debtor firm—Burden of proof of such agreement lies on those partners.*—The burden of proof that a creditor by agreeing to an arrangement whereby a firm indebted to him conveyed to two of the partners thereof certain property in trust to pay off his and certain other debts, thereby released the remaining members of the partnership lies upon the parties who were originally liable to such creditor. KALAIKHAN v. MADHO PERSHAD, **3 N.W.P. 129.**

(3)—*Debt proved or admitted — Payment, proof of.*—If a debt is proved or admitted, the burden of proving payment lies on the debtor. MOBARIK KHAN v. SEWA RAM, **35 P.R. 1867.**

(4)—*Deceased Hindu's creditor suing his son —Burden of proving nature of debt.*—In a suit by a creditor against the son of a deceased Hindu, it cannot be laid down as a general rule that the burden of proving the nature of the debt lies absolutely either on the creditor or on the son. MAMRAJ v. MUSSAMMAT BALASO, **16 P.R. 1878.**

(5)—*Suit on bond—Plea of absence of consideration—Admission of plaintiff as to difference of consideration—Shifting of burden.*—Where in a suit on a bond, the defendant pleaded want of consideration, *held*, he was not relieved of

***Burden of proof*—continued.**

——11.—Debtor and creditor—*concluded.*

the obligation of establishing his case by the fact of an admission of the plaintiff that the actual consideration was different from that described in the bond. LAL SINGH v. CHAITRAM, **15 C.P.L.R. 24.** (3 A. 824, *D.*; 3 B. 159, 22 A. 370, *R.*)

See LIMITATION ACT, 1908, ss. 4, 5, 29, cl. (1) (*b*), L.B.R. 1872—1892, 338.

——12.—Declaration of Title.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.

(1)—*Evidence—Suit for declaration of title.*—Where a plaintiff seeks to be declared the proprietor of land, he must make out that title affirmatively. He is in the same position as any other plaintiff and must make out his case. He must show that he is in possession and that his possession has been as owner. RASSONADA RAYAR v. SITHARAMA PILLAI, **2 M.H.C. 171.** [*Cons.*, 6 B. 215; *R.*, 20 B. 798.]

(2)—*Title—Evidence.*—A plaintiff must succeed, if at all, upon the strength of his own title and not by the infirmity of his opponents. RAHUMTULLA SAHIB v. MAHOMMED AKBAR SAHIB, **8 M H.C. 63.**

(3)—*Plaintiff to rely on strength of title—Adversary's weakness useless.*—The plaintiff in a suit for immoveable property must rely on the strength of his own title and not take advantage of the weakness of his adversary. FUTTEH KHAN v. BADAM, **71 P.R. 1866**; and MEGA v. SUDDA RAM, **66 P.R. 1867.**

(4)—*Suit for declaration of plaintiff's reversionary title—Cancellation of sale-deed.*—In a suit for declaration of plaintiff's reversionary title as heir to his uncle's property and for the reversal of a deed of sale from that uncle set up by defendant, the *onus* was held to be on the defendant. BIJKUNT NATH ROY v. GRISH CHUNDER MOOKERJEE, **15 W.R. 96.**

(5)—*Suit for possession—Intervenor.*—Where, in a suit for confirmation of possession and declaration of title, the principal defendants admit plaintiff's title, but a vendee from such defendants intervenes and claims the property alleging that he is in possession, *held* that the intervenor cannot question the plaintiff's possession and title until at least he (intervenor) could show possession. LALLA RAM SUHAE SINGH v. LALLA OJOODHYA PERSHAD, **5 W. R. 233.**

(6) *Party in possession of document—Plaintiff proving* prima facie *case.*—Where the plaintiff could not produce the document on which he relies, owing to the fact that he was not a party to it, and could not, from the circumstances of the case, have obtained possession of the document or of a copy of it, while the same circumstances would lead to the inference that the defendants ought to be in possession of it, then, it would be enough for the plaintiff to make out a *prima facie* case so as to throw

***Burden of proof*—continued.**

——12.—Declaration of Title—*continued.*

upon the defendants the burden of proving the document by primary evidence, or by secondary evidence on properly accounting for its non-production. RAM PRASAD v. RAGHUNANDAN PRASAD, **7 A. 738 = A.W.N. 1885, 160.** (3 I A. 85, *R.*)

(7)—*Claim under will—Proof.*—Persons relying upon a will for their title must establish by the most satisfactory evidence, *a fortiori* in the case of a will alleged to have been executed by a *pardanashin* lady, not only that the deceased executed the will, but that he or she executed it with full knowledge of its effect and that he or she was not induced to execute it by the exercise of any undue influence. SYAD MUHAMMAD KHAN v. SYAD BADR-UD-DIN, **149 P.R. 1882.** [*D.*, 107 P.R. 1906.]

(8) *Gift of share in village—Right to* shamilat.—In the absence in a deed of gift of a share in a village of an express statement of the donee's right to *shamilat* in the village, the burden of showing that the deed carries with it, as accessory thereto, a right to a proportionate share of *shamilat* lies on the person who asserts the same. FAZAL SHAH v. SIKANDAR ALI, **115 P.R. 1894.** (65 P.R, 1889, 239 P.R. 1890 and 1389 of 1890 (unreported, *R.*) [*F.*, 113 P.R, 1900.]

(9)—*Evidence—Displacement of legal title.*—A person, who seeks to bar one who is *prima facie* the legal owner, by evidence of ratification or of facts cogent enough to prove one not a formal, to be a substantial party, must make and prove such a case, for, he is one who seeks to displace a legal title. RAJAN v. BASUVA CHETTI, **2 M.H C. 428.**

(10)—*Impeachment of sale-deed as colourable transaction*—Onus *of proof as to want of consideration*—Prima facie *evidence—Shifting of burden—Indebtedness of vendor at time of sale.*—Where the plaintiff impeaches a sale-deed on the ground that the consideration therefor did not pass, the burden lies in the first instance on the plaintiffs to prove want of consideration. If he succeeds in establishing a good *prima facie* case, the burden is shifted on to the shoulders of the defendant to prove the passing of the consideration and to rebut the evidence on the plaintiff's side satisfactorily. Once the sale-deed is declared a colourable transaction and of no effect, the whole case is practically decided and it is not material to show how deeply indebted the vendor was at the time of the pretended sale or whether his indebtedness was known to the vendee. ESHWAR PATEL v. DADA PATEL, **4 C.P.L.R. 179.**

(11)—*Suit by defeated claimant to establish his right to property attached in execution.*—Where the plaintiff, a purchaser, seeks to establish his right to property, which was attached in execution proceedings as that of a judgment-debtor, after having failed in an attempt to procure the removal of the attachment in the course of those proceedings, the

***Burden of proof*—continued.**

——12.—Declaration of Title—*concluded.*

burden of proof lies upon the plaintiff and he must prove the payment of the purchase-money and possession of the property since the transfer to him. DAJIBA PATEL v. DINANATH, 6 **C.P.L.R. 81.** (12 B. 270, *R.*) [*R.*, 2 N.L.R. 87, 13 C.P.L.R. 69 ; *Affirm.*, 9 C.P.L.R. 142.]

(12)—Onus probandi—*Claim to get declaration that defendant's name has been entered in Revenue papers by mistake.—Held*, that the *onus* of proving that the plaintiff is in separate exclusive possession of certain land, and that defendant's name has been wrongly entered in the Revenue papers as its joint owner lies on the latter. BHOLA v. BRIJ LALL, **27 P.W.R. 1912.**

Disposal of claim to attached property otherwise than on merits—Suit by defeated claimant for declaration of title—Burden of proof—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 60 to 63, 13 C.P.L.R. 69.

——13.—Decrees and deeds, Suits relating to.

See DECREE.

See DEED.

(1)—*Purchase* lite pendente—*Judgment in suit, effect of—Actual possessor impugning decree giving formal possession*—Onus *on impugner.*—A party purchasing the right, title, and interest of another during the pendency of a suit against that other, is bound by the judgment in that suit. Where a decree in execution of which formal possession has been obtained is impugned by the party in actual possession as fraudulent and collusive, the *onus* lies on the impugner to prove their allegation. RABIA KHANUM v. MR. J. P. WISE, **23 W.R. 329.**

(2)—*Misjoinder—Civ. Pro. Code, 1859. s. 9—Burden of proof in suit for declaration of falsity of document.*—A lower appellate Court trying together two suits turning on entirely separate documents, it reverses the procedure indicated in s. 9, Act VIII of 1859. In a suit for a declaration that a document propounded by the defendant was false, the plaintiff has the burden of proving that allegation. RAM NIDHEE KOONDOO v. GOLUCK CHUNDER MOSHANTO, **11 W.R. 280.**

(3)—*Relationship between parties to a conveyance—Purchase-money — Registration* — Bona fides *not proved.*—The relationship between parties to a conveyance of property is not immaterial where the question is whether the purchase is true or fraudulent ; and the mere handing over of purchase-money before strangers, and registration, are not sufficient proof of a *bona fide* transaction. PRAN KISHEN DEB v. LOKENATH SING MOJOOMDAR, **10 W.R. 445.**

(4)—*Suit to cancel registered document—Denial of execution by plaintiff*—Onus *of proof of execution.*—Where, in a suit to set aside and cancel a registered document, the plaintiff comes forward and denies execution (after an

***Burden of proof*—continued**

——13.—Decrees and deeds, Suits relating to.—*continued.*

ineffectual denial of execution before the Registrar), the burden of proving its execution and genuineness is properly placed upon the defendant. MOHIMA CHUNDER DHUR v. JUGAL KISHORE BHUTTACHARJI, **7 C. 786 =9 C.L.R. 471.** (10 W.R. 329, 8 B.L.R. App. 26, *Diss.*)

(5)—*Order finding deed not genuine—Suit to set aside*—Bona fide *proof.*—In a suit to set aside an order of the Small Cause Court in which that Court had held that a certain *kobalah* was *mala fide*, the *onus* is on the plaintiff that it was executed *bona fide*. ISHAN CHANDRA DAS v. RUKIMUDDIN SOWDAGAR, **2 B.L.R. A.C. 326, Note = 10 W.R. 412.** [*D.*, 2 B.L.R. A.C. 326.]

(6)—*Duress.—The Sudder Dewany Adawlut* having refused to set aside a deed of *razinamah* for compromising an appeal then pending from that Court to the King in Council, on the ground that it was obtained by fraud and duress : *held*, on appeal, by the Judicial Committee, that the *onus* of proving such fraud and duress lay upon the appellant, in proceeding upon his petition in the Court below ; and their Lordships being satisfied that full opportunity for such proof had been afforded him, confirmed the judgment of the *Sudder Court*, but, under the circumstances, without costs. MOTEE LAL OPUDHIYA v. JUGGURNATH GURG, **5 W.R. 25, P.C. = 1 M.I.A. 1 = 1 Suther. 45 = 1 Sar. 88.**

(7)—*Sale* bona fide — *Burden of proof.*—Where, after the attachment of the right, title and interest of the judgment-debtor in certain property, the plaintiff preferred a claim under conveyances from the judgment-debtor, and it was rejected and the property sold, the judgment-creditor purchasing the same at the auction, and selling it to the defendant, who ousted the plaintiff, who thereupon sued to recover possession, *held*, that the *onus* was not entirely on the plaintiff to prove the *bona fides* of the sale, but that the evidence adduced by the defendant should be examined also. SRIMATI DEBI v. MADAN MOHAN SINGH, **2 B.L.R.A.C. 326.** (2 B.L.R A.C. 326, *Not. D.*)

(8)—*Possession claimed under hibba—Presumption of fraud—Duty of Court.*—Where the opposite party claims possession, under an alleged hibba, of property asserted by decree-holder to belong to his judgment-debtor, and plaintiff's evidence raises presumption of fraud, the Court should go on to the evidence on the other side. KADUMBINEE DOSSIA v. UNNOPOORNA DAYE, **14 W.R. 289.**

(9)—*Heba alleged to be a collusive deed of transfer of property*—Onus probandi.—Where the authenticity and *bona fides* of a heba are impugned, on the ground that, at the time the instrument was executed, the executants were in a state of indebtedness, and the registration was delayed until the making of certain decrees against them, *held* that the parties, whose

***Burden of proof*—continued.**

——13.—Decrees and deeds, Suits relating to —*continued.*

intention was questioned, were bound to give evidence of a satisfactory kind showing that this extremely suspicious transaction was *bona fide* intended to convey the property. CHUNDER NARAIN SEN v. AMIRTO LALL SEN, **24 W.R. 292.**

(10)—*Allegation of want of* bona fides *of trust deed.*—Where it is found on the face of a deed creating a trust that the transaction is *bona fide*, it is for the creditors who impugn the *bona fide* nature of the trust to prove their plea. KASHESHUREE DASSEE v. KRISHNA KAMINEE DEBIA, **2 Hay 537.**

(11)—*Fraud in bye—Mokasa set up by judgment-debtor—Motive made out for fraud*—Onus *as to* bona fides *of deed.*—Where plaintiff starts a *prima facie* case by alleging that the *bye-mokasa* set up by judgment-debtor's wife, was executed in fraud of creditors, and showing a sufficient motive for the fraud, the *onus* was held to have shifted to the defendant who was bound to prove the *bona fides* of the deed. GOWHUR ALI KHAN v. MUSSAMUT SAKHEENA KHANUM, **5 W.R. 307.**

(12)—*Possessory suit—Fraud.*—A plaintiff in possession for seven years since her husband's death ought not to be dispossessed on the ground of a fraudulent deed to which her husband and the defendant were parties years previously, to which she was no party. ECHAMOYEE v. HURO SOONDUREE DASSEE, **12 W.R. 155.** (3 W.R. 221, *R.*)

(13)—*Decree prejudicial to reversioners—Allegation of fraud—Burden of proof.*—Where the reversionary heir of a former proprietor sues for land in the possession of a third party, who obtained it by purchase at a sale in execution of a decree on a bond, both bond and decree being alleged to be fraudulent the burden was held to lie on plaintiff to prove that decree was obtained fraudulently. GRESH CHUNDER CHATTERJEE v. MOHESH CHUNDER NYALUNKAR, **10 W.R. 173.**

(14)—*Brother in joint family—Transfer of his interest to his brothers to attachment but after decree.*—Bona fides—Onus.—Where one brother of a joint undivided family transferred his interest in the joint property to the other brothers after a decree had been passed against him, although before attachment, *held* that, when a question arose, the *onus* was on those brothers to prove the *bona fides* of the transaction. BROJO LALL SANDYAL v. BHOBOO UNNODA PERSHAD BANNERJEE, **17 W.R. 499.**

(15)—*Suit by judgment-debtor—Allegation of fraud.*—Where plaintiff, on her rights and interests being put up for sale in execution of a decree, alleges that the decree is fraudulent and collusive and that no notice had been served on her, *held* that the plaintiff was bound to prove her case, and that it was not incumbent on the

***Burden of proof*—continued.**

——13.—Decrees and deeds, Suits relating to —*continued.*

defendant to prove that the decree passed by a competent Court was not collusive or that the notice had been actually served. MOHIMA CHUNDER MULLICK v. BURODA SOONDUREE DOSSEE, **12 W.R. 147.**

(16)—*Suit for declaration that pottah is false* — Prima facie *case* — Onus *on defendant.*—A plaintiff suing for a declaration that defendant's pottah is false must make out a *prima facie* case before the *onus* can be thrown on defendant to prove the genuineness of his pottah. JOY CHUNDER TUPPADAR v. RAM CHURN DOSS, **15 W.R. 117.**

(17)—*Suit by Mahomedan widow for share of husband's property—Tumliknamah—Proof.*—Where a Mahomedan widow sues the brother of her deceased husband for her share of the husband's property, and where the defendant sets up a tumliknamah by which the deceased conveyed away the property to defendant's son, the burden of proof lay on the defendant. SADUK ALI KHAN v. BIBEE PEAREE, **9 W.R. 142.**

(18)—*Voluntary settlement deed—Suit to set aside deed—Burden of proof of settler's knowledge as to effect of settlement and its finality.*—In a suit by a settler to set aside a voluntary deed of settlement, where there were circumstances to show that the settler had no knowledge of the legal effect of executing such a settlement deed, *held* that the burden of proving that the settler understood the effect of the settlement and its finality was on the defendant; and as the burden was not discharged, the plaintiff should succeed and the settlement could not consequently stand. (*Anderson* v. *Elsworth*, 3 Giff. 154; *Forshaw* v. *Welsby*, 30 Beav. 243; *Wollaston* v. *Tribe*, L.R. 9 Eq. 44, *R.*) M gave instructions to the defendants for the trust deed in question, which without containing a power of revocation settled Rs. 30,000, —the bulk of his property—upon the defendants as trustees, to perform his funeral ceremonies, and to carry out certain religious directions and observances, and to pay an annuity of Rs. 25 to his sister and a similar annuity to another person; and with the residue to found a Sanskrit class. Provision was to be made also for payment of Rs. 100 during the life-time of the settler for his maintenance and expenses or such larger sum as he might require for such purposes; but in other respects, it was not to come into operation until after his death. The defendants had a considerable influence over the mind of M, who was their family priest and who always relied upon them for advice in all worldly matters. The settlement deed was prepared and executed in the terms mentioned above. The evidence established that the actual provisions of the deed were explained to the settler, that the settlor was of sound mind, though of weak health, but also that *the legal effect of the deed* which was to give him an annuity out of his own property

***Burden of proof*—continued.**

——13.—Decrees and deeds, Suits relating to —*continued.*

during his life-time, and irrevocably to determine the disposition of that property after his death, *was not explained to him* at any time by any one. Shortly after the execution of the settlement deed, the settler became dissatisfied with what he had done and executed a Will by which he left the Rs. 30,000 to his sister. He also signed instructions and a power-of-attorney under which this suit to set aside the said settlement deed was filed. He died subsequently to the filing of the suit, and his sister and executrix became the plaintiff. The plaint prayed that the said deed should be set aside on the ground of undue influence, etc. *Held* that the deed must be set aside on the ground that the circumstances of the case threw upon the defendants the burden of proving that M, the settler, understood the effect of the settlement and its finality; and that they having failed to do so, the deed in question must be set aside. BAI MANIGAVRI v. NARONDAS CALLIANDAS, **15 B. 549.** [*D.*, 8 Bom. L.R. 652=31 B. 271.]

(19)—*Evidence Act (I of 1872), s. 111—Suit for cancellation of instrument—Gift to spiritual adviser—Fiduciary relationship—Undue influence—Burden of proof.*—Where a gift was made by the plaintiff, a very old man, in favour of the defendant, who was his *guru* or spiritual adviser, the desire of the plaintiff to secure benefits to his soul in the next world having been set forth as the only reason for the gift,—in a suit for the cancellation of the deed, it was held that the burden rested on the defendant to show that the transaction was made in good faith and without undue influence; and that, in the absence of such proof, the plaintiff was entitled to the relief asked for. MANNU SINGH v. UMADAT PANDE, **12 A. 523=A.W.N. 1890, 56.** (10 A. 535, *R.*)

(20)—*Gift to persons in a fiduciary relationship—Burden of proving absence of undue influence.*—A benefit being conferred on a person standing in a confidential relation towards another, every *onus* is thrown upon the person, filling such a fiduciary character towards another, of showing conclusively that he has acted honestly, and *bona fide*, without influencing the donor, who has acted independently of him. Where an instrument executed by a widow, after setting apart the rental of villages belonging to her, as her patrimony, for defraying the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity, with the residue after meeting the above expenditure, for himself, *held*, that this transaction was within the principle stated above. WAJID KHAN v. EWAZ ALI KHAN, **18 C. 545=18 I.A. 144, P.C.=6 Sar. 46.** [*R.*, 30 B. 578=8 Bom. L.R. 525.]

(21)—*Burden of proof—Deeds duly executed and registered.*—When certain deeds are duly executed and duly registered, the burden of

***Burden of proof*—continued.**

——13.—Decrees and deeds, Suits relating to —*concluded.*

proving that they are not real transactions, lies on those who allege the same. SHAM CHAND PAL v. PROTAP CHANDRA PAL, **25 C. 78, P.C. =24 I.A. 186=1 C.W.N. 594=7 Sar. 217.**

Suit to set aside decree on ground of fraud —Nature of fraud to be proved—*See* DECREE —GENERAL, 1 N.L.R. 20.

See RIGHT OF SUIT—GENERAL, 6 W.R. 2.

——14.—Documents relating to loans, Suits relating to.

(1)—*Suit for possession—Claim under admitted pottah—Right of lessee to grant pottah—*Onus.—In a suit for possession where plaintiff claims under a pottah the execution of which is not denied by defendant, who contends that the lessor had no power to grant it, the burden was held to be on the defendant. RAJAH MAKOOND NARAIN DEO v. JONARDUN DEY BURNICK, **15 W.R. 208.**

(2) — *Mortgage-deed, possession under.*—Where the execution of a mortgage-deed was admitted and long possession of the mortgagee under that decree was established, *held* that the *onus* of proving that the transaction was impeachable lay on the person who impugned it and denied that the money which was consideration for its execution was paid. HURPAUL SINGH v. MUSST. ZAHOORUN, **2 Agra 202.**

(3)—*Burden of proof—Mortgage-deed — Act III of 1877 (Registration), ss. 59, 60—Evidence.*—A suit was brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure. One of the defendants, who was not one of the mortgagees, but, a purchaser at auction-sale under a Rent Court-decree, filed a written statement in which she pleaded that the plaintiff's deed was executed by the mortgagor, who was a near relation of his, fictitiously and collusively and without consideration. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that the deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act III of 1877, were not sufficient to shift the burden of proof on to the defendant. MANOHAR SINGH v. SUMIRTA KUAR, **17 A. 428=A.W.N 1895, 93.** [*R.*, 6 C.L.J. 659=3 M.L.T. 38, 5 O.C. 18, 5 C.L.J. 653.]

(4)—*Part of consideration paid at time of execution and part before—Presumption—Positive evidence.*—Where a part of the consideration-money has been paid before, and the remainder at the time of the execution of a deed, there is more than a presumption that the whole consideration has passed. DOMUN SINGH v. BHUGGOBUTTY DEBEA, **8 W.R. 216.**

(5)—*Suit on alleged mortgage against* bona fide *purchaser*—Onus *of proof of execution of bond and* bona fides *of transaction.*—Where, in

Burden of proof—continued.

——**14.—Documents relating to loans. Suits relating to**—*continued.*

a suit on an alleged mortgage against a *bona fide* purchaser for value, the genuineness of the transaction is questioned, the plaintiff is bound to prove *prima facie* both the due execution of the bond and the *bona fides* of the transaction and the defendant need not give affirmative evidence of fraud. BRAJESHWARE PESHAKAR v. BUDHANUDDI, **6 C. 287=7 C.L R. 6.** [*R. and Expl.* 5 C.L.J. 653; *R.*, 6 C.L.J. 659=3 M.L.T. 38.]

(6)—*Proof of execution and consideration—Suit on bond.*—In a suit on a bond, the plaintiff is entitled to recover upon showing that it was executed by the defendant. The *onus* lies on the defendant of showing the want of consideration. JUGGUT CHUNDER CHOWDHRY v. BHUGWAN CHUNDER FUTTEHDUR, **Marsh 27=1 Hay 57=1 Ind. Jur. O.S. 67.** *See also* KURUFOOL KOOER v. RAJKALEE KOOER, **17 W.R. 439.**

(7)—*Actual right of passing of money—Mode of proving payment of consideration.*—Actual sight of the passing of the money is not the only mode of proving payment of the consideration for a bond. MUSSAMAT KURUFOOL KOOER v. MUSSAMUT RAJKALEE KOER, **17 W.R. 439.**

(8)—*Consideration for bond to be always proved.*—The genuineness and due execution of a bond does not dispense with the necessity of proof of consideration therefor. BABOO GHANSAM SINGH v. CHUKOUREE SINGH, **W.R. 1864, 197.**

(9)—*Execution of bond admitted—Receipt of consideration denied—Profits of estate misappropriated by wrong-doer, suit for—Jurisdiction.*—Where a defendant admits execution of a bond, but denies receipt of consideration, the *onus* of proving that consideration passed for the bond lies on the plaintiff. Where a defendant admits having directed plaintiff to pay certain sums of money due by the defendant to third parties, the plaintiff must prove such payments. A suit for profits of certain properties which have been appropriated by a wrong-doer is cognizable by a Civil Court. TEKEAT ROOP MONGUL SINGH v. ANUND ROY, **3 W R, 111.** [*Appr.*, 5 W.R 203; *R.*, 7 W.R. 441.]

(10)—*Evidence — Loan to young man by professional money-lender—Burden of proof—Evidence Act (I of 1872), s. 114—Negotiable Instruments Act (XXVI of 1881), s. 118.*—In the case of a suit by a professional money-lender against a young man recently come of age, the ordinary presumption that a negotiable instrument has been executed for value is so much weakened that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof, and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full. This is the practical effect of illustration (*c*) to s. 114 of the Evidence Act, and its explanation. Where the plaintiff in answer to such a defence affirms that he has paid the consideration in full, and is corroborated by his books and witnesses (if any), the *onus* again shifts. The strength of the case to be rebutted will depend, however, upon the credit to be given to the testimony adduced by the plaintiff as tested by cross-examination, the weight to be attached to his books arising from the manner in which they are kept, and the presence, or absence of suspicious circumstances in connection with them, and upon its inherent probability. When, however, these circumstances concur in the plaintiff's favour, a heavy *onus* is thrown upon the defendant which can only be met by a perfectly truthful and harmonious statement which the Court feels able to rely upon with confidence. And in the absence of this, the ordinary presumption laid down, in s. 118 of the Negotiable Instruments Act must prevail, *viz.*, that until the contrary is proved, the presumption shall be made that every negotiable instrument was made for consideration. MOTI GULABCHAND v. MAHOMED MEHDI THARIA TOPAN, **20 B. 367.** [*F.*, 133 P.L.R. 1901, 5 O.C. 307; *D.*, 9 P.R. 1906=19 P.L.R. 1906.]

(11)—Onus *of proof—Payment of consideration—Income-tax returns.*—Where the executant of a mortgage-deed denies receipt of consideration in a suit based upon the mortgage, having, however, previously admitted receipt thereof, before the Registering Officer, the burden of proving non-receipt of consideration would not be shifted on to the plaintiff by the mere circumstance that the plaintiff had not mentioned the bond or the interest accruing thereon in the income-tax returns submitted by him. ALI KHAN BAHADUR v. INDAR PRASHAD, **23 C. 950, P.C.=23 I.A., 92=7 Sar. 63.** [*R.*, 27 C. 11=3 C.W.N. 660, 5 C.L.J. 653.]

(12)—*Bond—Acknowledgment of receipt of cash therein—Proof of advance of part only*—Onus.—In a suit upon a bond containing an acknowledgment by the executant of the receipt of the whole sum in cash, where it is proved that only a part of the sum has been received by the defendant, the *onus* is on the plaintiff to prove in some other way the advance alleged by him. LALA LAKMI CHAND v. SAYID HAIDAK SHAH, **4 C.W.N. 82, P.C.** [*R.*, 5 O. C. 307.]

(13)—*Evidence—Suit on bond—Amount of debt advanced—Shifting of burden on admission of execution.*—In a suit on a bond the plaintiff has to prove the amount of the debt advanced. This is done in the first instance by proof of execution of the bond. It is then for the defendant to give evidence in answer, if he can, that the amount advanced was less than the sum claimed by the plaintiff. In the absence of such proof by the defendant, the plaintiff is

***Burden of proof*—continued.**

——14.—Documents relating to loans, Suits relating to—*continued.*

entitled to a decree in his favour for the amount claimed by him. SIVARAMAIYAR v. SAMU AIYAR, **1 M.H.C. 447.**

(14)—*Bond—Recital as to receipt of consideration*—Onus.—Where, in a suit upon a bond which contained a recital that the defendant had received the consideration, the defendant admitted the execution of the bond but denied the receipt of consideration, *held* that the recital in the bond was evidence against the defendant, though not conclusive, and that, if he disputed the consideration, the *onus* lay upon him to show that the recital in the bond which he had executed was not correct. FULLI BIBI v. BASSIRUDI MIDHA, **4 B.L.R. F.B. 84 =12 W.R. 25.** (3 M.I.A. 347, 2 B.L.R. P.C. 111, *Appl.*) [*R.*, 5 C.L.J. 653.]

(15)—*Bond—Suit—Written statement—Plea of non-payment of consideration—Admission*—Onus probandi.—Where plaintiff sued defendant on a bond which recited the fact of due consideration having been paid at the time of execution and defendant admitted execution of the bond, but pleaded that consideration had not been passed, *held* that it was upon the defendant to prove that the facts stated by him in the bond were really different from what they were recited to be. MANICKLAL BABOO v. RAMDAS MAZUMDAR, **1 B.L.R. A.C. 92=10 W.R. 132.**

(16)—*Bond citing receipt of money—Admission of execution—Burden of proof.*—Where a bond recites receipt of money, and defendant admits having executed it, a *prima facie* case arises, which defendant must rebut. RUGHOONATH DOSS v. LUCHMEE NARAIN SINGH, **10 W.R. 407.**

(17)—*Proof of want of consideration—Suit for money due on bond.*—When, in a suit for money due on a bond, both the execution and the receipt of the consideration are denied, the defendant must prove the latter plea, if the execution be established by the plaintiff. KISHENDYAL SINGH v. MONOHUR LALL, **2 Hay 381.**

(18)—*Bond—Plea of partial failure of consideration.*—In a suit on a bond, the defendant, while admitting the genuineness of the bond, contended that a portion of the consideration money was not applied by the obligee for the purpose for which it was agreed to be applied. The Court of first instance threw the burden on the plaintiff of proving that the amount in question which appeared by his books of account, relied upon by the defendant himself, had been in fact subsequently paid, and eventually disallowed the amount. The High Court *held* that the accounts must be admitted *in toto* and that the disputed items must be allowed. *Held*, by their Lordships, that the Court of first instance had acted on an entirely wrong principle. It would have been correct if the plaintiff had relied on his own books as proving his debt; but that was not the case.

***Burden of proof*—continued.**

——14.—Documents relating to loans, Suits relating to—*continued.*

The plaintiff relied upon the bond, and unless that was displaced, there was no answer to the action. The decree of the High Court was affirmed. RAJESWARI KUAR v. RAI BAL KRISHAN, **9 A. 713, P.C.=14 I.A. 142=5 Sar. 80.** [*R.*, 28 B. 294=6 Bom. L.R. 50.]

(19)—*Bond—Allegation of loss of document—Plea of discharge—Burden of proof.*—Where in a suit on a bond, the plaintiff accounted for the non-production of the bond, by alleging that the defendant had stolen it, and the defendant, admitting execution of the bond, pleaded discharge, the defendent was bound to begin and prove payment, either by production of the bond or by other evidence or by both. CHUNI KUAR v. UDAI RAM, **6 A. 73=A.W.N. 1883, 221.**

(20)—*Admission of execution of bond—Plea of payment—Burden of proof.*—The plaintiff sued on a bond made in his favour by the defendants, which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment. *Held* that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them. SAVJI *bin* SATU v. PATLU AND MAHADU *bin* DHARU, **8 B.H.C.A.C. 139.**

(21)—*Execution of document admitted—Suit on document*—Onus *of getting rid of admission—Effect of not traversing material allegations—Suit against firm—Names of partners to be specified in plaint—Summons.*—Where a defendant admits the execution of a document upon which he is sued, the *onus* lies on him to get rid of the effect of such admission. A defendant must be taken to admit all material allegations in the plaint which he does not traverse. In an action against a firm, the names of the partners should be specified in the plaint, and a summons served on one or more of its members if resident within the jurisdiction, YEKNATH BABAJI v. GULABCHAND KAHANJI, **1 B.H.C. 85.**

(22)—*Consideration, Disputed payment of—Misplacement of burden of proof—Acquiescence as to burden—High Court - Second appeal—Practice.*—The burden of proof rests on him who impugns the authenticity of a deed, the execution of which by the owners of the property to which it relates is admitted or proved. And the *onus* should properly be placed on the defendant who disputes payment of consideration when execution and receipts of consideration are admitted by the obligor. Where misplacement of the *onus* has been acquiesced in by the parties in the Court of first instance or in the lower appellate Court, the High Court would be very reluctant to interfere with the result unless there were reasons to suppose that the

***Burden of proof*—continued.**

——14.—Documents relating to loans, Suits relating to—*continued.*

error may have produced error in the decision of the case on the merits. GANGADAS v. DAMA, **5 Bom. L.R. 177.**

(23)—*Defendant admitting cause of action—Plea of payment*—Onus *of proving—Payment*—Where a defendant admits the cause of action and pleads payment, the *onus* is on him to prove discharge by payment. BIBEE MEHER-OONISSA v. ABDOOL GUNEE, **17 W.R. 509.**

(24)—Samadaskat—*Acknowledgment of debt—Reg. V of 1827, s. 9—Burden of proof as to receipt of consideration.*—Where the plaintiff sued to recover money lent, relying upon a *Samadaskat*, or acknowledgment of debt, given by the defendant: *Held* that s. 9 of Reg. V of 1827 contained the rule of law applicable to the case, and that the *onus* lay on the defendant to prove that he had not received full consideration for the acknowledgment of indebtedness which he had subscribed. MOTI KAHANJI v. DIPCHAND VIRCHAND, **5 B.H.C. A.C. 81.** [*Appr.*, 14 B. 206; *R.*, 25 B. 202=2 Bom. L.R. 986, 16 M. 234.]

(25)—*Admission of execution and registration of bond—Receipt of consideration not proved.*—An admission of execution and registration of a bond are not conclusive proof of the receipt of consideration by the executant. It cannot be laid down as a general rule that the *onus* lies either on the plaintiff or on the defendant. Each case must depend upon its particular circumstances. *In re* A REFERENCE BY COMMISSIONER, RAWALPINDI, **80 P.R. 1868.**

(26)—*Registered deed—Question of consideration*—Onus.—The consideration for a registered deed of sale will generally be presumed and he who pleads absence of the same must prove it. But, if the plaintiffs took no steps to enforce the sale-deed and did not even attempt to assert their rights under it for a long time (in this case, 20 years) by taking possession, applying for dakhil-Kharij, etc., the *onus* will be shifted to the other side, and the plaintiffs must prove the passing of consideration. RAM CHAND v. HARNAM SINGH, **68 P.R. 1900.** (17 P.R. 1888, *F.*) [*R.*, 24 P.R. 1902, F.B.]

(27)—*Suit on bond—Consideration denied*—Onus *on whom lies*—Where the defendant in a bond suit denies receipt of the consideration *in toto* or in part, the *onus* of proving the receipt thereof is equally on the plaintiff. In the latter case, the plaintiff is relieved from the burden of proving the payment of the consideration money to the extent of the sum, the receipt of which is admitted by the defendant, but nothing further. MUSSAMUT JHALOO v. SHAIKH FURZUND ALI, **5 W.R. 203.**

(28)—*Absence of consideration for a bond.*—Generally, if the consideration for a bond is denied by the defendant, the burden of proving the passing of consideration lies on the plaintiff, the mere existence in Indian documents of a

***Burden of proof*—continued.**

——14.—Documents relating to loans, Suits relating to—*continued.*

formal acknowledgment in no way affecting the *onus*. But, if the acknowledgment is of a more solemn formal character, *viz.*, registered, the presumption, being in favour of the truth of such declaration, will shift the *onus*, though the presumption can be rebutted. WAZIR SINGH v. JAI GOPAL, **17 P.R. 1888.** (153 P.R. 1882, *Cited.*) [*F.*, 68 P.R. 1900.]

(29)—*Bill of exchange or promissory note exhibiting the appearance of alteration—Whether the onus lies on the person suing to account for it—Whether in other documents the alteration is presumed to have been made before execution.*—If a bill of exchange or promissory note exhibit the appearance of alteration, the *onus* lies on the person suing to account for it; but in other documents (except wills) the alteration is presumed to have been made before execution. RAJA SHEWBUX BOGLA v. MA MA GYI, **14 Bur. L.R. 213.**

(30)—*Burden of Proof—Pro-note, execution of—Undue Influence.*—In a suit based on a pro-note, *held* that undue influence must be presumed, when it is found that the defendant, a dissolute young man, was lent money by the plaintiff, a money-lender, while the defendant was still a minor, and was supplied with very large quantities of jewellery in the presence only of the plaintiff's touts and dependants when the defendant was only a few days over 18 years of age, and on obviously false color is given to the transaction. SHEIKH MIRAN BAKSH v. SHEIKH MUHAMMAD HUSAIN, **133 P.L.R. 1901.**

(31)—*Suit on bond—General insanity—Proof of lucid interval.*—In a suit on a bond in which the plea was that the obligor was insane at the time of its execution and was also shown to be generally insane, the *onus* was held to lie on the party, asserting that it was executed at a lucid interval, to prove that, at the execution of the bond, the obligor was in a condition to arrive at a rational judgment as to its effect upon his position. MUSSAMMAT NUR BHARI v. GOBINDA, **87 P.R. 1888.**

(32)—*Loan—Lender entitled to decree on loan.*—A plaintiff sued for re-payment of a loan, and failed to prove an alleged pledge; he was entitled to a decree, unless the Court thought that the loan itself was not made. A party admitting the receipt of a note for Rs. 1,000 on loan becomes primarily responsible for it to the lender, and it is for the borrower to show that the advance was made, not on his credit, but on that of some other person. LALLA MANOHUR DOSS v. GUNGA PERSHAD, **2 N.W.P. 264.**

(33)—*Equity of redemption executed with mortgage*—Ekrar *reserving equity given to mortgagor—Mortgagee having possession of* ekrar *and claiming land—Mortgagor pleading loss*—Onus.—Where an *ekrar* reserving to the mortgagor the equity of redemption is made

Burden of proof—continued.

——14.—Documents relating to loans, Suits relating to—*continued.*

out at the same time as the mortgage, and made over to the defendant-mortgagor, but is alleged by the mortgagee, that is, the plaintiff, to have been returned to him as surrender of the equity of redemption and the mortgagor pleads that it was lost and somehow found its way to plaintiff, the presumption was held to be in favour of the plaintiff, who had possession of the *ekrar*, and the *onus* was held to be on the defendant to prove the alleged loss of the *ekrar*. RAJ COOMAR SINGH v. RAM SUHAYE RAM, **11 W.R. 151.**

(34)—*Civ. Pro. Code (Act VIII of 1859), s. 206—Act X of 1877, s. 258—Suit by judgment-debtor to recover money paid out of Court—Production of receipt executed by decree-holder, shifting of burden of proof on.*—The provisions of s. 206 of Act VIII of 1859 as adopted in the original s. 258 of the Code of 1877 only prevent *the Court executing the decree* from recognising a payment made out of Court and do not preclude the judgment-debtor from suing to recover money so paid by him to the decree-holder. The production, by the judgment-debtor-plaintiff in such a suit, of a receipt executed by the decree-holder is sufficient to shift to the latter the burden of proving that the statement contained in such receipt to the effect that the decree has been satisfied, is an incorrect statement. DAVLATA v. GANESH SASTRI, **4 B. 293.** [*F.*, 7 A. 124; *R.*, 5 M. 397, F. B. 10 B. 155, 11 B. 6, F. B.]

(35)—*Contract Act, s. 25—Burden of proving that prior debt was barred.*—In a suit on a bond executed to secure a former debt, it lies on the defendant to show that the prior debt was barred. HUBLAL SEEKUL v. RAMKOTI DEY ROY, **11 C.L.R. 381.**

(36)—*Burden of proof—Validity of contract—Defence of infancy set up—Fraudulent misrepresentation by minor.*—The burden of proving that a contract was a valid contract when it was made, lies upon the plaintiff. (6 A.L.J. 693, *R.*) The defendant, at the date of making a pro-note, represented himself to be of full age, and then, on a subsequent date, while giving evidence before a Court, stated his age to be 22 years. *Held*, that the statement did not amount to an admission, and the burden of proof did not shift from the plaintiff to the defendant. *Semble* :—A defendant is not estopped from pleading infancy, by reason of the fact that he had been guilty of fradulent misrepresentation regarding his age. KANHAYA LAL v. GIRDHARI LAL, **9 A L.J. 103.**

(37)—*Burden of proof—Illiterate women alleged to have made a mark and thumb impression—Denial of execution*—Onus probandi *on plaintiff.*—Where an illiterate woman, who is alleged to have put her mark and thumb impression on a document for Rs. 3 000, denies executing such a document, but admits executing a document which she believed was for

Burden of proof—continued.

——14.—Documents relating to loans, Suits relating to—*concluded.*

Rs 400 only, the burden of proof lies upon the plaintiff to prove consideration and the genuineness of the transaction. MAUNG BYA v. MAUNG PO, **11 Ind. Cas. 916.**

——15.—Easements.

See EASEMENTS.

(1)—*Easement—Right of way—Water-course—Onus—Magistrate's order—Crim. Pro. Code, s. 522.*—Where the right to have a way of water-course over certain land is disputed by the owner thereof and an order under s. 532 of the Crim. Pro Code, has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the *onus* of proving the claim in a subsequent suit by the owner to establish his right to the exclusive use of the land. OBHOY CHURN DEY v. LUKHY MONE BEWA, **2 C.L.R. 555.** (21 W.R. 140. *Overruled.*)

(2)—*Act XXV of 1861, s. 320—Suit for declaration that defendant had no right of way—Burden on plaintiff to prove exclusive possession.*—In a suit for a declaration that defendant has no right of way over certain land belonging to plaintiff, where the defendant has obtained an order from the Magistrate under Act XXV of 1861 ; s. 320, the *onus* of proving that he was entitled to *exclusive* possession lay on the plaintiff and not on the defendant of proving an easement. PUCHAI KHAN v. ABED SIRDAR, **21 W.R. 140.** [*Overruled*, **2** C.L.R. 555.]

(3)—*Easement claimed over plaintiff's water—Onus of proof.*—In a case where an easement is claimed over plaintiff's water the plaintiff is bound to establish that he acquired it by grant or user. MEGHRAJ SINGH v. RASHDHAREE SINGH, **17 W.R. 281.**

(4)—*Suit for removal of outlets from aqueduct—Right to exclusive use of water.*—In a suit to remove certain outlets in an aqueduct, on the allegation that plaintiff is entitled to the exclusive use of the water, *held* that the plaintiff was bound to make good the title alleged. MR. P T. ONRAET v. KISHEN SOONDUREE DOSSEE, **15 W.R. 83.**

Claim for possession of property—Plaintiff denying defendant's alleged right to easement. —*See* EASEMENT, 26 P.L.R. 1906.

——16.—Ejectment.

See EJECTMENT, SUIT FOR.

(1)—*Reg. XVII of 1827—Bom. Act I of 1865—Bom. Act IV of 1868.*—Semble—that Reg. XVII of 1827 and Bombay Act, I of 1865, were not applicable to building-sites in towns and cities until Bombay Act I of 1865, was expressly made applicable to such sites by Bombay Act IV of 1868. The law obtaining in India requires that in actions of ejectment the Courts should always

Burden of proof—continued

——16.—Ejectment—*continued.*

enforce the rule that a plaintiff must recover by the strength of his own title ; and a party who might have shifted the burden of proof, if he had proceeded under s. 15 of Act XIV of 1859, cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment. *Semble* :—Mere possession as a trespasser is not sufficient to entitle a plaintiff to recover in a suit brought under s. 15 of Act XIV of 1859. There must be in the plaintiff juridical, as opposed to mere physical possession. DADABHAI NARSIDAS v. THE SUB-COLLECTOR OF BROACH, **7 B.H.C.A.C. 82.** [*Disappr.*, 8 B. 371; *Ap.*, 9 B.H.C. 53, 5 C.L.R. 278 ; *D.*, 10 C.L.R. 99 ; *R.*, 4 B. 505, 12 C.P.L.R. 52 ; *Cited*, 7 C.P.L.R. 3.]

(2)—*Ejectment suit—Defendant in possession*—Onus *of proof—Plaintiff to prove his superior title.*—In an ejectment suit, the defendant in possession, though a trespasser, is entitled to require the plaintiff to prove that he has a superior title. KALU v. BARSU, **19 B. 803.** [*R.* 10 Bom. L.R. 571.]

(3)—*Suit to eject—Plea of permanent occupancy.*—In a suit in ejectment where the ownership of the plaintiff is proved and the defendant sets up a right of permanent occupancy, the burden of proving such a right is on the defendant. RANGASAMI REDDI v. GNANA SAMBANDA PANDARA SANNADI, **22 M. 264.** [*R.*, 25 M. 507.]

(4)—*Suit for ejectment—Proof of possession within 12 years*—Onus *of proof.*—In a suit for possession upon the ground of wrongful possession, the plaintiff is bound to prove that he or some of the persons under whom he claims have been in possession of the property within twelve years before suit. A mere allegation of the tenancy of the defendant under the person through whom the plaintiff claims, will not shift the burden of proof. GOPAUL CHUNDER CHUCKERBUTTY v. NILMONEY MITTER, **10 C. 374.** (9 I.A. 99, *Expl. & D.*) [*R.*, 14 B. 458.]

(5)—*Ejectment—Proof of title—Plaintiff claiming* inam *and* miras *rights—Defendant claiming* miras *rights—Suit to eject defendant*—Onus.—In suits for ejectment, the burden of proving title lies on the plaintiff. Where a person, claiming *inam* and *miras* rights over certain lands, sues to eject therefrom the defendant, who claims to have *miras* rights over the same, the burden of proving the *miras* rights lies on the plaintiff. MARUTI v. BANUBAI. **4 Bom. L.R. 801.**

(6)—*Ejectment, suit for*—Nij-jote *land suit for possession of*—Makarraridar—*Occupancy raiyat, plea of.*—In a suit for ejectment from *nij jote* lands, where the defence set up a right of occupancy, when the plaintiff was admitted to be a *makarraridar* of the landlord, it lies upon the defendants to make out that they are occupancy raiyats and are entitled to remain there. BARAIK KAMAL SAHAI v. LILHU CHRISTIAN, **8 C.L.J. 170.** (9 C. W. N. 144, 7 C.L.J. 523, *R.*; 3 C.W.N. 763, *Expl.*)

Burden of proof—continued

——16.—Ejectment—*continued.*

(7)—*Suit by landlord to eject trespasser—Burden of proving extinguishment of prior tenancy.*—In a suit by a landlord against a trespasser, it is not incumbent on the plaintiff to prove that a prior tenancy has been extinguished. HIRA LAL MISRA v. AOLA KUNBI, **14 C.P.L.R. 14.**

(8)—*Ejectment suit.*—The case of *Radha Gobind Roy* v. *Inglis* in 7 C.L.R. 364 was a peculiar one having reference to the recovery of alluvial lands which had been diluviated, and there was no intention, on the part of the Judicial Committee, in their decision in that case, to interfere with the general rule that, where a plaintiff claims land from which he alleges that he has been dispossessed, the burden is upon him to show possession, and dispossession within twelve years, or, at least, that the cause of action arose within twelve years. MURO DESAI v. RAMACHANDRA SESAI, **6 B. 508.** [*R.*, 9 C, 743=12 C.L.R, 257, 14 B. 458.]

(9)—Onus *of proving exclusive right—Court to decide right of defendant to share in house.*—In a suit to eject the special appellant from the portion of a house which he claimed to be in possession of as part owner, *held* that the lower appellate Court was wrong in laying down that it was not called upon to decide whether the defendant was entitled to a share in the house; as the *onus* of proving an exclusive title to the property lay on the plaintiff. ISUBJI *valad* MUHAMMAD v. KHATIZA KAMABDULY, **2 B.H.C. 181.**

(10)—*Ejectment under direct action of Court—Presumption*—Onus *of proof.*—An ejectment alleged to have taken place under direct action of Court, and supported by documents issued by and filed in the Court, must be presumed to have been real and *bona fide*, until the party ejected proves that all these proceedings were fictitious, and that he never lost possession of the land, but still holds it. SHAIKH BUDUROODDEEN v. HANEEF, MULLICK. **5 W.R. 180.**

(11)—Lakheraj *land*—*Suit for possession*—Onus *of proof.*—In a suit for possession of land which plaintiff held as *lakherajdar* up to the time of his dispossession by the defendant who pleads that the *lakheraj* was created subsequent to 1790 and that the land is part of his *mal* land ; *held*, that it is not necessary to try the validity of the title of the plaintiff, but that the *onus* of proving his allegation lies on the defendant. OOTTUM CHURN DUTT v. RAM LAL DAN, **6 W.R. 91.**

See CRIM. PRO. CODE, 1872, s. 530, 9 C.L.R. 205.

See EJECTMENT, SUIT FOR, L.B.R. 1893—1900. 360.

Suit by landlord against person not tenant—Nature of proof required of plaintiff — *See* EJECTMENT, SUIT FOR, 11 C.P.L.R. 22.

***Burden of proof*—continued.**

——16.—Ejectment—*concluded.*

Suit for ejectment—Defence setting up a tenure by right of purchase from former tenant—Plaintiff proving that he is owner of land—Defendant to make out that he is tenure holder and he is entitled to remain thereon—*See* EJECTMENT, SUIT FOR, 7 C.L.J, 553.

Suit for ejectment alleging that defendants are merely tenants-at-will—Burden of proof on defendants to show permanent interest—*See* EJECTMENT, SUIT FOR, 8 C.L.J. 513.

——17.—Execution of Decree.

See EXECUTION OF DECREE.

(1)—*Execution of decree—Sale of share in an estate—Rights of sharers*—Onus *of proof.*—Where, in execution of a decree, a share of an estate is sold, and the representatives of the purchaser absorb more land than belonged to that share and bring a suit to declare their rights, *held*, that there should have been a clear finding as to what was the extent of the share originally purchased, and that, in determining the claim of the representatives to the increase, the burden of a very distinct proof should be laid on them. SREEMUTTY URNOPOORNA v, RAJBULLUL BURDEN, **W.R. 1864 151.**

(2)—*Transfer of decree—Execution*—Onus *of proof.*—A person to whom a decree is transferred must prove his title to execute it if his title be disputed. GANESH MOHAPATTUR v. CHUNDEE CHURN KITUNYA **6 W.R, Mis. 126.**

See CIV. PRO. CODE, 1859, ss. 201, 207, 212, 221, 273, 274, 275, 280, 281, 8 B.L.R, 255=17 W.R. 165.

See LIMITATION ACT, 1908, ART. 182—STEP IN-AID OF EXECUTION, 2 B.L.R A.C. 194=11 W.R. 70.

——18.—Fraud.

See FRAUD.

(1)—*Voluntary payment of money to defendant induced by fraud—Burden of proof.*—Where voluntary payment of money to defendant is alleged to have been obtained by fraud and a suit to recover it is instituted, *held* that the burden was on the plaintiff to prove the case as laid in the plaint and not on the defendant to prove those allegations to be untrue. ANUND MOYEE DEBIA v. SHIB DYAL BUNWAREE, **2 W.R. 2.**

(2)—*Fraud—Burden of proof.*—The persons who seek the interference of the Court on the ground of fraud should prove it. BISHEN SAHU v. ANMOLE PANDEY, **A.W.N. 1882, 10.**

(3)—*Allegation that plaintiff's assignment was fraudulent*—Onus.—Where the defendant alleged that the plaintiff's assignment was fraudulent, the *onus* was on him to prove that the transaction was not *bona fide*. LALBEHARI DUTT v. SRINATH MOOKERJEE **3 B.L.R. A.C. 73 Note.** [*D.*, 3 B.L.R. A.C. 70= 11 W.R. 422.]

***Burden of proof*—continued.**

——18.—Fraud—*concluded.*

(4)—Onus probandi—*Fraudulent sale.*—In a suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud, the *onus* lies upon the plaintiff to make out that the sale was fraudulent. RAMGATI v. SRIMATI IMITARI BANU, **1 B.L.R. S.N. 20 (c).**

(5)—Onus probandi—*Allegation of fraud.*—Where a decree-holder in a suit to establish his claim to certain property as that of his judgment-debtor, alleges that the deed of sale conveying to defendant was fraudulently executed, *held*, that the decree-holder was bound to prove the fraud. LALA RUDRA PRASAD v. BINODE RAM SEN, **3 B.L.R. A.C. 71, Note=10 W.R. 321.** [*D.*, 3 B.L.R. A.C. 70=11 W.R. 422.]

(6)—*Property obtained by fraud—Suit by injured party—Limitation.*—When a man has committed a fraud and has obtained property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit. The mere fact that some hints and dues reached the injured party which, perhaps if vigorously and acutely followed up, might have led to a complete knowledge of the fraud is not enough to constitute clear and definite knowledge of it. RAHIMBHOY HABIBBHOY v. CHARLES AGNEW TURNER. **17 B. 141, P.C. = 20 I. A. 1=6 Sar. 259.** [*R.*, 27 A. 540=2 A. L.J. 350=A.W.N. 1905, 88, 2 N.L.R. 98, 31 M. 230=18 M.L.J. 19=4 M.L.T. 80, 15 C.W.N. 102=6 Ind. Cas. 154.]

Suit on bond—Plea of fraud and undue influence—*See* CONTRACT ACT, 1872, s. 16. 8 O. C. 210.

Sale of property to defeat creditor's claim—Good faith of purchaser—Consideration—Burden lies on purchaser—*See* FRAUDULENT TRANSFER, 4 L.B.R. 211.

Fraudulent transfer of property—Fraudulent intention not carried out—Suit to recover such property—Conditions for recovery—Burden of proof—*See* TRANSFER, 4 N.L.R. 26.

——19.—Hindu Law.

See HINDU LAW.

(1)—*Suit to set aside adoption by widow*—Onus *of plaintiff—Suspicious evidence.*—In a suit in which plaintiffs, claiming as heirs of a deceased Hindoo, sought to set aside an adoption effected by the widow as without authority and otherwise improper, the lower appellate Court held that the *onus* lay with the plaintiffs to prove their affirmation in respect to the adoption: *Held* that as one of the witnesses to the *unnoomutee puttro* was convicted of perjury, the plaintiffs were entitled to an opinion from the Judge as to the genuineness of that document, and unless the defendant's case in that respect could be established, the plaintiffs

Burden of proof—continued.

——19.—Hindu Law—*continued.*

would be entitled to a decree. *Held* that although the fact of an adoption having taken place and six years having elapsed, may render little evidence sufficient, these circumstances will not warrant the acceptance of suspicious evidence which is open to question. HUR DYAL NAG v. ROY KRISHTO BHOOMICK, **24 W.R. 107**. [*D.*, 30 A. 197 = A.W.N. 1908, 79, 5 A.L.J. 200.]

(2)—*Suit by heiress-at-law — Defendant setting up adverse title by adoption*—Onus *of proof.*—Where A sues as the heiress-at-law of her father and the defendant sets up a title based on adoption to defeat that right, the burden of proving that title rests entirely on the defendant. KRIPA MOYEE DEBIA v. GOLUCK CHUNDER ROY, **4 W.R. 78.**

(3)—*Claim to property left by widow*—Onus probandi—*Adoption.*—Where property left by a widow is claimed adversely to the natural heirs and against the presumption that the widow had acquired the *nucleus* from her husband, it is for those who claim it adversely to establish their special pleas and to show that it came into her hands from other sources. Where, in a suit by the natural heirs, the defendant sets up a preferential hereditary right by virtue of adoption, *held*, he must establish his adoption. BISSESSUR CHUCKERBUTTY v. RAM JOY MOJOOMDAR, **2 W.R. 326.**

(4)—*Award at settlement in favour of widow —Death of widow leaving daughter—Claim by husband's nephews of widow—Burden of rebutting presumption from award.*—Where an award was made at a settlement in favour of a widow, and, on her death, her husband's nephews took possession on the ground that they formed a joint undivided family with her husband, *held*, in a suit for possession by the widow's daughter, the burden of rebutting the presumption, arising out of the award of proprietary right, lay on the defendants. MT. SARASWATI BAI v. WAMAN RAO, **16 C.P.L.R. 3.** (27 C. 515, *F.*)

(5)—*Alienation by Hindu widow—proof of necessity.*—Where the validity of alienation by a Hindu widow is the question for the consideration of the Court, the *onus* of proving the necessity for the alienation rests with the alienee. Where, in such a case, the plea of necessity fails, the Court will not grant a decree for immediate possession, unless a very strong case of waste and deterioration be made out. *Quære*:—What is sufficient evidence to support a sale by a Hindu widow of property in which she has only a life-interest? CHUTTER DHAREE SINGH v. HARCOOMAREE, **1 Ind. Jur. O.S. 99.** *See also* NUND COOMAR SINGH v. GANGA PURSAUD NARAIN SINGH, **10 W.R. 94.**

(6)—*Allegation by reversioner of improper alienation—Alienee to prove legal necessity for alienation.*—Where a reversionary heir sues to recover property on the allegation that it has been improperly alienated, the alienee should show that there was necessity for the sale transaction. NUND COOMAR SINGH v. GUNGA PERSHAD SINGH, **10 W.R. 94.**

(7)—*Mitakshara school of Hindu law—Suit by son to annul alienation of ancestral property by father—Burden of proof of necessity—Application of purchase-money.*—In a suit by a son to annul an alienation of ancestral property by his father, the burden is not on the son to prove the necessity for the sale, but on the purchaser to prove the existence of the necessity; the necessity being shown, it is not for the lender to see to the application of his money, nor could his title be vitiated even though the borrower wasted the loan and neglected to appropriate it to the purpose for which it was borrowed. JAGDEB NARAIN SAHAYE v. LALLA RAM PROKASH, **2 W.R. 292** (6 M.I.A. 393, *F.*)

(8)—*Widow's power of alienation.*—It is incumbent on the purchaser of realty from a Hindu widow, to enquire whether the circumstances are such as to confer on her the power of alienation. HEERALALL SHAHA v. JADUR CHUNDER CHENCHKEY, **Cor. 119.**

(9)—*Hindu law — Presumption—Ancestral property*—Ex-parte *case—Good faith.*—Some brothers having possessed property jointly, the presumption is that their representatives are entitled only to the shares which belonged to the brothers under whom they respectively claim. Even when a suit proceeds *ex parte*, a plaintiff cannot get a decree without proving that he is entitled to the relief he prays for. The first duty of a purchaser from a Hindu childless widow is to satisfy himself as an ordinary prudent man would do, as to her right to sell. If he does not do so, he does not act with due care or attention in the matter, and, therefore, cannot be said to have acted legally in good faith, although he may, in fact, fully believe or take it for granted that all is right. RAM DHONE BHUTTACHARJEE v. ISHANEE, DABEE, **2 W.R. 123.**

(10)—*Suit by Hindu widow for possession of property—Plea of gift from plaintiff*—Onus *on defendant of proving free nature of gift.*—One P.R., a Hindu, died leaving one of his sons, W.R., him surviving, the other son G.R. having predeceased him. On the death of the son W.R., the inheritance devolved on his widow, the plaintiff, who, however, having obtained possession of only one half of the estate, sued to recover the other half in the possession of the defendant, the widow of the said G.R., the other son. Defendant's title was rested on the ground that the plaintiff had entered into a series of transactions after her husband's death, ceding to the defendant, as a free gift, possession of a moiety of the estate. The Judicial Committee, *held* that, to succeed on her plea, the defendant must show that the plaintiff, knowing her rights and knowing that she was making a free gift, did so make the gift,

Burden of proof—continued.

——19.—**Hindu Law**—*continued.*

that the evidence and the inference from the prior transactions were not only not favourable but were decidedly adverse to the defendant, leading to the conclusion that she had managed to come by a possession to which she was not entitled, and that the defendant having thus failed to discharge the *onus* of proof which rested on her, plaintiff was entitled to the decree for possessin sought to be obtained by her. DEO KUAR v. MAN KUAR, **17 A. 1=21 I.A. 148 P.C.=4 M.L.J. 272=6 Sar. 489.** (4 I.A. 119=2 B. 99, 8 I.A. 77=5 B. 408 *Appr.*

(11)—*Alienation by Hindu widow — Legal necessity for sale in question*—Onus *of proof.*—In cases of alienation by a Hindu widow, where the legal necessity therefor is questioned its existence must be shown by the party standing on the conveyance. BISSONAUTH ROY v. LALL BAHADOOR SINGH, **1 W.R. 247.**

(12)—*Sale of property of widow's husband contested—Debt admitted by widow—Denial by reversioners—Purchaser to prove debt.*—In a conteested sale of property for the alleged debt of a deceased husband, where the debt is admitted by the widow, but denied by the reversioners, the purchasers were held bound to prove the debt. MOONSHEE CASSEEMUDDEEN AHMED v. RAM DOSS GOSSAIN, **2 W.R. 170.**

(13)—*Disputed adoption — Compromise of claim—Consideration.*—Where, on the death of a deceased Hindu, objection was taken by the brother of the deceased to an adoption set up by the widow and the funeral ceremonies interfered with, and such objection was with drawn on certain conveyance being executed in favour of the brother, the burden of proving that the brothers objection to the validity of the adoption was groundless and the conveyance therefore without consideration, was upon the person who impeached the conveyance. SUBRAMANIA v. VENKATA, **6 M. 254.**

(14)—*Adoption*—Onus.—In a suit for possession of land by the plaintiff setting up a title by adoption, it lies on the plaintiff to prove the fact of adoption. It is irregular on the part of the Court to ask the defendant to prove his title to half the property, and on his failure to do so, to give the plaintiff half, when the latter had failed to prove his title by adoption. JANA v. MOHAMDA, **89 P.R. 1893.**

(15)—*Ancestral property, sale of—Duty of purchaser—Consolidation of cases—Rights of parties—Jurisdiction*—In justifying the purchase of an ancestral property, it is enough if the purchaser proves that he made *bona fide* inquiry into the matter as to whether necessity existed, and was led to suppose that it did exist. Where several cases are before a Court, and the subject of suit and the defendants vary with each case, the Court cannot order them to be tried as one case, or make the evidence given in one case evidence, in all the cases without the consent of the parties. The

Burden of proof—continued.

——19.—**Hindu Law**—*continued.*

parties to a suit being tried in a Court of first instance have a right to insist on all the advantages of a public hearing of the whole case before the judge who is judicially to determine the matter in dispute between them. SOORENDRO PERSHAD DOBEY v. NUNDUN MISSER, **21 W.R. 196.** [*Appr.*, 23 W.R. 1; *R.*, 22 C. 511.]

(16)—*Duty of purchaser of ancestral property—Sufficient pressure on estate.*—The purchaser of ancestral property must see that there is sufficient pressure upon the estate to make the transfer necessary. The fact of there being a decree, an attachment, and a proclamation for sale, is sufficient pressure. SHEORAJ KOOER v. MUCKCHEDEE LALL. **14 W.R. 72.**

(17)—*Existence of debts*—Bona fide *sale of ancestral property—Validity.*—Where the Court has expressly found the existence of debts, and that the sale of ancestral property was a *bona-fide* one, the circumstance that there was no actual pressure at the time in the shape of suits by the creditors for the recovery of their debts, is not of itself sufficient to invalidate the alienation. A sale of ancestral property merely for the purpose of procuring funds for the re-purchase of other property formerly belonging to the family cannot of itself be considered as a sale for any of the necessary purposes sanctioned by law. Although, as a general rule, it may lie upon those who claim under an alienation of ancestral property for necessary purposes to show that the transaction was within the limited powers of the party alienating, yet particular circumstances may shift the burthern of proof. No fixed rule can be laid down as to the degree of proof requisite in such cases. KAIHUR SINGH v. ROOP SINGH, **3 N.W.P. 4.**

(18)—*Suit for share of joint ancestral property—Estoppel in pleadings*—Onus.—In a suit for a share of joint ancestral property, where plaintiff claims under one who, when sued on a former occasion as trustee, never pleaded that he was a co-parcener, *held* that the plaintiff, if not estopped from now contending that the property is joint, has still the entire burden of proving that it is joint. SURNOMOYEE DEBIA v. GUNGA GOBIND ROY, **2 W.R. 264.**

(19)—*Allegation of joint ancestral property*—Onus *of proof—Evidence.*—In a suit by the widow of defendant's brother for half-share of an alleged joint ancestral property, where it is proved that the original estate was the mother's and the subsequent acquisitions of the defendant were made after her death, *held*, that the burden of proof lay on the defendant and the Court (in this particular case) was satisfied with a moderate amount of proof on his part. DUKEENA DABEE v. KISHEN CHUNDER SANDYAL, **3 W.R. 97.**

(20)—*Joint Hindu family—Separation and self acquisition*—Onus.—In a suit for possession of properties said to be joint, defendants averring self-acquisition the *onus* was held to be

Burden of proof—continued.

——19.—Hindu Law—*continued.*

with the defendants to rebut the presumption in favour of the family having been joint by proving self-acquisition. PEAREE LALL v. BUKHOREE LAL, **12 W R. 124.**

(21)—*Suit property admittedly joint—Presumption as to residue*—Onus *of proving separate acquisition.*—Where a part of the property sued for is admittedly joint, the presumption is that the residue is also joint, the *onus* lying on the defendant to prove separate acquisition. HEERA LALL ROY v. BIDYADHUR ROY, **21 W.R. 343.**

(22)—*Rebutting presumption of jointness of Hindu family— Shifting of* onus.—The presumption that a Hindu family is joint in food, worship, and estate may be rebutted, and where this is done, the *onus* is thrown on the opposite side. PROSUNNO MOYEE v. WOOMA CHURN DEB, **23 W.R. 141.**

(23)—*Evidence— Separate property of undivided member of joint family—Right of widow to succeed on default of male issue—Assertion of different course of descent.*—As, under the Hindu Law, the separate property of an undivided member of a joint family descends upon his widow in default of male issue, the person who asserts that a different course of descent is applicable must prove that it is so. KATAMA NACHIYAR v. THE RAJA OF SIVAGANGA, **2 M H.C. 146, Note, P.C.**

(24)—*Exclusion from joint family property*—Onus *of proof.*—The burden of proving that a member of a joint Hindu family has been excluded from enjoyment of the property for more than the statutory period and as such is not entitled to a share in the family property, is on the person who alleges the fact; and absence standing by itself is insufficient to establish such exclusion. MACHIRAJU v. SIMHACHALAM, **9 M.L.J. 129.**

(25)—*Allegation that acquisitions made by several members are separate, should be proved by the person who alleges—Defect entitling re-partition to be proved.*—Parties who allege that the acquisitions of the several members of a Hindoo family are not to be brought into hotchpot and divided *per stirpes*, must show that they were acquired in such a manner as to constitute them separate property and impartible, it is incumbent on those parties who admit that a partition has been made of certain portions of the family estate, and seek a re-partition of the portion so partitioned, to show that a condition attached to the partition which rendered it inoperative, or that the members of the family have consented to a re-partition of it. RAI NURSINGH DASS v. RAI NARAIN DASS, **3 N.W P. 217.** [*R.*, 28 A. 347 =3 A.L.J. 155=A.W.N. 1906, 34.

(26)—Onus *that certain property was joint family property—Limitation Act, 1877, art. 127.*—The burden of proof, where there was no contention that the parties were members of a joint Hindu family and where a part of the entire estate had been partitioned, as to the property being joint family property, was held to lie on the plaintiff. SADHU RAM v. MUSST BAINI, **66 P.R. 1898.**

(27)—*Hindu family emigrating from Mithla to Bengal—Presumption as to continuance of family Custom—Cessation of such custom,* onus *of proof as to.*—The presumption is, that members of a Hindu family, who emigrated from *Mithila* to *Bengal*, continue their family customs, and the *onus* is upon a party who alleges the cessation of such customs to prove that fact. SOORENDRONATH ROY v. MUSSAMUT HEERAMONEE BURMONEAH, **10 W.R. 35, P.C.=1 B L.R. 26 P.C.=12 M.I.A. 81=2 Suther. 147=2 Sar. 372.**

(28)—*Primogeniture—Rule in derogation of Hindu Law.*—Where a custom, such as one of primogeniture, in derogation of the ordinary Hindu Law governing devolution of property is set up by a party, it lies upon him to establish, by clear and unambiguous evidence, that the same in an ancient continuous and invariable rule in the family. SHYAMANAND DAS MOHAPATRA v. RAMA KANTA DAS MOHAPATRA, **32 C. 6.** [*R.*, 6 A.L.J. 364=36 C. 590=13 C.W.N. 581, P.C.]

(29)—*Family custom — Burden of proof — strict proof.*—A special family custom involving a departure from the ordinary Hindu Law should be properly proved by the person setting it up. GARUDHWAJA PARSHAD SINGH v. SUPARANDHWAJA PARSHAD SINGH. **10 M L. J. 267, P C.=23 A. 37=5 C.W.N. 33=27 I.A. 238=7 Sar. 724.**

(30)—*Hindu Law—Inheritance by primogeniture*, onus *of proof as to.*—The parties in this suit were brothers. The plaintiff claimed that, under the ordinary customary law of the Hindus, he was entitled equally with his brother to the moveable and immoveable property inherited from their father. The defendant set up a *privilegium* in his family of inheritance by primogeniture. *Held* that the *onus* of proof was on the defendant. SUPERUNDDHWAJA PRASAD v. GARURADDHWAJA PRASAD, **15 A 147=A.W.N. 1893, 85.**

(31)—*Contract—Evidence—Hindu Law and Malabar custom.*—In matters of contract the Courts are not bound by the Hindu Law and there is no peculiar law or custom of Malabar which displaces the ordinary rules of evidence as to proof of the liability of principals for acts of their agents. Circumstances determine on whom, in any particular case, the burden of proof lies as to the necessity for the loan. KOMBI v. LAKSHMI, **5 M. 201.**

(32)—*Alienation by Hindu widow—Duty of purchaser.*—A purchaser from a Hindu widow (alienating property as guardian of her minor son and for his maintenance) should satisfy himself as well as he can of the necessity for the sale. Further than this, he is not bound to see to the application of the money. RADHA KISHORE MOOKERJEE v. MIRTOONJOY GOW. **7 W.R. 23.**

***Burden of proof*—continued.**

——19.—Hindu Law—*continued*.

(33)—*Execution of bond by Hindu widow—Burden of proof.*—The *onus* of proving due execution of a document purporting to have been signed by a Hindu widow, lies upon the plaintiff (creditor), who relies upon the signature of the widow as binding the estate which she represented. RAMRATAN SUKUL v. NANDU. **19 C. 249. P.C. = 19 I.A. 9 = 1 Sar. 119.** (6 C. 843, *R.*)

(34)—*Mortgagee of widow for advances made to the widow for justifiable purposes—Right of mortgagee as against the Crown—Burden of proof.*—A made advances to a Hindu widow in possession, which were secured by a mortgage of the immoveable estate of her late husband's and the advances were applied by her to purposes for which she had power by the Hindu Law to charge or alienate her husband's estate, without the heir's consent, *Held*, that A was entitled, as against the Crown, who took the estate by escheat on the death of the widow for want of heirs, to possession of the estate under his mortgage, as security for the amount advanced and interest, subject to the equity of redemption by the Crown. The *onus probandi* lies on the mortgagee to prove, first, that the charge on the estate was the act of the widow: and secondly, that the debt so charged was a competent act of the widow; but the rule which throws the burden of proof on the party who alleges payment to prove it, or that the debt is presumed to be satisfied, unless the contrary is shown by the creditor is not always to be strictly enforced, but is to be governed by the circumstances and probabilities of the case. CAVALY VENCATA NARAINAPPAH v. THE COLLECTOR OF MASULIPATAM, **10 W R. 47, P.C. = 11 M.I.A. 619 = 2 Suther. 103 = 2 Sar. 338.**

(35)—*Decree against head of joint family—Sale of joint family property in execution—Purchase for valuable consideration—Impugning sale*—Onus.—Where joint family property is sold in execution of a decree against the head of the family, and purchased *bona fide* and for valuable consideration, the *onus* lies on members of the family who impugn the sale to show that the decree was an improper one. SHEO PERSHAD SINGH v. MUSSAMUT SOORJBUNSEE, **24 W R. 281.**

(36)—*Ancestral property — Mortgage*—Onus probandi—*Hindu widow.*—In a suit by a Hindu widow to recover a share of property alleged to have been inherited from her husband (J), and which had been mortgaged by her husband's brother (B) and sold under a decree obtained on the mortgage, where the question is raised whether the money for which the property was mortgaged had been borrowed by (B), for his own private use, or for the benefit of the family, *held* that the *onus* was on the defendant to show that the plaintiff had derived any benefit from the money. SREEMUTTY SREEMUTTY v. LUKHEE NARAIN DATT, **22 W.R. 171.**

(37)—*Hindu Law—Mortgage by widow—Suit by representative of mortgagee against reversionary heirs to enforce mortgage—Burden of proof.*

***Burden of proof*—continued.**

——19.—Hindu Law—*continued*.

—In a suit by the heir of a mortgagee against a Hindu proprietor's heirs, in possession after the death of his widow, to enforce a mortgage by her, the burden of proving the money to have been advanced to the widow for a purpose justified by legal necessity is on the plaintiff. It is incumbent on him to adduce sufficient evidence of the nature of the transaction. General evidence, to the effect that the husband died in debt and that the widow substituted new securities at reduced interest for former mortgages, is not sufficient to exempt the plaintiff from having to prove the particulars of the transaction and its justification. The burden of proving that the estate left by the husband is sufficient to meet the claim upon the widow is not thrown upon the defendants. MAHESHAR BAKSH SINGH v. RATAN SINGH. **23 C. 766, P.C. = 23 I.A. 57 = 6 M.L.J. 127 = 7 Sar. 19.** (6 M.I.A. 393, *Diss.*)

(38)—*Burden of proof—Suit by reversioner.*—Where, after a widow's death, the reversioner sued the donee for the possession of the house, *held* that the burden was on the donee to prove that the widow had, when she executed the deed of gift, such absolute right of ownership as would entitle her to alienate and deal with the property in any manner which would go beyond her life-interest. GANPAT RAO v. RAM CHUNDER, **11 A. 296 = A.W.N. 1889, 111.**

(39)—*Sale for arrears of rent due by father—Purchase by son*—Onus *of proof*,—Where property was sold for arrears of revenue due by a father and it was purchased by the son, who, at the time of purchase, was living together with the vendor, it was held that the son must prove that his purchase was *bona fide*. HUR SUHAYE MISSER v. DEEN DYAL SINGH, **7 W.R. 275.**

(40)—*Guardian of minors, sale by*—Onus *of proof*—Where the plaintiffs sue to set aside a sale effected by their guardians during their minority on the ground that the transaction was fraudulent and collusive, *held*, that the *onus* of substantiating the allgations lay on them. ACHUNTH SINGH v. KISHEN PERSHAD SINGH, **W R. 1864, 37.**

(41)—*Sale of minor's property*—Bona fides *of transaction.*—Where a person, after attaining majority, questions any sale of his property by his guardian during his minority, the burden of proving the *bona fides* lies on the person who upholds the purchase. ROOP NARAIN SINGH v. GUJADHAR PERSHAD NARAIN. **9 W.R. 297.**

(42)—*Suit to set aside sale by guardian with the sanction of the Court*—Onus *of proof on purchaser—Difference between stranger purchaser and creditor-purchaser*—Onus *of proof of necessity of sale by guardian—S.* 18, *Act* XL *of* 1858—Onus *of proof of fraud.*—In a suit to set aside alienations made with the sanction of the Court, under s. 18 of Act XL of 1858 by the guardian, the burden of proving that the alienations were improperly

***Burden of proof*—continued.**

—19.—Hindu Law—*continued.*

made lies heavily on the plaintiff, when the purchaser is a stranger; whereas in the case of the purchaser being himself the creditor, the *onus* is shifted on to the purchaser when the plaintiff has established a *prima facie* case—*Per Prinsep, J.* [*R.*, 15 C. 40.] Previous to the passing of Act XL of 1858, the purchaser of property from a guardian had, in a suit to recover it by the minor, to prove his good faith and his having satisfied himself, after proper enquiries. of the necessity for the sale. S. 18 of Act XL of 1858 assimilates the law more closely to the English law upon the subject and the purchaser at a sale made with the sanction of the Court, under the section, is not bound to make the same enquiries which duty the section casts upon the Judge making the order—*Per Garth, C.J.* (*Prinsep, J.*, was a different view.) [*F.*, 6 C. 161; *R.*, 22 C. 545.] Where fraud or illegality is alleged as a ground for setting aside a sale by a guardian made with the sanction of the Court, the *onus* lies upon the plaintiff to make out a *prima facie* case and to show that the debt, forming the consideration for the sale, was one for which the minor was not responsible. *Per Garth C.J.* SIKHER CHUND v. DULPUTTY SINGH, **5 C. 363=5 C.L.R. 374.**

(43)—*Debt contracted by Karnavan—Presumption—Burden of proof.*—In the absence of evidence, there is no presumption of law that a debt contracted by a Karnavan was contracted on behalf of the tarwad. It is for the creditor to show, if it is disputed, that the obligor had authority, from the family, as their agent or manager, to contract debts, and that he assumed to act, in the particular instance, as such agent or manager. When this is shown, it lies on the family to show that, in the particular instance, the obligor was not acting within the scope of his authority. KUTTI MANNADIYAR v. PAYANU MUTHAN, **3 M. 288.**

(44)—*Heir's title to estate uncontested—Possession obstructed—Conveyance by ancestor*—Onus *on obstructor.*—Where an heir's title to an estate is uncontested, and his possession only obstructed by an alleged conveyance on the part of an ancestor, *held* that the person in possession who caused the obstruction should prove the fact of the conveyance. KAMINEE MOHUN CHUCKERBUTTY v. KALEE KANT SEIN, **14 W.R. 275.**

(45)—*Purchaser bound to show what was purchased.*—A purchaser of another's right and interest is bound to show what may be properly comprised under that denomination. RAM NATH RAY v. SALEEM AHMED KHAN, **3 N. W.P. 188** [*R.*, 7 N.W.P. 261, F.B.]

(46)—*Widow allowed to exercise full rights of ownership—Curtailment of those rights*—Onus *of proof.*—Where a widow has been allowed to exercise acts of ownership, in respect of landed property belonging to her deceased husband incompatible with a mere right to maintenance from his estate, the *onus* of proof that the widow is entitled to nothing beyond a bare maintenance lies upon the party asserting this. NOWINDH SINGH v. MUSSAMAT SOHUN KOOER, **3 N.W.P. 12.**

(47)—*Hindu Law—Streedhun—Proof*—A Hindu wife, seeking to exempt property from responsibility for her husband's debts, must clearly prove that she had streedhun, and that she purchased the property with her self-acquired funds. BROJOMOHUN MYTEE v. MUSSAMUT RADHA KOOMAREE, **W.R. 1864, 60.**

(48)—*Suit for possession by* lakherajdar—Onus *of proof.*—A person suing as *lakherajdar*, for possession of land of which he has been dispossessed by the zemindar, is not entitled to a decree, merely on the ground of his possession after the resumption proceedings, but on proof of possession several years before presumption. BIBEE REAZOONISSA v. MOTEE SINGH, **2 W. R. 236.**

See CERTIFICATE OF ADMINISTRATION—GENERAL, A.W.N. 1902, 62.

Limitation Act, sch. II, arts. 142, 144—Settlement records and maps, value of as evidence—Separate ownership of land and of trees on land—*See* EVIDENCE—MAPS, 2 L.B.R. 56.

Fact of adoption admitted—Validity impugned—*See* HINDU LAW—ADOPTION, 30 C. 999=7 C.W.N. 784.

Suit for declaration of invalidity of alleged adoption—Right to immediate possession obstructed by intervention of widow's estate—Burden of proof that adoption was invalid or never took place lies on plaintiff—*See* HINDU LAW—ADOPTION, A.W.N. 1908, 79=5 A.L. J. 200=30 A. 197.

See HINDU LAW—ADOPTION, A.W.N. 1899, 28, 3 B. 273.

Validity of transaction depending on proof of legal necessity—Duty of creditor—*See* HINDU LAW — ALIENATION, 32 C. 158=9 C.W.N. 330.

Mortgagee—Auction-purchaser and reversioner—Contest between—Infancy of reversioner at the time of the mortgage—Effect—*See* HINDU LAW—ALIENATION, 6 C.L.J. 490.

Hindu Law—Joint family—Alienation of ancestral property by father—Son's right—Burden of proving immorality—*See* HINDU LAW—ALIENATION, 6 A. 193=A.W.N. 1884, 23.

Suit on mortgage by father—Liability of son's shares—Onus on creditor of proof of legal necessity for loan—*See* HINDU LAW—ALIENATION, 9 A. 493=A.W.N. 1887, 116.

Claim under hypothecation bonds executed by limited owners—Extent of liability of estate—

***Burden of proof*—continued.**

—19.—Hindu Law—*continued.*

Burden of proving necessity for loan—Consent of reversioners, nature and effect of—*See* HINDU LAW—ALIENATION, 21 A. 71=2 C.W. N. 729=25 I.A. 183, P.C.

In cases of alienations by a Hindu daughter owning a life-estate—Of legal necessity is on the alienee—*See* HINDU LAW—ALIENATION, 36 C. 753=2 Ind. Cas. 152.

See HINDU LAW—ALIENATION, 14 A. 420=19 I.A. 196, P.C. A W.N. 1886, 73, 2 B.H.C. 23, 10 W.R. 8, 2 M.H.C. 407, 17 A. 125=A. W.N. 1895, 24, 14 A. 179, F.B. = A W.N. 1892, 49, 4 B. 462, 119 P.R. 1901, 6 B. 520, 6 M. 400, 7 M 39, 13 M. 51.

Family custom allowing adoption—Burden of proof, difference in, according as family is generally subject or not to Hindu Law—*See* HINDU LAW—CUSTOM, 11 C. 463, P.C.=12 I A. 72.

See HINDU LAW — CUSTOM, 85 P.L.R. 1903=30 P.R. 1903.

Joint Hindu family—Liability of sons for father's debts—Defence of sons that debts were incurred for immoral purposes—Burden of proof on sons and not on creditors—*See* HINDU LAW—DEBTS, A.W.N. 1908, 61=5 A.L.J. 175 =30 A. 156.

Suit by son to set aside mortgage-decree against father—Proof of son's non-liability to pay debt—*See* HINDU LAW—DEBTS, 16 C P. L.R. 169.

Hindu Law—Money borrowed by manager of joint family—*Onus* on creditor to prove loan for family purpose—Series of pecuniary dealings between parties—Nature of evidence required—*See* HINDU LAW—DEBTS, 21 B. 808.

See HINDU LAW—DEBTS, 16 P.R. 1878.

Gosains—Office of Mahant—Marriage—Forfeiture — Evidence — Burden of proof — *See* HINDU LAW—INHERITANCE, 5 B. 682.

Party setting up *illatam* arrangement—On—*See* HINDU LAW—INHERITANCE, 12 M. 442.

Hindu Law—Disqualification from inheritance— Presumption — Leprosy—*See* HINDU LAW—INHERITANCE, 4 C.L.J. 323.

See HINDU LAW—INHERITANCE, 9 W.R. 439, 13 W.R. 21, P.C =13 M I.A. 333.

Attachment of Hindu son's interests in execution of decree against father personally—Debt not tainted with immorality—Son's interest not liable to exemption from attachment—*See* HINDU LAW—JOINT FAMILY, 27 A. 16, F.B.=A.W.N. 1904, 151=1 A.L.J. 310.

Hindu Law—Joint family—Joint or separate property—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1905, 212=2 A.L J. 658.

Presumption and onus of proof as to joint family—*See* HINDU LAW—JOINT FAMILY, 1 Agra 220.

***Burden of proof*—continued.**

—19.—Hindu Law—*continued.*

Hindu Law—Presumption as to joint nature of family and its property—Burden of proof as to separate nature of property—*See* HINDU LAW—JOINT FAMILY, 8 B. 154.

Hindu Law—Property left by will—Members of testator's family setting up that property was ancestral—*Onus* of proof—Property derived from mother, ancestral nature of—*See* HINDU LAW—JOINT FAMILY, 12 B. 132.

Law applicable to Khoja Mahomedans in Bombay—Ancestral property—Son's right to claim partition during life-time of father—Custom—Wealth amused in trade by individual, when ancestral—Evidence—*Onus* of proof—*See* HINDU LAW—JOINT FAMILY, 13 B. 534.

Cutchi memons—Position with regard to family property, governed by rules of Hindu law and custom—Family firm—*Onus* on member of family to show he is no partner—*See* HINDU LAW—JOINT FAMILY, 14 B. 189.

Property alleged to be self-acquisition by one party and contended to be joint property by the other—Existence of ancestral property — Presumption — *See* HINDU LAW—JOINT FAMILY, 3 M.L.T. 314.

Member of a joint Hindu family going into trade with funds not belonging to family—whether acquisition of trade joint family property or self-acquisition of acquiror — *See* HINDU LAW—JOINT FAMILY, 25 P.R. 1906 =81 P.L.R. 1906.

Presumption of jointness in *Dayabhaga* families—Proof of exclusion—*See* HINDU LAW —JOINT FAMILY, 4 C.L J. 56.

Hindu Law — Self-acquisition — Burden of proof—*See* HINDU LAW—JOINT FAMILY, 9 M. 477.

Importance of—Question of *onus* in Court of appeal—Practice—*See* HINDU LAW—JOINT FAMILY, 12 Bom. L.R. 801.

See HINDU LAW—JOINT AMILY, A.W. N. 1898, 60, A.W.N. 1902, 20, 4 O.C. 277, 1 B L.R.A.C 164=10 W.R. 198, 9 W.R. 558; 10 W.R. 436, 6 M.I.A. 53, 10 M.I.A. 490, 11 M.I.A. 369, 85 P.R. 1867, 17 P.R. 1870, 33 P.R. 1870, 2 Hay, 353, 13 A. 165, P.C., 5 B. H.C.A.C., 71, 6 M H C 371, 22 A. 141=A W. N. 1900, 2, 9 C. 237, 2 M. 19, 8 M. 214, 10 M. 251.

Legitimacy — Hindu Law — *See* HINDU. LAW—LEGITIMACY, A.W.N. 1905, 214.

See HINDU LAW—MAINTENANCE, 3 B 372.

Nambudri Brahmins—Right of junior member to marry—Custom—Burden of proof—*See* HINDU LAW—MARRIAGE, 14 M.L.J. 214.

Custom of succession at variance with *lex loci*—*See* HINDU LAW—MARRIAGE, 3 A.L.J. 209=28 A. 458=A.W.N. 1906, 83.

See HINDU LAW—PARTITION, 1 W.R. 30, P.C., 9 M.I.A. 66, 5 W.R. 67, P C., 13 M.I.A. 181, 13 M.L J. 75, 3 C.P.L.R. 41.

S. DAR, B.A.L.L.B.,
...High Court,
...AR (Kashmir).

***Burden of proof*—continued.**

——19.—Hindu Law—*concluded.*

See HINDU LAW — RELIGIOUS ENDOWMENT, 2 C. 341, P.C.=4 I.A. 52.

Alienation by Hindu widow — Consent of some only of a number of reversioners of equal degree—Want of necessity—Validity of alienation—*See* HINDU LAW—REVERSIONERS, 8 O.C. 21.

Acquisitions out of the income of widow's estate—Intention of widow to treat it as separate property or as an accretion to estate—Power of alienation—*Bona fide* purchaser for value—Burden of proof—*See* HINDU LAW—WIDOW, 11 O.C. 310.

Alienation made by widow without legal necessity—Right of son subsequently adopted by her to question—Onus on alienee from widow of proving grounds justifying alienation—*See* HINDU LAW—WIDOW, 11 B. 609.

Hindu widow—Acquisitions from property inherited from husband—Her power of disposition—Presumption—*See* HINDU LAW—WIDOW, 25 M. 351=12 M.L.J. 5.

See HINDU LAW—WIDOW, 24 M. 441, 6 M.L.J. 127, P.C., 14 M.L.J. 139.

See LIMITATION ACT, 1903, art. 118, 3 B.L.R. A.C. 145=11 W.R. 468.

Hindu Law—Decree on mortgage executed by father—Sons not made parties under s. 85, Transfer of Property Act—Onus on son of proving mortgagee's knowledge of their interests—*See* PARTIES TO SUITS—GENERAL, 21 A. 193.

See POSSESSION—GENERAL, 9 M.L.J. 33.

——20.—Husband and wife.

See HUSBAND AND WIFE.

(1)—*Delivery of Company's paper by wife to husband—Burden of proof of* bona fide *sale.*—In a suit by a wife (a Mahomedan woman) against her husband to recover the value of Company's paper, and personal estate, etc., the plaint alleged, that such paper being her separate property, had been, as she lived in seclusion, endorsed and handed over by her to her husband for the purpose of receiving the interest thereon. The defence of the husband was, that he had purchased such paper from his wife and, on the endorsement and delivery, had paid the full value to his wife, who had appropriated the proceeds to her own use. *Held*, upon a review of the evidence, that although the wife failed to prove affirmatively the precise case alleged by her in the plaint the husband was bound to show something more than the mere endorsement and delivery of the Company's paper, and that from the relations subsisting between the parties, the *onus probandi* was upon him to establish, first that the transaction which he set up was a *bona fide* sale; and second, that he gave full value for the Company's paper so received from his wife. *Held*, further, that, in the absence of proof of the husband having the

***Burden of proof*—continued.**

——20.—Husband and wife—*continued.*

means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and of the condition of the wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her. MOONSHEE BUZLOOR RUHEEM v. SHUMSHEROONNISSA BEGUM, 8 W.R. 3, P.C. =11 M.I.A. 551=2 Sar. 289=2 Suther. 59. (*On appeal from* W.R. F.B. 60.)

(2)—*Suit by wife against husband—Defence* bona fide *sale and consideration—Onus on husband—Endorsement of Government securities, scope of general rule as to.*—In a suit by a wife against her husband, in which the defence is *bona fide* sale and payment of consideration money, the onus is on the defendant. The mere endorsement of Government Securities (which, in the case of strangers of third parties, would throw the onus on the person alleging fraud) did not apply when the relation was that of husband and wife. MOONSHEE BUZZUL RUHIM v. SHUMSHEROON NISSA BEGUM, W.R., F.B. 60 (*on appeal*, 8 W.R. 3, P.C.= 11 M.I.A. 551).

(3)—*Property purchased in the name of Hindu wife—Presumption.—Quære.*—Whether, in the absence of evidence as to the source of the purchase money, any presumption arises that property purchased in the name of a Hindu wife has been purchased with her husband's money and is his property? *Semble.*—No presumption arises either way; the burden of proof depends upon the pleadings in each case and the position of the parties as plaintiffs or defendants—*Per Field, J.*, CHOWDRANI v. TARINY KANTH LAHIRY CHOWDRY, 8 C. 545=11 C.L.R. 41. [*Reversed*, 13 C. 181, P.C.; *R.*, 17 M.L.J. 339; *D.*, 10 C. 686.]

(4)—*Mahomedan wife—Suit by wife for recovery of property—Cause of action—Presumption.*—In a suit by Mahomedan wife, against her husband after divorce, for recovery of property belonging to her, cause of action arises when she separates from her husband; and, until the husband has proved his right to the property, the presumption is that he only held on behalf of his wife. ABDOOL ALI v. KURRUMNISSA, 9 W.R. 153.

(5)—*Possession—Burden of proof.*—In a suit to recover property on the allegation that the plaintiff's father obtained it in gift from his wife where it had been in the possession of father and son for more than thirty years and the defendant's name had been recorded in the collectorate as heir to the wife, *held* that considering that the husband and wife had been joint tenants, the plaintiff should prove that his possession was possession on his own account and not that of an agent. VELAET ALI KHAN v. MUSSAMUT AZMUN, 11 W.R. 513.

(6)—*Suit for property from husband to wife under* kobala—*Execution of kobala admitted—Nature of transfer in question—Court not to presume consideration—Plaintiff to prove it.*—

***Burden of proof*—continued.**

——20.—Husband and wife—*concluded*.

In a suit by a wife to recover property alleged to have passed to her from her husband under a *kobala*, the execution of which is undoubted, where the question is whether the transfer represented a real or simply a paper transaction, it is not for the Court to presume but for the plaintiff to prove that there was substantial consideration. HUR CHUNDER DUTT v. MUSST. URSHUDOONNISSA BIBEE, **24 W.R. 477.**

(7)—*Purchase of property by husband in the name of wife—Presumptions—Onus.*—Where a Mahomedan husband was found to have paid the purchase-money for a putnee-talook standing in the name of his wife, it was held that his having been in possession of the money was *prima facie* evidence that the putnee-talook belonged to himself, and not to his wife, and that presumption was not rebutted, by the fact that he purchased the putnee in the name of his wife. RANEE SURNOMOYEE v. LUCHMEEPUT DOOGUR, **9 W.R. 338.**

See EVIDENCE ACT, 1872, s. 112, 29 C. 111, P.C. = 29 I.A. 17 = 6 C.W.N. 146.

——21.—Intervenors.

See INTERVENORS.

(1)—*Suit for rent—Intervenor supporting defendant's case.*—Where in a suit for rent under a kubooleut, an intervenor supports the defendant's case, alleging the rents to have been paid to himself, and not to the plaintiff, the burden of proving such receipt and enjoyment lies entirely on the intervenor and the plaintiff need not establish his title or the kabooleut until the intervention is disposed of. RAM BHUROSE SINGH v. JEWA MAHATOON, **11 W.R. 319.** *See, also*, RADHA KISHORE TALUKDAR v. GOLUCK CHUNDER ROY, **11 W.R. 366.**

(2)—*Suit for kabooleut—Intervention—Inability to prove possession—Special appeal.*—An intervenor in a suit for a kabooleut of certain parcels of land, unable to give conclusive evidence of the actual possession he sets up, is out of Court in special appeal. RADHA KISHORE TALOOKDAR v. GOLUCK CHUNDER ROY, **11 W.R. 366.**

(3) *Decree under s. 77, Act X of 1859—Ejectment of person enjoying rent—Onus, on whom lies.*—Where a person has been formally declared by a decree under s. 77, Act X of 1859, to be in the enjoyment of the rent of the disputed land and consequently in possession, it is incumbent on another person seeking to oust him to prove his title. RUNGO MONEE DOSSEE v. UNNOPOORNA DEBIA, **7 W.R. 149.**

(4)—*Suit to get rid of Collector's decision under s. 77, Act X of 1859—Burden of proof.*—Where a party entitled seeks to get rid of the effect of a Collector's decision in favour of an intervenor under s. 77, Act X of 1859, he must institute a suit to prove his title; it is not sufficient for him to prove a vague allegation of

***Burden of proof*—continued.**

——21.—Intervenors—*continued*.

dispossession and put the burden of proving title on the defendant. MOHESSUR MOOKERJEE v. KALEEDOSS MOOKERJEE, **11 W.R. 378.**

(5)—*Suit for rent of mousah—Intervention—Consent—Issues—Special appeal.*—A suit for rent of a certain land alleged to belong to a mouzah bought at auction-sale being dismissed owing to the intervention of the defendant who claimed the land as part of her mouzah, both parties consenting to have the case decided on the question whether the defendants mouzah was or was not in existence, though the plaintiffs were bound to prove their own case, it was held that yet the defendant could not make out a new case in special appeal. MOONDUR BEBEE v. HUNOOMAN PERSHAD, **11 W.R. 277.**

(6)—*Suit by purchaser of* lakheraj *tenure for rent—Intervention — S. 77, Act X of 1859—Burden of proof.*—Where a suit by the purchaser of an alleged *lakeraj* tenure for rent from his under-tenant is thrown out by the intervention of the superior landlord under s 77, Act X of 1859, all he has to do in a regular suit is to prove that he is entitled to the rent. RAJ CHUNDER GHOSE v. JOY CHUNDER DUTT, **12 W R. 197.**

(7)—*Suit for possession against plaintiff's vendor—Claim by third party—Such party impleaded—Onus of proof.*—In a suit to recover possession of property from plaintiff's vendor, where a third party claims, and is made defendant the burden of proof lies on the intervenor. JUGGODANUND MISSER v. HAMID RUSSOOL, **10 W.R. 52.**

(8)—*Intervenor—Onus of proof.*—In a suit for recovery of possession of property under a registered *kobala*, the appellant intervened, alleging that he had purchased from the same vendors the disputed property prior to the plaintiff's purchase, and was made a party defendant. *Held* that, after the plaintiffs had proved their case against the original defendant, it was for the appellant to prove not only his prior purchase, but also his possession under it. BALMA KUNDU DUBAYE v. ADIKUNDA PUNDA, **7 C.L R. 560.** (10 W.R. 52, 13 W.R. 362, *R.*)

(9)—*Act X of 1859, s. 77—Suit for* kabuliat—*Intervenor*—Onus.—The plaintiff sued defendant (a ryot) for a *kabuliat*. The defendant admitted the plaintiff's right to the *kabuliat* sued for. An intervenor appeared on the allegation that he was in actual receipt and enjoyment of the rents *bona fide*. *Held*, that the *onus* was on the intervenor to prove that he was *bona fide* in actual receipt and enjoyment of the rents, and not on the plaintiff to prove his possession. SHEIKH BHARULLA *alias* BAROMIA v. SHEIKH MAGAN, **3 B.L.R. App. 61.**

(10)—*Suit for rent of share under* butwarrah *—Reg. XIX of 1814—Dismissal of suit—Non-production of documents—Onus of proof on intervenor.*—A suit for rent of a share consequent

Burden of proof—continued.

——21.—Intervenors—*concluded.*

on a *butwara* under Regulation XIX of 1814 having been dismissed because plaintiff could not file either *jumma-wassil-bakee* or *kubooleut held* that before dismissing the suit, the lower Appellate Court was bound to put the intervenor to the proof that the land appertained to the share which he got from his vendor, who obtained it by inheritance from one of the shareholders and to notice plaintiff's evidence, it being no defence to the intervenor that he was not invited to attend the *butwara*. HURCHUNDER CHUCKERBUTTY v. MEER MUKRUM ALI, **17 W.R. 143.**

See MORTGAGE — POSSESSION UNDER MORTGAGE, 12 W.R. 19.

——22—Landlord and tenant.

See LANDLORD AND TENANT.

(1)—*Ryot holding under Zemindar—Allegation of separate title*—Onus *on whom lies.*—When a ryot is holding lands of considerable extent under a zemindar, it is a matter peculiarly within his own knowledge of what that holding consists; and, if he alleges that one or two plots occupied by him are held under a different title, it is for him to show it. RAM COOMAR ROY v. BEEJOY GOBIND BURAL, **7 W.R. 535.**

(2)—*Suit by lessee of purchaser—Allegation of independent title by defendant.*—In a suit by the lessee of the purchaser of the rights and interests of the first defendant in lands alleged to fall within the zemindary so purchased, where defendants allege an independent title, *held* that the burden of proof lay on the defendant of establishing the title. DEWAN SHUMDAN ALI v. MOTHOORANATH DUTT, **14 W.R. 229.** [*R.*, 4 C.L.J. 548.]

(3)—*Rival tenants—Admission by one tenant—Resignation of tenancy*—Onus *of proof.*—Two rival tenants, A and B, claimed to hold under the same landlord K. A admitted the tenancy of B, but pleaded resignation by him (B) of his tenancy and a lease to himself. *Held* that the *onus* of proving the resignation lay on A. KISHEN CHUNDER SHAHA v. HOOKOOM CHAND SHAHA, **W.R. 1864, 47.**

(4)—*Suit to obtain declaration of tenancy*—Onus *on plaintiff.*—In a suit in which plaintiff seeks to obtain a declaration that defendants had a tenure under him, the burden of proof lies on plaintiff. ROYES MOLLAH v. MUDHOO SOODUN MUNDUL, **9 W.R. 154.** [*R.*, 20 B. 798.]

(5)—*Transferability of tenure*—Onus *of proof—Suit for resumption.*—There is no presumption that any tenure held is not a transferable tenure; and a landlord suing for *khas* possession, on the ground that a tenure sold was not transferable, must establish his case. DOYA CHAND SHAHA v. ANUND CHUNDER SEN MOZUMDAR, **15 C. 382.** [*Not F.*, 15 C. 89; *R.*, 13 M. 60, 25 C. 896, F.B.]

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

(6)—*Transferability of tenure*—Onus *of proof*—Where, in a suit to recover possession of lands belonging to the putni-estate of the plaintiff, which were purchased by the defendant in execution of a money-decree against the holder of a subordinate tenure, the defendant set up that the holding was of a permanent and transferable nature, *held*, the *onus* of proof of transferability lay upon the defendant. KRIPA MOYI DABIA v. DURGA GOVIND SARKAR, **15 C. 89.** (14 C. 382, *Not F.*) [*R.*, 13 M. 60, 25 C. 896, F.B., 9 C.W.N. 144, 1 C. L.J. 557.]

(7)—*Landlord and tenant—Sale of tenant's interest—Suit to set aside sale—Burden of proof—Transfer of Property Act, ss. 106, 108—Presumption as to tenancy and assignability—Tenancy at will—Permanent occupancy—Course of decisions.*—In the absence of a covenant not to assign, a tenancy is presumably a saleable interest, and it lies on the landlord, who seeks to set aside a sale of his tenant's right and to obtain possession of the land, to show what was the nature of the tenancy, how it ceased, and how the right to present possession accrued. [*F.*, 15 M. 95; *R.*, 20 M. 299.] Under ss. 106 and 108 of the Transfer of Property Act, which followed the previous course of decisions, there is no presumption that every tenant in a zemindari village is a tenant-at-will, or that a tenancy is not a saleable interest. [*D.*, 25 C. 896.] According to the course of decisions in Madras, the landlord may determine the tenancy if there is a contract, express or implied, by exercising his will in accordance with his obligations; there is no presumption in favour of a tenancy at will; an occupancy right may exist by custom; a pattadar or raiyat in a mitta is entitled to continue in possession so long as he regularly pays rent and has a saleable interest, and, by reason of special circumstances in evidence, the *onus* of proof may be shifted, even in regard to a permanent occupancy right, from the tenant to the landlord. APPA RAU v. SUBBANNA. **13 M. 60** [*R.*, 23 M. 318, 30 M. 155=17 M.L.J. 64=2 M.L.T. 25.]

(8)—*Suit to set aside a sub-tenure—Specific allegations in plaint about nature of tenure*—Onus *of proof.*—In a suit to set aside an *Ousut Neem Howlah* sub-tenure, where plaintiff makes specific allegations of the exceptional character of the tenure, and the defendant is in possession under orders of the Revenue Court passed under cl. 6, s. 23, Act X of 1859, *held*, it was for the plaintiff first to prove the specific allegation of the temporary and extraordinary character of the tenure. HERU SOONDUREE DEBIA v. AMEENA BEGUM, **5 W.R. Act X Rul. 72.**

(9)—*Suit to recover land*—Mokurruree *lease*—Onus *of proof*—In a suit to recover land under a *mokurruree* lease, in which the zemindar (defendant) admits the validity of the lease, but the other defendant also claims a *mokurruree* interest, the *onus* lay with the substantive

***Burden of proof*—continued.**

—22.—Landlord and tenant—*continued.*

defendant to show that his lease was *mokurruree*. RUGHOONATH LOBEY v. PURESH RAM MAHATA, **10 W.R 9.**

(10)—*Allegation of permanent khadim tenure under managers of endowed property* — Onus probandi.—Where plaintiffs have long held as khadims under the superior holders or managers of endowed property, and set up a claim to hold a permanent khadim tenure, from which they are not liable to be ejected except for misconduct, the *onus probandi* is on them. CHAND MEAN v. KHONDKAR ASHRUTOLLAH, **6 W.R. 89.**

(11)—*Suit for possession of* ayma *land—Identification by plaintiff.*—Where a plaintiff establishes a *prima facie* case of the identity of *ayma* land which he claims through his ancestor, who had been allowed by the Collector to retain it, it will rest with defendant to prove that the land is his own, or that it is not the *ayma* land which the plaintiff's ancestor once held. MOLLA ABDUR RUB v. HURRYHUR MOOKERJEE, **1 Ind. Jur. N.S. 50.**

(12)—Khoti *land—Suit against cultivator by Khot—Burden of proof.*—Where a Kabulayatdar Khot sued for rent from cultivators holding land in a *Khoti* village, *held* that the *onus* of proving the lands to be *Khoti* did not lie on the plaintiff; but that it lay with the holder of lands in a *Khoti* estate to prove that he is exempted from paying rent according to the custom of the country. MUHAMMAD YAKUB v. MUHAMMAD ISMAIL, **9 B.H.C. 278.** (Sp. App. No. 455 of 1868, *followed.*)

(13)—*Behar orchard lands* — Bhaoli *and* Nukdee *tenure*—Onus *of proving special nature of tenure.*—As there is no presumption that orchard lands in Behar are held on a *Bhaoli* tenure only and not on a *Nukdi* tenure, where a zemindar sues for the value of trees cut down in an orchard in Behar, the zemindar should prove the special nature of the tenure. DOMUN SING v. SOOKUN LALL, **2 W.R. 12.**

(14)—*Orchard land—Possession of planter of trees.*—Although generally it may be taken that land, whereon an orchard is planted, belongs to the zemindar, and has been granted to a stranger to plant trees thereon, in which case it reverts to the zemindar after the trees have disappeared and the land has become arable, yet, when it is asserted that the land belongs to the planter of the orchard, having been acquired by purchase, it is for the zemindar to prove that the land belongs to him and was given for plantation; and, in the absence of such proof, the holder or occupant may rely on his long possession. DHUNEE RAM v. AMANUT HOSSEIN, **2 Agra 361.**

(15)—*Landlord suing for possession*—Onus *of proof on landlord.*—Where landlord sues for possession of land within his estate, the *onus* is on him to prove that he is entitled to such possession. GUDADHUR BANERJEE v. KANYE DEKHOORIA, **8 W.R. 191.**

***Burden of proof*—continued.**

—22.—Landlordand tenant—*continued.*

(16)—*Talukdar—Suit for possession—Land purchased in execution.*—Where a talookdar sues for possession of land contained in an under-tenure purchased by him at an execution-sale, from some of which he has been dispossessed and his title in regard to the remainder is disputed, *held* that the *onus* lay on the plaintiff to prove his case. SHUSTEE RAM PAUL v. NOBOKANT ROY, **14 W.R. 190.**

(17)—*Suit for nila zamin—Extent of leased lands and nila zamin,* onus *of proof as to—Absence of proof—Presumption.*—In a suit for nila zamin, it is for the landlord to bring evidence of the relative extent of nila zamin and leased lands, and in default of such evidence, the whole must be taken to be leased to the tenant. MR. GEORGE MAXWELL REILY v. BAMA SOONDUREE DOSSEE, **25 W.R. 398.**

(18)—*Ouster by defendant admitting possession—Permissive possession*—Onus—Res judicata—*Kabooleut declared genuine by Revenue Court—Jurisdiction of Civil Court to try question.*—Where defendant, having ousted plaintiff, admits his alleged possession, but contends that it has been only permissive possession, as that of a tenant, not possession as owner the *onus* was held to be on the defendant. A Civil Court has jurisdiction to try the genuineness of a kubooleut found by the Revenue Court to be a genuine document. BOISTUB CHURN SEIN v. TRAHEE RAM SEIN, **15 W.R. 32.** [*D.*, 13 M. 287,]

(19)—*Sale of entire holding for arrears of rent—Claim for divided portion of tenure—Proof of tenancy.*—Where an entire holding has been sold for arrears of rent, plaintiff, claiming to hold a divided portion of the tenure, must prove his *status* as tenant in respect of the share in question. HURHUR SINGH v. MUSSAMAT OOMA KOOER, **16 W.R. 93.**

(20)—Kobala *held to be* mala fide—*Burden of proof.*—Where a plaintiff in a civil suit relies on a *kobala* held by a Small Cause Court to be *mala fide* the burden of proof lies upon plaintiff that the deed was really executed. ESHAN CHUNDER DOSS v. RUKEEMOODDEEN SOWDAGUR, **10 W.R. 412.**

(21)—*Occupancy for a long time.*—An occupancy of upwards of seventy years is sufficient to throw upon those who seek to disturb it, the burden of showing that the tenancy was not accompanied with a right of occupancy. KRISHNASWAMI v. VARADARAJA AND VARADARAJA v. VENKATACHALLA, **8 M. 345, F.B.** [*D.*, 16 M. 131, 271.]

(22)—*Portion of land in which defendant claimed right of occupancy*—Onus.—The *onus* of pointing out, that portion of the lands in which defendant claimed his right of occupancy lay on him. CHANDRABATI KOERI v. HARRINGTON, **18 C. 349, P.C. = 18 I.A. 27 = 5 Sar. 481.**

(23)—*S. 23, Act VIII of 1885 (Bengal Tenancy)—Occupancy tenant's right to cut trees—Custom*—Onus.—According to s. 23, Act VIII

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

of 1885, the burden of proof lies on the landlord to establish a custom prohibiting the cutting down of trees by an occupancy tenant, and not on the tenant to establish the contrary. NAFAR CHANDRA PAL CHOWDHURI v. RAM LAL PAL, **22 C. 742.**

(24)—*S. 23, Bengal Tenancy Act, 1885—Right of occupancy tenant to cut trees*—Onus.—The *onus* rests upon an occupancy tenant to prove a custom to cut down trees. PYARI LALL PAL v. NARAYAN MANDAL, **22 C. 746, Note.**

(25)—*Death of occupancy tenant—Suit for possession—Collaterals—Common ancestor—Burden of proof—Presumption.*—On a landlord suing for the possession of a holding in consequence of the death of an occupancy tenant, the defendants claimed it as the collaterals of the deceased. *Held* that the defendants should prove that a common ancestor of themselves and the deceased had held the land, of the defendants being entitled to no presumption in their favour. DIWAN v. DARA, **83 P.R. 1879.**

(26)—*Occupancy tenant admitting himself to be tenant at will—Proof of genuineness of admission*—Onus *of proof.*—If a tenant, recorded as one with right of occupancy, should admit that he was a tenant-at-will, the landlord has the burden of proving that the tenant made such admission voluntarily. JYMAL SINGH v. JAMIAH SINGH, **115 P. R. 1879.**

(27)—*Lakheraj*—Onus probandi—*Suit for Kubooleut at an enhanced rate of rent—Defendant claiming land as lakheraj—Defendant not bound to give* prima facie *proof of claim.*—UMBIKA CHURN MUNDLE v. RAMDHUN MOHURUR, **11 W.R. 35.**

(28)—Onus *of proving nature of tenancy.*—Where the defendant admitted that he was a tenant, the *onus* is upon him to show that his tenancy was such as he sets up, namely, a permanent tenancy at a rent which cannot be enhanced. RAJAH KHETTER KRISTO MITTER v. KUMAR DINENDRA NARAIN ROY, **3 C.W.N. 202.**

(29)—*Landlord and tenant—Suit for ejectment—Burden of proof.*—In a suit for ejectment, the landlord must show that, under the terms of the tenancy and in the circumstances that exist, he has a right to eject the tenant, although the latter may allege and fail to prove a right of occupancy. VENKATACHARLU v. KANDAPPA, **15 M. 95.** [*R.*, 20 M. 299, 23 M. 318.]

(30)—*Proof of zamindari rights—Right to garden planted with trees.*—The owner of a *bagh* in an estate in which he is not possessed of any zamindari rights must, if he claims a higher right than that ordinarily possessed by a tenant planter or the successor of such a planter, produce evidence in support of his claim; but, when the *bagh* has been admittedly

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

planted by a zamindar and has been, on the sale of his zamindari rights, reserved by him, it is incumbent on the purchaser to prove that, by the reservation, the vendor reserved only the interest which a tenant-planter would have possessed in the *bagh.* ALI BUKSH v. MUDUN GOPAL, **3 Agra 369.**

(31)—*Suit for kabuliat—Lands accreting to zimma tenure with fixed rent—Regulations XI of 1825 and VIII of 1793—Act X of 1859, s. 15*—In a suit for a kuboleut on an alleged right to assess lands which have accreted to a permanent zimma tenure, the plaintiff should prove that, under the law of accretion, s. 4, Reg. XI of 1825, the accretions are, either by custom or agreement, liable to be assessed. JUGGUT CHUNDER DUTT v. DESPINO PANIO-TY, **8 W.R 427.**

(32)—*Acknowledgment of tenancy—Suit for kabuliat.*—In a suit before the Collector for a kabuliat, on the ground that the defendant had occupied and cultivated certain lands of the plaintiff, the defendant pleaded that he was coparcener with the plaintiff of the land, but he admitted that he had given a kabuliat for some of the lands he occupied. *Held* that since by giving the kabuliat the defendant had acknowledged the plaintiff to be his landlord, the *onus* of proving the plea was upon the defendant. JUGGOBUNDOO MOOZOOMDAR v. GOOROOPERSHAD ROY, **Marsh 54.** *See, also,* GUROO PERSAD ROY v. JUGGOBUNDOO MOOZOOMDAR, **W.R.F.B. 15=1 Hay 228.**

(33)—*Suit for* kabuliat—*Admission of partial tenancy*—Onus *of proving non-tenancy—Jurisdiction of Collector.*—In a suit for Kabuliat when the defendant admits partial tenancy, the onus is on him to prove non-tenancy as to the rest. The Collector has jurisdiction in such a case. GOORO PRASAD ROY v. JUGGOBUNDOO MOZOOMDAR, **W.R. F.B. 15.**

(34)—*Suit for pattah at amulnama rate—Plaintiff to prove fairness of rate*—Where a ryot sues for a pottah at the rate fixed by the amulnamah given by defendant, the plaintiff was held bound to prove that the rate was fair. KISHEN PERSHAD SINGH v. MOHUN SINGH, **15 W.R. 420.**

(35)—*Suit for rent—Waste and* lakeraj *land—Plea of.*—In a suit for rent, when the raiyat pleads that part of the land is waste and *lakheraj*, the *onus* is on the landlord to prove that such land has paid rent to him in previous years. MOTEE LALL ADUCK v. JUDOOPUTTEE DOSS, **2 W.R. Act X, Rul. 44.** *See also* GUMANI KAZI v. HARIHAR MOOKERJEE, **B.L.R. Sup Vol. 15=W.R F.B. 116=Marsh 527.** MIRTOONJOY CHUCKERBUTTY v. BURODA KANT ROY, **6 W.R. Act X. Rul. 18,** and BISHESHUR CHUCKERRUTTY v. WOOMA CHURN ROY, **7 W.R. 44.**

(36)—Lakheraj *land—Suit for enhancement of rent*—Onus *of proof.*—To entitle the plaintiff to recover enchanced rent for that portion of

***Burden of proof*—continued.**

——22.—Landlord and tenant—*continued*.

the land which the defendant states is his *lakheraj*, the plaintiff ought to show that it is his *mal* land. The Judge must throw the *onus* of proof, in the first place, on him, and go into the defendant's evidence, only if the plaintiff makes out a *prima facie* case, and then not look to the validity of defendant's title, but his possession of the land as *lakheraj*. MIBTOONJOY CUCKERBUTRY v. RAJAH BARODA KANT ROY, **6 W.R. Act X, Rul. 18.**

(37)—*Suit for rent—Plaintiff denied to be landlord—Allegation of payment to intervenor—Points to be inquired into.*—Where in a suit for rent, defendant denies that plaintiff is landlord, alleging payment to an intervenor, it is not enough that the intervention is set aside; the Court must inquire whether defendant is a ryot of the plaintiff. JAGURDEE v. RADHA KISHORE TALOOKDAR, **13 W.R. 259.**

(38)—*Suit for rent—Ejectment*—Onus *as to rate of rent—Abatement.*—A tenant sued for rent may set up as answer ejectment by title paramount to that of his lessor; and if evicted from part of the land, the lessor must, on claiming an apportionment, show what is the fair rate of the lands out of which the tenant is not evicted. GOPANUND JHA v. LALLA GOBIND PERSHAD, **12 W.R. 109.** [*Cons.*, 24 C. 296; *R.*, 25 B. 269.]

(39)—*Rent alleged to be due under arrangement—Arrangement denied*—Onus *of proving arrangement—Copies of depositions taken when defendant was no party—Evidence.*—In a suit for rent alleged as due under an arrangement, repudiated by the defendant, the burden of proving the arrangement is on the plaintiff. Copies of depositions given in suits to which the defendant was no party are no evidence against him in subsequent suits. SHUMBOO GEER GOSSAIN v. RAM JEWAN LALL, **8 W.R. 509.**

(40)—*Suit for rent by share-holder—Plea of duty to pay in full to person entitled to entire rent*—Onus.—In a suit for rent by a share-holder, where defendant contends that he is not bound to pay otherwise than by entirety to the person entitled to the whole rent, held that the burden lay on the plaintiff to show that he had a right to sue for a fractional portion of the rent as he had sued. MUSSAMUT LALUN v. HEMRAJ SINGH, **20 W.R. 76.** [*Appr.*, 4 C. 96, F. B.; *D.*, **24** W.R. 350.]

(41)—*Landlord and tenant—Rate of rent*—Onus.—The mere fact that a tenant some time ago gave a *kabuliyat* for a limited period at a particular rate of rent, is not sufficient in itself to throw upon the defendant the entire burden of proving what the present rent is, without any evidence on the part of the landlord that the rent specified in the *kabuliyat* had ever been realised from him. MUKUNDA CHUNDRA SARMA SARKAR v. ARPAN ALI SHEIKH, **2 C.W.N. 47.**

***Burden of proof*—continued.**

——22.—Landlord and tenant—*continued*.

(42)—*Suit for rent—Plea of payment—Nature and* onus *of proof.*—The tenant, who, in a suit for arrears of rent for a certain year, pleads payment and cites the plaintiff's agent, who deposes to having received moneys from the defendant's under-tenant but not for the year in question, must specifically prove that such payments were in respect of the rent due for the period sued for. The tenant himself should take care, when he makes the payment, that the receipt given by the landlord is in proper form. BIBEE SYEFUN v. RUDDER SOHAY, **7 C. 582.**

(43)—*Suit for rent*—Onus *of proof about rate.*—In an ordinary case, when a landlord brings a suit to recover rent, it is for him to establish the rate at which he is entitled to recover if there it any dispute as to the rate. But when the defendants were in possession as tiecadars from 1262 to 1281, and the plaintiff never realized any rent from the defendants, whose tenancy was established in a previous litigation between himself and the defendants, *held* that the plaintiffs should be deemed to have stated the case in having proved that nine annas was the ordinary *Hakimee* (or landlord's) share in the village, and that it was for the defendants to prove their special plea that the proportion was eight annas and not nine annas. LOCHUN CHOWDHRY v. ANUP SINGH, **8 C.L.R. 426.**

(44)—*Suit for arrears of rent*—Onus *of proof.*—In a suit to recover arrears of rent from the defendant upon a registered *kabuliat*, the defendant pleaded that, although he executed the *kabuliat*, he did not obtain possession of all the lands as described in it. *Held*, that the *onus* was upon the defendant to prove his case. BANI MADHUB MOOKERJEE v. SRIDHUR DEB GHUTTACK, **10 C.L.R. 555.**

(45)—*Suit for rent—Ejectment—Rate of rent claimed in question—Burden of proof on plaintiff.*—In a suit for arrears of rent and for ejectment in consequence of non-payment where defendant challenges the rate claimed as well as plaintiff's right to sue alone, held that the burden of proving his right to the rate of rent sued for and that he was the sole proprietor lay on the plaintiff. SHAIKH ASHRUF v. RAM KISHORE GHOSE, **23 W.R. 289.**

(46)—*Suit for rent—Defendant pleading payment*—Onus.—*Held*, that, in a suit for rent where the tenant pleads payment, the *onus* is on him. PUREEAG LAL v. RAM JEEAN LALL, **1. W.R. 264.**

(47)—*S. 30. Reg. II of 1819—Assessment of* lakheraj *lands—Plaintiff*, onus *on.*—In a suit under s. 30, II of 1819, to assess more than 100 beegahs of land alleged to be plaintiff's mal lands, is the duty of the plaintiff to prove that the lands were his mal lands on or before the 1st December 1790, before the other party can be called upon to prove his title. SOOKHODA DEBIA v. SHEIKH AZEEOODDEEN, **2. W.R. 302.**

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

(48)—*Suit for arrears of rent—Deduction for lands washed away*—Onus probandi.—In a suit for arrears of rent, where deduction is claimed for lands washed away, the defendant is entitled to such deduction; but the whole *onus* lies upon the defendant of proving the extent of the deduction to which he is entitled and of showing precisely what lands have disappeared; and the plaintiff in proving that full rent has ever been paid has proved a sufficient *prima facie* case. MR. THOMAS SAVI v. OBHOY NATH BOSE, **2 W.R. Act X, Rul. 27.**

(49)—*Rent, collection of*—Onus *of proof.*—Whether the plaintiff's superior tenure is admitted over the whole or only a part of the defendants under tenure, and whether the existence, over a part of that under-tenure, of tenures independent of the plaintiff's under-tenure is pleaded, the *onus* of proving that rent has been collected direct from the tenant in possession lies upon the defendant. RAJ CHUNDER ROY CHOWDHRY v. SHAIKH ABBAS, **5 W.R. 185**

(50)—*No allegation by defendant about plaintiffs' knowledge as to amount of deductions—Admission of plaintiff about deductions*—Onus *of-proof.*—Where the defendant never sets forth plaintiff's knowledge of the amount of deductions and the plaintiff admits that deductions of a certain class and description would be made, it is for the defendant, who had made the outlay on account of which the deductions were claimed by him, to prove the amounts. LEKHRAJ ROY v. MR. U. BUCKLAND, **5 W.R. Act X, Rul. 65.**

(51)—*Arrears of rent*—Onus *of proof*—Jumma wassil baki *papers—Evidence.*—In a suit for arrears of rent at a specified rate, the plaintiff is to discharge the burden of proving that the defendant held the said land for which he was liable to pay at the rate sued for. *Jumma wassil baku* papers are not of independent evidentiary value. SHAIKH NEWAZEE v. L. LLOYD, **8 W.R. 464.**

(52)—*Act X of 1859, s. 4—Presumption under section*—Onus.—The presumption under s 4, Act X of 1859, is not removed by defendant's statement that the orchard was made more than 40 years ago ; the *onus* resting with the plaintiffs. SOODISHTEE LALL CHOWDHRY v. MUTHOO LALL CHOWDHRY, **8 W.R. 487.**

(53)—*Rent suit—Sale-deed*—Onus *on plaintiff—Written statement.*—In a suit for rent where a deed of sale is the foundation of plaintiff's right, the plaintiff should establish the deed, in spite of the defendant's failure to object to it in the written statement. ZIMUT HOSSEIN v. KUNEEZ FATIMA, **12 W.R. 5.**

(54)—*Short lease—Ryot holding over*—Onus *of proof.*—Where a landlord claims rent from a ryot holding under a short lease, for a period after the expiry of his lease, *held* that such landlord was bound to prove that the latter held on subsequently to the term of the lease. TILUCK PATTUCK v. MAHABEER PANDEY, **15 W.R. 454.**

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

(55)—*Rent-suit against shareholder—Intervenor—Decision without jurisdiction—Evidence*—Onus probandi.—Where plaintiff's share of rent said to be due to him by defendant, another shareholder, in respect of the occupation of a certain *zerait* land constituting the holding of the combined shareholders, and the defendant pleaded that the share of the plaintiff was less than what he stated it to be, *held* that the plaintiff was bound to prove the extent of his share. A ryot, in such a case, resisting the claim of a shareholder to rent could also, for valid reasons, oblige the plaintiff prove the amount of his share ; but in the case of an intervenor, the only *onus* on him would be to prove *bona fide* possession. A decision set aside by a superior Court as made without jurisdiction has no probative force between the parties. SOOKRAM MISSER v. W. CROWDY, **19 W.R. 283.** [*R.*, 35 751.]

(56)—*Execution of* kabuliat—*Plea of non-liability for rent—Allegation of* benamee—Onus *of proof of ownership*—Where a tenant, who has executed a *kabuliat* in the name of A, pleads non-liability to A for the rent, on the ground that A is *benami* for somebody else the *onus* is on him to prove that somebody else is, and that the ostensible owner is not the real owner. MUSSAMUT INDERBUTTEE KOOER v. SHAIKH MUKHOOB ALI TICCADAR, **24 W.R. 44.**

(57)—*Rent-suit—Admission of claim—Payment, proof of.*—In a suit for arrears of rent where defendant admits that certain sums are due, he is bound to prove payment. ROY MONOHUR LALL v. DHAREE GOALA, **24 W.R. 341.**

(58)—*Landlord and tenant—Rent, nature of—Burden.*—The appellant, a zemindar, sued the respondent, his tenant, for the value of his share of the produce of certain land by way of rent, alleging that the rent was payable in kind. The respondent alleged that the rent of the land in question was payable in coin, admitting, however, that it had formerly been paid in kind. *Held*, that the burden of proving the charge alleged by the respondent lay on him GRISH CHUNDER v. GANPAT NARAIN, **A.W.N. 1882, 113.**

(59)—*Rent-free land—Demand of rent—Burden of proof.*—Where certain land has been admittedly rent-free for fifty years, the burden of proving that rent is due is upon the person demanding it. KEVAL KUKER v. THE TALUQDARI SETTLEMENT OFFICER AND GAGUBHI ABHESANGJI TALUQDAR, **1 B. 586.**

(60)—*Landlord's right to eject tenant after notice—Exception—Proof.*—A landlord is entitled to eject his tenant after notice, unless debarred by certain rights of his tenant. He is not required to prove the absence of the circumstances which entitle that tenant to retain possession NUBO COOMAR GHOSE v. OOZIR SHIKDAR, **23 W.R. 238.** [*R.*, 11 C.L.R. 476.]

***Burden of proof*—continued.**

—22.—Landlord and tenant—*continued.*

(61)—*Suit for ejectment—Plea of* gujasta *tenure—Burden of proof—Ben. Act VIII of 1869, s. 102—Suit for arrears of rent—Second appeal.*—Where, in a suit for ejectment of the defendants on the ground that they were mere yearly tenants without any right, the defendants state that the holding was *gujasta* and transferable, and the plaintiff fails to establish a *prima facie* case that the tenants had no such right, and the defendants have produced evidence to show the existence of such a right, *held* that the plaintiff is not entitled to a decree for ejectment. In suits for arrears of rent, where a question whether the tenancy is a *gujasta* holding is tried by the lower Court, a second appeal lies, although the value of the suits is below Rs. 100, and the provisions of s. 102 do not apply to them. BYJI NATH SAHOO v. RAMDOUR ROY, **7 C.L.R. 369.** [*D.*, 8 C.W.N. 437.]

(62)—*Accrual of right of occupancy under s. 6, Act X of 1859.—Held* that no right of occupancy under s. 6, Act X of 1859, accrues, where the tenant came into possession under a contract only, or where a right of re-entry is reserved to the landlord. Where, however, there are no such terms, but merely a *pottah* for a certain number of years, the *onus* is on the landlord to show that the tenure was such that the express limit of years may be fairly applied to the possession and construed to give the right of re-entry. ROY ODYTE NARAIN SINGH v. UBHARAN ROY, **4 W.R. Act X, Rul. 1.**

(63)—*Suit for possession and mesne profits—Jurisdiction.*—A suit for possession of *jote* lands from which plaintiff had been ousted and for recovery of mesne profits against a zemindar and others, can be entertained by a Civil Court. A tenant must go out at the expiration of a lease which does not provide for re-entry, unless he can prove a right to further occupancy. PUDDO MONEE DOSSIA v. JHOLLA PALLAY, 7 W.R 283.

(64)—*Suit for* khas *possession—Defendant a ryot—Burden of proof—Right to eviction.*—Where a zemindar sues to obtain *khas* possession of land within his estate, if defendant is a middleman, plaintiff's right follows as a matter of course; but if a ryot, plaintiff must show that such defendant is liable to eviction. LALLA JOYNATH SAHEE DEO v. LUTCHUN CHRISTIAN, **16 W R. 158.** [*R.*, 9 C.W.N. 144.]

(65)—*Suit for possession—Admission of plaintiff's title—But plea of pattah—Traverse by plaintiff*—Onus *on defendant.*—In a suit for possession where admitting the plaintiff's title the defendant pleads a *pottah* from the plaintiff's ancestors, which the plaintiff traverses, the *onus* of proving the pattah is on the defendant. JOY RAM CHUCKERBUTTY v. BISSONATH JASH, **2 W.R. 208.**

(66)—*Suit by* lakherajdar *for possession against present* putneedar—Onus *of proof.*—In a suit by a *lakherajdar* for the possession of land of which he has been dispossessed by the present *putneedar* and which is in a village whereof the plaintiff had been a former *putneedar*, the *onus* is on the plaintiff to prove that the land was *lakheraj* during the period that he held the village in *putnee.* NUBO KISHEN MOOKERJEE v. PROMOTHONATH GHOSE, **5 W.R. 148.**

***Burden of proof*—continued.**

—22.—Landlord and tenant—*continued.*

(67)—Ousut *talook—Previous claim by right of purchase—Subsequent repudiation of claim—*Onus.—Where a defendant pleaded that the *ousut* talook in dispute, which they had hitherto claimed as their purchase for valuable consideration, was a mere fiction, the *onus probandi* was held to lie on them. JUGOBUNDHOO SEIN v. BHUGWAN CHUNDER DOSS, **17 W.R. 15.**

(68)—*Compromise—Exchange of lands*—Onus probandi.—Where a deed of compromise clearly showed that the lands granted to plaintiff were in exchange for the alleged *khoodkast* and *khamut* lands of her father, *held* that the *onus probandi* was not on the defendants as to the fact of the exchange, but on the plaintiff to start her case by some *prima facie* evidence. DHUNRAJ ROY v. MUSSAMAT CHUNDRABUTTY KOOER, **17 W.R. 559.**

(69)—*Suit to establish title to and for possession of* rajbaree jute—*Burden of proof on plaintiff.*—In a suit to establish title to, and for possession of, a *jote*, which was admittedly the *rajbaree jote* of defendant's ancestor, *held* that, the real point being how this *jote* came into the plaintiff's hands, the *onus* was on the plaintiff to show that the defendant's ancestor, or his heir relinquished the *jote* to the zamindar and that the zamindar had authority to puttun this *jote* to the plaintiff. MUSSAMUT MISREE BEWA v. RAM DOOLAL BISWAS, **18 W.R. 192**

(70)—*Execution sale of* lakheraj *land—Purchase—Stranger claiming* mourasi *tenure in such land*—Onus.—Where a party purchases at an execution-sale the rights and interests of a *lakherajdar*, and another claims a *mourasi* tenure in the property so purchased, the claimant should prove this *mokurari* title. If however, the defendant-claimant and his predecessors have been collecting rents from the ryots for a considerable number of years, and the jumma payable to the *lakherajdar* has, during all that time, remained unchanged, the Court may presume that the defendant has the *mourasi* right he claims, although he may not be able to produce his pottah to that effect. JUGGESSUR MOOKERJEE v. ANNUND MOYEE DOSSEE, **19 W R. 286.**

(71)—*Suit for possession—Plea of* lakheraj—*—Burden of proof.*—Where in a suit to recover possession of rent-paying land, as per defined boundaries, the defence is that the land is *lakhiraj*, the defendant's property, independently of the plaintiff, the plaintiff should not merely prove that the defendant's

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

plea of lakhiraj is not made out: but he must also show that he is owner of the particular land he seeks to recover. KHORSHED ALI v. BABOO DHOONDHAREE SINGH, **20 W.R. 457.**

(72)—*Suit for* khas *possession—Allegation of defendant holding under expired lease*—Onus *on plaintiff.*—In a suit by a landlord to obtain *khas* possession, where plaintiff's case is that defendant is holding under a lease the term of which has expired, the plaintiff has the burden on him of proving the determination of the tenure by efflux of time. RAM SEBUK DEY v. CHUNDEE CHURN DEY, **22 W. R. 510.**

(73)—*Possession Suit for—Title set up against defendant's zamindari rights*—Onus *on defendant*—In a suit for khas possession against a lessee who sets up a title to defeat plaintiff's admitted right as zemindar, the defendant is bound to prove the title so set up. BEHAREE SAHOO v. PURYAG MAHTOON **23 W.R 291,** [F., 11 C.L.R. 476, 15 C. 89; *R.*, 9 C.W.N, 144.]

(74)—*Act VIII of 1869, B.C., s. 27*—Onus *as to ejectment from portion of tenure.*—Where a suit is brought under Act VIII (B.C.) of 1869, s. 27, it is for plaintiff to prove that the land is a part of his tenure, and that he has been illegally ejected. L.G. CROWDY v. RAM BHURO SEE CHOWDHRY, **23 W.R. 883.**

(75)—*Suit for proprietary right—Admission by tenant during settlement*—Onus—*S 109, Evidence Act.*—Where a suit for proprietary possession of land, the plaintiffs were found to have been recorded in the settlement paper in 1859 as proprietors of the land, and the defendants to have then admitted in writing that the plaintiffs were the proprietors and that they themselves were their tenants-at-will liable to pay *malikana, held* that it was incumbent on the defendant to prove that the relationship of landlord and tenant had ceased to exist at such a time as would bar the suit under s. 109, I.E. Act. ATTAR SINGH v. RAM DITTA, **110 P.R. 1881.**

(76)—*S. 23, cl. 5, Act X of 1859—Illegal ejectment only question for decision*—Onus *on plaintiff.*—In a suit under cl. 5, s. 23, Act X of 1859, the only question for adjudication is that of illegal ejectment; the *onus* being on the plaintiff. ASGUR v. GOLUCK CHUNDER CHOWDRY, **8 W.R. 383.**

(77)—*Suit for possession—Plaintiff holding over term of lease and raising crop—Defendant appropriating crop on ground of alluvion*—Onus.—In a suit to recover possession, where plaintiff has held over the term of his lease and raised a crop which is appropriated by defendant (adjacent tenant), on the ground that the disputed land is his alluvion, the burden of proving that the land held by the plaintiff was removed from the control of the owner of the estate by circumstances which brought it under the

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

defendant tenant's control lay on the defendants (tenant and zamindar). HEMA PANDEY v. GUYADHUR ROY, **24 W.R. 108.**

(78)—*Suit to set aside settlement and recover* khas *possession—Validity of settlement proceedings*—Onus *of proof.*—Where the plaintiffs alleged that the suit lands were in the possession of the defendants as *chakran* lands, that the service in respect of which the lands had been granted had determined, and that they therefore became entitled to *khas* possession, the *Onus* would lie on the defendants to substantiate the validity and propriety of the settlement proceedings upon which they relied. NADIAR CHAND SINGH v. CHUNDER SIKKUR SADHU, **15 C. 763.**

(79)—*Landlord and tenant—Rent, rate of*—Onus—*Suit for damages for illegal distraint.*—In a suit to recover damages on the ground that the plaintiff's landlords, the defendants, had distrained his paddy alleging higher jummas, the *onus* is on the plaintiff to prove the annual rent payable by him. CHUNDER KANT MUKERJEE v. HEM LAL MONDAL, **1 C.W.N. 463.**

(80)—*Suit for enhancement of rent—Evidence to be adduced by plaintiff.*—In a suit for enhancement of rent, it is incumbent on the plaintiff to give some evidence or data upon which the Court could decide what is a fair and equitable rate of rent. MR. JAMES HILLS v. JENDAR MUNDUL, **1 W.R. 3.**

(81)—*Suit for enhancement of rent*—Onus—*Waste lands—Assessment—Occupancy-right.*—Where plaintiff sues to recover arrears of rent at enhanced rates, the *onus* of proving both the quantity and the rate is on him, and not on the defendant. Where rates are to be fixed by a Court of Justice, the plaintiff is not entitled to interest and damages on the ground that the defendant did not pay the enhanced rates demanded by the plaintiff. No assessment can be levied on waste lands, and lands not brought under cultivation are not liable to full rents or any rents at all. The plaintiff having treated the defendant as a tenant having a right of occupancy, and having allowed the first Court to proceed to the determination of fair and equitable rents without raising any question regarding the right of occupancy, cannot, in special appeal, claim the full rates mentioned in his notice, merely because the lower appellate Court has expressed an opinion that the defendant has no right of occupancy. Besides, even in the case of suits for assessment against ryots without rights of occupancy, Courts can only fix the rents according to the rules provided for determining fair and equitable rents. GOLAM ALI v. BABOO GOPAL LALL TAGORE, **1 W R. 56.**

(82)—*Uniform payment of rent—Presumption of occupancy—How proper rates of rent to be fixed*—Onus.—In case of proof of payment of rent at a uniform rate for 20 years, it is to be presumed that the tenant has held at this rate

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

from the time of the Decennial Settlement, until the contrary is proved by the opposite party. The presumption would still arise if such a payment is proved, though the receipts produced may not be proved. The adoption of an average rate from different rates given by several witnesses is not a correct mode of fixing the proper rate. The *onus* of proving the proper rate is upon the plaintiff, and not upon the defendant; and where the enhanced rate is required to be fixed by a Court of Justice, interest or damages at 25 per cent. should not be awarded. SUMEERA KHATOON v. BABOO GOPAL LOLL TAGORE, **1 W.R. 58.** [*Cons.*, 21 W.R. 157.]

(83)—*Suit for enhancement of rent*—Onus probandi.—Where the landlord sues for enhancement of rent and the defendant pleads that the productive powers of the land have been increased by his own exertions, the *onus* of proving such allegations is on the defendant. NOBEEN KISHEN BOSE v. SHOFATOOLLAH, **1 W.R. 24.**

(84)—*Estate settled in perpetuity—Sale—Suit by purchaser—Enhancement of rent.*—In a suit for enhancement of rent by the purchaser of a moiety of an estate settled in perpetuity according to a *jammabundee*, many years after the settlement, the plaintiff must show that circumstances have occurred since the settlement which have tended to raise the value of the ryots' lands. RAM LOCHUN PAUL v. MUSSAMUT BROJO MOHINEE, **W.R. 1864, Act X, Rul. 118.**

(85)—*Suit for enhancement of rent—Defendant's plea of* mokurari *patta*—Onus, *on whom lies.*—Where plaintiff sues to enhance defendant's rent, on the ground that the defendant did not pay the rents paid by others in the neighbourhood for similar lands, and defendant denied his liability to pay such rents owing to his having *mokurari* pattas, it was clearly for defendant, first of all, to prove those pottas. It is not obligatory on plaintiff to admit or deny anything till defendant, on whom, in such a case as this, the burden of proof entirely falls, proves his allegations as to his pottahs PRAN NATH ROY CHOWDHRY v. MOHEROODDEEN AHMED, **6 W.R. Act X, Rul. 39.**

(86)—*Suit for enhancement of rent—Custom set up by defendants*—Onus *on whom lies.*—Plaintiff sued for enhancement of rent. Objection was taken by the tenants that rent had been assessed on lands covered by hedges and ditches, and forming boundaries between fields, and that, according to custom, such land was not liable to pay rent at all. *Held*, that the *onus* of proving the custom lay on the tenants. HAROO CHOWDHRY v. JOYESSUR NUNDEE, **6 W.R. Act X, Rul. 46.**

(87)—*Suit for enhancement of rent—Power of lower appellate Court.*—In such a suit, it is perfectly open to the lower appellate Court dealing with the facts of the case to say whether, taking the receipts which extend over

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

a number of years together and having regard to the fact that the receipts did not specify the years to which the amounts relate, the amounts paid in any particular year were partly for the rents of that year and partly for the arrears due in respect of previous years. In such a suit, the *onus* is clearly on the plaintiff. He must show that the defendant is holding lands in excess of what he is paying rent for, and in order to do that, he must show for what quantity of land the defendant is paying rent. SURJA KANTA ACHARJEE v. BANESHWAR SHAHA, **24 C. 251.**

(88)—*Enhancement of rent—Excess land—Plaintiff*, onus *on.*—In a suit for enhancement on the ground that defendant holds lands in excess of what he pays rent for, plaintiff must show that they are included in defendant's tenure, and that he pays rent for a smaller area. SHAIKH AHMED HOSSEIN v. MUSSAMUT BANDEE, **15 W R. 91.**

(89)—*Suit for enhancement—Defendant alleging protection—S. 16. Act X of 1859.*—In a suit for enhancement, where defendant alleges protection under s. 16, Act X of 1859, the onus lies on him and the plaintiff must rebut any presumption which the defendant may raise in his favour under that section. NUBO KRISTO MOJOOMDAR v. TARA MONEE, **12 W. R. 320.**

(90)—*Enhancement of rent— Presumption—*—Onus *of proof.*—In a suit for enhanced rent, the presumption of law established by 20 year's holding at a uniform rate is absolute and unqualified and cannot be got over by showing that the plaintiff did not obtain direct possession of the estate for many years and was for other reasons prevented from suing. It is for the plaintiff to show that the present rent has been varied or fixed at a period subsequent to the Decennial Settlement. DHUN SINGH v. CHUNDER KANT MOOKERJEE, **W.R. 1864, Act X, Rul, 25.**

(91)—*Suit for enhancement of rent—Variation of rent*—Onus *of proof.*—In a suit for enhancement of rent, the fact that sums (in respect of rents) were paid in the particular years less than the payments in other years is insufficient to entitle the plaintiff to enhance the rent or to affect the defendant's rights to hold his land at a fixed rent. The *onus* of explaining such variations lies on the defendant. HURRONATH ROY v. CHITTRAMONEY DOSSEE, **3 W.R. Act X, Rul. 122.**

(92)—*Suit for enhancement of rent*—Onus *of proof.*—In a suit for enhanced rent of a taluq which has existed as an ancient taluq, the only question being whether the rent is fixed or variable, *held*, that the *onus* is first on the defendant to prove uniform payment of rent by him for 20 years, and then on the plaintiff to prove that the rent has varied since the Permanent Settlement. The defendant is not bound to give specific proof of payment in each

***Burden of proof*—continued.**

——22.—Landlord and tenant—*continued.*

of the 20 years, but only such evidence as will satisfy the Judge that the rent has not been changed during 20 years. RASHMONEE DEBEA v. HUBRONATH BOY, **1 W.R. 280.**

(93)—*Enhancement—Part of land sought to be enhanced rent-free—Shifting of* onus.—Where *prima facie* a tenant holds part of the land sought to be enhanced as paying rent, and part as rent- free, the burden of proof is shifted from the tenant to the landlord. NEHAL CHUNDER MISTREE v. HUREE PRASHAD MANDUL, **8 W.R. 183.**

(94)—Onus—*Registration in zemindari* serishta—*Reg. VIII of 1793, s. 51.*—Lands, held at a fixed uniform rent anterior to the Decennial Settlement, on failure of evidence of payment of fluctuating rent by the zamindar, on whom the *onus probandi* lies, held to be a dependent talook within the meaning of s. 51, Bengal Reg. VIII of 1793. It is unnecessary, in order to bring a talook within the scope of that section, that it should be registered at the time of the Decennial Settlement. It is sufficient to show that the tenure existed, and was capable of being registered at the time of that Settlement. RADHIKA CHOWDRAIN v. BAMA SUNDARI DOSI. **4 B.L.R. P.C. 8= 13 W.R. P.C. 11= 13 M.I.A. 248=2 Suther. 293=2 Sar. 524.** [*R.*, 21 W.R. 439, 24 W.R. 146.]

(95)—*Suit for enhancement of rent—Plea of dependent taluk—Burden of proof.*—Where the defendant, in a suit for enhancement of rent, claims to hold the land as a dependent *taluk*, subject to the payment of a revenue fixed for ever, the *onus* lies upon the plaintiff (zemindar) to prove its inclusion in the zemindari, at the time of the Permanent Settlement. ASSANULLAH v. BUSSARAT ALI CHOWDHRY, **10 C. 920.**

(96)—*Suit for—Plea of defendant that certain plots never paid any rent*—Onus probandi.—Where a landlord sues for enhancement of rent, and is met by an allegation that certain plots of land never paid any rent at all, he is bound to start his case, and to prove that the land in question had, at some time or other, paid him rent. GUNGADHUR SINGH v. BIMOLA DOSSEE, **5 W.R. Act X, Rul. 37.**

(97)—*Suit for enhancement of rent—Plea of* lakheraj *holding by defendant*—Onus *on whom lies.*—Where the plaintiff sued for enhancement of rent and the defendant pleaded a *lakheraj* holding as to a portion of the land and put in several documents in support of it, *held* that, the defendant having put in *prima facie* evidence, the plaintiff was bound to prove that the disputed land paid rent in former years. SHEEB NARAIN ROY v. CHIDAM DOSS BYRAGEE, **6 W.R. Act X, Rul. 45.**

(98)—*Suit for enhancement of rent*—Lakheraj *title*—Onus *of proof.*—In a suit for enhancement, where the ryot admits a part of the land to be rent-paying and the remainder *lakheraj*, the zemindar must prove that any part of the land was not exempted from liability to enhancement. DHUM MONEE DEBEE v. SUTTOORGHUN SEAL, **6 W.R. Act X, Rul. 100.**

(99)—*Suit for enhancement of rent—Plea by defendant that part of the land is* mal—Onus *of proof—Limitation.*—Where plaintiff sued for enhancement of rent and was met by a plea from the defendant that part of the land was *mal* land, *held*, that the plaintiff must prove that he collected rents from his land as *mal* before he can call upon the defendant to prove his *lakheraj* title, and that plaintiff even then must sue, subject to the law of limitation. RAM COOMAR GHOSSAL v. DEBEE PERSHAD CHATTERJEE, **6 W.R. Act X, Rul. 87.**

(100)—*Rent, enhancement of* — Lakhiraj—*Burden of proof.*—If, in a suit for enhancement of rent, the defendant sets up that certain plots of land, the rent of which is sought to be enhanced, are *lakhiraj*, and therefore not liable to pay rent, the *onus* is not on the defendant to prove that the land is *lakhiraj* but on the plaintiff to prove that the land is *mal* or rent-paying. The Courts are accustomed to require some *prima facie* evidence, from defendants raising such defence, that they hold some *lakhiraj* lands. SRIDHAR NANDI v. BRAJA NATH KUNDU CHOWDRY, **2 B.L.R. A.C. 211=14 W.R. 286, Note.** [*R.*, 14 W.R. 285.]

(101)—*Suit for—Plea of* lakhiraj *title to portion of land by defendant—Proof.*—Some *prima facie* proof must be adduced to bar the claim of a plaintiff in a suit for enhancement of rent, where the defendant admits tenancy for one part of the claim and chooses simply to allege a rent-free holding for the other. BEEBEE ASHRUFOONISSA v. UMUNG MOHUN DEB ROY, **5 W.R. Act X, Rul. 48.**

(102) — *Suit for enhancement — Plaintiff alleging lands to be* mal—*Plea of* lakhiraj.—In a suit for enhancement, where plaintiff alleges a certain area to be *mal*, and defendant sets up that a portion of it is *lakheraj*, the burden was held to be on the plaintiff to show receipt of rent for disputed portion before getting a decree for rent for such portion. In a suit for enhancement, *quære*—is it sufficient that defendant's plea is a mere allegation of *lakheraj*, or must it be supported by *prima facie* evidence. MUN MOHUN DEY v. SHREE RAM ROY, **14 W.R. 285.**

(103)—*Suit for enhancement of rent—Burden of proof.*—in a suit for enhancement of rent where defendant gives *prima facie* proof of a rent-free title, the burden of proof lies on plaintiff to prove receipt of rent. HEERA RAM BHATTACHARJEE v. ASHRUF ALI. **9 W.R. 103.**

(104)—*Suit for enhancement of rent —Evidence*—Onus *of proof.*—Where plaintiff sued for enhancement of rent and the defendant adduced in evidence a decree in 1820 between the predecessor of the plaintiff and his predecessor to

***Burden of proof*—continued.**

—22.—Landlord and tenant—*continued.*

show that he and his predecessors-in-title had been holding at a rate which was fixed by a sannad prior to the date of the Permanent Settlement, *held*, that the burden of proving that that decree was not applicable to this particular holding lay on the plaintiff. BHOBOSOONDREE DEBIA v. GOUR KISHORE DUTT, **6 W R. Act X, Rul. 96.**

(105) —*Suit for enhancement*—Onus *on plaintiff to prove grounds.*—In a suit to recover rent at an enhanced rate, the plaintiff should prove excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of the produce. GOLAM ALI v. BABOO GOPAL LAL THAKOOR, **9 W.R. 65** [*F.*, 9 C. 505; *R.* 11 W.R. 31. 164; *Affirm.*, 15 B.L.R, 125, Note.]

(106)—*Landlord claiming increase of rent for increase of area—Burden of proof*—It is for the zemindar, who seeks for an enhancement of rent (or a settlement of rent) on excess lands very many years after the original settlement of the ryot, to show that the lands held by the royt are in excess of the lands originally let to him in consequence of some encroachment or some alluvion increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent, which by carelessness or neglect or some other reason he had hitherto lost. GOURI PATTRA v. REILY, **20 C. 579.** (*Rel. on*, 10 C.W.N. 46; *R.* 5 C.L.J 538; *D.*, 2 C. L.J. 125.]

(107)—*Land Acquisition Act (X of 1870)—Chance of enhanced rent—Burden of proof.*—The burden of proving the capitalized value of the chance of enhanced rent lies on the landlord. SHAMA PROSUNNO BOSE MOZUMDAR v. BRAPODA SUNDARI DASI, **28 C. 145.** [*F.*, 7 C.L.J. 284.]

(108)— *Evidence — Remission— Burden of proof.*—Where the defendant, in a suit for arrears of rent, alleges remission, the burden of proof lies on the defendant. BUNWARY LALL v. MR. J FORLONG, **9 W R. 239.**

(109)—*Suit for arrears of rent*—Onus.—The *onus*, in a suit for arrears of rent at an enhanced rate where the defendant set up that he had relinquished all the *mal* land in his occupation, and that the residue of the land in dispute was *lakhiraj*, was on the plaintiff to prove that the land for which he sued for enhanced rent was rent-paying, and not on the defendant to make good his defence. MOHAMED ASSAR ALI v. NASSIR MOHAMED, **3 B L R. A C 304.** (Marsh 523, 5 W.R. Act X, Rul. 48, 8 W.R. 183, 3 W.R. 178, *D.*)

(110)—*S. 14, Act X of 1859—Suit to contest enhancement notice*—Onus *on ryot.*—Where a ryot contests a notice of enhancement, under

***Burden of proof*—continued.**

——22.—Landlord and tenant—*continued.*

s. 14, Act X of 1859, the ryot has the burden of proof on him PRITHEE RAM CHOWDHRY ROY BAHADOOR v. CHIDAM CHUNDER SHAH, **8 W.R. 8.**

(111)—*Suit-land in geographical limits of leased estate—Mal nature of lands not proved.*—The mere fact of particular lands falling within the geographical limits of an estate which is leased, does not show that they are *mal* lands for which rent is paid. BISHNATH CHOWDHRY v. RADHA CHURN GANGOOLY, **20 W.R. 465.**

(112)—*Resumption of* lakheraj, *suit for*—Onus *of proving lakheraj before 1790.*—In a suit for resumption of lakheraj, the onus of proving existence of the *lakheraj*, before 1790 is on the defendant. OMESH CHUNDER ROY v. DUKHINA SOONDRY DEBIA, **W.R. F.B. 95.**

(113) — *Resumption of* Lakheraj *lands—Burden of proof, on whom lies—Default by defendant—Effect.*—In a suit to resume certain land held as *lakheraj* by defendant, but without any valid title, *held*, that the burden of proving the validity of his title lies on the defendant, and that, if the defendant does not appear, on proof of service of notice on him, a decree should pass in favour of the plaintiff. MR. B.C. ELLIAS v. TITHRARAM ROY, **1 W. R. 164.**

(114)—Lakheraj *land—Resumption and assessment*—Onus *of proof.*—Where the plaintiff (a Rajah) sued to resume and assess lands held by the defendants rent-free under an invalid title, the latter filed his *sannad* obtained from a former Rajah as evidence of his title to the lands in dispute. *Held*, that the *onus* of proving that that a *prima facie* good title to be invalid and bad lay on the plaintiff who alleged it. BEER CHUNDER JOORRAJ THAKOOR v. SHIBJOY THAKOOR, **W.R. 1864, 8.**

(115)—Lakheraj *lands*—Mal *lands—Resumption.*—In a suit for resumption on the allegation that defendants were in possession as invalid *Lakhiraj*, the burden of proving that the lands are *mal* would lie on plaintiff, only where he is the representative of an auction-purchaser. The principle in 8 B L.R. 566=14 M.I A. 152, *applied*. ARFUNNESSA v. PEARY MOHUN MOOKERJEE, **1 C. 378=25 W.R. 209.** [*R.*, 9 C. 813.]

(116)—*Onus of proof—Grant.*—Where, in a suit to have the rent assessed, the defendant pleaded, in bar to the jurisdiction of the Court, that the grant, under which the plaintiff originally claimed the lands, was made prior to 1790, it was *held* that the burden of proving the fact lay on the defendant under the provisions of the Evidence Act, as the objection to the jurisdiction of the Court was raised affirmatively by the above statement. HEERA LALL PRAMANICK v. BARIKUNNISSA BIBEE, **3 C 501=1 C.L R. 596.**

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

(117)—*Resumption of* lakhiraj *land, suit for* —Lakhirajdar *claiming under grant prior to 1st December 1790—Burden of proof—Rent-suit —Decree for kabuliat* —In a suit by a zemindar to resume land held as *lakhiraj*, if the *lakhirajdar* claims under a grant of date prior to the 1st of December, 1790, the *onus* is on him to prove it. If the *lakhirajdar* claims under a grant subsequent to that date, the zemindar is not entitled to a decree, until he has shown that the land claimed is part of his zemindaree and at one time was *mal* land. And in the latter case, the *lakhirajdar* is not put to proof of his title until the zemindar has established the fact of the land having once, at some time subsequent to 1st December, 1790, been rent-paying land. A suit for rent on the basis of a decree for a Kabuliat cannot succeed, unless it is proved that defendants were called on to give a Kabuliat and refused to do so MAHOMED AKTUR v. G. M. REILY, **24 W.R. 417.**

(118)—Lakhiraj *grants—Resumption of* lakhiraj *land*—Onus probandi.—Proof of having held land as *lakhiraj* since 1st December, 1790, *i.e.*, evidence of possession dating back to that date, will be a conclusive bar to a suit for resumption either by Government, or by a purchaser at a revenue-sale, or by any other person. A person seeking to resume *lakhiraj* land must give *prima facie* evidence to show the payment of rent for that land at some time since 1st December, 1790. The law relating to *lakhiraj* grants and the law of limitation applicable to their resumption and assessment, explained and discussed. KAYLASH BASHINY DASSEE v. GOCOOLMONI DOSSEE, **8 C.230= 10 C.L.R. 41,** (B.L.R. Sup. Vol. 162, B.L.R. Sup. Vol. 109, 14 I.A. 152=8 B.L.R. 566, *R.*) [*R.*, 9 C. 813.]

(119)—*Suit for resumption—Lands alleged to be* lakhiraj—Onus *of proof.*—On an allegation by the defendant that the lands sought to be resumed are *lakhiraj*, the *onus* of proving that the lands are *mal* lies primarily on the plaintiff; judgment would be for the defendant, if the plaintiff fails to make out a *prima facie* case, in determining which, however, the fact of the defendant being a tenant of the plaintiff's is to be taken into consideration. BACHARAM MUNDUL v. PEARY MOHUN BANERJEE, **9 C. 813=12 C.L.R. 475.** (8 B.L.R. 566=14 M. I.A. 153, 6 C. 663, 543, *Cited.*) [*F.*, 12 C. 182; *R.*, 4 C.L.J. 548; *D.*, 12 C.W.N. 168, Note.]

(120)—*Suit for resumption of lands—Defence that lands are* lakheraj—Onus *of proof.*—In a suit for resumption of lands, if the defendant alleges that the lands are *lakheraj*, the *onus* is on the plaintiff, in the first instance, to show that the lands are *mal*, and if he fails to make out a *prima facie* case, the suit should be dismissed. NARENDRANARAIN RAI v. BISHUN CHUNDRA DAS, **12 C. 182.** (9 C. 813, 6 C. 543, 6 C. 666, *Distd.*)

(121)—*Plea of* lakhiraj—*Burden of proof—Shifting of—Admission of plaintiff's title—Plea set up after suit.*— Where defendants plea

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

lakheraj, the rule as to *onus* may be altered according to circumstances, as where plaintiff's title as landlord has been admitted and the plea not set up until after the suit is brought. GOONOMONEE DOSSEE v. RAJAH BURRODAKANT ROY BAHADOOR, **13 W.R. 191.**

(122)—*Resumption of* lakheraj, *suit for—Proof of collection of* mal *rents—Rule inapplicable where* mal *rent only collected.*—The Full Bench ruling that, before a plaintiff can resume *lakheraj* lands, he must prove the collection of *mal* rents, is not applicable to a plaintiff who collected *mal* rents from the time the land could bear any. RAM SOONDUR CHUCKERBUTTY v. RAMESSUR ACHARJEE, **8 W.R. 434.**

(123)—*Resumption of lands—Reg. II of 1805, s. 2, cl. 2—Right of Government to institute proceedings before Revenue Court—Reg. II of 1819—Reg. XIX of 1793—Exclusion of lands as* lakhiraj, *no evidence in resumption-suit—Reg. XIV of 1825.*—The right of Government to institute proceedings by, or before, the Revenue Collector, under Reg. II of 1819, for the resumption of lands for the purpose of assessment to the public revenue, is barred by Reg. II of 1805, s. 2, cl. 2, after the lapse of 60 years from the cause of action. So *held* by the Judicial Committee of the Privy Council, on appeal from a decree made by the Special Commissioners upon a claim by Government, when *Mahoteran* lands were held as *Lakhiraj* by the *Raja of Burdwan* before the Company's accession to the *Dewanny* in 1765, and no claim had been made by Government to resume the lands for assessment till the year 1836. The exclusion of lands, as *lakhiraj*, from the Decennial and Permanent Settlement, is of no weight, *per se*, as evidence of exemption to resumption under Reg. XIX of 1793. The general presumption is in favour of the liability to assessment of land, and by Regs. XIX of 1793 and XIV of 1825, the *onus probandi* lies on a claimant to *lakhiraj* to establish his title to exemption, not by inference, but by positive proof by a grant to hold as *lakhiraj*, or by a proprietary right, prior to the grant of the *Dewanny* (12th of August, 1765) and that the possession was *bona fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at or since that time. MAHA RAJA DHEERAJ RAJA MAHATAB CHUND BAHADOOR v THE GOVERNMENT OF BENGAL, **4 M.I.A. 466.**

(124)—*Suit to resume invalid* lakhiraj—Onus probandi.—Where Government, as agent of a zemindar, sues to resume invalid *lakhiraj* land under 100 beegahs, the *onus* of proof of the land being *mal*, when so claimed, is on the zemindar. RAM LOCHAN SIRCAR v. DEENONATH PAL, **2 W.R. 279.**

(125)—*Suit to assess lands alleged to be illegally usurped by* lakherajdar—Onus *on plaintiffs.*—Where an ordinary zemindar sues to assess lands said to have been illegally usurped

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

or alienated by a *lakherajdar*, subsequent to the Permanent Settlement, the burden of proof is on the plaintiff. BEHAREE LAL ROY v. KALEE DOSS CHUNDER, 8 W.R. 451.

(126)—Lakheraj *land, assessment of—Suit by auction-purchaser*—Onus *of proof*.—Plaintiff, as auction-purchaser, sued to assess rent on certain lands, which the defendant alleged to be valid *lakheraj*, held as such from before the Decennial Settlement. *Held* that the *onus* of proving the special plea, *i.e.*, possession as *lakheraj* from the year 1790, lay on the ryot SHAM LAL GHOSE v. SEKUNDER KHAN, 3 W.R. 182. [*D.* 8 *Ap.*, 1 C. 378; *Ap.*, 5 W.R. 191.]

(127)—Lakheraj *holding*—Onus—*Limitation Act, 1859, s. 1, cl. 14.*—In a case instituted after Act XIV of 1859 came into operation, where plaintiff is an auction-purchaser at a sale for arrears of revenue coming under cl. 14, s. 1 of the Act, the *onus* of showing that the land has been held *lakhiraj* or rent-fee from the period of the Permanent Settlement is on the plaintiff and the suit must be brought within 12 years of the purchase. MR. A.J. FORBES v. SHEIKH MEAH JAN, 3 W.R. 69 [*Dsiappr.* 25 W.R. 209, 1 C. 378; *F.*, 3 W.R. 182.]

(128)—Lakheraj *land—Beng. Reg. XLI of 1795, s. 10.*—Where certain land apparently *lakhiraj* was represented in village papers as part of *mal* land and included within the boundary of the revenue paying *mehal held*, on the zemindar's suit for assessment of the land, that the *onus* of showing that the case came within s. 10, Regulation XLI of 1795, lay on the zemindar. The inclusion of the land in the boundary was not conclusive evidence, nor was it conclusive when the boundary had not been made judicially. The landlord proving it to be so, the plaintiff claiming rent-free possession would be required to prove his rent-free possession (peaceably and without fraud) for sixty years before he can get a decree. BABOO MOHABEER PERSHAD v. BABOO OAMRAO SINGH, 1 Agra 167.

(129)—*Rent-free land—Benares.*—In a suit for rent of land in the Province of Benares which was rent-free and recorded as such at the Revision of Settlement in 1840-41 and 1842, the zemindar must show that, if it was *lakhiraj* in 1197 Fasli, there has been a legal resumption and assessment by judicial award; or if *mal* in 1197 Fasli, he must prove legal resumption and actual levy of rents. The burden of proving this by direct and specific evidence lies on the zemindar. MOTEE LALL v. JANKI ROY, 3 Agra 364.

(130)—*Suit to have certain lands declared* mal—*Burden of proof.*—Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some of which at least are rent-paying, they ought, if they want to show that any of those lands are rent-free, to give some *prima facie* evidence of it, before they

Burden of proof—continued.

—22.—Landlord and tenant—*continued.*

can call upon the zemindar to prove that the whole or any part of the lands *mal*. AKBAR ALI v. BHEYEA LAL JHA, 6 C. 66=7. C.L.R. 497. (W. R. Sp. No. 15, 8 W.R. 183, 5 W.R. Act X Rul. 48, *F.*) [*F.*, 4 C.L J. 548; *D.*, 9 C. 813.]

(131)—*Suit for rent paying land—Suit by auction-purchaser for land alleged by him to be* mal.—In a suit by an auction-purchaser for the *khas* possession of land alleged to be *mal* land fraudulently alienated by the former zemindar as *lakhiraj*, the burden of proving that it to be *mal* was on the plaintiff. ANDREW v. LYON, 2 Hay 362.

(132)—*Suit for possession—Plea of rent-free title—Burden of proof.*—In a suit to recover possession of land within plaintiff's estate where defendant sets up a rent-free title, *held*, that the plaintiff was only bound to show that either he or his predecessor had received rent for the land at some time subsequent to the Perpetual Settlement, in which case the *onus* of establishing title falls on the defendant. RAM NARAIN SINGH v. BISTOO THAKOOR, 15 W.R. 299.

(133)—*Suit for possession of resumed lands—Resumption Law if contemplates ejectment or assessment—Regs. II of 1819 and III of 1828.*—What plaintiff is required to prove in a suit for possession of resumed lands, in which he contends that the resumption laws contemplate assessment, and not ejectment, it is incumbent on the plaintiff to prove that he had formally applied for a settlement of the lands, but had been refused the same. KHAJA ABDOOL GANNI v. THE COMMISSIONER OF THE SUNDERBUNS, 2 W.R. 239.

(134)—*Suit for land as part of* putnee—*Defendant alleging it to be part of resumed jote land—Land whether* mal *or* lekhiraj—Onus.—Where plaintiff claims land as belonging to his putnee, and defendant alleges that it forms part of the resumed land of a *jote* for which he has obtained a decree in a resumption-suit; and the question at issue is whether the land is *mal* as beyond the limits of the decree, or *lakheraj* as included in the chittahs according to which possession was given to defendant in execution. The *onus* was held to lie on the defendant. SREEMUTTEE DOSSEE v. RAM NIDHEE KOONDOO, 16 W.R. 183.

(135)—*Purchaser at revenue sale—Withdrawal of suit for arrears of rent—Suit for ejectment from defendant's homestead—Assessment and* khas *possession.*—Where the purchaser of an estate at a sale for arrears of revenue, after withdrawing a suit for arrears of rent, sues to eject the defendant from a piece of land on which his homestead was, *i.e.*, to declare the land liable to assessment and to obtain *khas* possession, held that the *onus* of proving the land to be *mal* and of receipt of rent by him and his predecessors lay on the plaintiff. BISSAMBHUR BANERJEE v. KOYLASH CHUNDER BOSE, 23 W.R. 388.

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

(136)—*Suit for establishing* lakheraj *title to land*—Onus probandi.—Where a plaintiff comes into Court to prove a *lakheraj* title, no proof of possession for years (unless it be carried beyond 1790) as apparent *lakheraj* can excuse him from proving his title. RAM JEEBUN CHUCKERBUTTY v. PERSHAD SHAR, **7 W.R 458**.

(137)—*Suit for possession of* lakhiraj *land*—*Beng. Reg. XIX of 1793, s. 10.*—In a suit to recover possession of land from which the plaintiff had been ousted by the defendant under s. 10, Reg. XIX of 1793, on the ground that it was an invalid *lakhiraj* created after 1st December, 1790, the zemindar must prove that the *lakhiraj* was created subsequently to that date, and it was not for the *lakhirajdar* to prove that the *lakhiraj* was created prior to that date. MUN MOHINE DOSSEE v. JOYKISSEN MOOKERJEE. **W.R. F.B. 174**. *See also*, PREM SHEWUK DOSS v. ISHREE PERSHAD **2 W.R. 303**; TAREENEEPERSHAD GHOSE v. KUL LEECHURN GHOSE, **Marsh. 215=2 Hay 90**.

(138)—*Reg. XII of 1793, s. 10—Ousting of* lakherajdar—*Condition for exercise of right.*—Where a zemindar, under the provisions of s. 10, Reg. XIX of 1793, ousts a party long in possession as a *lakhirajdar*, such zemindar should prove his right to exercise that power before the *lakhirajdar* before the latter is required to prove his title to hold the land as a valid rent-free grant. MOHUNT PREM SHEWUK DOSS v. ISSUREE PERSHAD, **2 W.R. 303**.

(139)—*Purchaser at sale in execution of a decree.*—The *onus* of proving that a tenure is *lakhiraj* is not obviated by the circumstance that the person alleging that it is such, purchased the tenure as *lakhiraj* at a sale in execution of a decree. LALLA SHEEBLALL v. CHOLAM NUBBEE, **Marsh 235=2 Hay 23**.

(140)—*Validity of* lakhiraj *tenure.*—In a suit to recover possession of land from which the plaintiff claiming to be a *lakhirajdar* has been forcibly evicted by the land-holder, the plaintiff is not entitled to a decree for possession, unless he can show a *prima facie* case of *lakhiraj* tenure. *Semble* :—If he show such *prima facie* case, the Court will give a decree for possession and leave the zemindar to dispute the existence or validity of the alleged *lakhiraj* tenure in a resumption suit. SRINAUTH LALL v. JUNMEYJOY MULLICK, **Marsh 550=2 Hay 649**.

(141)—*Suit to recover* lakhiraj *lands—Burden of proof.*—In a suit to recover lands alleged by plaintiff to be *lakhiraj*, where plaintiffs purchased the land as *lakheraj*, and were admittedly in possession for a very long time it was for defendant to prove that the *lakhiraj* title was invalid. MUNSARAM DASS KURMOKAR v. GRIDHAREE RAM DOSS, **10 W.R. 278**.

(142)—*Suit for possession of* lakhiraj *land*—*Title*—Onus *of proof.*—Where plaintiff sues for possession of alleged *lakhiraj* land, if the alleged *lakhirajdar* proves *possession* as purchaser

Burden of proof—continued.

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of alleged *lakheraj* lands, it is not for the Court to put upon him the burden of proving a *title*: but, if the zemindar wishes that point tried either in such a suit as this or in another suit, he (the zemindar) must accept the *onus* of proving that the *lakheraj* is held on an invalid title, and he must do so, moreover, by proving that he collected *mal* rents from the lands, and that he is not barred by the law of limitation. GOSSAIN SHEO SUHAYE GEER v. MOHADEO SUHAYE, **6 W.R. 294**.

(143)—*Sutt for recovery of* lakhiraj *land*—*Allegation of wrongful eviction—Plaintiff to prove prior* lakhiraj *possession.*—In a suit to recover possession of *lakhiraj* land on ground of wrongful eviction, plaintiff must prove previous possession as *lakhiraj*. JOY KISHEN MOOKERJEE v. PEAREE MOHUN DUTT, **8 W.R. 160**.

(144)—*Ryot holding under invalid* lakhiraj *evicted—Suit on anterior possession.*—A ryot who has held under an invalid *lakhiraj* and is turned out, cannot sue to recover on ground of anterior possession. SREEMUTHY WOOMA SOONDUREE THAKOORANEE v. KISHORE MOHUN BANERJEE, **8 W.R. 238**.

(145)—*Suit to declare that certain lands are* lakhiraj—*Burden of proof.*—Where plaintiffs sue for declaration that certain lands are *lakhiraj* on the ground that defendant obtained a decree in the Collector's Court against them for rent, *held* that plaintiffs should prove their allegation. HURRENDUR KISHORE BAHADOOR v. KEDARNATH MITTER, **10 W.R. 188**.

(146)—*Suit for confirmation of possession and declaration of* lakhiraj *right—Sale for arrears of Government revenue—Rent-free tenures.*—In a suit for confirmation of possession and declaration of *lakhiraj* right against purchasers at a sale for arrears of Government revenue, it is not necessary for the plaintiff to prove affirmatively that the land has been held rent free from the time of the Permanent Settlement. RAM CHURN LALL v. HATEE MAHTOON, **13 W.R. 247**.

(147)—*Exemption from Government assessment*—Lakhiraj *from time of Perpetual Settlement*—Land to be released from Government assessment must be shown to have existed as *lakhiraj* at the time of the Perpetual Settlement. ESHAN CHUNDER SHAHA v. HATIMOOZZUMAH KHONDKAR, **13 W.R. 334**.

(148)—*Suit for confirmation of possession.*—In a suit for confirmation of possession and for declaration of plaintiff's *lakheraj* and *mokurrari* title and for a declaration that plaintiff has a *lakheraj* and *mokurari* title the burden of proof is on him. HUREE NARAIN RAY v. DOORGA CHURN DEGHOORIAH, **17 W.R. 449**.

(149)—Lakhiraj Sannad—*Possession without payment of rent.*—The production of a *lakhiraj sannad* is not necessary to prove that land is

Burden of proof—continued.

——22,—Landlord and tenant—*continued.*

held rent-free : this may be legally established by long and uninterrupted possession without payment of rent. DHUNPUT SINGH v. RUSSOMOYEE CHOWDHRAIN, **10 W.R. 461.**

(150) — *Non payment of rent — Proof of exemption—Permissive possession not adverse—Limitation.*—Non-payment of rent is *prima facie* proof of *de facto* exemption protected by limitation. The Court should be satisfied by the party claiming rent that the remedy claimed is not affected by lapse of time, and that the land was held for some service due and rendered to the zemindar, or otherwise by the zemindar's permission. If the holding were merely permissive, it could not prejudice the zemindar's right. ALI BUX v. MUSMAT ROOP KOOER, **2 N.W.P. 106.**

(151)—*Suit for resumption of land—Burden of proof.*—A plaintiff in a suit for resumption or assessment of land as part of *mal* zemindari for assessment, is bound in the first instance to prove a *prima facie* case—(1) of the payment of rent since 1790, or (2) that the land formed part of the *mal* assets of the estate at the Decennial Settlement. When such a *prima facie* case is made out, the *onus probandi* is shifted on the defendant, who, to exempt himself from assessment, must show that his tenure existed rent-free before the first December, 1790. HURIHAR MUKHOPADYA v. MADAB CHANDRA BABU, NABA KRISHNA MUKERJEE v. KAILAS CHANDRA BHATTACHARJEE, **8 B.L.R. 566, P.C. = 14 M.I.A. 152 = 20 W.R. 459 = 2 Sar. 713 = 2 Suther. 484.** [*F.*, 20 W.R. 465, 24 W.R. 447, 8 C. 230 = 10 C.L.R. 41, 9 C. 813 = 12 C.L.R. 475 = 9 C. 313, 12 C. 182, 10 C.W.N. 434 ; *Appl.* 1 C. 378 = 25 W.R. 209 ; *Discussed*, 3 C.W.N. 763 ; *Cons.*, 9 C.L.J. 119 = 35 C. 931; *R.*, 8 C.L.J. 177 ; *D.*, 4 C.L.J. 548.]

(152)—*Right of tenant to dig a tank on his land.*—In a suit by a zemindar alleging that the defendant, his tenant, had dug a tank on his land, and thereby done him damage by converting the land from its original state where the conversion is admitted by the defendant, but his defence is that he had a right to convert it, the *onus* is on the defendant to show his right to dig the tank. In the absence of clear proof of the nature of his tenure, he should at least show that the digging the tank is a fair and reasonable use of the land, and one which will not be to the detriment of the zemindar. TARINICHARAN BOSE v. DEB NARAYAN MISTRI, **8 B.L.R. App. 69.**

(153)—Khas *possession, Suit for—Plaintiff's title as patnidar admitted—Defendant to prove tenancy—Burden of proof—Land in suit contiguous to holding of defendant—Shifting of* onus. —The plaintiff's title as patnidar being admitted, the defendant cannot resist plaintiff's claim for *khas* possession, unless he can show that he has a tenancy which will entitle him to retain possession of the lands. (9 C.W.N. 144, *Rel. on.*) The mere fact that the defendant holds some land as tenant under the plaintiff is not

Burden of proof—continued.

——22.—Landlord and tenant—*continued.*

sufficient to throw upon the plaintiff the burden of showing that, in respect of any other land which the defendant may be found to be in possession of, he has no right as a tenant. The burden of proof lies upon the defendant. (20 W.R. 421, 11 C.L.R. 476, 12 C.L.J. 376, 8 Ind. Cas. 78. *Rel. on.*) Where the lands sought to be recovered are admitted by the plaintiff to be contiguous to the holding of the defendants, or where they have come to the possession of the defendants by encroachment, the *onus* is upon the plaintiff to prove that the lands in suit are outside the holding of the defendants. GOBINI DEBI v. LOKENATH, **11 Ind. Cas. 696.** (12 C.L.R. 457, 3 C.W.N. 763, *R.*)

See BEN. ACT VIII OF 1885, ss. 7 188, 26 C. 832.

See MAD. ACT VIII OF 1865, s. 12, 16 M. 271.

See U.P. ACT XVIII OF 1873, ss. 3 (4) (*a*), 7, 6 A. 286 = A.W.N. 1884, 77.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 5 C. 949 = 6 C.L.R. 260.

See EJECTMENT, SUIT FOR, 3 M.L.J. 222.

See ENHANCEMENT OF RENT—GENERAL, 5 B.L.R. App. 44 = 13 W.R. 462.

See ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 6 B.L.R. App. 122 = 15 W.R. 109.

See ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, 1 B.L.R. F.B. 25 = 10 W.R. F.B. 33, 6 C. 543 = 8 C.L.R. 7.

See LAMBARDAR, A.W.N. 1892, 72.

Suit in ejectment—Tenant in possession of *sir* land—Burden of proof of facts entitling protection from ejectment—*See* LANDLORD AND TENANT—EJECTMENT, 1 N.L.R. 32.

See LANDLORD AND TENANT—EJECTMENT, 2 C.L.R. 209.

See LANDLORD AND TENANT—NATURE OF TENANCY, L.B.R. 1872—1892, 427.

See LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 9 B. 419, 4 C. 314 = 3 C.L.R. 119.

See LANDLORD AND TENANT—PROPERTY IN TREES ETC., ON LEASED PREMISES, 13 A. 571 = A.W.N. 1891, 107, 21 A. 297 = A.W.N. 1899, 72, 23 C. 854.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 16 C. 223 = 16 I.A. 6 P.C.

See LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 5 C.W.N. 880.

The—is on the plaintiff, in the first instance, in a suit by a landlord for possession of land on the ground that it is *mal* and not *lakhiraj* —*See* LANDLORD AND TENANT—MISCELLANEOUS, 10 C.W.N. 434.

Burden of proof—continued.

——22.—Landlord and tenant—*concluded.*

Tenant in possession of some land of zamindars—Land not contiguous to holding—Encroachment— *Onus* — *See* LANDLORD AND TENANT—MISCELLANEOUS, 12 C.L J. 376= 8 Ind. Cas. 785.

See LANDLORD AND TENANT—MISCELLANEOUS. 9 Ind. Cas. 2.

See PATNI TENURE. 6 W.R. 25.

See RELINQUISHMENT OF TENURE, 7 B.L R, App. 11=15 W.R. 454.

Right of occupancy — Long possession—Burden of proof—Landlord and tenant—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 11 M. 77.

See RIGHT OF SUIT—POSSESSION, SUIT FOR, 12 C. 24.

Zuri-peshgi lease—Assertion of tenant-right on expiry of lease—Onus probandi—*See* ZURI-PESHGI-LEASE, 16 C.P.L R. 49.

——23.—Legitimacy.

See EVIDENCE ACT, 1872, s. 112.

(1)—*Evidence Act (I of 1872.) s. 112—Legitimacy contested*—Onus.— Where a person claims under s. 112 of the Evidence Act, to be the son of a deceased, he must prove that he was born within 280 days after the death of his father; the burden of proving the non-access of the deceased and his wife lies upon him who impugns the legitimacy. NARANDRA NATH v. RAM GOVIND, **4 Bom L.R. 243.**

(2)—Where a person is born 223 days after the death of his father, the burden of proof that he is not the son of his father lies on those who contest his legitimacy. TIRLOK NATH *v.* LUCHMIN KUNWARI, **5 Bom.L.R. 474.**

(3)—It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage. In such cases no certain inference can be drawn from the evidence as to the conduct of relations and friends. THAKUR AMJAL ALIKHAN v. NAWAB ALI KHAN, **9 Bom.L.R. 264=5 C.L.J. 1=17 M.L J. 56.**

——24.—Limitation and Adverse Possession.

See LIMITATION ACT, 1908, arts. 142 to 144.

(1)—*Former suit for rent—Subsequent suit for possession—Jurisdiction—Limitation*—Onus *of proof.*—A suit for possession is not excluded from the jurisdiction of a Civil Court, because a case of rent of the same lands may have been before the Revenue authorities under Act X of 1859. On a plea of limitation by the defendant, the *onus* of proof is on the plaintiff to show that he has a right to come into Court. BROJENDRO KOOMAR ROY CHOWDHRY v. RADHA GOBINDO SHAH, **1 W.R. 235.**

Burden of proof—continued.

——24.—Limitation and Adverse Possession—*continued.*

(2)—*Suit to reverse award by Survey Authorities—Limitation*—Onus *of proof.*—Where a plaintiff sued to reverse an award of the Survey Department more than three years after it was passed and the defendant specially urged that the suit was not in time, *held* that it was for the plaintiff to remove the bar to his suit. KUMOLA DASSEE v. SYED AZMUR ALI, **7 W. R. 13.**

(3)—*Title—Limitation*—A defendant setting up title and limitation may succeed on limitation, even if he cannot prove title; the burden of proof that he is within time lies on the plaintiff. NOBOKISHORE DEY v. RAMKISHEN MOHURIR. **3 W.R. 131**, [*Expl.*, 11 W.R. 357; R., 12 W.R. 44. 11 B. 469.]

(4)—*Limitation—Suit for possession as heir.*—In a suit to recover possession of lands as heir, where limitation is pleaded, plaintiff must prove his possession within 12 years prior to suit. BHILOO MUNDUL v. MOTTEE LALL GHOSE MUNDUL, **9 W. R. 251.**

(5) *Suit for resumption of* lakhiraj *land—Plea of limitation and twelve years possession—Cause of action*—Onus *of prcof.*—In a suit for resumption of *lakhiraj* land in which defendants (*inter alia*) pleaded limitation, alleging that they have been in possession more than twelve years without acknowledging plaintiff as landlord, and both the Lower Courts decree the claim, holding that plaintiff's cause of action arose on the date of a resumption decree obtained by him against the third party: *Held* that the decision is erroneous in law, as the resumption decree does not give plaintiff a cause of action against the present defendants; and it is for him to show that his claim is not barred. SHAIKH GHOGOOLEE v. SHAIKH MUZHUR HOSSEIN, **24 W.R. 389.**

(6)—*Suit in ejectment—Burden of proof.*—Decrees were made in the year 1816, in suits respecting boundaries of certain mouzahs in two zemindaries, and the boundary line determined. In 1845, a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of the Mouzahs, which land, it was admitted by the plaintiff, the defendants had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the defendants; and, secondly, that the plaintiff, or those under whom he claimed, had been in possession; for upwards of twelve years, and that the cause of action was, consequently, barred by Ben. Reg. III of 1793, s. 16. In such circumstances it was held that the issue was wholly independent of the question of boundary. *Held*, further, that, as the plaintiff sought to disturb the possession of the defendants, admitted by him to have existed for eleven years, but which the defendants alleged was a much longer period, the *onus probandi* was upon the plaintiff to remove the bar to the action by Ben. Reg. III

Burden of proof—continued.

——24.—Limitation and Adverse Possession —*continued.*

of 1793, s. 16. by satisfactory proof that the cause of action accrued to him on a dispossession. twelve years before the commencement of the suit, and that he, or some person through whom he claimed. was in possession during that period ; and that no proof of anterior title in his favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on to the defendants by compelling them to prove the time and manner of possession. Although the evidence of witness for the defendants as to possession is of no better character than that adduced by the plaintiff as to dispossession, yet, it lies on the plaintiff to make out his case ; and, as the probabilities of the case in this instance were against dispossession, it was held by the Judicial Committee, affirming the judgment of the Sudder Dewanny Adawlut, that the plaintiff had failed to prove the dispossession of the defendants, which was necessary to maintain the suit. MAHARAJAH KOOWUR BABOO NITRASUR SINGH. v. BABOO NUND LOLL SINGH, 1 **W.R.P.C. 51=8 M.I.A. 199= Suther, 420=1 Sar. 744.**

(7)—*Suit for possession—Admission of dispossession more than twelve years before suit*—Onus *of proving possession within period of limitation.*—When a suit for possession is instituted more than 10 years after plaintiff had been dispossessed. the burden of proving that he, or some person through whom he claims was in possession at some time within twelve years. NAWAB NAZIR SIDHEE NUZEER ALI KHAN BAHADOOR v. WOOMESH CHUNDER MITTER, **2 W.R. 75.**

(8)—*Possessory suit—Plea of limitation—Burden of proof.*—When defendant in possession pleads limitation as against a party suing for the same, it is necessary for the plaintiff to prove that he has been in possession of the property sued for within twelve years prior to the date of suit, independently of the date of dispossession which he may mention in his plaint. MIRZA MAHOMED HOSSEIN v. SURAHUTOONISSA KHANUM, **2 W.R. 88.**

(9)—*Possessory suit—Plea of limitation—Chief issue for trial.* — When limitation is pleaded in a suit for possession, it should form the first issue to be decided. KEDARNATH ACHARJEE v. BHUGWAN CHUNDER NUNDEE, **2 W R. 153.**

(10)—*Possessory suit—Dispossession—Burden of proof.*—In a suit to recover possession where plaintiff alleges that he was in possession, and was forcibly and wrongfully dispossessed, the plaintiff is bound to prove his case before the defendants can be called on to prove theirs. GOOROODOSS ROY v. HURONATH ROY, **2 W. R. 245.**

(11)—*Suit for possession*—Onus *of proof—Cause of action.*—Where plaintiff sues for possession alleging dispossession by the defendant, *held*, that the *onus* lay on the plaintiff to prove satisfactorily that the cause of action

Burden of proof—continued.

——24.—Limitation and Adverse Possession —*continued.*

accrued to him on a dispossession within 12 years of the commencement of suit. JUGODUMBA CHOWDHRAIN v. RAM CHUNDER DEO BUKSHEE, **6 W.R. 327.**

(12)—*Suit for possession—Plea of adverse possession—Assertion by plaintiff of permissive occupation*—Onus—*S. 110, Evidence Act.*—Where, in a suit for the possession of a house, it is found that the defendant has been in adverse possession of the same for more than 20 years alleging that, though the house was originally the plaintiff's, he (defendant) acquired it by exchange, and the plaintiff asserts that the possession of the defendant was only permissive the *onus* according to s. 110 of the Evidence Act, lies on him whoasserts that the possession was only permissive. NIHAL SINGH v. JIWANDA. **116 P.R. 1888.**

(13)—*Suit for redemption—Proof of title—Limitation*—Onus.—In a suit for redemption by the plaintiffs, alleging that the father had mortgaged the property to the defendants' grandfather, the defendants pleaded that it was mortgaged by the plainsiffs' grandfather 60 years ago and that, hence, the suit was barred by limitation. It was held that the burden first lay on the plaintiffs to make out a *prima facie* case of a subsisting title before the defendants could be called upon to prove their defence. RALIA RAM v. RADHA RAM, **88 P.R. 1893.** *See also*, AFLATOON v. JAI RAM, **53 P.R. 1893,** RAM CHAND v. BHANA MAL. **71 P.R. 1900. (11 A. 438 *R.*)** [*F.*, 58 P.R. 1905=59 P.L.R. 1905.]

(14)—*Redemption—Suit—Plea of limitation* —Onus.—In a suit for redemption of property mortgaged many years ago, in which the plea of limitation is set up, the plaintiffs must first prove that the right to redeem still subsists. GHULAM HASSAN v. HAJI MUHAMMAD, **53 P. R. 1894.** [*R.*, 8 P.R. 1906.]

(15)—*Possession by defendants for more than 12 years—Plaintiff to prove that he was not barred.*—Where, notwithstanding the possession of the defendants for more than 12 years, the plaintiff contended that the suit was not barred by limitation, it was for such plaintiff to prove such facts as entitled him to an extension of the ordinary period. ANANT RAM RAJPUT v. TAKATSINGH, **4 C.P.L.R. 57.** [*F.*, 3 N.L.R. 182, 5 N.L.R. 103.]

(16)—*Plea of limitation—Plaintiff to rebut—Auction-purchaser— Limitation.*—Where the plea of limitation is raised to a suit, it is for the plaintiff to set it aside. Where a decree-holder after purchase at an execution-sale of his judgment-debtor's rights and interests, sues for a declaration of title and for possession, and defendant pleads that neither plaintiff nor his judgment debtor was in possession within 12 years prior to the suit, the plea is not rebutted by the fact of the suit having been instituted within twelve years from the date of the auction-purchase. AHMED ALI *alias* AMANUT ALI v. HAREE CHAND, **21 W. R. 282.**

Burden of proof—continued.

——24.—Limitation and Adverse Possession —*continued.*

(17)—*Possessory suit—Ouster—Burden of proving possession before limitation began—Settlement proceedings—Evidence.*—In suits for recovery of possession on the ground of ouster, it is the duty of the plaintiff to prove that he has been in possession at some time within twelve years prior to suit when limitation is raised and adverse possession pleaded against his right of action. The proceedings of a Settlement Amin are no evidence against a person not a party to those proceedings. LALL SINGH v. BABOO MODHOO SOODUN ROY, **8 W.R. 426.**

(18)—*Limitation*— Onus— *Oral evidence.*—In deciding a plea of limitation, the plaintiff should prove his possession within twelve years of date of suit and it is not for the defendant to prove adverse possession for twelve years. Oral evidence is alone enough to prove possession. DINABUNDHOO SUHAYE v. MR. JAMES FURLONG **9 W.R. 155.**

(19)—*Possessory suit—Plea of limitation—Plaintiff's failure to prove possession within twelve years—Effect.*—In a suit for possession where limitation was pleaded, and there was evidence on both sides of the question, the circumstance that the plaintiff failed to prove possession within twelve years was held to be sufficient to dispose of the suit upon that issue. HUREE MOHUN DASS v. KOTESSUR GOKE, **24 W.R. 318.**

(20)—*Suit for possession—Burden of proof as to limitation.*—In a suit for possession where the bar of limitation is set up by the defendant in possession, the plaintiff was held to be under an obligation to remove such bar, although the defendant's possession be not admitted to have existed for eleven years. BUSSEROONISSA CHOWDHRAIN v. RAJAH LEELANUND SINGH. **14 W.R. 135.**

(21)—*Suit for possession—Adverse possession by defendant—Contest with Government on resumption question*—Onus *on plaintiff to rebut statutory bar.*—Where defendant admits adverse possession for upwards of 11 years, and plaintiff's cause of action having arisen at the close of a contest with Government which claimed to resume the land, defendant alleges that he knew nothing of the contest, and that he has held possession for 27 years, *held* that that the plaintiff was bound to remove the statutory bar pleaded by defendant by showing possession on his behalf within twelve years before suit. SYUD AMEER ALI v. MAHARANEE INDUR JEET KOOER, **15 W.R. 43.** (1 W.R. P.C. 51, *F.*) [*R.*, 6 C. 725.]

(22)—*Burden of proof—Limitation—Adverse possession.*—Where the plaintiff has established his title to land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant is upon the latter.

Burden of proof—continued.

——24.—Limitation and Adverse Possession —*continued.*

(Judgment of the High Court at Fort William, *affirmed*). RADHA GOBIND ROY SAHEB v. INGLIS, **7 C.L.R. 364, P.C. = 3 Suth. P.C. 809.** [*F.*, 5 A. 345; *Appl.*, 6 C. 725; *D.*, 9 C. 802 = 12 C.L.R. 337, 9 C. 744 = 12 C.L.R. 257; *R.*, 7 C. 225, 24 C. 256, 26 C. 114, 35 C. 961 = 12 C.W.N. 127 = 6 C.L.J. 735; *D.*, 6 B. 508, 9 M. 175.]

(23)—*Limitation—Adverse possession—Burden of proof.*—It is for the person who asserts that the plaintiff's claim to a certain share in landed estate was barred by limitation to show that his possession was, for twelve years prior to the institution of the suit, adverse to the plaintiff. IZZATUNNISSA v. MUHAMMAD TAQI, **A.W.N. 1881. 90.**

(24)—*Joint ancestral property—Limitation.*—*Held* that the admission of certain property as being joint ancestral throws the burden of proving exclusive and adverse possession beyond limitation upon the sharer refusing to admit other heirs. DABEE SUHAI v. SHEO DASS RAI, **1 Agra 285.**

(25)—*Plea of possession.*—Onus probandi.—Where a defendant pleaded partly title and partly purchase, but denied that the plaintiff's father or ancestor had been in possession of any portion of the land in dispute for a very long period, and asserted his own possession on ancient titles, *held*, that the *onus* of proving possession within the period of limitation lay on the plaintiff. ISHUR CHUNDER BISWAS v. BISSUMBHUR BISWAS, **W.R. 1864, 507.**

(26)—*Suit for possession*—Onus *of proof—Limitation.*—In a suit for possession, the defendant being admittedly in possession, and claiming to be so under a bill of sale dated 45 years ago, the plaintiff is bound to displace the defendant's *prima facie* title by showing that he has been in possession within 12 years prior to the suit. KEDARNATH MOOKERJEE v. MOHESH CHUNDER PAULIT, **1 W.R. 67.**

(27)—*Right of plaintiff by inheritance and prescription contested—Plea of proprietorship—Relation of landlord and tenants—Permissive occupation becoming adverse.*—The plaintiff claimed certain property by right of inheritance and prescription, but the defendant pleaded a title of proprietorship. The evidence showed that the relation of tenancy originally existed between the defendant and the plaintiff's ancestor. *Held*, that the plaintiff was bound to prove how the occupation, originally permissive, became adverse, the defendant not being bound to prove that he exercised his right of proprietorship within the period of limitation. KURM NEWAZ v. KURREEM BUKSH, **97 P.R. 1867.**

(28)—*Suit for possession—Plea of limitation—Possession as tenant—Burden of proving adverse possession.*—In a suit for possession where defendants plead limitation, and plaintiff proves

***Burden of proof*—continued.**

——24.—Limitation and Adverse Possession —*continued.*

that the commencement of the possession of the party through whom defendant claims was as tenant, the burden of proving when the nature of that possession was changed and how it became adverse was held to be on those who set up the plea of limitation. RAMDHUN SATRA v. NOBIN CHUNDER CHOWDHRY, **12 W.R. 250.**

(29)—*Suit to ejectment—Title to possession—* Onus *of proof.*—In a suit to recover possession of immoveable property by ejecting the defendant, the plaintiff must prove two things; —(1) that he was in possession within twelve years prior to suit ; (2) that he has a title to recover possession. BEER CHUNDER JOBRAJ v. THE DEPUTY COLLECTOR OF BHULLOOAH, **13 W.R. 23. P.C.**

(30)—*Old documents—Necessity for proof—Burden of proof—Pleader's statements.*—The fact of a pottah being 30 years old does not do away with the necessity of proof before it is used as evidence. Where plaintiff files documents relating to lands not identified with the land in dispute, that fact does not shift the burden of proof on to the defendant. The oral statement of a pleader is not enough to satisfy a Judge, acting as a Judge of fact, that certain documents are beyond the power of the parties wishing to use them as evidence. FAZIL SIRDAR v. CHENUM BISWAS, **10 W.N. 237.**

(31)—*Suit for possession—Limitation—Plaintiff to prove possession.*—In a suit for possession of land alleged to belong to the plaintiff's talook where the defendant pleads limitation, it is for the plaintiff to show that he was in possession within twelve years of suit. RAM LOCHUN CHOWDHRY v. JOY DOORA DOSSIA, **11 W R. 283,** (3 W.R. 80, F.B., 9 W.R. 124, *R.*)

(32)—*Suit for land in defendant's possession—Cause of action—Limitation—Burden of proof.*—In a suit for the possession of an open piece of ground, which must be brought within twelve years from the time the cause of action accrued, the issue is, not that the plaintiff must show that he exercised some right of ownership over the ground within the twelve years preceding the filing of the action, but that he must show when the defendant interfered with his possession and twelve years have not elapsed between the day the defendant interfered with the plaintiff's possession and the date of filing his claim. SAGANGOWDA *bin* BASANGOWDA v. BASAP *bin* CHENAPA, **9 B.H.C. 62.**

(33)—*Suit for possession—Denial of plaintiff's title—Plea of limitation—Limitation to be decided referring to plaintiff's possession—Permanent settlement ordered with party in possession —Presumption.*—In a suit for possession where defendant denies plaintiff's title and sets up a defence involving the plea of limitation, the question of limitation does not depend upon whether defendant was in possession, but upon whether plaintiff was in possession. Where defendant admits that the permanent settlement was ordered to be made with the party in possession, and that it was made within twelve years prior to the suit with the party from whom plaintiff claimed, *held* that, until the contrary is shown, that party is rightly presumed to be in possession, and plaintiff's claim is not barred by limitation. MAHOMED KOBEER v. ABDOOL AZEEN, **24 W.R. 315.**

(34)—*Possessory suit—Plea of limitation—Duty of plaintiff to prove title and accrual of cause of action within limitation period.*—In a suit to obtain possession where defendant pleads limitation, plaintiff is bound not only to prove his title, but also to show affirmatively that his cause of action accrued within twelve years before the commencement of the suit; and he must succeed upon the strength of his own title, not upon the weakness of his opponent's. LUTCHOO KHAN v. W. FOLEY, **24 W.R. 273.**

(35)—*Burden of proof—Adverse possession—Landlord and tenant.*—In a suit for possession, the defendants claimed to hold the land under a valid *miras* tenure so as to be entitled to the ground-rent from the ryots, and to pay the plaintiff, who was the superior landlord, merely the *miras* rent. *Held* that the plaintiff being admitted landlord made a *prima facie* case, and it lay on the defendants to show either that they had a valid *miras* tenure, or by reason of their having held as *mirasdars* adversely to the plaintiff for more than twelve years, the plaintiff, was debarred from questioning their right. The plaintiff must have notice of such adverse holding in order that he may be barred by limitation. OGRA KANT CHOWDHREE v. MOHESH CHUNDER SICKDAR, **4 C. L. R. 40.** (2 B.L.R. 111, P.C., *F.*) [*F.*, 14 C. 323.]

(36)—*Suit for possession — Dispossession—* Onus *of proof.*—Under the former Limitation Act the cause of action, and under the present law (Act of 1877) the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years; and he cannot, by merely proving possession at any period prior to twelve years before suit, shift the *onus* to the defendant. MAHOMED ALI KHAN v. KHAJA ABDUL GUNNY, **9 C. 744 = 12 C L.R. 255, F.B.** [*R.*, 10 C. 577, 10 C. 374, 8 B. 371, 105 P.R. 1901.]

(37)—*Suit for possession—Previous dispossession*—Onus *of proof.*—In every suit for recovery of land on the ground of dispossession, the plaintiff ought to start his case by proving his possession at some time within 12 years prior to suit. BHOOTNATH CHATERJEE v. KEDARNATH BANERJEE, **9 C. 125, (12 M.I.A. 337,** *R*).

***Burden of proof*—continued.**

——24.—Limitation and Adverse Possession —*continued.*

(38)—*Suit Cased on title—Proof of dispossession alone not sufficient.*—In a suit for land based on title, mere proof of possession and dispossession within twelve years before suit would not be sufficient to entitle the plaintiff to a decree. ERTAZA HOSSEIN v. BANY MISTRY, **9 C. 130=11 C.L.R. 393.** (7 I.A. 73, *F.*; 5 C.L.R. 278, *Diss.*) [*F.*, 17 C. 256; *Cons.* 12 C.P.L.R. 59; *Doubt.*, 78 P.R. 1902=137 P.L.R. 1902; *R.*, 8 B. 371, 12 A. 46, U.B.R. 1892—1896, Vol. II, 619, 3 C.W.N. 158, 26 C. 579.]

(39)—*Limitation Act, art. 142—Suit for ejectment—Burden of proof.*—In all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and the *onus* is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, and it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed. MOHIMA CHUNDER MAZOOMDAR v. MOHESH CHUNDER NEOGI, **16 C. 473=16 I.A. 23, P.C.=5 Sar. 321.** [*F.*, 3 A.L.J. 363=10 C.W.N 630=8 Bom. L.R. 400=1 M.L.T. 135=16 M.L.J. 272, P.C.; *Appl.*, 2 L.B.R. 56; *Expl.*, 14 B. 458; *D.*, 2 M.L.J. 210, 18 M. 171; 21 M. 53; *Discussed*, 3 C.W.N. 763; *R.*, 14 A. 193=12 A.W.N. 55, 13 A.W.N. 60, L.B.R. 1893—1900, 360, U.B.R. 1897—1901, Vol. II, 461, 105 P.R. 1901, 59 P.L.R. 1901, 105 P.L.R. 1901=65 P.R. 1901, 27 B. 43=4 Bom. L.R. 721, 24 A. 294=22 A.W.N. 45, 5 Bom. L.R. 225, 9 C.W.N. 111, 3 L.B.R. 27, 53 P.R. 1907=39 P.L.R. 1907, 7 C.L.J. 414=12 C.W.N. 273=3 M.L.T. 212, 14 Bur. L.R. 156.]

(40)—*Limitation Act, 1877, arts. 142, 144—Suits for possession—Burden of proof.*—Plaintiff, in this case, alleged that the possession he got of the property under a sale was obstructed by the defendants, from whom he now claimed to recover possession of it, together with mesne profits until such recovery. The suit was of the description contained in art. 142 of the Limitation Act and art. 144 did not apply. Plaintiff, therefore, was bound to show that he, or those under whom he claimed, had had possession within 12 years before suit. In cases falling under art. 144, the plaintiff may rest content with proof of title only, in the first instance, the burden lying on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit; where, however, the case is one falling under art. 142, the plaintiff must, at the outset, show possession within 12 years, and cannot rest merely on a proof of title. FAKI ABDULLA v. BABAJI GANGAJI, **14 B. 458.** [*F.*, 14 M. 96: *R.*, U.B.R. 1897—1901, 461, 65 P.R. 1901=105 P.L.R. 1901, 27 B. 43, 5 Bom. L.R. 225, 2 N.L.R. 32, 10 Bom. L.R. 571, 123 P.W.R. 1908, 12 Bom. L.R. 956.]

***Burden of proof*—continued.**

——24.—Limitation and Adverse Possession —*continued.*

(41)—*Suit for possession, adverse possession set up in answer to—Extent of* onus *on plaintiff.*—Where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and the defence is adverse possession, the question of limitation becomes a question of title. The plaintiff must at least give some *prima facie* evidence to satisfy the Court, in the first instance, that he was in possession within twelve years of the suit, before the defendant can be called upon to make out his defence of twelve years' adverse possession. Before going into the question as to whether the defendant had or had not a title by adverse possession, the Court ought to satisfy itself that there is *prima facie* proof of the plaintiff having had a subsisting title at the commencement of the suit. JAFAR HUSAIN v. MASHUQ ALI, **14 A. 193=A.W.N. 1892, 55.** (16 C. 473, 11 A. 438, *R.*) [*F.*, 28 A. 760=A.W.N. 1906, 234=3 A.L.J. 567; *R.*, 6 O.C. 119, 20 A. 182=18 A.W.N. 19, L.B.R. 1893—1900, 360, U.B.R. 1897—1901, Vol. II, 461, 105 P.R. 1901, 65 P.R. 1901=105 P.L.R. 1901.]

(42)—*Suit for possession of tank—Undivided* mehal—*Burden of proof.*—In a suit to recover possession of a tank included in an undivided *mehal*, where defendants allege separate possession for more than 12 years before the suit, *held* that, there being a *prima facie* case that some at least of the share-holders had used the tank, the defendants were bound to prove separate enjoyment by them. BROJONATH PAUL CHOWDHRY v. SREEGOPAL PAUL CHOWDHRY, **12 W.R. 468.**

(43)—*Limitation Act (XV of 1877), sch. II, art. 142—Plea of adverse possession.*—In this suit brought to recover possession of an estate, plaintiff had admittedly a title to maintain the action if she could get over the case made, under the Statute of Limitations, by the defendant. Plaintiff admitted the defendant's possession for seven years before suit, and there was documentary evidence of possession in favour of the defendant for more than five years preceding these seven years, which was exactly similar in character to that which accompanied his seven years' admitted possession, and which went back far behind the period of twelve years sufficient to establish the bar of plaintiff's suit by limitation. This circumstance threw on the plaintiff the burden of rebutting the inference which arose from the fact of the long possession accompanied by such documents. Such burden not having been discharged by the plaintiff, the suit was held to be barred. INNASI MUTHU UDAYAN v. UPAKARATH UDAYAN, **28 M. 10, P.C.=26 I.A. 210=7 Sar. 620.** [*R.*, 12 C.W.N. 273=7 C.L.J. 414=3 M.L.T. 212.]

***Burden of proof*—continued.**

——24.—Limitation and Adverse Possession *—continued.*

(44)—*Ejectment—Failure to prove possession within twelve years—Cause of action—Limitation*—Onus *of proof*.—In an action of ejectment, the plaintiff, though he cannot prove that he has been in possession of the land claimed within twelve years, must not on that account of necessity fail. He must, however, show that his cause of action has accrued within that period; and a plaintiff's cause of action arises when another person takes possession of his land, and not before. If any question of limitation arises, the burden of showing that the cause of action had arisen within the legal period of limitation lies upon the plaintiff. PANDURANG GOVIND v. BALKRISHNA HARI, **6 B.H.C. A.C. 123.** [*Appr.*, 9 C. 744, F.B.; *R.*, 9 B.H.C. 62, 7 C. 225, 9 M. 175, 6 B. 508, 11 A. 438.]

(45)—*Suit for possession—Proof of previous possession*.—Mere proof of having been in possession at some time during the twelve years before suit, by the plaintiff in a suit for possession of land, will not shift the burden of proof of title thereto to the defendant. DEBICHURN BAIDO v. ISSUR CHUNDER MANJEE, **9 C. 39 =11 C.L.R. 342.** (12 W.R. 472, *Cited*; 7 I.A. 81, *F.*) [*F.*, 17 C. 256; *R.*, 12 A. 46, U.B.R. 1892—1896, Vol. II. 619, 26 C. 579, 25 B. 287; *Cons.*, 12 C.P.L.R. 59; *Dis. and Doubted*, 137 P.L.R. 1902=78 P.R. 1902.]

(46)—*Suit by Crown—Cause of action*.—Assuming that the Crown has the right to oust any person who, without its sanction, occupies waste land which has not been appropriated for any public purpose, it cannot, by instituting a suit for a declaration of right or ejectment without specifying a date at which the cause of action arose, compel a defendant to prove possession for 60 years. SECRETARY OF STATE v. VIRA RAYAN, **9 M. 175.** [*F.*, 19 M. 165; *R.*, 3 M.L.T. 231.]

(47)—*Recovery of possession—Evidence of peaceable possession till dispossession—Proof of title*, onus *of*.—In a suit for recovery of possession of land upon proof by the plaintiff of peaceable and continuous possession till dispossession a month before suit, the defendant must show his title to the land. MOHABEER PERSHAD SINGH v. MOHABEER SINGH, **7 C. 591=9 C.L.R. 164.** [*R.*, 11 C.L.R. 133, 17 C. 256, 26 C. 579; *Cons.*, 12 A. 46, 12 C.P.L.R. 59.]

(48)—*Wrongful custer—Possession, suit for*—Onus.—In a suit for possession, it was found that the plaintiff had been some eleven years in possession until he was wrongfully ousted by the defendant, and thus the plaintiff's possession fell short of 12 years, that the plaintiff had not proved the *kobala* under which he claimed title, nor did the defendant prove his *kobala*. *Held* that the defendant was bound to prove his title and that he could not be allowed to take advantage of his own wrongful act in order to shift the burden of proof upon his opponent. If the defendant had, before the wrongful ouster, brought a suit to recover possession of the land, he must have failed, because his title had not been proved and he could not, by wrongfully evicting the plaintiff, throw upon him the burden of proof which would otherwise have lain upon him. BROJO SUNDER GOSSAMI v. KOILASH CHUNDER KUR, **11 C.L.R. 133.** (7 C. 591, 7 W.R. 174, 9 W.R 71, 12 W.R. 472, 4 C. 275, *R.*)

***Burden of proof*—continued.**

——24.—Limitation and Adverse Possession *—continued.*

(49)—*Suit for lands under cultivation—Plea of adverse possession*—Onus *of proof—Contra in the case of unculturable or jungly lands*—Onus *of proof in the case of lands under cultivation at date of suit, though previously unculturable*.—In suits for lands under cultivation, the plaintiff must, on a plea of adverse possession by the defendant, in the first instance, prove that the suit is not barred by limitation; and it is not for the defendant to prove his adverse possession at first. [*R.*, 6 C. 725=8 C.L.R. 90; 7 C. 225, 9 M. 175.] In suit for unculturable or uncultivated lands, on the other hand, the defendant must prove his adverse possession for more than 12 years. In the case of suits for lands under cultivation at the time of suit, but previously jungly or unculturable, the plaintiff must again prove, in the first instance, that the suit is not barred; but on proof by the plaintiff of the land having become culturable within 12 years before suit, the burden is shifted to the defendant who must prove more than 12 years' adverse possession. MAHOMED IBRAHIM v. MORRISON, **3 C. 36.**

(50)—*Limitation under Reg. II of 1805—Suit by Government against ghautwals*—Onus *of proof*.—According to Reg. II of 1805, 60 years is the period beyond which neither fraud nor any other special allegation will give a cause of action. In a suit by the Government against certain ghatwals, the defendants were found to have been in possession "for a very long time;" and, although they had failed to prove possession in excess of 60 years, the *onus* was held to lie on the Government to prove possession within 60 years. BROMANUND GOSSAIN v. THE GOVERNMENT, **5 W. R. 136.**

(51)—*Reversioner's rights purchased—Suit for possession by purchaser—Proof to be adduced by such purchaser against plea of limitation*.—To rebut the plea of limitation in a suit for possession by the purchaser of the rights of a reversioner to a widow's estate instituted within one day of the 12 years allowed by the law of limitation, the plaintiff must prove not only that the widow died, but also that she actually held possession up to the time of her death. KALEENATH TALOOKDAR v. JOY DOORGA DOSSIA, **11 W.R. 173.**

(52)—*Suit for possession of land after submersion—Limitation*.—Where the suit was for possession of certain land, on the allegation that it was land belonging to the plaintiff's village, but submerged at the time of the

Burden of proof—continued.

——**24.—Limitation and Adverse Possession** —*continued.*

Settlement, it the plaintiff could show the identity of the land submerged with the land which has since been left dry, the *onus* is on the defendant to show that some other person had been in adverse possession for twelve years before the plaintiff preferred his claim, and that such adverse possession commenced from a time when the plaintiff was in a position to dispute it. HUR SAHAL v. MAHOMED DAIM KHAN, **2 Agra 64.**

(53)—*Claim to accretion—Duty of plaintiff.*—In an accretion-claim plaintiff must establish facts extinguishing defendant's title as well as creating his own right. MUSSAMUT MOWLA KOOMAREE v. MUTTY SINGH, **25 W.R. 129.**

(54)—*Suit for possession of alluvial land—Magisterial proceedings fixing boundary—Suit to set aside Magisterial order—Effect of decree in suit—Issues*— Onus probandi.— Appellant sued to recover a tract of chur-land as parcel of his mouzah of Jogdash, defendant alleging the said land to be a parcel of his Mouzah Ghoogoomaree. About the year 1830, a large tract of land was diluviated by the river Chutol within the mouzahs belonging respectively to plaintiff and defendant; and after re-formation in 1837, a proceeding was taken by the plaintiff before the Magistrate under which he was ordered to be put in possession of a considerable tract of such newly formed land, the Magistrate laying down the boundaries. After nearly 12 years (*i.e.,*) in 1849, respondent's father brought a civil suit to set aside the Magistrate's decision, and the ultimate finding was that appellant had been in possession of the land described in the Magistrate's order from and since the date of that order; *Held* that that decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had continued in such possession; the question in the present suit being whether the lands now claimed are identical with those so described; *Held*, that that issue lay upon the plaintiff, because the foundation of his suit was that, having been in possession, he was dispossessed as a consequence of certain measurements made by Government officers: *Held* that plaintiff had failed to sustain the burden of proof. He relied principally on the boundaries given by the Magistrate, and certain maps prepared the and later as compared with the Government map of 1853: but the Privy Council were unable to place firm reliance upon any inference drawn from these maps. The Privy Council were also of opinion that, in questions of this kind, where the natural boundaries and land-marks have disappeared, evidence of possession was very important and satisfactory, and that there was no reason to distrust the witnesses of the respondent proving such possession. GRIJA

Burden of proof—continued.

——**24.—Limitation and Adverse Possession** —*continued.*

KANT LAHORY CHOWDHRY v. HURRISH CHUNDER CHOWDHRY, **19 W.R. 114 P.C.** [*R.*, 13 C.W.N. 281, 2 B. 19, 6 C.L.J. 621; *F.*, 8 C.L.J. 478.]

(55)—*Suit for possession of chur-lands reformed on original site after diluvion—Plea of limitation under adverse possession*—Onus *on plaintiff to prove previous possession.*—In a suit for possession of chur-lands as re-formations on the original site of plaintiff's or his vendor's lands, or accretions thereto, where limitation is pleaded by defendant in adverse possession, the *onus* lies on plaintiff to prove that, before disappearance or diluvion, the land in dispute was in the possession of his vendor. GOKOOL KRISTO SEN MOONSHEE v. M. DAVID, **23 W.R. 443.** [*R.*, 7 C. 225, 2 B. 19.]

(56)—*Burden of proof—Adverse possession——Diluvion—Re-formation.*—In a suit for possession of lands which have re-formed upon the old site after diluvion, the defendant set up adverse possession for twelve years. *Held* that the burden lay upon the plaintiff of proving that the defendant had not been in possession for the period of twelve years next preceding the commencement of his suit. (8 M.I.A. 220, *F.*) Where it was not proved that the whole of the lands claimed have re-formed within twelve years, the plaintiff must prove specifically the portion, if any, which has not so reformed. KOOMAR RUNJIT SINGH v. SCHOENE, KILBURN, **4 C.L.R. 390.** [*F.*, 11 C.L.J. 373=14 C.W.N. 317=3 Ind. Cas. 15; *Cons.*, 7 C. 225; *R.*, 6 C. 725=8 C.L.R. 90.]

(57)—*Suit for possession*—Onus *of proof—Presumption of possession and ownership.*—Proof by the plaintiff, in a suit for possession of land, of the exercise of rights of ownership more than twelve years before suit, when the land had been covered with water, would be *prima facie* evidence of possession and ownership, so as to raise a presumption of the continuance of the plaintiff's possession down to within twelve years, unless the defendant is able to make out a twelve years' statutory title by adverse possession. MOHINY MOHUN DAS v KRISHNO KISHORE DUTT, **9 C. 802=12 C.L.R. 337.**

(58)—*Claim to dispossessed land — Burden of proof, shifting of—Proof of possession—Nature—Diluviated and re-formed lands—Possession till diluviation, proof of—Presumption of subsequent possession—Claim to dispossessed land—Plea of limitation—Difference between property capable of actual possession and property incapable of it—Suit for dispossessed alluvial lands—Proof of title and possession by plaintiff till diluviation.*—As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years. [*Appr.*, 6 B. 508; *R.*, 9 M. 875.] Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend upon the nature of the case.

Burden of proof—continued.

——24.—Limitation and Adverse Possession —*continued.*

The burden of proof, may, on proof of facts giving rise to a presumption in favour of the party, shift to the other side. In the case of gradually diluviated and re-formed lands, whose diluviation has been more than twelve years before suit, the claimant must, in the absence of proof of possession since re-formation, at least prove possession till diluviation. Where the true owner is in possession at the time of diluviation, there will be a presumption of continuance of possession during submergence; and perhaps subsequently also till dispossession. — *Per Wilson*, J. [*R.*, 9 C. 744.] Though, generally, the plaintiff must, on being met with the plea of limitation, show his possession within twelve years before suit in the case of property capable of actual and visible possession, yet, in the case of property incapable of actual and visible possession, when the title and possession have been proved to be in a certain person up to a certain point of time—when there has been no transfer of the title to any third person—and there is no evidence of possession having been exercised by any other so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue, until the property again becomes susceptible of actual visible possession.—*Per Field*; *J.* On proof of title and possession till diluviation by the plaintiff, in a suit for dispossessed alluvial lands diluviated more than twelve years before suit, the burden of proving reformation more than twelve years before suit and adverse possession during the period was held to be shifted to the defendant, MANO MOHUN GHOSE v. MOTHURA MOHUN ROY, **7 C. 225=8 C.L.R. 126.**

(59)—*Alluvial land—Limitation.*—Where in a suit by plaintiffs to recover possession of alluvial lands on the allegation of dispossession, the defendants denied the plaintiff's title and possession, *held* the burden of poof, as to possession and dispossession within twelve years prior to suit, lay on the plaintiffs. UDIT NARAIN SINGH v GOLABCHAND SAHU, **27 C. 221=26 I.A. 236=7 Sar. 628.** [*R.*, 3 C.L.J. 316, 6 C.L.J. 735=12 C.W.N. 127=35 C. 961.]

(60)—*Suit for possession— Presumption—Rights of fishery—Julkur* --Suit for possession of lands in a river-bed where the river had changed its course and for getting rid of order of Criminal Court. The plaintiff was all along found to be in possession up to the year in which the criminal proceedings were held. *Held* that the presumption raised by plaintiffs continued and undisturbed possession of lands in the bed of a river which has changed its course was not rebutted by defendant's allegation that he was entitled to the julkur of the river. JAMES HOGG v. DENONATH KOONDOO, **11 W.R. 566.**

(61)—*Execution—Possession delivered long after sale—Irregularity—Burden of proof.*—Where the right and title of a party are sold in execution, but possession is a delivered to the purchaser more than 15 years after sale, *held* that this irregularity did not entitle the owner to a decree in a suit to recover the property, unless he could prove possession for more than twelve years before dispossession. ATTOTRAM DOSS v. BALUNKEE DOSS, **14 W. R. 387.**

(62)—*Suit by Hindu widow for confirmation of her right in her husband's property—Plea of possessory award — Limitation.* — A Hindu widow sued for confirmation of her right in certain lands which she declared to be hers in right of her husband. The defendant, pleading that the plaintiff never had been in possession, produced a possessory award of the property, given to her under s. 15, Act XIV of 1859. *Held*, that it was for the plaintiff to get over the limitation pleaded by the defendant and to show that she was in possession within 12 years. SHANTA MONEE GOOPTAH v. SUTTOABHAMA GOOPTAH, **7 W.R. 34.**

(63)—*Suit to establish proprietary right—Possession—Limitation.*—In a suit to establish poprietary right as against a mokuraridar plaintiff need not prove that he was in actual possession within 12 years. PROTAP NARAIN MOOKERJEE v. KARTICK CHUNDER MOOKERJEE, **10 W.R. 192.**

(64)—*Limitation—Boundaries.*—No proof of anterior title in the claimant such as would be involved in the decision of a question of boundaries in his favour can relieve him of the burden of proving that he was in possession within twelve years prior to suit, or shift it upon his adversaries so as to compel them to prove the time and manner of his dispossession. TARA SINGH v. CHAIDA MULL, **2 Agra 177.**

See ABANDONMENT OF TENURE, 38 P.R. 1885.

Proceedings before village conciliator—Their nature—Certificate—Computation of limitation —Limitation Act, XV of 1877, art. 144—Onus of proof—objection to jurisdiction of Court—Second appeal—*See* BOM. ACT XVII OF 1879, ss. 46, 47, 48, 13 B. 424.

Diluviated land—Possession prior to diluvion —Dispossession— Onus of proof—*See* DILUVION, 6 C. 725=8 C.L.R. 90.

Possession of ancestral property sold during plaintiff's minority, suit for — Inheritance, knowledge of exclusion from—Burden of proof —*See* LIMITATION ACT, 1908, art. 127, 2 O. C. 348.

See LIMITATION ACT, 1908, arts. 127, 128, 129, 4 M.H.C. 354.

See LIMITATION ACT, 1908, arts. 127, 144, 18 B. 513.

In a suit governed by art. 144 the—is on the defendant to show when the adverse possession he relies on commenced—*See* LIMITATION ACT, 1908, arts. 136, 144, 2 N.L.R. 32.

Burden of proof.—continued.

——24.—Limitation and Adverse Possession —*continued.*

Suit for ejectment—On whom — lies—*See* LIMITATION ACT, 1908, art. 142, 10 C.W.N. 630, P.C.=3 A.L.J. 363=8 Bom. L.R. 400=1 M.L.T. 135=16 M.L.J. 272.

In a suit by vendee for possession—*See* LIMITATION ACT, 1908, art. 142, A.W.N. 1906, 95=3 A.L.J. 334=28 A. 479.

See LIMITATION ACT, 1908, art. 142, 20 C. 550, P.C.=20 I.A. 38, 59 P.L.R. 1901, 16 B. 343, U.B.R. 1897—1901, Vol. II, 461.

As to standard measurement—*See* LIMITATION ACT, 1908, arts. 142, 144, 2 C.L.J. 125.

Extinguishment of title by adverse possession—*See* LIMITATION ACT, 1908, arts. 142, 144, 7 M.L.J. 186.

See LIMITATION ACT, 1908 arts. 142, 144, 49 P.R. 1884, 23 P.R. 1890, 14 M. 96.

See LIMITATION ACT, 1908, arts. 142, 144, 149, 5 M.L.T. 107=2 Ind. Cas. 314.

See LIMITATION ACT, 1908, art. 144, 19 C. 660, P.C.=19 I.A. 140, 122 P.R. 1883, 94 P.R. 1884, 116 P.R. 1900.

See SERVICE TENURE, 3 B.H.C.A.C. 49.

——25.—Mortgage.

See MORTGAGE.

(1)—*Mortgage-bond—Denial of execution and passing of consideration by third party.*—If an action to enforce a mortgage-security is contested by the mortgagor and execution is admitted by or proved against him, the *onus* lies upon him to prove that the recitals as to the payment of consideration for the deed which he executed are untrue. When it is contested by a stranger, who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case. BISHESWAR DAYAL v. HARBANS SAHAY, **6 C.L.J. 659=3 M.L.T. 38.** (6 C. 268, 17 A. 428, 5 C.W.N. 403, 5 C.L.J. 653, *R.*; 3 C.W.N. ccxxiv, *Diss.*)

(2)—*Land—Sale—Mortgage.*—The burden of proof that a transaction regarding certain land was a mortgage and not a sale is on the person out of possession. MAUNG SHWE THA v. MAUNG THU DAW, **L.B.R. 1893—1900, 461,** L.B.R. 1872—1892, 78, *D.*; L.B.R. 1872—1892, 102, 482, 491 and L.B.R. 1893—1900, 85, *R.*)

(3)—*Land ostensibly sold—Mortgage.*—Where a plaintiff seeks to redeem land ostensibly sold on the ground of there being a separate oral agreement to treat the transaction as a mortgage, the burden of proof of mortgage is on the plaintiff and the evidence of such mortgage transaction must be clear and credible. The Burmese of the present day in Lower Burma are for the most part well aware of the difference between a sale and a mortgage, and if they intend a mortgage only, it is dangerous for them to execute a deed of sale and rely on oral evidence, which must often be open to doubt, to prove a mortgage. MAUNG SHWE HLAING v. MAUNG SHWE DOK, **L.B.R. 1893—1900, 497.**

Burden of proof.—continued.

——25.—Mortgage—*continued.*

(4)—*Sale after mortgage*—Onus *of proof*—As the defendant stated that after the land had been mortgaged it was sold to him, he was bound to prove the sale. MIKE v. MI MIN THWE. **L.B.R. 1872—1892, 101.** [*Not F.*, L.B.R. 1893—1900, 511.]

(5)—*Land, mortgage or sale of—Tendency of Burmese agriculturist to mortgage rather than to sell his land.*—The burden of proof in cases in Lower Burma, in which a Burman agriculturist seeks to redeem land, which he says was mortgaged from a defendant in possession who alleges that it was sold, is, undoubtedly in the first instance on the plaintiff, who must fail if no evidence at all be given on either side. This is clear from s. 110 of the Evidence Act, L.B.R. 1872—1892, 102, *F.*) But when considering the evidence that is produced, it is the duty of the Court to bear in mind the tendency of the Burman agriculturist to mortgage rather than to sell land outright. The existence of this tendency is undoubted. MAUNG TUN U v. MAUNG NYUN, **L.B.R. 1872—1892, 642.** [*R.*, L.B.R. 1893—1900, 514, L.B.R. 1893—1900, 85.]

(6)—*Alleged sale after mortgage.*—A mortgage of land being established, the burthen of proving that it was converted into sale is of course on the person alleging that change in the condition of things. MAUNG LON v. MAUNG CHA, **U.B.R. 1896—1892, Vol. II, 575.**

(7)—*Conditional sale—Absolute sale—Presumption in favour of reservation of right of redemption.*—If there is evidence that a sale, apparently absolute, was really conditional, this evidence should not be regarded with suspicion, because such sales are in accordance with the custom or practice of the people. The condition must be strictly proved, and in the absence of proof, no presumption in its favour can rightly be drawn. SHWE NGA v. THA DUN, **L.B.R. 1893—1900, 511.**

(8)—*Redemption—Burden of proof—Ownership—Evidence Act, I of 1872, s. 110.*—In a suit for redemption of properties in the possession of the defendant, who sets up a sale, the burden of proving the mortgage is on the plaintiff RATAN KUAR v. JIWAN SINGH. **1 A. 194, F.B.**

(9)—*Mortgage—Redemption-suit.*—In a suit for redemption, in the absence of any proof of a mortgage by the plaintiff, the existence of such a transaction between the parties cannot be assumed, in consequence of the failure of the defendant to establish an alleged sale. Very slight *prima facie* proof on the part of the plaintiff would suffice to shift the entire burden

***Burden of proof*—continued.**

——25.—Mortgage—*continued.*

of proof on the defendant, but in its absence a plaintiff seeking to redeem cannot be relieved of the burden. BALAJI NARJI v. BABA DEVLI, **5 B.H.C.A.C. 159.** [*R.*, 11 A. 438, 27 B. 271.]

(10)—*Redemption-suit—Denial of mortgage.*—*Prima facie proof shifts onus.*—In suits to redeem, where the defendant denies the mortgage, very slight *prima facie* proof that a mortgage had been originally made will be sufficient to shift the entire burden of proof on the defendant. RAMCHANDRA v. MOKUND, **3 Bom. L. R. 152.**

(11)—*Suit for redemption of mortgage—Denial of mortgage—Possession with defendant—Burden of proof—Evidence Act (I of 1872), s. 110.*—Where the defendant in a suit for redemption happens to be in possession of the mortgaged property, affording evidence of his title thereto, the plaintiff-mortgagor alleging that the defendant is merely a mortgagee is bound to show that the specific mortgage has been executed. Mere indefinite statements by him as to the property having been mortgaged, when made without reference to any specific mortgage thereof, are not sufficient to shift to the mortgagee the *onus* of proving what the terms of the mortgage were, and his right under it to retain the property until he is paid off. In such cases, the law leans in favour of possession, and requires the person who comes in to redeem on his own terms, to make out a clear case and to succeed by the strength of the title he sets up. RAMCHANDRA APAJI v. BALAJI BHAURAV, **9 B. 137.** [*Appr.*, 11 A. 436=7 A.W.N. 155; *R.*, 27 B 271.]

(12)—*Redemption-suit— Mortgage-deed containing clause for forfeiture of property—Transfer of possession—Transfer of ownership, evidence of*—When a transaction begins as a mortgage, then, even though since the date of the mortgage, there has been a transfer of possession from the mortgagor to the mortgagee, and although the mortgage-deed provides for forfeiture of the property on failure to re-pay on demand the amount secured with interest due, there still must be sufficient evidence to show that the intention was to transfer the ownership of the property, if this be alleged by the mortgagee the burden of proof of such outright transfer being on the mortgagee resisting redemption. MAUNG PO TE v. MAUNG PO KYAW, **1 L.B.R. 215.** [*R.*, 5 L B.R. 40, L.B. R. 1905—1906, 5.]

(13)—*Burden of proof—Suit for possession of land by redemption of mortgage—Plaintiff to prove not only the existence of the mortgage but circumstances entitling him to redeem.*—If a plaintiff desires to obtain a decree for possession from a person who obtained possession under him or his predecessor as mortgagee, the plaintiff must prove that he is entitled to redeem the mortgage, or that the mortgage has determined by payment of the whole mortgage-debt, or by the happening of some other event which would determine the right of the mortgagee to hold possession as against his mortgagor. LAL MUKUND SINGH v. JAGESHAR SINGH, **A.W.N. 1894, 167.** [*R.*, 2 A.L.J. 62=A.W.N. 1905, 14.]

***Burden of Proof*—continued.**

——25.—Mortgage—*continued.*

(14)—*Possession.*—Where a suit was brought to redeem a mortgage, and defendants pleaded possession under a sale, *held*, under the circumstances, there having been long undisputed possession, that the *onus* of proving that the possession was less than a proprietary possession and was referable to a mortgage, lay on the person, who claimed to redeem it. RUGHOO NATH RAI v. CHUNDOO LALL, **2 Agra 395.**

(15)—Zur-i-peshgi *lease—Execution-sale—Possessory suit by purchaser from transferee—Proof of subsistence of mortgage—Equity of redemption — Ejectment of person long in possession*—Onus *of proving strict legal title*—In a suit for possession of mortgaged property instituted by the purchaser of the rights of the heirs of one to whom the rights of the original proprietor are alleged to have been transferred several years ago by an execution-sale, the plaintiff was bound to prove the subsistence of the mortgage and his right, as the representative of the heirs, to the equity of redemption and to possession on payment of what remained due. A person seeking to eject those long in possession ought to prove a strict legal title. ASHRUFFONNISSA BEGUM v. RUGHOONATH SOHOY, **2 W.R. 267.**

(16)—*Usufructuary mortgagee, Suit by—What the plaintiff should prove.*—*Held* that a plaintiff in possession under an usufructuary mortgage, and suing for the balance due, is bound to prove that he has not realised the amount due under the conditions of the lease from the usufruct. CHUTTER DHAREE SINGH v. SHAIKH SWEER HOSSEIN, **1 W.R. 28.**

(17)—*Burden of proof—Usufructuary mortgage—Redemption, Reg. XV of 1793, s. 11.*—In a suit for possession of immoveable property on the ground that a usufructuary mortgage of it had been satisfied out of the profits of the property, and for surplus profits, the burden of proving that the mortgage-debt has been extinguished lies on the mortgagee. Under the law of the Regulations, the mortgagees were bound to produce and prove their accounts. ABDUL GHANI v. DURGA PRASAD, **A.W.N. 1883, 90.**

(18)—*Usufructuary mortgage—Tender of account—Forcible dispossession by mortgagor—Onus as to interest—Act XIV of 1859, s. 15.*—Where a mortgagee sued to recover possession of property of which he was forcibly dispossessed by the mortgagor, who tendered the principal sum of the mortgage-debt, the interest on which it was agreed should be deducted out of the usufruct, the mortgagor making up any deficiency due to the falling short of the profits, and obtained a decree with wassulat *held*, that the *onus* was on him to produce the accounts and prove that something was due to him as interest,

Burden of Proof—continued.

——25.—Mortgage—*continued.*

though he might have sued under s. 15 Act, XIV of 1859. SREEMUTUY PRAN KISHOREE v. CHUNDEE CHURN BISWAS, **19 W.R. 429.**

(19)—Zur-i-pesbgi ijara *lease—Loan under lease—Mortgage of property as security—Suit for sale of such property—Dispossession under decree.*—In a suit for the sale of property mortgaged as security for a loan under a *zur-i-peshgi ijara* lease, and of which plaintiff had been dispossessed under colour of a decree, he having for many years had the usufruct of the land for the purpose of repayment, *held* that the burden was on him to show that there was anything due to him yet as also to show that the *ijara* entitled him to sell the property upon some contingency. MUSSAMUT MUJEEDUNISSA v. SYUD DILDAR HOSSEIN, **20 W.R. 178.**

(20)—*Suit for declaring that mortgage is not genuine*—Onus *of proof.*—When the plaintiffs, on service on them of notice of foreclosure by the mortgagees, bring a suit praying for a declaration that the mortgage was not genuine, *held* that the burden of proving that the mortgage-deed is a fabrication does not lie on them. GUJADHUR MOWAR v. ZINDA MOWAR, **6 W.R. 69.**

(21)—*Purchase from mortgagee after foreclosure*—Onus *of proving transaction to be fraudulent, on whom lies.*—In the case of a purchase of the mortgaged property from the mortgagee after foreclosure, where the mortgagor and the mortgagee admit the vendee's title, *held*, that the *onus* of proving that the transaction is fraudulent lies on the person who raises such a plea. MUSSAMUT SAHOODUR KOOER v. JOY NARAIN SINGH, **1 W.R. 326.** [*F.*, 7 W.R. 441.]

(22)—*Attachment by plaintiff — Mortgage alleged by defendant, validity of*—Onus.—Where plaintiff alleges that an attachment subsists, and that the mortgage under which defendant claims is invalid, plaintiff should prove his allegation. TOOLSEE DUTT MISSER v. BROJOMOHUN THAKOOR, **9 W.R. 332.**

(23)—*Suit to establish right to sale-proceeds of attached property—Claim to such property as tenant of land mortgaged—Execution of lease of tenancy—Consideration* —The burden of proving consideration as against the mortgagee, who was not a party to the lease, lies on the party to whom the lease was alleged to be executed. THA DUN U v. MR. HEAP OF MESSRS. HEAP & CO. **L.B.R. 1893—1900, 501.**

(24)—*Mortgage—Original mortgage barred by limitation—Renewal of mortgage within time set up.*—The land in dispute in this case had been in possession of the applicant-defendant for 46 years, since the year 1208 B.E, and, during all that time, her possession and title had not been challenged till this suit was brought, and the suit which preceded it brought by Ma U Ma, another of the heirs claiming the estate. The exact nature of the action brought by Ma U Ma had not been made clear as it ought to have been, but she claimed as the heir of Ma Win, who was the original owner of the land and who mortgaged it to defendants' predecessors. This mortgage was made in 1164, and redemption would now be barred by limitation. In 1208, some transaction took place and it was on this transaction that the dispute now turned. The plaintiff set up the claim that their predecessor continued the mortgage to defendants' predecessors whereas the defendant alleged that the land was then sold outright. It was clear that the plaintiffs had got to prove the mortgage in 1208 for they set up the mortgage-deed as the ground of their suit, and they would fail in their suit unless they could prove a mortgage at that time. *Held* that, in the circumstances, the mortgage had to be established by the plaintiffs and this had not been satisfactorily done. The defendants' title did not rest on the old mortgage by Ma Win which was extinct, but on long possession, and the plaintiffs must make out their title to redeem distinctly by proving the new mortgage of 1208. MA ZAN GYWE v. MAUNG THA HMIN, **U.B.R. 1892—1896, 220.**

(25)—*Mortgage—Burden of proof—Admission by defendant of previous ownership of part of land claimed by plaintiff's predecessor in interest* —An admission made by the defendant that a piece of mortgaged land which the plaintiffs sought, as mortgagors, to redeem, once belonged to the plaintiff's predecessor, was held not to shift the burden of proof, that the land was not mortgaged to the defendant, and that it lay on them to prove the mortgage; such admission might perhaps be taken into consideration in estimating the evidence. If the plaintiffs sued not as mortgagors seeking to redeem, but as owners seeking to recover possession, an admission made by the defendant that the plaintiffs' predecessor was, at one time, the owner of a piece of the land in question might avail them. MA HMO v. MAUNG SHWE HMAING, **U.B.R. 1892—1896, 222.**

(26)—*Alleged seizure by force or fraud of mortgage lands.*—Onus probandi.—Where A, a mortgagee, alleged that B forcibly took possession of the lands and carried off his documents substituting for them new ones by which A could not prove his title: *Held* that the *onus probandi* lay on A, and that the evidence was insufficient to prove that the release of the mortgaged lands was obtained either by force or fraud. RAI IBRAM BULLEE v. AGHA HOSSEIN KHAN, **7 M.L.J. 231.**

See BUDDHIST LAW—GENERAL, L.B.R. 1872—1892, 78.

See EVIDENCE ACT. 1872, s. 90, U.B.R. 1892—1896, Vol. II. 350.

See EVIDENCE ACT, 1872, ss. 91, 102, 114, U.B.R. 1897—1901, Vol. II, 396.

See EVIDENCE ACT, 1872, ss. 102, 110, U.B.R, 1896—1901. Vol. II, 412.

***Burden of Proof*—continued.**

——25.—Mortgage—*concluded.*

See EVIDENCE ACT, 1872, s. 110, L.B.R. 1893—1900, 514.

Burden of proof—Mortgagee's knowledge of son's interest—*See* HINDU LAW—ALIENATION 5 N.L.R. 117=3 Ind. Cas. 570.

See LIMITATION ACT, 1903, art. 12, 9 M. 460.

See MORTGAGE—GENERAL, 3 O.C 173.

Mortgage without possession — Possession subsequently given to mortgagee—Transaction a sale, not a mortgage—Burden of proof on the motgagee—*See* MORTGAGE—GENERAL 5 L. B.R. 40=2 Ind. Cas. 535.

Taking accounts in suit for redemption—Onus on mortgagee to prove dues from mortgagor — See MORTGAGE-ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 6 B. 669.

See MORTGAGE—FORECLOSURE. 6 A. 344=A.W.N. 1884, 110, 139 P.R. 1883.

Suit on mortgage—Defendant's plea that he was vendee and not mortgagee—Onus of proof—*See* MORTGAGE—FORM OF MORTGAGES, 7 B. 73.

Suit for redemption of mortgage of 1846—Plaintiff to give at least *prima faice* proof that mortgage is redeemable—*See* MORTGAGE—REDEMPTION, 11 O.C. 285.

Suit for possession—Adverse possession—*See* MORTGAGE—REDEMPTION, 2 A.L.J. 62=A. W.N. 1905, 14.

See MORTGAGE—REDEMPTION, 71 P.R. 1900, 61 P.L.R. 1904, U.B.R. 1892—1896, Vol. II, 565, 570, 579, A.W.N. 1899, 39, 12 A. 189=A.W.N. 1889, 199, 3 Bom. L.R. 152.

Authority of mortgagor to impose any easement on the property mortgaged whereby the security is rendered insufficient—Validity of such act—*See* MORTGAGE—MISCELLANEOUS, 85 P.R. 1902.

Suit for recovery of land mortgaged—Plea that mortgage was converted into sale—Burden lies on defendant to prove sale—*See* MORTGAGE—MISCELLANEOUS, 3 L.B.R. 5.

As to valid attestation of mortgage-deed sued on—Applicability of maxim *rite omnia esse acta*—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 2 N.L.R. 10.

——26.—Negotiable Instruments.

See NEGOTIABLE INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS ACT, 1881.

(1)—*Negotiable Instruments Act, 1881, s. 118.—Prseumption—Proof of consideration—Undue influence—Contract Act, 1872, s. 16.*—A money-lender admittedly lent money to a dissolute young man during his minority, and, again within a few days of his attaining his majority, supplied him with large quantities of jewellery in the presence only of his (plaintiff's) touts,

***Burden of Proof*—continued.**

——26.—Negotiable Instruments—*concluded.*

relations and dependants, and then obviously gave a false colour to the transaction in his claim; *held*, that under such circumstances undue influence is to be presumed, and the ordinary presumption laid down in s. 118 of the Negotiable Instruments Act, 1881, that, until the contrary is proved, the presumption should be made that every negotiable instrument was made for consideration was shifted to the plaintiff, who must, therefore, discharge the *onus* of proving the actual amount of the advances. MIRAN BAKHSH v. MUHAMMAD HUSSAIN 2 P.R. 1902. [*R.*, 9 P.R. 1906=19 P.L.R. 1906.]

In cases of negotiable instruments—Burden thrown on wrong party — Revision — *See* NEGOTIABLE INSTRUMENTS — HUNDIS — GENERAL, 25 P.W.R. 1910=24 P.L.R. 1910 =5 Ind. Cas. 891.

See NEGOTIABLE INSTRUMENTS—HUNDIS —MISCELLANEOUS, 1 B. 295.

Dishonour of hundi after acceptance—Notice of dishonuor—Omission to give notice—Burden of proving absence of damage consequent on omission to give notice—Partnership between drawer and drawee—Acceptor's liability barred by limitation—Drawer whether discharged—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 98 (*c*), 26 M. 239=17 M.L.J. 267.

——27.—Partition.

See PARTITION.

(1)—*Suit for possession*—Butwara *proceedings—Burden of proof.*—Where in a suit for possession of lands said to have been assigned to the plaintiffs by a partition made by a Collector, the defendants deny that certain plots are included in particular *daghs* in the *butwara* chittahs, the burden of proof was held to lie on the plaintiffs to prove their allegation. Where, in respect to a *dagh* the plaintiffs are admitted to be entitled to a certain quantity of land, and they claim particular lands as assigned to them by the *butwara* proceedings, the burden lies on them to prove their allegation. BHUGOBUTTY GOOPTA v. SARODA SOONDUREE DEBEA. **11 W.R. 337.**

(2)—*Suit for possession*—Butwara *award under Reg. XIX of 1814—Possession given up, plea of Burden of proof.*—In a suit for possession on the ground that the lands claimed were allotted to plaintiff's share by a *butwara* under Reg. XIX of 1814, *held* that the burden of proving that the defendant had interfered with the possession awarded to him by the Collector lay on the plaintiff. SYUD MOBARUK ALI v. SYAD IMDAD ALI, **16 W.R. 200.**

(3)—*Village site— Partition*—Abadi—Shamilat—Onus.—In a suit for the partition of a village-site in which the defendants plead that the entry in the Settlement Record is incorrect and that the village was a *bhayachara* village and that there is no divisible *Shamilat*

Burden of Proof—continued.

——27.—Partition—*concluded.*

in the village *abadi*, the burden of proving that there is divisible *shamilat* in the *abadi* rests on the plaintiffs. ISWAR SINGH v. ATMA SINGH, **117 P.R., 1894.** [*R.*, 136 P.R. 1906.]

(4)—*Suit by joint family member for division—Burden of proof that family was undivided.*—Where the plaintiff, a member of a Hindu family, suing for a division of the family estate, admitted on the face of his plaint that he had taken possession of part of the family property, and for sixteen years lived separate, the *onus probandi*, lies on him to show that the circumstances under which he became possessed of his portion of the property were consistent with his statement that the family remained undivided. SOMANGONDA *bin* DAJAMANGONDA v. BHARMANGODA, **1 B.H.C. 43.** [*R.*, 7 B.H.C. 133, 10 B.H.C. 444.]

See BUDDHIST LAW—PARTITION, L.B.R. 1872—1892, 22.

See BUDDHIST LAW—WIDOW, L.B.R. 1872—1892, 35.

See PARTITION—PRIVATE PARTITION, 8 C. 72=10 C.L.R. 81.

——28.—Possession and Proof of Title.

See POSSESSION.

(1)—*Suit for possession—Plaintiff's possession and title denied*—Onus.—In a suit for possession of land, where plaintiff's title and previous possession are both denied, *held* that the plaintiff should start his case. R. WALKER v. ATMA RAM MUNDUR, **14 W.R. 478.**

(2)—*Possession*—Prima facie *evidence of title—Burden of proof.*—Possession is *prima facie* evidence of title, and is primarily exclusive, and it is for him, who impugns this exclusive title, to show that the possession originated in a way not to affect his own right. KRISHNA CHARYA v. LINGAWA, **20 B. 270.** [*R.*, 78 P.R. 1902=137 P.L.R. 1902.]

(3)—*Sale—Gift*—Onus *of proof.*—Where a sale has been made to the defendant in possession of property of which a prior gift is alleged to have been made to the plaintiff, *held*, that the transaction throws doubt on the *bona fides* of the alleged gift and shifts the *onus* on the plaintiff to prove his title under the gift before the defendant in possession is called on to prove his title. GOBIND CHUNDER PAUL CHOWDREE v. GOLUCK CHUNDER GOSHAMEE, **1 W.R. 244.**

(4)—*Allegation of forcible ouster—Burden of proving ouster first.*—Where plaintiff alleges forcible ouster in a certain year, he is bound to prove such ouster before defendant need be called upon to prove anything. RAJARAM KALITA v. ROOPA KAGTEE KALITA, **13 W.R. 113.**

(5)—*Suit for possession*—Onus *of proof on whom lies.*—Where a plaintiff alleges that certain property had been in his possession as Khamar property and that the defendant

Burden of Proof—continued.

——28—.Poseession and proof of title—*contd.*

wrongfully seized them and sold the produce, *held* that the *onus* lies on the plaintiff to prove his case. HARADHUN DUTT v. KOONJO BEHAREE LAL SINGH BABOO, **5 W.R. 245.**

(6)—*Suit for possession*—Onus *on whom lies.*—In a suit for possession, the plaintiff must prove his title to recover the land. BUNGO CHUNDER BOSE v. KASHEE CHUNDER BOSE, **5 W.R. 218.**

(7)—Onus *of proof—Adverse possession—Nature of possession requiring proof.*—The *onus* of proving a title by adverse possession for the statutory period lies on him who alleges it. The possession required to be proved must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. RADHAMONI DEVI v. COLLECTOR OF KHULNA, **2 Bom. L.R. 592.**

(8)—*Claimant cannot succeed on account of weakness of title of adversary.*—A claimant cannot succeed because his adversary's title is weak and a person, who enters upon property which is lawfully in the possession of another, cannot hold it against that other, merely because he cannot prove a satisfactory title. ADJOODHYA PRASAD v. SHEDASS MADAN GOPAL, **1 C P.L.R. 3.** (6 B. 215, *Dist.*) [*R.*, 1 N.L.R. 150.]

(9)—*Forcible or wrongful dispossession of land.*—The plaintiff was admittedly in possession, and had been so for six years at least, as defendant himself acknowledged. There was evidence that she and her ancestors had been in possession for some 20 years. The defendant denied wrongful dispossession. He said the land had been made over to him by plaintiff and her husband. The burthen of proving this was on him. He had failed to discharge it. There was only the vague evidence of one witness for the defence that plaintiff's husband said he could work the land if he claimed the right over it, and this was contradicted by other evidence for the defence that defendant entered on the land in opposition to plaintiff who took criminal proceedings against him. Wrongful dispossession was, therefore, proved, and plaintiff was entitled to recover possesison at least, and to get back the land permanently, unless her claim could be resisted by a superior title. MA SI v. MAUNG YE BAW, **U.B.R. 1892—1896, Vol. II, 233**

(10)—*Suit for possession—Utility of presumption arsing from title.*—Where there is evidence, apparently strong on each side, in estimating the weight due to the evidence on both sides, the presumption which arises from title may in certain circumstances be regarded. But, if there be no credible evidence on plaintiff's side, no question of turning the balance of evidence by the weight of presumption as to title arises. LAXMAN v. MANGAL KHAN, **7 C.P.L.R. 12.** (12 C. 38, *R.*)

(11)—*Suit by person in possession for confirmation of title*—Onus *of proof.*—When a

Burden of Proof—continued.

28.—Possession and proof of title—*contd.*

plaintiff in possession sues to have his title confirmed, he is none the less bound to prove such title. JOLOKE SINGH v. GURWAR SINGH, **2 W.R. 167.**

(12)—*Proof of title by plaintiff—Burden of proving adverse possession.*—In a suit for possession based on title, where the plaintiff proves title, the burden of proving adverse possession is upon the defendant. SARSUTI v. KUNJ BEHARI LAL, **3 A. 345, F.B.** [*R.*, 11 A. 438.]

(13)—*Suit for possession—Separate possession—Forcible realisation of rents—*Onus *of proving existence of share in separate possession.*—In a suit for possession where plaintiff (the wife of one K) alleged having purchased, at a private sale from M and others, a distinct share of a certain talook, together with other rent-free lands, and that she was in separate possession by collecting rents when she was dispossessed by defendant who forcibly realized the rents, defendant stated that, in the same year she had purchased at a sale in execution the rent-free lands of K and others, that she was in possession and knew nothing where plaintiff's lands lay: *Held* that it was incumbent on plaintiff to prove by documentary evidence the existence of the distinct share said to have been purchased from M, or to bring M into Court to prove what he had sold. RADHIK CHOWDHRAIN v. NISTARINEE DOSSEE, **24 W.R. 126.**

(14)—*Claim to property attached in execution of decree—Suit to establish judgment-debtor's right.*—Where an attaching creditor proves that the judgment-debtor has been in possession and enjoyment of the property attached, and has been using it, to all external appearances, as owner and proprietor, the *onus* is cast on the claimant to prove his title. MATHURA DAS v. MITCHELL, **4 A 206 = A.W.N. 1882, 17.**

(15)—*Possession, evidence of—Title*—Prima facie *proof of possession*—Onus *of rebutting such evidence.*—Possession is evidence of title; and the plaintiff, proving that he had possession and had been forcibly disturbed, makes out a *prima facie* title which the defendant should rebut. MAHOMED BUX v. ABDOOL KUREEM, **20 W. R. 458.**

(16)—*Suit for possession of ousut taluk—Dispossession by purchaser of zemindari*—Prima facie *title in superior landlord—Burden of defeating of such title.*—In a suit to recover possession of an *ousut* talook on the allegation of having been dispossessed by the purchaser of the zemindari right, *held* that the defendant being shown to be the superior landlord and as such having had *prima facie* title, it lay on the plaintiff to defeat that right by proving the grant of an intermediate tenure. NISTARINEE v. KALI PERSHAD DASS CHOWDHRY, **23 W. R. 431.** (12 W.R. P.C. 7, *F.*) [*F.*, 7 C. 442.]

(17)—*Owner of land with* prima facie *title to possession—Tenure entitling to possession—Effect.*—The owner of land showing a *prima facie* title to possession can claim a decree, unless the party in possession has a tenure entitling him to retain possession RAM MONEE MOHUR v. ALEEMOODDEEN, **20 W. R. 374.** [*Ap.*, 22 W.R. 417; *F.*, 11 C.L.R. 476, 15 C, 89, 13 C. 1; *R*, 6 C.W.N. 105.]

(18)—*Possessory suit on ground of* khas *possession—Title admitted*—Onus *of proof.*—Where a suit to recover possession, based on the allegation that plaintiff had been in *khas* possession, is decreed by the first Court, and reversed by the lower appellate Court, on the ground that plaintiff had not proved his *khas* possession or dispossession, *held* that the lower appellate Court took a very narrow view of the case and decided it on wrong issue; the plaintiff should not have been called upon to prove *khas* possession in order to recover land from one who had no title to it, as the plaintiff's title had been admitted. RAJ KISHEN MOOKERJEE v. PEAREE MOHUN MOOKERJEE, **20 W.R. 421.**

(19)—*Suit for* kha*s possession—Plaintiff alleging permanent tenure—Plea of lease from zemindar—Effect—Limitation—Right to* khas *possession.*—In a suit for *khas* possession, where plaintiffs allege a permanent tenure, and defendants plead a lease from the zemindar, this plea indicates a good title, unless plaintiffs can prove a better title in themselves. But if plaintiffs establish that their tenure is of a permament character, and that they are not barred by limitation, they must be entitled to *khas* possession. ASSUROODDEEN v. GOBIND CHUNDER KOONDOO, **24 W R. 123.**

(20)—*Suit for possession by zemindar—Title admitted—Proof.*—In a suit for possession, the plaintiff who was admittedly the zemindar of the land, gave no evidence of her allegation that the land was her *zerait*, and the defendants failed to substantiate their defence that they had acquired a right of occupancy, nor were they able to prove that they were tenants of the plaintiff. *Held* that the plaintiff being admittedly the zemindar of the land, her title to the property was established; and unless the defendants establish their defence, or that they were even tenants-at-will under the plaintiff, the latter was entitled to a decree. BATAI ASHIR v. BHUGGOBUTTY KOER, **11 C.L.R. 476.** (12 M.I.A. 286, 20 W.R. 374, 20 W.R. 421, 22 W.R. 417, 23 W.R. 238, 23 W.R. 291, *F.*) [*F.*, 9 C.W.N. 144; *Appl.*, 15 C. 89; *D.*, 13 C. 1, 6 C.W.N. 105, 13 C.W.N. 661.]

(21)—*General title—Mokurari tenure*—Onus probandi.—Where a plaintiff has the general title to the property in suit, and the defendant sets up an interest as mokuraridar, the defendant has the burden of proof on him. KOONJ BEHAREE RAM v. BUKSHEE LUCHMUN DOSS, **19 W R. 188.** [*Ap.*, 22 W.R. 417; *F.*, 20 W.R. 421.]

(22)—*Possessory suit—Dispossession—Admission of plaintiff's ownership—Claim to hold possession under jote tenancy*—Onus:—Where, in a suit to recover possession of land of which

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

plaintiffs had been forcibly dispossessed, defendants admit the ownership to be with the plaintiffs, and pray to be allowed to hold possession under the jote tenancy, the burden of proof was held to be on them. HUREE MOHUN PODDAR v. GUREEBOOLLA MULLICK, **22 W.R. 417.** [*F.*, 11 C.L.R. 476; *R.*, 9 C.W.N. 144.]

(23)—*Suit for possession of julkur by landlord—Allegation of temporary tenancy in defendants—Plea of* miras *right—Suit demanding possession from defendants—Notice—Question for determination.*—In a suit by a landlord to recover possession of a julkur on the allegation that defendants never had had any but temporary tenancy, and that they had retired from the fishery, where defendants in answer set up a *miras* right: *Held* that the suit should be looked upon as a demand for possession from the defendants, or as it were a notice to give up possession, and that the question to be tried is whether the defendants are entitled to retain possession. KALEE KISHORE ROY v. BROJENDRO COOMAR ROY CHOWDHRY, **24 W.R. 266.**

(24)—*Decree for julkur as part of estate settled—Act IV of 1840 award, adverse possession under award—Original boundaries and modern possession.*—To obtain a decree for a julkur, as part of an estate settled with him, of which adverse possession has been obtained by Act IV, award, plaintiff must show, not only original boundaries, but modern possession. RANEE RADHA CHOWDHRAIN v. KISHEN SOONDUREE DOSSIA, **2 W.R. 304.**

(25)—*Forcible ouster—Suit for possession—Burden of proving title.*—Where a person forcibly dispossessed sues to recover possession title must be proved by the party guilty of the forcible dispossession. SHAMA SOONDUREE DEBIA v. THE COLLECTOR OF MALDAH, **12 W.R. 164.**

(26)—*Possessory suit—Allegation of dispossession—Procedure—Proprietary title and undertenancy.*—Proper procedure in a suit for recovery of possession on allegation of illegal dispossession pointed out. Where defendant establishes title as landlord, defendant cannot in a Civil Court succeed on the title of an under tenant. KUBEEROODDEEN AHMED v. NYAN BIBEE, **8 W.R. 354.**

(27)—*Suit to recover landed property in possession of defendant—Possession within twelve years before suit and title to possession.*—Where a plaintiff brought a suit in 1856 to recover landed property which was in the possession of the defendant since 1845 and at the time of the institution of the suit; *held* that, before the plaintiff could recover, he must prove, first, possession within 12 years before suit; and secondly, title to possession. BEER CHUNDER JOBRAJ v. THE DEPUTY COLLECTOR OF BHULLOOAH, **13 W.R P.C. 23.**

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

(28)—*Suit for possession—Question of title.*—In a suit to recover possession of land that had been entered upon under a lease, the Court need not go into plaintiff's title, until there are found grounds for believing that defendant's case is a good one. DABJEE SAHOO v. SHAIKH TUMEEZOODDEEN, **10 W.R. 102.**

(29)—*Illegal dispossession—Suit for possession*—Onus.—In a suit to recover possession, where plaintiff proves possession, and dispossession, the *onus* lies in the first instance on the defendant. RADHA BULLUB GOSSAIN v. KISHEN GOBIND GOSSAIN, **9 W.R. 71.** [*R.*, 11 C.L.R. 133.]

(30)—*Suit for possession*—Onus *of proof.*—Where A brings a suit to recover possession of land for which he had obtained a decree in a suit with C, but of which he had been illegally dispossessed by B, *held* that, the dispossession being proved, the *onus* lay in the first instance on B of proving his title, and that the mere fact that the land was indentical with that decreed to A in his suit with C could not entitle him (A) to a decree in his suit with B. JADUBNATH v. RAM SOONDAR SURMAH, **7 W.R. 174.**

(31)—*Suit in ejectment—Burden of proof.*—Suit by A, to recover real estate in the possession of B, and of his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by A's ancestors, and that B, and those claiming under him, were only usufructuary mortgagees in possession. *Held*, that the *onus probandi* was on A, who could only succeed by the strength of his own title, and not by reason of the weakness of B's title. If a party put in evidence, in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration and, if satisfied, adjudicate thereon. SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR v. CHINNA NAYANA CHETTI, **10 M.I.A. 151.**

(32)—*Possession under s. 15, Act XIV of 1859—Suit for possession*—Onus *of proof*—Where a person obtained possession under an order passed in accordance with the provisions of s. 15, Act XIV of 1859, and another person sues to recover possession of the suit-land from him, *held*, that it is for the plaintiff to prove everything and that the possession of the defendant cannot be disturbed, unless the plaintiff gives proof of a better title. MOULVIE MAENOODDEEN v. GREESH CHUNDER ROY CHOWDHRY, **7 W.R. 230.**

(33)—*Illegal ejectment—Suit for possession—Remedy—S 15, Act XIV of 1859—Possessory suit—Proof of title.*—Whether the plaintiff seeks to recover possession simply on the ground of illegal ejectment, his remedy is to bring a possessory suit under s. 15, Act XIV of 1859; otherwise he must show some title to

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

re-enter and that the landlord ejected him without having any right to do so. NUND KISHORE LALL v. SHEO DYAL OOPADHYA, **11 W.R. 168.**

(34)—*Possessory suit—S. 15, Act XIV of 1859, failure to recover possession in action under—Plea of purchase from plaintiff's father*—Onus.—In a suit to recover possession of land of which, plaintiff had failed to recover possession in an action under Act XIV of 1859, s. 15, defendant pleading acquisition by purchase from plaintiff's father, *held* that the *onus* lay on the plaintiff to prove his title and not on the defendant to show that the land in dispute was within the conveyances filed by him. JOKEE MEAH v. JOOGUL KISHORE SURMAH, **20 W.R. 414.**

(35)—*Agreement to abide by result of one suit—Suits to be analogous.*—Where parties to other suits agree to abide by the result of the decision in one, suits should be analogous, so that one decision might decide all the questions at issue. LUCHMAN PRITHEE MUNDUL v. KOOER SREE NUNDUN SINGH, **23 W.R. 383.**

(36)—Onus — *Possession — Heir-at-law.*—Where a defendant in possession of certain property resists a suit for possession thereof, brought by parties who have proved themselves to be the nearest heirs of the last full owner, the *onus* is on the defendant to prove his title. RAMPROTAB MISSER v. ABHILAK MISSER, **3 C.L.R. 170.** (3 B.L.R. A.C. 145, 13 B.L.R. 427, *F.*)

(37)—*Suit by plaintiff for possession as heir of his father—Defendant alleged the plaintiffs to have been adopted by another—Admission by plaintiff of his having been so adopted—Nature of such admissions—Estoppel.*—M and his transferees brought to suits for possession of property left by one P, the natural father of M. The defence was that the plaintiff could not inherit, inasmuch as he was adopted by K. The defendant filed several documents, in which the adoption was admitted by M himself. *Held*, that the burden of proving that the adoption relied upon took place, rested on the defendant. But that burden was, *prima facie*, shifted by her proving his solemn statements under hand and seal that it did take place. The defendant not being a party to those documents, the said statements did not amount to estoppel, but the party making the statements could rebut the presumption that they were true. The express admissions of a party to a suit, or admissions implied from his conduct, or evidence, and strong evidence against him ; but he could show that those admissions were mistaken or not true. RANI CHUNDRA KUNWAR v. NARPET SINGH, **4 A. L.J. 102, P.C. = 11 C.W.N. 321 = 6 C.L.J. 116 = 17 M.L.J. 103 = 2 M.L.T. 109 = 9 Bom L.R. 267. = 29 A. 184.**

(38)—*Possession of property—Owner—Mortgagee—Burden of proof.*—Where a person is shown to be in possession of property, not as owner of the full proprietary right, but as mortgagee, the burden of proof of qualified ownership lies on the party asserting it. Such a case falls within the scope of s. 110, Act I of 1872. SHEORUTTUN GIR v. DOORGA, **6 N.W.P. 36.** [*F.*, 11 A. 438.]

(39)—*Suit for redemption by mortgagee against sub-mortgagee—Latter setting up sale of rights—Unregistered deed—Possession*—Onus.—Title may be presumed from lawful possession, until want of title or better title is established. Where a dispute is between a mortgagee and a person deriving his rights from that mortgagee, the point at issue is the ownership of the mortgage made by the proprietor. Though the plaintiff may not set up a complete title to the ownership of the land, he is, therefore, not necessarily in the position of a man who has pleaded a limited title and so bound to prove it. JODH SINGH v. SUNDAR SINGH, **122 P.R. 1882.** [*R.*, 74 P. R. 1883, 126 P. R. 1884.]

(40)—*Proprietors — Claim for possession—Defence of limited title evidenced by unregistered deed.*—Suit by a proprietor for possession of lands against persons whom they alleged to be their tenants. Though admitting the plaintiff's proprietary right, the defendants set up a mortgage right, which, however, could not be proved as the deed evidencing the right was unregistered. The plaintiff was held entitled to a decree. SAWAN SINGH v. LEHNA SINGH, **123 P.R. 1882.** (58 P.R. 1877, 84 P.R. 1877, *F.*)

(41)—*Suit for possession—Allegation by defendant of* benami *purchase for him by plaintiff*—Onus *of proof.*—Where, in a suit for recovery of possession on the ground of dispossession, the defendant alleged that the lands were purchased *benami* for him, by the plaintiff, *held*, the *onus* of making out a *prima facie* case lay on the plaintiff under s. 110, Evidence Act. HURI RAM v RAJ COOMAR OPADHYA, **8 C. 759.**

(42)—Benami *transaction*—Onus.—A person, alleging that a sale is not what it purports to be on the face of it, is bound to prove his allegation. KARIM UD DIN v. HARDHYAN SINGH, **43 P.R. 1882.** *See also*, MUSSAMMAT FAZULUN-NISSA v. HARDHYAN SINGH, **43 P.R. 1882, note.** [*R.*, 37 P.R. 1909.]

(43)—*Suit to recover possession of property—Title—Burden of proof.*—No person can set up his own fraud. Where the plaintiff sued to recover possession of certain property, which she claimed by inheritance from her father, on proof that she had been dispossessed by a *benamidar*, in whose favour a formal conveyance had been executed by her father, *held*, that plaintiff's prior continuous and peaceful possession would completely answer the presumption arising from the defendant's recent and unexplained possession, and would shift back upon

Burden of proof—continued.

——28.—Possession and proof of title—*contd.*

him the *onus* of proving that he had acquired the property by a good title from the plaintiff or her father. MAHESH CHANDRA BANDOPADHYA v. SRIMATI BARADA DEBI, **2 B.L.R. A.C. 275=11 W.R. 185.** [*R.*, 11 C.L.R. 133.]

(44)—*Suit for title-deeds—Plea of beneficial interest in property*—Onus *of proof.*—In a suit for title-deeds, where beneficial interest is pleaded in the property purchased in plaintiff's name, *held* that, if the plaintiff could show that he had held possession from the time of the purchase to the institution of the suit, the defendant must prove that she had herself purchased the property ; else, the burden would lie on the plaintiff to prove that the property was purchased from his own funds. NILMONEE BANERJEE v. SURBO MUNGULA DEBIA, **2 W.R. 31.**

(45)—*Suit for possession of immoveable property—Adverse possession—Burden of proof.*—Suit for possession of plaintiff's share of certain immoveable property left by his paternal grandfather. The plaintiff's right of inheritance under his personal law having been lost (his father having predeceased his grandfather), a testamentary document under which his title, together with the defendants, originated some twenty-eight years before suit was set up by him, *Held* that he was bound to prove that his claim was within time. DIN MUHAMMAD v. MEER BAKHSH, **30 P.R 1902.**

(46)—*Suit by purchaser at Court sale—Defendant's plea of purchase under unregistered sale from judgment-debtor*—Onus *of proof—Adverse possession.*—Plaintiff, purchaser at a Court sale, of the judgment-debtor's interest, sought to eject the defendant, who pleaded possession under an unregistered sale by the judgment-debtor. *Held* that, as the defendant had admitted that he derived his title from the judgment-debtor, the burden of proving a valid sale by the latter lay upon the defendant and that he had failed to prove such a sale, the sale-deed to him being inadmissible as unregistered, and oral evidence being inadmissible in its place. Though, however, the defendant could not establish a title by purchase, it was competent to him to prove a title without the aid of his deed of sale, as a title founded on adverse possession for twelve years. SAMBHUBHAI KARSANDAS v. SHIVLALDAS SADASHIVDAS DESAI, **4 B. 89.** [*Appr.*, 4 B. 126, F.B.; *R.*,6 B. 168, F.B., 9 B. 137; *R.*, 12 B. 569, 11 A. 438, 16 B. 722, 27 B. 452=5 Bom. L. R. 144 ; *D.*, 18 B. 332.]

(47)—*Unregistered sale—Possession under*—Onus.—An unregistered deed of sale under which a person is in possession, would *prima facie* be evidence that he held as owner. The burden lies upon him, who claims under a registered sale, to show that the former is not the owner. IMAM BUKHSH v. POKHAR, **26 P.R. 1882.** (102 P.R. 1879, *F.*) [*R.*, 126 P.R. 1884 ; *F.*, 2 P.R. 1885.]

Burden of proof—continued.

——28.—Possession and proof of title—*contd.*

(48)—*Attachment in execution—Dower—Burden of proof.*—In a suit for the sale of property in satisfaction of a decree, where the judgment-debtor made it over to his wife in lieu of dower, and she transferred it to defendant. *Held* that the *onus* was on the plaintiff. LYAKUT ALI v. THE COURT OF WARDS, **10 W.R. 423.**

(49)—*Judgment-creditor getting partial possession without judgment-debtor's opposition*—Onus *of proof re inability to secure possession of remainder.*—Where a judgment-creditor admits having obtained possession of a portion of the land without opposition from the judgment-debtor, the *onus* lies on him to show that he was unable to obtain possession of the remainder. AMJATT ALI v. AZHUR ALI, **21 W.R. 241.**

(50)—*Boundary suit—Relation of Government--Government title of prescription of sixty years.*—The relation of Government in respect of the twenty-four *Pergunnahs*, as landlord and tenant, in a suit respecting boundaries with the tenant and another in possession of the land, is such, that the tenant cannot take advantage of the Government title of prescription of sixty-years. GUNGA GOBIND MUNDUL v. THE COLLECTOR OF THE TWENTY FOUR PERGUNNAHS, **7 W.R. 21.P.C. =11 M.I.A. 345.**

(51)—*Possession, suit to recover—Right of occupation*—Miras *land—Regulation XVII of 1827, s. 7, cls. 1 & 2—Bombay Act I of 1865.*—On the 8th August, 1857, the plaintiff passed a *kabuliyat* to Government and took possession of certain *miras* land abandoned by the *mirasdar* for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In a suit by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them, but the suit was dismissed by the Courts below. The lower appellate Court based its decision on the ground that, as the plaintiff failed to prove the fact of his alleged partnership with the defendants, he could not succeed, though the Court found in the plaintiff's favour the other facts stated above. *Held*, in special appeal, that, as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII of 1827, cls. 1 and 2, and Bombay Act I of 1865, have required the defendants to prove their claim to hold possession as against the plaintiff's right of occupation. TRIMBACK RANU v. NANA BHAVANI, **12 B.H.C. 144.** [*R.*, 13 M, 89.]

(52)—*Ejectment—Possession* — Onus.—Tenants long in possession and paying rent can only be ejected in a suit in a Revenue Court by a person entitled to receive rent. Where, in a suit for ejectment and possession, the defendant admits that the tenure of certain lands formerly held by him has passed to

***Burden of proof*--continued.**

——28.—Possession and proof of title—*contd.*

plaintiff, but that the lands in dispute do not form part of the tenure and are held by himself, under another title, *held* that it lay with the plaintiff to prove his case. The fact of the matter being peculiarly within the knowledge of the defendant did not vary the rule of law in respect to proof, and shift the *onus* on to the defendant GRIDHAR HARI v. KALI KANT ROY CHOWDHRY. **3 B.L R. A.C. 161.**

(53)—*Suit for possession, nature of grant, evidence of*—Onus probandi.—Where, in a suit to recover possession of a *mouza*, granted by the plaintiff's ancestor to the defendant's ancestor as a *jagir*, on the allegation that it was an ordinary service *jagir*, the plaintiff filed a *kabuliat* executed by the defendant's ancestor, which went to support the plaintiff's allegation, and the defendant neither filed the *auladad sannad* in support of his allegation regarding the nature of the grant, nor accounted for its non-production, *held*, the plaintiff was entitled to a decree. THAKAR DOYAL v. RAM NARAIN SINGH, **8 C. 375.**

(54)—*Possessory suit*—Jageer *tenure—Burden of proving grant—Secondary evidence of pottah granting* Jaghir.—In a suit to recover possession of certain lands upon the ground that they were granted as a *jaghir* tenure by plaintiff's ancestor to one P and his lineal descendants, and that such descendant, had failed: *Held* that it was necessary for plaintiff to prove the grant alleged in his plaint, without which no cause of action would have been shown; and, as the tenure was created in the usual and proper manner, *i.e.*, by *pottah* and *kabuliat*, the latter would be in possession of plaintiff's ancestors. As this was not produced no secondary evidence given of it, and no foundation laid for giving such evidence, it was unnecessary to go further into plaintiff's case. MAHARAJAH JUGGERNATH SAHEE v. MUSSUMUT AHLAD KOWUR, **19 W.R. 140.** [*D.*, 8 C. 375].

(55)—*Possessory suit—Allegation of management by defendant--Denial of management—Plea of title by purchase—Proof of thirty year's possession*—Onus *of proof*.—In a suit for possession under the allegation that the property in dispute was under the management of the defendant, who denied management, and set up a title by purchase and proved a possession for more than thirty years, *held* that the plaintiff was bound to prove a possession for his benefit. BABOO KIRAT SINGH v. RAM DOSS, **W.R. F, B. 8.**

(56)—*Suit for share of property on ground of joint living—Burden of proof*.—In a suit for a share of property which plaintiff claims to hold through another with whom he lived jointly, the burden of proving that the other had been in possession within twelve years prior to the institution of the suit lay on the plaintiff. JUGGRUR NATH SURMA MOJOOMDAR v. RADHA NATH SURMA MOJOOMDAR, **24 W.R. 241.**

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

(57)—*Suit by donee for possession from defendant alleged to be in temporary possession—Proof of donors' title, if necessary—Permissive—occupancy—Remand.*—A donee, under a deed of gift, brought a suit to recover a piece of land which he alleged, his donors had given for a temporary purpose to the defendant in possession six years before; and the Munsif found that it was so, and allowed the claim. But the District Judge, in appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree. *Held* that the Judge was in error in requiring the plaintiff to establish the title of the donors, without inquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on the point. SAKALCHAND SAVICHAND v. DAYABHAI ICHHAND, **4 B.H. C.A.C. 70.** [*R.*, 2 B. 299.]

(58)—*Forest Act* (*Madras Act V of 1882*)—*Burden of proof—Limitation Act, sch. II, art. 149.*—Granting that it is incumbent on a claimant to certain land taken up by Government as forest reserve, in the first instance, under ss. 4 to 10 of the Forest Act, to prove some *prima facie* ground of ownership before Government can be called upon to disprove his title or prove its own, the *onus* is certainly shifted when the claimant starts with an admitted possession and enjoyment of thirty years. The Government cannot compel the claimant to prove sixty years' possession, but must show a subsisting title of its own, and the presumption in favour of Government is only as regards unoccupied land. THE SECRETARY OF STATE FOR INDIA v. KOTA BAPANAMMA GARU, **19 M. 165.** [*R.*, 13 P.L.R. 1903.]

(59)—*Forest Act* (*Madras Act V of 1882*), *s. 6—Burden of proof—Presumption of title—Long possession*.—Certain land was constituted a reserved forest under the Madras Forest Act, 1882. A person alleging that the *jenm* title was vested in his family, claimed the ownership. His claim was contested by the Government, on the ground that the land belonged to another family and escheated to Government. It appeared that the claimant's family was in possession for at least sixty years, though he was out of possession for six years prior to the notification. The escheat set up was not proved. Under these circumstances, the claim set up was allowed. Observations on the burden of proof and on the presumption of title arising out of possession. SECRETARY OF STATE FOR INDIA v. BAUOTTI HAJI, **16 M. 315=2 M.L.J. 168.**

(60)—*Act IV of 1840, s. 3—Suit for possession of land attached under section—Burden of proof*.—In a suit for possession of land attached under s. 3, Act IV of 1840, by a Magistrate, the burden of proof was held to lie on the plaintiff. MAHARAJAH MAHESHUR SINGH v. BABOO RAMAPUT SINGH, **W.R. F.B. 7=1 Ind. Jur. O.S. 35.**

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

(61)—*Bengal Act IV of 1840, award under —Title, proof of.*—The plaintiff averring the defendant to be a trespasser, notwithstanding an Act IV award passed in his favour, may be called on by the plaintiff to prove his right and title to land; and, unless the defendant can establish that he holds the land in lease or in any other tenant right, the plaintiff is justified in regarding him as a trespasser and turning him out. BYDONAUTH SORBHON v. KENOORAM HOLDAR, **1 W.R. 210.**

(62)—*Possessory suit for land in another's occupation under Act IV award—Plaintiff acknowledged to be owner—Plea of hereditary right to land—Burden of proof.*—In a suit by an owner a *lakherajdar*, to obtain possession of land belonging to a temple in the occupancy of another under an Act IV award, where the defendant claimed the land as sevait, *held* that the *lakherajdar* being the acknowledged owner of the land, the *onus* of proving a right to the possession thereof lay on the party claiming such right. MOOROLEE DHUR PANDAH v. MUTHOORANUND DOSS, **2 W.R. 152.**

(63)—*Purchaser ousted from possession by alleged donees—Award of Criminal Court—Burden of proof on dispossessors suing out their claim.*—A, being in possession of lands, as purchaser, under deeds of sale from B the person last seized, was forcibly ousted from possession by C and D who set up a title to the lands, under an alleged deed of gift from B. A made a complaint to *Foujdarry* (Criminal) Court, and, under an order of that Court, was again put into possession; C and D being directed to institute a suit in the Civil Court, to establish their claim, which they accordingly did, relying upon their title, and impeaching the deeds of sale. In such circumstances, *held* by he Judicial Committee, reversing the decree of the *Sudder Dewanny Adawlet of Bengal*, (without prejudice, however, to any question which might arise between A and any other party claiming under B), that it was incumbent on C and D to prove their right to the lands claimed, before they could put A to proof of his title. RAM RUTTON RAE v. FURROK-OONNISSA BEGUM, **4 M I.A. 233.**

(64)—*Suit for possession of house with arrears of rent—Plea of sale under* kobala—*Burden of proving transfer.*—In a suit to recover possession of a house with arrears of rent, where defendants plead that plaintiff had sold his rights by a *kobala*, the execution of which is admitted, it was held that the burden of proving the genuineness of the transfer lay on the defendant, as the plaintiff was found to be all along in possession by realisation of the rent. AJOODHIA SAHOO v. BISSEN LALL, **24 W.R. 212.**

(65)—*Suit against purchaser in possession for more than twenty-five years*—Onus *of proof.*—In a suit against a purchaser in possession more than 25 years on the ground of having acquired

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

the property in the exercise of the plaintiff's zemindari right upon the relinquishment or abandonment of the property, the *onus* was held to lie on the plaintiff. MADHUB CHUNDER GHOSE v. NILKANT SHAHA ROY, **2 W.R. 41.**

(66)—*Suit between zemindars as to salt lands relinquished by Government—Possessory award.*—In a suit between zemindars as to salt lands relinquished by Government where one is in possession under a possessory award of the Criminal Authorities, the *onus* was held to lie on the plaintiff to show that the lands belonged to his zemindari. RAJAH LUCHMUN PERSHAD v. THE MAHARANEE OF BURDWAN, **17 W.R. 181.**

(67)—*Lessee's right to make contract detrimental to lessor's interests—Suit for title against party in possession under Criminal Court award —S. 530, Act X of 1872.*—A lessee has no right to make any contract detrimental to his lessor's interest, which is to take effect after determination of his lease. In a suit for establishment of title against parties in possession under award of Criminal Court under Act X of 1872, s. 530, the *onus* is on the plaintiff. BABOO HURI RAM v. BHIKAREE ROY, **25 W.R. 20.** [*F.*, 9 C.L.R. 305.]

(68)—*Party in possession of alluvial accretion under Magistrate's award—Burden of proof.*—Where one party is in possession of alluvial accretion under a Magistrate's order, the *onus* of proof lies on the other party who sued for a declaration of right to and for possession of various titles in such accretions, failing to sustain which either has no case. HURRO SOONDUREE v. SONATON DASS, **25 W.R. 464.**

(69)—*Suit for possession—Defendant in possession under order under s. 145, Crim. Pro. Code—Appeal.*—Where the plaintiff sued for possession of land, of which the defendant was, by an order under s. 145, in possession, and has made good his title before such Court, on appeal, it is for the appellant (the defendant) to show that the judgment of such Court is wrong. It is not enough for him to show that the plaintiff's title is not free from doubt, but he must give some acceptable explanation of the circumstances which led the Court below to its conclusion. DINOMONI CHOWDHRANI v. BROJO MOHINI CHOWDHRANI, **29 C. 187, P.C. =29 I.A. 24=6 C.W.N. 386=12 M.L.J. 83=4 Bom. L.R. 187=8 Sar 224.** (19 C. 660, *F.*)

(70)—*Suit for possession after order under Bengal Act, VII of 1876.*—In a suit for possession by a person, who has been declared to be out of possession under the Bengal Land Registration Act, the plaintiff must make out a *prima facie* case. MUDUN MOHAN PODDAR v. BHOGGOMANTO PODDAR, **8 C. 923.**

(71)—*Evidence Act, s. 110 — Possession—Proof of title.*—In a suit to prevent the defendants from obstructing the plaintiff in his enjoyment of the fruits of certain trees, which he claimed as heir of a person who purchased that

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

right, the defendants denied the existence of the right, and alleged possession and enjoyment in themselves. *Held*, that the District Judge, in appeal, having found the possession and enjoyment to be in the defendants, was right in throwing upon the plaintiff the burden of proving his title to the trees or their produce. Rule of evidence with reference to ancient documents stated. LALDAS RAMDAS v. KASHIRAM, **4 B.H.C.A.C. 60.**

(72)—*Evidence Act*, s. 110.—The Evidence Act, s. 110, plainly lays down that the burden of proof lies on the party who is out of possession. NGA KYAW ZAN v. NGA SHAWE ZAN, **L.B.R. 1872—1892, 102.** [*Expl.*, L.B.R. 1893, —1900, 461, L.B.R. 1872—1892, 482; *F.*, L.B.R. 1872—1892, 642, *R.*, L.B.R. 1893—1900, 85.]

(73)—*Suit for possession—Defendant setting up title under unregistered sale—S. 110 Evidence Act*—Onus.—Suit for possession of a certain land. The defendant in possession is shown to have acquired title by purchase under an unregistered sale-deed. The *onus* of proving that he is not the owner will, however, lie under s. 110, I.E.A. on the plaintiff. PIR BAKSH v. JHANDA MAL, **157 P.R. 1882** (102 P.R. 1879 121 P.R. 1882 *R.*) [*F.*; 2 P.R. 1885.]

(74)—*Possession—Presumption*—Onus *of proving that person in possession is not owner—Ss. 109, 110 and 114, I.E.A.*—The burden of showing that the defendant, who was admittedly in peaceable possession of a certain land for several years, was not the owner under s. 110, I.E. Act, lies on him who alleges that he was not the owner. But one presumption may be met by another. The Court may also under s. 114, presume if it thought it was probable, under the particular circumstances of any case and the common course of events, that a plaintiff's title, the existence of which is admitted until a certain date, continued in existence and might then put the defendant, though in possession, to the proof of his having acquired a valid title. HASSAN v. FAZAL WAHID, **121 P.R. 1882.** (102 P.W.R. 1879. *R.*) [*R.*, 157 P.R. 1882, 74 P.R. 1883, 126 P.R. 1884; *F.*, 2 P.R 1885.]

(75)—*S. 230, Act VIII of 1859—Decree-holder's right to dispossess contested—Regular suit unnecessary*—Onus *on applicant under section.*—In the case of an applicant who, under s. 230, Act VIII of 1859, contests a decree-holder's right to dispossess him, without having to institute a separate suit, the burden of proving his case lies on the applicant. MAHOMED AUSUR v. PROKASH CHUNDER SHAH, **8 W.R. 8.**

(76)—*Suit for possession—Ejectment and forcible dispossession—Upper Burma Land and Revenue Regulation (III of 1889), s. 23—Waste land—Burden of proof.*—Where, in proof of tenancy, a demand of rent and a promise to pay it is alleged, very strict proof should be

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

given in support of it. The lower Courts should carefully notice and examine discrepancies and inconsistencies in evidence themselves, without passing them over and should not leave the task to be performed by the High Court. Claims to waste lands, surrounding or adjoining cultivated fields irrigated from tanks and channels belonging to private persons, should be treated as claims to *bobo'aing* and not to State lands. MA YAN v. MAUNG KIN U, **U.B.R. 1892—1896, Vol. II, 224.** [*R.*, U.B.R. 1897—1901, Vol. II, 360.]

(77)—*Dispossession of one share-holder—Act VIII of 1859, s. 230, claim under—Burden of proof.*—Where, on the dispossession of one share-holder by another of a certain *jalkar* in execution of his decree, the dispossessed share-holder sued under s. 230, Act VIII of 1859, to recover possession of the same, alleging that the *jalkar* was left *ijmali*, and the decree-holder set up that the *jalkar* had been formed after the partition, and by diluvion of one of his own villages, *held* that the burden lay on the claimant to prove his case. UDAI TARA CHOWDRAIN v. KAJA ABDUL GANI, **8 B.L.R. App. 90.** (6 W.R. 41, W.R. 1864, 267, *R.*)

(78)—*Suit for possession of julkur*—Onus.—In a suit to recover possession, as part of plaintiff's share of a pergunnah, of certain fisheries alleged to be part of a *julkur* mehal left by partition in the joint possession of all the shareholders, *held* that the plaintiff must start her case by proving that the fisheries formed a portion of the julkur mehal held ijmalee by the parties and that it was specially necessary for her to establish *bona fide* possession. WOODOY TARA CHOWDHRAIN v. KHAJAH ABDOOL GUNEE, **12 W.R. 16.**

(79)—*Attachment and sale of property in execution—Suit by claimant in possession to establish title—Civ. Pro. Code (Act VII of 1859), ss. 230, 246*—Onus *of proof on purchaser.*—In this case, the claimant claimed that the attached property was his and that he was in possession of it when it was attached. His claim was rejected. In the suit that followed to establish his right, he proved his possession but failed to prove the title alleged by him. The Full Bench held that such possession having been proved, it lay upon the defendant to prove a title to the property in himself, or in the judgment-debtor, and in the absence of such proof, the plaintiff (claimant) was entitled to a decree declaratory of his right to the property as against the defendant. Where a person in possession of property, which is attached and sold as that of another, institutes a regular suit to establish his title, his possession in itself affords ground for an assertion of full proprietorship for the purposes of the suit, except so far as the right vested in the judgment-debtor can be shown affirmatively to contract or qualify it. So also, where a dispossessed party proceeds, under s. 233 of Act VIII of 1859, to vindicate the possession of

***Burden of proof*—continued.**

——28.—Possession and proof of title—*contd.*

which he has been deprived, although he may, at his option, give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proof of title, *i.e.*, his right to disposses the applicant. PEMRAJ BHAVANIRAM v. NARAYAN SHIVARAM KHISTI **6 B. 213, F.B.** [*Diss.*, 17 C. 256; *F.*, 1 Bom. L.R. 45; *Appr.*, 1 S.L.R. 107; *R.*, 8 B. 371, 1 C.P.L.R. 3, 13 A. 537=11 A.W.N. 196, 16 B. 722; 7 C.P.L.R. 3, L.B.R. 1893—1900, 32, 20 B. 270, U.B.R. 1892—1896. 619; *R.*, 12 C.P. L.R. 59, 2 O.C. 3, U.B.R. 1897—1901, 270, 2 Bom. L.R. 628, 25 B. 287=2 Bom. L.R. 1121, 3 Bom. L.R. 246, 78 P.R. 1902=137 P.L.R. 1902, 2 L.B.R. 152, 5 Bom. L.R. 225, 3 L.B. R. 27, 9 Bom. L.R. 1801; *R.*, 10 Bom. L.R. 571, 14 C.W.N. 141=2 Ind. Cas. 202.

(80)—*Suit for confirmation of possession—Lakheraj land—Admission of defendant*—Onus *on whom lies.*—In a suit for confirmation of possession brought by the plaintiff in consequence of certain land within his zemindari having been sold in execution of a decree as lakheraj land, the defendant admitted that the lands in suit were within the boundaries of the plaintiff's zemindari. *Held* that the *onus* lay on the plaintiff to prove his possession. BABOO FURSEEDH NARAIN SINGH v. BISSESSUR DYAL SINGH. **7 W.R. 148.**

(81)—*Confirmation of title, suit for—Plaintiffs asserting possession without proof of title*—Bona fide *purchaser from ostensible owner*—Onus probandi—Where a party asserting possession without evidence of title sues for confirmation of title against a *bona fide* purchaser for valuable consideration without notice from the party in whose name the property stood, the burden of proof first rests with the plaintiff to establish his own title before the defendant can be called upon to do so. LEKHRAJ ROY v. MUTTY MADHUB SEN. **14 R.W. 95.**

(82)—*Claim as collateral heir*—Onus probandi—*Court of first instance shifting the burden of proof.*—The *onus* is on a plaintiff, who institutes a suit as a collateral heir, to prove his title as such by descent. Where a claimant brought a suit for possession by right of inheritance, against the alleged adopted son of the last male owner, alleging himself to be the heir and denying that an adoption, purporting to be made by the widow, had been duly authorised by the deceased, the procedure taken by the Court of first instance, in proposing to make the establishment of the plaintiff's title depend upon the failure or success of the defendant in proving the adoption, was held to be an error. KALI KISHORE DUTT GUPTA MOZUMDAR v. BHUSAN CHUNDER *alias* BEPIN CHUNDER DUTT GUPTA, **18 C .201=17 I.A. 189, P.C.=5 Sar. 607.**

(83)—*Evidence Act, s. 110—Ejectment-suit—Long possession—Suit for possession—Allegation by defendant that plaintiff's long possession was only as tenant paying rent to him—Payment of rent not proved—Presumption—Finding by Court that plaintiff's possession was that of licensee—Court cannot set up case for parties.*—It is usually for the plaintiff who seeks ejectment to prove his title. But when possession for thirty or forty years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law, that the plaintiff's long possession indicates his ownership of the property. In an ejectment-suit, where the plaintiff had proved long possession, and the defendant alleged that plaintiff was in possession only as a tenant-at-will paying a certain rent to him, but failed to prove such receipt of rent, the proper inference to be drawn is that plaintiff's long possession was adverse. In the former, case, the finding by the lower Court that plaintiff's long possession was only that of a licensee was held to be improper, for that would be setting up a case for the defendant which he himself never set up. LACHHO v. HAR SAHAI, **12 A. 46=A.W.N. 1888, 43.** [*Cons.*, U.B.R. 1897—1901, Vol. II. Evidence, 110; *R.*, U.B. R. 1905, Evidence, 7.]

(84)—*Such suit by purchaser*—Onus *of proof of exclusion from property within 12 years.*—In such a suit by the purchaser of a share in joint family property, the *onus* of proving that the exclusion, if any, of the vendor from the property, took place within 12 years of the suit lies upon the purchaser.—*Per Garth, C. J.* RAM LAKHI v. DURGA CHARAN. **11 C. 680.**

(85)—*Two lesses claiming under same zemindar—Denial by zemindar*—Onus *of proof.*—A and B claimed under leases from a zemindar, who supported the claim of A and denied that of B. *Held* that B must prove his title. RAM DHYAN MISSER v. MOURAKHUN ROY, **6 W.R. 155.**

(86)—*Executor* de son tort—*Possession of some properties of the deceased debtor—Liability to prove extent of property actually received.*—Where it was found that the defendants took possession of some properties of a deceased debtor, *held* that this was sufficient to throw upon them the burden of proving that they did not receive so much of the property of the deceased as would satisfy the debt. *Held* also that the defendants were liable as executors *de son tort.* HAVA BHAYI v. LAKSMI DOSS THOPPAIN SAIT. **6 M L T. 362.** (3 M. 359, *F.*)

See BURDEN OF PROOF—DECLARATION TITLE, 71 P.R. 1866, 66 P.R. 1867.

Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, A.W.N. 1908, 125=30 A. 321=5 A.L.J. 601.

See CIV. PRO. CODE. 1908, O. XXI, r. 63, L.B.R. 1893—1900, 333.

Claim to attached property — Fictitious sale—Possession at date of attachment—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 4 L.B. R. 228.

***Burden of proof*—continued.**

——28.—Possession and proof of title—*concld.*

See EVIDENCE ACT, 1872, ss. 91, 101, 102, 110. L.B.R. 1872—1892, 133.

See EVIDENCE ACT, 1872, s. 110, L.B.R. 1872—1892, 474, U.B.R. 1892—1896, Vol. II, 371, U B.R. 1897—1901, Vol. II. 416, 418, 421, U.B.R. 1902—1903, Vol II, Evidence 7.

See LIMITATION ACT, 1908, art. 144, 27 C. 943, P.C.=27 I.A. 136=4 C.W.N. 597=2 Bom. L.R. 592.

Mortgagee ousted by trespasser—Adverse possession by trespasser against mortgagee, when good also as against mortgagor—Onus of proof—*See* LIMITATION ACT, 1908, art. 144, 18 B. 51.

See MORTGAGE—REDEMPTION, L.B.R. 1872—1892, 482, 494.

Suit for possession—Defence of limitation—Plaintiff to prove subsisting title—*See* POSSESSION—GENERAL, 3 A.L.J. 567=A.W.N. 1906, 234=28 A. 760.

What plaintiff has to prove in a suit where adverse possession is pleaded by defendant—*See* POSSESSION—ADVERSE POSSESSION, 73 P.L.R. 1906.

As to adverse possession among co-sharers—*See* POSSESSION—ADVERSE POSSESSION, 39 P.L.R. 1906.

Joint family property—Presumption in favour of joint possession by members—Exclusive possession by some members, effect of, on presumption—Onus of proof on party setting up joint possession—*See* POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 11 B. 220, Note (*a*)=P.J. 1883, 259.

See POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 11 B. 221, Note (*b*)=P.J. 1883, 262.

See POSSESSION—SUIT FOR FOSSESSION, A.W.N. 1887, 52, 14 W.R. 41, 18 W.R. 151, 8 B. 371, 51 P.R. 1904, 5 N.L.R. 33=2 Ind. Cas. 25.

Suit for possession—Title-deeds in plaintiff's name—Onus of proof—*See* TITLE, 6 B.L.R. 144.

——29—Pre-emption.

See PRE-EMPTION.

(1)—*Suit to establish pre-emptive right—Proof of preliminary ceremonies—Appellate Court—Questions of fact—Reasons.*—In a suit to establish a right of pre-emption held that the plaintiff was bound to prove the performance of preliminary ceremonies. It is not necessary for a Judge in every case to give his reasons in detail for agreeing with the lower Court on a question of fact, the case turning entirely on the weight of evidence. SYUD SHAH EKBAL HOSSEIN v. BUNSEE SAHOO, **25 W.R. 12.**

(2)—*Pre-emption—Allegation as to deed being ante-dated—Limitation Act, 1859, s. 1, cl. 1*—Onus.—Where A seeking to enforce a right of

***Burden of proof*—continued.**

——29.—Pre-emption—*continued.*

pre-emption alleges that B's deed of purchase is ante-dated, the *onus* of proof is on A, who, on failure, is barred by cl. 1, s. 1, ACT XIV of 1859. KUMUR ALI v. AZMUT ALI, **8 W.R. 383.**

(3)—*Pre-emption under Mahomedan Law*—Onus *of proof.*—Where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the burden of proof is on him to show that the property had in fact been sold below the stated price. SHEIKH MAHOMED NOORUL HOSSEIN v. SHEIKH HYDER BUKSH, **W.R. 1864, 304.** [*Con.*, 5 A. 184.]

(4)—*Pre-emption—Pre-emptor alleging that purchase-money is less—Burden of proof—Evidence Act, s.106.*—In a suit for pre-emption, where the pre-emptor claims the property for a price less than that mentioned in the sale-deed, it *prima facie* lies upon him to prove that the property was sold for a smaller price. But very slight evidence on his part is sufficient to shift the burden of proof upon the defendants (vendor and vendee) who must know the real facts, and who must be in a better position to give evidence relating to the actual price (s. 106, Evidence Act). BHAGWAN SINGH v. MAHABIR SINGH, **5 A. 184=A.W.N. 1882, 213.** (3 I.A. 85, *Appl*; W.R. Jan-July, 1864, 304, 13 W.R. 435, *R.*) [*F.*, 6 A. 344, 9 A. 225, 29 A. 618 =A.W.N. 1907, 202=4 A.L.J. 531; *R.*, 11 A. 438, 6 O.C. 327.]

(5)—*Pre emptor questioning correctness of price—Principle—Determination of amount payable by pre-emptor—Amount changing hands as consideration.*—As to the burden of proof where the pre-emptor questions the correctness of the price entered in the sale-deed the rule laid down in 5 A. 184 must be followed. In determining the amount which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale. TAMAKKUL RAI v. LACHMAN RAI, **6 A. 344=A.W.N. 1884, 110.** [*Appr.*, 14 A. 405, F.B.; *R.*, 16 A. 551, 121 P.R. 1894; *D.*, 11 A. 164.]

(6)—*Pre-emption—Fictitious nature of price in the sale deed, extent of* onus *on plaintiff of proving.*—In the majority of cases the only *prima facie* evidence, which the plaintiff pre-emptor, alleging the price in the sale-deed to be fictitious, could produce, would be any admission by the vendor or the vendee of the fictitious nature of the price set forth, or more frequently, evidence showing that the market-value of the property was so much less than the alleged price, as would lead any reasonable man to come to the conclusion that the alleged price was not the real price. Where the pre-emptor, has given such *prima facie* evidence, it then lies upon the vendor and vendee, who set up the price in the sale-deed as true and genuine, to give such an explanation by evidence as

***Burden of proof*—continued.**

—— 29.—Pre-emption—*concluded.*

will go to rebut the presumption raised by the plaintiff's evidence. In the present case, the defendant having given no explanation at all of the circumstances under which he was willing to give five times its market-value for the property, there was sufficient evidence before the Court upon which to find that the alleged contract price was a fictitious price and not a genuine one. SHEOPARGASH DUBE v. DHANRAJ DUBE, **9 A. 225=A.W.N. 1887, 39.** (5 A. 134, *F.*) [*F.*, 29 A. 618=A.W.N. 1907, 202=4 A.L.J. 551 ; *R.*, 9 A. 471.]

(7)—*Suit to enforce pre-emption after limitation—Knowledge of sale denied--Right to compute under s. 9, Act XIV of 1859—Proof required of plaintiff.*—In a suit to enforce the right of pre-emption brought after the period of limitation prescribed for such suits where the plaintiff alleges that he was not aware of the sale, and therefore claims to compute the period of limitation according to s. 9, Act XIV of 1859, *held* that the plaintiff clearly had to prove the case set up by him, *viz* , that he was fraudulently kept out of all knowledge of the sale till the vendor applied to the Collector for mutation of names. NUTUN SINGH v. MOGDHUN SINGH, **22 W.R. 479.**

Market Value—*See* PRE-EMPTION—GENERAL, 6 C. 327.

Pre-emption—Existence or non-existence of a custom—*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 2 A.L.J. 6=A.W.N. 1905, 16.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, A.W.N. 1882, 87.

A resumed *muafi*-holder claiming the right of pre-emption as co-sharer in a village within the terms of the *wajib-ul-arz* relating to that village, must prove that she is a co-sharer and can exercise the privileges of a co-sharer—*See* PRE-EMPTION—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC., 2 A.L.J. 145.

Right to pre-emption based on custom—Who to prove discontinuance of such custom—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, A.W.N. 1906, 174=3 A.L.J. 561.

See PRE-EMPTION—RIGHT TO PRE-EMPT. 33 P.R. 1885, 16 A. 412=A.W.N. 1894, 134.

See PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 83 P.R. 1901.

See PRE-EMPTION—MISCELLANEOUS, A.W.N. 1882, 16, 69 P.R. 1901, 5 A.L.J. 752, 34 P.R. 1904.

——30.—Rent, Sale for arrears of.

See RENT.

See SALE—SALE FOR ARREARS OF RENT.

(1)—*Rent-sale—Avoidance of under-tenures—Onus of proof—Bengal Act VIII of 1869, ss. 59, 60, 66.*—In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Bengal Rent Act, to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances, which have accrued thereon by an authorised act of the previous holder of the under-tenure, the plaintiff must prove that the defendant's holdings are such incumbrances as can be avoided by the plaintiff under s. 66 of the Rent Act. GOBIND NATH SHAHA CHOWDHURI v. PERSHADANGA CHOWDHURI, **13 C. 1.** (9 C.L.R. 449, *Appr.*; 11 C.L.R. 476, *Dist.*) [*D.*, 15 C. 555 ; *R.*, 9 C.L.J. 490=13 C.W.N. 720.]

***Burden of proof*—continued.**

——30.—Rent, Sale for arrears of—*concld.*

(2)—*Suit against zemindar to reverse patni sale—Reg. VIII of 1819—Non-service of notice—S. 106, Evidence Act*—In a suit against a zemindar to reverse the sale of a putnee tenure held under Regulation VIII of 1819 on the ground of non-service of notice, *held* that the defendant was bound, on the principle laid down in s. 106, Evidence Act, to prove service. DOORGA CHURN SURMA CHOWDHRY v. SYUD NAJUMOODDEEN, **21 W.R. 397.**

——31.—Revenue, Sale for arrears of.

See REVENUE.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS.

(1)—*Act XI of 1859, s. 54, object of—Revenue arrears—Sale*—Onus *of proof.*—The object of s. 54, Act XI of 1859, is to protect, not every encumbrance which may be set up, but only *bona fide* encumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser. Where surrounding circumstances suggest such creation, it would be for the party setting up the encumbrance to establish its *bona fide* character. MONOHUR MOOKERJEE v. JOYKISHEN MOOKERJEE, **5 W.R. 1.**

(2)—*Ejectment by auction-purchaser, ryot claiming protection from*—Onus *of proof.*—In a suit by a ryot against an auction-purchaser, claiming protection from ejectment under the proviso of s. 37, Act XI of 1859, the *onus* of proving the character of the holding is on the ryot. DOMUN LAL v. PUDMUN SINGH, **W.R. 1864, Act X, 128.**

(3)—*Act XI of 1859, s. 37—Revenue sale—Avoidance of under-tenure—Burden of proof.*—Where a taluk is sold at a revenue sale under Act XI of 1859, the burden of proving that under-tenures in the taluk fall under any of the exceptions to s. 37 of that Act, lies on him who alleges the under-tenures to be within those exceptions. RASH BEHARI BOSU v. HARA MONE DEBYA, **15 C. 555.** [*R.*, 27 C. 290, 13 C.W.N. 720=9 C.L.J. 490]

(4)—*Revenue Sale Law (Act X of 1859), s. 37—Encumbrance, annulment of—Burden of proof—Tenure held in permanent settlement.*—The right of a purchaser at a revenue sale in getting rid of encumbrances is such that he is

Burden of proof—continued.

——31.—Revenue, Sale for arrears of—*cld.*

in many cases allowed to have the benefit of throwing the burden of proof on his opponent; but where it is found that the tenure has been in existence and in the possession of the defendants and their predecessors for a period of one hundred years and where there is no proof, one way or the other, as to the precise date on which it came into existence, and where it is probable that it was created before the date of the Permanent Settlement, the burden of proof shifts on to the plaintiff. (20 W.R. 15, *F.*) In a case like this, no hard-and-fast rule can be laid down as to when the burden of proof shifts from one side to the other, and each case must be governed by its merits. NITYANUND ROY v. BANSHI CHANDRA BHUIYAN, **3 C.W.N. 341.** [*D.*, 27 C. 290.]

In a suit by a purchaser at a revenue sale under Bengal Act XI of 1859, against an occupancy raiyat, the—is on the latter to show that at the time of the sale he was a raiyat within s. 21 of Act VIII of 1885 (B.C.)—*See* BEN. ACT XI OF 1859, s. 37, 10 C.W.N. 497.

——32.—Sale in execution of decree.

See SALE — SALE IN EXECUTION OF DECREE.

(1)—*Suit to set aside sale—Irregularity.*—When a judgment-debtor sues to set aside a sale in execution of a decree on the ground of irregularity, the *onus* of proving the irregularity is on him. NUFUSA v. MAHOMED AKBAR GAZEE. **2 W.R. 74.**

(2)—*Suit to set aside execution sale on ground of fraud*—Onus *on plaintiff—Irregularity—Small auction bids.*—In a suit to set aside an execution-sale on the ground of fraud, the *onus probandi* rests on the plaintiff to prove his allegation; mere irregularity in the issue of processes will not of itself prove fraud, even where the auction bids were so small as to excite suspicion MUSST. BIBEE KUBEERUN v. MUSST. BIBEE SUFEEHUN, **24 W.R. 388.**

(3)—*Beng. Reg. XX of 1795—Proof of irregularity—Non-affixing of notices previous to sale.*—Several years after the purchase by the defendant of immoveable property at a sale in execution of a decree, the judgment-debtor sued this purchaser for the lands on the ground, amongst others, that the notices required by Bengal Regulation XX of 1795, s. 12, had not been affixed previous to the sale. *Held* that the *onus* of proving the default in affixing the notices lay upon the plaintiff, the judgment-debtor. MOHESH NARAIN SINGH v. KISHNANUND MISSER, **Marsh 592=2 Ind. Jur. O.S. 1=5 W.R P.C. 7=9 M.I.A. 324.**

(4)—Bona fide *sale by grandmother to stranger—Grand-daughter purchasing same from grandmother—Proof of* bona fides *in subsequent transaction.*—When a grand-daughter purchases from a grandmother, and attempts to oust a stranger, who purchased *bona fide* and without

Burden of proof—continued.

——32.—Sale in execution of decree—*cld.*

notice, full and satisfactory proof of the *bona-fides* of the transaction is necessary, even though no motive for fraud is proved. DABEE DUTT MISSER v. BIBEE ALIKOON-NISSA, **W.R. F.B. 77.**

(5)—*Suit to set aside execution-sale—Proof of* bona fides—Onus.—In a suit to have a purchase at an execution-sale set aside on the ground that it was not *bona fide* but collusive, the plaintiff has the burden on him to prove collusion; proof of the circumstances creating a suspicion of such *bona fides* will not suffice. But in a suit for possession of land and declaration of plaintiff's title by purchase, he must free his case of such suspicion as may arise from his own position with reference to the vendor and from any such circumstances as the improbability of such a purchase having been made. The bare production of a deed executed by the judgment-debtor will not suffice. ROOP RAM DOSS v. SASEERAM NATH KURMOKAR, **23 W.R. 141.** [*Con.*, 24 W.R. 209.]

(6)—*Suit to set aside execution sale*—Benami *purchase*—Onus probandi.—Where a plaintiff, professing to have purchased from the judgment-debtor, sues to recover possession by setting aside an execution-sale and ousting the certified purchaser, it is his duty to free his case from suspicion; and if, in such a case, the Court infers from suspicious circumstances that the plaintiff's purchase was *benami*, it would not be erring in law. GOLUCK NATH GHOSE v. SUE NATH BOSE, **24 W.R. 209.**

(7)—*Execution of decree—Attachment of tenure*—Onus *of proof.*—Where a zemindar in possession has made out a *prima facie* case and a judgment-creditor attaches a ryot's homestead, *held* that the *onus* of proving the liability of the tenure to satisfy the debt is on the latter. ALUCK MONEE DASSIA v. CHANDRA KANT MOOKERJEE, **6 W.R. 233.**

See CAUSE OF ACTION, 76 P.R. 1890.

See JURISDICTION OF CIVIL COURTS, **9 A. 602=A.W.N. 1887, 110.**

——33.—Will.

See WILL.

(1)—*Propounding will*—Onus probandi.—The *onus probandi* lies on every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. MT. ANANDI BAI v. HARLAL BRAHMAN, **15 C.P L.R. 1.** (13 C.P. L.R. 159, *R.*)

(2)—*Will—Suspicious circumstances attending it—Burden of proof.*—Whenever circumstances exist, which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. SHAMA CHARAN KANDU v. KHETTROMANI DASI, **2 Bom. L.R. 868.**

***Burden of proof*—continued.**

——33.—Will—*concluded.*

(3)—Onus *on party propounding will—None on impeaching party.*—The burden of proof lies upon the person who sets up a will and not upon the person who is prepared to impeach it. SUKH DEI v. KEDAR NATH, **33 Bom. L.R. 704.**

(4)—*Testamentary capacity*, onus *of proof as to.*—The burden of proving that the testator had the testamentary capacity lay on the proponent. RASH MOHINI DASI v. UMESH CHUNDER BISWAS, **25 C. 824, P.C.=25 I.A. 109=2 C.W.N. 321.** [*R.*, 11 C.W.N. 824]

See WILL—CONSTRUCTION, 4 W.R. 55.

Will of illiterate person—Proof of knowledge of contents of the will lies on person propounding the will—*See* WILL—EXECUTION, 11 C. C. 20.

Solicitor executor preparing and attesting will—Clause permitting him to charge for professional and other services—How Court to be satisfied as to *bona fides* and genuineness of clause—*See* WILL—EXECUTION, 9 C.W.N. 769. P.C.=7 Bom. L.R. 854=29 B. 530==15 M.L.J. 271=3 A.L.J. 68=32 I.A. 142.

Mental capacity of testator in dispute—Execution of will, proof of—Presumption—Rules for deciding such cases—*See* WILL—EXECUTION, 21 C. 279.

See WILL—REVOCATION, 19 C. 414, P.C.

See WILL—MISCELLANEOUS, 5 C.W.N. 895, P.C.=28 I.A. 136=23 A. 405.

——34.—Miscellaneous.

(1)—*On whom it should be placed.*—The burden of proof must be placed according to the pleadings and any preliminary examination of the parties, and, for the final decision of the case, the burden remains upon the same party. When the party who has to discharge the burden of proof, has made out a *prima facie* case, in a certain sense the burden of proof shifts on to the other party, for, in the absence of any rebutting evidence, the point at issue would be decided in favour of the party making out a *prima facie* case. When, however, the Judge has heard the whole case, he must weigh the evidence for both parties, placing the burden of proof as it was originally placed. Supposing the party upon whom the burden of proof lies makes out a *prima facie* case, and it is doubtful whether the other party has rebutted this case, it necessarily follows that the *prima facie* case is doubtful, and the party entitled to the benefit of the doubt is the party upon whom there was no burden of proof at the outset. Any other rule would obviously be unjust. The party upon whom the burden of proof lies begins, and has the first opportunity of proving a *prima facie* case. It is evidently unjust that this should finally shift the burden of proof upon the other party. He would thus be at a disadvantage. W.B. INNES v. ASGAR ALI, **L.B.R. 1893—1900, 456.**

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

(2)—*Evidence*—Onus *of proof—Whether defendant loses right to have* onus *placed on right party by electing to produce evidence—Both sides adducing evidence—Question of* onus *immaterial.*—Where the defendant, under an impression that the burden of proving a certain fact is in the first instance upon him, produces evidence, he does not lose his right to insist in the appellate Court upon the burden of proof being laid upon the right party. Both sides having given evidence, and there being no suggestion that any evidence had been excluded, the case may be dealt with as if the burden of proof had been cast upon the right party. MUHAMMAD TAHIR v. RAGHUBAR DAYAL, **8 A.L.J. 736.**

(3)—*Criminal trials in the Mofussil—General or special exceptions—Burden of proof—Evidence Act, s. 105—Assumption of absence of general or special exceptions in a charge for offence.*—Since the Evidence Act, the burden of proving the existence of circumstances, bringing the case within any general or special exceptions in criminal trials in the Mofussil, lies on the accused. Though the C. Pro. Code of 1872 contained no provision analogous to those in ss. 235 and 237 of the Code of 1861, it might be inferred, from s. 439. Ill. (*a*), of the Code of 1872, that the absence of all general exceptions and of some other exceptions mentioned in the Penal Code was to be assumed as before, without allegations, in the statement, of an offence in the charge.—*Per Markby, J. In thematter of the petition of* SHIBO PROSAD PANDAH, **4 C. 124=3 C.L.R. 122.**

(4)—*Evidence Act (I of 1872), s. 106—Burden of proof—Applicability to suit under N.W.P. Rent Act, 1881, s. 209—Facts within defendant's peculiar knowledge.*—It would be introducing a very dangerous principle by attempting to read s. 106 of the Evidence Act into s. 209 of the N.W.P. Rent Act when the words in the Rent Act are clear and specific, and the Legislature does not use, in s. 209, the language which will throw the whole burden upon the *lambardar*. MUHAMMAD INAYAT HUSAIN v. MUHAMMAD KARAMATIULLAH, **13 A. 301, F.B.=A.W.N. 1890, 131.**

(5)—*Burden of proof.*—It is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exists, which entitle him to the privilege claimed. THE ELGIN MILLS CO. v. THE MUIR MILLS CO., **17 A. 490=A.W.N. 1895, 113.**

(6)—*Difference between law of foreign State and law of one's owns country—Burden of proof—Presumption.*—It lies on him who asserts it to prove that the law of the foreign State differs from ours, and in the absence of such proof it must be held that no difference exists except possibly so far as the law here rests on the specific Acts of the legislature. RAGHUNATHJI v. VARJIWANDAS, **8 Bom. L.R. 525=30 B. 578.**

(7)—*Plaintiff to prove own title—Defendant setting up exaggerated statement of claim—Effect.*—A plaintiff is bound to prove his own title, and cannot succeed on the weakness of the defendant's case. The fact that the defendant has set up an exaggerated statement of his own claim will not affect the duty of the plaintiff to prove that his own claim is not overstated. If it appears that both parties have overstated their rights, that will be no reason for making the defendant alone suffer and for giving the plaintiff more than he has proved himself entitled to. RAJARAM v. NANCHAND, **3 Bom. L.R. 225.**

(8)—Onus *of proof—Notice of title—Constructive notice.*—A and B were co-sharers. B leased his share to D taking rent separately from him; and A sold his share to C so that B and C became co-sharers. Afterwards, B conveyed his share to E and delivered D's *kubuliyat* to him, the conveyance which was registered, reciting payment of the consideration. Subsequently, E sold the share to C for valuable consideration. In a suit brought by C for possession, B alleged that his conveyance to E was a *benami* transaction of which C was cognizant. *Held* that the *onus* of showing that was on B and that *prima facie* C was justified in supposing that E had a good title to convey. SATYA MONI DASSI v. BHUGGOBUTTY CHURN CHATTOPADHYA, **1 C.L.R. 463.**

(9)—*Conduct of plaintiff, showing that he admitted defendant's title—Burden of proof—Estoppel.*—The plaintiffs claimed to recover possession of certain lands and houses from the defendants, alleging that they and the persons whom they made *pro forma* defendants were seventh in degree from a common ancestor, when the succession opened out, and that the real defendants, the respondents, were only eighth in degree, and were therefore not entitled to the property. It appeared from the evidence that the plaintiffs undoubtedly admitted the right of the defendants immediately after the opening out of the succession, and acted upon that admission by permitting the names of the defendants to be registered in the Collector's office, and by carrying on suits with them in the joint names of all. *Held* that this course of conduct although it did not amount to an estoppel in point of law, threw upon the plaintiffs a heavy burden of proof, which they had not sustained. AGRAWAL SINGH v. FOWJDAR SINGH, **8 C.L.R. 346, P.C.** [*D.*, 9 A. 413.]

(10)—Benami—Onus *of proof.*—The burden of proving the *benami* nature of a transaction is on the person who alleges it. TIRUMALAYAPPA PILLAI v. SWAMI NAICKER, **18 M. 469.**

(11)—Benami *transaction—Evidence.*—The burden of proof is on the plaintiff, who seeks to give to a purchase a different meaning and complexion from those which it bears on its face. This burden must be strictly discharged; in other words, the plaintiff, in order to succeed,

must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture. RAMABAI v. RAMACHANDRA, **7 Bom. L.R. 293.**

(12)—*Fiduciary relation—Burden of proof—Extent of relief.*—Where a fiduciary or *quasi-fiduciary* relation had existed, Courts of Equity will always place the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of such beneficial jurisdiction stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another, and is not confined to cases of guardian and ward, attorney and client, or father and son, or of any of the more commonly recognized relations, which involves such consequences. SITAL PRASAD v. PARBHU LAL, **10 A. 535.**

(13)—*Fiduciary character — Acquisition of interest—Burden of proof.*—When a person occupying a fiduciary character in respect of another, such as a pleader for a mortgagee in a mortgage suit, obtains an advantage, which, in the ordinary course of events, should have accrued to that other, the burden of proving that the transaction is free from suspicion lies heavily on the person occupying the fiduciary character, and when he has not proved clearly the unsuspicious nature of the transaction, it is liable to be set aside. SUBBARAYUDU v. KOTAYYA, **15 M. 389.**

(14)—*Plaintiff suing executor* de son tort—*Proof of passing of property into executor's hands—Burden of proof on executor.*—If a person suing the executor *de son tort* has shown that some property has passed into his hands, the extent to which such property is received being peculiarly within his knowledge, he is bound to show that he has not received enough to satisfy the debt. MAGALURI GARUDIAH v. NARAYANA RUNGIAH, **3 M. 359.**

(15)—Ex parte *suit—Plaintiff to prove right to relief.*—In an *ex parte* suit, plaintiff is bound to prove his title to the relief sought. RAM DHONE BHUTTACHARJEE v. ISHANEE DABEE, **2 W.R. 123.**

(16)—*Wrongful occupancy—Damages*—Onus.—In a suit for possession and damages on the ground of wrongful occupancy, *held* that the *onus* was on the plaintiff. GOUR SURUN DOSS v. W. SERONDEY, **15 W R. 144.**

(17)—*Suit to recover damages—Wrongful act of defendant*—Onus.—In a suit to recover damages for loss incurred by the wrongful acts of the defendant, the plaintiff must show that the loss was the necessary and unavoidable consequence of those acts. MUSSAMAT LUBJAN BIBI v. SHEIKH SERIATUKA, **3 B.L.R. A C. 413=12 W.R. 329.** [*D.*, 13 O.C. 357.]

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

(18)—*Claim as collateral heir—Proof of title through common ancestor.*—Where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages ; and one important stage is, of course, the common ancestor himself. KEDARNATH DOSS v. PROTAB CHUNDER DOSS, **6 C. 626=8 C.L.R. 238.**

(19)—*Collaterals of sonless* khatri *town resident—Right of inheritance of such collaterals,* onus *as to.*—The burden of proof that the collaterals of a sonless *Khatri* resident of a town are entitled to inherit the deceased's property in preference to his daughters and their sons is upon the collateral asserting such rights. WISHAN DAS v. THAKAR DAS, **119 P.R. 1901.** [*R.*, 3 P.R. 1908, 48 P.R. 1908 ; *F.*, 54 P.R. 1903, 110 P.R. 1906 ; *R.*, 54 P.R. 1903, 51 P.R. 1903=174 P.L.R. 1903, 68 P. R. 1909=1 P L R. 1909 ; *Rel. on*, 3 P.R. 1908.]

(20)—*Suit by a reversioner to restrain alienation of occupancy rights — Custom—Punjab Tenancy Act, 1887, s. 59.*—Where a collateral seeks to restrain an alienation of an occupancy right by an occupancy tenant, the initial *onus* lies on the plaintiff ; but when he has proved his reversionary right, and his right to bring such a suit in the case of any other proprietary right, the *onus* will be shifted to the other side ; and the person who asserts that no such custom obtained as to occupancy right has to prove his contention. ABDULLAH v. ALLAH DAD, **98 P.R. 1907, F.B.=62 P.W.R 1907=16 P.L R. 1908.** (115 P.L.R. 1901, 12 P R. 1904, 89 P. R 1898, F.B., *R.*) [*R.*, 38 P.R. 1909=60 P. W.R. 1907.]

(21)—*Widow, property in possession of — Presumption of law—Property claimed through third person.*—The general rule is that he who claims property through some other person must show the property to have been vested in that person. *Held*, therefore, that, when a widow is found in possession of property of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, there is, in the absence of evidence, no presumption of law that the property found in the widow's possession was originally that of her husband. RAN BIJAI BAHADUR SINGH v. INDARPAL SINGH, **2 O. C. 286.**

(22)—*Proof of illegitimacy of defendant.*—In an action of ejectment to recover real estate, the plaintiffs claimed as heirs. The issue directed by the Court was, whether the party in possession, under a decree made in a summary suit pursuant to the Act XIX of 1841, was legitimate. In such circumstances, *held*, that as the title of the plaintiffs depended upon the illegitimacy of the defendant, they were bound to prove, by sufficient general evidence their heirship, in order to throw upon the defendant the *onus* of proving his legitimacy. The evidence upon that issue being unsatisfactory, the case was remitted to India for further proof. KHAJAH MOHAMAD GOUHUR ALI KHAN v. ASHRUFOONISSA, **2 W.R. 13 P.C. =9 M.I.A. 492 and 504.**

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

(23)—*Suit for mesne profits—Defendants in possession as wrong-doers—* Onus *of proof.*—The defendants in suits for mesne profits, who have been in possession as wrong-doers, must prove the sums realised by them as rent during their possession. BROJENDRO COOMAR ROY v. MADHUB CHUNDER GHOSE, **8 C. 343.**

(24)—*Suit for profits accruing from village—Proof—Presumptions — Practice.* — Plaintiffs sued to recover a one-fourth share in the income of a village, which was purchased by defendant 1 in 1873, alleging that the parties descended from one grandfather, and that a partition between them took place eight years before suit. Defendant 1 claimed to have purchased the property in 1873 with his own funds and to have been exclusively in possession ever since. The lower appellate Court held, (1) that, as the partition took place in 1879 and the purchase in 1873, the property must be regarded as ancestral, inasmuch as defendant 1 had not shown that it was acquired out of his own funds ; and (2) that as defendant 1 was a *kulkarni*, he was bound to show affirmatively that he had exclusive enjoyment, and until he were to do this, the plaintiffs were not bound to show that they had received their share of the profits from 1879 to 1898 : *Held*, remanding the case that the lower appellate Court had relied too exclusively on presumptions and had placed the burden of proof on the wrong party. VINAYAK v. DATTO, **2 Bom. L.R. 1134=25 B. 367.**

(25)—*Suit for possession—Plea of adverse possession—Plaintiff bound to prove possession and dispossession — Property lying waste —* Onus.—If a plea of adverse possession is set up in a suit for the recovery of possession of immoveable property, it is the plaintiff's duty to prove possession and dispossession within twelve years ; where, however, the property in dispute was up to a short time before suit waste and unoccupied, the plaintiff need not prove acts of possession within twelve years of suit, but only a *prima facie* title not extinguished by limitation in such a case. Waste land allowed to remain so by the proprietor cannot be held to be discontinuance of possession, and the *onus* is in such a case, shifted on to the defendant to prove when his possession became adverse. RAMZAN ALI v. BASHARAT ALI, **105 P.R. 1901.** [*R.*, 53 P.R. 1907.]

(26)—*Suit for land attached under s. 3 of Act IV of 1840.*—In a suit for possession of land attached by the Magistrate under s. 3 of Act IV of 1840, the *onus probandi* is on the plaintiff. MOHESHUR SINGH v. RAMAPUT SINGH, **W.R. F.B. 7=1 Ind. Jur. O S. 35.**

(27)—*Suit under Act VIII of 1859, old Civ. Pro. Code, s. 229 (s. 331 of the present Code)—* Onus *of proof.*—In a suit under s. 229 of Act VIII of 1859 (old Civ. Pro. Code), the plaintiff

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

must establish a *prima facie* case of possession, whereupon the claimant must make out if possible, a better title. RAKHAL CHURN MUNDUL v. WATSON AND CO., **10 C. 50.**

(28)—*Suit for* khas *possession—Existence of intermediate tenure—Burden of proof*—Onus *of proving that a parcel is outside the intermediate tenure—General rule*—Onus *of proof—Suits for ejectment.*—Where, in a suit by a landlord for *khas* possession of land in defendant's possession, the latter sets up an intermediate tenure, it lies on the defendant to prove its existence. Where the existence of the intermediate tenure is proved, the *onus* of proving that the parcel of land sought to be resumed is outside such tenure lies on the plaintiff-landlord. (12 M I.A. 275, *Expl.*; 12 C.L.R. 457, *F.*) It makes no difference whether the plaintiff admits the existence of the under-tenure or the defendant proves such tenure to exist, although denied by the plaintiff. (16 C. 473, 12 B.L.R. 210, 14 M.I.A. 152, *R. & Disc.*) [*Expl.*, 8 C.L.J. 170; *D.*, 6 C.W.N. 105.] In all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiffs to prove their own title. The *onus* is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, and it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed. RAJENDRO KUMAR BOSE v. MOHIN CHANDRA GHOSE, **3 C.W.N. 763.** (16 C. 473, *F.*)

(29)—*Ejectment — Intervenor*—Onus.—In a suit to recover possession of certain property from plaintiff's vendor who did not substantially resist the claim, a third party who came in and claimed the property was made a defendant. It was held that the *onus* of proof as against the plaintiff lay entirely on the intervenor. JAGGADANAND MISSER v. HAMID RASUL, **8 B.L.R. 182, Note.**

(30)—Patni *sale—Suit by purchaser—Suit for possession—Land within* patni *area.*—Mal or lakheraj.—When a purchaser at a *putni* sale proves his purchase and, on his applying for possession, is resisted by persons holding lands included within the ambit of the *putni* tenure, who set up the defence that the lands held by them are *lakheraj* and not *mal* it is for the defendants to prove that the lands have been held not under the *putni* tenure, but as *lakheraj*, SASHI BHUSAN BAKSHI v. MAHOMED MATAIN. **4 C.L.J. 548.** (14 M.I.A. 152, *D.*)

(31)—*S.* 8, *Public Demands Recovery Act* (*VII of* 1868), *Bengal*—Onus *of proving irregularity or illegality in preparation, serving or posting of notices—Suit to set aside* putni *sale—S.* 114, *cl.* (*e*). *I.E.A., presumption under.*—In the case of a sale for arrears of Government revenue, the notices are served in the ordinary way through the officers of the Revenue Court and the presumption under s. 114, cl. (*e*), I.E.A., would arise in respect to the service of such notices until the contrary is proved. The *onus* of proving that there has been irregularity in the preparation, service or posting of the notice rests on the person who seeks to have the sale set aside. (13 C. 197, 19 C. 690, *D.*; 21 C. 70, *Expl.*) There is no analogy between the case of a sale for arrears of revenue and that of a *putni* taluk. In a suit to set aside a *putni* sale, the burden of proving due publication rests entirely on the zamindar. SHEO RUTTON v. NET LOLL SAHU **30 C. 1 =6 C.W.N. 688.** [*F.* 3 C.W.N., 137=2 C.L.J. 325.]

(32)—Shamilat—*Right of purchaser* of khewat *land*—Onus probandi.—*Held*, that the rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him. From the fact that the *khewat* land has been sold, it does not follow that the *shamilat* land must be given to the purchaser without his paying for it, or without its being transferred to him, or that it must lapse to the rest of the proprietary body. When a person comes into Court alleging purchase of the *shamilat* land the *onus* of establishing it lies on him, and it is not discharged by proof that *khewat* lands have been sold to him. RAM DAS v. AMIR SHAH, **34 P.L.R. 1902=113 P.R. 1901** (65 P.R. 1889 and 42 P.R. 1897, *R.*)

(33)—*Partition—Common land—Burden of proving that land was not common.*—The burden of proving that lands that had been recorded as common to the mahal, belonged exclusively to the objectors to the partition, lies upon the objectors. In the absence of evidence to the contrary, the entries in the settlement and subsequent records are *prima facie* proof of right of common possession. KISHEN LAL v. FAZAL HAQ, **A.W.N. 1881 12.**

(34)—*Suit for share in ancestral property by Mahomedan—Plea of self-acquisition—Burden of proof on plaintiff.*—In a suit by a member of a Mahomedan family to recover a share in alleged ancestral property where defendant claims it as his separately acquired property, *held* that the defendant need not show that he had sufficient funds to enable him to obtain the property and that the plaintiff was bound to prove that the property was acquired for and enjoyed by the whole family jointly. MAHOMED AFAK v. EKRAM ALI, **14 W.R. 374.**

(35)—*Burden of proof—Supply of water through Government source—Second crop cultivation—Liability of Zemindar to pay water cess.*—Where the Zemindar's tanks depend for their supply upon the water flowing through a Government source, he may be entitled to a certain supply of water free; but the burden of proving the extent to which he is entitled lies on the Zemindar alone, and, if he fails to sustain this burden, his suit to that extent must

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

be dismissed and he cannot get a refund of the water-cess he had paid. MARIA SUSAI MUDALIAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **14 M.L.J. 350.** [*D.*, 34 M. 21=20 M.L.J. 766=7 M.L.T. 407, 8 Ind. Cas. 357.]

(36)—*Sale—Suit by vendor for declaration of right.*—A plaintiff, professed to make over as sold before a Revenue Officer certain property previously mortgaged to the defendant, in consequence of which mutation had been effected, he subsequently filed a suit for a declaration of his right questioning the genuineness of the mutation proceedings: *Held*, that the plaintiff ought to prove his case affirmatively, the *onus probandi* being upon him either by proving that he was personated before the Revenue Officer or that in fact he never admitted the transaction before him. GHARIB KHAN v. SIKANDAR, **91 P.R. 1902.**

(37)—*Minor's age at time of execution of sale-deed, Absence of proof of—Effect.*—In the absence of proof of age at the time of the execution by an alleged minor of a deed of sale, the sale was upheld. NIL MONEE CHOWDRY v. MUSST. ZUHEERUNISSA KHANUM, **8 W.R. 371.**

(38)—*Defendant pleading plaintiff's minority—Substantiation of plea.*—A defendant who pleads plaintiff's minority as a bar to the suit, is bound to substantiate the plea. CHEYT NARAIN SINGH v. BUNWAREE SINGH, **23 W. R. 393.**

(39)—*Suit for money lent to defendant's father, onus of proof on plaintiff.*—Suit for the recovery of money alleged to have been advanced by the plaintiff to a third party under a parwana or order issued by the defendant's father. Defendant pleaded that no such advance had been made by the plaintiff on the authority of his father and that the parwana filed with the plaint was a forgery. Agreeing with the decision of the High Court on the evidence in the case, the Privy Council held that the *onus* of proving the alleged advance lay upon the plaintiff, that he failed to bring forward the available evidence notwithstanding the impeachment of the parwana as a forgery, that all the probabilities of the case were against the allegations of the plaintiff, and, that, in the absence of sufficient evidence to establish the plaint transaction, he could not be given a decree. Further, the plaintiff might have been misled and deceived by certain other persons who detained the money away for themselves, so that the money, if any, given by the plaintiff, never actually reached the third party to whom the defendant's father had ordered the payment to be made. LACHMI PRASAD v. NARENDRO KISHORE SINGH, **14 A. 169 P.C.=19 I.A. 9.**

(40)—Ism furzi *transaction*—Onus *of proof.*—The burden of proof in an *ism furzi* transaction, is in the first place upon the person who claims against the tenor of the deed. *Held*, on the admitted fact that the narrative of the deed is

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

not in accordance with the facts, and on other evidence of the appellant, that the burden of proof was shifted on the respondent. SULEIMAN KADR BAHADUR v. MEHNDI BEGUM, **25 C. 473, P.C.=25 I.A. 15=2 C.W.N. 186.** [*R.*, 29 B. 306=6 Bom. L.R. 975.]

(41)—Hundi—*Suit by one of two joint endorsees for declaration of right to half the consideration—Allegation of fraud in writing endorsement made by other joint endorsee.*—One Mathura Das, the payee of a *hundi*, endorsed it over to Hira Lal and Ganga Baksh, Hira Lal and Ganga Bakhsh in turn endorsed the *hundi* in favour of Kheshab Deo. Keshab Deo paid half the money due on the hundi to Ganga Bakhsb, but refused to pay the other half to Hira Lal without the consent of Ganga Baksh. Hira Lal accordingly sued Ganga Bakhsh and Keshab Deo, claiming a declaration that he was entitled to the other half of the money due on the *hundi*. Ganga Baksh set up a defence that the joint endorsement had been made fraudulently, and that he alone was really entitled to the whole of the money. *Held* that under the circumstances of the case, especially as Ganga Bakhsh had joined in endorsing the *hundi* over to Keshab Deo, it was for Ganga Bakhsh to prove affirmatively the fraud set up by him and not for Hira Lal to show that no fraud had been committed. HIRA LAL v. GANGA BAKHSH, **A.W.N. 1907 17.**

(42)—*Suit on* hundi—*Execution admitted—Onus.*—If, in a suit on a *hundi*, the execution is admitted by the executant, the burden of proving special circumstances exonerating him from liability to the amount of the *hundi* lies on the executant. RAM DAS v. MUTHRA DAS, **6 P.L.R. 1905.**

(43)—*Suit to set aside a bond.*—*Held*, that, in the first instance, it lay on the plaintiff, who sought to set aside a deed, executed by him and perfected by possession, to make out the case alleged by him; and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the defendants the burden of proving the consideration for the deed. KALEEPERSHAD TEWAREE v. RAJAH SAHIB PERHLAD SEIN, **12 W.R. 6 P.C=2 B.L.R. 111, P.C.=12 M.I.A. 282.**

(44)—*Plea of payment*—Onus *of proof—Major portion of plaintiff's claim untrue—Dismissal of whole claim.*—A plea of payment must be proved by the party alleging it. Where a greater portion of the plaintiff's claim is shown to be untrue, the whole claim should not be dismissed on the ground that none of it was realiable. KOONJOO BEHAREE BANERJEE v. ROY MOTHOORANAUTH CHOWDRY, **1 W.R. 155.**

(45)—*Suit for balance of purchase-money due on sale of decree*—Onus *of proving non-payment of consideration—Admission under Act XX of 1866—Acknowledgment.*—In a suit to recover

Burden of proof -continued.

——34.—Miscellaneous—*continued.*

the balance of purchase-money alleged to have been due upon the sale of a decree, where plaintiff's case was that the consideration money was not paid, but a *rooqua* given for it payable when the mutation of names took place: *Held* that the *onus* of proving non-payment was thrown upon plaintiff in consequence of the acknowledgments she had made of the receipt of the whole purchase-money, *viz.*, on admission which was made and recorded under Act XX of 1866, at the time when the deed was registered, and again an acknowledgment made in the petition presented to the Court which made the decree for mutation of names Although, when a deed of sale containing an acknowledgment of payment is written, payment is not made, it may become an acknowledgment afterwards, *i.e.*, when the deed is handed over. NAWAB SYUD ALLEE SHAH v. MUSSAMMAT AMANEE BEGUM, **19 W.R. 149.**

(46)—*Consideration.*—A purchaser at a sale held in execution of a decree against the mortgagors was their representative-in-interest and the recital in the bond was evidence against him, and the *onus* was on him to prove the non-passing of consideration. SHYAMA CHARAN BATTACHARJEE v. ANANDA CHANDRA DAS, **3 C.W.N. 323.**

(47)—*Evidence—Burden of proof—Suit to set aside release—deed—Allegation of failure of consideration* — Onus *of proof.*— Where the plaintiff sued for a declaration that a deed of release executed in favour of the first defendant was invalid, on the ground that there was no cash consideration and that another consideration failed, and where the defendants admitted that the real consideration was not the one set out in the release: *Held*, that, as the admission made by the defendants was one upon which no decree could be given for plaintiffs, the *onus* lay on the plaintiff to prove failure of consideration. RAVIA BIVI AMMAL v. KADIR BATCHA ROW, **9 M.L.T. 480.**

(48)—Onus probandi—*Proof of payment of consideration—Registered document.* — *Held*, that, in the case of a registered document when the executant has admitted receipt of consideration, the burden of proving that some part of the consideration was not paid lies on him. Where it was shown that in the case of a registered mortgage-deed a part of the mortgage money was not paid and the mortgagee sued for possession of the mortgaged property without offering to pay up the part of the mortgage money unpaid, the claim was dismissed, although the mortgagee applied that decree be passed subject to his paying the amount found as unpaid. GOPI CHAND v. SARDAR KHAN, **P.L.R 1900, 401.** (17 P.R. 1888, 27 P.R. 1886, 100 P.R. 1889, *F.*)

(49)—*Condition precedent for liability attaching under an Act* —Onus *of proof.*—Where under an Act certain things are required to be done, before any liability attaches to any person in respect of any right or obligation, it is for the

Burden of proof—continued.

——34.—Miscellaneous—*continued.*

person, who alleges that that liability has been incurred, to prove that the things prescribed in the Act have been actually done. ASHANULLAH KHAN BAHADUR v. TRILOCHAN BAGCHI, **13 C. 197.** [*D.*, 25 C. 725, 28 C. 109, 30 C. 1; *R.*, 1 O.C. 254, 13 M.L.J. 479.]

(50)—*Principal and agent—Concurrent findings of fact—Evidence as to liability to account.*—A year after the execution of a deed of release by the principal exonerating an agent from liability to account and stating that there had been a settlement between them, the Agent signed an *ikrarnama* addressed to the principal, stating that there had not been a settlement of accounts, and that he was willing to account from the day of his appointment to date. The agent, subsequent to this, having resigned his appointment, instituted a suit for setting aside the *ikrarnama*, but that suit was dismissed. In a suit brought by the principal, the deed of release and its contents were proved to the satisfaction of both the Courts below, which dismissed the suit on that ground, although the *ikrarnama* appeared to them, in fact, to have been made. On appeal by the plaintiff, the contention was that the *onus* was on the defendant to explain his execution of the *ikrarnama*. *Held*, that, as it had been found by two Courts concurrently that the deed of release was valid, and that it necessarily followed from that finding that the *ikrarnama*, executed a year after the deed of release so far as it expressed the agent's willingness to account was false, the *onus* was as much upon the principal to explain his reception of the said *ikrarnama* as upon the agent to explain its execution. The question as to the burden of proof had therefore been rendered immaterial by the facts proved. On the materials before them, the Courts below had rightly decided in favour of the defendant. NILMONI SINGH DEO BAHADUR v. KIRTI CHUNDER CHOWDHRY, **20 C. 847, P.C. = 20 I.A. 95.**

(51)—*Liability of Railway Company—Risk Note—Contract to contrary.*—Where a Railway Company carries goods subject to the terms of the 'Risk Note' and fails to make delivery, the Company is exempt from liability. There is no doubt a *prima facie* liability on the Company to deliver, but if they set up their special contract and allege loss, it is for the plaintiff's to show that the circumstances in which the goods disappeared were not such as to amount to "loss" within the meaning of the special contract. The Railway Company need not show by affirmative evidence that they had lost the goods. MULJI DHANJI SEIT v. THE SOUTHERN MAHRATTA RAILWAY CO., **15 M. L.J. 396.** [*R.*, 113 P.R. 1908 = 15 P.L.R. 1909.]

(52)—*Act VIII of 1859, s. 7—Relinquishment of portion of claim—Objection on ground of* —Onus *on objector.*—Where a defendant objects under Act VIII of 1859, s. 7, that plaintiff omitted in a former suit to include

***Burden of proof*—concluded.**

——34.—Miscellaneous—*continued.*

the portion which he now claims, and in respect of which he then had a cause of action, the objector should discharge the burden of proof, the objection being one of fact. C. B. SKINNER & CO. v. RANEE SHAMA SOONDUREE, **19 W.R. 429.**

(53)—*Sale of goods by sample—Proof of inequality of sample.*—In a sale of goods by sample, the *onus* is on the party alleging that the goods are not equal to sample. ISHERA YARN MILLS COMPANY v. ABDUL KURREEM, **Bourke O.C. 276.**

(54)—*Judgment-debtor applying to set aside* ex-parte *judgment—Ground of non-service—Duty to make out* prima facie *case.*—Where a judgment-debtor applies to set aside an *ex-parte* judgment on the ground that there was no effectual service of the summons upon him, he should be called upon to give his evidence, or to make out a *prima facie* case. KHUDEERUN LALL v. CHUTTERDHAREE LALL, **21 W.R. 242.**

(55)—*Allegation of non-service of summons—Burden of proof as to.*—Where a party alleges that no summons has been served upon him, he must prove the allegation and where he starts a *prima facie* case in support of the allegation by his oath, the opponent must rebut this by evidence taken in the presence of the first party and subject to cross examination by him. MUSSAMUT JHUTOO KOOER v. LULITA KOOER, **22 W.R. 423.**

(56)—*Plaintiff subpoenaing Rajah to prove sannod—Rajah's refusal to come to Court—Rajah to rebut plaintiff's evidence.*—When a plaintiff subpœnas a Rajah to prove the authenticity of a sannad in virtue of which he claims to recover possession of land: *Held* that plaintiff's testimony is strengthened by defendant's (Rajah's) refusal to come into Court, it lying with the Rajah to rebut plaintiff's evidence, or prove personal disqualification. RADHA KISTO SINGH DEO v. GUDADHUR BANERJEE, **8 W.R. 453.**

(57)—*Judgment-debtor's heir admitting possession of property—Burden of proof as to extent of property.*—Where an heir of a deceased judgment-debtor admits possession of some of the latter's property, the heir (and not the decree-holder) is bound to prove the extent of that property. MATUNGINEE DEBEA v. GUGAN CHUNDER BHOOY, **2 W.R. Mis. 41.**

(58)—*Civ. Pro. Code, 1859, ss. 124, 246,—Execution-proceedings—Claimant to begin proof—Claimant to prove ownership or possession—Description of property.—Held*, by the majority of the Full Bench (*Mitter, J., dissenting*), that in a proceeding of execution of a decree under s. 246, Act VIII of 1859, the claimant, and not the execution-creditor, should begin; and he must prove, not the title of any third person, but that the property belonged to him, or was in his own possession. *Held*, by the Division Bench (*Peacock, C.J. and Mitter J.,*)

***Burden of proof*—continued**

——34.—Miscellaneous—*continued.*

that, in attaching property, a reasonably accurate description of the property in all that is required by s. 124, Act VIII of 1859. NGA THA YAH v. F.N. BAN, **11 W.R. F.B. 8.**

(59)— *Execution of decree—Objection by person claiming title to property sought to be sold in execution—Suit by decree-holder to establish title of his judgment-debtor—Burden of proof.*—One L B, the holder of a decree on a hypothecation-bond, sought to execute his decree by bringing to sale certain immoveable property of his judgment-debtor. Thereupon, one R.D., filed an objection based mainly on his (R.D's) possession of the property in question. The objector being, on enquiry, found to be in possession, his objection was allowed, and L.B, brought a suit to establish his right to execute his decree against the property. The Court of first instance and the lower appellate Court found that the ancestors of the judgment-debtors and R.D's mother were members of a joint Hindu family and that they about one hundred years ago had partitioned the property held jointly by them. *Held*, that, in respect of that portion of the property which the defendant had not shown to have belonged to the ancestor through whom he claimed, it was for the plaintiff to show that his judgment-debtor had been in possession for some period within 12 years preceding the suit. RAM DIAL v. LAL BAHADUR, **A.W.N. 1893, 60.** (16 C. 473, *R.*)

(60)—*Suit to recover income-tax by co-sharer—Co-sharer being defendant's manager—* Onus *of proof.*—In a suit to recover income-tax paid by a co-sharer, whom the lower Court found to be manager of the defendant and held not to be entitled to sue for the income-tax without rendering accounts, the fact that the defendant employed other persons for the collection of rents due in respect of his share was held not to prove that the plaintiff had ceased to hold possession thereof as manager or shift the *onus* of proof. RAMNATH GHOSE v. AMRIT MOYEE DOSSEE, **5 W.R. 168.**

(61)—Onus *of proving valid transfer.*—The *onus* of proving a transfer is upon the party who relies upon it. IMMADIPATTAM THIRUGNANA v. PERYIA DORAISAMY, **24 M. 377=5 C.W.N. 217=28 I.A. 46, P.C.=7 Sar. 811.**

(62)—*Mistake as to where, lies—Question of law justifying second appeal.*—Unless evidence is excluded from a wrong placing of the *onus probandi*, and the evidence offered on the issues framed has been fully gone into, a mistake as to where the burden of proof lies can rarely be a question of law which would justify a special appeal. MAUNG MEIK v. MAUNG AUNG MYAT, **L.B.R. 1893—1900, 650.** (21 C. 484, 21 W.R. 416, *R.*)

(63-66)—*S. 253, I.C.A., 1872—Agreement as to shares in partnership—Burden of proof.*—Where one party to a partnership-suit does not allege any specific agreement as to the amount

Burden of proof—continued

——34.—Miscellaneous—*continued.*

of the shares, but the other party alleges a specific agreement that the shares were to be unequal, the presumption, which exists as to the equality of partners' shares, casts the burden of proof upon the latter, who must therefore begin. JADOBRAM DEY v. BULLORAM DEY, 26 C. 281. [*R.*, 40 P.R. 1908=89 P.W.R. 1903=186 P.L.R. 1908.]

(67) — *Procedure in case of lunatic—Act XXXV of 1858*—Onus probandi.—The burden of proving an allegation as to the lunacy of any person is on the Collector or the person who makes the allegation. SHAIKH BUSHARU-TOOLLAH v. THE COLLECTOR OF TIPPERAH, 8 W.R. 375.

Suit for possession against trustee by members of temple committee—*onus* of proof as to class of temple—*See* ACT XX OF 1863, ss. 3, 4, 11, 12 M. 366.

Public body seeking to acquire portion of block of building structurally connected with the main block—*See* ACT I OF 1894, 27 M. 350.

Claim for exemption from enhancement of rent—What has to be proved—Act VIII of 1885 (B.C.), s. 50—*See* BEN. ACT VIII OF 1885, ss. 50, 52, 4 C.L.J. 37.

See BOM. ACT XVII OF 1879, s. 12, 9 B. 520.

Entry in record-of-rights made under C.P. Land Revenue Act—Burden of proving its incorrectness—*See* C.P. ACT XVI OF 1889, s. 72, 10 C.P.L.R. 33.

See MAD. ACT VIII OF 1865, ss. 18, 36, 40, 27 M. 94=13 M.L.J. 479.

See MAD. ACT III OF 1871, ss. 138, 139, 8 M. 64.

See MAD. ACT V OF 1882, s. 6, 15 M. 315=2 M.L.J. 158.

Suit on registered mortgage-bond—Want of consideration—Burden lies on the mortgagor—*See* PUN. ACT XVIII OF 1884, ss. 40, 70, 19 P.L.R. 1907.

On certain issue wrongly placed on party—Material irregularity committed within s. 70 (*a*) of Act XVIII of 1884—*See* PUN. ACT XVIII OF 1884, s. 70 (*a*), 143 P.W.R. 1908.

Suit for declaration that defendant is not under-proprietor—Settlement Record showing defendant to be tenant—Proof for establishing under-proprietary right—*See* U. P. ACT XXVI OF 1866, sch., r. 10, 8 O.C. 145.

See U.P. ACT XII OF 1881, ss. 93 (*a*), 209, 12 A. 301, F.B.=A.W.N. 1890, 131.

Suit for profits—Conduct of lambardar—Burden of proof—*See* U.P. ACT XII OF 1881, s. 209, 8 A. 61=A.W.N. 1886, 1.

See ARBITRATION—MISCELLAEOUS, 4 W.R.P.C. 31.

Burden of proof—continued

——34.—Miscellaneous—*continued.*

See BILL OF SALE, 3 B.L.R. App. 125.

Lies heavily on person setting up adoption of adult, which is not usual — *See* BUDDHIST LAW—ADOPTION, 14 Bur. L.R. 15.

See BUDDHIST LAW—GIFT, U.B.R. 1892—1896, Vol. II, 400.

Suit for land on allegation that it is *Chaukidar Chakran* land and the Collector transferred it to plaintiff—Defendant to prove transfer to be illegal — *See* CHAUKIDARI CHAKRAN LANDS, 2 C.L.J. 107=32 C. 1107.

See CIV. PRO. CODE, 1882, s. 257-A, 4 C. P.L.R. 148.

See CIV. PRO. CODE, 1908, ss. 92, 93, U.B. R. 1897—1901, Vol. II, 301.

Liability of broker—Want of authority—*See* CIV. PRO. CODE, 1908, s. 115, 10 C.W.N. 14.

If a defendant insists that an executor is a necessary party, he must prove that the executor is living within jurisdiction—*See* CIV. PRO. CODE, 1908, O. 1, rr. 8 (2), 10 (2), (3), (5), 11, O. XXXI, r. 2, 2 C.L.J. 484.

Suit by a defeated claimant under s. 283, Civ. Pro. Code, 1882—*Onus* of proof — *See* CIV. PRO. CODE, 1908, O. XXI, r. 63, U.B.R. 1905, Civ. Pro. Code, 16.

In suit under s. 283, Civ. Pro. Code, 1882, where objection under s. 278, Civ. Pro. Code, was disallowed and objector instituted suit, lies on plaintiff—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 5 A.L.J. 358.

See CIV. PRO. CODE, 1908, O. XLI, r. 20, 8 B.L.R. 184, Note=13 W.R. 362.

See COMMON LAND, 119 P.R. 1894.

Apportionment of compensation — Rights of zemindar—*Onus* of proof as to the value of a particular contingency to zemindar on whom lies—*See* COMPENSATION, 7 C.L.J. 284.

See CONTRACT—CONTRUCTION OF CONTRACTS, 15 B. 338.

Suit for damages for breach of promise of marriage—*See* CONTRACT ACT, 1872, s. 65, 1 C.L J. 261.

Bailment—Entrusting for repair the driving beam of a sewing machine to coppersmith—Degree of care—Burden of proof—*See* CONTRACT ACT, 1872, ss. 151, 152, and 154, U.B. R. 1908, 1st Quarter, Contract, 11.

Suit for costs incurred in claim-proceedings—*See* COSTS—SPECIAL CASES, U.B.R. 1905, Civ. Pro. Code. 18.

Onus of proof—Consent-decree for arrears of rent — *See* ESTOPPEL — ESTOPPEL BY JUDGMENT, 1 C.L.R. 528.

Suit for damages by legal representative of deceased person killed by accident while travelling in railway—Negligence—Burden of proof—*See* EVIDENCE ACT, 1872, s. 106, 4 M.L.T. 251.

***Burden of proof*—continued.**

——34.—Miscellaneous—*continued.*

Burden of proving death of person not heard of for 15 years—*See* EVIDENCE ACT, 1872, s. 107, 6 M.L.T. 153=2 Ind. Cas. 977=19 M. L. J. 502.

Whether the rule as to—is altered by s. 114 of the Evidence Act—*See* EVIDENCE ACT, 1872, s. 114, 1 N.L.R. 169.

As to whether transaction is sale or mortgage —*See* EVIDENCE ACT, 1872, ss. 157, 159, 160, 3 L.B.R. 250.

Claims relating to saranjams, applicability of rules laid down by British Government— Saranjam grant not a grant of soil—, on party alleging grant of soil—*See* GRANT—CONSTRUCTION, 6 B. 598.

See GRANT—CONSTRUCTION, 11 B.H.C. 162.

In dealings by illiterate woman—*See* ILLITERATE WOMAN, 2 Ind. Cas. 810.

Impartible property—Vatan property attached to office of desai—Presumption—Evidence of family or local custom—*Onus* of proof—*See* IMPARTIBLE ESTATE, 7 C.L.R. 1, P.C.=4 B 494=7 I.A. 162.

See INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 19 A. 125—A.W.N. 1896, 197.

Age of assured—Proof of age—Onus of proof —*See* INSURANCE, 20 B. 99.

See INSURANCE, 2 Ind. Jur. N.S. 308.

Settlement—Proof that settlor is a foreigner with foreign domicile—*See* INTERNATIONAL LAW, 9 C.W.N. 394=32 C. 631.

See JURISDICTION OF CIVIL COURTS, 15 B. 599.

Burden of proof of bar by limitation prior to date of acknowledgment—*See* LIMITATION ACT, 1908, s. 19, 26 A. 313=1 A.L.J. 1.

On whom lies in suit for damages for fraud when time of plaintiff's knowledge of fraud doubtful—*See* LIMITATION ACT 1903, arts. 62, 95, 97, 18 M.L.J. 19=31 M. 230=4 M.L.T. 80.

Fraud, suit to set aside decree on ground of—Knowledge of fraud—Defendant to prove that plaintiff had the knowledge more than three years before suit—*See* LIMITATION ACT, 1908, art. 95, 1 N.L.R. 20.

Of adoption among Mahomedans—Suit to set aside adoption—*See* MAHOMEDAN LAW—CUSTOM, 3 P.R. 1905=87 P.L.R. 1905.

Of relinquishment and estoppel—*See* MAHOMEDAN LAW—INHERITANCE, 10 O.L.J. 297, P.C.=11 Bom. L.R. 1210=19 M.L.J. 697=13 O.C. 183=14 C.W.N. 59=4 Ind. Cas. 457=31 A. 557.

Presumption of death of missing person—*See* MAHOMEDAN LAW—INHERITANCE 2 C.L.J. 236, P.C.=15 M.L.J. 317=7 Bom. L.R. 892= 2 A.L.J. 798=10 C.W.N. 33=33 C. 173=32 I.A. 177.

***Burden of proof*—continued**

——34.—Miscellaneous—*continued.*

Legitimacy— Presumption—Proof of non-access—*See* MAHOMEDAN LAW —LEGITIMACY, 2 C.L.J. 218.

Marriage by Mahomedan with a fifth wife when four previous wives are living—Children born of such marriage—Burden of proving legitimacy—*See* MAHOMEDAN LAW—MARRIAGE, 6 P.R. 1908.

Suit for arrears of maintenance—Nature of proof required—*See* MAINTENANCE, 16 C.P.L.R. 30.

Suit for damages for malicious arrest—On whom lies—*See* MALICIOUS ARREST, 29 M. 208.

See MALICIOUS PROSECUTION, L.B.R. 1893—1900, 387, 28 C. 591, 10 W.R. 439.

Extent of—On plaintiff in a suit for malicious prosecution, where he was convicted in first Court and acquitted only on appeal—*See* MALICIOUS PROSECUTION, 16 M.L.J. 18.

Suit for malicious prosecution—Onus of proving malice and absence of reasonable and probable cause—*See* MALICIOUS PROSECUTION, 12 C.P.L.R. 24.

Sale-deed by Gosha woman—*See* PARDANASHIN WOMAN, 12 M. 380.

See PARDANASHIN WOMAN. 1 B.L.R. O.C. 31, Note.

See PARTIES TO SUIT—GENERAL, 22 M. 326=9 M.L.J. 31.

See PARTNERSHIH—SUITS RELATING TO PARTNERSHIP, 11 P.R. 1897.

See PROBATE—GENERAL, 23 A. 472=A.W. N. 1901, 145.

Application for revocation of probate — Non-service of citation—Want of knowledge of application for probate—*See* PROBATE AND ADMINISTRATION ACT, 1881, 9 C.W.N. 190.

See RAILWAY COMPANY, 26 C. 465=3 C.W. N. 781. 2 Agra 200.

Onus of proving that any particular lands were included in the Permanent Settlement of 1793—*See* BEN. REG. XI OF 1825, s. 4, cl. (3), 3 C.L.J. 316.

See BEN. REG. III OF 1872, ss. 11, 25, 22 C. 473.

Where Reg. III of 1891, applied to any lands confiscating proprietary rights and giving compensation—Government must prove that statute applies—*See* BEN REG. III OF 1891, 12 C.W.N 1095=4 M.L.T. 234=10 Bom. L. R. 1102=8 C.L.J. 436=18 M.L.J. 549=36 C. 1=P.L.R. Journal Parts, p. 110=1 Ind. Cas. 182.

As to whether property in the hands of widow is part of her husband's estate or not—*See* RES JUDICATA—PARTIES, 7 M.L.T. 89= 33 M. 112=5 Ind Cas. 760.

Burden of proof—continued

——34.—**Miscellaneous**—*concluded*.

Suit for resumption—Plea of service in lieu of land—Enjoyment of land for 40 years—Burden of proof — *See* RESUMPTION, RIGHT OF—GENERAL, 8 M.L.T. 82=7 Ind. Cas. 401.

See RIGHT OF WAY, 3 B.L.R. app. 118.

See TODA GARAS HAK, 4 W.R. 55 P.C.

Trade-name — Special signification — *See* TRADE-MARK, 9 C.W.N. 281=32 C. 401.

See TRANSFER OF PROPERTY ACT, 1882, s. 53, 23 M. 184.

Suit for declaration that a deed of sale is not binding on plaintiff, being in fraud of creditors —Burden on plaintiff to establish affirmatively an intent to delay or defeat creditors—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 17 M.L.J. 11.

Party on whom—lies, to succeed, must establish *prima facie* case—Weakness of adversary's case not to be taken advantage of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 7 C.L.J. 586=12 C.W.N. 761=35 C. 1051.

As to whether a particular transaction is *ism forzi* lies on the person alleging it—*See* TRANSFER OF PROPERTY ACT, 1882, s. 91, cl. (*b*), 8 O.C. 349.

In case of breach of trust—*See* TRUSTS, 6 M.L.T. 143=2 Ind. Cas. 963=32 M. 490.

See VENDOR AND PURCHASER—INVALID SALES, 6 B. 309.

Burgadar.

(1)—*Burgadar, if tenant—Suit for burga rent, if maintainable in Small Cause Court—Small Cause Courts Act (IX of 1887), sch. II cl. (8).*—Settlement with a bargadar, under which he undertakes to cultivate the land for a half share of the produce, the remaining half going to the owner, does not by itself create the relation of landlord and tenant between the parties. A suit for recovery of the price of his share of the produce by the owner is maintainable in the Small Cause Court. KADE MANDAL v. AHADALI MOLA, **14 C.W.N. 639=6 Ind. Cas. 594.**

Burial.

Right of—and of reciting prayers before burial—Civil right—*See* CIV. PRO. CODE, 1908, s. 9, 16 M.L.J. 471= 1 M.L.T. 423=30 M. 15.

Custom of—*See* CUSTOM. 1 Bom. L.R. 170 =23 B. 666.

Burial ground.

Grant of land for burial purposes—Use of land as—Prohibited by Municipality—Right of grantee—Suit for possession of burial ground —*See* MUNICIPALITY, A.W.N. 1883, 3.

See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF A CLASS, 18 B. 699.

Burma.

Applicability of Transfer of Property Act to—*See* MORTGAGE — REDEMPTION, U.B.R. 1907, 3rd Quarter, Mortgage, 1.

Burma Boundaries Act.

See BUR. ACT V OF 1880.

Burma Courts Act.

See BUR. ACT XVII OF 1875.

Burma Fisheries Act.

See BUR. ACT VII OF 1875.

Burma Forest Act.

See BUR. ACT IV OF 1902.

Burma Land and Revenue Act.

See BUR. ACT II OF 1876.

Burma Laws Act.

See BUR. ACT XIII OF 1898.

Burma Municipal Act.

See BUR. ACT XVII OF 1884.

See BUR. ACT III OF 1898.

Burman Agriculturists.

See MORTGAGE—CONDITIONAL SALE, L. B. R. 1893—1900, 85.

Burma Recorders Courts Act.

See BUR. ACT XXI OF 1863.

Burmese Courts.

(1)—*Absence of statutory law—Burmese Courts—Practice.*—The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity and good conscience KADIR MOIDIN v. NEPEAN, **26 C. 1, P.C.=2 C.W.N. 665.**

Burmese Law.

See BUDDHIST LAW.

Burmese Woman.

Difference of creed whether a bar—Requisites of marriage—Marriage between Mussalman and—When valid—*See* MAHOMEDAN LAW—MARRIAGE, 21 C. 666, P.C.=21 I.A. 56.

Burning Ghat.

See BURIAL GROUND.

(1)—*Acquisition by Government—Compensation—Respective claims of Municipality and owner of the soil—Dedication of user—Extinction of use—Reverter to owner — Market-value of burning ground—Bengal Municipal Act (III B. C. of 1884), s. 30 — Construction—"And"—"Ghat."—Meaning.*—**An owner of lands may appropriate land to public use and yet retain in himself all such rights, in the soil as are compatible with the full exercise and enjoyment**

Burning Ghat—*concluded.*

of the public use, to which the property has been devoted, and it is not essential to constitute a valid dedication that legal title should pass from the owner. Nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land, which do not interfere with the uses for which it is dedicated: *Held*, in respect of land, which had not been expressly dedicated but was used by the public as a burning ground, that the circumstances of the case should that the owner made a dedication of the user of the property for the purposes of a burning ground, such dedication to remain in force only so long as the property continued to be used as a burning ground. When the sole use to which property had been dedicated becomes impossible of execution by reason of a statutory acquisition and compulsory use, for purposes inconsistent with the original dedication, it reverts to the dedicator or his representative. Although it is an essential element of a good dedication that it should be irrevocable, nevertheless when, after a valid dedication has been made, the use for which the property dedicated becomes impossible of execution or the object of the use wholly fails, there is an abandonment, in consequence of which the rights of the public therein fail and a reversion takes place, the dedication being taken to have spent its force when the use ceases. (1 C.W.N. 698=24 I.A. 177=25 C. 194, *D.*) Unlike the road-land which was acquired by the Collector in the above case, the burning ground in this case, treated as such, had a market-value, which had been actually assessed. Therefore, the person who was proved to be owner of the soil was entitled to the compensation assessed. The word *ghat* in s. 30 of the Bengal Municipal Act does not include a tract of land used as a burning ground. The sub-soil under a *ghat* does not vest in the Municipality under s. 30 of the Act; but the *ghat* itself does. The Legislature, by enacting s. 30, intended that such roads, etc., as are private property, or are maintained by Government or at the public expense should not vest in the Municipality. THE CHAIRMAN, HOWRAH MUNICIPALITY v. KHETTRA KRISTO MITTER, **10 C.W.N. 1044 =4 C.L.J. 343=33 C. 1920.** [*R.*, 52 P.W.R. 1908=78 P.L.R. 1908.]

See MAD. ACT I OF 1884, ss. 392, 433, 25 M. 118.

Business

See JURISDICTION—CAUSES OF JURISDICTION, 14 C. 256.

Bustoo Land.

Suit for rent of homestead or—Jurisdiction—Act IX of 1887, cls. 7 and 8—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 15 C. 174.

Butchers.

See POSSESSION—ADVERSE POSSESSION, 2 M.I.A. 479.

Butwara Chitta.

Admissibility in evidence of—*See* BEN. ACT VIII OF 1885, art. 3, 1 Ind. Cas. 807.

Butwara Papers.

Admissibility in evidence—*See* EVIDENCE ACT, 1872. ss. 9, 13, 2 Ind. Cas. 367.

Butwara Proceedings.

(1)—Butwara *proceedings of Collector—Finality.*—The *butwara* proceedings of a Collector are final for the purpose of fixing proportionate area and proportionate assessment of Government revenue, but they are not to preclude parties from coming into Court for the enforcement of their civil right under s. 1, Act VIII of 1859. KUNJ BEHARI SINGH v. NERU SING, **6 B.L.R. 663, note=15 W.R. 291.** [*Appl.*, 14 C. 67, F.B. 2 C.L.J. 351; *R.*, 6 B.L.R. 658=15 W.R. 471.]

Partition by Collector—Private partition—*Butwara* proceedings—Cause of action—*See* BENG. ACT VIII OF 1869, s. 15, 3 C.L.R. 453.

See BEN. ACT VIII OF 1876, 11 C.L.R. 550.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 3 B.L.R. A.C. 65=11 W.R. 410.

After private partition—Jurisdiction of Civil Court—Injunction—Collector not party to suit—*See* JURISDICTION OF CIVIL COURTS, 11 C.L.R. 533.

See JURISDICTION OF CIVIL COURTS, 2 B.L.R. F.B. 1=10 W.R. F.B. 66.

See PARTITION—PARTITION, EFFECT OF, 12 C.L.R. 281.

Joint and undivided estate—Private partition—*See* PARTITION—PRIVATE PARTITION, 8 B.L.R. App. 73. Note=13 W.R. 447.

See PARTITION—PRIVATE PARTITION, 8 C. 72=10 C.L.R. 81, 2 C.L.R. 134.

See BEN. REG. XIX OF 1806, 3 C. 705.

Byahi Marriage.

See HINDU LAW—INHERITANCE, Marsh 644.

Byalwafa.

See PARSIS, 5 B.H.C. A.C. 109.

Bye-law.

A District Municipality as to how to carry on offensive trades declared *ultra vires*—*See* BOM. ACT III OF 1901, s. 48 (*b*) (III), 4 Bom. L.R. 585.

See MAD. ACT II OF 1886, ss. 70, 87, 22 M. 524.

Rules framed by Municipal Board of Mussoorie as to building within Municipal limits—Order for demolition of building erected in contravention of such rules—*See* U.P. ACT XV OF 1883, s. 55, A.W.N. 1900, 8.

Bye-law—*concluded.*

Bye-laws passed by Municipality—Presumption—Validity—*See* U.P. ACT XV OF 1883, s. 55, 19 A. 493.

Municipal Board's powers to make—Extent of—*See* U.P. ACT XV OF 1883, s. 55 (c), 19 A. 313=A.W.N. 1897, 65.

Of Port Trust, Rule 59—*See* SALE OF GOODS, 17 B. 62.

Byragi.

Precept that—can acquire no property is only counsel of perfection — Presumption as to ownership of property held and money paid by the head of a *mutt*—*See* HINDU LAW—INTERPRETATION, 26 M. 79=12 M.L.J. 439.

Calcutta.

Easement—Light and air—Premises situate in — Law applicable—*See* PRESCRIPTION—EASEMENTS—LIGHT AND AIR, 6 B.L.R. 85=19 W.R. 194.

Calcutta Municipal Consolidation Act.

See BENG. ACT II OF 1888.

Calcutta Municipality.

See BEN. ACT VI OF 1863.

See BEN. ACT III OF 1899.

Calcutta Municipality (Amending Ben. Act IV of 1876.)

See BEN. ACT V OF 1884.

Calcutta Port Improvement Act.

See BEN. ACT V OF 1870.

Calcutta Sub-urban Police Act.

See BEN. ACT II OF 1866.

Calcutta University Act.

See BEN. ACT II OF 1857.

Calendar.

See LIMITATION—GENERAL, 9 B.L.R. App. 41.

Suit in time according to Bengal calendar and out of time according to English calendar—*See* LIMITATION ACT, 1908, s. 25, 13 C.L.R. 153.

See LIMITATION ACT, 1908, s. 25, 4 B.L.R. App. 53=13 W.R. 183.

Camp.

(1)—*Of Magistrate—Adjournment of case.*—*Per Jenkins, C. J.*—We earnestly hope that those judicial officers whose official movements may leave them open to this charge (that is, of wilfully compelling the defendant to follow the movements of his camp) will strive to exercise their powers with such consideration to those who appear before them as will secure them from any imputation of misconduct in this respect. GIRJASHANKAR v. GOPALJI, 7 Bom. L.R. 951=30 B. 241. [*R.*, 35 C. 756, F. B.=7 C.L.J. 666=12 C.W.N. 682.]

Camp Inquiry.

(1)—*Necessity for informing time and place of inquiry in camp.*—It is not enough that a party should be informed that a case will be taken up in camp. The place where it will be taken up and the date must be made known to him. WARLIA TELI v. NAKKU TELI, 5 C.P.L.R. 96.

(2)—*Necessity for Court's adhering to time and place fixed for hearing.*—A Court must fix a place as well as a time for hearing an appeal or suit and must adhere to both and ought not to dispose of an appeal or suit either at a time or at a place of which the parties have not had notice. TUKARAM v. GANPAT, 5 C.P.L.R. 99.

Canal.

(1)—*Hajiwah Canal in Multan District—Rights of Excavators and Government.*—The plaintiff instituted this suit against Government claiming proprietary right in the Hajiwah Canal in the District of Multan, which was supplied with water from the Sutlej river. The Canal was excavated by the plaintiffs' ancestors with the sanction of Government in the year 1861 at a cost of about nine lakhs of rupees. It passed through lands owned by persons not parties to this suit, whose consent plaintiffs' ancestors had obtained under agreement to supply them with water. In the settlement Records the Canal was entered as the property of the plaintiffs' father. The Government waste lands of over 60,000 acres, which were farmed by plaintiffs and others, were incapable of cultivation for want of water. The Government sanctioned in proprietary right a grant of this land to plaintiffs' father. Upon the death of plaintiffs' father disputes arose among his sons, and owing to such quarrel Government took over possession and management of the Canal. The Government denied the plaintiffs' right to the Canal outside the 60,000 acres grant and relied on the 8th clause of an agreement executed by the parties. The clause was as follows :—'The Canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee : Provided always that in consideration of the premises that the said grantor, his successor and assigns shall at all times hereafter, whenever he or they shall think necessary be entitled without the consent of, or permission from the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management and distribution of the water of the said Canal without payment of any compensation whatsoever, and further to clear the said Canal and recover the cost of clearance and management by a canal-rate to be levied on the area irrigated. *Held*, that the ancestors of the plaintiffs acquired a proprietary interest in so much of the Government lands taken for the purpose of the Canal as was required for its construction and maintenance, and also a right to have the waters of the Sutlej river admitted into the Canal so long as the Canal was used for the purpose for which it was originally designed. The principles applicable to such cases are—"If a

Canal —*concluded.*

man under a verbal agreement whith a landlord for a certain interest in land or, what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land a Court of Equity will compel the landlord to give effect to such promise or expectation, 1 E. and I, Ap. 129 at p. 170 (1865). *Held*, also that the Government were entitled under the agreement to hold possession and control of the land so long as they considered it necessary. AHMAD YAR KHAN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **99 P.L.R. 1901=38 P.R. 1902.**

(2)—*Division of water channel.*—A water channel should not be diverted so as to damage the land of another, GHANARAM v. NANHA JAGGU, **3 C.P.L.R. 143.**

Meaning of the term—*See* BOM. ACT VII OF 1879, s. 8, 5 Bom. L.R. 760=28 B. 105.

Ses EASEMENT, 7 M. 530.

Construction of—Expenses of making duots and for canal-rates—*See* ENHANCEMENT OF RENT — ENHANCEMENT, GROUNDS OF, **2 Agra 346.**

Construction of—Expenses for canal dues —*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 2 Agra 179.

See LANDLORD AND TENANT—LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION, 28 C. 693, P.C.=28 I.A. 211=5 C.W.N. 634=3 Bom. L. R. 505.

Canal and Drainage Act, Northern India.

See ACT VIII OF 1873.

Canal dues.

Construction of canal—Expenses for canal dues—*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 2 Agra 179.

Canals and Public Ferries Act.

See MAD. ACT II OF 1890.

Cancellation of Deeds.

See DEEDS—CANCELLATION OF DEEDS.

Cancellation of Receipt Stamp.

See STAMP ACT, 1899, s. 12 (3), 6 Bom. L.R. 436=28 B. 432.

Candidate.

Notification that—has passed—Cancelment of notification on ground of error—Appeal to Privy Council—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 6 A. 163, F.B.=A.W.N. 1884, 15.

See BOARD OF EXAMINERS, 28 C. 479.

Candidate—*concluded.*

Suit against Municipal Board for declaratory decree to be entered in list of—for election as members of Board—Alleging of *malafides* against revising tribunal—Maintainability of suit against Board—*See* MUNICIPALITY, 22 A. 143=A.W.N. 1900, 4.

Pleadership examination — Board of Examiners—Standard of marks required for pass certificates raised without notice to candidates —Application by unsuccessful candidates for revision of list of successful candidates—*See* PLEADERSHIP EXAMINATIONS, 9 A. 611, F.B. =A.W.N, 1887, 148.

Canning's Confiscation Proclamation of 1858.

See MORTGAGE—GENERAL, 4 C. 839, P. C.=6 I.A. 1.

Canning's Proclamation of 15th March, 1858.

Nazal land in Oudh, suit for possession of— Burden of proof — Effect of—Power-of-attorney signed by Deputy Collector for Deputy Commissioner, presumption as to—*See* POSSESSION,— SUITS FOR POSSESSION, 7 O.C. 65.

Canongoe.

Obstruction to canongoe appointed by settlement officer—*See* BEN. ACT V OF 1875, ss. 4, 5, 6 C.W.N. 120.

Canongoe Papers.

See CANONGOE PAPERS.

Cantonment.

(1)—*Right of military authorities to quarter troops in houses belonging to private individuals in cantonments— Military Regulations.*—The military authorities have no right to appropriate to their own uses houses the property of private individuals in cantonments, except, subject to the conditions prescribed by the Military Regulations, on the faith of which the houses were built or purchased. *Held* by the Appellate Court that, when a person was in the occupation of a house in cantonments, he could not be ejected without due notice. CAREY v. ROBINSON, **1 Ind. Jur. N.S. 88= Bourke, O.C. 399.**

(2)—*Contract by Cantonment Committee, suit for damages for breach of, maintainable against Committee as body corporate—Bombay Act III of 1867, s. 11.*—This was a suit for damages for breaches of some conservancy contracts entered into by the plaintiff with the Cantonment Committee of Poona. The defendants took objection to the form of the suit, on the ground that the Poona Cantonment Committee of which they were members, not being a corporate body, could not be sued as such, but that the members ought to be impleaded defendants *nominatim* and individually. The District Judge, however, *held* that the plaintiff need not bring in the members of the Committee as parties *nominatim* that the suit was properly

Cantonment—*continued.*

constituted, and gave a decree for the plaintiff. The High Court confirmed the decree concurring with the lower Court in holding that there was nothing wrong in the form of the suit as it was brought. The Committee was created by rules made under s. 11 of Bombay Act III of 1867. These rules, though not by express words, do, by implication, create the Committee a corporation for the purposes of the conservancy of the cantonment. When the Committee has entered into contracts in a corporate manner, it is not open to the Committee to deny such corporate character when sued for damages for breach of such contracts, and it is, therefore, open to the Committee to sue and be sued in its own name on such contracts. THE CANTONMENT COMMITTEE, POONA v. BARJORJI BAMANJI, **14 B. 286.** [*D.*, 34 B. 583=12 Bom. L.R. 615.]

(3)—*S. 380, Civ. Pro. Code, 1882—British Cantonment of Secunderabad.*—For the purpose of s. 380, Civ. Pro Code, the British Cantonment of Secunderabad must be regarded as being a place out of British India. HOSSAIN ALI MIRZA v. ABID ALI MIRZA, **21 C. 177.**

(4)—*Grant of land for building purposes — Right of Government to eject grantee--Assessment of alluvial accretions-Jurisdiction of Civil Court.* —Under the Military Regulations relating to grants of lands in cantonments, a grant cannot be resumed by the Government without a month's notice, and without payment of the value of buildings which may have been authorised to be erected. The Civil Courts have no jurisdiction to assess rent on alluvial accretions to lands granted in cantonments. PATTERSON v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **3 A. 689=A.W.N. 1881, 46.**

(5)—*Land within Municipal limits—Suit by Secretary of State—Refusal to pay ground-rent —Cause of action—Jurisdiction of Civil Court —Right of grantee to compensation on ejectment* —Certain land situate within the limits of a cantonment was granted rent-free for building purposes by the military authorities, and, on its resumption by civil authorities, the ground rents on such land were assigned to the Municipality within whose limits the land was situated. On the refusal by the representative of the grantee to pay the ground-rent demanded by the Municipality, the Secretary of State for India in Council sued him in the Civil Court, for a declaration of his proprietary right to the land, for its assessment to ground-rent, and in the event of the refusal of the defendant to pay such rent when fixed, for possession of the land by ejectment of the defendant therefrom, and for mesne profits of the land. *Held* —(*a*) that the Municipal Committee were the plaintiff's agents in demanding ground-rent, and that the plaintiff had therefore a right to sue; (*b*) that the refusal of the defendant to pay ground-rent, or accept the lease or to quit the land, afforded a cause of action, implying as it did a denial of the plaintiff's title; (*c*) that plaintiff was entitled to claim reasonable compensation for the use and occupation of the

Canto nment—*continued.*

land; (*d*) that the suit was one properly cognizable by the Civil Court, and that the plaintiff was entitled to the reliefs he sought; (*e*) but that in the event of the defendant being ejected, the plaintiff would pay him compensation for his buildings to be determined by an umpire. THE SECRETARY OF STATE FOR INDIA v. JAGAN PRASAD, **6 A. 148=A.W.N. 1884, 6.** [*D.*, 30 B. 137=7 Bom. L.R. 735.]

(6)—*Resumption of, with buildings thereon—Notice—Payment of compensation—Land in Cantonment—Resumption — Government.*—In 1862, E, the predecessor-in-title of the defendants, obtained from the Government the land in dispute, under a grant which was made on the terms of the General Order of the 31st July 1856. The General Order provided among other things: "Permission to occupy such ground in a Military Cantonment confers no proprietary right, it continues the property of State. It is resumable at the pleasure of Government, but in all practicable cases one month's notice of resumption will be given, and the value of the buildings which may have been erected thereon, as estimated by a commitee, will be paid to the owner." E erected a bungalow on the land and in 1874 he sold the bungalow and all his interest in the land to H, whose interest devolved at his death on his executors, the defendants. On the 19th October, 1903, a notice was given on behalf of the Bombay Government to the first defendant that he should on the 1st December, 1903 quit the possession of premises and deliver them to the Cantonment Magistrate at Poona: and that the Government was prepared to pay to him Rs. 15,500. The defendants having declined to comply with the notice, the Secretary of State for India in Council filed a suit to recover possession of the property from the defendants. The defendants in answer contended that one month's notice to the remaining two executors (defendants 2 and 3) was not given and that the value of the buildings had not been estimated or tendered. *Held*, (1) that the giving of notice was not a condition precedent, the provision, about it being nothing more than a statement of what will be done where practicable for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve. That even if it be assumed that a notice was a condition precedent to the right of resumption, it was clear that three executors on their own showing were joint occupants and notice given to one of them satisfied the provision. That payment was not made a condition precedent to resumption, though no doubt the right to that payment would arise on resumption. SECRETARY OF STATE v. VAMANRAO, **7 Bom. L.R. 735=30 B. 137.**

(7)—*Cantonment land, alienation of—Native State—East India Company—Rights of alienation, and management and control of the same in the absence of any treaty.*—The Hyderabad Subsidiary Force, which had its headquarters in the Secunderabad Cantonment, was a force

Cantonment—*continued.*

in the employment of the East India Company, and commanded by the Company's Officers, but maintained, by agreement, in Hyderabad Territory for the protection of the Nizam. It appears that there never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the Military Commander commanding the Hyderabad subsidiary force on the other, with respect to the management, control, and dispossession of the Cantonment and the land comprised in it. When the Nizam's Government admitted a British Force within its territory, and allotted it to the Secunderabad Cantonment as its Headquarters, it, no doubt, by necessary implication, conveyed to the military authority all powers of jurisdiction, control, and management incident to maintaining the efficiency and the discipline of the troops, and the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity land forming part of the Cantonment, and undoubtedly Hyderabad territory for a purpose wholly unconnected with military requirements. PESTONJI v. EDULJI, **10 Bom. L.R. = 287 = 12 C.W.N. 465 = 4 N.L.R. 65 = 7 C. L.J. 401 = 3 M.L.T. 339 = 18 M.L.J. 199 = 14 Bur. L.R. 102 = 35 C. 478, P.C. = 35 I.A. 79.**

(8)—*Cantonment, land in—Presumption in respect of such land—Adverse possession—Limitation.*—In the beginning of the 19th century, one Lieutenant Young, having built a house to quarter his regiment, also appropriated a piece of land adjoining the same, situated within Cantonment limits and subject to Cantonment rules until 1874, when it was made over by the Military authorities to the Civil authorities. Sixty years had not elapsed since the acquisition of the land by the defendant. *Held* that the suit was not barred by limitation. A party who builds a house in Cantonments must be taken to have derived his title to occupy the land from the Military authorities, and their power to make a grant of it can only be co-extensive with their own tenure of the property and no assignment by them can subsist beyond the period the land might remain subject to Cantonment regulations. BANK OF UPPER INDIA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **7 A.L.J. 1894.** (6 A. 148, *R.*)

(9)—*Cantonment, land and building in—Tenants if owners or licensees—Permission to build, effect of—Long possession—Presumption of ownership if arises—Resumption by Government—Compensation.*—On the question whether the appellants' house situated within the Poona Cantonment was held by the appellants in proprietary right or under the military or cantonment tenure, so as to be resumable by the Government at their pleasure subject to the payment of compensation for buildings erected by the tenant: *Held*—That, assuming that the house existed at or before the time the cantonment was formed, there was under the

Cantonment—*concluded.*

circumstances of the case, strong probability that the owner was duly compensated along with other proprietors for the change in his position as owner to that of licensee; that permission to build bungalows, though frequently given, did not carry with it any short of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities; that, in the circumstances, mere possession or occupation of the bungalow on the site raised no presumption that the appellants or their predecessors in title were owners in fee; that the appellants were mere licensees and the land in question had been lawfully resumed by Government. KAIKHUSRU ADERJI GHASWALA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **15 C.W.N. 909, P.C.**

(10)—*Lease for more than one month—Bengal Army Regulations, para 24.*—An agreement to take a lease of a house in Amballa Cantonment for one year is not valid by reason of para 24 of the Bengal Army Regulations which prescribes that houses in cantonments can only, according to those Regulations, be let by the month. HODGKINSON v. FITZHERBERT, **115 P.R. 1882.** (71 P.R. 1873, *Cited.*)

(11)—*Hire of house—Refusal by tenant to pay higher rent than is stipulated for by the landlord with the Cantonment Committee—Plea invalid.*—In a suit by a landlord for arrears of rent due from the tenant, the latter amongst other pleas contended that the landlord when obtaining permission from the Cantonment Committee to build the house in question agreed to charge a certain rate and could not claim a higher one. *Held* that as this is no suit between the landlord and the Cantonment Committee, but between him and third parties, such plea cannot be allowed. MOHUN LAL v. MUSSAMMAT BEGAM, **72 P.R. 1883.**

Right of pre-emption as to property in—*See* PUN. ACT II OF 1905, ss. 3 (3) (*a*), 7 (1), 3 P.L.R. 1911 = 9 P.R. 1911 = 9 Ind. Cas. 388 = 30 P.W.R. 1911.

Suit for fruit on trees in Cantonment—*See* U.P. ACT XII OF 1881, ss. 3 (2), 93 (*a*), A.W.N. 1881. 162.

Grant by military authorities of cantonment land—Resumption by Government—*See* GRANT—MISCELLANEOUS, 3 Agra 7.

In Native State—Power of commanding officer to grant land—*See* NATIVE STATES, 12 C.W.N. 465, P.C. = 35 C. 478 = 35 I.A. 79 = 3 M.L.T. 339 = 4 N.L.R. 65 = 14 Bur. L.R. 102 = 18 M.L.J. 199 = 10 Bom. L.R. 287 = 7 C.L.J. 401.

See RESIDENCE, 9 B. 244.

Cantonment Act.

See ACT III OF 1880.

See ACT XIII OF 1889.

Cantonment Act, Bombay.

See BOM. ACT III OF 1867.

Cantonment Committee.

Is a public servant—Notice of claim necessary—*See* CIV. PRO. CODE, 1908, ss. 2 (17), 80, 12 Bom. L.R. 615.

Cantonment Court.

Soldier—Army Schoolmaster—Cantonment Court of Small Causes—Jurisdiction—*See* SMALL CAUSE COURT, MOFASSIL JURISDICTION OF—GENERAL, 6 M.H.C. 83.

Cantonment House Accommodation Act.

See ACT II OF 1902.

Cantonment Joint Magistrates Act.

See ACT III OF 1859.

Cantonment Magistrate.

(1)—*Act III of 1859, s. 4, jurisdiction of Court of Cantonment Magistrate—Small Cause Courts Act, XI of 1865, ss. 12, 8.*—The fact that a person is neither carrying on business nor is resident within the limits of a Military Cantonment does not by itself disentitle him from suing in the Court of the Cantonment Magistrate. The only persons precluded from doing so are those not registered as military bazaarmen at the time the debts were contracted. Also, unless the defendant is amenable to the articles of war as contemplated by s. 4 of Act III of 1859, in which case he can only be sued in the Court of the Cantonment Magistrate, he may also be sued in the Court of the Subordinate Judge, provided the cause of action arose within his jurisdiction. The Small Cause Court Act, XI of 1865, s. 12, saves the jurisdiction of the Cantonment Magistrate, but does not take away the jurisdiction conferred by s. 8 of the Small Cause Court Act. SUNDARDAS JAGJIVANDAS v. MOMANDAS TICUMDAS, **9 B. 454.**

(2)—*Civ. Pro. Code, 1882, s. 15—Jurisdiction—Court of lower grade in two Courts having jurisdiction.*—Defendants were sued on a bond executed by them at the Ahmedabad cantonment, the cause of action having thus arisen within the jurisdiction of the Cantonment Magistrate. The residence of the defendants, however, happened to be within the jurisdiction of the City Small Cause Court. On the question being referred to the High Court for decision, whether the Court of the Cantonment Magistrate at Ahmedabad with Small Cause jurisdiction up to Rs. 200 was to be considered the Court of "the lowest grade" having jurisdiction in the cantonment, within the meaning of s. 15 of the Civ Pro. Code, with reference to the City Small Cause Court at Ahmedabad, *held* that, although both the above Courts had jurisdiction to try the cause, yet, the Small Cause Court of the Cantonment, whose jurisdiction extended to only Rs. 200, whilst that of the City Small Cause Court extended to Rs. 500, was to be deemed to be the Court of lower grade, and therefore, under s. 15 of the Civ. Pro. Code, the proper Court to try the suit. MOHANLAL RAICHAND v. VIRA PUNJA, **12 B. 169.** [*F.*, 16 B. 702.]

Cantonment Magistrate—*concluded.*

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 4 B.H.C. A.C. 187.

Captain.

Contract by agent on behalf of—and owners of ship then in the roads—Liability of agent—*See* PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF AGENTS, 7 M.H.C. 82.

Captor.

Animal ferœ—Pit—Captor—Right of.—He who prepares a pit in order that an animal *ferœ* may fall, and into which the animal actually falls, becomes the captor and, as such, owner of the animal, though a third person may get actual possession of it. MAKATH v. KONDAPUNI, **4 M. 268.**

Carnatic Act, Nawab of.

See MAD. ACT XXX OF 1858.

Carpenter.

Office of village carpenter, whether "hereditary office."—*See* BOM. ACT III OF 1874, s. 4, 21 B. 733.

Carriers.

See ACT III OF 1865.

See ACT IV OF 1879.

See ACT IX OF 1890.

See COMMON CARRIERS.

(1)—*Misdescription—Loss of goods.*—Misdescription of the nature of goods entrusted to a common carrier disentitles the sender to recover for their loss, although the goods would not be subject to any extra rates had they been properly described. ROHEEMOOLLAH v. PALMER, **Cor. 133.**

(2)—*Common carrier—Delivery at risk of Consignor—No delivery to consignee.*—Where a vendor delivers the goods sold to a common carrier at his risk for being carried to the vendee, there is no delivery of the goods to the vendee, though the carrier has been chosen by the vendee himself. WINTER v. WAY, **1 M. H.C. 200.**

(3)—*Foreign Steamship Company—Passenger—Conditions on back of ticket—Company's negligence—Suit for damages for loss of passenger's luggage—Condition of registration of luggage endorsed on passage ticket—Duty of carrying Company—Foreign carrying Company—Place of Contract—S 151, Contract Act.*—Foreign Steamship Company are not common carriers in the ordinary English sense. [*Not F.*, 28 M. 400.] A passenger by ship is bound by the conditions on the back of his passage-ticket though they are in a language unknown to him and though the Company has not taken his signature as required by those conditions. A foreign Company, in a suit for damages for loss of the luggage of a passenger, would not be relieved from the consequences of their own negligence by printed conditions on the back

Carriers—*continued.*

of the passengers' passage ticket. Where one of the conditions endorsed on a passenger's ticket was that the carrying Company was not answerable for the loss of unregistered luggage, the Company could, in a suit for damages for the loss of the passenger's luggage, succeed only on proving that the passenger was bound by the conditions, that they were ready and willing to register the luggage and that the passenger did not in fact register it. Where a contract to carry a passenger was made by a foreign Company in Calcutta, they were bound by the provisions of s. 151 of the Contract Act. MACKILLICAN v. THE COMPAGNIE DES MESSAGERIES MARITIMES DE FRANCE, **6 C. 227=7 C.L R. 49**. [*R.*, 32 M. 95=18 M.L.J. 497=4 M.L.T. 110.]

(4)—*Railway Company — Liability of carriers by Railway under Railway Act IV of 1879, s. 10.*—After the passing of the Railway Act of 1879, the liability of carriers in India, including carriers by Railway, is held to be not limited to liability for negligence, but is held to be a liability as insurers of the goods delivered to them. CHOGEMUL v. THE COMMISSIONERS FOR THE IMPROVEMENT OF THE PORT OF CALCUTTA, **18 C. 427**. [*R.*, 19 B. 165; *D.*, 17 B. 417.]

(5)—*Law applicable to common carriers—Contract Act, 1872, s. 152—Common carriers—Contract Act not applicable—Reasons—Carriers' Act (III of 1865), liability under—Combined effect of ss. 6, 8 of the Act—Duties and liabilities of common carrier governed by principles of English Common Law recognised in Carriers' Act—Liability under Act IX of 1890 (Railways).*—The Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, the common carriers are not within the Act. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is duly cast upon common carriers by reason of their exercising a public employment for reward. The Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. It only purports to define and amend certain parts of that law. The only section in the Act in which bailment, for the purpose of carriage, is mentioned in s. 158, which, however, deals only with gratuitous bailments. At the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the Common Law of Enland, formed a complete Code. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with necessary modifications. As the Act of 1865 is not "expressly repealed" by the Act of 1872, nothing in the Act of 1872 is to "effect" its provisions. [*F.*, 14 Bur. L.R. 77; *R.*, 11 Bom. L.R. 335, 32 M. 95=4 M.L.T. 110=18 M.L.J. 497.]

Carriers—*continued.*

That the duties and liabilities of a common carrier are governed in India by the principles of English common law on that subject, however introduced, has been recognised by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers' Act of 1830 (11 Geo. IV and 1 Will. IV, Ch. 68). His responsibility does not originate in contract, but is cast upon him by reason of his exercising this public employment for reward. His liability as an insurer is an incident of the contract between him and the owner, not inconsistent with the provisions of the Contract Act; and the law of carriers, partly written and partly unwritten, remained as before the Act. The combined effect of ss. 6 and 8 of the Act of 1865, is that, in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. (10 C. 166, *Appr.*; 3 B. 109, *Diss.*) [*R.*, 32 M. 95=4 M. L.T. 110=18 M.L.J. 497.] The Railway Act, 1890, reduce the responsibility of carriers by Railway to that of a bailee, under s. 152, Act IX of 1872, but this did not affect the law relating to common carriers, as such, laying down their liability, as insurers, on non-delivery. THE IRRAWADDI FLOTILLA COMPANY v. BUGWAN DAS, **18 C. 620=18 I.A. 121 P.C.= 6 Sar. 40**. [*Appr.* 19 B. 165; *R.*, 17 B. 417, 723, 8 C.W.N. 349.]

(6)—*Goods of a dangerous nature—Duty of persons sending—Notice—Act XVIII of 1854, s. 15—Negligence—Act XIII of 1855—Suit for compensation for destruction of life.*—A person, who sends, for conveyance by rail, an article which he knows to be of a dangerous and explosive nature, is bound, both on the general principles of law, and by the special provisions of the Railway Act XVIII of 1854, to give notice of its contents to the Company's servants. He is also bound to take all reasonable precautions to preclude the risk of accident. Failure to do either of these things will render him liable for the consequences, whether they occur in a manner he could have contemplated or not. Mode of assessing damages in a suit for compensation or destruction of life under Act XIII of 1855. LYELL v. GANGA DAI, **1 A. 60, F.B.**

(7)—*Contract between Railway Company and passengers—Obligation for safe carriage—Due care—Accident—Negligence—Burden of proof—Ignorance of law as defence—Damages—Costs of suit.*—An obligation to take due care, *i.e.*, a high degree of care, attaches to carriers, and it casts on them the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. Although they are not insurers against all defects, they are insurers against all defects, which care and skill can guard against. If causes owing to which loss of life and damage had resulted to the passenger were causes which could have been prevented from becoming effective, by care and skill on the

Carriers—*continued.*

part of the Railway Company, then, that care and skill the Company were bound to exercise. The burden of proving that they exercised that care and skill lies upon them. The maxim that every man must be supposed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question, and cannot be legitimately made use of in a case where the parties are entirely different and distinct from him. In suits for damages against carriers for loss of life occasioned by their negligence, distinct evidence of the loss sustained or benefit expected is not necessary. The Court must award a fair amount, having regard to all the circumstances of the case. (16 B. 254, *F.*) In such cases, costs should be allowed on such a scale as not to exhaust the damages awarded. KALIDASS MOOKERJEE v THE EAST INDIA RAILWAY COMPANY, **2 C.W.N. 609.** (7 B.H.C. 119, 120, *F.*)

(8)—*Liability of Railway Company—Loss of valuable articles—S. 11. Act IV of 1879 (Railway Act)—English and Indian Laws similar.*—Where the servents of a Railway Company received a box containing gold and silver coins and the person delivering the same declared their value and nature, he was not bound to tender, but the carrier must demand, the increased charge for insurance. And if no such demand was made, the carrier would be liable for the loss of, or injury to, the goods, although the increased charge was not paid. The words of the English Act, 11 Geo. IV and 1 Wm. IV, c. 68, ss. 1 and 17 and 18, Vic, C. 31, s. 7 and the words in Act IV of 1879, s. 11 (Railways) are practically the same so far as this matter is concerned. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. BUDHU NATH PODDAR, **19 C. 538.** [*R.*, 17 B. 723 ; *Diss.*, 19 B. 165.]

(9)—*Short delivery — Time and place of apprisal, reasonableness of.*—A stipulation, by carriers, that they should be apprised of claims made on them for default on the part of their servants, at their chief place of business and within a time, which will render inquiry likely to be attended with some result, is not unreasonable. THE BRITISH INDIA STEAM NAVIGATION COMPANY v. HAJEE MAHOMED ESACK AND COMPANY, **3 M. 107.** [*R.*, 26 B. 592.]

(10)—*Carrier by sea.*—A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee, but such *prima facie* obligation may be affected by the custom of the port where the goods are to be delivered. Neither by the custom of the port of Bombay, nor by the provisions of the Customs Act, is the master of a ship bound to wait 15 days before commencing to land his cargo, but within a reasonable time after the arrival of his ship—48 hours in the case of a sailing vessel, and somewhat less in case of a steamer—he is at liberty to land goods if the consignee has not then sent boats for them ; and such landing is not unlawful, or a breach

Carriers—*continued.*

of contract as carrier, on the part of the master. The landing of goods under the above circumstances, and setting them apart for the consignee, do not constitute a delivery of them to the consignee ; but such goods, after being so landed, continue in the possession of the master as carrier. The defendant received goods on board his steamer under a bill of lading which exempted him from liability for loss occasioned by the act of God, the Queen's enemies, *fire* and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature or kind, and lawfully landed them on the Custom House Bunder at Bombay, where they were accidentally burned before they were delivered to the consignee. *Held* that he was protected by the above exception in the bill of lading. THE HONGKONG AND SHANGHAI BANKING CORPORATION v. T. BAKER, 6 **B.H.C.O C. 71.** *On appeal*, **7 B. H.C. 186.** [*F.*, 13 B. 571 ; *R.*, 19 B. 639.]

(11)—*Proprietor of dak carriages—No common carrier—Ordinary care—Bailee for hire.*—The term "common carrier" as understood in the English Law does not include a person carrying on the business of dak-carriages. Such a person should exercise only reasonable and ordinary care in respect of baggage entrusted to him ; but he is not responsible for any loss which may not arise from the negligence or default of himself or his servants. He is not bound to insure the safe conveyance of the baggage against all risk save the act of God or the Queen's enemies. He is to be regarded as a bailee for hire, and the fact that he does not deliver the baggage at the end of the journey should be accepted as *prima facie* proof that the loss has been occasioned by negligence for which he is responsible, and, consequently, the *onus* of proof lies on him that reasonable care was exercised by him. TODAL SINGH v. THOMPSON, **2 N.W.P. 237.**

(12)—*Act XIV of 1866—Government Bullock Train—Government, ordinary bailee for hire, not common carrier.*—Goods conveyed by the Government Bullock Train or not entrusted to the post office for conveyance within the meaning of Act XIV of 1866. In respect of the Government Bullock Train, Government must be regarded as an ordinary bailee for hire, and not as a common carrier. As such bailee, apart from any special condition limiting its liability, it is bound to take ordinary care of goods entrusted to it for conveyance, and if goods are stolen through the negligence of its servants, it is liable to make good the loss to the consignor. But it may, as any other bailee for hire, limit its liability by conditions, provided those conditions are not repugnant to public policy or positive law. A condition that it will not be responsible for loss occasioned by the negligence of its servants is certainly not repugnant to positive law, nor a condition repugnant to public policy. THE DEPUTY POST MASTER, BAREILLY v. EARLE, **3 N.W.P. 195.**

Carriers—*continued.*

(13)—*Ship-master undertaking to deliver goods subject to terms of bill of lading—Effect—Action for damages to goods by defendant's negligence—Proof.*—A ship-master, undertaking to deliver goods, subject to the exceptions and conditions mentioned in the bill of lading, takes on himself the consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law. In an action for damages to goods by defendant's negligence as a common carrier, plaintiff need not give evidence of such negligence, unless the defendant shows the cause of injury to be within the exceptions. G. SHETLIFF v. C. SCOTT, **22 W.R. 39.**

(14)—*Time for delivery of goods—Lien for carriage of goods.*—Although a carrier may not be bound to deliver goods on any specific day within any specific time, he is bound to deliver them within reasonable time, and what constitutes reasonable time must be determined upon the consideration of all the circumstances of the case. A carrier is entitled to his freight and charges, and he is entitled to retain the goods in satisfaction of his lien upon them. BULDEO DASS v. NATHOOMUL, **2 Agra 132.**

(15)—*Nature of obligation of common carriers—Origin of the liability—Implied agreements by carrier by water—Burma Laws Act (XIII of 1898), s. 13—Law administered by Calcutta High Court in civil case to be administered by Burma Courts—Contract Act.*—The obligation imposed by Law on Common Carriers has nothing to do with contract in its origin, but it is a duty cast upon common carriers by reason of their exercising a public employment for reward, and a breach of such duty is a breach of the Law and for this breach an action lies, founded on the Common Law, which action wants not the aid of a contract to support it. *Held*, that the Common Law liability of a carrier in the position of the defendant rests on the same foundation as the liability of a common carrier, *Held* that a carrier by water impliedly engages that his vessel shall be water tight. *Held*, also that, under sub-s. (2) of s. 13 of the Burma Laws Act, all questions arising in civil cases in the Courts of Rangoon shall be dealt with and determined according to the Law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction; that the Common Law of England is part of the law administered by such Court in cases which arise in Calcutta; that if such Common Law would be applied in a case of the same description as the present arising in Calcutta, it should be applied by this Court to the present case. MALADI SATHALINGAM v. RAMJAM LALLJU SAJAN, **14 Bur. L.R. 77.** (18 C. 620, *F.*)

(16)—*Perishable goods shipped—Destruction of decayed goods at port by order of Municipal authorities—Obliteration of marks—Portion of goods not identified—Rest delivered—Claim for short delivery—Negligence—Liability of carrying Steamship Company.*—In July 1907, 2,035

Carriers—*continued.*

baskets of onions were shipped from Madras to Moulmein by the B.I.S.N. Co. They travelled to Rangoon by a certain steamship and were there transhipped to two other steamships and conveyed to Moulmein in three different voyages. Three of the consignees of these onions were A, E, and P, and to them were consigned 100, 100 and 150 baskets respectively. A pleaded that he only received 70 baskets, and so he sued the Company for short delivery of 30 baskets. Under similar circumstances, E and P respectively sued the Company for short delivery of 25 and 54 baskets. The Company denied their liability by reason of the clauses of their bills of lading, and they especially relied on the endorsement on the bills; "Onion bags and baskets frail. Carried at shippers' risk. Steamer not responsible for condition or outturn of contents." On the merits of the case, they pleaded that the 2,035 baskets were shipped to 17 consignees in Moulmein and arrived in Rangoon on the 21st July (a Sunday, when no transhipment is done), and that the consignment was re-shipped to Moulmein as per account stated by them. The Company stated that, by order of the Municipality, 176 baskets and 11 bags, containing 50 baskets, were destroyed in Moulmein, owing to the deterioration of their contents and that, after delivery, 32 baskets still remained in the godown, and they urged that, owing to the baskets being frail and their contents having become bad and the consequent obliteration and destruction of all marks, it was impossible to say to whom any portion of the 258 baskets were consigned. The plaintiffs A, E, and P were invited to bear a rateable porportion of the loss. The plaintiffs had also been offered a portion of the 32 baskets in the godown, which they refused to accept, with the result that, on the 30th August, the whole 32 baskets were destroyed as rotten. These baskets bore no marks. The plaintiffs did not urge that the onions had been damaged owing to the negligence of the defendant Company, but contended that the defendant Company had to show what had become of each cargo consigned to them. The Company, however, did account for the whole 2,035 baskets consigned to them. *Held* that, having regard to the perishable nature of the goods, the frail packing, and the terms on which the Company undertook to carry, in the absence of any proof of negligence on the part of the carriers the Company could not be held liable for all the baskets destroyed by order of the Municipality and that the loss should fall on the owners of the goods; and that with respect to the baskets bearing no marks and, hence, undelivered, the several owners of the consignments became tenants in common of the baskets in proportion to the quantities which should have been delivered to them respectively, and the plaintiffs, who refused to take shares though offered, could not hold the defendant Company responsible. THE BRITISH INDIA STEAM NAVIGATION COMPANY, LTD v. A. H. DADABHOY, **4 L.B.R. 334=14 Bur. L.R. 299.**

Carriers—*continued.*

(17)—*Liability of, for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of.*—The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant Company, for delivery to the plaintiff's agent at another port, and, on arrival at that port, were placed by the Company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption. The condition in the bill of lading ran thus:—"In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee." In a suit by the plaintiff for recovery of the value of the rice so damaged. *Held—Per Subrahmania Aiyar, J.*—The Company, in landing the goods without precautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances, have taken of like goods of his own, and the damage was, therefore, the result of the Company's negligence. The condition in the bill of lading puts an end to the Company's liability as carriers, when the goods leave the ship's tackle, but constitutes their subsequent possession, until delivery, as that of bailees. For, if it were otherwise, the bill of lading might be construed so as to exempt the Company even from wilful misconduct on the part of the Company's servants. (22 B. 184, *R.*) *Per Miller, J. (contra).*—The Company are amply protected, against all responsibility, by terms of the bill of lading and are, therefore, not liable for damages. The general exception of negligence will apply to all stages of the transaction covered by the contract, and is not restricted to that stage, during which the goods are actually in the ship (13 B. 571, 10 C. 486, *Compd.*) but if there is a special clause dealing with a particular stage of the transaction, that must be applied, to the exclusion of the general exception (22 B. 184, *Compd.*) and it has been frequently held that an exception against negligence is valid if clearly expressed. (10 C. 489, 13 B. 571, *F.*) K.V.S. SHEIKH MAHOMED RAVUTHAR v. THE B I. S.N. COMPANY. **1 M.L.T. 387=16 M.L.J. 573 =30 M. 79.** [*Reversed*, 18 M.L.J. 497=4 M. L.T. 110.]

(18)—*Liability of, for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of—English, American and Indian Law—Contraction against liability—Public policy—Contract Act, ss. 23 and 151.*—The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant company, for delivery to the plaintiff's agent at another port, and on arrival at that port, were placed by the company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption. The condition in the bill of lading ran thus:—"In all cases and under all circumstances, the liability of the company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee." In a suit by the plaintiff for recovery of the value of the rice so damaged. *Held, per White, C.J., and Sankaran Nair, J.*—The contract was not terminated by the deposit of the goods on the foreshore, and it was for the defendants to show that the plaintiff's goods were ready for delivery at the time they were damaged and not for plaintiffs to show they were not ready; and as there is no evidence to show that the bags were ever ready for delivery by being separated from the rest, the defendants were negligent. *Per Wallis, J.*—The plaintiff's claim is not so much for non-delivery of the bags, as for failure to deliver them in good order and condition, and the plaintiffs failed to prove that the condition of the bags, when put at their disposal, justified them in refusing to take delivery. *Held also, per White, C.J., and Sankaran Nair, J. (Wallis, J., contra).*—A ship-owner is not exemped from liability for negligence, unless the contract which exempts him is both clear and express; and as the contract in this case, though clear, is not express, the defendants are not protected by their bill of lading (*b*). *Per White, C.J., and Wallis, J.*—The law of the United States of America, forbids a carrier to exempt himself by contract from liability for negligence, while the law of England does not. On a question of this character the Courts in India ought to follow the law of England. (10 C. 489, 28 M. 400, *R.*) *Per Sankaran Nair, J.*—The question of liability is not concluded by authority in India. A rule of English Common Law ought not to be followed, when it is opposed to the principles followed and acted upon by the Indian Legislature. A contract exempting a ship-owner from liability for the negligence of himself or his servants in not taking the care required by s. 151, Contract Act, is contrary to public policy and, therefore, void under s. 23 of that Act. Such an exemption clause is clearly against the interests of the mercantile community and not necessary in the interest of the ship-owners. The reasons of the English and American rules on the subject considered. K.V.S. SHEIK MAHAMED RAVUTHAR v. THE BRITISH INDIA STEAM NAVIGATION CO., LTD., **4 M L T. 110. F.B.=32 M. 95=18 M. L.J. 497=1 Ind. Cas. 977.**

(19)—*Carriers Act (III of 1865), ss. 3, 8 and 9—Through-booking of goods by steamer and rail - Liability of Steamer Company for loss during transmission by rail—Railways Act (IX of 1890), s. 75.*—The plaintiff consigned a parcel of silk articles through the Indian General Steam Navigation and Railway Company, Ld., for delivery at Khagra, knowing that the articles would be carried in the first instance by the defendant Company, then by the Eastern Bengal State Railway and then by the East

Carriers—*continued.*

Indian Railway Company. They did not declare the value of the articles which exceeded Rs. 100, nor disclose the contents of the parcel. It was found that the goods were lost, after they had been made over to the Eastern Bengal State Railway. *Held*, that the agreement was in substance with both the Steam Navigation Company and the Railway Companies, and the former could not be held responsible for the loss. GOKUL CHANDRA DAS v. INDIAN GENERAL STEAM NAVIGATION AND RAILWAY CO., LD., **11 C.W.N. 1076.** (11 C.W.N. 1071, *F.*)

(20)—*Contract to carry partly by steamer and partly by rail—Divisibility of contract—Omission of consignor to declare value and description of goods as required under the provisions of Carriers Act and Railways Act—Liability for damages for loss of the goods.*—Where through-booking, first by steamer and then by rail or *vice versa*, is made for public convenience, and when the journey is performed partly in steamers of one company and partly in trains of another, and the charges creditable to each are subsequently adjusted the contract is divisible so far as the two portions of the journey are concerned. Where a consignor failed to declare the value and description of the goods as required under the provisions of the Carriers Act and the Railways Act, and sued the steamer company for damages for loss of the goods so carried partly by steamer and partly by rail, *held* that, so far as the journey was by steamer, the steamer company is entitled to claim, as regards the act of its agents and servants, the protection afforded by the provisions of the Carriers Act, and so far as the journey was by rail, it is similarly entitled to claim the protection afforded by the Railways Act. NARANG RAI AGARWALLA v. RIVER STEAM NAVIGATION & Co. LTD., **34 C. 419=11 C.W.N. 107.**

(21)—*Liability of carriers by sea—Whether they are common carriers—Law applicable to such carriers contracting at Calcutta—Lanaing goods during rain—Negligence—Misfeasance.*—Plaintiff's agents, at Calcutta, shipped to the plaintiff at Madras, as consignee, certain goods in a steamship of the defendant company. On arrival at Madras, the goods were delivered to plaintiff in rain and part of them damaged by wet. This suit was instituted for damages from the defendants for negligence and misfeasance. On behalf of the plaintiff, it was contended that defendants were not common carriers and could not contract themselves out of their liability as bailees and that, even if they were common carriers, they were not protected by the protection clause in the bill of lading as their act was one of misfeasance and not mere negligence. The Chief Judge of the Small Cause Court dismissed the suit holding that the defendants were protected by the above clause, but stated a case for the opinion of the High Court on the question, "whether, under the bill of lading, the defendants were liable to the plaintiff." *Held*, that defendants

Carriers—*continued.*

were common carriers and, as the contract was made at Calcutta, the *lex loci contractus*, viz., the law of England, applied to them, but as the acts of the defendants' servants in landing goods in rain amounted only to negligence, they were sufficiently protected by the provision in the bill of lading. REFERENCE UNDER PRESIDENCY SMALL CAUSE COURTS ACT, s. 69, **28 M. 400.** (6 C. 227, *Not F.*) [*R.*, 32 M. 95=18 M.L.J. 497=4 M.L.T. 110.]

(22)—*Common carriers, liability of—The Carriers Act (III of 1865)—How related to English Carriers Act (II of Geo. IV and I Will. IV, C. 68)—Effect of special contract between carrier and owner of goods—Two-fold risks of carriers—Exemption clauses, construction of—Insurer who has paid owner for loss of goods due to carrier's negligence, position of—Subrogation—Right of suit of owner—Damages recoverable by owner and equity in his hands in favour of insurer—Insurance policy containing stipulation, "warranted no recourse against carriers"—Damages not proved at hearing—Failure if to lead to dismissal of suit.*—The relative rights and liabilities of common carriers and those for whom they carry are outside the Indian Contract Act and are governed by the principle of the English Common Law as modified by the Carriers Act of 1865. A common carrier therefore in India is subject to two distinct classes of liability, the one for the losses for which he is liable as an insurer, the other for losses for which he is liable under his obligation to carry safely. Speaking generally the first of these are insurable risks from which the element of default is absent, the second are risks of conveyance in which that element is present. The Carriers Act of 1865 has in some degree modified this position. The effect of ss. 6, 8 and 9 of the Carriers Act of 1865 is that the liability of a common carrier for the loss of goods, not being of the description contained in the schedule to the Act may be limited by special contract signed by the owner, save where such loss shall have arisen from the negligence of criminal act of the carrier or any of his agents or servants. The Ganges Manufacturing Co., Ltd., had entered into an agreement with a number of Steamer Companies, the defendant carrying Company amongst them, to have all their jute carried from certain ports by one or other of the Steamer Companies for a term of 5 years. Cl. 10 of the agreement provided that the "Jute Company undertakes to hold the Steamer Companies harmless and indemnified from and against all claims which can be insured against and covered by an ordinary F.P.A. Policy, that is to say, against claim for actual or constructive total loss only of the goods insured, and not against claims for partial loss and damage unless the vessel be stranded, sunk or burnt and the Steamer Companies agree that they shall have no right to claim on the cargo for general average" a consignment of 1,000 bales of jute was shipped by one G.R. Chakravarthy on the defendants Company's flat "Lemro" for delivery at the Jute Company's Mill, the

Carriers—*continued.*

Bill of leading being endorsed to the said Jute Company, it being stated on the back thereof, amongst other conditions, that "the Company will not be liable for the loss of or damage to any property delivered to them to be carried, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents." *Held*, on a construction of the agreement, that the exemption of cl. 10 did not extend to loss arising from the negligence or criminal acts of the carrying company. It has been the policy of the English Courts, in dealing with exemption clauses to recognise the distinction between the insurance risks and the carrying risks of a common carrier, and to construe them as not extending to carrying risks in the absence of clear words to that effect. In India where there is a statutory prohibition against exempting a carrier from loss arising from negligence or criminal acts, there is perhaps an even stronger reason for adopting this canon of construction, at any rate, within the limits implied by this prohibition. The above rule is not limited in its application to bills of lading. The flat carrying jute having caught fire so that it had to be scuttled, under s. 9 of the Carriers Act, it was held (in the absence of evidence to the contrary), that the loss was due to the negligence or criminal act of the carrying company of its agents or servants. A policy of insurance in respect of the lost jute issued by plaintiff, Insurance Company, contained a stipulation: "warranted no recourse against carriers." *Held*—that the stipulation in the policy of insurance did not amount to a relinquishment by the Insurance Company in respect of risks not exempted. Claims in respect of losses which had arisen from the negligence of the carrying company, its agents or servants, were therefore not relinquished under the clause. The Insurance Company in the present case claiming against the carrying company by way of subrogation and not of assignment had no right to sue in their own name, and the suit could only be brought in the name of the Jute Company. *Held* that substantially the present suit was by the Jute Company to recover damages from the carrying company, and any matter that could be pleaded against the Jute Company would be an effective answer, though in truth the purpose of the suit was to benefit the Insurance Company. Plaintiffs ought to have proved the amount of damages at the hearing; but it would not in the circumstances be right to visit their default in this regard with the penalty of a dismissal of the suit. BRITISH AND FOREIGN MARINE INSURANCE CO. v. INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD., **15 C.W.N. 226=38 C. 28=9 Ind. Cas. 364.**

(23)—*Negligence— Attempting to board a tramcar in motion— Injury to passenger—Damages—Liability of the Tramway Company.*—The plaintiff, in attempting to board a tramcar of the defendant Company which was in motion, set his foot on foot-board but failed to

Carriers—*continued.*

get a firm grip of hand bar; and before he could raise himself into the car he slipped and fell, and had his toes injured by the wheels of the car. He sued to recover from the Tramway Company damages for the injury, alleging that the foot-board was loose and not properly fixed and the Company was therefore liable for negligence. *Held*, that the plaintiff was not entitled to recover damages, as he himself was negligent in trying to get into a car while in motion. If a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do, and if he does it and sustains injury while in the act of doing so, it would be an accident or a misfortune, for which the Company could in no event be held liable. TEMULJI JAMSETJI JOSHI v. THE BOMBAY ELECTRIC SUPPLY AND TRAMWAY COMPANY, LIMITED, **13 Bom. L.R. 345.**

(24)—*Carriers in inland waters—Mate's receipt, not a bill of lading and not a negotiable instrument—Notice of lien not binding on such carriers.*—Certain paddy was shipped to Rangoon by the plaintiffs in the first defendant's name in the boats of the 2nd defendant Company. The first defendant sold the cargoes to a firm of millers, and obtained delivery of the paddy from the 2nd defendant Company without producing the mate's receipts which its agents had given for the paddy. The plaintiffs sued the 2nd defendant for damages to the amount of the debt due from the first defendant: *Held*, that the 2nd defendant Company was not liable, and the document relied on in the suit was not a mate's receipt. Mate's receipts are not bills of lading, though they are sometimes referred to as such. A bill of lading is a mercantile document in use in connection with carriage of goods in a seagoing vessel. To no document given by an officer of an inland waters carrier, could the term and the law relating to mate's receipts as known to mercantile law be properly applied. Where an instrument is by the custom of trade transferable like cash by delivery and is capable of being sued on by the person holding it *pro-tempore*, it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value. The 2nd defendant Company's receipt in this case could not be held to fulfil these conditions: *Held*, further, that the Rate Circular and its wording did not put the Company under any legal obligation or duty to any one except the persons with whom it contracted, and that consequently the plaintiffs had no right of action against it. *Held*, also that, even if the plaintiffs had given notice of their claim to the paddy, the so-called mate's receipt not being a negotiable instrument, the Company would not have been bound to deliver them. THE IRRAWADDY FLOTILLA CO. v. T. S. NACHIAPPA CHETTY, **9 Ind. Cas. 465.**

(25)—*Carrier, liability of—Consignment of goods—Delivery to consignee—Recovery of value of goods by carrier from consignee for failure to*

Carriers —*continued.*

produce bill of lading—Cause of action against carrier by consignor—Limitation Act (XV of 1887), sch. II, arts. 11, 185—Construction of the articles of Limitation Act.—Defendant Company undertook to deliver goods shipped by plaintiff to consignee. The goods were delivered under an indemnity-bond. About six months after date of consignment, the defendants recovered the value of the goods for latter's failure to produce the bill of lading: *Held*, that an action by consignor to recover the said value from the carrier was governed *not* by art. 31 but by art. 115, Limitation Act. (26 M. 780, 13 M.L.J. 412, 12 M.I.A. 244, 11 W.R. P.C. 5, 2 B L.R. P.C. 10, *R.*) The proper rule for construction of the articles of the Limitation Act is that we must read all the three columns of the second schedule together, and if in any case the first column of a particular article be applicable, but not the third column, which lays down from when time should be reckoned, we must reject that article. KOTHANDARAMA CHETTY v. BRITISH INDIA STEAM NAVIGATION CO., LTD., **8 Ind. Cas. 882=9 M L.T 169.** (26 M. 780, 13 M L.J. 412, *Rel. on.*)

(26)—*Uninsured goods—Declaration of value—Railway Company when liable for loss—S. 10, Act XVIII of 1854.*—Under s. 10, Act XVIII of 1854 the consignor of goods is bound to declare their value unless he is prevented from doing so by the defendants voluntarily or unvoluntarily leading him to believe that such a declaration is unnecessary and that he is protected from loss without making it. In the absence of any such thing the Railway Company is not liable for any loss. S P. AND D. RAILWAY COMPANY v. RUSTOM KHAN, **29 P. R. 1872.**

(27)—*Goods consigned at owner's risk—Liability of Railway Company for loss or damage—S. 10, Act XVIII of 1854.*—Where the owner of goods was requested by the Railway Company to insure the goods but the owner sent them at his own risk the Railway Company is not responsible for any loss or damage, being protected by s. 10 of Act XVIII of 1854 and the special contract. JEYTU NUND v. THE PUNJAB RAILWAY COMPANY, **91 P.R. 1868.**

(28)—*Goods worth above Rs. 100—Declaration necessary—Carriers when liable for loss.*—Under Act III of 1865 goods worth above Rs. 100 should be declared and in the absence of any such declaration the carrier is not liable for their loss. Even in such a case he may be held liable only on the ground of negligence or criminal act on the part of himself or his agents under s. 8 of the Act. Where there is no declaration the negligence or criminal act should in the case of loss or damage to article included in the list, either appear or be necessarily inferred. ASSA NUND v. THE INDIAN CARRYING COMPANY, **13 P.R. 1866.**

(29)—*Common carrier—Contract to carry—No route fixed—Convenient route to be followed—Cartage.*—In a contract to carry a load from one place to another, there was no mention by

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which route the load was to be carried. There were two routes, one shorter and the other longer. The longer route was more convenient to carry the load: *Held*, that the cartage should be calculated on the distance of the longer route, as that was the only convenient route. AGENT OF B.N.W. RAILWAY v. RAM SUNDER, **11 Ind. Cas. 43.**

(30)—*Carrier of goods—Loss of goods delivered—Measure of damages—Head office at one place and breach at another—Jurisdiction of the Small Cause Court at the branch place to certain suits*—The measure of damages in the case of goods delivered to a carrier at one place to be conveyed to another and lost *en route*, held to be the market-value of the goods at the place of delivery. Where the carrier had his head office at Calcutta and a branch at Amritsar and the goods which were lost by the carrier on the way were delivered at Amritsar to be carried to Peshawar. *Held* that the Small Cause Court at Amritsar had jurisdiction. ARRATOON v. BHAGOO, **10 P.R. 1866.**

(31)—*Carrier of passengers—Breach of contract—Liability for damages—Measure of damages.*—A common carrier who agreed to convey the plaintiff a certain distance for a certain sum paid in advance is liable to be sued for in damages for having conveyed him only a part of the distance leaving him to make his own arrangements for the rest of the journey at additional expense. In assessing damages latitude is allowed to the Courts to have regard to injury to health and feelings as well as to the actual outlay incurred. THE REV. W. ROSS v. PUNJAB HORSE DAK COMPANY, **77 P.R. 1867.**

(32)—*Action against carriers—Tort or contract—Loss of goods—Cause of action where arises.*—An action for loss of, or injury to, goods by a carrier, may be an action for a wrong or a breach of contract. Where property entrusted to a common carrier was lost or stolen the cause of action arises where the property was lost. SAHI RAM v. GOLAB SINGH, **56 P. R. 1868.**

Carrier—Carriage of goods for no hire or reward—Not acting as carrier—*See* BOM. ACT VI OF 1886, s. 87, 4 S.L.R. 236.

Liability of—*See* BILL OF LADING, 13 C. W.N. 733, P.C.=6 M.L.T. 11=19 M.L.J. 316 =4 Ind. Cas. 475.

By sea—Bill of lading, construction of—Loss by fire—Liabilities of ship-owners for goods after being landed—*See* BILL OF LADING, 5 C.L.R. 157.

Delay in delivery of goods by carrier—*See* DAMAGES—MEASURE AND ASSESSMENT, 82 Agra 132.

Failure to deliver goods—Suit for compensation—Limitation — *See* LIMITATION ACT, 1908, art. 31, 13 C.W.N. 851=3 Ind. Cas. 469.

Carriers—*concluded.*

Suit against a carrier for compensation for non-delivery of goods, governed by art. 31 of the Limitation Act—*See* LIMITATION ACT, 1908, art. 31, 108 P.R. 1906=2 P.L.R. 1907=30 P.W.R. 1907.

See NEGLIGENCE, 9 W.R. 73.

Goods accepted by consignee— Acceptance whether precludes claim for damages—*See* RAILWAY, 14 C.L.J. 472.

Breach of contract to convey passengers—Damages—*See* RAILWAY COMPANY, 26 C. 465 =3 C.W.N. 781.

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF, 2 Agra 11.

Carriers Act.

See ACT III OF 1865.

"Carry on business" meaning of.

See CIV. PRO. CODE, 1908, ss. 16 to 20.

See JURISDICTION—CAUSE OF JURISDICTION.

Suit against Collector representing Government — Collector residing and carrying on business outside local limits—Cause of action also outside local limits—Jurisdiction of High Court to entertain suit—*See* JURISDICTION—CAUSES OF JURISDICTION, 1 M.H.C. 286.

Defendant a high priest in Odeypore—Arrival at Bombay on tour as high priest—Suit against defendant during stay at Bombay, whether maintainable in Bombay High Court —"Dwelling," "carrying on business," meaning of, in Letters Patent, 1865—*See* JURISDICTION—CAUSES OF JURISDICTION, 14 B. 541.

See SUMMONS, 4 B. 416.

Cash.

See RENT.

Rent in kind and cash—*See* ENHANCEMENT OF RENT — ENHANCEMENT, EXEMPTION FROM, 3 B.L.R. App. 88=12 W.R. 14.

Cashier.

Stamp-duty payable—Security for due fulfilment of duties as cashier—*See* STAMP ACT, 1899, s. 26, sch. II, arts. 57 (*b*), 62 (*c*), 27 M. 71.

Caste.

See ACT XXI OF 1850.

See RIGHT OF SUIT—CASTE QUESTIONS, SUITS RELATING TO.

(1)—*Act XXI of 1850—Loss of caste—Forfeiture of rights or property.*—Since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property. HONAMMA v. TIMANNABHAT, **1 B. 559.** (4 B. H.C. A.C. 25, *F.*) [*R.*, 23 M. 171.]

(2)—*Marriage—Authority of caste to declare marriage void.*—Courts of law will not recognize the authority of a caste to declare a

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marriage void, or to give permission to a woman to re-marry. REG. v. SAMBHU RAGHU, **1 B. 347.**

(3)—*Khatris—Soodras — Rajpoots.*—Inquiry into the history of the Khatri class. Such class held not to have lost caste and sunk into the Soodra class. The Rajpoots of Central India, and in the District where the Rajdom of Ramnugar is situate, *held* to be of the Khatri class, and that the right of succession to the Raj and Zemindary was to be determined by the laws and customs of that class. CHOUTURYA RUN MURDUN SYN v. SAHUB PURHULAD SYN, **4 W.R. 132, P.C.=7 M.I.A. 18=1 Suther. 313= 1 Sar. 591.**

(4)—*Caste—Account books—Rights of members to inspect them fully and freely—Questions going to root should be raised in pleadings—Question of jurisdiction can be raised by defendant at the earliest opportunity—Practice.*—The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. It is preliminary to a right to assert a claim to property, and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. A suit brought by plaintiffs on behalf of themselves and others as members of the Cutchi Memon Jamat, to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste funds and properties, is maintainable in Civil Courts. It is the assertion of a pure legal right, and it in no way affects the "internal autonomy of the caste" or "its social relations." There is no analogy whatever between a Corporation as known to English Law and an Indian caste. The principles governing the rights of members of caste to inspection of accounts of caste properties must be governed by considerations very different from those governing the rights of members of Corporation seeking inspection of the documents of such Corporation. Questions which go to the very root of a suit ought as a rule to be raised in the pleadings. A defendant can be permitted to raise a question of jurisdiction, not specifically pleaded, only if he does so at the earliest possible opportunity; he ought not, in any event, to be allowed to raise it after the plaintiff has closed his case. HAROON HAJI VAHEDINA v. HAJI ADAM HAJI OOSMAN NURANI, **11 Bom. L.R. 1267=4 Ind. Cas. 569.**

(5)—*Excommunication from—Restitution of conjugal rights—Caste—Excommunication from caste — The husband must get re-admission into the caste before he can compel his wife to live with him—Mussalman Kharwas—Status of the parties as members of a community—Mahomedan law.*—In a suit by the husband, who is excommunicated from his caste, for the restitution of conjugal rights against his wife, it is open to the latter to require that he should get himself re-admitted into the caste, to which the parties belonged at the time of marriage, before she is compelled by the Court to go and

Caste—*continued.*

live with him as his wife. This principle applies to the Mussalman Kharwa community of Broach. BAI JINA v. JINA KALIA, **9 Bom. L. R. 451=31 B. 366.**

(6)—*Caste matters—Cognizance by Court—Principles of English law not applicable to castes—Autonomy of caste—When Court will interfere in caste matters—Trustee can only claim inspection of documents relating to trust.*—A person, who is a trustee of a caste fund, has no legal claim to a roving inspection of all caste documents, on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trust. A right to inspection of documents belonging to a caste, existing in any person by virtue of his being a member of the caste, cannot be evolved by a reference to English law. A Court will not grant a decree for the enforcement of a privilege granted by a caste, because such a privilege may be taken away by the caste at any time and the decree may be rendered nugatory. The proper tribunal in such cases is the caste itself and not a Civil Court. "Autonomy of a caste" must at least mean that, where rights to property are not involved, all matters of internal management must be left to the decision of the caste. Courts will not interfere where the rules of the caste make special provision of the question in dispute. Where there is a question in dispute between the caste and a section of the caste, it is outside the jurisdiction of the Court. The Hindu caste is a unique aggregation so wholly unknown to the English law that English decisions concerning English corporations and partnerships tend rather to confusion than to guidance upon matters relating to caste. A Hindu caste may have points of resemblance to English Corporations and partnerships, but its points of difference appear more numerous and radical. Where according to well-established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction, on the plea that the Court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court, but to meet the objection often raised that, in matters within the jurisdiction, the Court can only exercise such powers as are expressly given by the Legislature and no others. To give rise to a cause of action for refusing the inspection of documents, which a person has right to inspect, it must be established that an express demand was addressed to the proper quarter and was distinctly refused, or, atleast, that the other party showed by his conduct that he was determined not to do what was required. JETHABHAI NURSEY v. CHAPSEY COOVERJI, **11 Bom. L.R. 1014=34 B. 467=4 Ind. Cas. 108.**

Custom — *See* CONTRACT — BREACH OF CONTRACT, 6 M.H.C. 40.

Contract by head of—Procuring re-admission to caste—Procuring marriage within caste—

Caste—*continued.*

Contract to pay money in consideration—Validity—*See* CONTRACT ACT, 1872, s. 23, 13 B. 131, Note.

Defamatory communications made to a, privilege attaching to—*See* DEFAMATION, 1 Bom. L.R. 478=24 B. 13.

Exclusion from—Owing to defendant's imputations— Damages— Privilege— *See* DEFAMATION, 140 P.R. 1882.

Re-admission of out-caste person by portion of caste—Publication of defamatory matter by member of other portion—Absence of good faith—Exceeding privilege—*See* DEFAMATION, 2 M.L.J. 127=15 M. 214.

Caste offence—Punishment— Jurisdiction—Effect of words implying that plaintiff is an out-caste—*See* DEFAMATION, 6 M.L.T. 290=33 M. 67=19 M.L.J. 714=3 Ind. Cas. 955.

Easement of necessity — Right of way—One way or more—Caste considerations—*See* EASEMENT, 16 B. 552.

Difference of caste among rajvats — *See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 3 AGRA REV. 3.

Yajman vritti—Whether the officiator can be removed by the caste—Jurisdiction—*See* HINDU LAW—GENERAL, 13 Bom. L.R. 1171.

Powers of the head of a—Jurisdiction of Civil Courts—*See* HINDU LAW—CUSTOM, 17 M. 222=4 M.L.J. 101.

Custom — Reddi — *See* HINDU LAW—CUSTOM, 4 M. 272.

Hindu Law—Putting out of caste—Guardianship—*See* HINDU LAW—GUARDIANSHIP, 1 A. 549.

Meaning of the term—*See* HINDU LAW—MARRIAGE, 7 M.L.T. 17=20 M.L.J. 49=5 Ind. Cas. 42=33 M. 342.

Intermarriage between persons of different sub-divisions of Sudra—*See* HINDU LAW—MARRIAGE, 15 C. 708.

See HINDU LAW—MARRIAGE, 2 N.W.P. 300.

Suit by some members of a caste for declaration of exclusive right to worship at temple. Cognizability of, by Civil Court—*See* JURISDICTION OF CIVIL COURTS, 7 B. 323.

Suits necessitating incidental decision of caste questions, extent of powers of Civil Courts to entertain—Caste property, suit maintainable against member of caste to recover—*See* JURISDICTION OF CIVIL COURTS, 11 B. 531.

See JURISDICTION OF CIVIL COURTS, 15 B. 599, 10 M. 133.

Proof of injury to plaintiff—Loss of—Malice—*See* LIBEL, Marsh 224=1 Hay 539.

Property purchased by faction succeeding from a caste—Possession of property by member of faction—Suit for recovery of possession brought

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on behalf of caste—Cognizability of suit by Civil Court—*See* POSSESSION — SUIT FOR POSSESSION, 12 B. 225.

Suit for declaration to be called the Ayya of Hirameth—Maintainability—*See* BOM. REG. II OF 1827, s. 11, 12 Bom. L.R. 358=6 Ind. Cas 519=34 B. 455.

Hindu Law—Restitution of conjugal rights—Minor wife—Decree, if minor an outcaste only on restoration to caste and position as wife—*See* RESTITUTION OF CONJUGAL RIGHTS, 28 C. 37=5 C.W.N. 195.

Caste Disabilities Removal Act.

See ACT XXI OF 1850.

Caste Question.

See JURISDICTION OF CIVIL COURTS, 5 B. 83, 5 B. 84, F.B., Note, 19 B. 507.

Suit for fees as the office of caste Guru, not cognizable by Civil Courts because of involving—*See* JURISDICTION OF CIVIL COURTS. 6 B. 725.

Jurisdiction—Cause of action in Civil Court—Caste question—*See* JURISDICTION OF CIVIL COURTS, 15 B. 599.

Mochi caste at Surat—Suit by hereditary priests for injunction and damages—*See* JURISDICTION OF CIVIL COURTS, 20 B. 784.

See BOM. REG. II OF 1827, s. 21, 20 B. 190.

See RIGHT OF SUIT—CASTE QUESTION, SUITS CONCERNING, 7 W.R. 7, P.C.=3 M.I. A. 359.

See RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 2 B. 470.

Caste rules, offending against.

—*S. 640, Civ. Pro. Code, 1882—Commission to examine witness—"Pardanashin" lady.*—Even if a pardanashin lady offends against the rules of her class, that does not deprive her of her right to be examined under commission. MOHESH CHUNDER ADDY v. MANICK LALL ADDY, **26 C. 650=3 C.W.N. 781.** (26 C. 651, Note, *F.*)

Catalogue.

Of goods for sale, not a series of offers, but only an invitation for offers—*See* CONTRACT—MISCELLANEOUS, 12 O.C. 17=1 Ind. Cas. 325.

Illustrations in, copyright—*See* COPYRIGHT, 12 C.W.N. 753=35 C. 463.

Category.

Question of—*See* COURT FEES ACT, 1870, s. 12, A.W.N. 1900, 90.

Cattle.

Seizure of—Illegal impounding—Civil suit—Special Procedure—*See* ACT I OF 1871, 2 C.L.R. 344.

See DAMAGES—DAMAGES, SUITS FOR, 16 C. 159.

Cattle Trespass.

S. 13, Act III of 1857—Power of Magistrate.—A Magistrate could not, under s. 13 of Act III of 1857, punish except for an act of forcible opposition to the seizure of cattle damage feasant. MR. JAMES HILLS v. SREE HUREE RAY, **7 W.R. 155.**

Cattle Trespass Act.

See ACT I of 1871.

Cause List.

See PRACTICE AND PROCEDURE, Bourke O.C 238, 2 Hyde 86, 4 B.L.R. App. 75, 27 C. 355.

Cause of action.

See CIV. PRO. CODE, 1908, C. II, r. 2.

See RELINQUISHMENT OF PORTION OF CLAIM.

See RES JUDICATA—CAUSE OF ACTION.

(1)—*Meaning of—Act VIII of 1859, Civ. Pro. Code, s. 2.*—Cause of action, the term, to be construed with reference to the substance rather than to the form of action. KRISHNA BEHARI ROY v. BUNWARI LALL ROY **1 C. 144, P.C.=25 W.R. 1=3 Sar. 555=2 I.A. 283.** [*F.*, 11 C. 301=12 I.A. 23, P.C.; *D.*, 15 M. 111; *R.*, 21 M. 91, 13 M.L.J. 448=27 M. 760.]

(2)—*Meaning of.*—Cause of action is the entire set of facts which give rise to an enforceable claim. It comprises every fact, which a plaintiff must, if traversed, prove in order to obtain judgment. It has no relation whatsoever to the defence, which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. DULICHAND CHAUDHRI v. LALLAH KURMI, **1 N.L.R. 4.** (16 C. 98=15 I.A. 156, P. C., *F.*) [*Obs.*, 3 N.L.R. 94.]

(3)—*Meaning of.*—Cause of action means that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. MUSA YAKUB v. MANILAL AJITRAI, **7 Bom. L.R. 20=29 B. 368.** [*R.*, 30 A. 525, P.C.]

(4)—*What constitute.*—A cause of action is every fact which a plaintiff must prove to support his case. The title on which the plaintiff sues is only one of several ingredients in the cause of action; the term includes the infringement of plaintiff's right, together with the means employed for that purpose. The right, by itself, furnishes no cause of action. It is the rights combined with all the particulars that go to make the infringements which constitute the cause of action. RAM PRASAD v. S. M. SACHI DASSI, **6 C.W.N. 683.** (16 A. 165, 14 C. 681, 7 M.H.C. 290, 11 M. 106, 24 C. 831; *R.*, 29 C. 257, *D.*,) [*R.*, 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907.]

(5)—*What it consists of.*—A cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist, and which if proved, will entitle him to the relief, or to

Cause of action—*continued.*

some part of the relief prayed for, and is to be sought for within the four corners of the plaint. NONOO SINGH MONDA v. ANAND SINGH MONDA, **12 C. 291.** (8 C. 819, *F.*)

(6)—*Meaning of the term "relief"—Cause of action.*—"Relief" means the remedy which a Court of Justice may afford in relation to some actual or apprehended wrong or injury. "Relief" is not synonymous with "cause of action" which includes all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court. (*Stuart, C.J.*) SARSUTI v. KUNJ BEHARI LAL, **5 A. 345, F.B.** [*R.*, 27 B. 379.]

(7)—*Ss. 26 and 17, Civ. Pro. Code, 1882—Cause of action, meaning of—Joinder of plaintiffs—S. 31 (b).*—The expression "cause of action" is only defined indirectly for the purposes of s. 17, Civ. Pro. Code, and so far as that section goes, it is used in a restricted as well as in some respects in an elastic sense. HARMONI DASSI v. HARI CHURN CHOWDHRY, **22 C. 833.**

(8)—*Meaning of—Joint suit by reversioners—Place of suing.*—When immoveable properties are situate in several districts, a suit regarding the whole can be brought in any one of the districts. It is legal on the part of reversioners to bring a joint suit for the possession of the properties on the death of the widow, as the right, title and property of the plaintiffs, though divisible, were undivided. Even supposing that the term "cause of action" means the facts constituting the infringement of a right, and not the right itself, if the wrongful act by which several rights were infringed be the same, a joint suit is not unsustainable. A suit for the possession of a house which could not, owing to the widow's existence, be included in the previous declaratory suit by the reversioner to set aside her alienations, was held not barred under s. 43, of the old Code (O. II, r. 2), Civ. Pro. Code. ASA SINGH v. INDAR SINGH, **91 P.R. 1898.** (14 C. 661, *F.*) [*Cited*, 38 P.R. 1903=87 P.L.R. 1903.]

(9)—*Definition of.*—Cause of action held to mean every fact which it is material to be proved to enable the plaintiff to succeed. Every thing, which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action. DEEP NARAIN SINGH v. DIETERT, **31 C. 274=3 C.W.N. 207.**

(10)—*Definition of.*—The expression "cause of action" means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. It does not include irrelevant or immaterial facts, but embraces material facts without which the plaintiff must fail. MOTILAL v. SURAJMAL, **6 Bom. L.R. 1038=30 B 167.** [*Not F.*, 9 Bom. L.R. 903; *R.*, 31 M. 223, 33 B. 364.]

(11)—*Civ. Pro. Code, Act XIV of 1882, s. 424—Cause of action—Construction.*—The words "*cause of action*" in s. 425 of the Civ. Pro. Code, should not be too strictly construed. BACHCHU SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **25 A. 187.** [*R.*, 8 C.W.N, 913, **34 C. 305= 5 C.L.J. 270.**]

Cause of action—*continued.*

(12)—*Civ. Pro. Code, s. 17, illustrations.*—The illustrations to s. 17 of the Civ. Pro. Code, afford no safe guide as to the meaning of "cause of action" as used in the Code. LALJEE LALL v. HARDEY NARAIN, **9 C. 105.** (13 B.L.R. 461=22 W.R. 79, 1 M. 377, *F.*) [*R.*, 25 A. 48=A.W.N. 1902, 179.]

(13)—"*Right to sue*"—"*Cause of action.*"—"*The right to sue*" is based upon facts which go to make up what is called the "cause of action." SHAM CHAND GIRI v. BHAYARAM PANDAY, **22 C. 92.**

(14)—*Its relation to defence and relief prayed for—Distinct causes of action.*—The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. [*R.*, 18 A. 131=A.W.N. 1895, 2, 18 A. 432, 21 M. 153 =8 M.L.J. 92, 139 P.L.R. 1901, 25 M. 736, 1 N.L.R. 4, 8 O.C. 389, 3 L.B.R. 56, 57 P.R. 1907=66 P.W.R. 1907, F.B., 28 P.R. 1907= 93 P.L.R. 1908.] Where the ground of action in an earlier suit is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right, by selling it or by affecting it with mortgages, and the cause of action to set forth in the subsequent suit is not mere matter of intention, and it does not refer to either sale or mortgage, but consists in an allegation that the widow has in point of fact made a *de præsenti* gift of the whole interest to a third party, that of itself is a good cause of action which did not and could not arise until the deed of gift was executed. The two grounds of action are different. A cause of action which did not exist at the time when the previous action was dismissed cannot be regarded as other than a new cause of action subsequently arising. CHAND KOER v. PARTAB SINGH, **16 C. 98=15 I.A, 156, P.C.=5 Sar. 243.** [*R.*, 2 O.C. 17.]

(15)—*S. 50, Civ. Pro. Code, 1882, allegation of cause of action in manner of.*—The plaintiff when he files his suit must allege the cause of action in the manner prescribed in s. 50 of the Civ. Pro. Code, 1882, and must prove necessary allegations in so far as they are not admitted by the defendant. GANO v. SHRI DEV SIDHESHVAR, **4 Bom. L.R. 58=26 B. 360.**

(16)—*Absence of cause of action—Dismissal of claim—Declaratory decree—Conditions under which such decree will be passed.*—Whenever in the progress of a cause, it appears that no cause of action has accrued to the plaintiff, his claim must be dismissed. A declaratory decree will not be passed in favour of a plaintiff, unless the defendant has done some act which interferes with the enjoyment by the plaintiff of the subject-matter in respect of which the suit is brought. BALAVA *kon* BASANGOUDA v. SHIDGEUDA *valad* KADAPPA, **7 B.H.C.A. C. 99.**

Cause of action—*continued.*

(17)— *Decree — Cutting of 'bund' at fixed time by defendant—Wrongful omission on part of defendant, effect of- Cause of action—Suit for damages.* — A decree provided that the defendants should cut a certain *bund* every year on a certain date, and that, if they failed to do so, the plaintiff should cause the *bund* to be cut in execution of the decree. The defendants failed to cut the *bund* on the fixed dates in 1309 and 1310, and the plaintiff brought a suit for damages for the loss of his crop of those years owing to the wrongful omission on the part of the defendants. *Held*, that the wrongful omission afforded a sufficient cause of action to the plaintiff, and in order to entitle him to recover damages, it was not essential that, in each year, the plaintiff should have essayed to cut the *bund* and should have been prevented from doing so. QUAMZAI HUDA v. KUMUD NATH, **7 Ind. Cas. 248.**

(17-*a*)—*Suit on decree or judgment.*—The final judgment of a competent Court does not constitute a new cause of action. JEEWUN v. JEZ RAM, **108 P.R. 1868.** (14 P.R. 1869, 55 P.R. 1867, *Overruled.*)

(17-*b*)—*Decree of a foreign Court a fresh cause of action.*—A decree of foreign Court was held to be a cause of action in a Court of British India. KHETA MULL v. JOWAHIR MULL, **4 P.R. 1874.**

(17-*c*)—*Suit on a decree, a proceeding in execution.*—A fresh suit on a decree is treated as a proceeding in execution. MOOKHA v. KHOOSHALU RAM, **55 P.R. 1867, 16 P.R. 1874.**

(17-*d*)—*Suit on decree—Decree conditional—Omission to execute decree—Fresh suit on the same subject-matter—Suit not barred.—Held* (by Full Bench) :—that where a plaintiff has sued for possession of land, and has obtained a decree for possession, conditional on payment of money to the defendant, he is not by reason of such decree debarred from maintaining a second suit for possession after the expiration of the period within which he might have obtained possession by execution of the decree. RAM SINGH and SAHIB SINGH v. NODH SINGH, **93 P.R. 1879, F.B.**

(17-*e*)—*Suit for a portion of a former decree —Decree in favour of plaintiff—Delivery of possession of less than the decree included—Suit for possession of remainder maintainable—Remedy by appeal.*—As to a suit for a portion of a former decree, plaintiff obtained a decree against defendant for possession of immoveable property and was put in possession under that decree of less than the decree included : in a suit brought by the plaintiff for possession of the remainder it was held that although under the former decree he ought to have been put in possession of the portion now claimed, a fresh suit for such portion would not lie ; that his remedy was by appeal against the order of the Court which failed to give him full possession. JOWAHIR v. RAMPERSHAD, **24 P.R. 1869.**

Cause of action—*continued.*

(18)—*Stage for objection as to want of—Reg. XLVIII of 1793, s. 14—Counter-part quinquennial registers—Suit for declaration of* julkur—Onus—*Record-keeper's report—Evidence.*—The objection that plaintiffs had no cause of action was not allowed to be taken for the first time after the case had been three times before the first Court, and twice before the High Court in special appeal according to s. 14, Reg. XLVIII of 1793, no counterpart quinquennial registers in the native language are authentic, unless attested by the Zillah Judge in a suit for a declaration of right to a certain *julkur* or fishery, the *onus* was held to lie on the plaintiff. The report of a record-keeper is not admissible in evidence. GOBIND CHUNDER SHAHA v. PUDDO MONEE DOSSEE, **17 W.R. 400.**

(19)—*Different titles—Unity of cause of action.* —The mere claiming of three shares of money due under a bond executed in favour of plaintiff and others jointly, under different titles derived from different persons in different ways, cannot affect the unity of the cause of action. KALEE SUNKAR BHADOOREE v. ESHAN CHUNDER BHADOOREE. **17 W.R. 528.**

(20)—*Same cause of action in different suits—Different claims and remedies—Whether allowable.*—A plaintiff, who has once sued for and obtained a perpetual injunction against the defendant directing him to abstain from excluding the plaintiff from a certain property, cannot again sue for damages for the wrongful exclusion by the defendant from the same property, as he is barred under s. 43 (=O. II, r. 2), Civ. Pro. Code, from suing twice for different reliefs and claims on the same cause of action. CHAJJU SINGH v. NIHAL SINGH, **190 P.R. 1888.**

(21)—*Trial of different causes of action—Civ. Pro. Code, 1859 ss. 8, 9—Scope.*—S. 9 applied only to causes of action mentioned in s. 8, by and against the same parties. KOSSELLA KOER v. BEHAREE PATUCK. **12 W.R. 70.**

(22)—*Splitting of causes of action—Separate suit for claim based on same cause of action.*— The whole claim accruing under a first sale should be included in one suit, and where compensation is omitted from the first suit on the same cause of action, the plaintiff cannot claim it in a separate suit. TARINEE PERSHAD GHOSE v. RAGHUB CHUNDER BANERJEE, **13 W.R. 208.**

(23)—*Splitting up of—Execution — Suit by claimant to set aside a sale — Subsequent suit for possession—Limitation.*—A suit by a mortgagee to set aside a sale of the mortgagor's property in execution of a decree against him, after having intervened unsuccessfully does not bar a further suit by such mortgagee for possession. Where s. 5 of the Limitation Act, 1877, or s. 7 of the General Clauses Act, deems the presentation of an application to be within time, if presented on the re-opening day in cases where the period limited expires on a holiday, the fact that the applications may be

Cause of action—*continued.*

received in some Courts, even during holidays, cannot alter the above rule. GANPAT RAI v. HIRA SINGH, **29 P.R. 1891.**

(24)— *Specific Relief Act, s. 42 — Punjab Land Revenue Act, s. 45—Suit for declaration of title—Entry in Revenue papers.*—Where the defendants, taking advantage of a wrong entry in the Revenue Register, entered without making the plaintiff or the defendant party thereto try to oust the plaintiff from the land, the plaintiff has a cause of action against them under s. 42 of the Specific Relief Act and s. 45 of the Punjab Land Revenue Act. NATHA SINGH v. SADIQ ALI, **20 P.R. 1900.** [*R.*, 140 P.R. 1907.]

(25)—*Suit based on wrong cause of action—Legality of dismissal of suit.*—The mere fact that a plaintiff may have made a mistake as to his cause of action should not prevent him from succeeding in his suit, upon establishing a real cause of action not inconsistent with his allegations in the plaint. DURGA SHANKAR v. RAM PRASAD, **14 C.P.L.R. 151.** (11 C.P.L. R. 65, *Expl.*; 22 B. 513, *R.*)

(26)—*Secretary of State — Suit against — Plaint.*—In a suit for the restoration of property, brought against the Secretary of State, the plaintiff's principal allegations were that the Magistrate attached some property belonging to him as the property of his brother, and that, when the plaintiff objected to the attachment, he refused to release it. No action by the Secretary of State, or by any person for whose actions he could be deemed responsible, was referred to or suggested in the plaint. *Held* that the plaint disclosed no cause of action against the Secretary of State, and that the suit was not maintainable. SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAM AUTAR **4 O.C. 29.**

(27)—*Declaratory decree—Cause of action—Limitation.*—*Held* that a declaratory decree is not a cause of action for arrears of rent which plaintiff might have obtained in a former suit, and which have subsequently become barred by limitation. HURRONATH ROY v. GOOROODOSS BISWAS, **3 W.R. Act X, Rul. 19.** [*D.*, 6 W.R. Act X, Rul. 42.]

(28)—*Suit for declaration of under-proprietary right—Plaintiff's being recorded as an occupancy-tenant—Decree for enhancement of rent.*—Plaintiff sued for a declaration that he was an under-proprietor in the land in suit. Some thirty years before the present suit plaintiff's father had been served with a notice of ejectment. He resisted the notice on the ground that he was an under-proprietor and the notice was cancelled. He continued to hold on the same terms until the last settlement, when he applied to be recorded as an under proprietor; but the Settlement Officer declined to record him as such, holding that he had no power to determine that any one was an under-proprietor but, finding the plaintiff to be more than a tenant-at-will, recorded him as an occupancy-tenant. Later on, in 1900, the Talukhdar

Cause of action—*continued.*

sued the plaintiff, and succeeded in getting a decree, for enhancement of rent. Plaintiff, in consequence, brought the present suit for declaration that he was an under proprietor; the suit was more than six years from the date of the plaintiff's being recorded in the settlement as an occupancy-tenant, but within six years from the date of the judgment enhancing the rent. *Held*, that the suit was not barred by time; the Settlement Officer having had no power to determine titles, the plaintiffs being recorded as an occupancy-tenant gave the latter no cause of action to establish his title. He had a good cause of action only when the decree for enhancement, treating him as an occupancy-tenant, was passed; the present suit being within six years from such judgment, was in time. HAR DAYAL v. UDIT NARAYAN SINGH, **8 O.C. 30.** [*R.*, 10 O.C. 440, 12 O.C. 164.]

(29)—*Right to rent on becoming due or decree for rent.*—The right to rent on its accruing due not the decree for rent, is the cause of action. NOBBO KISHEN BANERJEE v. MODOO SOODUN GANGOOLY, **2 W.R. 277.**

(30)—*Plaint—Hypothecation —Sale— Mortgage.*—The plaintiff alleged that certain property was the hereditary property of himself and his brother N; that it had been settled by an award that if the plaintiff or N, desired to mortgage or sell their respective shares, they should, in the first instance, mortgage or sell to one another, and if one party declined to take in mortgage or purchase, then the other should be at liberty to alienate elsewhere; that N, had, in disregard to the provisions of the award, executed a bond in favour of R, in which he had hypothecated the property and stipulated that the debt should only be recoverable from the property hypothecated; that N, had confessed judgment in a suit brought against him by R, on the bond, and had allowed a decree to be passed against the property; and that, as the bond had the effect of a deed of sale, and had been executed with an intent to defraud him, he sued to obtain possession of the property and a declaration of his title thereto as purchaser. The lower Courts decreed the plaintiff's claim. R., in special appeal pleaded that the plaintiff had no cause of auction the property not having been sold. *Held*, (*Pearson* and *Spankie, JJ.*) that the mere hypothecation of the property did not give the plaintiff a title to it as purchaser, and that the suit, as brought, must be dismissed. RAJAH PIRTHEE SINGH v. DYA KISHUN, **5 N.W.P. 226.**

(31)—*Daily fine levied by Municipality—Detention of* omnibus—*Suit for damages—Fine set aside by High Court—Detention declared illegal —Cause of action, accrual of.*—In a suit for damages on account of a daily fine by the Howrah Municipality, and the detention of an *omnibus*, the fine being set aside by the High Court, and the detention pronounced illegal: *Held* that the plaintiff's cause of action, if any, would accrue upon the seizure of the

Cause of action—*continued.*

omnibus, and not upon the order of the High Court which allowed the conviction to stand as to one rupee; and that the continued detention is not a cause of action from day to day. D. HUGHES v. THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF HOWRAH, **19 W.R. 339.**

(32)—*Suit for proprietary title—Decree under Act X of 1859 in defendant's favour—Cause of action.*—If a defendant obtained a decree under Act X of 1859 on the ground of being proprietor, and plaintiff only a ryot, the latter has a distinct cause of auction to show that he is the real proprietor. BISSUMHUR PANJAH v. MADHOO SOODUN DEY, **15 W.R. 254.**

(33)—*Changing plea—Decree on cause of action not intended.*—A plaintiff cannot change the character of his pleading and obtain a decree on a cause not at first intended. DUHNPUT SINGH ROY BAHADOOR v. VELLAYET ALI, **15 W.R. 211.**

(34)—*Beng. Act X of 1859, s. 28—Cause of action under—Payment of rent subsequent to Decennial Settlement—Plaint received—Jurisdiction of Courts to try suit—Limitation*—An application to dispossess defendant of land held rent-free, on the ground that it belongs to plaintiff's estate and has paid rent subsequent to the Decennial Settlement, raises no cause of action under s. 28; but the plaint being received, the Courts have jurisdiction to try the case. A plea of limitation was held to render of no avail the time during which plaintiff was in forcible possession. REAZOONNISSA BEEBEE v. MOTEE SINGH, **12 W.R. 135.**

(35)—*Possession of judgment-debtor after symbolical delivery to decree-holder—Accrual of cause of action.*—A fresh cause of action arises when a judgment-debtor remains in *khas* possession, in spite of symbolical possession having been delivered to his decree-holder. BAPU RAO PATIL v. GOVIND RAO, **16 C.P.L. R. 107.** (19 A. 499, 21 A. 269, 20 B. 351, 30 C. 710, *R.*)

(36)—*For money — Hundi not properly stamped — Worthless cheque — Stamp Act.*—Where the original cause of action for money is the *hundi*, bill or note itself and does not exist independently of it, there is no cause of action for money lent or otherwise than upon the hundi, bill or note itself. In such a case, the claim cannot be treated as one for money given for a consideration, which has failed, *e.g.*, a worthless cheque. CHELLAPPA CHETTY v. MAUNG PU, **L.B.R. 1893—1900, 122.** (7 C. 256, *F.*; 3 C. 314, *R.*)

(37)—*Right to possession and right to profits of immoveable property are distinct rights.*—A person, who had already sued for and obtained possession of immoveable property, may again sue for damages for use and occupation of the same and is not barred by s. 43, O. 2, r. 2, Civ. Pro. Code, as wrongful ouster and wrongful enjoyment of profits constitute separate causes of

Cause of action—*continued.*

action. An infringement of the right to possess immoveable property does not necessarily involve an infringement of the right to enjoy the profits of the same. RAJA BIKRAMA SINGH v. PRAB DIAL, **129 P.R. 1889, F.B.** (2 M. 210, *Appr.*; 2 M. 151, 138 P.R. 1882, *Diss.*; 9 C. 283, *D.*) [*R.*, 28 P.R. 1907, 32 P.R. 1910, 78 P.R. 1903 = 137 P.L.R. 1902.]

(38)—*Sale in auction—Suit pending—Simultaneous suits for declaration of invalidity of sale and for possession.*—Certain properties were brought to sale in execution of an *ex-parte* decree. Before this decree could be set aside and an order to stay execution could reach the sheriff, the properties were sold under the circumstances, it was held not illegal to bring two simultaneous suits, one for a declaration that the Court-sale was void and the other for possession of the properties in question, though the cause of action may be the same as one suit could not be said to have priority over the other. (1 A. 650, A.W.N. 1888, 147, *F.*; 9 M. 279, *Not F.*) *Held* also, that the *onus* of proving, that the plaintiff was a minor at the date of the *ex-parte* decree, was on the plaintiff, and that the plaintiff failed to do so. A Court-sale, defective not on account of irregularities in publishing or conducting it, but on account of the Court not having any jurisdiction and such other defects as make the sale void *ab initio*, is a nullity. A sale in auction, not complying with the necessary formalities, is *de facto* void. To a suit based on the allegation that the so-called sale is no sale at all, art. 12 of the Limitation Act does not apply. LALA SIVA RAM v. KASHI RAM. **76 P.R. 1890.** (11 B. 119, 130, 12 B. 18, *F.*; 14 C. 18, *Expl.*) [*Diss.*, 40 P.R. 1910.]

(39)—*Suit premature— Dismissal—Further suit—Scope of ss. 42 and 43 (=O 2, rr. 1 and 2) Civ. Pro. Code.*—S. 43, Civ. Pro. Code, is not applicable to a case where a suit is dismissed as premature and as brought without any cause of action. So, when the cause of action arises, a subsequent suit for the claim is maintainable. S. 43, Civ. Pro. Code, explained. AHMAD KHAN v. MEHR KHAN, **35 P.R. 1893.**

(40)—*Order returning plaint for amendment—Appeal—Suit for partition against several persons interested in part of the property.*—An appeal under Civ. Pro. Code, 1882, s. 588 (6) (O. XLIII, r. 1, new Code) lies from an order returning a plaint for amendment, as not being in accordance with the rule laid down in s. 44 (O. II, rr. 4 and 5). A plaintiff can, in a suit for partition, ask for a share of the share to which a third person, whose heir the plaintiff is, would be entitled, if he were alive. The date of the cause of action in a suit for partition is fixed arbitrarily, as the right to partition is a continuing right, enforceable at any time when joint enjoyment is found to be irksome. There is no distinction in partition-suits between claims to a share accrued long ago and to a share to which the plaintiff

Cause of action—*continued.*

becomes recently entitled. They can be joined in one suit. SODHI HUKAM SINGH, R. B. v. BIBI BHAGWAN DEVI, **79 P.R, 1899.**

(41)—*S. 43 (= O. II, r 2), Civ. Pro. Code—Knowledge—Informalities in review.*—Objections as to informalities in presenting an application for review cannot be sustained when once the review had been accepted and a decree passed, disposing of the suit. If it can be shown that a person at the time of bringing the previous suit, was aware of circumstances indicating that he had another claim in respect of the same cause of action, s. 43 of the Civ. Pro. Code would bar a subsequent suit for the whole or a portion of such other claim. NAWAB MUHAMMAD KABIR v. MUSST. BHAG BHARI, **17 P.R. 1897** [*R.*, 28 P.R, 1907.]

(42)—*Co-wives—Suit by one against other—Marriage, evidence for presumption of.*—Where the two wives of a deceased person applied for a succession certificate, which was granted to one of them, the other wife can sue the first for her share of the debts due to their husband and her cause of action arises from the date when the right to collect debts had been conferred and not from the the date of actual realisation of the debts. Marriage may be presumed from the statement of the parties or from their general conduct towards each other, until it is rebutted by stronger evidence. MUSST. SATARA BEGAM v. MUSST. HUSAIN KHANAM, **16 P. R. 1897.**

(43)—*Auction purchaser — Sale set aside—Refund of money.*—The purchaser and the assignee of such auction-purchaser, at an auction-sale, subsequently set aside, has a right to sue the person to whom the money is paid in the ordinary way or in the special manner mentioned in s. 315 of old Code (=O. XXI, r. 93), Civ. Pro. Code, 1908 and such suit is maintainable, though, when it is instituted, the order dispossessing him of the property is, before the Chief Court for revision. But the cause of action arises only when he is deprived of his bargain and ejected from the property. KHAWAJA YUSAF SHAH v. HIS HIGHNESS THE RAJA OF FARIDKOT, **7 P.R. 1897.**

(44)—*Suit on bond for interest only—Subsequent suit for principal, whether barred by s. 43, Civ. Pro. Code* —A plaintiff, who, in a previous suit, sued for interest only on a promissory note is barred, under the old s. 43 (=O. II, r. 2) from bringing another suit for principal and subsequent interest ; he ought to have claimed the principal in the previous suit, as the bond had created only one obligation. MIAM SINGH v. SHAM DAS, **70 P.R. 1889.**

(45)—*Bonds executed in favour of different parties in regard to same transaction—Joinder of causes of action—Civ. Pro. Code, 1882, ss. 28, 45 —Evidence Act, s. 92.*—Where the cause of action for the relief sought in one suit, with regard to two bonds executed to two different parties is a single one, the plaintiff is not prevented from bringing a single suit, merely because some of

Cause of action—*continued.*

the defendants are not interested in the entire subject matter of the suit. S. 92, Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document. SHEIKH MUHAMMAD BAKHSH v. RAM DATT, **5 P.R. 1896.**

(46)—*Signature on creditor's accounts—No new cause of action.*—The signature of a debtor on the account in the creditor's books does not constitute a new cause of action. VITTALSHA NANESHA v. SHEODIN, **2 C P.L.R. 40.**

(47)—*Suit for a share in inheritance—Dower, subsequent claim for—Civ. Pro. Code, s. 13, Explanation II and s. 43.*—*Held*, that the cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance. *Held*, further, that there is no legal obligation to include a claim for dower in a suit for inheritance. KISAR BEGAM v. NIZAM AHMAD, **11 O.C. 69.** (21 C. 157, 20 A. 81, *D.*)

(48)—*Failure to perform contract to plant trees —Recurring cause of action—Accrual of cause of action—Limitation.*—The defendant committed breach in a contract to plant 2,000 betel nut trees within 5 years of the date of the lease. *Held* that the plaintiff's cause of action is not an annually recurring one, but accrues at the expiration of the 5 years, and he is bound to sue within one year from that date. The date of defendant's restoration to possession by the Civil Court after illegal ejectment by plaintiff is not that on which plaintiff's cause of action accrues. KALEE KOMUL MOJOOMDAR v. JUMUT ALI, **11 W.R. 452.**

(49)—*Court Fees Act, 1870, ss. 12 (ii), 16, 17 —Suit for specific performance of contract to sell and for pre emption on sale—Distinct causes of action—Civ. Pro. Code, 1882, ss. 44 (a), 45 and 561.*—A plaint embraced two claims based on two distinct causes of action, *viz.*, a contract to sell to the plaintiff and a right of pre-empion, subsequently accrued, and prayed for either a decree ordering the specific performance of the contract of sale or for pre-emption on payment of the amounts due. The value of the first claim formed the basis on which the plaint was stamped. The claims were decreed by the first Court in the alternative. On appeal the Divisional Judge reversed the decree with regard to the first relief, but maintained the second. The defendant appealed against the latter part of the appellate judgment and the plaintiff put in cross-objections against the former part thereof, *Held* that the plaint, though claiming an alternative and not a cumulative relief, should, under s. 17, Court Fees Act, be stamped on the values of the two claims, as it embraced two claims based on two distinct causes of action ; that under s. 16 Court Fees Act, the respondent ought to pay Court-fees on the value of the claim for specific performance and that the plaintiff would have

Cause of action—*continued.*

to pay additional Court-fees in the first Court under s. 12 (ii) as the question of valuation was there raised and wrongly decided.—*Quære* :—Whether in this suit, the two causes of action the contract to sell and the later pre-emptive right, could be lawfully combined. MUSST. FATIMA BEGAM v. MUHAMMHD ZAKARIA, **96 P.R. 1895.** [*R.*, 57 P.R. 1907, 41 P.R. 1910.]

(50)— *Pro-note, cause of action existing independently of—Maintainability of suit on.*—When a cause of action for money is complete in itself, whether for goods sold or for money lent or for any other claim, and the debtor, then, gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may sue on the original consideration, provided he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person, but when the original cause of action is the bill or note itself and does not exist independently of it, there is no cause of action for money lent otherwise than upon the note itself. VARALAGADDA VEERARAGAVAYYA v. GORANTLA RAMAYYA, **15 M.L J. 484=29 M. 111.** (7 C. 256, *F.*; 10 M. 94, *D.*) [*R.*, 7 A.L. J. 459. 17 M.L.J. 126 ; *D.*, 7 Ind. Cas. 320.)

(51)—*Promissory note—Original consideration—Construction of instrument.*—A person, who takes a promissory note on account of a pre-existing debt, may, if the document becomes inadmissible in evidence, sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost, or parted with the same. But, if the original cause of action is the promissory note itself and does not exist independently of it, he cannot succeeed without the instrument, according to s. 91 of the Evidence Act, as the instrument is the only contract between the parties. A document apparently a promissory note, but containing an unconditional order directing a certain person to pay a certain sum of money to another person comes within the definition of a bill of exchange in s. 5 of the Negotiable Instruments Act, though the document may also contain a promise (conditional on his meeting the bill) to re-pay the plaintiff on a certain date. SHEO DAS v. KANHAYA LAL, **61 P.R. 1888.** [*R.*, 42 P.R. 1895].

(52)—*Promissory note inadmissible in evidence—Other evidence—Ss. 65, 91, Evidence Act, and s. 34, sch. I, art. I, Stamp Act.*—Secondary evidence of a document inadmissible under s. 34 of the Stamp Act cannot, according to ss. 65, 91 of Evidence Act, be given. But, if the plaintiff can allege contract quite different from the one reduced at the form of the said document, he can succeed. BAKHSHI RAM LABHAYA v. KAKA RAM, **42 P.R. 1895.** (7 C. 260, 4 P.R. 1881, 73 P.R. 1886, 61 P.R. 1888, 82 P.R. 1891, *R.*)

(53)—*Sale—Agreement by purchaser to pay price in discharge of incumbrances—Failure to pay for three years—Threat of suit by creditors*

Cause of action—*continued.*

of vendor—Vendor suing for payment of price—Whether gives rise to cause of action—Payment after suit—Award of costs to plaint—Propriety.—The defendants purchased property from the plaintiff, undertaking to pay the price or part of it to his creditors. For three years, they failed to make any payment, and thus left the plaintiff in the position that property other than that sold was still under encumbrance when it ought to have been freed from encumbrance. Plaintiff filed a suit and the defendants thereafter paid the amount claimed. *Held*, that, though the property had not been actually sold up as threatened by his creditors, still the plaintiff had a cause of action against the defendant. *Held*, also, that costs were properly awarded to the plaintiffs on the ground that the defendants failed to do what they ought to have done before. ANSUR SUBBA NAIDU v. BATHULA BEE BEE SAHIBA, **8 M L.T. 188=7 Ind. Cas. 269.** (23 M. 441, 5 M. L.T. 247, 14 M.L.J. 285, *R.*)

(54)—*Accrual of, to a contingent reversionary heir.*—Where a cause of action accrues to a contingent reversionary heir and is barred as against him, it is barred as against all the successive reversionary heirs. JAMNABAI v. DHARSEY, **4 Bom. L.R. 893.** [*D.*, 13 M.L.J. 360.]

(55)—*Failure of—Suit for possession—Proper decree to be made in such a case—Possibility of media concludendi being the same in other actions gives the Court no power to pronounce upon them.*—Where the plaintiffs claimed to have possession of their mother's property on the ground that she was dead and the Court held that it was not proved that the lady was dead, the inevitable inference would seem to be that the suit should be dismissed. The mere circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. MUSSAMMAT WALIHA v. JOGESHWAR NARAYAN, **10 Bom. L.R. 9=7 C.L J 44=12 C.W.N. 227=17 M.L.J. 626= 2 M.L T. 509=25 C. 189, P.C.=14 Bur. L.R. 101=35 I.A. 38.**

(56)—*In account stated—An account stated respecting a debt constitutes a new and distinct cause of action.*—An account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. HANSRAJ v. LALJI, **6 Bom. L R. 454=28 B. 447.**

(57)—*Act VIII of 1859, s. 100—Suit for damages for trespass—Cause of action.*—The words "cause of action" in s. 100, Act VIII of 1859, means right to bring an action. A cause of action for damages for trespass survives, after the death of one joint owner, in favour of the other joint owner or owners. CHANDRAMOHAN DUTT v. BISWAMBER LAHA, **1 B.L. R.O.C. 42.**

Cause of action—*continued.*

(58)—*Erroneous date of cause of action as signed in plaint—Cause of action not barred by limitation--Error as to date immaterial.*—In a plaint claiming the removal of certain trees the plaintiff alleged a certain date as that on which the cause of action accrued. It was found by the Court that the date so alleged was incorrect, but that the trees had not been planted at such a time that the suit would be barred by limitation. Except as to the question of limitation, the date of the planting of the trees was otherwise immaterial. *Held* that the misstatement of the date of the accrual of the cause of action could not justify the dismissal of the suit. RAJ RANI v. ALOPI, **A.W.N. 1900, 25.** (18 A. 403, A.W.N. 1899, 132, *R.*)

(59)—*In rent-suits and in suits for mesne profits.*—The cause of action in a former unsuccessful suit for rent by a joint-tenant against his co-sharers is different from that in a suit for mesne profits. HUREE DYAL GOOHO MOJOOMDAR v. GOBIND CHUNDER PAUL, **17 W.R. 387.**

(60)—*Suit for contribution*—Ex-parte *decree—S. 119, Act VIII of 1859—Application under—Appeal--Compromise—Execution of* ex parte *decree—Duty of correcting error.*—K brought a suit for contribution against M, A and F, and obtained an *ex-parte* decree which M and A applied to set aside under Act VIII of 1859, s. 199. This application having been disallowed, M and A appealed against the order. While the appeal was pending, M, A and F filed deeds of compromise in which they and K gave up their mutual claims ; but in K's deed, instead of writing the names of the three ladies in detail, he used the word "appellants." As F had not appealed, she applied to the Munsiff to have the deed corrected. Her claim was granted, and the decree was upheld in appeal. The defendant in special appeal, *inter alia*, denied that there was any cause of action. *Held* that even if there (as admitted) was an intention to take proceedings in execution of the *ex-parte* decree, there was a cause of action. And it was a matter of duty to have the error in the document corrected as soon as discovered. SYUD MAHOMED ABDOOL KADIR v. SHAIKH FURZUND ALI, **24 W.R. 362.**

(61)—*Suit for recovery of Government promissory note—Made over to defendant for drawing interest—Promise to return in particular time—Duty of Court.*—In a suit to recover a Government promissory note which (plaintiff alleged) had been made over to defendant for the purpose of drawing interest, but had been fraudulently kept back notwithstanding a promise (whereto plaintiff consented) to return it within a given time, *held* that if the plaintiffs' account were true, the Court would have to consider whether from the date of the promise which would afford plaintiff a cause of action, the suit was brought within the prescribed period. PURNANUND ASRAM v. SHAMA CHURN SEN, **24 W.R. 224.**

(62)—*Damages for digging tank by co-sharers—Cause of action for damages—Time of accrual.*

Cause of action—*continued.*

—The cause of action accrues to a joint tenant for damages caused by the digging of a tank by his co-sharers from the time the tank is dug. HUREE DYAL GOOHO MOJOOMDAR v. GOBIND CHUNDER PAUL, **17 W.R. 387.**

(63)—*Civ. Pro. Code, 1859, s. 246—Withdrawal of claim under section—Revival—Claimant in possession proving no hostile act by opponent—Cause of action absent.*—A claim under Act VIII of 1859, s. 246, withdrawn, cannot be revived ; and the claimant, if in possession, and proving no hostile act on the part of the opposite party, has no cause of action. GOOROO DASS ROY v. KAMALA KANT SEN, **20 W.R. 456.**

(64)--*Joinder—Cause of action—Limitation.*—Although, on an account for work and labour, goods sold, and debt, each of the different items would originally have constituted a cause of action, still, as they accumulate, they may be and generally are combined in one cause of action on one homogeneous account. Where there is no law, special custom, or agreement making the remuneration on the general contract for labour to be done payable in advance, the cause of action accrues from the time when the labour was performed. RAJAH PERLADH SEN BAHADOOR v. RUNJEET ROY, **W.R. 1864, 68.**

(65)—*Rent-suit—Not filed in time—Award of damages in former suit for not giving receipts—Cause of action.*—Where rents are not sued for within 3 years from the end of the year for which they are due, the fact that damages were awarded against the plaintiff in a former suit for not giving receipts for that year will not create a cause of action. HURO PERSHAD ROY v. WOOMA TARA DEBEE, **15 W.R. 194.**

(66)—*Evidence—Proof of another cause of action—Dismissal of suit.*—Where evidence given to support one cause of action establishes a different cause of action, the Court should dismiss the suit. MUDHOSOODUN GOSSAMEE v. A. HILLS, **10 W.R. 242.**

(67)—*Error in thakbust map giving rise to no injury—Cause of action.*—A mere error in a thakbust map from which no injury has accrued is no cause of action. RAM BUNDHOO CHATTERJEE v. MUDHOO SOODUN PATEA, **21 W.R. 134.**

(68)—*Verbal contract—Plaintiff joining defendant in mortgaging his share of joint property—Private arrangement—Right contingent on terms of arrangement—Limitation.*—With reference to plaintiff's right to recover, where he has voluntarily joined with defendant in mortgaging his share of joint property to a third party under an arrangement by which defendant undertook to pay him a certain sum at the expiration of the usufructuary lease jointly granted, *held* that such right accrued at the expiration of the lease and that the plaintiff had three years from that date to bring his suit, because the contract was oral. RAM DEHUL MISSER v. TEKUDHUR MISSER, **21 W.R. 247.**

Cause of action—*continued.*

(69)—*Suit to set aside mortgage-bond and decree between other parties in other place for collusion to injure plaintiff—Attachment—Absence of cause of action.*—In a suit for a decree to set aside a mortgage-bond and a decree between other parties in another district, in which plaintiff alleges collusion between those parties with a view to injure him, and that his property had been attached in execution, *held* that plaintiff has no cause of action. MUNGER MEAH v. LUCHMEE NARAIN SINGH, **21 W.R. 266.**

(70)—*Suit for possession of land given for maintenance of female dependants of family—Cause of action when arises.*—In a suit to recover possession of, and a declaration of title to, land given by D before his death in equal shares to his daughter-in-law G and grand-daughter-in-law L, to be enjoyed during life as maintenance: *Held* that if plaintiff's case is made out, his cause of action in respect of G's moiety arose on G's death, and in respect of L's moiety when she had her daughter's name substituted for her own. MUSSAMUT RAM LACHMEE KOOER v. KASHEE PERSHAD SAHEE, **21 W.R. 388.**

(71)—*Loan made to Vakils of a Zemindar for purposes of the Zemindari—Suit against the Zemindar.*—The Vakils of a Zemindar borrowed a large sum of money of certain money-lenders, giving a bond in their individual names to a trustee of the lenders in the English form. It was found that the money was borrowed for the purpose of paying the arrears of Government revenue due by the Zemindar and that the money borrowed was actually paid, and received by the Treasury, in discharge of the arrears. It appeared that the bond had been drawn up in the name of the trustee (an Englishman) for the lenders, in order that proceedings might be taken against the borrowers in the Supreme Court of Calcutta. It appeared, also, that the sanction of the Revenue Department had not been obtained, when the loan was raised, as required by the Regulations of 1781 and 1787, which were then in force. The present suit was instituted by the lenders against the Zemindar and the survivor of the two vakils who had executed the bond (the other having died). *Held*, that, the money having been proved to have been borrowed for the purposes of discharging the Government-revenue due on the Zemindari, the plaintiffs were entitled to maintain the suit against the Zemindar, on the basis of the contract entered into by the latter's vakils. *Held*, also, that the bond having been executed in the name of the trustee of the lenders in the English form for the purpose of enabling them to sue the vakils of the Zemindar in the Supreme Court of Calcutta, it did not prevent the lenders from instituting the suit in the Mofussil Courts, under the law prevailing among the natives in matters of contract. *Held*, also, that, the Regulations of 1781 and 1787 having been repealed when the suit was instituted, and there being nothing in the

Cause of action—*continued.*

Regulations of 1781 and 1787 to prevent a Zemindar from contracting a debt, or a lender to take an obligation from a Zemindar, without the sanction of the Revenue Department, there was nothing, when the suit was instituted, to prevent the Court's passing a decree in favour of the plaintiff. GOPEE MOHUN THAKOOR v. RAJA RADHANAT **5, W.R. 72, P.C.**

(72)—*Summary proceedings— S. 246, Civ., Pro. Code, 1859—Possession—Cause of action.*—Where the success of a party in summary proceedings under s. 246, Code of Civil Procedure, 1859, is grounded on his being in possession as of his own right, that is a sufficient cause of action to the opposite party. SHUMBOO CHUNDER SURNOKAR v. RUSSICK CHUNDER CHUNC, **15 W.R. 346.**

(73)—*Procedure.*—A Hindu whose share in an ancestral estate had been alienated by a co-proprietor, instituted simultaneously three different actions against the co-proprietor, and the persons to whom the alienations had respectively been made, to recover several distinct parcels of land which constituted his share. *Held* that, as the plaintiff had but one single cause of action against the co-proprietor, he ought to have brought but one suit against him, and either included all the alienees in this suit, or brought separate actions against the alienees for the several pieces of land in their possession, and caused the proceeding in these suits to be stayed till the suit against the co-proprietor was determined. The course of procedure last indicated is the more correct course. *Held*, further, that as the separate suits against the co-proprietor were instituted simultaneously the error in splitting up the claim against him did not affect the merits; and accordingly the decree was affirmed. VITHA *et al* HEIRS OF BAPU KAMBLE v. NARAYAN DABHULKAR, **5 B.H.C. A.C. 30.** [*R.*, 12 B.H.C. 148.]

(74)—*Madras Civil Courts Act—Jurisdictional value of suit with two causes of action.*—In a suit for the redemption of a *kanom* and also for recovery of certain arrears of rent, there being two distinct cause of action in the suit, the value of the subject-matter of the suit, for the purposes of jurisdiction must be taken to be the aggregate value of the two heads of relief. KONNA PANIKKAR v. KARUNAKARA, **16 M. 328.** [*R.*, 7 O.C. 154; *D.*, 19 M. 16.]

(75)—*Suit by debtor to compel creditor to accept money due.*—A suit will not lie by a debtor to compel the creditor to accept payment of an instalment due under a bond, which contains a stipulation that it is to be paid in instalments, and on failure to pay any instalment, the whole sum then due, should become payable at once. A suit, is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. KRISTAYA v. KASIPATI, **9 M. 55.**

Cause of action—*continued.*

(76)—*Fictitious* kutkina *lease—Intervenor—Declaratory decree—Perpetual injunction.*—If a *kutkina*-lease relied on by an intervenor is found to be fictitious, the plaintiff is entitled to a declaration to that effect, and to a perpetual injunction to restrain the defendant from setting it up. ROGHOOBUR CHOWDHRY v. BHEKDHAREE SINGH, **11 W.R. 455.**

(77)—*Instalment of* kistbundi—*Cause of action.*—Each instalment of a *kistbundee*, as it becomes due, constitutes a fresh cause of action. EMATOOLLAH CHOWDHRY v. HURRO CHUNDER DA, **2 W.R. 39.**

Claim for damages for improper search by a judicial officer as such—No cause of action against the Secretary of State for India—Addition or substitution of defendant—Civ. Pro. Code, s. 32—*See* ACT XVIII OF 1850, 59 P.W.R. 1908.

See ACT XIII OF 1855, 85 P.R. 1894.

Arising where performance is to be completed—*See* ACT IX OF 1899, s. 2, 4 S L.R. 20=7 Ind. Cas. 593.

Suit to enforce acceptance of patta—Limitation—*See* MAD. ACT VIII OF 1865, s. 9, 23 M. 474=10 M.L J. 258.

See MAD. ACT VIII OF 1865, s. 10, 22 M. 250, Note.

The cause of action must be stated in the notice under s. 424 of the Civ. Pro. Code, 1882—*See* ACT OF STATE, 6 Bom. L.R. 131.

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Second appeal—Objection raised at hearing—Civ. Pro. Code, 1877, s 542—*See* APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 2 A. 884.

Plaint not disclosing—Objection in special appeal — Duty of Court—*See* APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 5 B.L.R. 154=14 W.R. 420.

Second appeal—Plea of non-disclosure of—by plaint—Maintainability of plea—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 21 A. 341, F.B.=A.W.N. 1899, 151.

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Non-disclosure of cause of action in plaint—Decree upon merits—Ground for reversal of decree—*See* APPELLATE COURT — MISCELLANEOUS, 7 C. 343.

See BUDDHIST LAW—DIVORCE, 1 L.B.R. 7 U.B.R. 1897—1901, Vol. II, 28.

See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 16 C. 545.

See CIV. PRO. CODE, 1908, ss. 16, 18, 21, 17, O.II, r. 2, U.B.R. 1897—1901, Vol. II, 222.

Separate invasions of plaintiff's rights—Distinct causes of action—*See* CIV. PRO. CODE, 1908, s. 17, 12 P.W.R. 1910=5 Ind. Cas. 835 =59 P.L.R. 1910.

Cause of action—*continued.*

Arising of—Place where it is deemed to arise—*See* CIV. PRO. CODE, 1908, s. 20, 2 Bom. L.R. 605, 3 Bom. L.R. 82=25 B. 528, 5 Bom. L.R. 494.

See CIV. PRO. CODE, 1908, s. 20. O. VII, r. 10, s. 115, L.B.R. 1872—1892, 487.

Public officer—Suit against notice stated in notice—*See* CIV. PRO. CODE, 1908, s. 80, 13 C.L.R. 195.

See CIV. PRO. CODE, 1908, O. I, rr. 3, 4 (*b*). O. II, rr. 6, 7, O. VI, r. 17. O. VII, r. 11, s. 99, 27 M. 80.

See CIV. PRO. CODE, 1908, O. I, r. 9, O. II, rr. 3. 6, 18 A. 131=A.W.N. 1896, 2.

Joinder of—*See* CIV. PRO. CODE, 1908, O. II, rr. 3, 6, L.B.R. 1872—1892, 355.

See CIV. PRO. CODE, 1908, O. XXI, r. 16, 78 P.R. 1896.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. II, r. 2 L.B.R. 1893—1900, 409.

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Continuing, power of High Court to award damages in respect of, accruing after the date of decree—*See* CONTRACT ACT, 1872, s. 27, 7 Bom. L.R. 107=29 B. 107.

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In action of libel, is not the writing but the publication—*See* DEFAMATION, 6 Bom. L.R. 684.

Words imputing unchastity to wife afford, to husband without proof of special damage—*See* DEFAMATION, 4 C.L.J. 388=34 C. 48.

Imputation of sorcery against wife affords no—to husband for defamation—*See* DEFAMATION, 4 C.L.J. 390.

Ejectment—Suit against several defendants—*See* EJECTMENT, SUIT FOR, 24 C. 831.

See FOREIGN COURT, JUDGMENT OF, 7 M. 105.

Cause of action—*continued.*

Ghatwali tenure—Service dispensed with by Government—Suit by son of former holder of tenure seeking settlement of lands appurtenant thereto—*See* GHATWALI TENURE, 9 C.W.N. 663.

One cause of action cannot come into existence by instalments on different dates—*See* GUARDIAN—GENERAL, 86 P.W.R. 1910=7 Ind. Cas. 505=213 P.L.R. 1910.

Subsisring money-decree obtained against father alone—Suit against sons as under decree—Cause of action—Limitation—*See* HINDU LAW—ALIENATION, 23 M. 292, F.B.

See HINDU LAW—JOINT FAMILY, 6 B.L.R., App. 101=14 W.R. 480.

See JOINDER OF PARTIES, 23 C. 833.

Appropriation of debt due to minor by third party—Whether there is any, as against such third party—*See* JOINT TORT-FEASORS, 147 P L.R, 1906.

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Causes of action, meaning of—Jurisdiction, effect of acquiescence of parties—*See* JURISDICTION—QUESTION OF JURISDICTION, 11 B. 160, Note=P.J. 1875, 218.

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Objection as to want of, when may be taken—*See* LEASE—GENERAL, 5 Ind. Cas. 336.

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Meaning of—*See* LETTERS PATENT, 1865, BOMBAY, cl. (12), 20 B. 767.

Recurring—Suit by mortgagee for possession of mortgaged property—Default in payment of instalment—*See* LIMITATION — GENERAL, 8 O.C. 286.

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Accruing to an infant Hindu widow—Adoption by her during minority—Suit by adopted son—Limitation—*See* LIMITATION ACT, 1908, ss. 6. 8. 9. arts. 142, 144, 9 C.W.N. 795=2 C.L.J. 87.

Accrual of cause of action during minority—*See* LIMITATION ACT, 1908, s. 7, 10 B. 241.

See LIMITATION ACT, 1908, s. 14, 32 C. 118. 4 O C. 293.

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Suit to set aside adoption—Ignorance of adoption or its validity—*See* LIMITATION ACT, 1908, arts. 118, 119, Marsh 221=1 Hay 497.

Suit for declaration of heirship—Accrual of cause of action only from date of denial—*See* LIMITATION ACT, 1908, art. 120, 15 B. 422.

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Entry of defendant's name in 1895 in revenue papers—Application for correction of such papers—Denial of plaintiff's title and assertion of his own by defendant—Refusal to have the entry corrected—When cause of action for declaratory suit arose—*See* LIMITATION ACT, 1908, art. 120, 5 A.L.J. 637=A.W.N. 1908, 252=4 M.L.T. 444=31 A. 9=1 Ind. Cas. 557.

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Where a promissory note is the sole—Whether liability independent of note could form basis of suit—*See* NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE, 9 O.C. 315.

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Suit to establish a right to share in property against co-sharers in possession thereof—Necessary parties—Misjoinder—Civ. Pro. Code, 1882, s. 28—*See* PARTIES TO SUIT-GENERAL, 6 O.C. 379.

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Suit for removal of trees—Contingent damage—Present cause of action—*See* RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY, 5 A. 369=A.W.N. 1883, 58.

See RIGHT OF SUIT—POSSESSION, SUIT FOR, 6 N.-W.P. 137.

Riparian rights—Prescriptive right—Erection of bunds—Cause of action—*See* RIPARIAN PROPRIETORS, 4 B.L.R. App. 30=13 W.R. 48.

Suit by a dismissed servant of Government against the Secretary of State—*See* SECRETARY OF STATE, 33 C. 669.

Slander of title—Counterfeiting trade-mark—Allegation to Collector of customs—Detention of goods by Collector in consequence—Damages—*See* SLANDER, 10 C.W.N. 107=4 C.L.J. 268.

Objection as to non-existence of, when to be taken—Cause of action when superseded—*See* SPECIAL OR SECOND APPEAL—GENERAL, 2 P.L.R. 1911=9 Ind. Cas. 385=28 P.W.R. 1911.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 25 M. 540.

See SPECIFIC RELIEF ACT, 1877, s. 42, A. W.N. 1885, 215.

Suit on an oral agreement embodied in an unstamped pro-note—Admission by defendant—*See* STAMP ACT, 1899, s. 35, 66 P.R. 1906=73 P.L.R. 1907.

Cause-papers.

Attorney's lien on—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 29 C. 63=6 C.W.N. 215.

Caveat.

See PROBATE.

See WILL.

(1)—*Propounding will — Party entitled to enter.*—It is a general rule of law that before a person can be permitted to contest a will the party propounding it has a right to call on him to show that he has some interest and that his interest will be prejudiced by the will. GOPAL DAS v. MT. BANDAN, **15 C.P.L.R. 101.**

Caveat—*concluded.*

(2)—*Special citation.*—The mere receipt of a special citation would not entitle one to enter a caveat. *In the goods of* HURRY DOSS BONNERJEE AND SREEMUTTY GUNGAMONY DABEE, **4 C 87.**

WILL—Probate, application for—Reference to arbitration—Award, effect of—*See* ARBITRATION—REFERENCE TO ARBITRATION, 20 B. 238,

Probate, grant of—by mortgage and attaching creditor of next-of-kin—*See* PROBATE—REVOCATION OF GRANT, 6 C. 460.

Withdrawal of—, after suit partly contested—Order for grant of probate made on—Effect on party cognisant of proceedings—*See* PROBATE—REVOCATION OF GRANT, 27 C. 927=4 C. W.N. 757.

By reversioners—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 69, 71, 1 C. L.J. 258.

See PROBATE AND ADMINISTRATION ACT, 1881, s. 71, 1 L.B.R. 212.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 6 N.-W.P. 168

Caveat Emptor.

(1)—*Ss. 20 and 65, Contract Act—Lease of Government village—Lessee to become proprietor on certain conditions—Lessees' transfer of rights—No Government sanction—Validity.*—The lessee of a Government village transferred his rights to a third person, the plaintiff, against the conditions of the lease, and the Government dispossessed him of the land and his rights. The sale-deed contained no covenant for title. *Held* that the plaintiff's suit for possession must fail no material mistake of fact rendering the contract void under s. 20, Contract Act, or a breach of it for which compensation could be claimed under s. 65, Contract Act, being proved and that the doctrine of *caveat emptor* will apply to such a case. KASHMIRA SINGH v. HANWANTA, **62 P.R. 1893.** [*F.*, 40 P.R. 1892.]

Principal of—Applicable to sales in execution—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 91, 93 A.W.N 1905, 99=2 A.L.J. 244=27 A. 537.

Doctrine of—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 91, 93, 13 C.W.N. 1080=2 Ind. Cas. 559=10 C.L.J. 556=37 C. 67

Doctrine of—*See* RAIYATI HOLDING, 6 Ind. Cas. 761.

Application of maxim of—*See* SALE—GENERAL, U.B.R. 1907, Evidence, 1.

Caveat emptor, doctrine of—Inapplicability of Court sales—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 21 M.L.J. 969.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 4 B.H.C. A.C. 114.

Applicability of doctrine of—to sales in India—*See* TRANSFER OF PROPERTY ACT, 1882, s. 55, 8 O.C. 345.

Caveator.

(1)—*Interest of a caveator.*—A person laying no claim to any of the property of the testator, but disputing the right of the testator to deal with certain property as his own, cannot be properly regarded as having such an interest in the estate of the deceased testator, as entitles him to come in and oppose the grant of probate ABHIRAM DASS v. GOPAL DASS, **17 C. 48.** (8 C. 570, *Diss*; 4 C. 1=2 C.L.R. 422, 8 C.L.R. 287, *F.*) [*F.*, 4 O C. 84, 4 C.W.N. 602, 26 B. 792; *R.*, 52 P.R. 1902.]

District Judge admitting person as—Order of Appeal—Civ. Pro. Code, s. 588, cl. 2—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 69, 86, 17 C. 48.

Cemetery.

Muhammadan Law—Religious endowment—Place used as cemetery—Form of suit—Permission of Court under s. 30, Civ. Pro. Code, 1882—*See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, A.W.N. 1885, 219.

Census Register.

Is not a public document under s. 74 of the Evidence Act—*See* EVIDENCE ACT, 1872, s. 74, 6 Bom. L.R, 535.

Central Provinces.

See ACT XX OF 1863, ss. 14, 23, 3 C.P.L.R. 11.

Central Provinces Additional Rates Act.

See C. P. ACT X OF 1878.

Central Provinces Civil Courts Act.

See C. P. ACT XVI OF 1885.

Central Provinces Court of Wards Act.

See C. P. ACT XXIV OF 1899.

Central Provinces Courts Act.

See C. P. ACT XIV OF 1865.

See C. P. ACT II OF 1904.

Central Provinces Government Wards Act.

See C. P. ACT XVII OF 1885.

Central Provinces Land Revenue Act.

See C. P. ACT XVIII OF 1881.

See C. P. ACT XVI OF 1889.

See C. P. ACT XII OF 1898.

Central Provinces Laws Act.

See C. P. ACT XX OF 1875.

Central Provinces Municipal Act.

See C. P. ACT XVIII OF 1889.

See C. P. ACT XVI OF 1903.

Central Provinces Tenancy Act.

See C. P. ACT IX OF 1883.

See C. P. ACT XVII OF 1889.

See C. P. ACT XI OF 1898.

Certificate.

(1)—*Commissioner for taking accounts—Power to grant certificate—Nature of.*—The general nature of a certificate, or report, whether general or separate, is that it should, in the case of a general certificate, comprise the *result* of all the proceedings under the decree or order of reference, or, in the case of a separate certificate or report, that it should comprise the result of some or one of such proceedings. The Court is not bound either to uphold or reverse the Commissioner's decision or to consider it in anyway till he has arrived at and certified something that can be called a result, either of the whole inquiry before him or of some part or branch of it. RUSTOMJI BURJORJI v. KESSOWJI NAIK, **3 B. 161.**

This circular circulates Home Department notification warning officers to be careful when granting certificates to their subordinates. **Civ. Cir. Memo No. 17, 20 W.R. Rules & Ords. of the H.C. p. 23.**

Report or—by medical expert as to the mental capacity of an alleged lunatic admissibility in evidence of, in a contentious proceeding—Indian Evidence Act, s. 32—*See* ACT XXXV OF 1858, 7 O.C. 354.

Under s. 10 of the Hereditary Offices Act, 1874—*See* BOM. ACT III OF 1874, s. 10, 1 Bom. L.R. 825.

Pleader's fees—by pleader not according to rules—*See* COSTS—TAXATION OF COSTS, 15 A. 169=A.W.N.1893, 78.

Meaning of the term "receipt" in s. 2, sub-s. 23 of the Stamp Act—to the effect that a premimum on an insurance policy has been paid, issued for the purpose of supporting a claim to exemption from income-tax not a receipt—*See* STAMP ACT, 1899, s 2 (23), 2 L. B.R. 307.

Certificate by the Tribunal of appeal.

That a case is fit to be appealed to the High Court—*See* BOM. ACT IV OF 1898, s. 48 (11), 7 Bom. L.R. 569=29 B. 514.

Certificates, Administration Act.

See ACT X OF 1851.

Certificate of Administration.

1.—GENERAL.

2.—CANCELLING CERTIFICATE.

3.—EFFECT OF CERTIFICATE.

4.—ISSUE OF CERTIFICATE.

5.—NATURE AND FORM OF CERTIFICATE

6.—PROCEDURE.

7.—MISCELLANEOUS.

See ACT XIX OF 1841.

See SUCCESSION CERTIFICATE ACT.

***Certificate of Administration*—continued.**

——1.—General.

(1)—*Application under Act XXVII of 1860—Debts alleged to be due to estate of deceased's estate—Petition to be heard.*—Where an application is made under Act XXVII of 1860, on the allegation that there are debts due to deceased's estate, and the allegation is not denied, the Court must hear the petition. FUZL MOULA v. GOLAM SHURRUFF, **12 W. R. 505.**

(2)—*Certificate under Act XXVII of 1860—Appeal to reduce amount of security.*—Under s. 6 of Act XXVII of 1860 no appeal lay merely for the purpose of varying the Judge's order by reducing the amount of security required from the party declared to be entitled to a certificate. When an appeal has been properly instituted under s. 6, the Court may alter or vary the Judge's order as to security. MUSSAMAT SOONEA v. RAM SUHA, **2 N.W.P. 146.** [*F.*, 1 A. 287, 3 A. 304.]

(3)—*Certificate for collection of debts given on the basis of the grantee being adopted son of creditor - Suit for declaration of non-existence or invalidity of adoption—Burden of proof.*—One Sardar Singh, a minor under the guardianship of his father, Dip Chand, obtained a certificate authorizing him to collect debts due to Gir Prasad, deceased, on the basis of his being the adopted son of Gir Prasad Singh, the alleged adoption having been made by Ram Kunwar, one of the widows of Gir Prasad Singh. The two other widows of Gir Prasad Singh who, though given more than one opportunity of doing so, never appeared in the proceedings before the District Judge, sued for a declaration that the alleged adoption of Sardar Singh to Gir Prasad Singh never, in fact, took place, or, if it did take place, was invalid owing to want of authority on the part of Ram Kunwar to adopt. *Held* that the burden of proof was on the plaintiffs, who disputed the fact and the validity of the adoption, to give *prima facie* evidence to support their statement. SARDAR SINGH v. RAM KUNWAR, **A.W.N. 1902, 62.** (9 W.R. 436, *R.*; 11 W.R. 468, 12 W. R. P.C., 1, *D.*) [*F.*, 5 A.L.J. 200, 30 A. 197 =A.W.N. 1908, 79.]

To minor's estate—*See* ACT XL OF 1858, A. W.N. 1881, 16.

See ACT XL OF 1858, ss. 6, 9, 12, A.W.N. 1889, 170.

Guardian of person and property of minor—*See* ACT IX OF 1875, s. 3, 13, B. 285.

Minor and guardian—Decree binds minors even when guardian obtains no—*See* BOM. ACT XX OF 1864, s. 2, 20 B. 534.

See GUARDIAN—APPOINTMENT OF GUARDIANS, 5 B. 310.

Hindu Law—Guardianship of widow—Grant of—Under Act XL of 1858—*See* HINDU LAW—GUARDIANSHIP, 6 C. 584.

***Certificate of Administration*—continued.**

——1.—General—*concluded.*

Undivided minor member of joint Hindu family—Suit by manager of family as next friend of minor—Of minor's share whether should be obtained under Act XX of 1864—*See* HINDU LAW—JOINT FAMILY. 8 B. 395.

See JOINDER OF PARTIES, 99 P.R. 1898.

See MINOR—SUITS BY AND AGAINST MINORS, 9 B.H.C. 289.

See SUCCESSION CERTIFICATE ACT, 1860, 11 B. 179.

——2—Cancelling Cetificate.

(1)—*Certificate under Act XXVII of 1860—Cancellation—Procedure.*—Where a certificate under Act XXVII of 1860 was granted to a person and it is subsequently sought to be cancelled, *held* that it cannot be decided in the summary department, where a question of right was involved, in which cases it must be adjudicated in a regular suit. Under s. 6 of the Act, the application for the cancellation must be made to the High Court. MOHUNT SUSMAN GOSSAIN v. RAMCHURN BHUKUT, **5 W.R. Mis. 48.**

(2)—*Ss. 7, 19, 21, Act XL of 1858—Grant of certificate under s. 7, Act XL of 1858—Recall.*—The grant of a certificate under s. 7 of Act XL of 1858 can be recalled summarily under s. 21 without any account having been previously taken in a regular suit under s, 19, where the application for recall is based on charges of waste and mismanagement. NANEE BIBEE v. KHOJAH SURWAR HOSSEIN, **7 W.R. 522.**

(3)—*Certificate under Act XXVII of 1860—Recalling of certificate—Nearer heir—Object of Act XXVII of 1860.*—A certificate, under Act XXVII of 1860, may not be recalled, because there is an heir in a nearer degree to the deceased than the certificate-holder, the object of that Act not being to assist parties in establishing a disputed right or title. KUBEER CHUNDER BUNDO v. RAM KANYE DOSS BISWAS, **17 W.R. 174.**

(4)—*Allegation of fraud in obtaining certificate—Act XXVII of 1860—Proof of allegation.*—Where a party claiming to be the rightful heir alleges that fraud has been committed in obtaining a certificate under Act XXVII of 1860, the Judge should require the opposite party to substantiate their allegation that the claimant is disqualified from inheriting. KHETTUR MONEE DEBEE v. MADHUB CHUNDER ROY, **13 W.R. 160.**

(5)—*Act XXVII of 1860 s. 6—Certificate wrongly granted—Suspension where no list of debts filed.*—The High Court under s. 6, Act XXVII of 1860 suspended a certificate which had been wrongly granted in a case where no list of debts due to the estate of the deceased had been filed. MIR FYAZ ALI v. TALEB ALI, **18 W.R. 380.** [*Expl*, 20 W.R. 412: *R.*, 24 W.R. 211.]

***Certificate of Administration*—continued.**

——2.—Cancelling Certificate—*continued.*

(6)—*List of debts not necessary.*—It is not necessary that a list of debts should be filed before a certificate can be granted. RADHIKA CHURN SEN v. JUDOO NATH GOSSAMEE, **20 W.R. 412.** [*R.*, 24 W.R. 211.]

(7)—*Widow's rights to certificate not objected to on notice issued—Regular suit.*—Where notice has been issued, and the petitioner does not appear and object to the widow of a deceased party receiving a certificate of administration, the Judge is right to refer him to a regular suit. MANICK CHUNDER v. RAJ LUCKHEE DOSSEE, **19 W.R. 252.**

(8)—*Administration—Certificate, application for, by two widows of intestate—Practice.*—Where the widows of an intestate applied for administration to the estate of the deceased, *held* that the District Judge before whom the application was made was right in following the usual practice (which was declared to be a reasonable practice) of his Court in refusing to grant such administration to the widows jointly. NITTYO KALI DABEA v. KEDAR NAUTH CHATTERJEA, **5 C.L.R. 368.**

(9)—*Husband authorising widow to adopt by will—Certificate to widow—Grant of certificate to adopted son—Procedure.*—Where a widow, acting under the authority given her under the will of her husband, adopts a son and discards him on account of his misbehaviour, *held* that the adopted son, who, after he attained majority, applied to the Court for withdrawing the certificate granted to the widow in pursuance of the will and for granting a certificate to himself, cannot contest the validity of the will in a summary proceeding, and that the question between the parties could only be decided by a regular suit. ISSUR CHUNDER BABOO v. POORUNA BEEBEE, **4 W.R. Mis. 16.**

(10)—*Act XL of 1858—Transfer of family jewels by, and revocation of certificate to, Hindu widow.*—Family jewels appearing to have been part of the ancestral property were held not transferable by a Hindu widow, except for special purposes; and acts of waste would render it necessary to withdraw the certificate granted to her under Act XL of 1858. BHAGWANEE KOONWAR v. PARBUTTY KOONWUR, **2 W.R. Mis. 13.**

(11)—*Cancellation of certificate for want of jurisdiction—Proof of allegation—Procedure—Act XXVII of 1860.*—In the case of an application to have a certificate under Act XXVII of 1860 cancelled on the ground that the Judge had no jurisdiction, the Judge should require applicant to prove his allegation, and the opposite party should show cause why the certificate should not be recalled. JUGGESSUR DHUR v. BHUGOBUTTY DASSEE, **13 W.R. 464.**

(12)—*Refusal to recall a certificate to collect debts—Appeal.*—No appeal lies from an order refusing an application to recall a certificate

***Certificate of Administration*—continued.**

——2.—Cancelling Certificate—*concluded.*

under Act XXVII of 1860. *In the matter of* MANUK PERSHAD NANUK PERSHAD v. LALLA NITYA LALL, **6 C. 40=6 C.L.R. 388.** [*F.*, 7 M. 555.]

——3.—Effect of Certificate.

(1)—*Application under Act XXVII of 1860—Title to collect debts only to be considered—Question of existence of debts—Representative title.*—In an application under Act XXVII of 1860, the Judge has to consider only the title to collect debts, not whether there are any. The certificate is conclusive of representative title. MUSSAMUT BUGGOBUTTY KOOER v. BHOLONATH THAKOOR, **8 W.R. 317.**

(2)—*Debts contemplated by Act XXVII of 1860.*—Act XXVII of 1860 contemplates all debts due to, and outstanding at the death of, the deceased, even those beyond the date of the certificate. SHIBDYAL TEWARY CHOWDHRY v. BIDDYAMOYEE DEBIA CHOWDHRAIN, **18 W.R. 271.**

(3)—*Act XXVII of 1860—Effect of certificate of administration.*—The certificate under Act XXVII of 1860 does not determine any question of heirship, but merely protects debtors of a deceased person from liability for payments made to certificate holder. If it be found that such certificate holder was not the rightful heir the question of heirship may be tried in a regular suit, notwithstanding the grant of a certificate. The certificate to collect debts should nevertheless ordinarily be granted to the person entitled to the inheritance. MUSSAMAT JOKNA v. MUSSAMAT BAUGWANEE, **3 N.W.P. 320.**

(4)—*Act XXVII of 1860, object of certificate under.*—The object of a certificate, under Act XXVII of 1860, is to enable representatives to recover debts due to the deceased at the time of his death, not claims accruing subsequently. MUSSAMUT JHANJOO KOOER v. MUSSAMUT DAMEANAH KOOER, **17 W.R. 343.**

(5)—*Right of widowed daughter—No title in party obtaining certificate.*—A District Judge is right in granting a certificate under Act XXVII of 1860 to the widowed daughter claiming under the will of the deceased, which was established without dispute; this law not creating a title in the party obtaining the certificate. CHUNDRA MONEE DEBIA v. RASH BEHARY CHOWDHRY, **21 W.R. 24.**

(6)—*Contest between heirs of full-blood and half-blood.*—Where a certificate, under Act XXVII of 1860 for a moiety of the estate of the deceased, was granted to each of two heirs, one of the half-blood, and the other of the full-blood the High Court, on the appeal of the latter, who possessed the title-deeds and had performed the *shradh*, ordered the certificate of the whole estate to be given to him. HURRO KRISTO DOSS v. RAMA NUNDO DOSS, **22 W.R. 274.**

(7)—*Title to specific property—Act XXVII of 1860—Enquiry.*—No question of title to specific property can be tried under Act XXVII of 1860. SHEIKH IMAMUN v. MUSST. NUNNOO, **17 W.R. 193.**

***Certificate of Administration*—continued.**

——3.—Effect of Certificate—*continued.*

(8)—*Certificate granted under Act XX of 1841—Effect.*—*Held* that a certificate granted under Act XX of 1841 did not establish the right of inheritance of the party to whom it was granted, but simply empowered him to collect debts due to the estate of the deceased. The title of plaintiff or her father could not, under the circumstances, be questioned by a co-sharer after its public acknowledgment and practical effect given to that acknowledgment during a long period of years. SKINNER v. SKINNER, **2 Agra 128.**

(9)—*Act XXVII of 1860—Effect of certificate—Court's consideration.*—In a proceeding to obtain an administration certificate under Act XXVII of 1860 for the collection of debts payable to the representatives of deceased persons, the Court has to determine merely whether the applicant is entitled to receive a certificate and not his title as heir or legal representative of the deceased. The rights as between each other of several persons claiming to be interested in the property of the deceased are not to be determined in such a proceeding. The Act does not authorize the grant of a certificate for a portion of the property or debts, whether such portion be separate and defined or not. BEYCHAN SAHOO v. GANESH SAHOO, **2 N.W.P. 439.**

(10)—*Title not given by certificate — Right to collect debts becoming due after deceased's death.*—A certificate under Act XXVII of 1860 gives no title to the property in succession to the deceased, nor does it authorize the holder to sue for and collect debts which have accrued due after the death of the deceased to persons who have subsequently become owners of his property. GOUREE BYJNATH PERSHAD v. MUSSAMUT LOCHUN KOOER, **22 W.R. 102.**

(11)—*Receipt of money under certificate——Title to money—Holder of money only trustee.*—The receipt of money under a certificate does not give a title to the money; the holder only becoming trustee for the person to whom the money belongs. GOBIND CHUNDER BAGCHEE v. DOORGA MONEE DEBIA, **23 W.R. 270.**

(12)—*Effect of certificate under Act XXVII of 1860—When relationship to which it certifies contested.*—In a suit by C as purchaser from A as heir of B, the grant of a certificate under Act XXVII of 1860 to A, as daugter and heir of B, to collect his debts, does not preclude the defendant, who was not a party to that proceeding, from showing that A was not B's daughter. Certain property, purchased in the name of B, was mortgaged by him to the defendant, to whom a further charge was subsequently executed by D, E, and F. In a suit for redemption by the plaintiff claiming title as heir of B; *held* that the defendant was at

Certificate of Administration—continued.

—3.—Effect of Certificate- *continued.*

liberty to show that B was only a trustee for D, E and F. BUNDHOO BHUGUT v. SYED MAHOMED HOSSEIN, **2 W.R. 70.**

(13)—*Collection of debts on succession—Act XXVII of 1860—Validity of will—Suit to contest under Civ. Pro. Code, 1859.*—A decision as to the validity of a will under Act XXVII of 1860 does not preclude the institution of a regular suit under Act VIII of 1859 between the same parties to dispute the validity of the same will, ANUND CHUNDER MITTER v. BANEE MADHUB MITTER, **11 W.R. 127.**

(14)—*Right to certificate—Act XXVII of 1860—Genuineness of will.*—To determine the right to a certificate under Act XXVII of 1860, the Judge must decide the question of the genuineness of the will. KALEE CHUNDER SURMA v. GOBIND PERSHAD SURMA, **12 W. R. 454.**

(15)—*Certificate to person claiming under will—Act XXVII of 1860—Effect.*—The grant of a certificate under Act XXVII of 1860, to a person claiming under a will cannot support a claim to title by that person in a regular suit brought on a will. SOOKHO SOONDUREE DABIA v. WOOMA SOONDUREE DEBIA, **18 W.R. 253.**

(16)—*Grant of certificate on evidence, nature of—Summary proceedings and proceedings on evidence, difference between—Right to bring regular suit—Previous judgment, value of.*—When the question of granting a certificate under XXVII of 1860 is dealt with by the Court with all the available evidence before it just as in a regular suit, and the matter of the certificate is decided upon after full deliberation, the position of the parties becomes very different from what it is at the conclusion of a really summary proceeding. Technically, there may still be the right to bring a regular suit; but the regular suit in such a case, is a re-hearing, and the Court is bound to pay due respect to the judgment already arrived at. GREEDHAREE SINGH v. MUSSAMUT FOOLJHUREE KOOER, **24 W.R. 173.**

(17)—*Negotiation of Government securities by holders of certificates under Act XXVII of 1860.—Held* that a Judge can empower holders of certificates under Act XXVII of 1860 to negotiate Government securities mentioned in the will of the deceased. *In re* SREEMUTTY BHUGGOBUTTY DEBIA, **3 W.R. Mis. 18.**

(18)—*Certificate granted under Act on title afforded by will—Estate given to grantee—No right as executor or legatee—Succession Act, s. 187—Semble.*—The grant of a certificate under Act XXVII of 1860 on the title afforded by the will, gives the grantee the estate in respect of which the debts accrued, but does not establish a right as executor or legatee within the meaning of the words of s. 187 of the Succession Act. KRISTO CHUNDER MOOKERJEE v. CHUNDEE PERSHAD BANERJEE, **23 W.R. 252.**

Certificate of Administration—continued.

——3.—Effect of Certificate—*concluded.*

(19)—*Certificate under Act XL of 1858—Adoption.*—On the death of A, B claimed his estate as his adopted son against W (A's widow) who denied the adoption. The adopted son being a minor, Y, as his guardian applied for a certificate under Act XL of 1858. *Held* that, until the adoption is finally proved, the certificate will not enable the adopted son or his guardian to interfere with in the possession of her husband's estate. PANCH COWREE MUNDUL v. BHUGOBUTTY DOSSIA, **6 W.R. Mis. 47.**

(20)—*Certificate under Act XL of 1858—Certificate under Act XXVII of 1860—Procedure—Issue of certificate.*—A certificate under Act XL of 1858 gives the right to collect the debts due to the estate; but if the debtor objects to pay, the right cannot be enforced without a certificate under Act XXVII of 1860. Where an applicant for a certificate under Act XXVII of 1860 is opposed by a party claiming under a will, the Judge is bound to proceed under s. 3. Where an applicant for a certificate is entitled to a share, the smallness of the share will not debar her from getting a certificate entitling her to collect according to the share. RAESUNNISSA BEGUM v. RANEE KHUJOORUNNISSA, **10 W.R. 462.**

——4.—Issue of Certificate.

(1)—*Court Fees Act, 1870. s. 6—Furnished, construction of—Act XXVII of 1860—Issue of certificate on supply of stamp.*—Construction of the word "furnished" in s. 6, Court Fees Act, 1870. A certificate, under Act XXVII of 1860, should be issued directly it is granted, provided the proper stamp be furnished. DHUNPUT SINGH DOOGUR v. THE GOVERNMENT, **17 W.R. 489.**

(2)—*Deceased having no fixed place of residence at time of death—Court having jurisdiction to grant certificate.*—Where a person had no fixed place of residence at the time of his death, the Judge of the district in which his debts are, has authority to grant a certificate of administration under Act XXVII of 1860. GOLAM SOBHAN *alias* SABOO MEAH v. MAHOMED ROUF, **20 W.R. 286.**

(3)—*Two wills—Certificate—Act XXVII of 1860.*—An order recognizing two wills cannot be made under Act XXVII of 1860. BEMOLA MOYEE DEBEA v. KISHTOMONEE DEBEA, **W.R. 1864, Mis. 10.**

(4)—*Collection of debts of endowment—Refusal of certificate.*—A District Judge rightly refuses a certificate under Act XXVII of 1860 for the collection of the debts of an endowment. BHYRUB BHARUTTEE MOHANT, PETITIONER, **21 W.R. 340.**

(5)—*Certificate under Act XXVII of 1860, to whom granted.*—As a general rule, the heir to a deceased is the person who should have a certificate to collect the debts, and manage the estate of the deceased under Act XXVII of 1860.

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

If he, as heir, is entitled to the whole surplus of the estate, the fact of his having been in a hostile or friendly position as regards the deceased will not be material. The sole heir will be the best person to take care of his own interests. In cases of several heirs contending with each other, if there be no disputes among them, the heir who is entitled to the largest share, may, in the absence of other disqualifying circumstances, be the person entitled to a certificate. ABDOOL ALI v. ABIDUNNISSA KHATOON, W.R. 1864, Mis. 41.

(6)—*Application for certificate under Act XL of 1858—When to be granted.*—Where the petitioner applied for a grant of certificate under Act XL of 1858, allowing him to take charge of the estate left to his minor nephew by his father deceased and the application was rejected by the Judge without sufficient grounds, *held* that it is evidently not the policy of the law to prevent parties from performing their natural duties by the younger members of their family who may be deprived of their natural parents; and it should not be considered as an axiom that an uncle or other near relative will necessarily defraud the minor. In this case, the certificate was granted. MAHOMED SALEH v. THE GOVERNMENT, W.R. 1864, Mis. 26.

(7)—*Certificate to collect debts—Relationship through male and female lines—Preference.*—The father's father's brother's son of a deceased person is entitled to a certificate to collect the debts due to the deceased, in preference to a person (*e.g.*, the father's brother's daughter's son), who claims though a succession of persons, one of whom was a female. GOPAL CHUNDER NATH COONDOO v. HARIDAS CHUNI 11 C, 343. (23 W.R. 117, 4 C. 411, *Followed.*) [*R.*. 15 C. 780.]

(7-a)—*Certificate for collection of debts—Rival claimants—Question as to the genuineness and validity of the will—Court bound to make enquiry into and adjudicate upon the validity of will.*—Where the eldest son of a deceased person applied for a certificate under XXVII of 1860 to enable him to collect the debts due to his deceased father. The younger son opposed it and claimed a certificate under a will alleged to have been executed by the father. The genuineness and validity of the will was disputed by the eldest son. The Court refused to go into the question of the genuineness and validity of the will. *Held* that an objector claiming a certificate under a will is entitled to have an enquiry into and adjudication upon the title which he sets up, before a decision by the Court as to which claimant should get the certificate. THAKUR DAS v. DYA RAM, 36 P.R. 1878,

(8)—*Person representing himself as deceased's cousin—Person asserting exclusive right as tekait to taluk—Right of brothers to collect debts.*—The assertion of an exclusive right as tekait to a certain talook by a person representing himself as cousin of the deceased cannot prejudice the right of brothers, as next heirs to the deceased, to collect his debts, and to give quittances, to his debtors. BABOO PURLADH SINGH v. HET NARAIN SINGH, 2 W.R. Mis. 5.

(9)—*Will set up by objectors not proved—Natural heir entitled to certificate.*—Where a will set up by objectors is not sufficiently proved, the Court is justified in looking on the natural heir as entitled to a certificate of administration. DINO BUNDHOO CHOWDHRY v. RAJA MOHINEE CHOWDHRAIN 15 W.R. 73.

(10)—*Applications under Act XXVII of 1860 — Duty of Judge.*—When applications for certificates under Act XXVII of 1860 are made, the Judge should determine who is entitled, and grant accordingly. He cannot make an order in respect of the property of the deceased. KHAJAH OHEED KHAN v. THE COLLECTOR OF SHAHABAD, 9 W.R. 502.

(11)—*Competition for certificate—Procedure—Security.*—Of several applicants for a certificate under Act XXVII of 1860, the heir or person having the largest interest is entitled to it, and the Court may call on him to give security for any small interest not sufficiently protected. AZEEM KHAN v. MUSSAMUT AMEERUN, 12 W.R. 38. [*F.* 13 W. R. 143.]

(12) — *Owner dead long ago — Property managed by stranger — Right of heiress to certificate under Act.*—An heiress is entitled to a certificate under Act XXVII of 1860, although the owner died nine years before, and the property had been previously managed by a third party. PULASH MONEE DOSSEE v. ANUND MOYEE DOSSEE, 8 W.R. 398.

(13)—*Executor under will, right of, to a certificate.*—The executor under a will, if it be not contested, has an undoubted right to a certificate under Act XXVII of 1860, though he be not the legal heir. If the will be contested, the Judge should enquire into its validity, and, if he consider it proved, give a certificate, leaving the parties dissatisfied to set it aside by a regular suit. BIDHOO BHOOSHUN MOOKERJEE v. ISSUR CHANDER ROY CHOWDHRY, W.R. 1864, Mis. 4.

(14) — *Claim to certificate under will of Mahomedan —Inheritance in dispute — No necessity for collecting debts—Procedure.*—In a claim under a will to a certificate to enable the applicant to collect the debts of a deceased Mahomedan under Act XXVII of 1860, no necessity for collecting debts being shown, and the inheritance being disputed: *Held* that the Judge was right in refusing to give a certificate under that Act. SYED AGAMEER v. GOMANEE KHANUM, W.R. 1864, Mis. 6.

(15)—*Claim to certificate under will—Will, not properly executed—Will, though void, a proper guide to testator's intentions*—In an application for a certificate under Act XXVII of 1860, where applicant's title is based upon a will to which the signatures of the witnesses are found

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

to have been affixed previously to that of the testator, the Court holds that the deed is inoperative as a will ; but inasmuch as it expresses fully the testator's wishes regarding the management of his affairs, and is very distinct as to the confidence reposed in the applicant (the second wife), the Court decides that she is the proper person to have the certificate. MUSSAMUT KHUTTUN KOOER v. MUSSAMUT POONA KOOER, **24 W. R. 322.**

(16)—*Compromise among members of Hindu family—Separate shares taken on death of one member—Right to certificate.*—Where a compromise being effected among the members of a joint Hindu family, the several parties take separate shares of the family-property, on the death of one of the members, the others are not entitled to a certificate of administration, which may be given to the adopted son with the consent of the widow. MUSSAMAT MUNBASEE KOOER v. NOWRUNGEE LALL, **15 W.R. 134.**

(17)—*Members of joint family preferable to separated member*,—Members of a joint family have a preferential claim over a separate member to a certificate of administration to the estate of a deceased member of the family. RAM GOLAM SAHOO v. JANKEE PERSHAD SAHOO, **23 W.R. 31.**

(18)—*Certificate to member of joint family not to be refused.*—A certificate, under Act XXVII of 1860, cannot be refused merely because the deceased was a member of a joint Hindu family. Ordinarily, the managing member would be the person best entitled to the certificate, but this would not be the case when the members had fallen out. CHOWDHRY KRIPA SINDHOO DOSS v. RADHA CHURN DOSS. **23 W.R. 234.**

(19)—*Certificate to collect debts—Question of adoption, whether Court is bound to enter into—Minor whether certificate can be granted to.*—An adopted son not being a natural heir and the fact of adoption being disputed, the Judge is justified in refusing to enter into the question of adoption, in a succession certificate proceeding, and granting the certificate to the nephew of the deceased who was the next heir according to Hindu law; but security should be taken from the nephew. [*Diss.*, 15 C. 574, 23 C. 431 ; *Doubted*, 6 C. 303]. A certificate to collect debts under Act XXVII of 1860 may be granted to a minor by his next friend. KALI COOMAR CHATTERJEE v. TARA PROSUNNO MOOKERJEE, **5 C.L.R. 517.** [*F.*, 20 A. 352.]

(20)—*Act XXVII of 1860—Adoptive son of deceased obligee of hypothecation-bond, need not obtain certificate under.*—Where the obligee of a hypothecation-bond was dead, his adopted son entitled to recover the debt due under the bond was held to be under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit. GOPALA v. SAMINATHAYYAN, **12 M. 255.**

(21)—*Deceased's full sister's son in possession—Half-brother—Former preferred.*—A certificate of administration given to the deceased's

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

full sister's son in possession, rather than to the half-brother, was held to have been given to the party best entitled with reference to the object of Act XXVII of 1860. SHAIKH LALL MAHOMED v. BUZLOOL HOSSEIN, **17 W.R. 562.**

(22)—*Deceased son's daughter's son—Nephew—Right to certificate.*—A nephew is entitled to a certificate of administration in preference to a deceased son's daughter's son. AREE MURDUN BHUGGUT v. JANNATH BHUGGUT, **15 W.R. 328.**

(23)—*Nephews managing testator's property partly in their own right and partly as guardians—Entitled to two certificates under Act XVII of 1860 and XL of 1858.*—Nephews managing testator's property partly in their own right and partly as guardians of a minor son, are entitled to one certificate under Act XXVII of 1860 to collect debts of whole estate, and to another under Act XL of 1858 to take charge of minor's share. MAKHUN CHUNDER SHAHA v. CHAND MONEE DOSSEE, **8 W.R. 105.**

(23-*a*)—*Daughter-in-law applying for a certificate to her father-in-law's estate—Certificate not to be granted notwithstanding mutation of names.*—A daughter-in-law is not, even though a mutation of names is effected, entitled for the grant of a succession certificate to the estates of her deceased father-in-law, in case where her husband predeceased his father. MUKHUN LAL v. MUSSUMAT LACHMI, **20 P.R. 1872.**

(24)—*Deceased ascetic's disciple or spiritual brother or preceptor—Right to certificate.*—A deceased ascetic's disciple, or spiritual brother or preceptor, is entitled to a certificate to collect his debts ; even though mentally incapacitated to succeed to the office. GUREEB DOSS v. MUNGUL DOSS, **14 W.R. 383.**

(25)—*Grant of certificate to illegitimate sons—Assignment of property—Acknowledgment.*—A certificate of administration may be granted to illegitimate sons of a deceased Hindu to whom the latter had assigned his property, and whom he had acknowledged as his sons. PRODHAN RAM v. MUSSAMAT JERIA KOOER, **17 W.R. 189.**

(26)—*Act XXVII of 1860—Conditions for grant of certificate under.*—A Judge must look to fitness and propinquity before granting a certificate under Act XXVII of 1860. NUNKOO SINGH v. PURM DHUN SINGH, **12 W.R. 356.**

(27)—*Certificate of administration to guardian of minor—Recovery of estate—Suit by guardian.*—Under Act XL of 1858, a certificate of administration to the estate and property of her minor son may be granted to a person, so that the guardian may institute a suit on behalf of the minor to recover the estate of his grandfather. SARODA SOONDUREE DOSSEE v. TARINEE CHURN CHOWDHRY, **6 W.R. Mis. 23.**

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

(28)—*Minors—Act XL of 1858—Grant of certificate, conditions for.*—A certificate under Act XL of 1858 ought not to be issued, where there is neither present right nor prospective possession. NOBIN CHUNDER SHAHA v. RAJ NARAIN SHAHA, **9 W.R. 582.**

(29)—*Minor's grandmother, Application for certificate by—Act XL of 1858—Act XXVII of 1860.*—The grandmother of minors applying for certificates under Acts XL of 1858 and XXVII of 1860 with the father's consent may be granted them if she be competent and willing. MUSSAMAT OOMRAO DOOLHAEN v. SYUD AGAMEER, **12 W.R. 119.**

(30)—*Act XXVII of 1860—Minor coming of age—Application for certificate.*—Where the minor heir having come of age, the parties entitled apply for a certificate under Act XXVII of 1860, to enable them to draw on Government securities belonging to the estate in respect of which the trustee appointed by will has demised: *Held* that it is the duty of the Judge to grant the application. *In re* PREONATH SIRCAR, **13 W.R. 325.**

(31)—*Guardian indicated by law of parties—Immorality charged against certificate-holder—Duty of Judge.*—Act XL of 1858 does not prevent the selection of a guardian indicated by the law of the parties, if he be a fit person. Where the holder of a certificate under Act XL of 1858 is charged with immorality, it is the duty of the Judge to inquire into the truth of the charge and the fitness of the certificate-holder. MOHOMUDDY BEGUM v. MUSST. OOMDUTTOONISSA, **13 W.R. 454.**

(32)—*Act XL of 1858—Certificate to guardian of adopted minor—Objection.*—A certificate under Act XL of 1858 is rightly given to the guardian of an adopted minor where there is no doubt of the fact of adoption: an objector on the ground of illegal adoption not claiming to be guardian has no *locus standi.* KISTO KISHORE ROY v. ISSUR CHUNDER ROY, **15 W.R. 166.**

(33)—*Act XL of 1858, s. 7—Claimant under genuine will—Right to certificate in spite of minor's mother.*—Under s. 7, Act XL of 1858, a claimant, by virtue of a genuine will, is entitled to a certificate notwithstanding the existence of a natural guardian in the person of the minor's mother. BHOOBUN MOHINEE DEBEE v. POORNA CHUNDER BANERJEE, **17 W.R. 99.**

(34)—*Grant of certificate to a near relative of a minor not compulsory but discretionary—Act XL of 1858, s. 7.*—Under s. 7, Act XL of 1858, it is not obligatory to grant a certificate for the administration of the property of a minor to a near relative. The Court may grant a certificate or not, as it thinks proper under the circumstances of each particular case. MUSSUMAT KHAN KOUR v. GUJAR MAL, **23 P.R. 1878.**

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

(35)—*Deceased informing creditor that moneys due were given to certain person—Such person to get certificate—Evidence of intention—Act XXVII of 1860.*—The circumstance of a party on the day of his death informing his creditor that he has given all moneys due to him to his mother-in-law is sufficient indication that she is the proper person to receive the certificate under Act XXVII of 1860. In cases under Act XXVII of 1860, Judges should certify whether the certificate has been actually granted. ZEEMUTOONISSA KHANUM v. KHUTOO BEGUM, **12 W.R. 239.**

(36)—*Death of daughter—Certificate under Act XXVII of 1860, grant of, to husband in preference to mother.*—On the death of a daughter leaving landed property in the possession of her mother, *held*, that the husband of the deceased is entitled to receive a certificate under Act XXVII of 1860 to enable him to collect debts due to the deceased in preference to the mother, and that such certificate will not authorise the husbands interfering with the possession of the mother in the landed property which she claims as her own. MOHUN SOONDUR KOONWUR v. RAMANOOGRO NARAIN, **3 W.R. Mis. 3.**

(37)—*Vesting of property in adopted son—Widow with power to adopt—Compulsion—Certificate under Act XXVII of 1860.*—As soon as the adoption is made, property vests in the adopted son, even though he is a minor. A Hindu widow with power to adopt cannot be compelled to make the adoption. The mother of a deceased adopted minor son is entitled to a certificate under Act XXVII of 1860 in preference to the manager of the minor's estate. SREEMUTTY DEENO MOYEE DOSSEE v. DOORGA PERSHAD MITTER, **3 W.R. Mis. 6.**

(38)—*Mother of adopted son.*—The mother of a deceased adopted minor son is his legal representative, and entitled to a certificate under Act XXVII of 1860 as his legal heir. DEENO MOYEE DOSSEE v. DOORGA PERSHAD MITTER **5 W.R. Mis. 6**; DEENO MOYEE DASSEE v. TARACHARAN COONDOO CHOWDHRY, **3 W.R. Mis. 7, note = Bourke A.O.C. 48.**

(39)—*Certificate of administration—Issue of, and right to certificate—Widow—Disputed adoption.*—When the title of a person claiming as adopted son of the deceased is disputed, the certificate may properly be granted to the widow of the deceased. DIRG PAUL SINGH v. MUSST GAINDA KOONWAR, **1 Agra Mis. 13.**

(40)—*Act XL of 1858—Act XXVII of 1860—Certificate.*—A certificate granted under Act XL of 1858 to administer to an estate, though it gives the right to the administrator to collect the debts due to the estate, is not sufficient to enable the party to whom the certificate is granted to enforce that right in Court if the debtor objects to pay the debt, for, without certificate under Act XXVII of 1860, no debtor of any deceased person can be compelled in any Court

Certificate of Administration—continued.

——4.—Issue of Certificate—*continued.*

to pay his debt to any person, claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained under the Act. Where an applicant for a certificate under Act XXVII of 1860 is opposed by a party claiming under a will, the Judge is bound to proceed under s. 3 of the Act, and determine which of the claimants is entitled to the certificate. (9 W.R. 459, *R.*) Where an applicant for a certificate is entitled to a share, the mere fact of the share being small will not debar her from getting a certificate entitling her to collect according to the share. *In the matter of* RANI RAISUNNISSA BEGAM, **2 B.L.R. A.C. 129=10 W.R. 462.** [*R.*, 3 B.L.R. A.C., 404.]

(41)—*Two certificates of administration, if can be granted to estate.*—Two certificates of administration to an estate cannot run together. A person, who fails to appear and contest the grant of a certificate to one X, a year before his own application, cannot claim one now for himself. SREEMUTTY SHAM MANNA v. RAMDYAL GOOHOO, **1 W.R. Mis. 2.**

(42)—*Certificate to widow to collect debts due to her deceased husband although adoption of her husband is set aside.*—A Hindu widow may be granted a certificate (as guardian of her minor son) to enable her to collect the debts due to the estate of her deceased husband, although the adoption of the husband may have been set aside. NITTO KAMEE DEBEE v. OBHOY GOBIND CHOWDHRY, **5 W.R. Mis. 10.**

(43)—*Widow's rights to collect husband's debts—Certificate.*—*Held* that a widow has a right to obtain a certificate to collect the debts due to her deceased husband, in preference to a cousin. MUSSAMMAT GUNGA KOONWAREE v. ROY BABOO SHIB GOLAM SAHOO, **1 W.R. Mis. 3.**

(44)—*Objectors claiming under transfer from widow—Right of widow to certificate—Enquiry.*—Where certain objectors claim the property of the deceased on the ground of a transfer of the same from the widow under a *tukseenamah*, the Court should enquire into such claim before granting a certificate to the widow, as being the legal heir of the deceased. DEB PERSHAD v. MONGA KOONWAR, **4 W.R. Mis. 19.**

(45)—*Special title of objector not proved—Act XXVII of 1860—Certificate to deceased's widow.*—Where a Judge, holding that the special title put forward by an objector is not proved, decides that the widow of deceased is best entitled to a certificate under Act XXVII of 1860, *held* that under the special law the Judge's decision was right. PROTAP NARAIN DOSS v. POORNO MASHEE DAYE, **14 W.R. 416.** [*R.*, 17 W.R. 102.]

(46)—*Estate sold subsequent to owner's death for arrears of revenue—Sale-proceeds payable to estate—Widow's application for certificate—certificate for moiety granted to each of two heirs.*—Where an estate is sold, subsequent to the death of the owner, for arrears of revenue, the sale-proceeds being payable to the estate of the deceased, there is nothing in the law to prevent the Judge from entertaining the widow's application for a certificate. *In re* MUSSAMAT TRIPOORA SOONDUREE, **22 W.R. 45.** [*Expl.*, 24 W.R. 203.]

(47)—*Widow—Certificate of administration for husband's property.*—The petitioner, a Hindu widow, applied for a certificate of administration, under Act XXVII of 1860, for her deceased husband's estate, and stated in her petition that her husband possessed, at the time of his death, self-acquired property, besides the property he had inherited from his brother. The opposing parties set up a will of the deceased's father, under which a certain share of the testator's estate was given to the petitioner's husband, and, in the event of his death without children, to his mother, and after her death, to his brother. *Held* that it was not necessary for the purpose of the application to decide on the validity or otherwise of the will, as the widow was entitled to a certificate in respect of her husband's property; and, further, that the will, which purported, in certain events, to give to the testator's widow that share of the property which he bequeathed to his son (the petitioner's husband), could not affect her claim to the certificate in respect of her husband's self-acquired property. KHOODOOMONEY DABEE v. MASHEE DABEE, **1 Ind. Jur. O.S. 36.**

(48)—*Certificate under Act XXVII of 1860, Application for, by two widows—Separate possession—Evidence.*—Two Hindu widows alleging themselves to be guardians of their deceased husband's minor son applied for a grant of certificate under Act XXVII of 1860 in order to realise the amount of a decree in their joint names. A step-brother of the deceased opposed the application on the plea that the family was joint. *Held* that it must be first found out whether the son had a separate estate and whether he was not in joint possession with the objector (step-brother of his father). *Held* also, that the fact that the decree stood in the joint names of the widows did not, by itself, prove separate possession. CHINTAMAN SINGH v. ROOPA KOONWAR, **6 W.R. Mis. 32.**

(49)—*Act XXVII of 1860—Widow holding certificate—Deceased's alleged heir preventing delivery of property to widow—High Court moved under s. 404, Civ. Pro. Code, 1861—Jurisdiction—Security by widow*—Where a Magistrate on a representation from H, who alleged himself to be a cousin of the deceased, refused to deliver the latter's property to his widow who held a certificate under Act XXVII of 1860, and she, having had her appeal to the Sessions Judge dismissed, moved the High Court under s. 404, Crim. Pro. Code, 1861: *Held* that the High Court had no-

Certificate of Administration—continued.

——4.—Issue of Certificate—*concluded.*

jurisdiction to deal with the matter under s. 404, Act XXV of 1861. But it was also held that the property may be delivered to the widow on her furnishing security for the purpose of indemnifying H. CAZEE ABID HOSSEIN v. MUSSAMUT REAZUN, **15 W.R. 302.**

(50)—*Applicant for certificate under Act XXVII of 1860—Seventh in descent from common ancestor and no* bandhu—*Neither related to nor heir of deceased—Right to certificate.*—Where an applicant for a certificate under Act XXVII of 1860, is seventh in descent from a common ancestor through the female line and therefore not a *bundhoo*, *held* that he is no relative of such ancestor and no heir to the deceased, and is not entitled to a certificete. HUR NARAIN SINGH BABOO v. KESHUB LALL SETH TULWAR, **23 W.R. 384.**

(51)—*Widow admittedly heiress of deceased—Claiming under husband's will—Proper person.*—A widow, admittedly the heiress of the deceased, claiming under her husband's will, is the proper person to obtain a certificate, notwithstanding the objection of an adopted son. BISSUMBHUR SHAHA CHOWDHRY v. SREEMUTTY PHOOL MALA CHOWDHRAIN, **21 W.R. 31.**

(52)—*Act XXVII of 1860, s. 3—Widow applying for certificate— Opposition by party who also produces will of deceased—Genuineness of will to be enquired into.*—Where, on the application of a widow for an administration certificate to the estate of her deceased husband, a third party, K, produced a will, alleged to be that of the deceased and opposed the application for the certificate, and the Judge granted the certificate to such third party, *held* that the Judge ought not to have done so, unless he was quite satisfied that the will was genuine. *In the matter of* KOONJ BEHAREE GHUR, **11 W.R. 171.**

See HINDU LAW—PARTITION, 6 W.R. 139.

——5.—Nature and Form of Certificate.

(1)—*Act XL of 1858, Application under—Contents.*—States what an application for a certificate under Act XL of 1858 ought to set forth, *viz.*, that there is property to which the minor is entitled and of which the applicant claims to have charge, the application need not refer to the estate of the deceased. KOOSOOM KHAMINEE DEBEE v. CHUNDER KANT MOOKERJEE, **23 W.R. 346.**

(2)—*Act XXVII of 1860—Form of certificate—Appeal from Zillah Courts' order.*—Act XXVII of 1860 provides no appeal from the order of Zillah Court as to the form of certificate. BANEE MADHUB MOOKERJEE v. NILAMBUR BANERJEE, **8 W.R. 379.**

(3)—*Limitation of certificate to special debts—Act XXVII of 1860—Joinder of parties in certificate—Appeal.*—A certificate under Act XXVII of 1860, cannot be limited to particular debts. Such a certificate cannot be appealed

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——5.—Nature and Form of Certificate—*cld.*

against, on the ground that the Judge joined with the appellant another person who had an interest in the debts to be collected. PRAN KHAN, APPELLANT, **17 W.R. 238.**

(4)—*Division of certificate—Collection of portions of debt.*—Act XXVII of 1860 does not contemplate a division of the certificate or a power to collect fractional share of debt. MUSSAMUT EIBEE BOODHUN v. JAN KHAN, **13 W.R. 265.**

(5)—*Act XXVII of 1860, s. 8—Joint certificate to collect debts—Determination of right to certificate.*—Act XXVII of 1860 (an Act for facilitating the collection of debts on succession) gives a Judge no power to grant a joint certificate to two persons, his duty being to determine which of the applicants has the better right. MUSSAMAT GOURA v. KEKREE SINGH, **4 N.W.P. 60.** [*F.*, 5 A. 195.]

(6)—*Applicant husband and cousin of deceased—Certificate to be granted to him alone—Certificate jointly with another opposing cousin*—Where the applicant for a certificate of administration under Act XXVII of 1860 is the husband as well as the cousin of the deceased, the certificate of administration ought to be granted to him alone, and not jointly with another cousin who opposes the application. EAD ALI KHAN v. WAHED ALI KHAN, **23 W.R. 25.**

See MINOR—SUITS BY AND AGAINST MINORS, 9 B.H.C. 310.

——6.—Procedure.

(1)—*Wrong procedure—Delegation of examination of witnesses—Order illegal.*—In an application for a certificate of administration, the District Judge having delegated the examination of the witnesses in the case to the Nazar of the Court, and having, on the evidence so taken, made an order granting the certificate: *Held* that the procedure was illegal; and that the order so passed must be annulled; and further proceedings for the investigation of the title directed in which the witnesses should be examined by the Judge himself. LAKSHMIBAI v. RUDRAPPA, **2 B.H.C. 382.**

(2)—*Duty of Court under Act XXVII of 1860—Granting certificate to person making out title—Inquiry into disputed facts.*—The Court is bound under Act XXVII of 1860 to give a certificate to the person making out a title, and when parties are not agreed as to facts, to try the issues in the ordinary way. MUSSAMUT ANUNDEE KOOER v. BACHOO SINGH, **20 W.R. 475,** [*Appr.*, 15 C. 574, 6 C. 303; *R.*, 3 C, 616.]

(3)—*Certificate of administration under Act XXVII of 1860—Enquiry.*—Where, in an application for a certificate of administration under the provisions of Act XXVII of 1860, the applicant claimed as heir of the deceased and impugned his marriage, *held*, that the Judge must inquire summarily into the question,

Certificate of Administration—continued.

——6.—**Procedure**—*continued.*

whether the marriage of the deceased and the consequent legitimacy of his children has been established or not. MR. TAYLOR v. MUSSAMAT NUNDEE JAN, **W.R. 1864, Mis. 25.**

(3-*a*)—*Grant of certificate subject to condition—Appeal to vary conditions—Jurisdiction—Act XXVII of 1860, s. 6*—Where, on an application for a certificate under Act XXVII of 1860, the District Court granted one subject to certain conditions and the petitioner preferred an appeal to vary the conditions: *Held*, that no appeal lies as the 1st clause of s. 6 of the Act does not allow an appeal by a successful petitioner against an order in his favour with a view to vary the terms, an application with such an object being cognisable only by the Court which passed the order. THAKAR DAS v. DAYA RAM, **136 P.R. 1878.**

(4)—*Application for certificate under Act XL of 1858—Enquiries by Judge.*—Enquiries that ought to be made by a Judge with reference to an application by Hindoo famale for certificate of administration under Act XL of 1858 in respect of estate belonging to adopted son were held merely to be whether the boy was a minor and whether the petitioner being a near relative was a fit person to be entrusted with the charge of the minor's property. BROHMO MOYEE CHOWDHRAIN v. CHITTUR MONEE CHOWDHRAIN, **8 W.R. 23.**

(5)—*Petitioner for certificate summoned for examination—Absence without good cause—Rejection of petition—Act VIII of 1859, s. 270—Sanction to prosecute.*—Where a Judge, in a retrial on remand, summoned the petitioner for a certificate to collect the debts of one R, to attend for the purpose of examination, and the latter was absent without good cause, *held* that the Judge rightly exercised the powers conferred by s. 270, Act VIII of 1859 in rejecting the application. A Judge should not give his sanction to a prosecution for forgery before all the testimony is heard and a *prima facie* case made out. *Quære.*—Is the Judge's sanction necessary to the prosecution for forgery of a petitioner filing a certain document? SEETARAM SAHOO v. SHEO GOLAM SAHOO, **91 W.R. 183.**

(6)—*Act XXVII of 1860—Certificate—Will—Division and separation—Proof of.*—On the application of the widow of a proprietor who had separated from his brother, the objector, for a certificate under Act XXVII of 1860, on the ground of right of inheritance and a will, it is sufficient, for the purposes of the Act, to decide whether the estates of the brothers were joint or separate when the applicant's husband died. SOOKHRAJ BAHADOOR v. JUREENA BIBEE, **11 W.R. 341.**

(7)—*Certificate claimed under will—Judge to decide on preferability—Certificate to widow.*—When a certificate under Act XXVII of 1860, is claimed by reason of an alleged will, the Judge should decide whether, under the will, the claimant has a preferable right, instead of

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— 6.—**Procedure**—*concluded.*

granting a certificate to the widow upon security. JUGGUT CHUNDER ROY v. CHUNDER MONEE SHAHA, **17 W.R. 277.** [*Appr.*, 15 C. 574.]

(8)—*Act XXVII of 1860, s. 5—Discretion of Court granting certificate as to security—High Court, interference of, with such discretion.*—Under Act XXVII of 1860, s. 5, the Court granting a certificate has a discretion to determine whether or not will require security to be given by the person to whom it grants it. The High Court will not, on appeal, review or interfere with the due exercise of such discretion by the lower Courts. MAHLSIBAI v. VITHOBA MANDAPPA GULVE, **7 B.H C. App. 26.**

(9)—*Security in obedience of High Court's order—Act XXVII of 1860—Judge's power to release security—Time for return of security.*—Jurisdiction of a Zillah Judge in respect of the release of money taken as security by an order of the High Court from the holder of a certificate under Act XXVII of 1860. Security taken from the holder of a certificate of administration should not be returned till the time allowed for an opposing claimant has expired. GOUR SOONDUR PAROY v. KRISTO KANT MAHATON, **15 W.R. 108.**

(10)—*Separate certificates in respect of different moieties of the same debt.*—It may not be proper for a Court to grant separate certificates, in respect of different moieties of the same debt, but, after it has done so, they cannot be regarded as a nullity, by a Court, which is asked to order payment of the debtor to which they relate. SREENIVASA IYENGAR v. SUNDARARAJA IYENGAR, **17 M.L.J. 37.** (27 A. 87, *R.*)

(11)—*Succession certificate—Dismissal of suit pending decision of application for certificate is improper.*—*Held*, that the dismissal of a suit for non-production of a succession certificate is improper, where application to obtain the certificate is pending in Court. AMIR SINGH v. RAM CHAND, **94 P.L.R. 1902.**

——7.—**Miscellaneous.**

(1)—*Will—Certificate—Regulation VIII of 1827.*—A plaintiff can sue to establish his title under a Will without producing a certificate under Reg. VIII of 1827. PATEL MAFATLAL NARANDAS v. BAI PARSON, **19 B. 320.**

(2)—*Reg. VIII of 1827—Evidentiary value of certificate—Effect of such certificate—Legal representative—Certificate of heirship.*—A certificate of heirship granted under Reg. VIII of 1827 is not *prima facie* evidence that the holder of it is the rightful heir of deceased. The effect of such certificate is merely to give security to persons in possession of or indebted to the estate of the deceased in dealing with such holder as the legal representative of the deceased. SHRIPAT RAMCHANDRA KULKARNI v. VITHOJI *valad* MALHARJI PATIL *et al*, **4 B.H.C.A.C. 178.** [*F.*, 10 B. 449, *D.*, 8 B.H.C. 152, F.B.]

Certificate of Administration—continued.

—7.—Miscellaneous—*continued.*

(3)—*Limitation Act, XV of 1877, arts. 123, 131—Suit for share in annual* vatan *allowance—Reg. VIII of 1827, position of holder of administration certificate granted under — Such holder not a representative.*—Plaintiffs, as co-sharers in a *deshpande vatan*, sued to recover their portion of the annual allowance in respect of their share in the *vatan* which had been received from the Collector by their co-sharers, the defendant and his father. The District Judge treated the plaintiff's claim to a share as one to a distributive share of the property of the original owner of the *deshpande vatan* who died intestate, and applying art. 123 of the Limitation Act, for determining whether the plaintiffs right was barred, decided that it was so barred. *Held* that art. 123 of the Act was not applicable to the case and that the suit was not barred. Art. 123 has been intended to apply only to a case in which it is sought to obtain a share from a person who, as executor or otherwise, represents the estate with a legal obligation to distribute it. That article could, therefore, have no application to the present case, there never having been a representative of the estate otherwise than for the purpose of management. The certificates of administrations granted to several persons in succession, including the present defendant, only conferred the right of management and did not constitute the holders of such certificates the representatives of the estate for the purpose of distributing it amongst the co-sharers. KESHAV JAGANNATH v. NARAYAN SAKHARAM, **14 B. 236.** [*F.*, 15 B. 135; *R.*, 5 Bom. L.R. 355, 2 L.B.R. 184, 5 N. L.R. 41=2 Ind. Cas. 15, 20 M.L.J. 288, F.B. =6 Ind. Cas. 50=8 M.L.T. 4.]

(4)—*Payments to widow whose certificate of administration was set aside on appeal.*—Where a widow obtained an order for a certificate of administration to the estate of her deceased husband, which order was, however, reversed on appeal before the certificate was granted: It was held that payments made to the widow before the order was reversed were unauthorised. DAMODHAR BAPUJI PACHAPURKAR v. ZINGA *kom* KANDLIKA, **7 B.H.C.A.C. 31.** [*Expl.*, 8 B.H.C. 152, F.B.; *R.*, 9 B.H.C. 37.]

(5)—*Reg. VIII of 1827, s. 7—Person holding certificate of administration under, whether a transferee under s. 232, Civ. Pro. Code—Right of certificate holder to execute decree.*—A person holding a certificate of administration granted under Reg. VIII of 1827 has the power to do all acts necessary to get in the estate, which would comprise the executing of decrees obtained by the deceased. He is in the position of a transferee of the decree empowered to apply for its execution under s. 232 of the Civ. Pro. Code. KHANDERAV RAYAJIRAV v. GANESH SHASTRI, **11 B. 368.** [*Appr.*, 1 N.L.R. 49.]

(6)—*Succession to estate of deceased person in dispute—Bom. Reg.* VIII *of 1827, s. 9—Construction of words "may appoint"—Powers of Court.*—Where there is a dispute as to the

Certificate of Administration—continued.

—7.—Miscellaneous—*continued.*

right of succession to a deceased's property between two claimants, and neither of them is in possession, the District Judge within whose jurisdiction the property in dispute is situate has the power, under s. 9, Regulation VIII of 1827 (on application having been made to him for the purpose) to appoint an administrator. The language of s. 9 of Regulation VIII of 1827 is imperative and not permissive. The use of the words "may appoint" in the section does not imply that the District Court has any discretion in a proper case to appoint or not to appoint an administrator. If any discretion is given by s. 9 of the Regulation as to the exercise of the power thereby conferred, it is not that of exercising the power or not at pleasure when the occasion arises, but only of determining whether the occasion has arisen in the particular case. SHRI VISHWAMBAR PANDIT v. VASUDEV PANDIT, **13 B. 37.**

(7)—*Reg. VIII of 1821, s. 4—Application for certificate of heirship based on adoption—Adoption denied by opponent—Procedure—Applicant not to be referred to regular suit.*—B obtained in 1865 a certificate of heirship to his uncle who had died in 1842. In 1889, the widow of the deceased adopted H, who in 1894 applied for a certificate of heirship to the deceased, alleging that he was his legal heir; and also for the cancellation of that granted to B. B denied the legality of the adoption, and contended that he was himself the heir. The District Judge, thereupon, dismissed the application, referring the applicant to a regular suit to establish the validity of the adoption. *Held* by the High Court that the District Judge had no authority to dismiss the application and refer the applicant to a regular suit. He was bound to investigate the case, following the procedure laid down in s. 4 of Reg. VIII of 1827. The case was accordingly remanded for a legal inquiry. HARISING v. BHAUSING, **20 B. 548.**

(8)—*Act XX of 1841—Summary procedure—Act XXVII of 1860.*—A (a Hindu) died intestate in December 1865, leaving his widow in possession of his property, moveable and immoveable. The descent of A's property was admittedly governed by the law of the Mitakshara. On the 19th January, 1866, A's nephew presented a petition to the Zillah Court, under Act XIX of 1841, denying the title of the widow. Upon this alone, the Judge directed the widow to come in and show cause, which she did on the 2nd February following. A daughter of A on 10th March, presented a petition in opposition to the nephew's claim for possession. The nephew filed a reply. In the meantime, the widow applied for a certificate under Act XXVII of 1860, which was opposed by both nephew and daughter. The nephew also filed a cross-petition under Act XXVII of 1860. All these petitions came on by consent together for adjudication on a state of facts admitted by all parties through their

Certificate of Administration—continued.

——7.—Miscellaneous—*continued.*

pleaders, who, also, by consent between themselves, submitted their view of the question of law to be decided on the Acts of 1841 and 1860. The questions so submitted were (1) Did it appear on the evidence that there was a separation between A and his nephew according to the Mitakshara doctrine? (2) If the evidence *per se* established a legal separation, was such separation negatived by certain admissions of A? The Judge refused the application of the widow under Act XXVII of 1860, and granted possession to the nephew under Act XIX of 1841. The nephew was a man of substance, and able to bring a regular suit, and there was no evidence of possession by force or fraud on the part of the widow, the only question being her right according to the Mitakshara law. *Held* that the Judge was in error in proceeding summarily under Act XIX of 1841 on the declaration of the applicant alone and without other enquiry, but that this defect was cured by the widow's appearing; that the Judge ought not to have tried the cases under Acts XIX of 1841 and Act XXVII of 1860 together and on the same issues; but that the Judge having jurisdiction over the subject-matter and to frame the issues, his order was not open to appeal or review. JUSODA KOONWAR v. GOWREE BYJNATH PERSHAD, **1 Ind. Jur. N.S. 365=6 W.R. Mis. 53.**

(9)—*Administrator holding certificate under s. 7, Act XL of 1858—Submission of accounts.*—An administrator holding a certificate under s. 7, Act XL of 1858 need not submit to the Court periodically accounts of monies realised and disbursed on account of the minor, unless sued for such under s. 19 of the Act by any relative or friend of the minor. MUSSAMUT SOU KOLLY KOONWAR, APPELLANT, **6 W.R. Mis. 53.**

(10)—*Order under Act XX of 1841—Validity of will—Inheritance—Suit by daughter as heiress-at-law—Limitation.*—The effect of an order under Act XX of 1841, is not to establish a will incontestably against the whole world, or prevent a will from being impeached in a suit if set up to defeat the rights of parties claiming under the law of inheritance. A suit by a daughter claiming as heiress-at law to establish her title to possession of land left by her father or to avoid an adverse will, must be brought within 12 years from her father's death. MAHOMED AZEEMOOLLAH KHAN v. MUSSAMUT SUHOOHRA BEBEE, **W.R. 1864, 227.** [*F.*, 16 W.R. 214]

(11)—*Certificate under Act XX of 1841—Its nature.*—A certificate for collecting the debts due to the estate of a deceased person, given under Act XX of 1841, is personal to the party to whom the certificate is granted and is not transferable from hand to hand by private sale. SYUD MEHDEE ALLY KHAN v. LUCHMEEPUT BABOO, **1 W.R. Mis. 28.**

(12)—*Cancellation of certificate granted under Act XX of 1841.*—A Court cannot, solely on the

Certificate of Administration—continued.

——7.—Miscellaneous—*continued.*

petition of a party, cancel a certificate granted to him under Act XX of 1841, or declare that his trust and guardianship have ceased. If he gives up his duties of his own accord, he does so on his own responsibility, and the Court will not order him to act. SHUMBOO CHUNDER KHAN v. ISHAN CHUNDER BANERJEE, **W.R. 1864, Mis. 23.**

(13)—*Act XXVII of 1860, s. 3—Effects of foreigner domiciled abroad—Certificate of administration whether grantable in respect of—Reg. VIII of 1827—Jurisdiction to grant certificate depending on locality of assets.*—S. 3 of Act XXVII of 1860 contemplates the issue of a certificate under it only for the estate of a British subject either resident within the District where a certificate is sought, or else having no fixed place of residence. There is no provision in the Act for the administration of the effects of a foreigner domiciled abroad, as was the deceased, in the present case, who was a *sirdar* of Baroda, resident there, where also he died. Also the locality of the assets regulates the jurisdiction of the Court to grant a certificate under Reg. VIII of 1827 while Act XXVII of 1860 alone had regard to the person. The Assistant Collector had been appointed administrator of the estate of the deceased in this case who had died leaving considerable property in the District of Surat. Admittedly, he had not been relieved of his office as administrator by the Court as contemplated in the section under which he was appointed and, while his status subsisted, no one else could represent the estate, the appointment of an administrator excluding other representatives so long as it endures. Consequently, the plaintiffs in this case were *held* to be incompetent to bring the present suit as heirs of the deceased to recover the balance due on a bond executed by the defendants in favour of the deceased. MIR IBRAHIM ALIKHAN v. ZIAULNISSA LADLI BEGAM SAHIB, **12 B. 150.** [*D.*, 21 B. 102.]

(14)—*Necessity for grant of certificate.*—Before the grant of a certificate under Act XXVII of 1860, some necessity for it must be shown, as that there are debts to be collected. RAJ CHUNDER BUTTACHARJEE v. MEERTUNJOY SHEEROMONYE, **2 Hay 299.**

(15)—*Application for certificate under Act XXVII of 1860—Procedure by Court.*—On an application being made for a grant of certificate under Act XXVII of 1860, the Court must ascertain whether the applicant or any one else has a right to the certificate sought and must grant the same accordingly. *In re* SHEIKH MEAN JAN, **5 W.R. Mis 20.**

(16)—*Two relatives of deceased applying for certificate—Act XXVII of 1860—Judge not to refer parties to regular suit—Judge bound to determine.*—Where two relatives of a deceased person severally apply, under Act XXVII of 1860, to a District Judge for a certificate to administer the estate. *Held* that it is not a proper course for the District Judge to refer them

Certificate of Administration —continued.

——7.—Miscellaneous—*continued.*

to a regular suit : he should determine, in the manner pointed out by the Act, whether either, and if so which, of the applicants, has a right to the certificate, and grant the same accordingly. JAMSEDJI KAVASJI v. MOTIBAL, **2 B. H.C. 375.** [*R.*, 7 B. 341, F.B., 21 B. 53.]

(17)—*Duty of Judge in petition for certificate.* —Certificate under Act XXVII of 1860 should be granted by Judge simply on determining the right of applicant and without any other enquiry. KALEENATH DUTT, APPELLANT, **8 W.R. 21.**

(18)—*Act XXVII of 1860—Certificate, Judge not to inquire into existence of debts* —A Judge is not required to ascertain whether there are debts due to deceased's estate before granting a certificate under Act XXVII of 1860. SHURUT CHUNDER MOOKERJEE v. THAKOORMONEY DEBIA, **9 W.R. 240.**

(19)—*Enquiry conclusive for purposes of certificate—Right to recover moneys by regular suit.* —An inquiry under Act XXVII of 1860 is conclusive for the purposes of a certificate ; but the right to recover moneys by a regular suit is not affected. TARINEE CHURN BROHMO v. ROMA SOONDUREE DOSSEE, **20 W.R. 312.**

(20)—*Certificate to be granted only if debts shown as owing to deceased at time of death—Debtor, meaning—S. 2, Act XXVII of 1860.*— Certificates under Act XXVII of 1860 should be granted only where it is shown that the deceased person, at the time of his death, had certain debts owing to him, or that there were persons who could be called debtors of the deceased. A person in whose hands are the surplus sale proceeds of a property belonging to the deceased, is a debtor within the meaning of s. 2. BISHNO DOSS v. MUNGAL DOSS, **24 W.R. 203.**

(21)—*Points to be proved by petitioner for certificate under Act—Title to collect debts—Prima facie evidence of existence of debts.*—A petitioner for a certificate under Act XXVII of 1860 need do nothing more than prove his title to collect the debts if there are any, not even give *prima facie* evidence of the existence of debts. BEEMUL DASS v. SHIKHUR CHAND, **24 W.R. 211.**

(22)—*Certificate to be granted only if debts are proved—Grantee must have best right.*—A certificate of administration ought not to be given without its being proved that there are debts, and that the grantee has the best right to collect them. UCHHUBA DOSSIA v. NITYANAND SHAHA, **24 W.R. 463.**

(23)—*Power of executor to appoint substitute —Summary inquiry.*—The power of an executor to appoint a substitute and all such questions arising out of the will are not matter for summary investigation on application for a certificate of administration. ISHEN CHUNDER BANERJEE v. DWARKANATH NUNDEE, 2 **W.R. Mis. 47.**

Certificate of administration—continued.

——7.—Miscellaneous —*continued.*

(24)—*Applicant being widow and heiress of deceased—Lapse of long time after applicant's death—No evidence of debts or assets—Grant of certificate to such widow.*—An applicant's being widow and heiress of a deceased person is not of itself a reason why a certificate of administration should be granted to her many (*e g.*, 20) years after his death, in the absence of evidence of debts or assets. WOOMA TARA GOOPTA v. KALEE TARA GOOPTA, **25 W.R. 93.**

(25)—*Certificate under Act XXVII of 1860—Conditions.*—Under what circumstances an applicant is entitled to a certificate under Act XXVII of 1860. *In re* BAMA KALLEE DASSEE, **10 W.R. 4.**

(26)—*Act XXVII of 1860—Suit by legal representative to recover debt due to deceased—Heirship certificate if and when necessary.*—The production of a certificate of heirship under Act XXVII of 1860 is not a condition precedent to the institution of a suit by a person claiming to be the legal representative of a deceased creditor. But the Court may require the plaintiff to obtain such a certificate, if it entertains any reasonable doubt as to the person entitled to the payment. *In re* RAMDAS BRIJ GOVINDAS, **10 B. 107.**

(27)—*Property in wrongful possession of another not recoverable under certificate.*—Certificate under Act XXVII of 1860, authorises collection of debts of deceased, but not recovery of property in wrongful possession of another. MEWSOON v. MEE NAY, **8 W.R. 1.**

(28)—*Hindu widow with certificate not proper person to continue suit for recovery of immoveable property—Widow can do so as heir to childless deceased.*—A Hindoo widow holding a certificate under Act XXVII of 1860 is not necessarily the proper person to continue suit for recovery of immoveable property ; but she is entitled to do so as heir, if deceased, being sole owner, died without issue. SEVINTHIA PILLAI v. MOOTOOSAWMY, **8 W.R. 2.**

(29)—*Suit by heir of deceased—Production of certificate—Order directing issue of certificate insufficient.*—The heir of a deceased person is, in a suit by himself, bound to produce the certificate itself where a certificate of heirship is a condition precedent to his right of suit. It is not sufficient for the heir to produce the order or a copy of the order, directing the issue of such certificate to him. MULCHAND v. MOTICHAND HARGOVANDAS, **9 B H.C. 37.** (7 B.H.C. A. C. 31, 32, 8 B.H.C. 1, 9, 140, 154, 155, *R.*) [*D.*, 19 B. 320.]

(30)—*Party in a suit, deceased—Next heir—Certificate—Act XXXVII of 1860 —Held* that, under Act XXVII of 1860, a certificate is not necessary in order to allow a party who is next heir to come in to represent a deceased party in a suit. OLONGO MOONJEREE DOSSEE v. GOBINDNATH, **W.R. 1864, Mis. 14.**

(31)—*Carrying on of suit or executing decree for deceased person—Permission for, without certificate under Act XXVII of 1860.*—When a

Certificate of Administration—continued.

——7.—Miscellaneous—*continued.*

party makes an application to a Court to allow him co represent a deceased person in respect of the carrying on of a suit or executing a decree, the Court may take evidence, and, if satisfied, may grant him such permission without giving him a certificate under Act XXVII of 1860. Such permission would be limited to the particular purpose and would not be a warrant to such party to collect debts as if he held a certificate under Act XXVII of 1860. SYED EKRAM HOSSEIN v. RAJAH KIRTEE CHUNDER BAHADOOR, **3 W.R. Mis. 9.**

(32)—*Certificate of administration—Person unwilling to take it — Procedure—Mother of minor.*—An order for the issue of a certificate of administration to a particular individual ought to be made only when it is known that, that individual is willing to take it ; but not otherwise. A certificate of administration ought not to be forced upon the unwilling mother of a minor. Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her. *Held*, that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her. Course pointed out where no relative or friend of a minor can be found willing to take such a certificate. BABAJI v. MARUTI, **11 B.H.C. 182.**

(33)—*Certificate of administration—Act XX of 1864, s. 11—Scope of certificate.*—*Held* that where the Court, under s. 11 of Act XX of 1864 (Minors Act), directs a certificate of administration to the estate of a minor to be granted to the Collector of a district, such certificate must extend to the moveable as well as the immoveable estate of the minor. LAKSHMIBAI v. GANESA ANTAJI *et al*, **4 B.H.C. A. C. 129.** [*R.*, 21 A. 412, P.C].

(34)—*Act XX of 1864—Administration of minor's estate, effect of certificate granted under the Act for.*—The deed settling the terms of adoption by a widow provided for the management of the estate by her during the minority of the boy taken in adoption on the application of the natural father of the boy. However, the District Court granted him a certificate of administration of the minor's estate and that Court's order was confirmed by the High Court holding on appeal that the administration certificate was only an authority for managing the minor's estate as it really existed. Also, any right of property or possession which could properly have been asserted by the widow against the minor before the certificate was issued to the natural father might equally be asserted even after the grant of the certificate, and so, the widow was not, by the appointment of the natural father of the minor boy as administrator of his estate, deprived of any right or interest vested in her by the deed of adoption. GURUPADAVA v. PUTAPA, **8 B. 599.**

Certificate of Administration—concluded.

——7.—Miscellaneous—*concluded.*

(35)—*Act XL of 1858—Natural guardian of a Hindu minor—His powers.*—The natural and legal guardian of a Hindu minor may deal with the minor's property by mortgage or otherwise, within proper limits without a certificate of administration under s. 2 of Act XL of 1858, from the Civil Court. HEIT SINGH v. THAKOOR SINGH, **4 N. W. P. 57.** [*F.*, 3 A. 535.]

(36)—*Undivided Hindu famiey—Certificate of administration grantable in respect of share of minor member—Ascertainment of minor's share, necessity of regular suit for.*—On an application being made for the appointment of an administrator, under Act XX of 1864, for the estate of the minor members of a joint Hindu family it is competent to the Court to make such an appointment, but not to remove the person in management of the joint property, with a view to ascertain and divide off the shares of such minors. The rights of persons other than the minors in the joint property could only be dealt with in a regular suit instituted by a person properly representing the minors. BABAJI v. SHESHGIRI, **6 B. 593.** [*R.*, 19 B. 309.]

(37)—*Debts due to person deceased—Enforcement of payment of — Certificate under Act XXVII of 1860.*—A person, who enforces payment of a debt, as the heir of a person deceased, must produce a certificate, which the debtor has a right to require in order to save himself from the risk and liability of paying the debt to the wrong person. TARINEE PERSHAD GOOSE v. GUNGA DHUR, **6 W.R. Mis. 34.**

—*Claims made to deposits by holders of administration certificates.*—This circular draws attention to G.O. No. 7 of 1875 about claims made to deposits by holders of adminstration certificates. **Rev. Cir. No. 2, 25 W.R. Rev. Cir. 1.**

Form of application for certificate of administration. **25 W.R.H.C. Rules Cir. No. 2, dated 28th January, 1876, p. 3.**

See BOM. ACT XX OF 1864, 3 B. 431.

See COSTS—SPECIAL CASES, 3 W.R. 23.

See HINDU LAW—ANCESTRAL PROPERTY, 3 N.W.P. 91.

See MINOR—SUITS BY AND AGAINST MINORS, 6 W.R. Mis. 116.

See REPRESENTATIVE OF DECEASED PERSON, 8 B.H.C. A.C. 152.

Certificate of Collector.

(1)—*Under the Pensions Act.*—Effect of certificate of Collector. *See* KRISHNAJI v. ANANT, **5 Bom. L.R. 950 = 28 B. 241.**

(2)—*Revocation by Revenue Commissioner.*—Revocation of certificate of a Collector is not permissible to the Revenue Commissioner. BHIMBHAT v. BHIKAMBHAT, **1 Bom. L.R. 184 = 23 B. 676.**

Certificate of Collector—*concluded.*

(3)—*Suit on agreement for maintenance from cash allowance—Necessity of certificate.*—Certificate of a Collector is required in a suit based on an agreement to allow maintenance out of cash allowance. DAMODAR v. SATYABHAMABAI, 9 **Bom. L.R. 889=31 B. 512.**

(4)—*Suit for arrears of assessment from Khatedars—S. 9, Pensions Act, 1871—Inam.*—Certificate of Collector is not required in a suit for arrears of assessment, due from khatedars holding lands in an Inam village, by the Inamdar, whose right to the inam is admitted by Government under s. 9 of the Pensions Act, 1871. ANTAJI v. KASHINATH, **6 Bom. L.R. 423.**

Certificate of Guardianship.

(1)—*Act XL of 1858, ss. 6, 12, 21—Marriage of minor no sufficient cause for withdrawing manager's certificate—Resignation by manager-Appointment of successor—Notice—New manager and guardian.*—The marriage of a minor is not a sufficient cause within the meaning of s. 21, Act XL of 1858 for withdrawing a certificate as manager, without neglect of duty or similar cause. One manager under Act XL of 1858 cannot shift the responsibility from himself and resign the appointment and another take it up without the provisions of s. 6, Act XL of 1858, being duly carried out. Where two parties were fighting to get hold of the property of a minor who was likely to suffer if it remained in the hands of either, the Court ordered it to be made over to the Collector under s. 12, Act XL of 1858, with direction to appoint a manager and guardian. MUSST. JUGODUMBA KOER v. MUSST. MIRCHA KOER, **17 W.R. 269.**

(2)—"*Residence*"—*S. 5, Act XL of 1858—Construction.*—The word "residence" in s. 5, Act XL of 1858, is not where the minor may be dwelling when the application for a certificate is made, but the family-house where every member usually resides, though circumstances may arise in which it may be taken to mean otherwise. SHEIKH MAHOMED HOSSEIN v. AKBUR HOSSEIN *alias* NUKCHEDOO, **17 W.R. 275.**

(3)—*Re-call of—Waste by sale of property for small debts.*—A certificate of guardianship was re-called where the guardian had been grossly wasting the property by allowing portions to be sold for debts of a very small amount when there was an ample fund to prevent the sales. GOONOMONEE DOSSEE v. BHABU SOONDUREE DOSSEE, **18 W.R. 258.**

(4)—*Revocation of certificate—S. 21, Act XL of 1858—Misconduct.*—A certificate of guardianship was cancelled under s. 21, Act XL of 1858, in a case where the guardian, without any sufficient cause or justification and without legal advice, withdrew an appeal made to set aside a sale of the estate of the minors, and at the same time dealt with the auction-purchaser

Certificate of Guardianship—*concluded.*

and obtained a putnee of a portion of that very property in the name of his own wife. BIATMBER DAY MOZOOMDAR v. ISHUN CHUNDER DUTT BISWAS, **18 W.R. 169.**

(5)—*Suit to revoke certificate.*—It is not necessary to institute a regular civil suit in order to obtain the revocation of a certificate of guardianship. MAHOMED NUKSHUND KHAN v. MUSUMAT AFZUL BEGUM, **3 N.W.P. 149.**

See EVIDENCE ACT, s. 35, 17 C. 849.

Evidentiary value of certificate on question of age of minor—*See* MINORITY, 18 A. 478 = A.W.N. 1896, 158.

See REGISTRATION ACT, 1908, ss. 71—77, 7 B.H.C. A.C. 3.

Certificate of heirship.

(1)—*Reg. VII of 1827, certificate of heirship not obtainable by minor under.*—Having regard to all the provisions of Reg. VIII of 1827, a certificate of heirship cannot be granted under that Regulation to a minor. BAI BAIBA v. BAI DAGUBA, **6 B. 728.** [*R.*, 7 B. 341.]

Certificate of Sale.

(1)—*To auction purchaser—Refund of money by later mortgagees, authority to require.*—A certificate of sale to an auction-purchaser confers on him no right to require the later mortgagees or those purchasing under them as auction purchasers to return back the money he paid either personally or out of the property. BAIJNATH v. BHIMAPPA, **3 Bom. L.R. 92.**

(2)—*Effect of.*—A certificate of sale, granted under s. 316 of the Civ. Pro. Code, 1882, is not conclusive as to the property sold. So far as regards the parties to the suit and those claiming through or under them, the certificate is determinative as to the date from which the property sold actually vests in the purchaser. The property sold is what is described in the proclamation of sale. BALWANT v. HIRACHAND, **5 Bom. L.R. 217=27 B. 344.** [*R.*, 6 Bom. L.R. 864.]

(3)—*If necessary to be filed in suit for establishment of title by auction-purchaser—Decree against landlord, if admissible in evidence against tenant.*—A purchaser of immoveable property at an execution-sale can establish his title by evidence independently of the sale certificate; a sale certificate is not the title, but merely the title-deed. (27 B. 379, 5 A. 305, *F.*) A decree obtained by a person, claiming to have a proprietary right to certain lands, against other persons who set up similar proprietary right to the same lands, is admissible in evidence against the tenants of the latter, who were not parties to the suit in which that decree was obtained, and who do not claim independently of their landlords. TANTARDHARI SINGH v. SUNDER LAL MISSIR, **7 C.L.J. 384.** [*R.*, 7 C.L.J. 387, 9 C.L.J. 346=1 Ind. Cas. 63.]

Certificate of Sale—*continued.*

(4)—*Dispossession under sale certificate not warranted by sale—Complaint not made by executing Court—Suit for restoration—Limitation.*—A party dispossessed under a certificate of sale not warranted by the sale itself, who has made no complaint to the Court executing, may sue for restoration any time within twelve years. BHEEM GOYALLEE v. KHOOBEEN SAHOO, **17 W.R. 429.**

(5)—*Sale certificate, how to be construed.*—A sale certificate will not be invalidated by a mere inaccuracy of language or misdescription. The intention of the parties must be given effect to. SHEIK MOULA BUKSH v. MOONSHEE KURUCK LALL, **7 W.R. 246.**

(6)—*Act VIII of 1859, s. 259—Ex parte order amending certificate.*—A Court is not legally competent to make an *ex parte* order amending a sale certificate, granted under Act VIII of 1859, s. 259. RAJAH RAGHOO NUNDUN SINGH BAHADOOR v. ROBERT WILSON, **23 W.R. 301.**

(7)—*Admissibility of evidence of, to identify subject of sale.*—Where a sale certificate is accurate as to any part of the description of the subject of sale, and can be used to identify it with the help of extraneous evidence, such evidence can be received. MUSSAMUT MALEEBUN v. MUSSAMUT RASEEDA, **25 W.R. 401**

(8)—*Contradiction of sale certificate—Evidence of facts lying behind certificate.*—The Court refuses to go to facts lying behind a sale certificate for the purpose of contradicting its terms. LALLA BISSESSUR DYAL v. DOOLA CHAND SAHOO, **22 W. R. 181.** [*R.*, 27 B. 334.]

(9)—*Identity of land not disputed—Misdescription of right transferred by certificate—Grant of possession to purchaser.*—Where the identity of the land is not in dispute, the mere circumstance that the right transferred by a sale-certificate, is called by mistake *joteedakhalee*, instead of by some other term nearly importing the same thing, is not a difficulty in the way of giving the purchaser possession. SHAIKH KULEEMOODDEEN DAROGA v. ASHRUF ALI KHAN, **19 W.R. 276.**

(10)—*Verbal error in execution proceedings—Effect on purchaser's right.*—A mere verbal error in proceedings in execution of a decree, if there is no doubt as to the Court's intention, does not defeat the auction-purchaser's right. A sale allowed to be completed without opposition from the judgment-debtor who accepts the proceedings so far as to petition for extension of time must not be treated as a nullity. TARANATH CHUCKERBUTTY v. JOY SOONDUREE DABEE, **21 W.R. 93.**

(11)—*Admission of documents subject to proof—Construction of sale certificate—Misdescription.*—It should be distinctly noted that an admissible document coming under the class requiring proof is admitted on the record subject to proof. Documents not evidence between the parties should not be admitted in evidence. In

Certificate of Sale—*continued.*

construing a sale-certificate, the Court must try and ascertain what was intended to be sold, a mere misdescription does not defeat the purchaser's right. WILLAIM BRUCE MANSON v. GOLAM KEBRIA MOONSHEE. **15 W.R. 490.** [*F.*, 21 W.R. 93; *Cons.*, 19 W.R. 276.]

(12)—*Execution sale under barred decree—Sale certificate, effect of.*—Where a decree under which a sale takes place is in force and the sale has been confirmed, a sale certificate would operate as a valid transfer of the property sold, notwithstanding that the sale actually took place at a time when execution had become barred. SARODA CHURN CHUCKERBUTTY v. MAHOMED ISUF MEAH, **11 C. 376.** (7 C. 91, 8 C. 51, *F.*)

(13)—*Effect of—Registered certificate of sale—Un-registered previous optionally—Registrable sale-deed — Priority.*—A certificate of sale issued under the Civ. Pro. Code is not an instrument operating to create, limit, or extinguish title. It is an act of Court exhibiting the assent of the Court to the sale which in effect transferred what title the owner had to the purchaser—such transfer to take effect on the granting of the certificate. The holding of a registered sale certificate does not entitle the holder to priority over a purchaser under an earlier but unregistered sale-deed, which was optionally registrable. NARASAYYA v. JANGAM, **7 M. 418.** [*R.*, 11 M. 296.]

(14)—*Execution-sale of lease decreed with mesne profits—Certificate of sale.*—Where, in execution of a money decree against the representatives of the judgment-debtor, all their right, title and interest in a lease, the possession, with mesne profits, of land comprised in which had been formerly decreed to the judgment-debtor, was sold, it was held that inasmuch as the certificate of sale referred only to the lease the right to the mesne profits awarded by the original decree did not pass by the sale. GANESH LAL TEWARI v. SHAMNARAIN, **6 C. 213.**

(15)—*Unregistered—Non-production—Rule of presumption.*—Omnia rite acta.—A purchaser in Court-sale need not prove the sale certificate or its registration, if the auction-purchaser is proved or admitted. VELAN v. KUMARASWAMI, **11 M. 296.** [*F.*, 7 C.L.J. 384; *R.*, 96 P.L.R. 1909=9 P.R. 1909.]

(16)—*Certificate acquiring force of final decree—Bengal Act, VII of 1880, ss. 8 and 10—Sale under certificate—Substantial injury—Remedy.*—The certificate would become absolute and take effect as a final decree under s. 8 of Bengal Act VII of 1880, only when the notice under s. 10 is actually served. Where substantial injury has resulted from a material irregularity in the publication or conduct of a sale under a certificate under Bengal Act VII of 1880, the judgment-debtor's only remedy is by appeal under s. 2 of Bengal Act VII of 1868. SADHUSARAN SINGH v. PANCH DEO LAL, **14 C. 1** [*Overruled*, 5 C.W.N. 521, F.B.=29 C. 73; *F.*, 22 C. 419, 23 C. 641; *R.*, 21 C. 360. 11 C. W.N. 803=6 C.L.J 84=34 C. 677.]

Certificate of Sale—*continued.*

(17)—*Registration of certificate of sale — Of memorandum—Act VIII of 1859, s. 259—Act XX of 1866, ss. 17 and 42.*—Under the provisions of Act VIII of 1859, s. 259, and Act XX of 1866, s. 17, a certificate of sale requires to be registered and the registration of a memorandum of the certificate is not sufficient. SRINIVASA SASTRI v. SESHAIYYANGAR, **3 M. 37, F.B.** [*Cons.*, 11 M. 296.]

(18)—*Certificate of sale, Effect of.*—The effect of the grant of a certificate of sale is to create statutory evidence of the transfer and it is not necessary to pass the title. SADAGOPA v. JAMUNA BAI, **5 M. 54.**

(19)—*Sale-certificates, registration of—Registration Act (of 1871 and 1877), s. 17.*—Sale-certificates granted under s. 259 of Act VIII of 1859, Civ. Pro. Code, are not compulsorily registrable under s. 17 of the Registration Act. PROKASH CHUNDER DASS v. TARACHAND DASS, **9 C. 82, F.B. = 12 C.L.R. 1.**

(20)—*Certificate of sale left unregistered—Grant of fresh certificate — Practice.* — On attempting to get possession of the house purchased by the applicant at a Court-sale, he was obstructed, and, with his application for removal of the obstruction, presented his sale-certificate which he had not got registered. On the refusal of the above application because of the non-registration of the sale certificate, he applied for a fresh certificate. The lower Courts having refused to grant the same, he made the present application to the High Court under its extraordinary jurisdiction, and that Court ordered that a fresh certificate, dated the day on which it may be granted, and reciting the fact of the sale and the date thereof, should be given, the original certificate in the applicant's possession being taken back. *In re* LAKSHMAN, **9 B. 472.**

(21)—*Issue of certificate of sale—Insufficiency of stamp—Court not bound to grant fresh certificate.*—A Court, having once issued a certificate of sale to a purchaser at the Court auction, is under no obligation to give him another for the sole purpose of evading the penalty which he has incurred by not having presented in the first instance to the Court a paper properly stamped for it. NANDRAM MOTIRAM v. KACHA BHAV, **9 B. 526.**

(22)—*Grant of sale certificate—Ministerial duty—Statute of Limitation.*—Where a duty is cast upon the Court to do a certain thing, as for instance, the grant of a sale-certificate, the Statute of Limitation does not apply. A sale-certificate granted more than three years after the confirmation of sale would therefore be valid and not open to objection on the ground of its having been applied for more than three years after confirmation of sale. DEVIDAS JAGJIVAN v. PIRJADA BEGAM, **8 B. 377.** [*R.*, 30 B. 415 = 8 Bom. L. R. 218.]

(23)—*Certificate of sale, claims admitted or established by decree to form part of, for purposes of stamp duty.*—Claims in respect of

Certificate of Sale—*continued.*

property admitted by the parties or established by decree passed by a Court is to be entered in the certificate of sale and computed as part of the purchase-money for the purpose of stamp duty. *In re* RAM KRISHNA, **9 B. 47.** [*F.*, 15 B. 532.]

(24)—*Mortgage—Registration.*—An endorsement made and signed by a Judge on a deed of mortgage of immoveable property, certifying that the deed was purchased at a public sale, held in his Court, in execution of a decree, operates as a sale certificate, and, if it relates to immoveable property of the value of Rs. 100 and upwards, must be registered, and, if unregistered, is inadmissible in evidence. KANAHIA LAL v. KALI DIN, **2 A. 392.**

(25)—*Purchaser at sale in execution, limitation for application for possession made by—Limitation Act (XV of 1877), sch. II, art. 178.*—An application by an auction purchaser, praying to be given possession of the property purchased by him, should be made within three years from the date on which the certificate of sale was issued and granted to him. Otherwise the application would be barred by time under art. 178 of the Limitation Act of 1877. HANMANTRAV PANDURANG JOGLEKAR v. SUBAJI GIRMAJI, **8 B. 257.** [*R.*, 32 M. 136 = 19 M.L.J. 224 = 4 M.L.T. 350, 14 C.W.N. 433 = 5 Ind. Cas. 89]

(26)—*Sale certificate—Registration Act, III of 1877, s. 17 (b)—Civ. Pro. Code, s 316.*—A certificate of sale, granted under s. 316 of the Civ. Pro. Code, does not require registration as provided by s. 17 of the Registration Act, for it is not an instrument of the kind mentioned in cl. (*b*) of that section. MASARAT-UN-NISSA v. ADIT RAM, **5 A. 568. F.B = A. W.N. 1883, 159.** [*R.*, 142 P. R 1908, F.B]

(27)—*Certificate of sale—Right of action.*—The appellant sued the respondents to recover possession of certain property purchased by him for Rs. 40 at a sale in execution of a decree. He had no certificate of sale. *Held* that suit had been properly dismissed by the lower Courts. CHIRANJI LALL v. NATHU, **A. W.N. 1882, 105.**

(28)—*Sale certificate—Duty of purchaser—Evidence.*—It is the business of an auction-purchaser to see that the sale-certificate conveys to him what he supposes himself to have purchased, and it is open to him to adduce evidence afterwards to prove that he purchased anything more than the certificate shows him to have taken in the sale. No amount of evidence showing that the tenants have been willing to pay rents to an auction-purchaser can prevail against the rights of a *mokurrureedar* whose tenure has survived an auction-sale. PEAREE MOHUN MOOKERJEE v. GOSTO BEHARY DEY, **26 W.R. 104.**

See ACT I OF 1868, 5 O.C. 228.

Value of—issued under the Revenue Sale Law (Bengal Act XI of 1859)—*See* BEN. ACT XI OF 1859, 10 C.W.N. 948 = 33 C. 1193.

Certificate of Sale—*continued.*

See BEN. ACT XI OF 1859, s. 14, 4 C.W.N. 465.

Does not create a title, but is merely evidence of title—Title of purchaser when he comes final—*See* BEN. ACT XI OF 1859, ss. 27, 54, 7 C.L.J. 387.

See BEN. ACT VII OF 1880, ss. 21, 22, 17 C, 414.

See APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 12 B.H.C. 247.

Grant of—Certificate of sale ordered to be granted where the auction-purchaser who entered into possession laid out great sums of money on the property of purchaser—*See* AUCTION-SALE, 1 Bom. L.R. 446.

See CIV. PRO. CODE, 1908, s. 65, O. XXI, r. 94, 7 M. 248.

Order disallowing application for amendment of—*See* CIV. PRO. CODE, 1908, s. 104, O. XLIII, r. 1 and s. 47, 23 A. 476=A.W.N. 1901, 156.

Is a document of title but is not a public document under s. 65 (*e*) of the Evidence Act, 1872—*See* CIV. PRO. CODE, 1908, O. XXI, r. 31, 2 Bom. L.R. 533.

Purchaser at execution sale—Suit for possession of property—Sale certificate whether necessary—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 92, 94, 5 A. 305, F.B.=A.W.N. 1883, 48.

See CIV. PRO. CODE, 1908, O. XLI, r. 23, 16 M. 207.

See LIMITATION ACT, 1908, art. 181, 4 M. 172, 5 B. 202, 6 B. 586.

Suit substantially against infant — Decree against widow and heiress of deceased landholder, representing her infant son—Sale-certificate describing judgment-debtor as widow of deceased and mother of infant son—Description irregular—Effect—*See* MINOR—SUITS BY AND AGAINST MINOR, 20 C. 11.

Suit to redeem by purchaser in execution—Absence of certificate of title—Production of certificate at hearing—*See* MORTGAGE—REDEMPTION, 6 B. 139.

Execution sale, evidence of — Sale-certificate not admissible for want of registration—*See* REGISTRATION ACT, 1908, s. 17, 7 C. L. R, 115.

Granted by Collector in accordance with the Rules issued by the Board of Revenue after sale of "B Class" lands—Transfer of title—Registration—*See* REGISTRATION ACT, 1908, s. 17, 35 C. 614.

Whether compulsorily registrable—*See* REGISTRATION ACT, 1908, ss. 23, 24, 60, 87, 89, 5 A. 84=A.W.N. 1882, 183.

Not registered, suit not maintainable by holder of—*See* REGISTRATION ACT, 1908, 49, 4 B. 155.

Certificate of Sale—*continued.*

See REGISTRATION ACT, 1908, s. 50, 3 B. H.C. A.C. 167.

Sale in execution of a Revenue Court decree—Title of purchaser — Sale-certificate and delivery of possession whether necessary to perfect title—*See* SALE—SALE FOR ARREARS OF RENT—GENERAL, 5 A. 297=A.W.N. 1883, 41.

See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 7 B. 254, 12 B. 589.

Application for sale-certificate by auction-purchaser—*See* SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 13 B. 670.

Purchaser of property at prior sale in execution of decree—Non-registration of certificate of sale—Purchaser at subsequent sale with registered certificate, rights of, as against previous purchaser—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 11 B. 588.

Certificate of sale—Sale subject to mortgage-lien—Property sold in different lots to different persons—Stamp duty payable by each purchaser, amount of—*See* STAMP, 10 B. 58.

Stamp duty—*See* STAMP ACT, 1879, cl. 16, sch. I, 5 M. 18, F.B.

Stamp duty on—*See* STAMP ACT, 1899, art. 18, ss. 23, 24, 5 B. 470, F. B.

Property sold subject to mortgage—Stamp duty leviable on purchase-money—*See* STAMP DUTY, 15 B. 532, F.B.

Certificate of the Conciliator.

Under the Dekkhan Agriculturists Relief Act—*See* BOM. ACT XVII OF 1879, s. 47, 10 Bom. L.R. 505=32 B. 375.

Certificate to collect Debts.

See CERTIFICATE OF ADMINISTRATION.

See SUCCESSION CERTIFICATE ACT.

(1)—*Certificate to collect debts of personal estate of deceased* mohunt—*Spiritual son and spiritual brother*—Mohunt.—As between the *chela* (spiritual son) and the *guru bhai* (spiritual brother) of a deceased *mohunt*, the former is entitled in preference to the latter, to a certificate to collect the outstanding debts in respect of the private estate of the deceased. DUKHARAM BHARTI v. LUCHMUN BARTI, 4 C. 955=4 C.L.R. 49. (21 W.R. 340, *D.*)

(2)—*Certificate to collect debts—Grant opposed—Duty of Court—Unnecessary enquiry into title—Ground for setting aside order upon careful investigation—Grant of certificate to collect debts opposed by alleged adopted son—Refusal by Judge to investigate title.*—When an application for the grant of a certificate to collect debts is opposed by another with an alleged preferable title, the Court is bound to enter into the question of title for determining which of

Certificate to collect Debts—*concluded.*

them has the preferential title to the certificate. [*Appr*, 15 C. 574 : *R*., 23 C. 431, See, also, 15 C. 574, 17 M. 437.] Where a certificate to collect debts has been granted, on an investigation of title, to the person who opposed the application, the circumstance that the Judge was warranted in having refused to go into the question of title, supposing he was, would be no ground for setting aside his order passed upon investigation. *Per White, J.* Whether the law laid down in 5 C.L.R. 517, that, upon an application for the grant of certificate to collect debts being opposed by an alleged adopted son the Judge is warranted in refusing to enter into an investigation of the *factum* and validity of the alleged adoption, is correct law ? SHEETANATH MOOKERJEE v. PROMOTHONATH MOOKERJEE, **6 C. 303=7 C.L.R. 475.** (20 W.R. 476, 4 C. 411, 3 C. 616, *R.*)

(3)—*Preference between major son and widow representing minor son.*—The elder son of a deceased Hindu, governed by Mitakshara, is entitled to a certificate to collect debts in preference to the widow of the deceased as representing her minor son. GOURAH KOERI v. GUJADHUR PURSHAD, **5 C. 219=4 C.L.R. 398.**

(4)—*Act XXVII of 1860—Court-fees Act, sch. I, art. 12—Power of third parties to compel grantee to render accounts.*—The power given to a Court to compel the grantee of a certificate under the Act to file a statement on oath of all moneys realized or recovered by him is not intended to be exercised to enable strangers to compel such grantee to render accounts of the administration of the estate. BAVA SANT RAM v. JASMAL, **94 P.R. 1887.**

Refusal to recall a—*See* CERTIFICATE OF ADMINISTRATION — CANCELLING CERTIFICATE, 6 C. 40=6 C.L.R. 388.

Application for certificate to collect debts due to a deceased person—*See* LIMITATION ACT, 1908, art. 181, 8 M. 207.

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See EVIDENCE—MISCELLANEOUS, 23 C. 950, P.C.=23 I.A. 72.

Of foreign judicial records, presumption as to—*See* EVIDENCE ACT, 1872, ss. 65, 66, 86, 2 Bom. L.R. 562.

Of order of Court passed on compromise—*See* EVIDENCE ACT, 1872, s. 77, 1 A.L.J. 369.

Execution in British India of decrees of Native States, Cooch Behar—Want of—*See* EXECUTION OF DECREE—NATIVE STATES, DECREES OF COURTS OF, 14 C. 546.

See REGISTRATION ACT, 1908, s. 57, 7. C. C. 365.

Certified Purchaser.

See BENAMI TRANSACTIONS—CERTIFIED PURCHASER.

Certified Purchaser—*concluded.*

Suit by real owner against—for declaration of title, dismissed as barred by s. 317, Civ. Pro. Code—Subsequent suit by—against real owner for profits—*Res judicata*, applicability of rule of—*See* RES JUDICATA—PARTIES, 2 A.L.J. 111=A.W.N. 1905, 39=27 A. 443.

Certiorari, Writ of.

(1)—*Removal by Bombay High Court, of case from Bombay Small Cause Court—Bombay High Court can superintend Bombay Small Cause Court—Ground for removal—Terms of order.*—The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of cl. 13 of the Letters Patent of the High Court, and the latter has, therefore, power, for purposes of justice, to remove a case from the Small Cause Court, and itself to try and determine such case. The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may under peculiar circumstances be a good ground for granting an order to remove a case from the Small Cause Court into the High Court. Terms upon which such order will be granted. PIRBHAI KHIMJI v. THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY, **8 B.H.C.O.C, 59.**

(2)—*Act IX of 1850 s. 54.*—A suit of *certiorari* lay, as of course, to remove, before judgment, all cases commenced in the Calcutta Court of Small Causes, subject to the limitation imposed by s. 54 of Act IX of 1850, unless such cases fell within the usual exceptions recognized in English practice, so far as such exceptions may be applicable to the High Court. PILLANS v. PENINSULAR AND ORIENTAL STEAMSHIP COMPANY, **1 Ind. Jur. O.S. 68.**

(3)—*Act XXVI of 1864, s. 7.*—It is no ground for the removal of a cause by *certiorari* from the Court of Small Causes that a difficult point of law is likely to be involved in it. The proper course is to apply to the lower Court under s. 7 of Act XXVI of 1864. MADHUB KISSEN SETT v. GOUR SOONDER SETT, **Cor. 90.**

Cess.

(1)—*Covenant—Construction of—"Road and public" work cesses as levied at present—Revaluation—Increased cesses payable by whom.*—Where the lessors agreed with the tenants that the latter were to pay, in addition to the fixed rent road and public works cesses at half-anna per rupee, as was levied at the time, according to the instalments given at the foot of the instrument. *Held*, that the lessees were to pay road and public works cesses at half-anna per rupee as was levied in accordance with the statutory provision of the subject, and that the effect of the covenant was not to impose the liability for any additional cesses upon the landlords. KRISHNA CHUNDRA BASU v. MOHENDRA NATH BASU, **13 C.L.J. 212=9 Ind. Cas. 704.**

Cess—*continued.*

(2)—*Act XVII of* 1876—*Not land-revenue.*—A cess is not land-revenue within the meaning of the U.P. Act XVII of 1876. JANKI BARSARAN v. RAMKUMAR DAS, **3 O.C. 823.**

(3)—*Cess and rent distinguished.*—The primary notion of a cess is a payment not for the benefit of the landlord, but a payment for some purpose of public convenience, such as sanitation, police and the like. The words "rent" "cess" and so forth, must be interpreted with reference to the meaning attached to them at the time for which the payments are claimed. *Muhtarfa* or rent of certain plots of land in the use and occupation of a *Chipi* a non-agricultural *raiyat* residing in the *Abadi* and carrying on the business of calico-printing, is not a cess and is therefore recoverable as rent. ABDUL HAI v. NATHUA, **1 A.L. 537.**

(4)—"Khurcha," *an illegal cess.*—*The "Khurcha"* is an illegal cess. A zemindar has no right to levy it from his tenant. NAGENDRA BALA DASSI v. GURU DOYAL MUKERJI, **30 C. 1011=7 C.W.N. 535.**

(5)—*Contract to pay.*—Where the talukdar has engaged to pay certain cesses for roads, schools, etc., he cannot recover them from the biswadars, unless they are bound to pay them by some positive law, or have engaged or have consented to do so; nor is any individual biswadar bound to pay merely because his co-partners have agreed to pay or have paid them. DHUNEE RAM v. MOORLEE DHUR, **2 Agra 326.**

(6)—*Liability to pay cess—Holders under biswadar—Contract to pay.*—*Held* that if the biswadars were not liable to cesses claimed, those holding under them could not be liable to plaintiff's claim; and that the liability of the defendants, whether they be lessees or mortgagees under the biswadars, must depend, firstly on the liability on the biswadars themselves and secondly, on the terms of the lease or mortgage under which they are found to be in possession. DHUNEE RAM v. MOORLEE DHUR, **2 Agra 325.**

(7)—*Cess not avowed or sanctioned—Right of suit to recover.*—A cess which was not avowed or sanctioned, cannot be recovered by suit, nor can it be taken into account in fixing the Government-revenue at the settlement. SHEIKH BISHARUT ALLY v. SEETUL MISSER, **1 N.W.P. 37.**

(8)—*Act XIX of 1844—Abolition of cesses on trades—Duty on cotton exported from Broach, whether "a tax upon a trade" within the Act.*—The late plaintiff-appellant was the managing proprietor of a temple in Broach and, in that capacity, he claimed to be entitled to a *lago* or perquisite or tax, of two annas per bale on all cotton brought in and exported from Broach. It was contended for the appellants that, though the tax in question was one affecting trade, it could not therefore be deemed a cess upon a trade within the meaning of that expression as intended by Act XIX of 1844. Their

Cess—*continued.*

Lordships of the Judicial Committee were, however, of opinion that the cess properly came within the purview of the Act and it had therefore been abolished by the Act. It was a cess of a mixed kind, local and indirect, upon a particular trade—the trade of cotton buyer carried on in Broach—attaching when the article of merchandise in which the trader deals is bought in Broach and exported from Broach. SHRI KALYANARAIJI v. THE MOFUSSIL COMPANY, LIMITED, **14 B. 326, P.C.=17 I.A. 103.** [*Appr.*, 5 Bom. L.R. 703.]

(9)—*Cess agreed to be paid in addition to original rent—Nature of combination—Rent lawfully claimable.*—The cess which a ryot consents to pay over and above the original rent forms, with the old rent, a new rent lawfully claimable under the contract. JEEUTOOLLAH PARAMANICK v. JUGODINDRO NARAIN ROY, **22 W.R. 12.** [*F.*, 8 C. 730.]

(10)—*Declaratory suit.*—A Government lessee cannot, where there is no contract, sue for declaration of right to levy a cess upon a jotedar grazing his cattle on his own jote within the precincts of the lessee's mehal. BHUGEERATH SHIKDAR v. RAM NARAIN MUNDUR, **9 W.R. 299.**

(11)—*Government revenue, and public cesses.*—Revenue and the public cesses constitute a standing encumbrance and first charge upon the land subject to them. CHATRAPUT SINGH v. GRINDRA CHUNDER ROY, **6 C. 389=7 C.L.R. 456.** [*Disc.*, 30 C. 778=8 C.W.N. 357.]

(12)—Dak cess—Dak *cess regarded as rent, when.*—Where *dak* cess is claimed under the contract by which the rent is payable, according to the definition of the word "rent" as contained in the Bengal Tenancy Act, it must be regarded as rent, that is to say, as a part of what is lawfully payable in money for use and occupation of the land held by the tenant. WATSON & CO. v. SREE KRISTO BHUMICK, **21 C. 132.**

(13)—*Cess leviable according to village custom—Re marriage of widows—Maintainability of suit—Act XIX of 1873 (N.W.P. Land Revenue Act), s. 66—Requisites of a valid custom—Entry of cess—Not conclusive evidence of custom—Cesses leviable on marriage—Inapplicability of English analogies.*—A Civil Court cannot enforce a cess leviable according to village custom on the re-marriage of widows of a particular sect, when such cess is not recorded in the settlement record, under the general or special sanction of the Local Government. (S. 66, N.-W.P. Land Revenue Act). Among the conditions essential for establishing a custom are that it is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. The mere entry of a customary cess by a settlement officer may be important evidence of custom, but it is not conclusive proof of it. *Per Stuart, C. J.*—That public policy favours marriage and that a custom, which allows the levy of a cess on marriages is

Cess—*continued.*

opposed to such policy, are considerations derivable from English law and are inapplicable to cases in this country where Zemindars sometimes claim such cesses on the strength of village custom. LALA v. HIRA SINGH, **2 A. 49**

(14)—*Payment on account of chowkidari tax, nature of—Suit for arrears of chowkidari tax—Act VI of 1870 (Bengal)—S. 3 Reg. V of 1812—Act VIII of 1885 (Bengal Tenancy)—Act XIV of 1882 (Civ. Pro. Code), s. 586—Second appeal.*—The amount, which a putnidar agrees to pay to the zemindar on account of the chowkidari tax, is paid quite as much on account of the occupation of land of the *mouza* by him as that which is expressly called the rent, and is part of the ground rent quite as much as the latter. A stipulation for the payment of such amount cannot be regarded as one for the "imposition of an arbitrary or indefinite cess," within the meaning of s. 3, Reg. V of 1812, or for an imposition "under the denomination of *abwab*, *mathout*, or the like application in addition to the actual rent" within the meaning of s. 74 of the Bengal Tenancy Act, for the imposition here depends, primarily not upon the will of the zemindar, but upon the law of the land (Bengal Act VI of 1870). (4 C. 576, *F.*; 17 C. 131, 726, *D.*; 15 C. 828, *R.*) [*F.*, 26 C. 611; R., 3 C.L.J. 337, 6 O.C. 299.] A suit for arreas of chowkidari tax is one for "rent," when such tax is legally recoverable. (8 W.R. 517, 9 W.R. 518, 11 C. 221 and 21 C. 132, *R.*) In a suit for arrears of chowkidari tax, there is a second appeal. ASSANULLA KHAN BAHADUR v. TIRTHABASHINI, **22 C. 680.**

Estates under the direct management of the Collector are liable to zemindaree dak cess, **Rev Cir No. 1, 21 W.R. Rev. Cir. p. 12.**

See ABWABS, 11 C. 175, F.B., 15 C. 828, 17 C. 726, F.B.

Abwabs, suit by landlord to recover—Long period of payment of Abwabs—Effect—*See* ABWABS, 17 C. 131=16 I.A. 152. P.C.

See BEN. ACT X OF 1859, s. 78, **1 N.W.P. 41.**

Public Works Cess, Ben. Act III of 1877, —Road—Public cess—Income-tax—*See* BEN. ACT X OF 1871, 11 C.L.R. 140.

See BEN. ACT VII OF 1880, ss. 10, 19, 19 C. 783.

Publication of valuation-roll not condition precedent to liability to pay road—*See* BEN. ACT IX OF 1880, ss. 34, 35, 36, 41, 28 C. 109.

See BEN. ACT IX OF 1880, s. 56, 10 C. 743.

See BEN. ACT IX OF 1880, s. 106, 28 C. 637 =6 C.W.N. 128.

See BEN. ACT VIII OF 1885, ss. 53 to 68, 72 to 75, 20 C. 254.

See BEN. ACT VIII OF 1885, ss. 74, 179, 26 C. 611=3 C.W.N. 608.

Cess—*continued.*

Dispute regarding dak—Nature of dispute —Amount in dispute less than Rs. 100—Appeal —*See* BEN. ACT VIII OF 1885, s. 153, 21 C. 132.

Suit to set aside sale for arrears of cesses on the ground that no notice was issued under s. 10, maintainable—*See* BEN. ACT I OF 1895, 28 C. 813=6 C.W.N. 331.

Lessor may recover local fund—From lessee —*See* BOM. ACT III OF 1869, s. 8, 17 B. 54.

Water cess—Tenant — Extra water taken from landlord's tank—*See* MAD. ACT VIII OF 1865, 10 M. 282.

Land-cess in the nature of rent—*See* MAD. ACT VIII of 1865, s. 4, 13 M.L.J. 211.

See U.P. ACT XIX OF 1873, s. 66, A.W. N. 1893, 205.

Payment of rent in kind—*See* U.P. ACT, XIX OF 1873, s. 66, A.W.N. 1885, 320.

See U.P. ACT III OF 1878, s. 8, A.W.N. 1899, 187.

Whether '*muhtarifa*.' recorded in a village *wajib-al arz*, is rent or 'cess' within the meaning of Act III of 1901 (U.P. Land Revenue)—*See* U.P. ACT III OF 1901, ss. 56, 86, 27 A. 183.

Levying of market dues—Legality—*See* U. P. ACT III OF 1901, ss. 56, 86, 7 A.L.J. 176=5 Ind. Cas. 288=32 A. 193.

Liability of Babuana property of cesses— *See* BABUANA GRANT, 13 C.W.N. 118=4 Ind. Cas. 331.

See CONTRACT—ILLEGAL CONTRACTS, 9 C.L.R. 279, 3 B.L.R.A.C. 44=11 W.R. 395.

Right to levy—On cotton from Broach—Suit for declaration of right, illegality of cess under Act XIX of 1844—Agreement to pay tax prohibited by law—*See* CONTRACT ACT, 1872, s. 23, 8 B. 398.

See CUSTOM, 1 A. 440, 1 Agra 134, 135.

See DAMAGES—DAMAGES, SUITS FOR, 8 C. 290=10 C.L R. 223.

Cess paid under fear of distraint, if can be recovered—*See* INAM, 6 M.L.T. 242=19 M.L.J. 470=32 M. 456=3 Ind. Cas. 456.

Inamdar whether entitled to claim from Government the expenses of collecting—from tenants—*See* INAMDAR, 17 B. 422.

See JURISDICTION OF REVENUE COURTS, 3 N.W.P. 21.

Water cess—*Isara* pattadar's liability to pay—*See* LANDLORD AND TENANT—GENERAL, 10 M L.T. 452.

Illegal cess, what is.—*See* LANLORD AND TENANT—GENERAL, 10 Ind. Cas 465.

Mulganidar not liable to pay increased rent on enhanced assessment and local—*See* LAND TENURE—IN KANARA, 4 B. 478, Note=P.J. 1879, 294.

Cess—*concluded.*

Proceedings of Settlement officer as to—*See* LIMITATION ACT, 1908, arts. 45. 46, 1 Agra 134.

Suit for recovery of money paid in excess on account of road—*See* LIMITATION ACT, 1908, art. 96, 12 C 533.

Suit by Zemindars against muafidars for consolidated cess—*See* LIMITATION ACT, 1908, art. 132, A.W.N. 1882, 28.

Levy of summary cess—Interest in immoveable property—Impeachment of—Limitation—*See* LIMITATION ACT, 1908, art. 144, 13 Bom. L.R. 1047.

See PRINCIPAL AND AGENT — MISCELLANEOUS, 30 C. 1011=7 C.W.N. 535.

See BEN. REG. V OF 1812, 15 C. 828.

See BEN. REG. XX OF 1817, s. 10, 28 C. 293.

Payments made to Zemindar by occupiers of village *abadi* on marriages whether ground rent or cess—*See* RENT, 11 Ind. Cas. 217.

Mention of—In survey proceeding—Judicial determination—*See* RES JUDICATA—ADJUDICATIONS, 1 Agra 135.

See RIGHT OF SUIT—MISCELLANEOUS, 2 N.W.P. 425.

Suit for zemindari cesses, not Small Cause suits—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, 1 A. 444, F.B.

See SMALL CAUSE COURT — MOFUSSIL, JURISDICTION OF — GENERAL, 3 N.W.P. 21.

See TAX, 2 B.H.C. 75.

Burden of proof—Supply of water through Government source—Second crop cultivation—Liability of Zemindar to pay water-cess—*See* WATER RIGHTS, 14 M.L.J. 350.

Cess Act.

See BEN. ACT IX OF 1880.

Cess, District Road Act.

See BEN. ACT X OF 1871.

Cess in lieu of Village Fees Act.

See MAD. ACT IV OF 1864.

Cess, Madras Irrigation Act.

See MAD. ACT VII OF 1865.

Cession of British Territory.

(1)—*Re arrangement of jurisdiction within British territory—Legislative Act necessary—3 & 4 Will., IV., Cap. 85, s. 43—24 & 25 Vic., Cap. 67, s. 22—24 & 25, Vic., Cap. 104, s. 9—Agreement to transfer from British to Political Agent's jurisdiction—Not cession of British territory—Proof—Evidence Act, 1872, s. 113—Power of Governor-General—Cession of territory—Legislation as to sovereignty or dominions of Crown—British Court—Territorial jurisdiction — Cession of territory — British territory in India — Power to cede.*—A rearrangement of jurisdiction within British

Cession of British Territory—*continued.*

territory, by the exclusion of a certain district from the Regulations and Codes in force there, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control, cannot be done without a Legislative Act, under the provisions of 3 and 4 Wm. IV. Cap. 85, s. 43, 24 and 25 Vic., Cap. 67, s. 22 and 24 and 25 Vic., Cap 104, s. 9. [*Expl.*, 33 C. 219, P.C.=10 C.W.N. 361=3 C.L.J. 395=8 Bom. L.R. 129=3 A.L.J. 250=16 M.L.J. 115=1 M.L.T. 115=33 I.A. 1] An agreement on the part of the Government of India whereby they purported to transfer certain British territories from ordinary British jurisdiction to the supervision, laws and regulations of a Native State Political Agency, does not amount to a cession of British territory to a Native State. Such a cession, being a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, must be strictly proved and cannot be established by any uncertain inferences from equivocal acts. [*R.*, 16 P.L.R. 1904.] The Governor-General in Council being precluded by St. 24 & 25 Vic., Ch. 67, s. 22 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, cannot, by any Legislative Act (*e.g.*, Evidence Act I of 1872) purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude enquiry by the Court as to the nature and lawfulness of that cession. The jurisdiction of a British Court, over the subject-matter of a suit and the parties thereto, where it is territorial, and the territory ceases to be British by any valid cession, can no longer be exercised, whatever may be the stage or condition of the litigation at the time of such cession. [5 B. 249, 8 C. 985.] *Semble*—that the general and abstract doctrine laid down by the High Court of Bombay that it is beyond the power of the British Government, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace to a foreign power, is not sound. DAMODAR GORDHAN v. DEORAM KANJI. **1 B. 367, P.C. =3 I.A. 102=1 A.C. 322=25 W.R. 261.** [*F.*, 2 A. 1]

(2)—*British Territory in India—Power of the Crown to cede—Form or manner of such grant or cession—Jurisdiction of British Indian Courts over ceded territory.*—The Crown is competent to cede territory in its Indian dominions, to a foreign prince or a feudatory chief, without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. Where it is shown that a cession of territory was effected by the Government of India, that it was accepted by the Secretary of State, as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government, there is sufficient evidence of a cession by

Cession of British Territory—*concluded.*

the Crown of such territory. (1 B. 367, *F.*) [*R.*, 16 P.L.R. 1904.] Whether there has been a cession in sovereignty is a question of fact to be decided, not merely by the form or language of the documents, by which the grant or cession was made, but also by a consideration of other facts and circumstances, tending to show the nature and effect of such grant or cession. The Courts of British India have no jurisdiction over property in ceded territory ; they cannot, therefore, order the sale of lands situated in such territory. LACHMI NARAIN v. RAJA PARTAP SINGH, **2 A. 1.** [*R.*, 16 P.L.R. 1904.]

(3)—*Power of Secretary of State for India to cede territory—East India Company—Powers of Indian Legislature—Dismemberment of State—Evidence Act, s. 113.*—The Secretary of State for India in Council did not succeed to the power to cede territory under St. 21 & 22, Vic. c. 106, when the Government of India was, by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company. The Indian Legislature cannot make and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as by such a law the authority of Parliament, and of those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom, must, of necessity be affected. S. 113, Evidence Act (I of 1872), therefore, though not disallowed, is not protected by s. 24 of Stat. 24 & 25, Vic. c. 67, and the direction therein contained, that a notification in the Gazette of India, that any portion of British territory has been ceded to any Native State, Prince, or Ruler shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed. DAMODAR GORDHAN v. GANESH DEVRAM, **10 B.H.C. 37.**

Judgment of British Court—Suit on, in Native territory—Cession of territory to British Government pending suit—Act XVII of 1886, s. 8—*See* RES JUDICATA—MISCELLANEOUS, 10 A. 517=A.W.N. 1888, 183.

Cestui que trust.

See TRUST, 19 C. 513.

Ceylon.

Attachment of pension payable in British India to descendants of former Royal family in Ceylon—Validity of attachment—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 26 M. 423.

Ceylon Ordinance (II of 1889).

Ss. 9, 704—"Appear or depend," meaning of—*See* FOREIGN COURT—JUDGMENT OF, 3 Ind. Cas. 190=19 M.L.J. 459=32 M. 469.

Ceylon Registration Office.

Certified copy of will taken from the records in the—Inadmissibility of as secondary evidence of will—*See* EVIDENCE ACT, 1872, s. 74 (1), (iii), 23 M. 499=10 M.L.J. 310.

Chairman.

When the original list of voters can be revised by the Chairman—*See* BEN. ACT II OF 1888, ss. 8, 19, 21 to 23, 31, 23 C. 717.

Company—Meeting of shareholders—Time and place for taking a poll—Object of taking such poll—Powers of—*See* COMPANY—MEETINGS AND VOTING, 15 B. 164.

Embezzlement by manager of Municipal Council—Liability of chairman for embezzlement — Limitation — *See* LIMITATION ACT, 1908, arts. 36, 2, 89, 90, 22 M. 342,

Chakran holding.

See BEN. ACT X OF 1871, s. 3, **7 C.L.R.** 373.

Chakran Land.

(1)—*Chowkidari—Putni, construction — Zemindar—Putnidar—Lands held by Chowkidar, revert to whom, on resumption.*—In the absence of a contract to the contrary, the zemindar, who appoints and dismisses chowkidars and is in enjoyment of their services since the creation of the *putni* lease, is entitled to the lands held by the chowkidars, after the resumption of such lands by the Government. NITYA NUND HAZRA v. MAHARAJADHIRAJ BEJOY CHAND MOHATAB, **7 C.L.J. 593.** (5 C.L.J. 28, *D.*)

(2)—*Resumption and transfer to Zemindar—Recovery of same by* putnidar—*Suit for specific performance, if necessary.*—Where *chakran* lands were included in the *putni potta* granted by the Zamindars to the plaintiffs before the resumption thereof under the Chowkidari Act. *Held*—That, upon resumption and transfer of the lands to the Zemindars, the remedy of the putnidars was to bring a suit for recovery of possession, and not a suit for specific performance of a contract. KUMAR BUNWARI MUKUNDA DEB BAHADUR v. BINDHU SUNDAR THAKUR, **12 C.W.N. 459=7 C.L.J. 439=35 C. 346.** (34 C. 564, *N.F.*; 11 C.W.N. 201=34 C. 108, 4 C.W.N. 814, *R.*)

See CHOWKIDARI CHAKRAN LAND, 9 C.W.N. 571=1 C.L.J. 303.

Resumed—Ryoti interest if can be acquired in—*See* ESTOPPEL—GENERAL, 13 C.L.J 271.

Reg. XX of 1817—Whether an entry in Chowkidari register is made in discharge of official duty and in the ordinary course of business—*See* EVIDENCE ACT, 1872, 13 C.W.N. 71=1 Ind. Cas. 376.

Resumption of, by Chakran Commissioner—Effect—Order of Commissioner, if necessary to be set aside—*See* JOINT KHAS POSSESSION, 10 C.L.J. 103=3 Ind. Cas, 399.

Suit for partial partition of chowkidari—Of portion of estate, whether maintainable—*See* PARTITION—GENERAL, 12 C.W.N. 640.

Chalgeni lease.

Landlord and tenant—Chalgeni lease—Determination of lease by notice to quit or otherwise not proved—Suit for ejectment, not maintainable—*See* LANDLORD AND TENANT—EJECTMENT, 15 B. 414, Note=P. J, 1880, 122.

Challan.

(1)—*Possession of Collectorate* challan *by muktear—Evidence.*—Possession of a Collectorate *challan* by a mukhtear is *prima facie* proof of payment by him. LALLA MOHADEO PERSHAD v. SHEETANUND MISSER, 17 W.R. 502.

Chamber.

Application for appointment of receiver to be made in Court or Chambers—Practice and Procedure—*See* RECEIVER, 28 C. 250.

Chamber Judge.

Can review the Taxing Master's decision on costs—*See* COSTS—TAXATION OF COSTS, 9 Bom. L.R. 983=32 B. 262.

Can revise the prothonotary's order disallowing a party to sue in *forma pauperis*—*See* RULES OF HIGH COURT AND SUPREME COURTS—BOMBAY, 9 Bom. L.R. 475=32 B. 163.

Champerty.

(1)—*And maintenance—Applicability.*—The English Law of Champerty and Maintenance is not as such applicable to India. RAJA RAI BHAGWAT v. DEBI DAYAL SAHU. 10 Bom. L. R. 230=12 C.W.N. 393=35 C. 420=7 C.L.J. 335=5 A.L.J. 184=18 M.L.J. 100=3 M.L.T. 344=14 Bur. L.R. 49, P.C.

(2)—*What is.*—If the purchaser of a share of land joins his vendor in a suit to recover his own property, his action is not champerty. MUNIRAKHUN SINGH v. BHODOY SINGH 12 W.R. 133.

(3)—*Vendor accepting inadequate price—Promotion of unnecessary litigation and corrupt motive.*—A transaction is not to be necessarily regarded as champertous, merely because the vendor accepted an inadequate price on account of his needs. To constitute champerty or maintenance, there must be something in the transaction tending to promote unnecessary litigation and tainted with corrupt motives. GURUSAMI v. SUBBARAYYA, 12 M. 118. [*F.*, 2. N.L R. 17.]

(4)—*Champerty and maintenance—Agreements contrary to public policy—Assignment—Rights of third party to impeach.*—There may be a valid transfer of property for the purpose of financing a suit, upon the terms that the property or the proceeds realised from the litigation shall be divided between the transferor and transferee, irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the Court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits. (4 I.A. 23=2 C. 233, *F.*) In ordinary cases it is a rule that, where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that

Champerty—*continued.*

there was no consideration, but the rule does not apply where the transferor being a party to the litigation pleads that the assignment was fictitious and without consideration. BALDEO SAHAI v. HARBANS, 8 A.L.J. 652. (12 B. 686 *F.*)

(5)—*Agreement to convey property after decree in lieu of expenses of litigation—Reversionary heir—Agreements opposed to public policy—Wagering transaction—Contract for sale.*—Where, after the death of a Hindu widow, the reversioner, who was out of possession, entered into an agreement with the plaintiff, under which the latter was to provide the entire expenses of the litigation and in return therefor the former undertook, on obtaining possession of the property in question, to make over one-half of the same to the plaintiff, *held* that the agreement was not void either on the ground that it was opposed to public policy or that it was of the nature of a wagering transaction. *Held*, further, that the agreement did not amount to a sale and did not confer on the plaintiff any interest in the property capable of being enforced by a suit against the parties in possession who were not themselves bound by the terms of the agreement. INDER SINGH v KESRI SINGH, 14 O.C. 139. (20 C. 843, *R.*; 8 O.C. 155, 11 O. C. 301. *D.*)

(6)—*Champerty—Property, subject-matter of suit—Sale of a share—Validity.*—*Held*, that there is no rule of Indian law which prohibits the transfer of a share of property merely because the property is the subject of litigation. SADHANMAL LEKHRAJ v. SIRDAR BIBI, 2 Sind. L.R. 76.

(7)—*Unconscionable bargain.*—Where certain persons sold their land worth about Rs. 25,000 for Rs. 4,000 as they were in urgent need of funds to conduct a litigation regarding that land and certain other lands, and the conduct of the litigation was taken from the hands of the vendors and entrusted to the vendee who was to advance about Rs. 4.000, the sale-amount, for the expenses of the litigation, *held*, that the transaction ought to be relieved against, as unfair advantage was taken of the pressing difficulties and necessitous circumstances of the vendors to force upon them a bargain which was hard and unconscionable. Assuming that plaintiff (vendee) honestly believed that the vendor had a good and honest claim, the offer to secure his advances upon the whole estate was more than ample, and if he did not believe the claim to be a good one, the advance was of a champertous character and for the mere purpose of speculative litigation. VIJAYARAGHAVA v. PRANAL ANNE 1 M.L.J. 340.

(8) — *Champerty — Maintenance — Wager—Guarantee—Conditional promise—Agreement to advance money for litigation—Consideration—Public policy—Contract Act (IX of 1872), ss. 23, 30.*—An agreement, by which a person, advancing money for conduct of a litigation, is promised the return of his money without interest and a share in the property, is not opposed

Champerty—*continued*

to public policy; nor is it of the nature of a wager but ought to be treated as a conditional promise or guarantee. NIAMAT ALI v. ILAHI BAKSH, **8 Ind. Cas. 500.** (22 W.R. 148, 1 B.L.R. 509, 1 I.A. 241, 20 I.A. 112, 20 C. 843, *R.*)

(9)—*English Law—Conveyance of property tending to foster gambling in litigation.*—Though the English rule against champerty and maintenance does not prevail in this country in its entirety, still, a conveyance of property, which tends to foster and promote gambling in litigation, is void as being clearly unconscionable, speculative and opposed to public policy. DEBI DAYAL SAHOO v. BHAN PERTAB SINGH, **31 C. 433=8 C.W.N. 408.** (2 C. 233, 8 M.I.A. 170, *R.*)

(10)—*Sudder Dewanny Adawlut Madras—Agreement contingent upon a certain event—Non-occurrence of such an event—Champerty—Assignment of right of action.*—The Sudder Dewanny Adawlut, at Madras, dismissed a suit on the ground that the facts disclosed a case of champerty—a question not raised by the pleadings, or in the Court below. *Held*, by the Judicial Committee, that, as that objection was not raised, or the points recorded by the Court, as required by Madras Regulation XV of 1816, s. 10, cl. 3, the dismissal upon such ground could not be maintained, as the objection, founded upon the English doctrine of champerty, ought not to be noticed by the Court upon a mere inference arising incidentally from the evidence in the suit. K., being in urgent want of money, entered into an agreement in writing with N., acting as the agent of F., for an advance of Rs. 19,000. The agreement recited that N had undertaken to procure this amount from F., on his return, he being then absent from the place where the agreement was executed, and K promised, in consideration of the loan, to grant N, a lease of his *Zemindary*, and it was provided that K should, on F's arrival, execute a regular deed. N, could only accommodate K, with a part of the proposed loan, and as the matter was urgent, and F's return was expected to be within a few days, it was verbally agreed that the remaining portion of the loan should be advanced within eight days. F, did not return till nineteen days after, when he was willing to make the advance required; but, in the *interim*, and after fifteen days from the date of the agreement, K., from pressure for money, had been obliged to get the advance from another party, and had, thereupon granted him a lease of his *Zemindary*. N, then brought a suit for specific performance of the agreement. He afterwards died, when his heir assigned N's interest under the agreement to F, who, thereupon, brought an action against K, for breach of contract. The Civil Court awarded damages for the breach, but, upon appeal, the Sudder Court dismissed the suit, on the ground that the assignment by N's heir to F, was void for champerty. *Held*, that, as N, was only the agent of F, the party really interested in the performance of the agreement, the assignment by his heir of his interest under

Champerty—*continued.*

the agreement, for the purpose of enabling F, to bring the suit, was not champerty or maintenance, as it was wholly unnecessary as F, was suing in respect of his own interest for a breach of contract. *Held*, further, that, as the agreement to grant the lease was incomplete in itself, and conditional upon the advance by F. within eight days, a delay of nineteen days, in the circumstances of the want of money by K, to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease. By the English Law, to maintain an action for champerty or maintenance, it is necessary to establish that the transaction was against good policy and justice, or tending to promote unnecessary litigation. FISCHER v. KAMALA NAICKER, **3 W.R. 33, P.C.=8 M.I.A. 170.**

(11)—*Hindu law—Widow, alienation by—Champerty—Reversioner—Suit by reversioner—Unfounded charges of misconduct, profligacy and debauchery—Costs.*—Where a Hindu widow had assigned away absolutely the whole of her husband's estate to N, to be held by him as to one half for his own use and benefit, and as to the other half to secure the re-payment to him of all advances made by him to her, and to make over to her the balance (left after re-pay in these advances), *held* that such an assignment was not binding on the reversionary heirs of the husband except as regards the charge on one moiety for expenses incurred and advances made by N, whether by way of maintenance or otherwise, with interest thereon at the rate stipulated. (4 B.L.R.O.C. 1, *F.*) Costs not allowed to the plaintiff under the circumstances of the case. BISHWANATH CHUNDER v. KHANTAMANI DASI, **9 B.L.R. 76.**

(12)—*Hindu widow—Suit by reversioner to restrain waste—Champerty—Gambling transaction—Limitation—Jurisdiction.*—B, a childless widow, instituted a suit against the surviving brothers of her husband who retained the enjoyment and use of the whole estate, for the recovery of her husband's share in the family property. On the 4th April 1859, during the pendency of that suit, she entered into an agreement with G, by which after reciting the material facts as to the condition of the family and of the property and the nature of her claim and stating that she was unable from proverty to prosecute that claim, she assigned all which she might be entitled to recover and receive from the joint estate in right of her deceased husband, together with all interest and accumulations which had accrued or might thereafter accrue thereon, and all benefit and advantage to be had or derived from the suit about to be instituted; and she appointed G, her attorney, to institute and carry on any suit or suits in her name for the purpose of recovering her right and share in the property, and it was then agreed that of the property, etc., which might be recovered, G should, in the first place, retain one moiety for his own absolute use and benefit by way of remuneration and reward for his

Champerty—*continued.*

trouble and labour in the conduct and management of the contemplated suits and proceedings, and as to the remaining moiety, that he should repay himself all such sums as he might from time to time have advanced and paid for the maintenance of B, with interest at the rate of 12 per cent. per annum, and also all such sums and costs as he might from time to time have advanced or been put to in carrying on and managing the suits, with 12 per cent. per annum interest, and should pay over the residue to B herself. The suit was subsequently withdrawn. On 10th May, 1859, B by G filed a fresh bill against her husband's surviving brothers for recovery of her husband's share in the estate together with accumulations. On 19th August, 1861, a decree was made by the Supreme Court in that suit for a large sum of money out of the joint estate, the whole to be enjoyed by her as a Hindu widow in the manner prescribed by the Hindu Law. On 14th November, 1860, G's interest in the assignment of April 1859 was assigned to H. In pursuance of the said decree, a large sum of money was deposited in Court. On the 22nd February, 1866, the daughter and the daughter's son of the husband of B, on behalf of the reversionary heirs, instituted a suit in the Zilla Court of Hooghly against B, G and H, the two first defendants being resident in Hooghly and H a resident of Calcutta. On the application of the last two defendants, the suit was in April 1866 removed into the High Court. In that suit, the plaintiffs sought to have the agreement of 4th April 1859 between B and G (together with any sub-assignments as might have been made on the footing of it, set aside as being a void contract, and asked for an order that the money should be paid into Court and there kept during the life of B for the benefit of the reversionary heirs. *Held* that, as the plaintiffs distinctly asked for relief against contemplated waste, the suit was not barred by lapse of time as the cause of action did not arise until the waste was about to be committed. *Held*, in appeal, by *Peacock, C. J. and Macpherson, J.*, that the plaintiffs were entitled to maintain the suit for the relief sought and for the protection of property, *i e.*, to restrain waste and to prevent the payment of the money out of Court to G. *Held* by *Peacock, C.J.*, that the assignment of the 8-anna share, as security for the advances and expenses which G or his assignees might reasonably and properly make or incur for the maintenance of the said B and for carrying on the necessary proceedings to enforce her rights with 12 per cent. interest on such advances, was not void, but that it created a charge upon that 8-anna share of the property which was binding upon the reversionary heirs to the extent of such advances and expenses, and that there was a legal necessity for such charge. But as regards that part of the deed by which the other 8-anna share of the property to be recovered was assigned to G and his assigns for his and their own use as remuneration for their trouble and labour to be bestowed in the conduct and management of the suits, the deed was not binding upon the plaintiffs or upon the persons

Champerty—*continued.*

who, upon the death of B, the widow, might be entitled to take by inheritance the property of her deceased husband, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain and a speculative, if not gambling contract. (8 M.I.A. 170, 2 B.L.R. P. C. 111, *R.*) *Held* also that the defendant H, by joining in the application to have the suit removed into the High Court, admitted the jurisdiction of the Court to try the case in the exercise of the extraordinary original civil jurisdiction and that he could not afterwards dispute the jurisdiction. *Held*, by *Macpherson, J.*, that the suit having been removed to the High Court, and all the parties being thus brought before a Court which would have had jurisdiction if the suit had been in the first instance instituted in it, the original want of jurisdiction was cured and no question as to it could any longer be raised. *Held*, by *Phear, J.*, that the transaction of 1859 was one purely of a gambling character. The law which forbids and makes void all acts contrary to public policy and subversive of the general interests of society, is in force at least within the Presidency towns. It was part of the Law of England in 1726, it is so still, and there is nothing whatever in the circumstances of this country to make it inapplicable here. The contract which the plaintiff impeached is vicious to a degree, and offends the law under which private contracts may be void upon public grounds. Such a Law was introduced into Calcutta by the Charter of 13th George I. There is a power inherent in every Court of Justice which receives its authority from the state to subordinate the interests of private persons to those of the public, and to take care, where the two are in conflict, that the latter should prevail. *Held*, on appeal, by *Macpherson, J.*, that the transaction between G and B was according to English Law, illegal as being against public policy and the whole matter was a mere gambling speculation and that the deed of the 4th April was void as against the reversioners as being contrary to public policy, save so far as it operated as a charge on an 8 anna share, for all costs and advances, etc., properly paid, with interest. *Held* by *Peacock, C.J.*, and *Macpherson, J.* that the case having been transferred from the Hooghly Court, the High Court must apply the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly. *Per Macpherson, J.*—The law applicable to the case if tried in the Court of Hooghly was precisely the same as the English Law applicable to it. GROSE v. AMIRTAMAYI DASI, **4 B.L.R. O.C. 1=12 W.R.O.C. 13.** [*F.*, 9 B.L.R. 76, 6 B.L.R. 732, 1 C.L.R. 296 ; *R.*, 4 A. 532=2 A.W.N. 133, 8 B.H.C. O.C. 1, 7 M.H.C. 128, 17 W.R. 238, 2 C. 233, 60 P.R. 1884, 11 A. 57, 33 P.L.R. 1907, F.B.=45 P. W.R. 1907=61 P.R. 1907 ; *Expl.*, 7 M.H.C. 128 ; *D.*, 23 W.R. 535.]

(13)—*Agreement between Mahomedan Mukhtear and members of Hindu family for prosecuting*—*Suit.*—An agreement under which a

Champerty—*continued.*

Mahomedan mookhtear advances money to carry on a suit by members of a Hindoo family to set aside alienations, on the understanding that he will be entitled to a share of the property recovered savours of champerty, and a suit involving such interference cannot be countenanced. SHEIKH ABED HOSSEIN v. LALLA RAM SARUN, **13 W.R. 427=18 B.L.R. 516, Note.**

(13-*a*)—*Champertous transactions when valid.*—A contract by which a party in consideration of supplying funds to enable another to prosecute a *bona fide* claim was to participate in the fruits of the suit is not void. But one disclosing conditions falling within the definition of champerty as laid down in (*Fisher* v. *Kamala Naiker*), 8 M.I.A. 186 is illegal. GHOLAM MAHOMED v. WALIDAD, **70 P.R. 1870.**

(14)—*Apparently champertous agreement held not to be so—Maintenance—Public policy—Parties to suits.*—One M H., being apprehensive that (in consequence of an action of trespass in the Supreme Court which M. R. and A. R. had brought against P P.) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K. N., that he, K. N. should conduct the pending case at his own cost and necessary expenses and that after M. H, should have proved that the piece of land was his sole property, K.N. and M.H. should erect a building on it at their joint expense, and that the rents and profits of such building should be enjoyed by K. N. und M. H. jointly during the life-time of M. H., after whose death the property, with the building, was to be the sole and absolute property of K. M. *Held* that the above agreement (when considered in connection with its surrounding circumstances) did not favour of maintenance or champerty, nor was it void as being against public policy. The question as to how far the English law relating to maintenance and champerty is applicable to Hindus in the presidency towns considered. *Quœre.*—whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants. Where K. N., claiming under the above agreement, sued to recover the property comprised in it from the mortgagee of the administrator of M. H. who was in possession of the property, it was held that the representatives of the mortgagor were not necessary parties to the suit. DAMODHAR MADHAVJI v. KAHANDAS NARANDAS, **8 B.H.C. O.C. 1.** [*R.*, 2 C. 233, P.C].

(15) R., entered into an agreement with G., that if a suit, which was then about to be brought by G, for the recovery of certain lands, should be decided in favour of G, R. was to pay G., Rs. 85, and G. was to make over to R., half the land recovered. R was to pay G., Rs. 50 in certain proportions, which R was to lose if the suit was not decided in favour of G. G recovered the land, and R. then sued him upon the above agreement. No issue was

Champerty—*continued.*

taken in the Court of first instance on the question whether the agreement was void for champerty. An issue was raised on this question by the appellate Court, and (no evidence being taken) was decided in favour of the defendant. *Held* in special appeal that, as it was not manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the appellate Court ought not to have held it void. *Semble*, that the above agreement was not void on the ground of champerty; at any rate, that it was capable of explanation by a consideration of the surrounding circumstances which the plaintiff should have had an opportunity of giving in evidence. RAMRAV KHANDERAV v. GOVIND PANDSHET *et al*, **6 B.H.C.A.C. 63.** [*R.*, 11 A. 128, 2 O.C. 149].

(16)—*Purchase of suit.*—Every purchase of a suit is not champerty. JUG MOHUN LALL v. MUSSAMUT BUDDUN KOER, **9 W.R. 243.**

(17)—*Transfer of property—Champerty.*—The Courts will not interfere when a transfer is completed at once, *e.g.*, where a party buys a certain share of a litigant's risk, and stands or falls by his purchase, having only the right to recover his share from the party suing if the latter wins his case; and having no claims at all if the Courts decide against him. PUNCHANUN MUZOOMDAR v. DOORGA NATH ROY, **W.R. 1864, 300.** [*R.*, 11 A. 128.]

(18)—*Law-proceedings — Bond—Suit on.*—*Held*, that a suit will lie on a bond executed for the purpose of securing money which is to be expended in carrying on certain law-proceedings. NOBEEN CHUNDER GHOSE v. RAMGOGERNATH GOPE, **W.R. 1864, 63.** [*R.*, 11 A. 128.]

(19)—*Parties to suit—Champertous agreement.*—A person, who has no real interest in a suit, ought not to be allowed to join in it to defray the costs of the suit from beginning to end, in consideration, of sharing the profits of the litigation. HAZARI LAL v. JADAUN SINGH, **5 A. 76=A.W.N. 1882, 180.**

(20)—*Agreement to share property in litigation—Reasonable compensation for work done and expenses properly incurred.*—The English Law of Champerty is not in force in India. Agreements to share the subject of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy. But, if they are extortionate and unconscionable, effect should not be given to them. Reasonable compensation, under the claim for general relief for work done and expenses properly incurred, would be awarded. RAGUNATH v. NILKANTH, **20 C. 843, P.C.=20 I. A. 112.** [*Cited*, 79 P.R. 1894; *R.*, 24 C. 183, 2 O.C. 149, 20 P.L.R. 1906=26 P.R. 1906, 29 A. 303=A.W.N. 1907, 55=4 A.L.J. 22; *F.*, 35 C. 420, P.C.=35 I.A. 48=12 C. W.N. 393=7 C.L.J, 335=5 A.L.J. 184=10 Bom. L.R. 230=18 M.L.J. 100=3 M.L.T 344=14 Bur. L.R. 49.]

Champerty—*continued.*

(21)—*Agreement of champertous nature, invalid.*—An agreement by which a stranger to a suit already commenced agrees to maintain it and which provides that he should have the whole of the thing in dispute and something more, in the event of the success of the suit and that he should be the master of the litigation by compelling it to be carried on by an attorney determined by him, is void as it is distinctly forbidden and indictable by the Common Law and the Statue Law of England, and as it is opposed to public policy. MULLA JAFFARJI TYEB ALI SAIB v. YACALI KADAR BI, **7 M H. C. 128.** [*Appr.*, 20 W.R. 446; *R.*, 22 W.R. 535, 2 C. 233, P.C.]

(22)—*Contract—Champerty—Maintenance——Applicability of English Law to natives of India—Principles of public policy and administration of justice applicable.*—The rules of English Law relating to "champerty" and "maintenance" have no application to natives of India. In considering and deciding upon objections to the civil contracts of natives of India on the ground of maintenance or champerty the general principles as regards public policy and the administration of justice must be looked to. To constitute maintenance, there should appear the instigation of improper litigation with a bad purpose or motive, contrary to public policy and justice. Champerty is a species of maintenance and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of a suit. PITCHA KUTTI CHETTI v. KAMALA NAYAKKAN, **1 M. H.C. 153.** [*R.*, 8 B.H.C. O.C. 1, 2 C. 233, P.C.]

(23)—*Suit for account and redemption of mortgage, whether maintainable by assignee of equity of redemption—Assignment of such equity, not bad as champertous.*—Plaintiff sued to redeem two mortgages as assignee of the equity of redemption, to which the defendant pleaded among other things, that the assignment to the plaintiff was champertous. The Subordinate Judge found that the assignment to the plaintiff was a gambling transaction entered into with the object of gaining the spoils of an unrighteous litigation and was therefore null and void as opposed to public policy. There was however, nothing in the evidence in the case to show that the plaintiff entered into the arrangement with his assignor with any other motive than to avail himself of a defect in defendant's title and to redeem the mortgaged property in the hope of deriving profit. The equity of redemption in the mortgagor is an interest in the land, which it is open to any one to purchase, however speculative the transaction might be under the circumstances of a particular case Consequently, though the assignment of such equity in this case might not be a praiseworthy one *in foro conscientiæ*, it was not such as the Court could regard as a transaction opposed to public policy having been entered into with the object of gaining the

Champerty—*continued.*

spoils of an unrighteous litigation. GOPAL RAMACHANDRA v. GANGARAM ANANDISHET, **14 B. 72.** [*F.*, 18 M. 374; *Appr.*, 6 O.C. 305; *R.*, 22 M. 310=9 M.L.J. 17, 2 N.L.R. 17, 26 P.R. 1906=20 P.L.R. 1906, 1 S.L.R. 60; *D.*, 9 Bom.L.R. 462.]

(24)—*Sale for inadequate consideration—Suit by purchaser for possession—Speculative suit—Maintainability.*—Suit to recover possession of property purchased by plaintiff. The sale was for an inadequate amount and for the purpose of a speculative suit against persons claiming adversely to the plaintiff's vendor. *Held* that the claim was not champertous, the elements required to bring the contract of sale within the rulings relating to champertous transactions being wanting. It was not a case in which the plaintiff had acquired an improper interest in the unrighteous litigation of other people, nor was there any other circumstance making it champertous. It might be a speculative suit, but that did not make it champertous. SIVA RAMAYYA v. ELLAMMA, **22 M. 310=9 M.L.J. 17.** [*R.*, 26 P.R. 1906=20 P.L.R. 1906, 2 N. L.R. 17.]

(25)—*Contract Act, s. 253—Speculative sale.*—A speculative sale is not bad on the ground of being against public policy. RAMANUJA AYYANGAR v. NARAYANA AYYANGAR, **18 M. 374.** [*R.*, 2 N.L.R. 17.]

(26)—*Contract Act* (IX *of* 1872), *s. 23—Champerty—Unconscionable bargain—English law of champerty and maintenance—Applicability to India—Public policy.*—A contract to pay, in the event of success, a large sum of money (Rs. 25,000) in consideration of the obligee's financing a litigation, was *held* under the circumstance of the particular case, to be hard and unconscionable and opposed to public policy, and a decree only for the sum actually advanced (Rs. 3,700) was given. [F., 11 A. 128; *R.*, 11 A. 118, 20 P.L.R. 1906=26 P.R. 1906, 1 S.L.R. 21, 61 P.R. 1907=45 P. W.R. 1907=33 P.L.R. 1907, 115 P.R. 1908.] The specific English law of maintenance and champerty has not been introduced into India. A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining reasonable recompense therefor, but for the purpose of gambling in litigation, or of injuring or oppressing others by abetting or encouraging unrighteous suit so as to be contrary to public policy, effect ought not to be given to them. CHUNNI KUAR v. RUP SINGH, **11 A. 57=A.W.N. 1888. 296.** (4 I.A. P.R. 46, 47, *F.*) [*R.*, 2 O.C. 149, 8 O.C. 210, 10 O.C. 173.]

S. N. DAR, B. A. LL. B.
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SRINAGAR (Kashmir)

Champerty—*continued.*

(27)—*Assignment of* debutter *land in consideration of defendant ejecting by suit, at his own costs, Brahmins, etc.*—A Hindu widow, together with the next heir, joined in assigning to the defendant a *debutter* estate, in consideration of the defendant conducting, at his own costs, proceedings for the ejection of Brahmins and Banias then in occupation as *poojaries* to conduct the worship of the idols; and upon the condition that he should thereafter conduct such worship, and out of the proceeds and offerings retain three-fourths for his own purposes and for hospitality, and pay the remaining fourth for the maintenance of the widow and the heir. *Held*, that the assignment was valid, the purpose for which the lands were dedicated being provided for; and that, although the transaction amounted to champerty, that was no ground for treating it as invalid. An assignment between Hindus of property the subject-matter of litigation, on conditions which constitute champerty, is not on that ground invalid. JADUBINDU ODHIKAREE v. LOKENAUTH GEREE, **Marsh 303=2 Hay 160.**

(28)—*Agreement to furnish money for litigation and divide property recovered—Champerty—Public policy.*—An agreement to furnish money for litigation on the terms of sharing the property recovered is not necessarily void in India, unless accompanied by circumstances which, according to the *dictum* of the Privy Council in 1 I.A. 241 lead to the conclusion that it was not a "*bona fide* one for the acquisition of an interest in the subject of the litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive." TARACHAND v. SUK LAL, **12 B. 559.**

(29)—*Agreement to purchas equity of redemption pending litigation—Application by purchaser to be added as defendant—Right of purchaser to be made party under s. 32, Civ. Pro. Code.*—In execution of the decree obtained by the plaintiff A in a previous suit, a certain house was attached by him, D-1 and D 2 the first and second defendants in this suit having then preferred a claim to the house, the attachment was raised, and the plaintiff brought the present suit to establish his right to attach the house in execution. D-1 and D-2 alleged in defence that the prior decree had been fraudulently obtained by the plaintiff. Some months before the present suit was filed. D-1 had mortgaged the house in question to the present applicant H who made a further advance to D-1 on the same security a few weeks after the institution of the suit, and also entered into an agreement with D-1 to purchase the property, the sale to be completed on and immediately after the decision of the present suit. By the agreement, D-1 undertook to defend the present suit by A, and it was arranged that, if the suit should result in A being allowed to execute his decree against the house, "the said H shall be at liberty to cancel the contract of purchase." D-1 however, subsequently intimated to H his intention to withdraw from the defence, and thereon H applied for

Champerty—*continued.*

and obtained a rule against A, D-1 and D-2 to show cause why he should not be made a party defendant to the suit. The application was opposed on the ground that the agreement was champertous, but it was held that it was not of such a nature but amounted to an absolute sale to H of the equity of redemption in D-1 subject to a power conferred on the purchaser to annul or cancel the sale in a certain event, and H had acquired such an interest in the property that the Court would exercise its discretion properly only by holding him to be entitled to be made a party to the suit under ss. 32 and 372 of the Civ. Pro. Code (XIV of 1882). AHMEDBHOY HUBIBHOY v. VULLEEBHOY CASSUMBHOY, **8 B. 323.** [*F.*, 13 C, 90.]

(30)—*Agreement to supply funds to suitor and share property in litigation—Not opposed to public policy unless extortionate and unconscionable.*—Agreements to share the subjects of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselfes opposed to public policy; but, if they are extortionate and unconscionable, effect should not be given to them. (4 I.A. 23=2 C. 233, *F.*) It was found in this case that the consideration for the transfer was considerably less than the true value of the property dealt with. The transferor, who succeeded in the litigation with the aid of the champertor, declined to give him either the property conveyed or damages sufficient to cover the costs of the litigation. The High Court *held* that the champertor was entitled to a decree for the amount of money actually advanced with interest thereon, but not to the reward actually stipulated for, which in the circumstances was excessive and unconscionable. This view was affirmed by the Judicial Committee. RAJA MOHKAM SINGH v. RAJA RUP SINGH, **15 A. 352. P.C.=20 I.A. 127.** [*R.*, 79 P.R. 1894, 24 C. 183, 20 P.L.R. 1906=26 P.R. 1906, 29 A. 303=A.W.N. 1907, 55=4 A.L.J, 222, 10 O.C. 173, 1 S.L.R. 21, 2 Ind. Cas. 385.]

(31)—*And maintenance—Public policy—Right of suit.*—The English Laws of Champerty and maintenance are not specifically in force in India. Contracts in the nature of champerty should be held invalid in India only on the ground of their being opposed to public policy. An agreement to supply funds for a litigation is not, *per se*, champertous. But, if such an agreement is found to be extortionate, unconscionable and inequitable, or if it were entered into for improper objects (*e.g.*) for gambling in litigation or with the object of injuring third parties by encouraging unrighteous suits, the Courts would not enforce it. RAMCOOMAR COONDOO v. CHUNDER CANTO MOOKERJEE, **2 C. 233, P.C.=4 I.A. 28.** [*Appl.*, 12 B. 559; *F.*, 35 C. 420=7 C.L.J. 335=12 C.W.N. 393=10 Bom. L.R. 230=5 A.L.J. 184=18 M.L.J. 100=3 M.L.T. 344=14 Bur. L R. 49, 15 A. 352=20 I.A. 127, P.C.; *D.*, 14 B. 72; *R.*, 3 B. 402, 9 A. 476, 11 A. 57, 13 A. 102, 13 M. 225, 23 M, 449, 31 C. 433 =8 C.W.N. 408.]

Champerty—*continued.*

(32)—*Law in Bengal.*—There is no law against champerty or maintenance in Bengal. PANCHCOWREE MAHTOON v. KALEE CHURN, **9 W.R. 490.**

(33)—*Champertous agreement—Discretion of Court.*—Though a Court will not enforce an inequitable or extortionate agreement, it can award reasonable compensation for work done, as a merely champertous agreement is not void. DHALLU MISSAR v. JIWAN SINGH, **79 P.R. 1894.** (20 C. 843, 15 A. 352, *Cited.*)

(34)—*Legal Practitioners Act, (XVIII of 1879), ss. 13, 14* — Mukhtear *and client—Champertous agreement—Legality of.*—An agreement between a *mukhtear* and his client for the supply of funds for litigation, in lieu of a share in the property, is illegal and the practitioner will be held gulity of "grossly improper conduct in the discharge of his professional duties" under s. 13 of the Legal Practitioners Act and liable to suspension under s. 14 of the Act. *In re* ALI MUHAMMAD MUKHTAR, **111 P.R. 1894.** [*R., & F.*, 69 P.R. 1904; *R.*, 61 P.R, 1907=45 P.W.R. 1907=33 P.L.R. 1907.]

(35)—*Unconscionable bargain—Registration.*—In a suit for the specific performence of an agreement, under which the defendant, who was engaged in a suit with third parties, agreed to give the plaintiff one-fourth of whatever might be decreed to him, if the latter supplied him with funds to conduct the suit, and according to which the defendant had to give land worth Rs. 300 in lieu of Rs. 80 spent by the plaintiff for the expenses of the suit, *held* that the agreement, not being registered, could not affect land worth Rs 300 and that specific performance of the agreement could not be granted as it was an unconscionable bargain. JHANDU KHAN v. BARKHUDAR, **160 P.R. 1889.** [*R.*, 89 P.R. 1909.]

The sale of a mere right to sue is bad for—*See* ACTIONABLE CLAIM, 2 N.L.R. 17.

See ASSIGNMENT OF CHOSE-IN-ACTION, 18 W.R. 438, 3 B. 402.

Suit, dismissal of, under s. 375, Civ. Pro. Code—Misjoinder of parties—Maintenance —*See* CIV. PRO. CODE, 1908, s. 98, 2 O.C. 149.

See CONTRACT ACT, 1872, s. 23, 5 C. 4, 20 P.L.R. 1906=26 P.R. 1906.

And maintenance—*See* COSTS—SPECIAL CASES, 1 Ind. Jur. N.S. 282.

Agreement to carry on litigation, effect of—English and Indian law—Unconscionable agreement—*See* GOSSAINS, 2 Ind. Cas. 385=14 C.W.N. 191.

See LEGAL PRACTITIONERS — ATTORNEY AND CLIENT, 1 N.W.P. 1.

See PARTIES TO SUITS — ADDING PARTIES TO SUITS, 3 C.W.N. 754.

See RIGHT OF SUIT—COSTS, 2 C, 233, P.C. =4 I.A. 23.

Champerty—*concluded.*

Sale by person out of possession—Misstatement in sale-deed as to receipt of consideration-money—Whether sale tainted on the ground of—*See* RIGHT OF SUIT—MISCELLANEOUS, 9 C.W.N. 477=8 O.C. 155=27 A. 271=32 I.A. 113=15 M.L.J. 197.

Succession to property of Armenian Christian residing in Oudh at the time of annexation—*Lex loci* with reference to the English Law of Succession—Territorial Law of Oudh on the introduction of British rules—Executory trust—Will, construction of—Justice, equity and good conscience—Intention of testator—Limitation Act, 1877, sch. ii, arts. 134, 136, 140, 144—Sale in execution of decree upon mortgage executed by holder of life-interest—Purchaser for value without notice—*See* SUCCESSION, 6 O.C. 305.

Chance.

Of heir-apparent — Relinquishment of — Validity—*See* MAHOMEDAN LAW—ALIENATION, 2 Ind. Cas. 865.

Chandavand.

See CUSTOM — PUNJAB — INHERITANCE, 101 P.R. 1879.

Change.

(1)—*Advance of money for saving mehal from sale—Lien on mehal.*—A person who advances money to another for the purpose of saving a mehal of the latter from sale for arrears of rent, has no lien on the property for the money advanced. HURRI MOHUN BAGCHI v. GIRISH CHUNDER BUNDOPADHYA, **1 C.L.R. 152.** (18 W.R. 404, 22 W.R. 401, *cited and held not apply.*)

Change of Attorney.

Change of attorney by client, leave of Court necessary for, under Rule 320 of the High Court—Non-payment of costs to previous attorney, ground for withholding leave—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 23 M. 134.

Change of case in appeal.

See APPELLATE COURT—PRACTICE AND PROCEDURE, 16 W.R. 32, P.C.

Change of Law.

See APPEAL—RIGHT OF APPEAL—EFFECT OF, REPEAL ON.

See PRACTICE AND PROCEDURE.

(1)—Retrospective effect—Procedure, change in—Changes of law relating to procedure have a retrospective effect. BALAKRISHNA PANDHARINATH v. BAPU YESAJI, **19 B. 204.**

Change of procedure pendente lite—Effect—*See* ABATEMENT OF APPEALS, 7 M. 195.

Effect of—Right to costs—*See* COSTS—MISCELLANEOUS, 5 M.L.T. 287=32 M. 312 =4 Ind. Cas. 501.

Change of Law—*concluded.*

Effect of change of law—*See* COURT FEES ACT, 1870. s. 7, sch. II, cls. 3, 4, 7 A.L.J. 546=32 A. 517=6 Ind. Cas. 832.

Effect of, of procedure—*See* EXECUTION PROCEEDINGS, 4 Ind. Cas. 492.

See IMPARTIBLE ESTATE, 8 C.W.N. 186, P.C.=31 I.A. 1=27 M. 131=6 Bom. L.R. 7.

See PRACTICE AND PROCEDURE, 27 M. 131=31 I.A. 1=8 C.W.N. 186=6 Bom. L.R. 7, P.C., 13 O.C. 152=6 Ind. Cas. 1015.

Law governing suit when law is changed pending suit—*See* STATUTES, CONSTRUCTION OF, 1 Hay 369.

New Acts to apply — *See* STATUTES, CONSTRUCTION OF, 6 M.L.J. 122.

As to the mode of valuing suits for purposes of jurisdiction—Effect of—*See* VALUATION OF SUITS, 4 M. 220.

Channel.

See CANAL.

Charge.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, s. 100.

(1)—*Intention to create charge.*—In equity, no charge can be created unless there is an intent to charge. OMRAO BEGUM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **19 C. 884, P.C.=19 I.A. 95.**

(2)—*Extinguishment.*—Where the right to a payment (like an annuity) charged upon immoveable property, devolves upon the person liable to make the payment or his representatives, the charge is extinguished. RADHEY LAL v. MAHESH PRASAD, **7 A. 864=A.W.N. 1885, 275.**

(3)—*Escheat, Crown taking by.*—On failure of heirs, the Crown takes by escheat, subject to trusts or charges affecting the estate. SONET KOOER v. HIMMUT BAHADOOR, **1 C. 391, P.C. =2 I.A. 92=25 W.R. 339.** [*R.*, 28 B. 276, 7 C.W.N. 810, 17 C. 826, 15 C.P.L.R. 89.]

(4)—*Mortgage —Charge - Condition against alienation.* — Where a bond stated, that the obligors mortgaged the property as security for the loan, and that so long as the same remained unpaid, the property would not be sold or mortgaged to any one, *held* by the Full Bench (*Petheram, C.J., dissenting*), that the bond created a simple mortgage, and by *Petheram, C.J.* that it created only a charge in favour of the obligor on the property, for it did not give him, either expressly or impliedly, the right to sell the property himself. SHEORATAM KUAR v. MAHIPAL KUAR, **7 A. 238, F.B.=A.W.N. 1885, 8.** [*Diss.*, 13 A. 28; *R.*, 13 B. 90. F.B., 14 B. 377, 20 B. 408 F.B, 12 C.P.L.R. 26.]

(5)—*Charge and simple mortgage, distinction between.*—A charge differs from a mortgage not only in form, but also in substance. A plea of purchase for value without notice, for instance,

Charge—*continued.*

although it may be perfectly good against a charge, will be wholly unavailing against a mortgage. KISHAN LAL v. GANGA RAM, **18 A. 28=A.W.N. 1890, 216.** (9 M. 218, 13 W.R. 82, 13 B. 90, 5 A. 121, 6 A. 551, 8 B.H.C. 75, 6 B. 193, 6 B. 538, 8 A. 26 *R.*) [R., 33 C. 985 =4 C.L.J. 219, 11 C.W.N. 1005, P.C.= 17 M.L.J. 444=4 A.L.J. 625=6 C.L.J. 379= 2 M. L. T. 333= 9 Bom. L.R. 1104= 30 M. 426, 35 C. 837=7 C.L.J. 492=12 C.W.N. 849.)

(6)—"*Mortgage*" *and* "*charge*"—*Transfer of Property Act, 1882.*—The distinction, clearly drawn for the first time between "mortgage" and "charge" in the Transfer of property Act is absent in the Limitation Act. GIRIVAR SINGH v. THAKUR NARAIN SINGH, **14 C. 730, F.B.**

(7) *Indefiniteness—Partition-deed—Stipulation to pay, and in default, to pay twice the amount from the properties—Whether a charge is created.*—In a partition-deed it was stipulated that one of the parties should discharge a certain debt, and, in default, it was provided that, if either of the parties should fail to observe any of the provisions of the deed, the party in default should pay to the other party, who should have sustained loss, twice the amount from their properties. The question was as to whether the words "pay... the amount from their properties" created a charge. *Held* that the words "properties" referred to the properties mentioned in the schedules to the deed, and consequently there was no indefiniteness. The words were sufficiently apt to create a charge. *Obiter.*—Even if the language were general (and not specific as in this case) it does not follow that a charge is not created by reason of the fact that the language is general, since a distinction should be drawn between wideness of language and indefiniteness of language. MANIKKAM PILLAI v. AUDINARAYANA PILLAI, **7 M.L.T. 158=5 Ind. Cas. 917=20 M.L.J. 407.** (3 M, 35, *Doubted.*)

(8)—*Co-sharers undertaking to pay mortgage-debt in certain proportion—Agreement to realize thee excess from the person and property of the defaulting co-sharer—Whether such agreement creates a charge.*—Some property, which had previously been mortgaged devolved upon certain persons by inheritance. They agreed to divide the property amongst themselves and to pay the mortgage debt proportionately to their shares. The agreement contained a stipulation that "if for any reason, any of the co-sharers, fails to pay the debt, then the co-sharer, who has to pay any amount of the debt in excess of his share shall be entitled to get the same from the person and the property of the defaulting co-sharer." *Held*, that the stipulation in the agreement did not create any charge upon the property of any of the co-sharers in respect of any sum paid by any other co-sharer in excess of his rateable share of the debt. The co-sharer paying in excess could, however, recover such excess from the defaulting co-sharer by the proper process of law. KISHEN LAL v. BHAWAH KUAR, **8 Ind. Cas. 864.** (14 A. 162, *F.*)

'harge—*continued.*

(9)—*On lands—Land revenue—Payment by* Khatedar.—An unsolicited expenditure in respect of the property of another, even if made for the purpose of its preservation, gives no lien, over the property, outside maritime law. Hence, a payment of land revenue by a person of property belonging to another but included in his *khata*, does not create any charge over the property. SHIVRAO v. PUNDLIK, **4 Bom. L.R. 90=26 B. 437.** [*Diss.*, 26 M. 686. F.B., A.W.N. 1904, 74; *R.*, 26 A. 407, F.B.; *D*, 26 A. 407, F.B.]

(10)—*Suit for arrears of assessment does not give.*—An inamdar suing for arrears of assessment is not entitled to a charge on the lands of, but only to a money-decree against the occupants; hence, no personal decree can be passed against an occupant in respect of assessment for the years previous to his coming on the holding. VINAYAK v. LAKSHMAN, **3 Bom. L R. 700=28 B. 92.** [*F.*, 6 Bom. L.R. 423.]

(11)—Where the Crown takes by escheat, the estate is subject to the same trusts and charges as previously affected it. THE COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARAINAPPA, **2 W.R. 59. P.C.=8 M I A. 500.**

(12) — *Charge — Payment of Government revenue by lambardar a charge on the property in the hands of a subsequent purchaser—Notice to purchaser of such payment—Lambardar and co-sharer.*—The heirs of a lambardar who had paid the Government revenue on behalf of certain land, cannot, when seeking to recover the same as a charge on the property in the hands of subsequent vendees, succeed without proving as against those vendees notice that the Government revenue had been by the lambardar, as alleged, on behalf of the land purchased by them. KHUSHHAL CHAND v. NIZAM-UN-NISSA, **A.W.N. 1891, 9.** (8 A. 384, *R.*; 11 M I.A. 254, *D.*)

Under s. 65 of Bengal Tenancy Act, whether one within s. 100, Transfer of Property Act—*See* BEN. ACT VIII OF 1885, s. 65. 4 C.L J. 219 =33 C. 985.

Effect of payment of whole arrears by one co-sharer—Lien on—in favour of such co-sharer—Transfer of Property Act, IV of 1882—*See* U. P. ACT XIX OF 1873, 14 A.273, F.B.=A.W N. 1892, 117.

Upon property—*See* AGREEMENT, L.B.R. 1893—1900, 340.

Property burdened with a, for charity—Alienability—*See* CHARITABLE TRUST, 7 Ind. Cas. 79=8 M.L.T. 224.

Mortgage—Letting by mortgagee to mortgagor—Rent in lieu of interest—Charge—Prior incumbrance—*See* CIV. PRO. CODE, 1908, s. 73, 9 M. 57.

A plaintiff attaching the property of the defendant before judgment has no—on the property attached, so as to have priority over other creditors—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 10. 31, s. 48, O. XXI, rr. 43, 52, s. 73, O. XXXVIII, rr. 8, 11, 12, 10 C.W.N. 634=33 C. 639.

Charge—*continued.*

Sale in Court-auction of property subject to—Right of purchaser, in suit by holder of charge, to contest the charge—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, 1 N.L.R. 150.

Sum recoverable by Government as stamp fees, first charge on proceeds of sale—*See* CIV. PRO. CODE, 1908, O. XXXIII, r. 10, 25 M. 733, 12 M.L.J. 405.

And mortgage, difference between — *See* COMPROMISE—GENERAL, 7 C.L.J. 492=12 C.W.N. 849=35 C. 837.

See CONTRACT ACT, 1872, s. 29, 1 A. 275.

One co-sharer making payment of Government revenue for another—*See* CO-SHARERS—GENERAL, A.W.N. 1886, 269.

Payment of arrears of revenue by one of the co-sharers—Effect — Charge on share of other co-sharers—Equity—*See* CO-SHARERS—GENERAL, 14 C. 809, F.B.

Payment of Government revenue by co-sharer for another to save sale of estate—Charge on such share—*See* CO-SHARERS—GENERAL, 9 C. 377.

See CO-SHARERS—GENERAL, 22 C. 800.

Decree—Construction—Charge or mortgage —*See* DECREE—DECREE, CONSTRUCTION OF, 8 A.L.J. 418.

See DEED—ATTESTATION OF DEEDS, 1 C. W.N. 81.

Hypothecation of immoveable property — Mortgage or charge—*See* DEED—CONSTRUCTION OF DEEDS, 9 Ind. Cas. 828.

Sale-deed, the words "as malikana," in a, when creates a heritable charge—*See* DEED—CONSTRUCTION OF DEEDS, 9 A. 591=A.W. N. 1887, 121.

Loan for expenses of an appeal—On amount to be realised on success—Persons paid from such amount deposited, right of lender against—*See* EQUITABLE MORTGAGE, 16 M. 429.

Created in favour of lender of purchase-money —Equitable charge on property purchased—*See* EQUITABLE MORTGAGE, 15 A. 304, P.C.

Enforcement of charge created by decree, by application, by suit—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 2 C.W.N. 33.

On lands—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 3 C.L.R. 504.

Whether maintenance of a Hindu widow is a —on the husband's estate—*See* HINDU LAW—MAINTENANCE, 10 C.W.N. 1074=4 C.L.J. 476.

Decree for maintenance against undivided members of Hindu family—Charge—Liability of property in hand of persons claiming by survivorship—*See* HINDU LAW—MAINTENANCE, 24 M. 689.

Right of illegitimate son to maintenance—Sudras—Maintenance, a—on the zemindar—*See* HINDU LAW—MAINTENANCE. 11 W.R. 6, P.C.=2 B.L.R. 15, P.C.=12 M.I.A. 203.

Charge—*continued.*

Post diem interest claimable under mortgage-bond a charge on mortgaged property—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 12 C.P. L.R. 18.

See INTEREST—SPECIAL CASES, 21 B.L.R. 1903.

Subject-matter of suit to establish validity of—*See* JURISDICTION—QUESTION OF JURISDICTION, 15 C.P.L.R. 161.

Decree for recovery of land on payment of certain sum—Whether creates a—*See* LIMITATION ACT, 1908, ss. 6, 8, arts. 142, 144, 100 P.R. 1909.

Suit for recovery of arrears of malikhana—no—claimed on land—*See* LIMITATION ACT, 1908, arts. 115, 120, 132, 33 C. 998.

Vendor's—for unpaid purchase-money, limitation for suit to enforce—*See* LIMITATION ACT, 1908, arts. 132, 111, 29 M. 305.

See LIMITATION ACT, 1908, arts. 132, 147, 20 B. 408, F.B., 13 B. 90, F.B.

See LIMITATION ACT, 1908, arts. 144, 148, A.W.N. 1885, 300.

Dedication, under Mahomedan Law, of a portion of the profits of the land does not constitute a *wakf* of either the whole or portion of the land—At best it creates merely a—*See* MAHOMEDAN LAW—WAKF, 2 C.L.J. 166.

Interest whether a charge on the mortgaged property—*See* MORTGAGE—GENERAL, 116 P.L.R. 1909=3 Ind. Cas. 978=162 P.W.R. 1909.

See MORTGAGE—CONSTRUCTION OF MORTGAGE-DEEDS, 23 P.L.R. 1900, NOTES OF JUDGMENT, P.L.R. 1900, 178.

Promise not to alienate property—*See* MORTGAGE—FORM OF MORTGAGES, 2 A. 449.

Hypothecation-bond, terms in, taken sufficient to create—*See* MORTGAGE—FORM OF MORTGAGES, 8 A. 486=A.W.N. 1886, 216.

Whether a mortgagor redeeming a mortgage has a—on the interests of the other co-mortgagors for the amount payable by the latter—*See* MORTGAGE—REDEMPTION, 10 C.W.N. 626, P.C.=3 A.L.J, 360=3 C.L.J. 481=1 M.L. T. 143=8 Bom. L R. 397=16 M.L.J. 269=28 A. 482.

Necessity for payment of further—before redemption—*See* MORTGAGE—REDEMPTION, 8 O.C. 227.

Merger of—*See* MORTGAGE—REDEMPTION, 1 C.L.J. 531.

Merger of—Charge when kept alive—*See* MORTGAGE—MISCELLANEOUS, 2 C.L.J. 202.

Portion of sum raised used for legal necessity—Rights of alienee—*See* PARTIES TO SUITS—GENERAL, 4 B.L.R. A.C. 118=12 W.R. 478.

Suit for redemption converted into one for recovery of property on payment of a—*See* PLEADINGS, 10 O.C. 17.

Charge—*continued.*

Instrument creating—in nature of mortgage—Necessity for registration—Admissibility in evidence—*See* REGISTRATION ACT, 1908, s. 17, 20 B. 553.

See REGISTRATION ACT, 1908, s. 17, 1 A. 274, 2 A. 96, 190 P.L.R. 1905=1 P.R. 1906.

Document creating an equitable — Only stamped with stamp required for power of attorney—not registered according to provisions of Registration Act—Immoveable property not affected—*See* REGISTRATION ACT, 1908, ss. 17, 21, 49, 7 C.L.J. 149=12 C.W.N. 316=35 C. 845.

See RENT, 2 M. 234.

See ST. 11 & 12, VICT., C. 21, s. 23, 25 M. 406=12 M.L.J. 282.

Decree on compromise creating—for maintenance—Liability of *bona fide* transferee for value without notice—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 39, 100, A.W.N. 1906, 165=3 A L.J. 551=28 A. 655.

Creation of a—Agreement to execute a mortgage-deed—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 54, 100, 28 M. 54.

Under the Transfer of Property Act, 1882, distinguished from vendor's lien in England—*See* TRANSFER OF PROPERTY ACT, 1882, s. 55, 5 Bom. L.R. 838.

Money paid by the purchaser of a part of the mortgaged property to pay off the prior mortgage—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 55 (6) (*b*), 82, 95, 9 O.C. 259, B.

Mortgage invalid owing to want of attestation does not become a—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 59, 100, 9 C.W.N. 697=32 C. 729.

Bond providing for collateral security without actual transfer of any interest is simple mortgage and not—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 59, 100, 9 C.W.N. 1001.

Oral agreement in compromise — Decree creating a charge on immoveable property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 9 M. 103.

Ss. 59, 100, Act IV of 1882—No charge created under s. 100, if instrument invalid as mortgage for want of attestation—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 59, 100, 31 M. 337.

When a mortgage fails as such, the deed will take effect as a—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 59, 100, 17 M.L.J. 39.

Deed whether mortgage or charge—Construction—Creation of charge on the happening of a condition — *See* TRANSFER OF PROPERTY Act, 1882, s. 61, 21 M.L.J. 562.

Decree creating charge for maintenance—Enforcement how effected—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 67, 99, 22 C. 903.

Consent-decree ordering money to be paid by instalments and creating charge on property

Charge—*concluded.*

—Property not liable to be sold in execution of decree—Separate suit to be brought under s. 67 —*See* TRANSFER OF PROPERTY ACT, 1882, ss. 67, 99, 100, 22 C. 859.

See TRANSFER OF PROPERTY ACT, 1882, ss. 63, 100, 15 C. 492.

Mortgagee under mortgage executed between date of default and date of sale entitled to—On surplues sale-proceeds on sale for arrears of Revenue—*See* TRANSFER OF PROPERTY ACT, 1882, s. 73, 3 C.L.J. 52.

Right of a purchaser of a portion of a property subject to a charge to have the charge satisfied out of the other portion of the property —*See* TRANSFER OF PROPERTY ACT, 1882, ss. 82, 56, 2 A.L.J, 698.

Right of a co-mortgagor who was paid off the entire mortgage-debt to a—on the mortgaged property—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 82, 95, 4 C.L.J. 79.

Payment of mortgage-decree by one of several representatives of a deceased mortgagor—Charge —Contribution—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 82, 95, 100, 9 C.W.N. 865.

Suit for sale on foot of mortgage of property subject to a charge for maintenance—*See* TRANSFER OF PROPERTY ACT, 1882, s. 88, 3 A.L.J. 848=A.W.N. 1907, 18=29 A. 205.

Sale of property, the subject of a—Right of holder of charge against his debtor — *See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 2 A.L.J. 379=A.W.N. 1905, 144.

Suit under Transfer of Property Act, s. 67, compromised—Simple money-decree with a charge on property—Decree-holder how to enforce charge—*See* TRANSFER OF PTOPERTY ACT, 1882, s. 99, A.W.N. 1905, 189=2 A.L.J. 479=28 A. 58.

Haqi Chaharum, whether, is a—*See* TRANSFER OF PROPERTY ACT, 1882, s. 100, 2 A.L.J. 754.

Whether a covenant by vendee with vendor to pay plaintiff certain quantity of rice, a charge—*See* TRANSFER OF PROPERTY ACT, 1882, s. 100, 5 M.L.T. 73=2 Ind. Cas. 617.

Actionable claim, transfer of—Right to recover subscriptions, assignment of right of holder of a—*See* TRANSFER OF PROPERTY ACT, 1882, s. 134, 7 M.L.T. 125=5 Ind. Cas. 834.

Suit for recovery of property subject to—*See* VALUATION OF SUIT, 10 O.C. 42.

Valuation for jurisdiction—Subject-matter of suit to establish—Upon property—*See* VALUATION OF SUIT, 4 M. 339.

Chariramna Holdings.

Pasture lands— Chariramna *holdings — Tenancy if permanent—Occupancy-right, acquisition of, in—Using land for purposes of cultivation, if waste—Remedy of landlord—Forfeiture—Landlord and Tenant Act* (X *of* 1859),

Chariramna Holdings—*concluded.*

s. 6—Bengal Tenancy Act (*VIII of* 1885), s. 5 (2)—*Notice—Service—Transfer of Property Act* (*IV of* 1882) *ss.* 106, 108 (*o*) 111 (*g*).—The question being whether certain holdings situated in the tract known as *chariramna* or pasture lands in Mouzah Basantpur in Zillah Purnea were permanent tenancies, it was proved that salee by private treaty and by auction through Court of such holdings were frequent, that cases of ejectment were uncommon, that such holdings frequently passed to the heirs of the deceased tenants and that mutation of names in the zemindar's *sherista* had been frequently allowed sometimes on payment of *nazarana* and sometimes without: *Held* that the proper inference to be drawn from the circumstances was that the tenants had a permanent right in the holdings and were not liable to ejectment on notice. *Per Doss, J.*—That, assuming that the lands were settled with the tenants only for the purpose of grazing cattle, the tenants had acquired a right of occupancy in the lands, before the Bengal Tenancy Act came into force) under s. 6 of Act X of 1859. (11 W.R. 231, *F.*, That it was not reasonable to hold that, at the inception of tenancies, it was intended by the parties that the lands were never to be used for cultivation, and the tenants were raiyats within the meaning of s. 5, sub s. (2) of the Bengal Tenancy Act. *Per Richardson, J.*—The tenants had failed to prove that the lands were left for purposes of cultivation, or that they had acquired occupancy—right therein. That, by using lands, intended for grazing, for purposes of cultivation, the tenants did not incur forfeiture. SHEIK LATIFAR RAHAMAN v. A.H. FORBES, **14 C.W.N. 372=5 Ind. Cas. 783.**

Charitable Bequest.

See HINDU LAW—RELIGIOUS ENDOWMENT.

See MAHOMEDAN LAW—WAKF.

See RELIGIOUS ENDOWMENT.

(1)—*Mixing up with other bequests.*—Where charitable purposes are mixed up with other purposes of a shadowy and indefinite nature that the Court cannot execute them, such as 'charitable or benevolent' 'or charitable or philanthropic' or 'charitable or pious' purposes or where the description includes purposes which may or may not be charitable and a discretion is vested in the trustees, the whole gift fails for uncertainty. TRIKUMDAS v. HARI DAS, **9 Bom. L R. 560=31 B 583.** [*R.*, 10 C. L.J. 355, F.B., 14 C.W.N. 18, F.B.]

(2)—Anna-chhatra—*Bequest.*—A bequest by a Hindu for the maintenance of an *anna-chhatra* is not void as being too vague. ADVOCATE-GENERAL v. T. J. STRANGMAN, **6 Bom. L.R. 56.**

(3)—Dharam, *bequest to.*—A device or bequest for *dharam* is void, because the objects which can be considered to be meant by that word are too vague and uncertain for the administration

Charitable Bequest—*continued.*

of them to be under any control. RANCHORDAS v. PARVAAIBAI, **1 Bom. L R. 607=23 B. 725=26 I.A. 71=3 C W.N. 621.** [*F.*, 23 A. 448, 2 Bom. L.R. 106, 12 M.L J. 197, 25 A. 435, 30 M. 340, 9 C.L.J. 236; *Rel.*, 10 C.L.J. 355, F.B. 14 C.W.N. 18, F.B.; *D.*, 28 M. 197; *Expl.*, 17 M.L.J. 379; *R.*, 3 Bom. L.R. 902, 6 Bom. L.R. 78, 8 C.W N. 653, 31 C. 895, 24 B. 504, 4 Bom. L.R. 893, 25 M. 507, 31 C. 166, 8 C. W.N. 273, 5 A.L.J. 23=30 A. 111=A.W.N. 1908, 34, 6 C.L.J. 490.]

(4)—*Uncertainty—Void bequest.*—A bequest for "some one or more charitable, educational or other philanthropic institution or institutions" is void for uncertainty. CHADUNBAI v. DADY, **3 Bom. L.R. 902=26 B. 632.**

(5)—*Suit for administration of will—Oudh—East India Company*— A testator devised considerable property, both real and personal, for charitable purposes, amongst which he directed certain sums to be set apart for the liberation of persons imprisoned for debt, and for the endowment and establishment of a College at Lucknow, in the dominions of the King of Oudh. A suit having been instituted in the Supreme Court of Calcutta, to administer the will, the Court directed an inquiry whether the College could be established, and the bequest for the liberation of prisoners carried into effect, with reference to the testator's intention and the sanction of the Government at Lucknow. On the subject of the bequest for the liberatton of prisoners, the Master found in the negative, and reported that, with respect to the establishment of the College, there was not sufficient evidence to enable him to state whether it could be established with reference to the testator's intention and the sanction of the Lucknow Government, but, as no further evidence was likely to be obtained, he appended the correspondence with the British Resident at Lucknow, by which it appeared that, though the King of Oudh did not object to the establishment of the College, he held out no expectation that he would afford it his countenance or support. The report having been confirmed, and a decree made thereon, the Supreme Court, on a re-hearing of the cause, directed an inquiry whether the Governor-General in Council had the means of giving effect to the bequest to the College at Lucknow, and whether he was willing to receive the funds bequeathed for that purpose: the Master found that the Governor-General was willing to receive the funds, but did not state whether he had the means of giving effect to the bequest; the Court, however, thereupon decreed the payment of the funds to the Governor-General, or such person as he should appoint. Upon appeal to the King in Council, *held*, by the Judicial Committee, that, though the reference to the Master on the re-hearing, after the confirmation of his previous report, was informal, and if objected to at the time, would have been fatal, yet, as no objection had been taken, and the Master had not satisfied the whole of

Charitable Bequest—*concluded.*

the inquiry by stating whether the Governor-General had the means of carrying the testator's intention into effect, that part of the decree affirming the Master's report, and directing the payment of the fund to the Governor-General, must be reserved, and the case sent back to ascertain that fact; Their Lordships being of opinion that, under the existing relations between the East India Company and the King of Oudh, an arrangement might be made for the appointment of a trustee to carry the Lucknow bequest into effect, under the direction, and subject to the jurisdiction, of the Supreme Court. THE MAYOR OF LYONS v. THE EAST INDIA COMPANY, **1 M.I.A. 175.**

(6)—*Charity—Failure of gift—Doctrine of cypres—Jurisdiction of Court, when arises—Power of appellate Court, interference with scheme—Duty of Court constructing scheme.*—The principle of the doctrine of *cypres*, in relation to charities, is that the Court treats charity in the abstract as the substance of the gift and the particular disposition as the mode, so that, in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy, which never fails and cannot lapse. It cannot be laid down as a general principle that the *cypres* doctrine is invariably displaced where the residuary bequest is to charity. The jurisdiction of the Court to act on the *cypres* doctrine arises upon the failure of a specific charitable bequest, whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. Among charities there is nothing analogous to benefit of survivorship. An appellate Court will be reluctant to interfere with a *cypres* scheme formulated by a lower Court unless it be plainly wrong. The Court, while having regard to the other objects of the testator's bounty in constructing a scheme, ought to give its primary consideration to the gift, which has failed, and to a search for objects akin to it. THE MAYOR OF LYONS v. THE ADVOCATE-GENERAL OF BENGAL, **1 C 303=26 W.R. 1=3 I.A. 32.** [*R.*, 32 B. 214, 9 Bom L.R. 1203.]

See HINDU LAW—WILL, 31 C. 895=8 C.W. N. 653.

By a Cutchi Menon for Maulud Sheriff and Agiarai Hujrat Pir are void as offending against the law of perpetuities—*See* MAHOMEDAN LAW—CUTCHI MEMONS, 5 Bom.L.R. 1010

See WILL—CONSTRUCTION, 4 C. 443=1 C.L.R. 566

To poor relations—Uncertainty—*See* WILL—MISCELLANEOUS, 31 C. 166=8 C.W.N. 273.

Charitable Endowment.

Suit relating to charity under, interest necessary to institute—*See* CIV. PRO. CODE, 1908 O. I, r. 8 (1), 21 M. 10.

Charitable Endowment—*concluded.*

Trustee's competence to grant permanent tenure—Power of Collector under Reg. VII of 1817—*See* RELIGIOUS ENDOWMENT, 27 M. 291, P.C.=8 C.W.N. 545—31 I.A. 83=14 M. L.J. 200.

Charitable Funds.

See ADVOCATE-GENERAL, 4 M.I.A. 109.

Charitable Gifts.

Hospitals, gifts to—Corporate bodies—*See* SUCCESSION ACT, 1865, ss. 90, 105, 6 C.W.N. 321.

Charitable Institution.

Subscription to—Suit—*See* RIGHT OF SUIT—MISCELLANEOUS, 10 C.L.R. 197.

Charitable Trusts.

(1)—*Practice — Decree, setting aside of—Notice of motion—Jurisdiction—Public charitable bequests—Distribution of* tramdis *and* tras *among members of the testator's caste and to Sarasvat Brahmins—Doctrine of* cypres. —When a decree, either preliminary or final, is once passed the Judge passing it has no power to vary or alter it on an application made to him based merely on a notice of motion. A Lohana testator by his will gave a bequest of Rs. 7,500 for distribution of *tramdis* (brass pots) to the members of his caste and Saraswat Brahmins in Bombay; and he made another bequest to present *tras* (a kind of copper pot) and sugar candy among the members of his caste and Sarasvat Brahmins in 1440 villages in Cutch. The Advocate General, as the relation of the plaintiffs, sued to have it declared that it was not practicable to carry out those bequests, and to ask the Court to apply them *cypres* to some other and more useful charity:—*Held*, that the bequests in question were valid public charitable bequests, and were capable of being carried out. In cases of charitable bequests, the Court has no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because the one might not be so useful as some other that the Court might substitute. THE ADVOCATE-GENERAL OF BOMBAY v. FARDOONJI ARDESHAR CURSETJI FARDOONJI, **13 Bom. L.R. 332.**

(2)—*Property burdened with a charge for charity—Alienability.*—Where property is not merely dedicated to a charity, but burdened with a charge in respect of a charity, as where the founder's family has a beneficial interest in the surplus income, it can be alienated subject to the charge. MUTHU NADAN v. SHUNMOOGATHA PILLAI, **7 Ind. Cas. 79=8 M.L.T. 224.**

(3)—*Gift for a charitable purpose—Trust for a definite object acted upon—Trust irrevocable.* —A gift of money for a charitable purpose is not revocable when the trust is created for definite objects of bounty and acted upon. SIRDAR PERTAB SINGH v. LEWIN, **43 P.R. 1867.**

Charitable Trusts—*concluded.*

See RELIGIOUS COMMUNITY, **12 B.H.C. 323.**

Not void for vagueness—Parties—Persons interested not being upon the record—Effect—*See* RELIGIOUS ENDOWMENT, **5 A.L.J. 23=A.W.N. 1908, 34=30 A. 111.**

Charities.

(1)—Right of Advocate-General to appear for the informations for administration of charities. ATTORNEY-GENERAL v. BRODIE, **4 M.I. A. 190.**

Powers of Manager of Charitable Institution—Evidence and burden of proof of necessity for alienation—*See* ALIENATION, 13 O.C. 79=5 Ind. Cas. 1005.

Lands dedicated to—, suit to set aside illegal sale of not governed by s. 539, Civ. Pro. Code—Advocate-General not necessary party—*See* CIV. PRO. CODE, 1908, ss. 92, 93, 8 B. 365.

Taxation—Charity suit—Defendants' costs as between attorney and client ordered to be paid out of charity funds—Discretion of taxing master to allow charges but not against charity funds—*See* COSTS—TAXATION OF COSTS, B. 301.

Public and private—Prerogative of the Crown—*See* MAHOMEDAN LAW—WAKF, **6 Ind. Cas. 219=7 A.L.J. 761.**

Bequest for charitable purposes—*See* MAHOMEDAN LAW—WILL, **75 P.R. 1907=168 P.L. R. 1908=139 P.W.R. 1907.**

Will—Establishment of charity under—Trust outside jurisdiction—Settlement of scheme—Duty of Court—*See* TRUST, 18 B. 551.

See TRUSTS ACT, 1882, s. 34, 18 M. 443.

Bequest to a—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Cypres doctrine—*See* WILL—CONSTRUCTION, **36 C. 261=1 Ind. Cas 944**

Charter Party.

(1)—*Contract of—Ship-owner's lien—Charterer and sub-charterer—Bill of lading issued to sub-charterer by captain—Captain authorised by owner of ship to sign bill of lading—Sub-charterer, whether bound by charter-party—"Without prejudice to the charter," meaning of—Notice by shipper of charter-party, effect of.*—Where the captain of a chartered ship was, by the terms of the charter-party, authorised to sign bills of lading on behalf of the ship-owners, a bill of lading issued by the captain to a sub-charterer entitled the latter to have the goods delivered to him on the terms of the bill of lading, irrespective of the charter-party, although he had notice of it. (*Cobin v. Newberry*, 1 Cl. and Fin. 1832; *Small v. Moates*, 9 Bing. 574, 1833; *Fry v. Chartered Mercantile Bank of India*, L.R. 1 C.P. 689 1866; *Gardner and Sons v. Trechman*, L.R. 15 Q.B.D. 1884, *F.*) A stipulation in the

Charter Party—*continued.*

charter-party that the bills of lading were to be signed by the captain " without prejudice to the charter " only meant that the rights of the ship-owners and the charterers against each other under the charter-party were to be preserved. Third parties to whom the bills of lading were issued would not thereby be made liable to the conditions stipulated in the charter-party. (*Hansen* v. *Harrold Brothers*, L.R. 1894, 1 Q. B. 612, *R.*) Notice by a shipper of the charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charter-party shows that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party and had the opportunity of reading it, and did not trouble himself about it, he might be treated as knowing the contents. TURNER v. HAJI GOOLAM MUHAMMAD ARJAM, **1 A.L.J. 553, P.C. = 31 I.A. 222 = 28 B. 573 = 6 Bom. L.R. 743 = 9 C.W.N. 1.**

(2)—*Parties to suit.*—If a master of a ship signs a charter-party in his own name as a contracting party, and at the same time discloses the name of his principal, he can sue upon the charter-party, but if a master signs a charter-party for the owner as a contracting party, he cannot sue upon it. The owner of a ship residing in England can be sued in a Civil Court in Burma for a breach of the charter-party, provided the cause of action arose within the jurisdiction of the Court in which the suit is instituted. F.W. CHADWICK v. NAWSEE DEWRAJ, **L.B.R. 1872—1892, 658.** (5 B. 584, 7 B. 51, 5 C. 71, 5 B. 589, 5 C. 79, *R.*)

(3)—*Contract—Charter-party — Shipping — Misrepresentation as to tonnage of ship—Substantial part of contract—Condition precedent—Rule as to warranty in contract.*—Where defendants chartered a ship from the plaintiff they might refuse to accept her in fulfilment of the charter party, on the ground of misdescription of the ship in respect of her tonnage, and may treat the contract as void by reason of the said misrepresentation by the plaintiff. In this case, the defendants in Bombay chartered a ship *Runic* from the plaintiff which was described in the charter-party as of the measurement of about 2,700—2,800 tons net register. From the evidence, it appeared that the defendants had never seen the vessel, and that the parties negotiated the charter-party in question on the basis of the tonnage of the vessel being as stated in the charter-party. The ship, however, turned out to be of the registered tonnage of 3,045 tons, and the defendants refused to accept her in fulfilment of the charter-party. *Held* that the representation in the charter-party as to the tonnage of the ship was intended to be a substantive part of the contract between the parties; that the statement in the charter-party as to the tonnage was a condition precedent of which the defendants were

Charter Party—*continued.*

entitled to avail themselves, whether or not they would have suffered loss had they accepted the ship; and that the defendants were, therefore, justified in repudiating the contract. With regard to the statement in a contract descriptive of the subject-matter of it or of some material incident thereof, the true doctrine established by principle as well as authority is, generally speaking, that if such descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, *i.e.*, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. (*Belin* v. *Burness*, 3 B. and S. 753, *R.*) THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED v. SOONDERDAS DHURUMSEY, **15 B. 389.**

(4)—*Charter-party—Mistake of fact—Mutual or unilateral — Rectification— Cancellation.*—Where one of the parties to an agreement is under a misapprehension as to a certain date which date is a matter materially inducing the agreement, the mistake is not mutual but on one side only; and even if both parties had been under such a mistake, cancellation and not rectification should be ordered by Court, the agreement being then void under s. 20 of the Contract Act by reason of the common mistake as to an essential matter, *i. e.*, the date in the present case. Courts of equity do not rectify contracts, they may rectify instruments purporting to have been made in pursuance of the terms of a contract. But it is necessary for a plaintiff to show that there was an actual contract concluded antecedent to the instrument sought to be rectified and that such contract is inaccurately represented in the instrument. HAJI ABDUL RAHMAN ALLARAKHIA v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, **16 B. 561.**

(5)—*Charter-party—Loading of cargo—Option of owners—Choice of port—Construction—Election—Effect of election once made.*—By a charter-party made with the defendants, the plaintiff chartered the defendant's steamship to carry a full cargo of pilgrims from Jeddah to Calcutta. The charter-party provided that " the owners are to have the option of requiring the charterer to ship salt at Ras Rawaya or at Aden to fill up the lower holds of the steamer at a lump sum of Rs. 12,000 only, payable before delivery at port of discharge." The ship sailed under the charter-party and reached Jedda. The agent there gave the charterer notice calling on him " to destine the port where you intended to load the salt." The charterer paid a certain portion of the freight according to the terms of the contract and requested that the ship might be sent to Aden for the salt. Soon afterwards the captain, believing that no salt would be found at Aden, refused to go there unless the balance of the freight was paid down in advance. The charterer paid the money under protest and brought this suit to recover

Charter Party—*continued.*

the whole sum he paid. *Held* that the plaintiff was entitled to a decree for the sums he was called upon to pay under the salt charter. *Held*, on a careful construction of the charter-party, that the option of choosing the port was with the plaintiff and the option, whether salt shall be shipped or not, was with the owners. Even assuming that the choice, of the port was, by the charter-party, with the defendants, the latter must be taken, under the circumstances of this case, to have elected to send the plaintiff to Aden; and having so elected, could not afterwards change their minds and require the plaintiff to go to Ras Rawaya. An election once definitely made is final, apart from all collateral considerations. (*Brown* v. *Royal Insurance Company*, 28 L.J.Q.B. 275; *Gath* v. *Lees*, 3 H. and C. 558, *R.*) HAJI ABDUL RAHMAN ALLARAKHIA v. HASANBHOY VISRAM, **16 B. 501.**

(6)—"*Safe port or as near thereunto as may safely get always afloat*"—*Ship unable to enter port or lie there without previous lightening—Rights of parties.*—A charter-party was entered into between the plaintiffs and the defendant, by which it was agreed, *inter alia*, that a steamer *Ossian* should load from the charterers a full and complete cargo, and "being so loaded, should therewith proceed direct all the way under steam, *via* Suez Canal, to a safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers of their assignees always afloat." Marseilles was named at first as the port of discharge, but subsequently, and before the cargo was completely loaded, the defendant was informed that the destination of the said vessel would not be Marseilles but Cette, and bills of ladings for the cargo already loaded were made out for Cette and were tendered to the defendant for signature. The defendant refused to sign the bills of lading because they were not for Marseilles, and refused to sail for Cette, as the vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. *Held* that, assuming that the plaintiffs (the charterers) had power to alter the destination of the ship from Marseilles, the port of discharge at first named, there was no breach of the charter-party by the defendant to refuse to sail to Cette or to sign bills of lading for that port, because, it was found that in the latter port the vessel cannot, by reason of her draught of water, lie and discharge "always afloat" without being previously lightened. *Held* also that the result would not be otherwise even if the charterers undertook to incur all the expenses necessary for lightening the vessel. W. & A. GRAHAM & CO. v. MERVANJI NUSSERVANJI, **5 B. 539.**

(7)—*Suit by charterers for damages for refusal to employ Stevedores to load and unload cargo.*—Where a charter-party was a time charter to commence on arrival in Calcutta and to terminate at one of five named ports, the charterers being at liberty to send the ship on any number

Charter Party—*continued.*

of voyages in the *interim*, carrying what freight they liked and the agents of the ship-owners covenanted that the steamer should be provided "with a proper and sufficient crew of officers, seamen, engineers, stokers, firemen and other necessary persons for working cargo with all despatch," it was *held*, that the parties contemplated only the method of unloading by the crew and that a suit by the charterers for damages for refusing to unload by stevedores would not lie. SOOPRAMONIAN SETTY v. HEILGERS, **5 C. 71=4 C.L.R. 377.**

(8)—*Misdescription in charter party as to tonnage of ship, whether renders voidable the contract to charter the ship—Indian Contract Act (IX of 1872), ss. 14, 19.*—The point at issue in this case was whether the defendants who had chartered a ship of the plaintiffs for a voyage were, in law, entitled to treat the contract of charter party as void, on account of the erroneous statement of the plaintiffs in the charter-party as to the size and tonnage of the vessel. The erroneous nature of the above statement was established by evidence and it was of such a material kind as to have induced the defendants to charter the ship, which otherwise they would not have done. The plaintiffs had made positive assertions about the size and tonnage of the ship which assertions were not true and were not warranted by any information they had at the time. They caused the defendants to make a mistake as to the size of the vessel which in this case was the quality the parties had principally in view. The consent of the defendants to the charter-party in question having been caused by reason of such representation by the plaintiffs, the agreement in the charter-party was held to be, by reason of the provisions in s. 19 of the Indian Contract Act (IX of 1872), a contract voidable at the option of the defendants, "the party whose consent was so caused" within the meaning of the section. THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED v. SOONDER DAS DHURUMSEY, **14 B. 241.** [*Affirmed on appeal*, 15 B. 389.]

(9)—*Contract—Mercantile Law — Shipper's lien on cargo for freight—Lien when lost.*—By the general rule of Mercantile law, the owner of a ship has a lien on the cargo for the freight earned upon the voyage, but this lien may be lost by an express contract to the contrary in the charter-party or by the waiver of the right by some other document binding on the owner. BJORCK v. THE MADRAS RAILWAY COMPANY, **2 M.H.C. 102, Note.**

(10)—*Contract—Bill of lading—Delivery of cargo not conditional on payment of freight—Insolvency of charterer—Right of Captain of ship to retain cargo for freight due.*—A person in London chartered a ship to load a cargo at Cardiff and unload it at Madras. By the terms of the charter-party, the freight was made payable in London on unloading and right delivery of the cargo, at the rate of 25 Sh. per ton on the quantity delivered. The charter-party then provided as to the time and mode of

Charter Party—*continued.*

payment that such freight was to be paid one-third by freighter's acceptance at three months from the final sailing of the vessel from her last port in the United Kingdom and the remainder by like bill at three months from date of delivery at freighter's office in London, of the certificate of right delivery of the cargo agreeably to bill of lading. It further contained the stipulation that £ 150 was to be advanced in cash at port of discharge on account of the freight against the captain's draft at ninety days. The cargo was loaded and a bill of lading was given therefor. On the day the ship sailed from Cardiff, the owners drew a bill on the charterer at three months for £ 261. A few days later, the general agents in London of the Madras firm advanced money on account of the Madras firm and received as security for such advance the bill of lading blank-endorsed and sent it to the firm at Madras. Sometime afterwards the charterer accepted the bill for £ 261. The ship arrived at Madras after the charterer had suspended payment; and the Captain thereof refused to deliver the cargo but claimed to retain it for the value of the dishonoured bill and the balance of freight due. *Held* that the clauses in the charter-party clearly showed that the intention of the parties was that all freight was to be paid in London and that it was not affected by the insolvency of the charterer. The captain had no lieu on the cargo for the freight but was bound to deliver it to the firm at Madras. ARBUTHNOT v. DAIGRE, **2 M.H. C. 88.**

(11)—*Nomination of Ship's Agents by freighters—Suit for breach of clauses of charter-party—"Going, seeking" meaning of expression.*—A charter-party made between the defendants (the owners of the *Seaforth*) and H & Co. (the freighters) provided that "the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship business there inwards and outwards on the customary terms not exceeding 2½ per cent. on amount of freight payable inwards and 5 per cent. outwards. H and Co., nominated the plaintiffs to transact the ship's business in Bombay (a port of discharge) with the knowledge and consent of the master of the *Seaforth*, if the plaintiffs accepted and acted under such nomination. The defendants refused to pay the plaintiffs commission on the outward freight of the *Seaforth*, on the ground that under the circumstances under which such freight was procured, the plaintiffs were not, under the charter-party, entitled to receive commission on it. *Held* that the plaintiffs were sufficiently within the consideration of the charter-party to maintain a suit for the breach of such clauses of it as were inserted for their benefit. Meaning of the mercantile expression of a ship "going, seeking" discussed. BLACKWELL & CO. v. JONES & CO., **7 B.H.C.O.C. 144.** [*R.*, 6 Bom. L.R. 421.]

(12)—*Charter-party—Freight—Bill of lading—Short delivery—Letter of guarantee.*—*Held* on the terms of the charter-party, in this case,

Charter Party—*concluded.*

that the owner of the vessel had a right to keep possession of the cargo until the freight was paid; and as the bills of lading referred to the terms of the charter-party, that he had the same right against the holders of the bills; and also that the master's allowing a portion of the cargo to be delivered would not prevent the owner of the vessel from insisting upon his lien on the remainder. A letter of guarantee given by the holders of bills of lading for "the payment of the balance of freight due under the charter-party less any claim for short delivery," etc., was construed to refer to the balance of freight less any claim of the charterer against the owner, and not to extend to a claim arising out of the master signing bills of lading for more goods than were put on the vessel. J. S. DODS v. C. E. STEWART, **8 B.L.R. 340=17 W.R. 49.**

See BILL OF LADING, 5 B. 313.

Consignee selling cargo to several purchasers—Charter-party — Delay to take delivery—Nature of contract—Payment of demurrage—

See CONTRACT—CONSTRUCTION OF CONTRACTS, 13 B. 392.

See DAMAGES—MEASURE AND ASSESSMENT, 8 B.L.R. 544.

See DAMAGES—MISCELLANEOUS, 6 B.L.R. App. 20.

See GUARANTEE, 1 Ind. Jur. N.S. 412.

Breach of—Injunction when grantable—*See* INJUNCTION—SPECIAL CASES, 6 B. 5.

Signed by agents without authority of master of ship, master not liable under—Execution of charter-party by agents for master and owner—Signature of bills of lading by master as agent of charterer—Liability of charterer to recoup master for damages paid for short delivery—*See* MASTER OF SHIP, 7 B. 51.

Chastity.

See HINDU LAW—MAINTENANCE, 5 C.W.N. 549.

Chastity of wife—Right to inherit husband's estate—*See* HUSBAND AND WIFE, 4 C. 327.

See MAHOMEDAN LAW — INHERITANCE, 37 P.R. 1888.

Chattel.

Mortgage of—Prior — *See* MORTGAGE—GENERAL, 15 C.W.N. 813, P.C.

Chauhans.

Custom of exclusion of daughters from inheritance among—*See* CUSTOM, 8 O.C. 94.

Chdar Andazi.

A—form of marriage—Legality of such marriage and legitimacy of offspring—*See* ACT XV OF 1856, 4 P.R. 1905=20 P.L.R. 1905.

Cheating.

See PRE-EMPTION—MISCELLANEOUS. A. W.N. 1904, 265.

Chelas.

See HINDU LAW — INHERITANCE, 11 B. 514.

Celas—*concluded.*

Right of, to succeed—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 7 C.W.N. 145.

Cheque.

See NEGOTIABLE INSTRUMENTS — CHEQUES.

(1)—*Post-dated cheque — Stamp.*—A post-dated banker's cheque is available in the hands of its holder and is admissible in evidence with only a one-anna stamp. MOTILAL v. JAGMOHUNDAS, **6 Bom.L.R. 699.**

(2)—*Cheque for more than Rs. 20—Stamp.*—A cheque executed in British India for amounts of more than Rs. 20 is, under s. 5 of the Stamp Act, chargeable with a duty of one anna. If not so stamped, it will be inadmissible in evidence. DAMODAR DAS v. MAJOR DORAN, **69 P.R. 1894.**

See NEGOTIABLE INSTRUMENTS—BILL OF EXCHANGE, 16 C. 432.

Liability of endorser — *See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 35, 43, 7 A. 490, F.B.=A.W.N. 1885, 101.

Chhimba.

Occupancy-tenant, gift by, to his daughter's sons—Suit by reversioners to contest alienation—Punjab Tenancy Act, ss. 59, 60, &c.—Presumption as to tenant's competency to alienate—Proof—*See* CUSTOM—PUNJAB—ALIENATION, 60 P.W.R. 1907=38 P.R. 1909.

Chhor Chithi.

Pat and Natra marriages—Chhor Chithi—Inheritance—*See* HINDU LAW — MARRIAGE, 1 B. 97.

Chief.

Deposition of Chief—Appeal—*See* ACT OF STATE, 1 A.L.J. 691, P.C.=32 C. 1=31 I.A. 239=8 C.W.N. 841=6 Bom. L.R. 763.

Chief Commissioner.

See LOCAL GOVERNMENT, 9 B.L.R. 196, Note=14 W.R. 331.

Chief Constable.

Chief constable, liability of Government for tortious acts of—*See* ST. 21 AND 22, VIC. C. 106, ss. 42, 65, 6 Bom.L.R. 65=28 B. 314.

Chief Court.

See VAKALATNAMAH, 103 P.R, 1890.

Chief Court, Jurisdiction of Punjab.

(1)—*Jurisdiction of Chief Court to hear appeals transferred to it by Judicial Commissioner of North-West Frontier Province—S. 87-A—North-West Frontier Province Law and Justice Regulation (VII of 1901) as amended by Regulation (1 of 1906).*—The Chief Courts' jurisdiction, as a Court of Civil appeal, has been defined by its Constitutive Act, and in respect of certain special proceedings, this jurisdiction has been enlarged by Acts emanating from the same authority which constituted the Court and defined its jurisdictional limits. It has no other jurisdiction as such Court of appeal, and this jurisdiction cannot be extended extra-territorially to North-West Frontier Province by s. 87-A of the above Regulation which was made under a Statute, which is not in force in the Province in which the Court is situate, and by an authority (the Governor-General in Executive Council) whose powers of legislation are exceptional, special and strictly limited under that Statute. The jurisdiction of Chief Court cannot be extended or modified except by an Act of the Legislature. JODH NATH v. SADHU RAM, **50 P.R. 1907, F.B.=61 P.W.R. 1907.**

Chief Court, Jurisdiction of Punjab—*concld.*

(2)—*Matrimonial jurisdiction—Appeal against order of single Judge, refusing to strike of the record the name of co-respondent—Appealability—Divorce Act (IV of 1869), s. 55—Punjab Courts Act (XVIII of 1884), s. 9-A—Civ. Pro. Code, s. 2.*—No appeal lies against an order by a single Judge, sitting on the original side, refusing to strike off the record the name of a person impleaded as co-respondent to a petition for dissolution of marriage and damages. T. v. B. AND B., **98 P.R. 1909=172 P.W.R. 1909=4 Ind. Cas. 882.** (18 P.R. 1903, 30 C. 489, 18 A. 375, 22 B. 612, 14 M. 88, *R.*)

(3)—*Held* per *Campbell, J.*, that where a Subordinate Court, in a case where no further appeal lay to the Chief Court, hears an appeal which by law would not lie from the original Court, the Chief Court, under s. 35 of Act XXIII of 1861, can pass an order only as to the Lower Appellate Court's proceedings, but cannot interfere with the proceedings of the original Court. PEER BUKSH v. JUMAL, **80 P.R. 1870.**

See SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 91 P.R. 1877.

Power of revision of—Order under s. 295, Civ. Pro. Code—Revision—*See* PUN. ACT XVIII OF 1884. s, 70 (1) (*a*) and (*b*), 65 P.R. 1905=130 P.L.R. 1905.

Power of—to remand a case when the Judge of the lower Court has failed to hear arguments of pleaders or parties before pronouncing his judgment.—*See* CIV. PRO. CODE, 1908, s. 33, O. XX, r. 1, s. 95, 5 P.L.R. 1905.

Chief Judge.

Is the sole Judge in election matters—*See* BOM. ACT III OF 1888, s. 33, 9 Bom. L.R. 417 =31 B. 604.

Should determine the amount of compensation consequent upon the Municipal Commissioner's action—*See* BOM. ACT III OF 1888, ss. 222, 504, 9 Bom L.R. 1321.

Right of—to appoint Judges for the hearing of cases—*See* ST. 24 AND 25, VICT. C. 104, ss. 13, 14, 30 C. 588=7 C W.N. 547.

Chiefship.

Chiefship, succession to—*See* FAMILY CUSTOM, 5 Bom. L.R. 486.

Child.

Dissolution of marriage on account of adultery—Access to—*See* ACT IV OF 1869, s. 37, 5 B.L.R. 71.

Child—*concluded.*

Application by mother of illegitimate child to have the child removed from the custody of the father and placed under her custody—Mother being a prostitute—*See* ACT IX OF 1861, A.W.N. 1887, 239.

See EVIDENCE ACT, 1872, s. 112, 29 C. 111, P.C.=29 I.A. 17=6 C.W.N. 146.

Maintenance of—Power to cancel an order for maintenance—*See* MAINTENANCE, A.W. N. 1904, 149.

Gift to—*See* WILL—CONSTRUCTION, 1 Ind. Jur. O.S. 74=1 M.H.C. 17.

Child-witness.

Child-witness, affirmation of—*See* ACT X OF 1873, S. 13, 5 Bom. L.R. 551.

Chinese Buddhist.

Residing in Burma—Law applicable—*See* BUDDHIST LAW—MARRIAGE, 8 Ind. Cas. 452.

Chinese Law—Inheritance.

(1)—*Chinaman marrying a foreign woman of different religion and claiming to administer her estate after her death.*—When a Chinese marries a woman in a foreign country and that woman is capable of possessing and does possess property, there may be a customary law governing the succession to such property. If she is a Buddhist and she dies leaving no children, her husband would be an heir and presumably entitled to administer. Where plaintiff, a Chinaman, and a follower of Confucius, who had two Chinese wives whom he had married in succession, on coming to Rangoon, went through a ceremony of marriage with one Ma Bi, a Burmese (Zerbadi) woman, and a Buddhist or a Mahomedan who lived with him and was recognised by the community as a wife and on Ma Bi's death, plaintiff applied for letters of administration to her estate and defendants failed to establish any rights as caveators, *held*, after consideration of the legality of the marriage, and of the rights which it gave to plaintiff in Ma Bi's estate after her death, that, in the circumstances, the plaintiff's claim was just and reasonable, and ordered accordingly. PAI BENG TENG v. KO MAUNG, **2 L.B.R. 261.** (2 L.B.R. 95, *R.*)

(2)—*Buddhist law not applicable to Confucians and Taoists — Indian Succession Act, s. 331,*—Buddhist law as administered in Burma is not usually applicable to Chinese residents. Confucians and Taoists are not Buddhists, and are therefore not exempted by s. 331 from the provisions of the Indian Succession Act, 1865. HONG KU v. MA THIN, **L.B.R. 1872—1892, 135.** (10 B.H.C. 241, 5 B.H.C. O.C. 172, 185, 12 M.I.A. 81, 4 B.H.C. O.C. 1, 24, *R.*)

(3)—*Inheritance among Chinese—Joint family property—Customs—Acquiescence—Division of property.*—Plaintiff-respondent claimed certain property as having been wrongfully taken away from her by her husband Shwe Gan's brother, Nga Shan. On looking at the evidence, it was conclusively proved that the property so taken was Nga Shan's own. Originally all the property was the joint family property of the two brothers and their nephew Nga Shwe. After the death Shwe Gan, his widow, the plaintiff-respondent, went on living in common with Nga Shan, and after a year or so, when she desired to quit the household, a division was made between her and her brother-in-law by Chin elders, both parties touching the pipe or tube for sucking *Kaung* from *Kaung* pot in token of acquiescence, as usual in such matters among the Chin people; and Nga Shan removed from the house taking his portion of the goods with him. The first appeliate Court refused to be satisfied with this positive evidence of assent merely because the division was of recent date, and the plaintiff had brought the suit. *Held* that the plaintiff-respondent had accepted the division of property and could not now challenge or go back upon what had been done. MAUNG HMON v. MA PYU **U.B.R. 1892—1896. Vol. II, 238.**

See SUCCESSION ACT, 1865, ss. 332, 190, 1 L.B.R. 193.

Chingleput.

Jurisdiction of the—District Court—*See* JURISDICTION OF CIVIL COURTS, 1 M. 89, F.B.

Chit.

See KURI CHIT, 2 M.W.N. 249.

Chit Agreement.

See ACT VI OF 1882, s. 4, 20 M. 68=7 M.L.J. 26.

Chit Fund.

(1)—*Penalty—Security bond—Chit fund—High rate of interest.*—The defendant in this case held a share in a chit fund and obtained his prize. As security for his paying in the subsequent drawings, he executed a bond to the stake-holders promising to deliver 27 cottas of paddy in half-yearly instalments of 3 cottas each. Under the terms of the bond, if there was any default in the date of payment of any single instalment, the whole was payable with interest at 1/16th cotta per cotta per diem from date of default. *Held* that the stipulation was in accordance with the rules of the chit fund which were not in any way illegal, and was, therefore, not unenforceable. PERIASAMI THALAVAR v. SUBRAMANIAN ASARI, **14 M.L. J. 136.**

(2)—*Payment of part of prize to a subscriber —Agreement between starter and subscriber for payment of balance on subscriber's furnishing security—Failure of starter to pay balance of prize money—Whether relieves subscriber from obligation to pay future instalments—Default in payment of instalments—Action for recovery of last two intsalments—Stipulation for payment of all future instalments in default of any one instalment—Waiver—Limitation.*—A *kuri* was

Chit Fund —*concluded.*

started by plaintiff's predecessor in 1893. It was to consist of 14 tickets of Rs. 500 each and it was to continue for 13 years. Defendant, one of the subscribers, won a prize at the sixth drawing. A portion of the prize-money was paid to him by the plaintiff and the balance was reserved with the latter for payment to defendant when he gave security for payment of future subscriptions. It was found that defendant offered the security and that plaintiff defaulted to pay the balance reserved with him. It was also a condition that, in default of defendant's payment of any one instalment, all future instalments would become due at once. Plaintiff credited the unpaid prize-money towards subsequent instalments, and sued defendant for the last two instalments. Defendant pleaded that he was not liable to pay the future instalments, as plaintiff did not give him the balance of his prize-money, and that, as he made default in payment of the instalment due for 1900, all the instalments became then due and the suit was barred by limitation: *Held*, (1) that, apart from the special agreement, a default in payment of the prize-money did not relieve the defendant from liability to pay future subscriptions; (2) that, as it was found that plaintiff had waived the benefit of the stipulation for payment of all overdue instalments in default of any one instalment, the suit was not barred by limitation. PAZHANCHERI PANANGAT BLAHAYIL v. PAZHANCHERI MANANTHAN, **8 Ind. Cas 510** (3 M. 61, 12 M. 192, 18 M. 257, 13 C.W.N. 1010 =4 Ind. Cas. 17, *R.*)

Consisting of more than twenty members, necessity for registration, under the Companies Act—*See* ACT VI OF 1882, 1 M.L.T. 237=16 M.L.J. 395=29 M. 477.

See ACT VI OF 1882, s. 4, 11 M.L.J. 130.

Association consisting of more than 20 persons —Unregistered Company—Maintainability of suit for recovery of subscription—*See* ACT VI OF 1882, s. 4, 1 M.L.T. 106.

Chittagong.

The revenue peculiarities of the district of Chittagong dealt with in this case. PROSUNNO COOMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **26 C. 792=3 C.W.N. 695.**

Noabad Taluqs—Perpetual or permanent Settlements, onus of proving—*See* BURDEN OF PROOF—GENERAL, 26 C. 792=3 C.W.N. 695.

Chittahs.

See DOWL FEHRIST, 3 C. 322.

Prepared for distributing public revenue on a partition of an estate are public documents—*See* EVIDENCE — MISCELLANEOUS DOCUMENTS, 15 C.W.N. 515.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 29 C. 187, P.C.=29 I.A. 24=6 C.W.N. 386,

Chittahs —*concluded.*

Title—Resumption—Evidentiary value of—*See* EVIDENCE—MISCELLANEOUS, **14 C. 120.**

Resumption or Settlement chittas—Admissibility thereof in evidence—*See* EVIDENCE—MISCELLANEOUS, 1 C.W.N. 530,

Admissibility of, in evidence—*See* EVIDENCE ACT, 1872, ss. 13, 83, 2 Ind. Cas. 513.

Measurement—*See* EVIDENCE ACT, 1872, s. 83, 9 C. 741.

Chose-in-action.

Assignee of negotiable instrument as assignee of chose-in-action—Transfer of Property Act, ss. 130 and 137—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—GENERAL, 17 M.L.J. 393=3 M.L.T. 7.

Chota Nagpur.

(1)—*Act VIII (B.C.) of 1869—Applicability to Lohardugga.*—Act VIII (B.C.) of 1869 applied to the District of Lohardugga in Chota Nagpur. PUROHIT GOBIND RAM v. BHUPAL SINGH, **10 C.L.R. 76.**

Deputy Commissioner in—Not a District Judge—Ss. 2, 344, Civ. Pro. Code—*See* DEPUTY COMMISSIONER, 16 C. 13.

Chota Nagpur Incumbered Estates Act.

See BEN. ACT VI OF 1876.

Chota Nagpur Incumbered Estates Act Amending Act VI of 1876.

See BEN. ACT XII OF 1877.

Chota Nagpur Landlord and Tenant Procedure Act.

See BEN. ACT I OF 1879.

Chota Nagpur Tenancy Act.

See ACT VI OF 1908.

Chota Nagpur Tenancy (Amendment) Act.

See BEN. ACT V OF 1903.

Chota Nagpur Tenures Act.

See BEN. ACT II OF 1869.

Chowdhris.

Right to receive fees as—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, A.W.N. 1907, 228=4 A.L.J. 715=29 A. 683.

Chowdhuri.

Office of—Succession—Primogeniture—Custom—Evidence—*See* HINDU LAW—INHERITANCE, 6 A.L.J. 364, P.C.=13 C.W.N. 581=9 C.L.J. 499=11 Bom. L.R. 530=36 C. 590=19 M.L.J. 239=6 M.L.T. 84=1 Ind. Cas. 754.

Chowkidar.

Entries in a chowkidar's register — *See* LEGITIMACY, P.L.R. 1900, 412.

Chowkidar's Register of births and deaths—Admissibility—*See* EVIDENCE ACT, 1872, s. 35, 14 C.C. 68.

Chowkidari Chakran Lands.

(1)—Chowkidari Chakran *lands, if form part of estate before and after resumption—Mortgage of Zemmaari before resumption—Accession to mortgaged property after resumption—Transfer of Property Act (IV of 1882), s. 70—Tenants holding for 50 years under* ouowkidar—*Whether acquire occupancy right—Chowkidari chakran* lands do form part of the estate before resumption and re-settlement by the Collector. On their resumption, they form a separate estate for one purpose, that is, as being hypothecated for the payment of the *Chowkidari* settlement. A mortgage of the Zemindari executed before resumption would cover resumed *chowkidari chakran* lands upon their transfer to the *zemindar* ; for they would be accretions to the mortgage after release within the meaning of s. 70 of the Transfer of Property Act. Tenants, who have been holding under the *chowkidar* for fifty years or so, acquire occupancy rights, and are not liable to be ejected by the zemindar upon resumption and transfer to him of the chakran lands. RAKHAL DAS MUKHERJEE v. MADHAB CHANDRA SINGHA, **8 Ind. Cas. 823=C.W.N. 61=13 C.L.J. 109.** (31 C, 1021, 8 C.W.N. 161, *Rel. on* ; 9 C.W.N. 571, 1 C.L.J. 303, 12 C.W.N. 161, 7 C.L.J, 85, 35 C.185, *D.*)

(2) — *Resumption — Settlement — Zemindar and* putnidar — *Parent estate — Separation — Limitation—Registration in zemindar's* sherista *— Sale under Reg. VIII of 1819—Void or voidable—Share of profits.*—The resumption of *chaukidari chakran* lands by Government and their subsequent transfer to the landlord do not separate them from the parent estate so as to create a new title in the proprietor. A suit by the *patnidars* for land so resumed and resettled with the proprietor is governed by arts. 142 or 144, Limitation Act. If the plaintiffs can prove their title as *putnidars*, it is no bar to their bringing such a suit that they are not registered in the zemindar's *sherista* as such. A sale under Reg. VIII of 1819 at which the defaulting *putnidar* purchases the *putni benami* is not void but voidable ; and if it is not avoided the right to the property remains in the actual purchasers. On settlement of the lands with the *putnidar*, the landlord is entitled not only to the amount assessed by the Collector under s. 49 of the *Chaukidari* Act as payable by him to the *chaukidari* fund, but also to a fair proportion of the profits accruing to the estate by virtue of the resumption and re-settlement. He is also entitled to be recouped for any additional expenses arising out of the transfer of the lands or the obligation to pay the sum assessed yearly to the *chaukidari* fund. HARECK CHAND BABU v. CHARU CHANDRA SINGHA, **13 C.L.J. 102.**

(3)—Chowkidari *assessment—Arrears for three years—Act VI 1870 (B.C.), s. 55—Act IX of 1859, ss. 5 and 6—Sale for arrears of three years—Sale, validity of.*—S. 55 of Act *VI* of 1873 (B.C.) does not prohibit the Collector selling the land for the arrears of *Chowkhidari* assessment of more than one year. If he so

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sells, his proceedings are irregular, but the sale is not necessarily or *ipso facto* void. If a Collector issues a notice under s. 6, instead of under s. 5 of Act XI of 1859, it is a mere irregularity which does not render the sale a nullity. MAHARAJA SIR JATINDRA MOHUN TAGORE BAHADUR v. JOGENDRA NATH ROY, **6 C.L.J. 99=11 C.W.N. 1107,** (31 C. 256=31 I.A. 52, 32 C. 111, *R.*)

(4)—*Resumption—Title* — Chowkidar, *power to appoint.*—Certain *chowkidari chakran* lands were resumed by the Government and transferred to the holder of the Zemindari, within which they were situated. Long anterior to this, the whole of the Zemindari, excluding certain lands in the *khas* possession of the Zemindar, had been granted in *putni*. The *putnidar* claimed to be entitled to the resumed lands. The Zemindar and the lessee from him resisted the claim, on the ground that, as under the *putni* lease, right was reserved to the Zemindar to appoint *Chowkidars* upon a vacancy arising in the office, the Zemindar was entitled to the lands upon resumption : *Held* that the fact that the Zemindar was entitled to make an appointment to the office of Chowkidar did not create in him an interest in the lands held by the *Chowkidars* which, upon resumption and transfer to the Zemindar, would pass to the *putnidar*, from whose lease they had not been excepted. GIRISH CHANDRA ROY v. HEM CHANDRA ROY, **5 C.L.J. 28.** [*R.*, 34 C. 109=11 C.W.N. 201=5 C.L.J. 33; *D.*, 7 C.L.J. 593.]

(5)—*Resumption and transfer—Act VI (B.C.) of 1870, s. 48-51, 58, 61 and 64—Limitation Act XV of 1877), sch. II, art. 14—Presumption of fact—Evidence Act, s. 114—Burden of proof—Jurisdiction of Civil Court.—Per Mitra and Woodroffe, JJ.*—When the plaintiff sues for the recovery of possession of land on the allegation that the land is *Chaukidari Chakran* land and lies within this Zemindari and the Collector has transferred the same to him, he is bound, in the first instance, to prove so much of his case as has been denied or has not been admitted by the defendant. It being found that the land was not *Chaukidhari Charan* land and did not lie within the Zemindari of the plaintiff, any transfer made by the Collector, in his favour under s. 50 of the Act, is not authorised by the Statute and does not confer any title on him. An order passed without jurisdiction need not be set aside and art. 14 of the Limitation Act, sch. II, does not apply to such a case. [*R.*, 14 Bur. L.R. 59. F.B., 2 C.L.J. 306, 36 C. 726=10 C.L.J. 189 ; *F.*, 33 C. 693.] An order of the Collector under s. 50 is of the nature of a vesting order and is not an order contemplated by the Limitation Act, sch. II, art. 14 and does not require to be set aside, specially at the instance of one who was not a party to it. Such a party has no cause of action until his possession has been interfered with. Art. 14 cannot be invoked against the defendant defending his possession unless the law makes the

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order final by reason of its not being contested within the specified time. The mere fact that the Collector has made the transfer does not raise any presumption that the land was *Chaukidari Chakran* land and that the Collector acted within the Statute. S. 114 of the Evidence Act has no application to such a case. (21 C. 627, 24 B. 435, *F.*) *Per Pargiter. J., contra*,—Under s. 114 of the Evidence Act there is a presumption that the resumption wat made legally, and by s. 62 of the Chaukidari Act, the resumption is final. The objection that the order of the Collector was illegal as the Collector had come to a wrong decision regarding the estate in which the land lay, is not valid as it is a question merely of an error in the decision of the Collector and not a question of jurisdiction. The defendant had his remedy by a suit to set aside the order of the Collector. Under art. 14 and s. 28 of Limitation Act, the defendant's title had ceased to exist, and he cannot set it up in defence. The Civil Court had no jurisdiction to go into the question of the resumption and the transfer. The burden of proof lay on the defendant to show that the transfer which was admittedly made by the Collector under the Act and which must be presumed to have been made rightly, was illegal. RAJA NARENDRA LAL KHAN v. JOGI HARI, **2 C.L.J. 107=32 C. 1107.** (*R.*, 14 Bur. L.R. 59. F.B.]

(6)—*Resumption of, and transfer thereof, to Zemindar—Bengal Tenancy Act, s. 181, applicability of, to such land—Right of lessee claiming from one not having any right.*—The Zemindari interest in a certain village belonged to two persons, each owning an eight-annas share therein. The *Chowkidari Chakran* land in the village was transferred by the Collector to the Zemindars under the provisions of Act VI of 1870, after rectifying the mistake, whereby the whole land had been given to one only of the Zemindars. The *putnidar* under one of the Zemindars granted, before rectification of the mistake, to the present defendant No. 4, a lease of the whole 16 annas of the land in question. The lessee from the *putnidar* under the other Zemindar, brought the present suit for a declaration of his right as lessee to an 8 annas share in the land. The defendants, who had settled with defendant No. 4, contended that the land in question was excepted from the operation of the Bengal Tenancy Act by s. 181 of the Act. They, also, contended that they were cultivators who had acquired, *bona fide*, a right to hold the lands from one whom they *bona fide* believed to have the right to let them into possession and were consequently either occupancy or non-occupancy *raiyats* not liable to be ejected as trespassers. *Held*, that the defendants-settlors got no more than the 8 annas share belonging to the Zemindar under whom the lease was obtained (20 C. 708, *Not Appl.*) *Harington and Bodilly, JJ.*—(8 C.W.N. 320, *R.*) S. 181 of the Act exempts from the operation of the Act any incident of any service tenure. The lands, when transferred to the Zemindar, become his *Zerait* land and not

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raiyati land. Consequently, the lands in question stand unaffected by the Act. *Mookerjee, J.*—(10 M.I.A. 16, 8 C.W.N. 320, *R.*) The *Chowkidari Chakran* lands cease to be *chakran* lands as soon as they are enfranchised. Upon a transfer to the Zemindar, such lands are at his disposal, to be dealt with by him as *mal* or *zerait* at his option. In relation to these lands, the position of the Zemindar is identical with what might be imagined to have been his position when he had the entire lands of his Zemindary at his disposal, and had not settled any portion thereof, with cultivating tenants. There cannot be discovered any intelligent principle upon which a trespasser may be taken to have authority to impress upon resumed *chakran* lands a particular character, which can be determined at the choice of the true owner alone. The rule laid down in 20 C. 708 cannot be extended. The defendants who had settled with defendant No. 4, cannot, therefore, be said to have acquired the status of either occupancy or non-occupancy *raiyats*, and cannot successfully contend that the act of a person, who had no title whatsoever, but who sought to impose a *raiyati* character upon the lands, is binding upon the plaintiff, who is the representative of the true owner. In this view of the matter, s. 181 of the Act does not apply to the case. For, this section applies to service tenures so long as they possess the incidents thereof. And as soon as the service ceases, upon statutory resumption and transfer thereof to the Zemindar, the *chakran* lands lose all the incidents of a service tenure. SHAIKH JONAB ALI v. RAKIBUDDIN MALLIK, **9 C.W.N.571=1 C.L.J. 303.** [*F.*, 5 C.L.J. 33=11 C.W.N. 201=34 C. 109; *R.*, 6 C.L.J. 572.]

(7)—*Resumption of, settlement with zemindar, sale for non-payment of Government revenue —Surplus sale-proceeds, apportionment of.*—When *chowkidari chakran* lands, after resumption and transfer to the Zemindars, have been sold for non-payment of the Government assessment, the Zemindar as also the *putnidar* are entitled to share in the surplus sale-proceeds, provided the *chakran* lands are included within the *putni* grant. The determination of this question does not depend upon the decision of the question of the right of the *putnidar* to hold the *chakran* land, upon payment of additional rent. HARI DAS GOSWAMI v. NISTARINI GUPTA, **5 C.L.J. 30.** [*R.*, 34 C. 109=11 C.W.N. 201=5 C.L.J. 33.]

(8)—*Resumption and transfer to* zemindar—Putnidar's *right to claim settlement for* zemindar—*Suit, virtually for specific performance—Conditions which* zemindar *may impose—Equitable defence—Liability of* putnidar *to pay amount of assessment by Collector and part of the profits.*—A suit by a *patnidar* against his *zemindar* for recovery of resumed *chowkidari chakran* lands, brought on the ground that under the terms of the *putni* the *putnidar* became entitled to the *chowkidari chakran* lands as soon as they were transferred by the Government to *zemindar*, is virtually a suit for

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specific performance of contract. The *zemindar* would be equitably entitled to refuse settlement asked by the *putnidar*, unless the *putnidar* agreed to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits such as the zemindar would in the circumstances be entitled to impose on him. *Semble*:—It is not correct to hold that the *putnidar* is not bound to pay to the *zamindar* more than the assessment made by the Collector. RAJENDRA NATH MUKERJEE v. HIRA LAL MUKERJEE, **14 C.W.N. 995=7 Ind. Cas. 554.** (5 C.L.J. 33, 11 C.W.N. 201, 4 C.W.N. 814, *R.*)

(9)—*Bengal Act, VI of 1870, s. 50—Lands resumed by Government and transferred to the Zemindar—Right of* Darpatnidars—*Suit for* khas *possession and execution of proper deeds—Frame of suit—Pleadings.*—Suit by plaintiffs, *darpatnidars* of a *Mouza*, against the Zemindar, for *khas* possession of certain lands and for the execution of a deed of transfer, on the allegation of the Zemindar having transferred all his rights to the *patnidars*, and the latter having similarly transferred all their rights to the plaintiffs. Subsequent to the creation of the tenures, the Government resumed the lands, and transferred them to the Zemindar, who made raiyati settlement of the same with others. It was contended that the suit was wrongly framed and it ought to have been one for specific performance of a contract without any prayer for possession, inasmuch as the Zemindar had no title to the lands at the time of the *patni*, and could not have transferred the same, and that the jural relation was merely that of an agreement to grant, and that agreement must be specifically enforced before the plaintiff could have a title to sue for possession. *Held* that the plaint was rightly conceived, and that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is not repugnant to any rule of law. RANJIT SINGH v. KALIDAS DEBI, **37 C. 57=14 C.W.N. 527=5 Ind. Cas. 205.** (18 B. 537, 22 M. 24, 33 C. 596, 34 C. 564, 35 C. 346, *R.*)

(10)—*Assessment by Collector—Settlement of resumed lands with* putnidar—*Landlord's right to claim fair and equitable rent—S. 49, Beng. Act VI of 1870 (Village Chaukidari).*—The rent which landlord is entitled to claim when making a settlement of resumed chaukidari chakran lands with a *putnidar*, is not restricted to the amount of the assessment made by the Collector under s. 49 of the Bengal Act VI of 1870, but he is entitled to claim a fair and equitable rent. GOPENDRA CHANDRA MITTER v. TARAPRASANNA MUKERJEE, **37 C. 598=14 C.W.N. 1049=7 Ind. Cas. 790** (4 C. W.N. 814, 34 C. 109=5 C.L.J. 33, *R.*)

See BEN. ACT X OF 1859, s. 6, 31 C. 1021, 8 C.W.N. 860=31 I.A. 17, P.C.

See BEN. ACT VI OF 1870, s. 1, **14 C.L.J. 151.**

Chowkidary Chakran Lands—*concluded.*

Purchaser of estate at Revenue-sale—Sale—Tittle to—*See* BEN. ACT VI OF 1870, ss. 50, 55, 10 C.W.N. 593=33 C. 596=5 C.L.J. 299.

Chowkidari chakran land—*Putni*, construction—Zemindar appointing chowkidars and enjoying their services—Putnidar—Lands held by Chowkidar revert to whom, on resumption by Government — *See* CHAKRAN LAND, 7 C. L.J. 593.

Chowkidari Tax.

(1)—Chowkidari *tax, suit for arrears of — Act VIII of 1885 (Bengal Tenancy) —Civ. Pro. Code, 1882, s. 586—Second appeal.*—A suit for arrears of *chowkidari* tax is one for "rent" when such tax is legally recoverable. (8 W.R. 517, 9 W.R. 518, 11 C. 221, 21 C. 132, *R.*) In a suit for arrears of *chowkidari* tax, there is a second appeal. ASSANULLA KHAN BAHADUR v. TIRTHABASHINI, **22 C. 680.**

Payment on account of chowkidari tax, nature of—Suit for arrears of chowkidari tax—Act VI of 1870 (Ben.)—*See* CESS, 22 C. 680.

Chowkidari Village Act.

See BEN. ACT VI OF 1870.

Chowpatti Foreshore.

Chowpatti foreshore falls within the purview of City of Bombay Municipal Act—*See* BOM. ACT III OF 1888, s 410, 7 Bom. L.R. 726.

Christian.

Marriage under Muhammadan rites between a Christian and Shiah woman, invalidity of —*See* MAHOMEDAN LAW—MARRIAGE, 19 A. 375=A.W.N. 1897, 91.

Illegitimate son of a Hindu father and Christian mother—Right to maintenance—*See* MAINTENANCE, 27 M. 13.

Christian Marriage Act.

See ACT XV OF 1872.

Chudasama Gameti Garasias.

Chudasama Gameti Garasias, custom of adoption among—*See* HINDU LAW—ADOPTION, 5 Bom. L.R. 534=27 B. 492.

Chundavand.

See CUSTOM — PUNJAB—INHERITANCE, 51 P.R. 1889, 4 P.R. 1891, 134 P.R. 1892, 84 P.R. 1893, 119 P.R. 1893, 22 P.R. 1895, 46 P.R. 1897, 74 P.R. 1898, 12 P.R. 1899.

Custom of, in matters of succession—*See* CUSTOMS—PUNJAB—INHERITANCE, 142 P. L.R. 1906.

Chur.

And jungle lands—Possession, discontinuance of—*See* LIMITATION ACT, 1908, art. 142, 9 C. W.N. 111.

See SETTLEMENT—RIGHT TO SETTLEMENT, 2 C.L.R. 592.

Church.

(1)—Dharmakartas *or headmen of a Roman Catholic Church—Powers thereof.*—The appointment of a committee of headmen or *dharmakaratas* in a Roman Catholic Church by the

Church—*concluded.*

Bishop to assist the Vicar in the secular affairs of the church gives the members of such committee no right to close the church or oust the Vicar, and still less to appoint a schismatic priest not under the discipline of and obedience to the Church of Rome. MARIAN PILLAI v. BISHOP OF MYLAPORE, **17 M. 447.**

Church of England.

Evidence—Oath—Conscientious objections to take oath on Bible by member of—Admissibility of evidence not given on such oath—*See* OATH, 2 M.H.C. 246.

Chur Lands.

See ALLUVION.

See DILUVION.

(1)—*Alluvion—Limitation—Possession—Dispossession—Limitation Act (XV of 1877), sch. II, arts. 142, 144.*—In a suit for declaration of title to and recovery of possession of *chur* lands which had been diluviated more than twelve years before the suit, the plaintiffs proved their title and possession up to the time of diluviation, and alleged that the disputed lands had re-formed within twelve years of the suit. The defendants alleged and it was found that the lands in question came into existence some 30 years ago and have been gradully forming since then. How much was formed yearly and whether the *chur* was fully formed in five years could not be determined: *Held*, that the case should not be treated as though it were one of adverse possession falling within art. 144, Limitation Act, whereas the appropriate article was art. 142. BILASH CHANDRA MUKHOPADHYA v. AMJUD ALI PATWARI, **9 Ind. Cas. 554.** (7 C. 225, 8 C.L.R. 126, *F.*)

(2)—*Practice—Privy Council—Reversal of judgment of High Court on facts.*—In a case in which the position of certain *chur* lands in the Brahmapootra was in issue, the Privy Council, on a consideration of the facts, reversed the judgment of the High Court and restored the decision of the Court of first instance which was founded upon a long and careful local investigation conducted by an Ameen who visited the spot, and whose integrity was unimpeached. RANI SERATSUNDARI DEBI v. PRASANNAKUMAR TAGORE, **6 B L.R. 677, P.C.=16 W.R. P.C. 20=13 M.I.A. 607.**

(3)—*Alluvial lands*—Chur—*Title by accretion to new formation.*—The reforming of the land in the bed of a navigable river after considerable interval and frequent floods, is not *prima facie* to be ascribed to a loss from any particular portion of a riparian estate, nor is the land which has been removed by a sudden avulsion reclaimable, unless the circumstances supply evidence of identity. A title by accretion, to a new formation is not founded on equity of compensation, but on a general accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will follow the title to that parcel to which it adheres. Such a title is not

Chur Lands—*concluded.*

established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the *chur*. A detached *chur*, independent of usage, in such a stream, would belong to neither riparian proprietor, and the circumstance that it was subtended by the land of one, would not be enough to entitle him to it. The mere cultivation of *chur* lands, like that of waste or jungle land, carries with it no *prima facie* character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase, and a purchaser *bona fide* and without notice might, with perfect honesty, and even with the favourable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title. EKOWRI SINGH v. HIRALAL SEAL, **2 B.L.R. P.C. 4=11 W.R. P.C. 2=12 M.I.A. 136.** (4 M.I.A. 403, *R.*) [*Appr.*, 18 W.R. 4; *R.*, 18 W.R. 113, 2 B. 19; *D.*, 3 B.L.R. A.C. 377=11 W.R. 350.]

(4)—*Suit on* chur — *Survey made before parties' right accrued—Evidence of possession of proprietary and* julkur *right—Evidence of title.*—In a suit regarding a *chur*, the survey having been made at a time when neither of the parties held any right in the land, and when both their villages belonged to the same proprietor, was held to be some evidence of possession at that time not only of the *julkur* but of the right of property in the river, and possession under those circumstances to be some evidence of title. MOHINEE MOHUN DOSS v. KHAJAH ASSANOOLLAH, **17 W.R. 73.**

(5)—*Reg. XI of 1825, s. 4, cl. 3*—Chur *thrown up in navigable river—Test of ownership to* chur.—In a suit regarding the right to a *chur* or island thrown up in a large navigable river originally surrounded by deep unfordable water, but between which and the estate of the zemindar a fordable channel had since been created, the state of things existing at the time when the *chur* or island was thrown up or formed is the criterion by which the right either of the Government or of the owner of the contiguous land is to be determined, with reference to cl. 3, s. 4, Regulation XI of 1825. BUDROONISSA CHOWDHRAIN v. PROSUNNO COOMAR BOSE, **14 W.R. F.B. 25.** (2 W.R. 34 and 127, *D.*; 9 W.R. 402 and 312, *Expl.*)

Circuit Committee.

Proceedings of—is good evidence in questions relating to rights of Government with respect to Zemindari property—*See* SERVICE TENURE, 3 C.L.J. 1, P.C.=10 C.W.N. 161=3 A.L.J. 55=8 Bom. L.R. 1=16 M.L.J. 1=1 M.L.T. 3, P.C.=29 M. 53=33 I.A. 46.

Circulars.

Financial Commissioner's circular letter No. 3441, dated 5th June 1901—*See* PUN. ACT XIII OF 1900, s. 3, 5 P.R. 1904, Rev.

Circulars—*concluded.*

Financial Commissioner's Book of 1867—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 5 O.C. 266.

No. 17 of 1850—*See* RIGHT OF OCCUPANCY—MISCELLANEOUS, 18 P.R. 1885.

Book Circular No. V of 1889—*See* VALUATION OF SUIT, 132 P.R. 1894.

Circular Order No. 104 of 1860 of the Judicial Commissioner of Oudh.

See LIMITATION—MISCELLANEOUS, 10 M. I.A. 114.

Circular Order No. 41 of 1866.

See LOCAL INVESTIGATION, 4 C. 718=3 C. L.R. 234.

Circular Order No. 25 of 1870,

See LOCAL INVESTIGATION, 4 C. 718=3 C, L.R. 234.

Circulars of High Court.

(1)—*High Court, Civil Circular, 80—Essentials of an application for execution.*—The proper view to take of Rule 80 is not that it prescribes the essentials which an application for execution must contain, and which are necessary to constitute the application itself an application in accordance with law, but that it requires something further besides the application itself, an accompaniment extraneous to the application, as a condition precedent to further action by the Court executing the decree. RAMCHANDRA v. LAXMAN, **8 Bom. L.R. 892=31 B. 162.**

(2)—*Circulars of High Court, effect of.*—A circular order of High Court cannot affect the law as laid down by a Full Bench. GOLOKEMONEY DABIA v. MOHESH CHUNDER MOSA, **3 C. 547=1 C.L.R. 149.**

(3)—*Sadar Adalat of Madras—Circular order dated 12th September, 1851—Applicable only to summary applications for execution of decrees.*—The circular of the Sadar Adalat of Madras dated 12th September, 1851, had reference only to summary applications for the execution of decrees. PUDIA KOVILA GALLA v ALLUNAUNNALATTA KADINNI, **1 M.H.C. 146.**

High Court's Civil Circular, No. 90 (*c*)—*See* COURT FEES ACT, 1870, sch. II, No. 1, **16 B. 700.**

Circular Orders.

This circular explains Circular Order No. 25, dated 25th July, 1872. **Civ. Cir. Or. No. 19, dated 27th July, 1874, 22 W.R. Civ. Cir. 8.**

Small Cause Courts Judges to obtain and keep up the "Dairy of the Court" prescribed by Circular Order, dated 14th February, 1870. **Civ. Cir. Memo. No. 6, dated 25th September, 1871, 16 W.R. Civ. Cir. 10.**

Citation.

Necessary before grant of letters—Revocation consequent on defective citation—Application for probate, incompetency of Court to go into question of title on—*See* PROBATE—EFFECT OF PROBATE, 12 B. 164.

Citation—*concluded.*

Practice—Citations—Mode of issuing citations—Payment of advertisements in newspapers—*See* SUCCESSION ACT, 1865, s. 250, A.W.N. 1903, 30.

City Civil Court Act, Madras,

See MAD. ACT VII OF 1891.

City Land-Revenue Act, Madras.

See MAD. ACT XII OF 1851.

City of Bombay Improvement Act.

See BOM. ACT IV OF 1898.

City of Bombay Municipal Act.

See BOM. ACT III OF 1888.

City of Madras Municipal Act.

See MAD. ACT V OF 1878.

See MAD. ACT I OF 1884.

Civil Appeals Act.

See ACT IX OF 1854.

Civil and Criminal Justice Act, Aden.

See BOM. ACT II OF 1864.

Civil Circulars.

This circular prescribes rules for the preparation of the statements showing the average duration of suits and appeals. **Civ. Cir. No. 6, dated 9th March, 1870, 13 W.R. Civ. Cir. 9.**

This circular state how Column 2 of Form C, prescribed by Circular No. 24, dated 19th June 1866, should be filled up. **Civ. Cir. No. 14, dated 7th June 1870, 13 W.R. Civ. Cir. 18.**

This circular circulates amended copy of Circular requiring orders of Civil Courts regarding attachments of estates to be notified to Collector of District in which estates are situated. **Civ. Cir. Memo No. 2, dated 10th January, 1871, 15 W.R. Civ. Cir. 13.**

Meaning of 6th Column in para 12 of Circular Order No. 32, dated 8th November, 1870, explained. **Civ. Cir. No. 5 of 6th February, 1872, 17 W.R.H.C. Rul. & Or. 2.**

Amendment of notice circulated with Civil Circular Memo. No. 2 of 1870. **Civ. Civ. Memo No. 4 of 16th February, 1872, 17 W.R.H.C. Rul. & Ors. 3.**

This circular rescinds Circular Order No. 55, dated 7th November 1854. **Civ. Cir. No. 7 of 17th November 1854, 10 C.W.R. Civ. Cir. 1.**

This circular circulates Rules regarding the service of processes in Calcutta. **Civ. Cir. Memo. No. 2, dated 21st February 1870, 13 W.R. Civ. Cir. 4.**

This circular deals with the additional heading and an alteration in Table I, Return No. 28 of 1873-74. **Rev. Cir. No. 1, 20 W.R. Rev. Cir. p. 3.**

Civil Circulars—*concluded.*

This circular calls for Statements 6 and 6-A regarding average duration of suits and appeals. **Civ. Cir. Or. No. 24, 20 W.R. Rules & Orders of the H..C, p, 24.**

This circular inquires how Circular Order No. 21 of 1873 has worked. **Civ. Cir. Memo. No. 8, 23 W.R. Rules & Ors. of the H.C.P. 10.**

This circular circulates rules for the admission of appeals. **Civ. Cir. No. 17, dated 23rd May, 1871, 16 W.R Civ. Cir. 1.**

District Judges to forward to the High Court an impression of the seals of their respective Courts, **Civ. Cir. Memo. No. 7, dated 26th September, 1871, 16 W.R. Civ. Cir. 10.**

Rules 72—*See* CIV. PRO. CODE, 1908, ss. 122, 129, 130, 131, 5 Bom L.R. 394.

Civil and General Circulars.

Paragraph 235—Examination of parties before fixing issues.—The direction contained in paragraph 235 of the Civil Circulars, namely, that it is generally desirable to examine the parties or their advocates before fixing issues, should be observed as a standing rule in all cases where first grade advocates are not engaged on both sides. MAUNG PO v. MAUNG SHWE THET, **L.B.R. 1893—1900, 649.**

Civil Court.

See JURISDICTION OF CIVIL COURT.

(1)—*Stamp—Complaint by Civil Court.*—A complaint preferred by a Munsif under s. 168 of the Crim. Pro. Code need not, though it does not bear the seal of the Munsif's Court be on stamped paper. REG. v. SAJJAN *valad* VITHU, **5 B.H.C. Cr. 104.**

(2)—*Civil Court, meaning of.*—The Judicial Commissioner's Court in Assam is the Civil Court contemplated by s. 29, Act XL of 1858. KALEEKA PERSHAD BHUTTACHARJEE v. DHUKHINA KALLY DABEE, **W.R. 1864, Mis. 84.**

Jurisdiction of—*See* BUR. ACT II OF 1876, ss. 6, 55, 56. L.B.R. 1893—1900, 429.

See MAD. ACT V OF 1882, ss. 2, 4, 10, 14, **17 M. 193.**

Duty of—*See* BUDDHIST LAW—ECCLESIASTICAL, U.B.R. 1902—1903, Vol. II, Buddhist Law—Ecclesiastical, 1.

Power of—to question reasons assigned by Revenue authorities for granting or refusing applications for Darkhast—*See* DARKHAST RULES, 1 M.L.T. 278=29 M. 461; appeal thereon dismissed, 2 M.L.T. 141=30 M. 270.

Magistrate exercising jurisdiction under s. 488 of the Civ. Pro. Code is bound by decree of touching matters he has to decide, in the proceedings—*See* DECREE — MISCELLANEOUS, 9 C.C. 49 B.

Incompetency of a, to make allotment of land as a grazing-ground—*See* WASTE LAND, L.B.R. 1872—1892, 603.

Civil Courts Act, Bengal.

See BEN. ACT VI OF 1871.

Civil Courts Act, Bombay.

See BOM. ACT XIV OF 1869.

Civil Courts Act, Central Provinces.

See C.P. ACT XVI OF 1885.

Civil Courts Act, Madras.

See MAD. ACT III OF 1873.

Civil Courts Act, Transfer for certain suits to.

See BEN. ACT III of 1870.

Civ. Pro. Code (Act VIII of 1859).

[REP., ACT X OF 1877.]

(1)—*Code of Civil Procedure.*—The Code of Civil Procedure is neither a special nor a local law. PEARY MOHUN AICH v. ANANDA CHARN BISWAS, **18 C. 631.** [*Appl.*, 22 M. 179=8 M.L.J. 265.]

(2)—*Civ. Pro. Codes of 1859 and 1877—Object.*—The Code of 1870 is, as the previous Code of 1859 was, a Code to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. It deals with the procedure, and almost entirely with procedure. KASHI MOHUN BARNA v. BISHNOO PRIA. **15 C. 365.**

(3)—*Civ. Pro. Code (VIII of 1859), applicability of, to proceedings under Registration Act.*—The procedure prescribed in Act VIII of 1859 (old Civ. Pro. Code) is applicable to proceeding under Registration Act (VIII of 1871) including the power to admit a review. *In the matter of the petition of* HADJEE ABDOOLAH, **2 C. 131, P.C.=3 I.A. 221=26 W.R. 50.** [*R.*, 23 B. 698, 14 M.L.J. 471, F.B.]

(4)—*Courts required to watch working of Act VIII of 1859.*—This circular directs Judges to whose districts Act VIII of 1859 has been extended to watch its working. **Civ. Cir. Memo. No. 3, dated 14th April 1870, 13 W.R. Civ. Cir. 13.**

(5)—*"Rent" for the purposes of Acts VIII and X of 1859.*—For the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property." MAHESCHANDRA CHATTAPADHYA v. GURUPRASAD ROY, **8 B.L.R. 155=13 W.R. 401.** (1 B.L.R. A.C. 177, *D.*)

(6)—*Suit for mere declaration of title prior to passing of Act—Suit seeking declaration of title against some defendant and ejectment against the rest.*—Prior to the passing of Act VIII of 1859, no law existed sanctioning suits for mere declaration of title without a prayer for consequential relief. A suit could not be brought praying for the ejectment of some of the defendants and declaration of title against the other defendants. NAYAN MANNI v. GODA SHANGARA, **1 M.H.C. 252.**

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(7)—*Rule as to civil procedure generally incorporated in special Act—Inconvenience pointed out.*—The introduction of a clause affecting civil procedure and Civil Courts generally such as s. 15 of Act X of 1876, into an Act purporting to regulate a special branch of civil procedure only, *viz.*, that relating to revenue jurisdiction, is inartistic in legislation and inconvenient in the administration of justice. Such a general provision, when hidden in a special Act not often resorted to in practice, is apt to be overlooked by pleaders and Judges who are seldom concerned in revenue cases. JADOW MULJI v. CHHAGAN RAICHAND, **5 B. 306.**

(8)—*See* ATTACHMENT BEFORE JUDGMENT, 4 B.L.R. 63, F.B. = 13 W.R. 9.

(9)—*See* CERTIFICATE OF ADMINISTRATION—EFFECT OF CERTIFICATE, 11 W.R. 127.

(10)—*See* EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 3 *B.* 214.

(11)—*See* FRAUD—MISCELLANEOUS, 22 W. R. 213.

(12)—*See* IMPARTIBLE ESTATE, 8 C.W.N. 186, P.C. = 31 I.A. 1 = 27 M. 131 = 6 Bom. L. R. 7.

(13)—*See* JURISDICTION OF REVENUE COURTS, 9 W.R. 246.

(14)—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 9 C. 283 = 12 C.L.R. 434.

(15)—*See* PARTITION—SUITS FOR PARTITION, JURISDICTION OF CIVIL COURTS IN, 16 W.R. 190.

(16)—*See* REVIEW—REVIEW WHEN LIES, 16 W.R. 159.

(17)—*See* SALE—SALE FOR ARREARS OF RENT—MISCELLANEOUS, 16 W.R. 61.

(18)—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 99 P.R. 1881.

(18-*a*)—*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS WHEN LIE AND WHEN NOT, 1 Ind. Jur. O.S. 50.

(19)—*See* SPECIFIC PERFORMANCE, 14 W. R. O.C. 15.

(20)—*See* SUPERINTENDENCE OF HIGH COURT, 9 W.R. 115.

(21)—*See* WITNESS — EXPENSES OF WITNESS, 2 Hyde 236.

(22)—*Ss. 1, 5, 6, 8, 9—Jurisdiction—Valuation—Joinder of causes of action — Mesne profits.*—Causes of action joined in one suit may be tried by a Court which has jurisdiction as to the entire value, although the value of one of the causes of action is below the value cognizable by it. Thus, a Principal Sudder Ameen has jurisdiction to try a suit for land with

Civ. Pro. Code (Act VIII of 1859)—*continued.*

mesne-profits, notwithstanding that the value of the land standing by itself was under the value cognizable by him. LUCHMEE PERSHAD DOOBEY v. MUSSAMAT KALASOO, **B L.R. Sup. Vol. 620, F.B. = 7 W.R. 175 = 2 Ind. Jur. N.S. 89,** *Overruling* DHURAM RAWOOT v. RAMNATH SAHOO, **2 Hay 585.**

(22-*a*)—Ss. 1, 15—*See* REGISTRATION ACT, 1908, ss. 49, 71, 72, 73, 74, 75, 1 B.L.R. F.B., 58 = 10 W.R. F.B., 51.

(23)—Ss. 2, 7—*See* RES JUDICATA—CAUSE OF ACTION, 15 W.R. 168.

(24)— Ss. 2, 7 — *See* RES JUDICATA—PARTIES, 1 N.W.P. 119.

(25)—S. 3— *See* PLAINT — RETURN OF PLAINT, 5 B.L.R. App. 15 = 13 W.R. 358.

(26)—S. 4—*See* APPEAL—ORDERS, 2 B.H. C. 367.

(26-*a*)—S. 5—*See* NO. 22, *supra.*

(26-*b*)—S. 6—*See* NO. 22, *supra.*

(27)—S. 7—*See* NOS. 23, 24, *supra.*

(28)—Ss. 7, 8—*See* JOINDER OF CAUSES OF ACTION, 13 W.R. 196.

(29)—Ss. 7, 15—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 8 C. 483, F.B. = 11 C.L.R. 57.

(30)—Ss. 7, 97—*See* WITHDRAWAL OF SUIT, 1 A. 324.

(31)—*S. 8—Cause of action—Misjoinder.*—Courts should reject plaints against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned. RAJA RAM TEWARY v. LUCHMAN PERSAD, **B. L R. Sup. Vol. 731 = 8 W.R. 15.** [*Appr.*, 11 W. R. 273 = 8 B.L.R. 130, note = 11 W.R. 397, 18 W.R. 288, 464, 23 W.R. 400, 14 C. 631; *Appl.*, 9 W.R. 490, 2 A. 738; *R.*, 8 W.R. 64, 7 B. 289, *D.*, 25 W.R. 60, 9 C. 763 = 12 C.L.R. 556.]

(32)—S. 8—*See* MISJOINDER OF CAUSES OF ACTION, 2 B.L.R. App. 53 (*b*) = 11 W.R. 397, 3 B.L.R. A.C. 190, 3 B.L.R. App. 77, 11 W.R. 542.

(33)—S. 8—*See* NOS. 22, 28, *Supra.*

(34)—Ss. 8, 9—*See* CAUSE OF ACTION, 12 W.R. 70.

(35)—Ss. 8, 9—*See* MISJOINDER OF CAUSES OF ACTION, 9 W.R. 525.

(36)—Ss. 8, 350 — *See* MISJOINDER OF CAUSES OF ACTION, 12 W.R. 11.

(37)—S. 9—*See* BURDEN OF PROOF—DECREES AND DEEDS, SUITS RELATING TO, 11 W.R. 280.

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(38)—S. 9—*See* NOS. 22, 34, 75, *supra.*

(39)—S. 10—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 14 W.R. 92.

(40)—S. 14—*See* ALLUVION — FORMATION OF CHURS OR ISLANDS, 3 W.R. 94.

(41)—S. 14—*See* APPEAL—ORDERS, 2 Agra 214.

(42)—S. 14—*See* BOUNDARY, 12 W.R. 150.

(43)—S. 14—*See* COLLECTOR, W.R. 1864, 191.

(44)—S. 14—*See* JURISDICTION—MISCELLANEOUS, 5 W.R. 211.

(45)—S. 14—*See* JURISDICTION OF REVENUE COURTS, W.R. 1864, 360.

(46)—S. 14—*See* SURVEY AWARD, W.R. 1864, 369, 2 W.R. 213, 11 W.R. 389.

(47)—Ss. 14, 15—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 8 B.L.R. 382=17 W.R. 169.

(48)—*S. 15—Declaratory suit—Inability to ask for consequential relief.*—The rule of law laid down by the Privy Council in Strimathoo Moothoo Vijia Ragoonadha *v.* Dorasinga Tevar (15 B.L.R. 106), to the effect that 'a declaratory decree cannot be made, unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court,' ought not to be understood as denying to the Courts of this country the power to grant decrees in any case, in which, independently of the provisions of s. 15 of Act VIII of 1859, they had the power to grant a decree. That power is the same as that of the Court of Chancery in England. This was a case in which the plaintiff might, beyond merely seeking the cancellation of a deed, have—(but he had not) asked for an injunction. The suit, however, was held maintainable and a declaratory decree alone was granted. RAM NEEDHEE KOONDOO v. RAJAH RUGHOO NATH NARAIN MULLO, **1 C. 456=25 W.R. 516.**

(49)—*S. 15—Declaratory decree—English Chancery Act, s. 50.*—When the life-tenant has alienated property, the person who is entitled as reversioner, is entitled to a decree declaratory of his title under s. 15 of Act VIII of 1859. Although the words of s. 15 of Act VIII of 1859 are almost identical with those of s. 50 of the English Chancery Amendment Act, it does not follow that in any case in which the latter section is held inapplicable by the Courts of Chancery in England, the former section will be held to be equally inapplicable in India. The application of s. 15 of Act VIII of 1859 must be viewed in connection with the system of procedure to which it belongs. TIRUMALATHAMMAL v. VENKATARAMANAIYAN, **2 M.H.C. 378.** [*F.*, 6 M.H.C. 117.]

(49-*a*)—*S. 15—Declaratory decree—Consequential relief not prayed for—Declaratory decree—Judicial Committee.*—There may be cases in which a merely declaratory decree may be made without granting any consequential relief; or, in which the plaintiff does not actually ask for any consequential relief in the suit; otherwise the 15th section of the Civ. Pro. Code (Act VIII of 1859) would have no operation at all. All that the Court was to see both according to the Code and the analogous provision in the English Statute is whether the declaration of the plaintiff's right may be the foundation of relief to be got somewhere—for example in a Court other than that wherein the declaratory decree is prayed for. The plaintiff asked for a declaratory decree to the effect that he was entitled to enhance the rent, in order that he may sue the tenant in a Revenue Court for enhancement of rent. *Held*, that this was a proper case in which a mere declaration of right might be made. [*F.*, 11 B.H.C. 232; *Appl.*, 5 A. 55; *R.*, 6 N.W.P. 231, F.B., 23 W.R. 314, 2 B. 370, 5 C. 512, 10 C. 324=10 I.A. 150, P.C.] Where it is shown that a Court has a discretion to make a declaratory decree, and where, in the exercise of such discretion, a declaration is made, the Judicial Committee will not interfere with such discretion upon light grounds. SADUT ALI KHAN v. KHAJEH ABDUL GUNNY AND KHAJEH ABDUL GUNNY v. MUSSAMAT ZAMOORUDOONISSA KHANUM, **11 B.L.R. 203, P.C.=19 W.R. 171=I.A. Sup. Vol. 165=3 Sar. 229.** [*R.*, 8 A. 365; 2 Bom.L.R. 254.]

(49-*b*)—*S. 15—Declaratory decree—Consequential relief.*—The right given by Act VIII of 1859, s. 15 of obtaining a declaration of title without consequential relief can be claimed only in those cases where the Court could have granted relief if relief had been prayed for. Plaintiff, a Raja, was in possession of certain lands by receipt of rents from tenants. The tenants alleged that they were in possession under a "*Mogole bromottur* title." The plaintiff's suit was for setting aside the title alleged by the defendants. *Held*, the suit not being one to set aside any deed set up by the defendants impugning his title as zemindar or Raja, but merely to set aside an assertion, was not maintainable. The Courts could grant a declaratory decree, only in cases where consequential relief, if asked for, could be granted. This was not a case of that kind. RAJA NILMONEY SING DEO BAHADOOR v. KALEE CHURN BHUTTACHARJEE, **14 B.L.R. 382, P.C.=23 W.R. 150=2 I.A. 83=3 Sar. 447=3 Suther. 77.** [*R.*, 1 M. 65, 1 C. 456=25 W.R. 516, 3 C. 612, 5 C. 512=4 C.L.R. 517, 21 B. 509, 20 A. 96=A.W.N. 1897, 204, 27 B. 43, 3 Ind. Cas. 224; *Cons.*, 15 B.L.R. 83=23 W.R. 314=3 Sar. 486=3 Suther. 106=2 I.A. 169; *D.*, 13 C. 3.]

(50)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 5 B.L.R. 514, Note=12 W.R. 248, 6 M.H.C. 307, 6 M.H.C. 310.

(51)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 8 W.R. 341, 9 W.R. 325, 22 W.R. 312, 23 W.R. 150, 1 M. 65.

(52)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—ORDERS OF CRIMINAL COURT, 22 W.R. 329.

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(53)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 10 C. 324, P.C. =10 I.A. 150=13 C.L.R. 418.

(54)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 7 B.L.R. 614=15 W.R. 421, 1 Ind. Jur. N.S. 390.

(55)—S. 15—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 12 W.R. 248, 21 W.R. 101, Bourke O.C. 8 =Cor. 94.

(56)—S. 15—*See* DECLARATORY DECREE, SUIT FOR — MISCELLANEOUS, 9 W.R. 380, 17 W.R. 466.

(57)—S. 15 — *See* ESTOPPEL— ESTOPPEL BY CONDUCT, 3 B.L.R. App. 55.

(58)—S. 15—*See* GUARDIAN— MISCELLANEOUS, 10 W.R. 17=7 B.L.R. 617, Note.

(59)—S. 15—*See* HINDU LAW — ALIENATION, 5 B.L.R. 508.

(60)—S. 15—*See* JURISDICTION OF CIVIL COURTS, 6 B.L.R. 658=15 W.R. 471, P.C.

(61)—S. 15—*See* REMAND, 11 W.R. 77.

(62)—S. 15—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 4 C.L.R. 270.

(63)—S. 15—*See* NOS. 22-*a*. 29, 47, *supra*.

(64)—Ss. 15, 350 — *See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 13 W.R. 175.

(65)—S. 24—False verification—Verification by mocktear—*See* PLAINT — VERIFICATION AND SIGNATURE, W.R. F.B., 41=Marsh 127 =1 Ind. Jur. O.S. 44.

(66)—S. 28—*See* PLAINT—VERIFICATION AND SIGNATURE, 5 W.R. Mis. 33, 6 W.R. Mis. 59.

(66-*a*)—Ss. 34, 103—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 7 B.L.R. 207=16 W.R. 17.

(67)—Ss. 41, 97, 272, 327—*See* PRACTICE AND PROCEDURE, 3 B.L.R. A.C. 396=12 W.R. 432.

(68)—Ss. 60, 66—*See* SUMMONS, 2 B.L.R. A.C. 59=10 W.R. 349.

(69)—S. 66—*See* NO. 68, *supra*.

(70)—Ss. 74, 80—*See* ATTACHMENT BEFORE JUDGMENT, 1 Ind. Jur. N.S. 294, Note.

(71)—S. 77—*See* PARTIES TO SUITS — GENERAL, 24 W.R. 409.

(72)—S. 77—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 10 W.R. 34.

(73)—S. 77—*See* RENT, SUIT FOR, 12 W.R. 81.

(74)—S. 80—*See* NO. 70, *supra*.

(75)—Ss. 81 to 84 and 92—*See* INJUNCTION—UNDER CIV. PRO. CODE, 6 W.R. Mis. 1.

(76)—S. 82—*See* NO. 75, *supra*.

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(77 and 78)—Ss. 83, 84—*See* INSOLVENCY —CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE, 2 B.H.C. 146.

(79)—Ss. 83, 84—*See* ST. 11 & 12 VIC. C. 21, 1 B.H.C. 224.

(80)—S. 84—*See* NOS. 75, 78, 79, *supra*.

(81)— Ss. 84, 270—*See* ATTACHMENT — PRIORITY OF ATTACHMENT, 13 W.R. F.B., 9.

(82)—S. 92—*See* NO. 75, *supra*.

(83)—S. 97—*See* NOS. 30, 67, *supra*.

(84)—*Ss. 97 (b), 230, 231—Applicability of s. 97 (b) to a proceeding under s. 230, after it has been duly numbered and registered.*—S. 97 (*b*), Civ. Pro. Code, is applicable to a proceeding under s. 230, Civ. Pro. Code, after it has been duly numbered and registered. The effect of s. 230 read with s. 231 is to empower and require the Court to deal with an application under it for which probable cause has been shown, as a plaint on the institution of a suit, and, in proceeding with the trial of the claim of the applicant, to apply the law of procedure in just the same manner and with the same effect as if the applicant were the plaintiff in a suit instituted by plaint in the ordinary way. In short, the sections make the application, when numbered and registered, a regular suit for all purposes. SUBBARAMANIEN v. PONNUSAWMY CHETTY, **5 M.H.C. 298.** [*R.*, 21 P.R. 1909=32 P.L.R. 1909=27 P.W.R. 1909=1 Ind. Cas. 604.]

(84-*a*)—S. 103—*See* NO. 66-*a*, *supra*.

(85)—S. 105—*See* EXECUTION OF DECREE —EXECUTION BY AND AGAINST REPRESENTATIVES, 9 W.R. 442.

(86) — S. 107 — *See* SALE — SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 24 W.R. 260.

(86-*a*)—S. 119—*See* NO. 219, *infra*.

(87)—*Ss. 119, 148, 158—Application—Review.*—A decree of dismissal passed on a day fixed by adjournment for the first hearing of the suit and for the default of non-appearance of the parties or their vakils, is a decree that may be made under s. 147, Civ. Pro. Code, and is consequently one to which s. 119, Civ. Pro. Code, may be applied. But where a suit is adjourned to a day to enable the parties to produce witnesses, and on that day the vakils of both parties appear but no witnesses, and the suit is dismissed, s. 148 alone applies to the default for which the decree is passed; it is clearly therefore a final decree, subject only to a review of judgment or an appeal. AMBALAVANA PADEIYATCHI v. SUBRAMANIA PADEYATCHI, **6 M.H.C. 262.** [*R.*, 10 M. 270, 18 M.L.J. 51=3 M.L.T. 225.

(88)—*S. 123—Construction of.*—S. 123, Civ. Pro. Code, 1859, contemplated that a defendant should, in his written statement, set forth the case he intended to make at the trial. CHOVA KARA v. ISA *bin* KHALIFA, **1 B. 209.**

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(88 *a*) — *S. 124—Written statement—Offer without prejudice—Irrelevant matter.*—An offer without prejudice should be omitted from the pleadings. In a suit where the written statement of the plaintiff contained letters relative to an offer made by the defendant without prejudice, the Court ordered, on the application of the defendant, that the paragraphs of the written statement relating to the offer should be struck out. HALFORD v. THE EAST INDIAN RAILWAY COMPANY, **12 B L.R. App. 19.**

(89)—S. 124—*See* WRITTEN STATEMENTS, 8 W.R. 295, Cor. 39.

(90)—S. 130—*See* APPEAL—GROUNDS OF APPEAL, 21 W.R. 183.

(91)—Ss. 130, 350—*See* STAMP ACT, 1862, s. 17, 3 B.L.R. A.C. 235=12 W.R. 47.

(92)—S. 148—*See* NO. 87, *supra.*

(93)—*Ss. 148, 162—Refusal by original Court to allow plaintiff to examine defendant as witness—Dismissal of suit—Duty of appellate Court.*—Where the original Court refuses to grant the application of the plaintiff in a suit to examine a defendant as his witness and, on the adjourned date of hearing, plaintiff fails to produce any other witness, and the original Court dismisses the suit under s. 148, Civ. Pro. Code, and it is found on appeal that there was no good ground for the refusal of the lower Court to compel the attendance of the defendant as a witness, it is the duty of the appellate Court to remand the suit to the original Court, in order that the defendant's examination as a witness for the plaintiff may be taken, and the case fully heard and determined upon the evidence of that and any other witness whom either party may produce. LATCHMANA RAU SAHIB v. RAGUNATHA RAU, **6 M.H.C. 299.**

(94)—Ss. 156, 216, 220—*See* LIMITATION ACT, 1908, ART. 182—NOTICE OF EXECUTION, 6 W.R. Mis. 97.

(95)—S. 158—*See* NO. 87, *supra.*

(96)—S. 162—*See* WITNESS—SUMMONS TO AND ATTENDANCE OF WITNESSES, 1 W.R. 297, 17 W.R. 507, 21 W.R. 44.

(97)—S. 162—*See* NO 93, *supra.*

(98)—Ss. 162, 163 — *See* Appeal—ORDERS, 1 W.R. 83.

(99)—*Ss. 162, 163, 170—Evidence.*—When a defendant specially summoned to attend and give evidence under ss. 162 and 163, Civ. Pro. Code, failed to attend, and there was evidence to support the plaintiff's case, the Court acted rightly in deciding against the defendant under s. 170. SHAN CHANDRA GHOSE v. HARIS CHANDRA BANERJEE, **9 B L R. 218. Note=12 W.R. 369.**

(100)—S. 163—*See* NOS. 98, 99, *supra.*

(101)—Ss. 166, 170—*See* WITNESS—EXAMINATION OF WITNESSES, 1 B.L.R. S.N. 20, C.

Civ Pro. Code (Act VIII of 1859)—*continued.*

(102)—S. 170—*See* NOS. 99, 101, *supra.*

(102-*a*)—*Ss. 187, 189, 193, 196—Appeal—Costs—Discretion.*—An appeal will lie on a mere question of costs, though any interference with the order of the first Court as to costs should be exercised with discretion. GRIDHARI LAL ROY v. SUNDAR BIBI, **B.L.R. Sup. Vol. 496=6 W.R. 187.** [*F.*, 14 W R. 255, 1 C. 385 =25 W.R. 226, 12 C. 179; *Appl.*, 8 C. 91; *R.*, 18 W.R. 253, 8 B. 368, 16 B. 241, 4 C.W.N. 90, 6 O.C. 52].

(103)—S. 192—*See* DAMAGES—DAMAGES, SUITS FOR, 2 W.R. 76.

(104)—S. 192—*See* SPECIFIC PERFORMANCE, 1 M.H.C. 341.

(105)—*Ss. 201, 207, 212, 221, 273, 274, 275, 280, 281—Act XXIII of 1865, ss. 8, 13, 15—Execution of decree—Infructuous execution—Execution against person*—Onus,—After an infructuous execution against the judgment-debtor's property, the Court is bound, upon application made, to issue execution against his person, and the burden of proof should be put on the debtor, when arrested, to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct. C. SETON v. A. S. BIJOHU, **8 B.L.R 255=17 W.R. 165.**

(106)—Ss. 205, 233 to 238—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 7 B.L. R. 318=15 W.R. 34.

(107)—*Ss. 205, 273—Attachment of necessary wearing apparel.*—Necessary wearing apparel is not liable to attachment under. GANGARAM VELJI v. PARBHU DAYARAM, **9 B.H.C. 272.**

(108)—S. 207—*See* NO. 105, *supra.*

(109)—*Ss. 208, 284, 285 287, 290—Execution.*—Where a certificate of non-satisfaction and a copy of the decree are transmitted by the Court which granted the decree to another Court for execution under s. 285, Civ. Pro. Code, any application for the revival of execution after the proceedings have been struck off the file or for the substitution of the name of an assignee for that the original decree-holder should be made to the Court which passed the decree. The word "Court" in s. 208 does not extend to the Court to which the decree is transmitted but is limited to the Court which passed the decree. SHEO NARAIN SINGH v. HARBANS LAL. **5 B.L.R 497=14 W.R 65.** [*F.*, 9 B. H.C. 46; *Appl.*, 28 M. 466, F.B.=15 M.L.J. 116; *R.*, 27 C. 488.]

(109-*a*)—*Ss 210, 211, 246—Act XXIII of 1861, s. 11—Execution of decree—Claim by personal representative of judgment debtor—Appeal.*—Where application is made to execute a decree originally obtained against A, and against B, one of the legal representatives of A deceased, and such application is based, as it must be, upon the ground that B is in possession of property belonging to the estate of A, which property the Court is asked to attach with a view to sale, B's answer to that application being that she

Civ. Pro. Code (Act VIII of 1859)—*continued*

holds the property, not as the representative of A, but in her own right, such answer cannot be termed a setting up of a claim under Act VIII of 1859, s. 246; but it is an answer to an application made under ss. 210 and 211, and the case comes under the terms of Act XXIII of 1861, s. 11. Where a suit is brought under s. 203, Act VIII of 1859 against the representatives of a deceased person the defendant need not be sued in any "capacity," but should be described as stated in s. 26; and the plaint should contain an allegation that he is the representative of such deceased person. AMEERUNISSA KHATOON v. MEER MOZUFFER HOSSEIN CHOWDHRY, **12 B L.R. 65=20 W.R. 280.** *Appr.*, 6 C. 777=8 C.L.R. 117, 9 B. 458, 16 C. 1, 16 C. 603; *R.*, 8. A. 626, 9 A. 605, 15 C. 437.]

(110)—Ss. 210. 296—*See* COSTS—SPECIAL CASES, Bourke O.C. 154.

(111)—S. 212—*See* NO. 105, *Supra.*

(112)—Ss. 212, 285—*See* LIMITATION ACT 1908, ART., 182—STEP-IN-AID OF EXECUTION, 1 A. 525.

(113)—S. 216—*See* NO. 94, *supra.*

(114)—*Ss. 216, 217—Execution—Procedure.*—Where an application is made to execute a decree and notice is issued under s. 216, Civ. Pro. Code, and the opposite party presents a petition containing grounds of objection, the Judge is bound, whether a day for hearing is fixed or not, and even if the petitioner is not present, to consider the objections and pass such order as may appear just and proper. RAJBALLAB SAHA v RAMSADAY GHOSE **5 B L.R. App. 65=14 W.R. 155.**

(115)—S. 217—*See* APPEAL—DECREES AND EXECUTION OF DECREES, W. R. 1864, Mis. 23.

(116)—S. 217—*See* NO. 104, *supra.*

(117)—S. 220—*See* NO. 94, *supra.*

(118)—S. 221—*See* NO. 105, *supra.*

(118-*a*)—S. 225—*See* PARTITION—SUITS FOR PARTITION. JURISDICTION OF CIVIL COURTS IN, 100 P.R. 1876.

(119)—Ss. 225, 320—*See* APPEAL—ARBITRATION. 1 B.L.C. 319, Note=8 B.L.R. 130, Note =12 W.R. 397.

(120)—*Ss. 226, 229, 231—Obstruction to execution of decree for immoveable property—Fresh suit.*—The provisions of s. 226 of the Civ. Pro. Code, 1859, are permissive, and if a plaintiff does not choose to proceed under that section, there is nothing to prevent him from bringing a regular suit against those who obstructed him from obtaining possession in execution of his decree. It is only when an application under s. 226 is entertained and registered as a regular suit and decided against him, that the plaintiff would be precluded from instituting a regular suit in regard to the same matter. The plaintiff, therefore, can bring a regular suit if his application is rejected as being beyond time. BENI PRASAD v. LACHMAN PRASAD, **4 A. 131 =A.W.N. 1881, 145.**

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(121)—S. 229—*See* NO. 120, *supra.*

(122)—*Ss. 229, 231—Applicability.*—The provisions of s. 231 are not applicable where the proceedings are not conducted according to the provisions of s. 229 of the Procedure Code. CHUJJOO v. DOORGA DASS, **2 Agra 225**

(123)—Ss. 229, 231—*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS WHEN LIE AND WHEN NOT, 9 W.R. 337.

(124)—Ss. 229, 283—*See* APPEAL—ORDERS, 2 W.R. Mis. 22.

(125)—S. 230—*See* NO. 84, *supra.*

(126)—*Ss. 230, 231—Appeal only on decision passed on investigation.*—The language of s. 231 Civ. Pro. Code, shows that the Legislature intended only to give the appeal from a decision passed after an investigation of the matter in dispute in the same manner as if a suit had been instituted, and in that case to prohibit any fresh suit; but not to give any appeal if the Court should reject the application as being made without probable cause, leaving the applicant in that case to his remedy by an ordinary suit. STRINARASIMMA CHARIYAR v. NARASIMMA CHARIAR, **5 M.H.C. 183.**

(127)—Ss. 230, 231—*See* APPEAL—ORDERS, 1 W.R. 139, 21 W.R. 39.

(128)—S. 231—*See* NOS. 84, 120, 122, 123, 126, 127 *supra.*

(129)—S. 232—*See* ATTACHMENT——SUBJECTS OF ATTACHMENT, 8 W.R. 9.

(130)—S. 233—*See* NO. 106, *supra.*

(131)—S. 234—*See* NO. 106. *supra.*

(132)—*Ss. 234, 246—Prohibitory order in respect of debt due to judgment-debtor—Objection raised by alleged debtor—Duty of Court.*—On an objection being taken to the attachment and sale of an alleged debt or deposit due to the judgment-debtor, the Court by which the prohibitory order has been made is bound to inquire into the existence of the debt, and, where there is no *prima facie* evidence of the same, it should set aside the prohibitory order. MANSUKH UMED v. MOHANLAL MADHAV, **4 B. 324.**

(133)—*Ss. 234, 246—Application for cancellation of prohibitory order.*—It is not competent to a Court to entertain an application, under s. 246 of Act VIII of 1859, to cancel a prohibitory order issued under s. 234 on the ground that the person served with the order is not in possession of the property mentioned in such order; nor can such a person have, in any manner, been damnified by that order. LALLU GIRDHAR v. SHANKARDAS RAMJI, **4 B 325, Note.**

(134)—*S.* 235—*See* NO. 106, *supra.*

(135)—Ss. 235, 256, 259, 285—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, W.R. 388.

(136)—S. 236—*See* NO. 106, *supra.*

(137)—S. 237—*See* No. 106, *supra.*

Civ. Pro. Code (Act VIII of 1859)—*continued.*

(138)—Ss. 237, 271—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALY, RIGHT TO, 24 W.R. 305.

(139)—S. 238—*See* No. 106, *supra.*

(140)—*Ss 241 242, 243, 246—Scope of s. 246—S. 246 not applicable to debt due—But to immoveable property or specific moveable property—Debt due to judgment-debtor attached in hands of person owing it—Procedure under ss. 241, 242, or 243.*—Act VIII of 1859, s. 246 applies only to immoveable property or to specific moveable property, not to a debt due. When a debt due to a judgment-debtor is attached in the hands of the person who owes it, he may put it into Court voluntarily under s. 241, or under compulsion under s. 242, or be sued for it under s. 243. A person who is sued under s. 243, Act VIII of 1859, is not barred, because of the lapse of a year, from setting up any ground of defence which he may have against the claim, MUSSAMUT RAMBUTTY KOOER v. KAMESSUR PERSHA, **22 W.R. 86.** [*R.*, 24 M. 20, 27 M. 67.].

(141)—S. 242—*See* No. 140, *supra.*

(142)—S. 243—*See* NO. 140, *supra.*

(143)—S. 246—*See* NOS. 132, 133, 140, *supra.*

(143-*a*)—S. 249—*See* SALE—SALE IN EXECUTION OF DECREE—DESCRIPTION IN PROPERTY SOLD, ERRORS IN, 1 C.L.R. 460.

(143-*b*)—*S. 271—Bill of exchange—Execution of decree—Attachment by mortgagee.*—A and N were sued by B on a bill of exchange and A mortgaged certain property which belonged to himself and N jointly as security for the payment and the property was afterwards sold subject to the mortgage of B in execution of a decree held by a third party. B got one decree on the bill of exchange, and another declaring that he had a good mortgage of A's interest in the property and for an account and sale in default of payment. Subsequently B got an order, in his bill of exchange suit, for payment from the surplus sale-proceeds in the third party's suit. On appeal from an order ordering B to re-pay the amount, on the ground that he was entitled to share in the surplus, the order was allowed to stand on B undertaking to pay into Court the mortgage-money with interest, if that sum should be received by him in the mortgage-suit. BANK OF BENGAL v. NUNDOLALL DOSS, **12 B.L.R. 509.**

(143-*c*)—*S. 271—Execution of decree—Attachment by mortgagee.*—The proviso in s. 271, Act VIII of 1859, applies to a case where the property is actually sold subject to a mortgage and where the purchaser is, in fact, only buying the equity of redemption which remains in the judgment-debtor; and it does not apply where there is merely the right by the law in the mortgagee to enforce his mortgage against the purchaser. Where a mortgagee brings a suit upon his bond, and obtains a decree for the money due, which decree says that the execution shall be had against the property pledged

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and then against the person, it is competent for him to waive his right as mortgagee, and, resting upon his money-decree, to seek to have a share in the surplus proceeds of sale under s. 271. SHEIKH FAKEER BUX v. CHUTTURDAREE CHOWDRY, **12 B.L.R. 513, Note=14 W.R. 209.** [*Diss.*, 27 C. 285; *F.*, 21 W.R. 43; *R.*, 4 C.L.R. 11, 5 B. 470, F.B.]

(144)—*S. 250—Application under the suit—Nature—Ordinary suit.*—An application under s. 230, Civ. Pro. Code, 1859, when once registered and numbered as a suit, should be tried as an ordinary suit between the applicant as plaintiff and the decree-holder as defendant. The Court should try not only the question of possession but also the question of title. MUSSAMAT YUSAN KHATUN v. RAMNATH SEN, **7 B.L.R. App. 26.**

(145)—S. 250—*See* ST. 11 AND 12, VIC. C. 21, 3 B.H.C O.C. 25.

(146)—S. 256—*See* NO. 135, *supra.*

(147)—Ss. 257, 258—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASE ON SETTING ASIDE SALE, 4 B.L.R. F.B., 11=12 W.R. 8.

(148)—Ss. 257, 387—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 3 W.R. 70.

(149)—S. 258—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASE ON SETTING ASIDE SALE, **1 W.R. 55, 6 W.R. 147.**

(150)—S. 258—*See* NO. 147, *supra.*

(151)—S. 259—*See* NO. 135, *supra.*

(152)—S. 265—*See* SUPERINTENDENCE OF HIGH COURT, 8 W.R. 26.

(153)—S. 270—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 2 Agra 183.

(153-*a*)—S. 270—*See* NO. 81, *supra.*

(154)—*Ss. 270, 271—Attachment—Proceeds of sale of property—Distribution.*—A creditor holding several decrees against the same judgment-debtor cannot take out simultaneous attachments against that debtor's property, in such manner as to entitle himself, under s. 270 of the Civ. Pro. Code, to have all his decrees paid in full to the exclusion of other attaching creditors. He can only be regarded as first attaching creditor in respect of one of the decrees which he held. RADHA GOBINDA SHAHA v. SHEIKH TAWKU JAMADAR, **2 B.L.R. A.C. 100.**

(155)—S. 271—*See* EQUITY OF REDEMPTION, 5 B.L.R. 380.

(156)—S. 271—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHT TO, 21 W.R. 43, 21 W.R. 86, 21 W.R. 194.

(157)—S. 271—*See* NO. 138, 134, *supra.*

(158)—*S. 273—"Improper means," meaning of—Fraud—Suing heirs of obligor.*—B obtained a decree under s. 23, Act XX of 1866, against M.

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one of the original obligors,and against the representatives of P, another of the original obligors, who died previous to the suit being brought. B took out attachment in execution of that decree. K, who obtained a decree against M, subsequent to the decree of B, also took out execution of his decree and attached the same property. Then K applied under s. 272, Act VIII of 1859, that his decree was to be satisfied first, on the ground that B obtained his decree by fraud and improper means. The Munsiff, who was the same officer who had given B the decree found that there was no fraud, but held that, inasmuch as B had sued the representatives of one of the original obligors who was dead at the time he brought the suit, on a stamp of one-fourth of the value prescribed for a plaint in such suits, the decree of B had been obtained by improper means, and he therefore passed an order to the effect that K's decree was to be satisfied first. *Held*, that a mere error of the description alluded to, namely, an error in suing the representatives or heirs of the deceased obligor, was not obtaining a decree by "improper means" within the meaning of s. 272, Act VIII of 1859, and that the Munsiff's proceedings were without jurisdiction. *Per Ainslie, J.*—There must be some misconduct on the part of the decree-holder in order to invalidate his decree under s. 272, and not a mere error in procedure on his part or on the part of any pleader employed by him. BRAJANATH SHAHA v. KANAYI LAL SEN, **6 B.L.R. 174=14 W.R. 363.**

(159)—S. 272—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 11 W.R. 97.

(160)—S. 272—*See* FRAUD—FRAUD, ELEMENTS OF AND PROOF OF, 2 W.R. Mis. 29.

(161)—S. 272—*See* JURISDICTION—QUESTION OF JURISDICTION, 14 W.R. 363.

(162)—S. 272—*See* NO. 67, *supra.*

(163)—S. 273—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. COEE, Bourke, A.O.C 74, Bourke, O.C. 101, 6 B.L.R. 575=15 W.R. 204, 12 W.R. 125, 21 W.R. 185, 25 W.R. 95, 5 M.H.C. 108.

(164)—S. 273—*See* WARRANT, Bourke, O.C. 96.

(165)—S. 273—*See* NOS. 105, 107, *supra.*

(165-a)—Ss. 273, 274, 275 and 283—*See* APPEAL—DECREE AND EXECUTION OF DECREE, 2 B.H.C. 94.

(166)—Ss. 273, 280—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 1 Ind. Jur. N.S. 247, 5 B.L.R. App. 21.

(167)—S. 274—*See* NOS. 105, 165-*a*, *supra.*

(168)—S. 275—*See* NOS. 105, 165-*a* *supra.*

(169)—Ss. 275 281—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 2 Ind. Jur. N.S. 91.

(170)—S. 280—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 12 W.R. 422.

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(171)—S. 280—*See* NOS. 105, 166, *supra.*

(171-*a*)—Ss. 280, 281—*See* COURT FEES ACT, 1870, 8 B.L.R. App. 42=16 W.R. 84.

(172)—Ss. 280, 281—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 1 Ind. Jur. N.S. 8.

(173)—S. 281—*See* NOS. 105,169, 171-*a*, 172, *supra.*

(174)—S. 283—*See* NOS. 124, 165-*a*, *supra.*

(175)—S. 284—*See* NO. 109, *supra.*

(175-*a*)—Ss. 284, 372—*See* BEN. ACT X OF 1859, ss. 23, 77, 153, 160, 161, 28 C. 532=5 C. W.N. 279.

(176)—Ss. 284, 285—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 12 B.H.C. 212.

(177)—S 285—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 6 N.W.P. 73.

(178)—S. 285—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 1 Ind. Jur. N.S. 189.

(179)—S. 285—*See* LIMITATION ACT, 1908, ART 182—STEP-IN-AID OF EXECUTION, 7 N. W.P. 79.

(180)—S. 285—*See* NOS. 109, 112, 135, 176, *supra.*

(181)—Ss. 285, 286—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 10 W.R. 337.

(182)—Ss. 285, 286—*See* SMNLL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE OF, 16 W.R. 227.

(183)—*Ss. 285, 348—Act XIV of 1859—Limitation—Act IX of 1871—Compromise under decree—Instalment—Payment under compromise.*—The receipt of instalments by a decree-holder, out of Court, in pursuance of a compromise made between him and his judgment-debtor and sanctioned by the Court, is not a proceeding to enforce or keep in force a decree. [*Appr.*, 3 A. 585.] Nor can a condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, prevent limitation from running. STOWELL v. BILLINGS, **1 A. 330.** [*R.*, 2 A. 322.]

(184)—S. 286—*See* NOS. 181, 182, *supra.*

(185)—S. 287—*See* NO. 109, *supra.*

(186)—S. 288—*See* COMPANY—WINDING UP OF COMPANY, 3 B.H.C. O.C. 20.

(187)—S. 288—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 2 B.L.R. A.C. 65=10 W.R. 357.

(188)—S. 290—*See* NO. 109, *supra.*

(189)—S. 296—*See* NO. 110, *supra.*

Civ Pro. Code (Act VIII of 1859)—*continued.*

(190)—Ss. 315, 318 and 320—*See* ARBITRATION—MISCELLANEOUS, 5 B.L.R. 357.

(191)—S. 318—*See* NO. 190, *supra.*

(192)—S. 320—*See* ARBITRATION — MISCELLANEOUS, 12 Ind. Jur. N.S. 16.

(193)—S. 320—*See* NOS. 119, 190, *supra.*

(194)—Ss. 320, 325—*See* APPEAL—ARBITRATION, 5 B.L.R. App., 77, Note=12 W.R. 93.

(195)—S. 325—*See* NO. 194, *supra.*

(196)—S. 327—*See* NO. 67, *supra.*

(197)—Ss. 332, 334, 337—*See* APPEAL—GROUNDS OF APPEAL, 4 N.W.P. 120.

(198)—S. 334—*See* NO. 197, *supra.*

(199)—S. 337—*See* NO. 199, *supra.*

(200)—S. 348—*See* NO. 183, *supra.*

(201)—S. 350—*See* NOS. 36, 64, 91, *supra.*

(202)—S. 352—*See* REMAND, 2 B.L.R. S.N. 13 (*b*)=10 W.R. 388.

(202-*a*)—S. 359—*See* JUDGMENT — FORM AND CONTENTS, 7 B.L.R. App. 14=15 W.R. 131.

(202-*b*)—S. 372—*See* NO. 175-*a*, *supra.*

(202-*c*)—*Ss. 372, 387—Act XLIII of 1860, s. 1—Act XXIII of 1861, s. 27.*—A special appeal does not lie from the decision of the lower Court on a regular appeal in a suit of the nature cognizable by Court of Small Causes (though instituted prior to the passing of Act XLIII of 1860). GORA CHAND MISSER v. RAJA BAYKANTO NARAIN SNGH, **12 B.L.R. 261, F.B.=20 W.R. 421.** [*R.*, 11 M. 130.]

(203)—S. 374—*See* REVIEW—WHAT QUESTIONS CAN BE RAISED IN REVIEW, 9 W.R. 370.

(204)—S. 374—*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 1 W.R. 247,

(205)—S. 374—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 17 W.R. 214.

(206)—S. 375—*See* REVIEW—JURISDICTION TO REVIEW, 14 W.R. 436.

(207)—Ss. 376, 377—*See* MINOR—SUITS BY AND AGAINST MINORS, 16 W.R. 231.

(208)—Ss. 376, 377—*See* REVIEW — REVIEWS AFTER TIME, 6 W.R. 99.

(209)—*S. 377—Review of judgment—Limitation.*—An application for review of judgment cannot be granted after the proper time, on grounds which should have been, but were not, urged at the hearing of suit, unless just and reasonable cause were shown to the satisfaction of the Court for not preferring it within the time allowed by law. MADHO DAS v. RUKMAN SEVAN SINGH, **2 A. 287.**

(210)—S. 377—*See* LIMITATION ACT, 1908, s. 3. 14 W.R. 446.

Civ. Pro. Code (Act VIII of 1859)—*concluded.*

(211)—S. 377—*See* LIMITATION ACT, 1908, s. 4, **4 B.L.R. F.B. 32=12 W.R. 21.**

(212)—S. 377—*See* REVIEW — REVIEWS AFTER TIME, 3 W.R. 119, 8 W.R. 483, 10 W.R. 26.

(213)—S. 377—*See* NOS. 207, 209, *supra.*

(214)—Ss. 377, 378 — *See* SUPERINTENDENCE OF HIGH COURT, 2 B.L.R. A.C. 181 =11 W.R. 56.

(215)—S. 378—*See* NO. 214, *supra.*

(216)—S. 387—*See* REPEAL OF ACT, EFFECT OF, W.R. 1864, 35.

(217)—S. 387—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 3 W.R. Mis. 19, 8 W.R. 321.

(218)—S. 387—*See* NO. 148, *supra.*

(219)—Ss. 387, 119—*See* REPEAL OF ACT, EFFECT OF, W.R. 1864, Mis. 36.

Civ. Pro. Code, (Act X of 1877).

[REP., ACT XIV OF 1882.]

(1)—*Payment for decree not certified—Suit to recover.*—The provisions of Civ. Pro. Code, 1877 (prior to the Amendment Act) are no bar to a suit to recover money paid by a judgment-debtor to the judgment-creditor, twice over, on account of the satisfaction of the decree not being entered. MUSUTTI v. SHEKHARAN, **6 M. 41.** (5 M. 397, *F.*) [*F.*, 10 C. 354; *D.*, 11 B. 6, 16 M.L.J. 54.]

(2)—*See* EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 3 B. 214.

(3)—Ss. 2, 244, cl. (c) and 546—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 8 C. 477=10 C.L.R. 517.

(4)—Ss. 2, 344—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 3 C.L.R. 508.

(5)—*S. 3.*—The word "procedure" in the Civ. Pro. Code of 1877, s. 3, has not the same meaning as "proceedings" in s. 6 of Act I of 1868. "Procedure" implies the machinery by which proceedings are conducted; and this, after decree, is that provided by the New Code, although the proceedings may have been instituted under the Old Code. *Per Garth, C.J.* "Decree" in the Code of 1877 did not include "orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree. *Per Jackson, J.* RUNJIT SINGH v. MEHRBAN KOER, 3 C. 662=2 C.L.R. 391, F.B. [*R.*, 4 C. 825=3 C.L.R. 593.]

(6)—S. 3—*See* SPECIAL OR SECOND APPEAL—GENERAL, 3 C.L.R. 437.

(7)—Ss. 3, 586, 590—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, A.W.N. 1886, 181.

(8)—Ss. 4, 6, Ch. XX—*See* BUR. ACT XVII OF 1875, ss. 31, 66, 4 C. 94=2 C.L.R. 485.

Civ. Pro. Code (Act X of 1877)—*continued.*

(9)—S. 5, Ch. XX, ss. 344 to 360—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF —PRACTICE AND PROCEDURE, 2 B. 641.

(10)—S. 6—*See* NO. 8, *supra.*

(11)—Ss. 13, 244—*See* RES JUDICATA—CAUSE OF ACTION, A.W.N. 1881, 64.

(12)—S. 20—*See* STAY OF PROCEEDINGS, 4 C.L.R. 282.

(13)—*Ss. 32, 562, 563, 569—Remand for adding fresh parties*—An appellate Court is not competent, either under s. 569, or under s.566, Civ. Pro. Code, to order a fresh trial of the suit by adding new parties. Where the Court of first instance has not disposed of the case on a preliminary point, but has decided it on the merits after framing and trying all issues in the case, the fact that the plaintiff has chosen not to implead persons put forward in the defendant's statement as really liable, but has been content to take a decree against the minors alone, however ineffectual it may prove, the appellate Court is not competent to remand the suit for re-trial by addition of fresh parties. AMIR BEG v. ZAINULABDIN. **A.W.N. 1881, 49.**

(14)—Ss. 32, 582—*See* LIMITATION ACT, 1908, s. 22, 2 A. 487.

(15)—S. 49 (*c*)—*See* SPECIFIC RELIEF ACT, 1877, s. 19, A.W.N. 1881, 22.

(16)—S. 51—*See* PLAINT—VERIFICATION AND SIGNATURE, 3 C.L.R. 15.

(17)—S. 99—*See* APPELLATE COURT — REJECTION OR ADMISSION OF EVIDENCE, 2 A. 554.

(18)—S. 121—*See* INTERROGATORIES, 5 C. 707=5 C L R 509.

(19)—*Ss. 214, 244—Pre-emption—Conditional decree—Question whether purchase-money has been paid within time—Questions relating to execution.*—The question whether the purchase-money has been paid in time by the plaintiff who has obtained a conditional decree in a suit for pre-emption, is not one relating to the *execution* of the decree, bearing directly as it does upon what the final result of the suit should be; it is a matter for decision in the suit itself. Any proceedings, therefore, purporting to decide the matter on the execution side, would be ill-founded. Therefore, where the defendants in a suit for pre-emption had appealed from the decree passed against them, and also from an order, purporting to be passed on the execution side, disallowing their objection that the purchase-money had not been paid by the plaintiff within time, and the appellate Court allowed their objection and reversed the decree of the lower Court, the rejection by the High Court, of the appeal in respect of the execution-proceedings was no bar to the hearing of the appeal preferred by the plaintiff from the decree of the appellate Court dismissing the suit, and could not furnish a ground

Civ. Pro. Code (Act X of 1877)—*continued.*

for review of the judgment passed in the second appeal in favour of the plaintiff. MUHAMMAD ALI v. DEBI DIN RAI, **4 A. 420=A.W.N. 1882, 94.** [*Appr.*, 11 O.C. 144; *R.*, 179 P.L.R. 1901=21 P.R. 1902.]

(20)—*S. 244—Party to suit—Representative*—In a case in which a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, he should be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. Such questions must be disposed of in execution under s. 244, Civ. Pro. Code, and not by separate suit. ARUNDADHI v. NATESHA, **5 M. 391.** [*F.*, 9 B. 458, 16 C. 1; *R.*, 7 M. 255, 8 A. 626, 15 C. 437, 12 M. 387, 5 P.R. 1907=40 P.W.R. 1907 =23 P.L.R. 1908; *D.*, 9 M. 80.]

(21)—*S. 244—Dispossession of third party in execution of decree—Property purchased from judgment-debtor but not affected by decree—Separate suit.*—A third party who purchases from a judgment-debtor prior to decree, property which is not covered by the suit and not affected by the decree, is not a representative of any of the parties to the suit; and where he is deprived of such property, in execution of the decree in such suit, the matter is not one relating to the execution of the decree, and the third party can file a separate suit for recovery of possession of the property. (2 A. 61, *D.*) *Observation by Stuart, C. J.*, on his judgment in 1 A. 388 and on the judgment of the Full Bench in 2 A. 61 referring to that judgment. ZAUKE LAL v. JAWAHIR SINGH, **5 A. 94=A.W.N. 1882, 188.** [*R.*, 15 B. 290, 24 C. 62; *D.*, 18 M. 13.]

(22)—*S. 244—Execution of decree—Separate suit—Money wrongly realized in execution.*—A separate suit would not be maintainable to recover money alleged to have been wrongly realized from plaintiff by execution of a decree in a suit to which he was a party but from the operation of which, he alleged, he had been specially exempted. RAMAPAT MISR v. KALANATH PANDAY, **A.W.N. 1881, 79.**

(23)—*S. 244—Limitation Act, IX of 1871—Laches—Execution of decree-Money over drawn.*—In execution of a decree of 1868, on an account being taken, the decree-holders obtained a certain sum by the sale of certain property. Subsequently, on the application of the judgment-debtor, the account was re-opened, and finally in 1875 it appeared that the decree-holders had overdrawn. In 1876, the judgment-debtors applied for an order for the repayment of the sum so overdrawn. *Held* that (*a*) this was a question respecting money paid in execution of a decree and therefore it must be disposed of by the Court executing the decree and not by a separate suit; (*b*) the English doctrine of laches did not apply in this country; and (*c*) the application was not barred by any provision of the Limitation Act. SHEIKH ALLIJ HOSSEIN v. SHEIKH MUZHUR HOSSEIN, **4 C.L.R. 577.** [*D.*, 10 C. 538.]

Civ. Pro. Code (Act X of 1877)—*continued.*

(24)—*S. 244—Suit by decreeholder to recover amount refunded to purchaser — Judgment-debtor adjudicated insolvent*—Where, after confirmation of sale, the judgment-debtor was adjudicated insolvent, and an order was, upon an application by the purchaser, made for refund of the purchase-money from the decree-holder, *held* that a suit by the decree-holder to recover the amount refunded by him would be barred, the question being one to be determined under s. 244, Civ. Pro. Code, by the Court executing the decree. E. SOLANO v. S. AHMEIDA, **10 C.L.R. 373.**

(25)—*S. 244—Order determining mesne profits recovered subsequent to decree—Order fixing costs of execution—Not appealable.*—An order under s. 244, Civ. Pro. Code, 1877, determining the amount of mesne profits recovered by the plaintiff subsequent to decree, is not appealable; nor does an appeal lie from an order fixing the amount payable on account of the costs of execution of that decree. DALPATBHAI BHAGUBHAI v. AMARSANG KHEMABHAI, **2 B. 553.** [*Appl.*, 5 C. 50.]

(26)—*S. 244 — Pleader's fees.* — Although orders passed under s. 244, Civ. Pro. Code, 1877, would fall within the definition of the term "decree" this would not place them on a higher footing as to the scale of costs to be made applicable to them. The scale of costs applicable to such orders would be that given by art. 57 of Circular No. 19 of 1880 of the High Court. BULAND KHAN v. IBRAHIM HUSAIN, **A.W.N. 1882, 2.**

(27)—S. 244—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 11 C. 362.

(28)—S. 244—*See* SALE—SALE IN EXECUTION OF DECREE—STAY OF SALE, 7 C. 733 = 9 C.L.R. 344.

(29)—S. 244—*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS, WHEN LIE AND WHEN NOT, 1 M. 401.

(30)—S. 244—*See* NOS. 3, 11, 19, *supra*.

(31)—*Ss. 244 and 258—Execution of decree—Plea of satisfaction in car.*—Where a decree-holder executed apatta, in his judgment-debtor's favour, of the land in the latter's possession, to which he was entitled under the decree, and afterwards took out execution under it, *held*, satisfaction of the decree not having been entered up, the judgment-debtor would not be entitled to object, under s. 244 of the Civ. Pro. Code, that the decree-holder was not entitled to possession under the circumstances. S. 258 of the Civ. Pro. Code deals with the adjustment of any decree, and not merely with that of a money-decree. BABA MOHAMED v. WEBB, **6 C. 786 = 8 C.L.R. 36.** *F.*, 44 P.R. 1906; *D.*, 22 M. 182.]

(32)—Ss. 244, 258—*See* DAMAGES—DAMAGES, SUITS FOR, 3 C.L.R. 414.

(33)—*Ss. 244, 643—Order refusing application to send judgment-debtor for trial before Magistrate for an offence under s. 206, I.P.C.—Appeal.*—An order rejecting an application under s. 643, Civ. Pro. Code, 1877, to send a judgment debtor for trial before a Magistrate for fraudulently removing certain property in order to prevent it from being taken in execution of a decree, does not fall under s. 244, Civ. Pro. Code, and is, therefore, not appealable. KRISHNA RAM v. SARJU PRASAD, **A.W.N. 1881, 14.**

(34)—S. 258—*See* NOS. 31, 32, *supra*.

(35)—S. 341—*See* ARREST, 7 B. 106.

(36)—S. 344—*See* NOS. 4, 9, *supra*.

(37)—*Ss. 344, 350, 351 (c)—Application by judgment-debtor to be declared insolvent—Enquiry.*—An application to be declared insolvent under s. 344, Civ. Pro. Code, was rejected by the District Judge in the following terms:—"The other side does not wish to put in proof; the Court is by no means satisfied under cl. (c) of s. 351, Civ. Pro. Code, it therefore rejects the application." *Held* that there had not been sufficient inquiry into the application. The order of the District Judge was reversed and the case remanded for fresh disposal. SHEO MANGAL SINGH v. GANGA PRASAD, **A.W.N 1882, 55.**

(38)—Ss. 344, 351 — *See* INSOLVENCY—ORDER AND DISPOSITION, 58 PR., 1881.

(39)—*Ss. 344, 351, 354, 588 (17)—Insolvent application—Disallowance—Appeal.*—An order disallowing an application to be declared an insolvent is not appealable. The appeal allowed under s. 588 (17), so far as an order under s. 351 is concerned, appears to be on behalf of the judgment-creditor only. JUGJEEBUN GUPTA v. HURRO KUMAR PAL, **6 C.L.R. 135.**

(40)—Ss. 344, 588 (17)—*See* APPEAL—ORDERS, 124 P.R. 1882.

(41)—Ss. 345 to 349—*See* NO. 9, *supra*.

(42)—S. 350—*See* NOS. 9, 37, *supra*.

(43)—S. 351—*See* APPEAL—ORDERS, **2 M. 219.**

(44)—S. 351 — *See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 4 A. 337 = A.W.N. 1882, 68, 142 P.R. 1893.

(45)—S. 351—*See* NOS. 9, 37, 38, 39, *supra*.

(46)—*S. 351 (c)—Insolvent judgment-debtor—Unfair preference.*—With reference to the meaning of the expression in s. 351 (c) of Act X of 1877, "unfair preference" the Court held that it could not be inferred from the mere fact that the judgment-debtor had paid a certain creditor that he had given him an "unfair preference." The true principle would be that, if a *bona fide* application had been made, or pressure had been brought to bear upon the judgment-debtor, by a person having a right to apply and the judgment-debtor's act in discharging such debt proceeded upon such application or pressure, then it was not entirely voluntary, and could not be regarded as an "unfair preference" within the meaning of that section. NATHMAL DAS v. HIRA LAL, **A.W.N. 1882, 18.**

(47)—S. 352—*See* NO. 9, *supra*.

Civ. Pro. Code (Act X of 1877)—*concluded.*

(48)—Ss. 352, 355—Receiver appointed under s. 354, duty of, to pay off mortgage—Secured and unsecured creditors—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 7 B. 455.

(49)—S. 353—*See* NO. 9, *supra.*

(50)—S. 354—*See* NOS. 9, 39, *supra.*

(51)—S. 355—*See* NOS. 9, 48, *supra.*

(52)—Ss. 359 to 360—*See* No. 9, *supra.*

(53)—S. 375—*See* ARBITRATION—PRIVATE ARBITRATION, 130 P.R. 1882.

(54)—S. 434—Suit on judgments—Courts in Native States—Foreign judgments—Judgment of British Indian Courts—Suit in High Court on judgment of Court of Small Causes—*See* FOREIGN COURT, JUDGMENT OF, 6 B. 292.

(55)—Ss. 440, 444—*See* MINOR—SUITS BY AND AGAINST MINORS, 11 C.L.R. 15.

(56)—S. 444—*See* NO. 55, *supra.*

(57)—S. 546—*See* NO. 3, *supra.*

(58)—S. 562—*See* NO. 13, *supra.*

(59)—Ss. 562, 564, 53 — *See* PLAINT—AMENDMENT OF PLAINT, 6 M. 239.

(60)—S. 563—*See* NO. 13 *supra.*

(61)—S. 564—*See* NO. 59, *supra.*

(62)—S. 569—*See* NO 13, *supra.*

(63)—S. 582—*See* NO. 14, *supra.*

(64)—S. 586—*See* NO. 7, *supra.*

(65)—S. 588—*See* NOS. 39, 40, *supra.*

(66)—S. 590—*See* NO. 7, *supra.*

(67)—S. 595 (*a*)—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 4 A. 238.

(68)—S. 599—*See* LIMITATION ACT, 1908, s. 12, 10 M. 373.

(69)—*Ss. 622, 643—Dismissal of suit—Confirmation by appellate Court—Order of District Munsif to prosecute plaintiff under s. 209, I.P.C. Crim. Pro. Code, 1872, ss. 297, 471.*—After the decree of a District Munsif dismissing a suit was affirmed on appeal, the District Munsif made an order sending the case to the Magistrate for enquiry under s. 209, I.P.C. *Held* that the Munsif's order was not revisable under s. 622, and it could not be treated as an order under s. 643, Civ. Pro. Code, the case not pending then before him, nor under s. 297, Crim. Pro. Code, as the order, which should be taken to have been passed under s. 471, Crim. Pro. Code, was not one passed in a judicial proceeding. RAM GOPAL v. SHEO KHATIK, **A.W.N. 1882, 92.**

(70)—S. 643—*Sse* NOS. 33, 69, *supra.*

(71)—S. 649—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 6 C. 201=7 C.L.R. 79.

(72)—S. 651—*See* ESCAPE FROM LAWFUL CUSTODY, 4 A. 27.

(73)—Sch. IV, Forms 132 and 133—*See* PARTNERSHIP—MISCELLANEOUS, 7 C. 428 =9 C.L.R. 157.

(74)—Sch. IV, Firm 133—*See* NO. 73, *supra.*

Civ. Pro. Code (Act XIV of 1882).

[REP., ACT V OF 1908.]

(1)—Ss. 2, 206, 588—*See* DECREE—GENERAL, L.B.R. 1893—1900, 449.

(2)—Ss. 5, 360, Ch. XX, sch. II—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 9 M. 112.

(3)—*S. 9—Right to hoist a flag—No exclusive privilege—Suit of civil nature.*—Plaintiff in the suit claimed a declaration that he was entitled to hoist certain flag and that the defendant had no right to interfere with it. He alleged that the defendant had pulled it down and carried it away. *Held* that the plaintiff was only vindicating a common law right, and was entitled to maintain the action inasmuch as he did not claim any exclusive privilege. RAJA SHAH v. HUSSAIN SHAH, **7 A.L.J. 830=7 Ind. Cas. 314.**

(4)—Ss. 11, 15, 17 and 57—*See* ACT IV OF 1869, ss. 2, 3, 55 and 56, U.B.R. 1892—1896, Vol. II, 338.

(5)—Ss. 13, 21—Collector's decision under s. 13 of Madras Act III of 1895—Subsequent civil suit—*See* MAD. ACT III OF 1895, 30 M. 320.

(6)—Ss. 13, 244, 257-A.—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 29 B. 96=6 Bom. L.R. 853.

(7)—Ss. 13, 344—*See* RES JUDICATA—MISCELLANEOUS, 122 P.L.R. 1903.

(8)—*Ss. 14, 20, 21—Deduction of time.*—The words "date of the order staying proceedings" and "time requisite for going from the one Court to the other" do not include the interval between the dates of the stay of proceedings and of the return of the plaint. The reason for not so including that interval is that under s. 21, Civ. Pro. Code, the plaintiff is not chargeable with any Court-fee when the suit is reinstituted under an order under s. 20, Civ. Pro. Code. GURAPPA CHETTI v. PULLAYYA CHETTI, **3 M.L.J. 270.**

(9)—S. 15—*See* NO. 4, *supra.*

(10)—S. 17—*See* NO. 4, *supra* and NO. 18, *infra.*

(11)—S. 17, Expl. III—*See* CONTRIBUTION, SUIT FOR—JOINT TORT-FEASORS, P.L.R. 1900, p. 525=7 P.R. 1901.

(12)—*Ss. 17, 20—Non-resident defendant must apply for stay of proceedings—Acquiescence.*—S. 17 (*c*) of the Civ. Pro. Code, and the last paragraph of s. 20 must be read together, and the term "acquiesce" in s. 17 (*c*) must be interpreted in the light thrown upon it by s. 20. Therefore, the defendant who does not acquiesce under s. 17 (*c*) should indicate his want of acquiescence not by a mere objection to the jurisdiction of the Court, but should apply under s. 20 for a stay of proceedings on the ground that it is more convenient that the suit should be tried in one or other of the Courts in which it might have been instituted

Civ. Pro. Code (Act XIV of 1882)—*continued.*

If the plaintiff applies for leave under s. 17 *(c)*, the Court will at once determine the question. If the plaintiff does not do so, the law contemplates that the question may be raised by any non-resident defendant who, however, must do so by showing that the trial can be more conveniently held by some other Court. A bare objection to the jurisdiction, is not, therefore, a compliance with the law, and, in the absence of such compliance, the defendant must be deemed to acquiesce in the institution of the suit in the Court in which it is. ISMALL PEER AMBALAM v. NEELAMEGAM SERVAI, **8 M.L.J. 38.** (6 M. 344. *F.*)

(13)—Ss. 17 (*b*), 20—*See* JURISDICTION—QUESTION OF JURISDICTION, 6 M. 344.

(14)—*Ss. 17, 20 and 57—Suit not triable without leave of Court—Leave of Court not obtained—Acquiescence—Procedure.*—When a cause of action for a suit has not arisen within the local limits of the jurisdiction of the Court in which it is filed, and one or more of the defendants reside outside such limits, and objection is taken in the written statement filed by the defendants that the plaintiff not having obtained leave to file the suit under s. 17 of the Code of Civil Procedure, the Court has no jurisdiction to try it: *Held*, that, in such a case, the plaint may be returned by the original or the appellate Court for presentation to the proper Court, as the objecting defendants cannot be held to have submitted to the jurisdiction of the Court by not putting the provisions of s. 20 in force. (6 M. 344 and 8 M.L.J. 38, *Diss*; 9 B. 266, *R.*) S. 20 of the Civ. Pro. Code applies to those cases only in which a suit may be instituted in more than one Court without any special permission or acquiescence. NAND LAL v. GOPAL SAHAI, **86 P L R. 1903=27 P R, 1903.**

(15)—Ss. 17 *(a)*, Exp. III, 20, 57 and 622—*See* JURISDICTION—CAUSES OF JURISDICTION, 32 C. 146.

(16)—*S. 20—Scope of—"Points for decision being analogous"—Whether sufficient reason*—The jurisdiction given under s. 20, being of an exceptional character, is to be exercised cautiously, and when the Court is satisfied that justice is more likely to be done by the suit being instituted in some other Court. The mere fact that the points for decision in two cases, instituted by different parties in different Courts compelling a plaintiff in one Court who sues as a pauper and who had not been made a party to the suit in the other Court, to sue in such other Court, especially where the value of the property within the jurisdiction of the Court, where the plaintiff had sued as a pauper, was larger than that in the other Court. KHETA v. SANGA RAM, **8 P.R. 1894.** (4 C.L.R, 282, *D*; 13 B. 178, *Cited.*)

(17)—*S. 20—Suit for profits of partnership—Partnership entered into at Lahore—Business carried on at Hansi—Plaintiffs residents of Khurja—Alleged contract to remit profits to the plaintiff's place of residence not proved.*—S. 20, Code of Civil Procedure, enables the Court to stay a suit upon application made for that purpose. It does not empower the Court to entertain a suit, which otherwise it would have no jurisdiction to entertain. A partnership was entered into at Lahore, and the firm was carrying on the business at Hansi in the Punjab. Plaintiffs were partners of the firm residing at Kurja in the United Provinces. They brought a suit for their shares of the profits in the Court at Aligarh, on the basis, of an alleged special contract, by virtue of which their share of the profits had been agreed to be remitted to Kurja. The alleged contract was not proved. *Held*, that the Court below ought not to have entertained the suit and should have returned the plaint for presentation to the proper Court. BANKA MAL v. SHIAM LAL, **5 A L.J. 88=A. W.N. 1908, 46.**

(17-*a*)=S. 20—*See* NOS. 8, 12,] 13, 14, 15, *supra*

(18)—*Ss. 20 and 17—Procedure—Order purporting to be made under s. 20, returning plaint but not staying proceedings—Practice.*—A Court purporting to act under s. 20 of the Code of Civil Procedure was "satisfied that justice was more likely to be done by the suit being instituted in another Court," but, instead of making an order staying proceedings, either finally or until further orders, the Court made an order returning the plaint. *Held* that this was an illegal order, and, further, that it could not be supported as an order returning a plaint on the ground that the suit could not, having regard to s. 17 of the Code, have been instituted in the Court in which it was brought without the leave of the Court, which had not been granted. MAHIPAT SINGH v. TEJ KUNWAR, **A W.N. 1901, 136.**

(19)—*Ss. 20 and 24*—Two suits between the same parties in two Courts under jurisdiction of two different High Courts—Power of High Court to order stay of proceedings in one Court—*See* PRACTICE AND PROCEDURE, 35 C. 541.

(20)—*Ss 20, 53—Venue—Choice of plaintiff—Practice.*—The plaintiff, who was the Secretary and Manager of the Hinganghat Mill Co., at Bombay, sued the defendant, the Chairman of the Company, for defamation alleged to be contained in a notice published in the Bombay Gazette, dismissing the plaintiff from his office of Secretary. It appeared that, sometime before the present suit was filed, the plaintiff had filed a suit against the Company for wrongful dismissal in the Court of the Deputy Commissioner at Wardha, in the Central Provinces, the Court of the District in which Hinganghat is situated, and this suit was pending at the time when the present suit for defamation was filed. The defendant took out summons under s. 20 of the Civ. Pro. Code, and contended that the plaintiff should not be permitted to bring the present suit in Bombay, that it could be more conveniently tried at Wardha, and that in fact, the questions raised in the present suit between him and the

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plaintiff be practically decided by the decision of the earlier suit which was pending disposal at Wardha. He also urged that neither he not the plaintiff resided or carried on business at Bombay and that a material part of the evidence can only be procured at Wardha. *Held* that, inasmuch as the libel of which the plaintiff complained had been published in Bombay he had *prima facie* the right to file his suit in the Court at Bombay. He might also have filed it at Wardha where the defendant carried on business. This alternative choice of a *forum* is given to a plaintiff by s. 17 of the Civ. Pro. Code. GEFFERT v. RUKCHAND MOHLA, **13 B. 178.** [*F.*, 8 Ind. Cas. 449.]

(21)—*Ss. 20, 211—Amount sued for in Presidency Small Cause Court admitted by plaintiff in a suit in the High Court—Set-off—Power of High Court to restrain Small Cause Court from proceeding with the case before it.*—The plaintiff, in the suit, alleged that certain amount was due to him from the defendant, that he owed a less sum to the defendant, and that he was willing to set-off this sum against the sum claimed by him. Hence he sued only for the balance. On the very day on which the plaintiff instituted the present suit against the defendant in the High Court, the defendant brought a suit against the plaintiff in the Presidency Small Cause Court, for the sum admitted to be due by the latter to the former. *Held*, that, if the defendant in the suit took no further steps, he was entitled to treat the sum due to him as an admitted set-off, as though he made a claim to a set-off under s. 211 of the Code. Consequently, if the plaintiff failed, the defendant was entitled to ask for judgment for the sum admitted to be due. Therefore, the High Court was entitled to restrain the Small Cause Court from proceeding with the suit before it, under s. 20, Civ. Pro. Code. R. S. HART v. A. W. GROSER, **9 C W.N. 748.** [*R.*, 34 C. 97.]

(22)—S. 21—*See* NOS. 5, 8, *supra.*

(23)—S. 24—*See* TRANSFER OF CIVIL CASES, 11 C.L.J. 218=5 Ind. Cas. 771, 5 Ind. Cas. 588, 6 Ind. Cas. 518=12 Bom. L.R. 354=34 B. 411.

(24)—S. 24—*See* NO. 19, *supra.*

(25)—Ss. 25, 562, 564—*See* JURISDICTION—QUESTION OF JURISDICTION, 9 A. 191, P.C. =13 I.A. 134.

(26)—*Ss. 23, 28, 31, 34, 50, 362, 364, 368 372, 437, 541, 544, 559, 587—Parties, addition of, to a record—Appeal by person not a party to the decree appealed against.*—Except in the case of a plaint, where the plaintiff names himself as plaintiff, and the defendant as the party against whom he seeks a remedy, no person can bring himself or any one else or to the record of a Court unless with the cognizance and by the leave of the Court. SHIB SAHAI v. JAGAN NATH, **A.W.N. 1892, 139.**

(27)—S. 27—*See* NO. 26, *supra.*

(28)—S. 28—*See* NO. 26, *supra.*

(29)—S. 32—*See* NO. 26, *supra.*

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(30)—*Ss. 32, 559, 562, 565,—Addition of parties—Party added in appeal who was not a party to suit.*—When an Appellate Court thinks it necessary to have as a party before it in appeal, a person not appearing in a representative capacity and not a party to the suit in the Court of first instance, such appellate Court should remand the case to the Court of first instance, direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issue raised between him and the opposite side. It is the intention of the Legislature that in cases which may go in second appeal to the High Court or which may go to Her Majesty in Council, the parties to the suit should have the benefit of their issues of fact and of law being tried by two Courts. MAUNG CHEIN v. MA SHWE THAN, **2 L.B.R. 277.** (18 A. 332, 23 A. 167, 1903, 2 L.B.R. 245, *R.*)

(31)—S. 34—*See* NO. 26. *supra.*

(32)—S. 37—*See* POWER-OF-ATTORNEY, 1 L.B.R. 98.

(33)—Ss. 42, 43—*See* BUDDHIST LAW—DIVORCE. U.B.R, 1902—1903, Vol. II, Civil, BUDDHIST LAW—DIVORCE, 12.

(34)—S. 43—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 1 L.B.R. 13.

(35)—S. 43—*See* MORTGAGE—MISCELLANEOUS, L.B.R. 1893—1900, 14.

(36)—S. 43—*See* NO. 33, *supra.*

(37)—Ss. 44-A and 562—*See* REMAND, A. W. N. 1887, 266.

(38)—S. 50—*See* NO. 26, *supra.*

(39)—S. 53—*See* NO. 20, *supra.*

(40)—S. 54 (*b*)—*See* LIMITATION ACT, 1908 s. 3, L.B.R. 1893—1900, 33.

(41)—S. 57—*See* NOS. 4, 14, 15, *supra.*

(42)—*Ch. VII—Execution of decree—Procedure*—Res juidicata.—Ch. VII of the Code does not apply to execution-proceedings. Where an application for execution is dismissed for default of prosecution, an application to restore the original application cannot be entertained. The decree-holder should file a fresh application for execution. (15 A. 84, 18 C 429, 76 P.R.1903=170 P.L.R. 1903, *R.*) orders passed in execution-department are binding on parties, even if invalid, if they are passed after notice to them and no steps are taken to set the orders aside by appeal or otherwise. DULO RAM v. PALA MAL, **139 P.L R 1905.**

(43)—Ch. VII—*See* RES JUDICATA—ADJUDICATIONS, A.W.N. 1885, 168.

(44)—*Ch. VII and s. 158—Suit, dismissal of, for default.*—The plaintiffs instituted their suit in the Court of the Munsif in February, 1888. After several preliminary dates, the 26th of July was fixed for the framing of issues

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On that date the 17th of August was fixed for the hearing. The plaintiffs, however, were not ready on the 17th of August to proceed with their case and time was allowed them till the 26th of September. On the last mentioned date, the Munsif passed an order dismissing the plaintiffs' suit "for default of prosecution." Subsequently, the Munsif cancelled this order and proceeded with the trial of the case and ultimately gave a decree in the plaintiffs' favour. *Held* that the order above referred to dismissing the plaintiffs' suit must be regarded as an order under Ch. VII of the Code, of Civil Procedure and not as one, passed under s. 158 of that Code. LACHMAN SINGH v. BHAJAN SINGH, **A.W.N. 1893, 84.**

(45)—S. 102—*See* ATTACHMENT—STRIKING OFF EXECUTION PROCEEDINGS, 1 L.B.R. 70.

(46)—*Ss. 108, 350, 623—Insolvency proceeding*—Ex parte *order, setting aside of—Review.*—S. 350 of the Civ. Pro. Code, contemplates that on the date fixed for hearing, the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out. If the objector had no notice of the application for insolvency, he is entitled to apply under s. 108 of the Civ. Pro. Code to set aside an *ex parte* order passed under s. 350 of the Code; but if notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex parte* under s. 350, he is entitled to make an application under s. 623 of the Civ. Pro. Code, to set aside the *ex parte* order on the ground that it was in contravention of s. 350. MOOL CHAND RAM v. SARJOOG PERSHAD, **7 C.L.J. 268.**

(47)—S. 158—*See* NO. 44, *supra.*

(48)—Ss. 203, 204, 571—*See* JUDGMENT—FORM AND CONTENTS, L.B.R. 1893—1900, 1.

(49)—S. 204—*See* NO. 48, *supra.*

(50)—S. 206—*See* NO. 1, *supra.*

(50-*a*) S. 210—*See* NO. 126, *infra.*

(51)—*Ss. 210, 230, 257-A—Execution of decree—Agreement for satisfaction by instalments—Transfer of decree for execution—Limitation Act, sch. II, art. 179.*—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257-A of the Code of Civil Procedure for the satisfaction of the decree by instalments. Nor does the granting of a subsequent application for re-transfer, by the Court which passed the decree operate in any way to sanction such an agreement between the parties for the satisfaction of the decree by instalments; still less to change the decree as it originally stood into a decree in terms of such agreement. CHOUDHRI GANDHARAP SINGH v. RAO SHEODARSHAN SINGH, **A.W.N. 1890, 197.**

(52)—*Ss. 210, 257—A.—Decree to be executed—Sanction of Court under s. 257-A cannot operate as an order under s. 210.*—The decree in a suit which must be executed, is the decree as originally passed, or as altered by a proper order for that purpose, as *e.g.*, by an order under s. 210, Civ. Pro. Code. A sanction to an agreement under s. 257-A, Civ. Pro. Code, cannot be treated as a decree of the Court, nor can it operate as an order under s. 210, although undoubtedly, an order under s. 210, would operate as a sanction under s. 257-A. GANDHARAP SINGH v. SHEODARSHAN SINGH, **12 A. 571=A.W.N. 1890, 197.** [*D.*, 96 P.R. 1900.]

(53)—*Ss. 210, 257-A—Execution of decree—Compromise.* — A compromise between the decree-holder and the judgment-debtor, under which the former is put in possession of property, for realisation of part of the decretal amount by means of the usufruct, and the balance is made payable by instalments, in default of any one of which the whole amount should be realisable by execution, cannot be executed as an instalment decree with respect to which limitation runs from the date of the instalment due. RAMLAKHAN RAI v. BAKHTAUR RAI, **6 A. 623.** (3 A. 585, *F.*) [**R., 11 A. 228.**]

(54)—S. 211—*See* NO. 21 *supra.*

(55-56)—Ss. 230, 235 and 245—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT. U.B.R., 1904, 1st Qr., Execution of Decree, p. 1.

(57)—*Ss. 234, 248, 460—Minor—"Suit," meaning of—Appointment of guardian—Duration of office—Sale in execution—Want of notice to guardian—Application for execution—Error in description of guardian—Effict—Representation of minor—Notice under s. 248—When necessary.*—Plaintiff T, a mortgage decree-holder, put in an application for execution, and had the widow and the minor son of his judgment-debtor G brought on record as his legal representatives. In the proceedings in respect of the said application, the Nazir was appointed guardian *ad litem* of the minor son, but the execution sale did not take place for want of biddings. Subsequently T put in a second application for execution in which he described the mother as the guardian of the minor. No notice of this application was sent to the Nazir, the proper guardian, and a sale took place in pursuance of that application, in which sale the plaintiff, T, purchased the mortgaged properties. Plaintiff now sued for partition and possession of G's (judgment-debtor's) share. It was contended that the sale was made without jurisdiction, no notice of the second application for execution having been served on the minor's guardian, and was therefore not valid. *Held, per Crouch, A.J.C.* (*a*) that the appointment of the Nazir as guardian was an appointment under s. 462, Civ. Pro. Code, that is, as guardian for the suit, and that such guardianship did not terminate until the suit was disposed of; that the word "suit" in s. 460, Civ. Pro. Code, means or includes the proceedings incidental to the enforcement of a decree, and

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that these cannot be regarded as terminated until the decree has been satisfied. *Held*, also, an error in the application for execution, describing the mother as being the guardian instead of the Nazir, does not vitiate a sale held under an order made in pursuance of it, and that such an error could not affect the jurisdiction of the Court. *Held*, also, that no notice of the second application under s. 248, Civ. Pro. Code, need be issued to the guardian, and that the terms of the last para of that section make it clear that no notice is necessary, if, upon a previous application for execution against the same person, the Court has ordered execution to issue against him. *Held, per Pratt, A.J.C.*—(1) that the appointment, in the first execution-proceeding, of the Nazir as guardian, does not amount to a substantial representation, by the Nazir of the minor in the second execution-proceeding, of which no notice had been issued to Nazir under s. 460, Civ. Pro. Code. *Held*, also, (2) that "in execution-proceedings the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds, when they find that it is substantially right." (6 I.A. 233, *F.*; 24 B. 135, *R.*) *Held*, also, (3) that, even if the minor were not represented by the Nazir, yet the estate of the deceased was sufficiently represented by the widow, and that the requisites of s. 234, Civ. Pro. Code, having thus been satisfied, the Court has jurisdiction to proceed against the estate, and the whole estate passed by the sale. THAKUMAL TEJUMAL v. BALOMAL LEKHRAJ, **2 S.L.R. 55 F.B.** (Marsh, 614, 14 M.I.A. 605. 11 C. 45, 6 I.A. 233, 21 B. 439, 24 B. 135, *R.*)

(58)—Ss. 234, 248, 361 to 372, 583—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 18 B. 224.

(59)—S. 235—*See* NO. 56.

(60)—S. 244—*See* NO. 6, *supra*.

(61)—*Ss. 244, 257-A—Agreement by a judgment-debtor to pay interest at a rate higher than that provided in the decree—Agreement without sanction void—Right of suit.*—An agreement entered into by a judgment-debtor to pay interest at a rate higher than that provided in the decree in consideration of the decree-holder giving time to the judgment-debtor, and not sanctioned by the Court, is void under the provisions of S. 257-A, and cannot be enforced by suit. GOPAL SAHU v. BRIJ KISHORE PERSHAD, **9 C.W.N. 1004=32 C. 917.** (6 C.W.N. 27. *D.*; 26 M. 19, 25 A. 317, *R.*) [*R.*, 61 P.L.R. 1907=71 P.W.R. 1907=29 P.R. 1908, F.B.]

(62)—*Ss. 244, 257-A—Mortgage in satisfaction of decree—Sanction not granted—Subsequent grant of sanction by same Court—Legality of.*—A mortgage-bond was executed in satisfaction of a decree. The Court did not sanction the arrangement but directed execution to proceed. On the application for execution being struck off for default, the decree-holder applied for execution of the decree. Thereupon the judgment-debtor again pleaded that the decree had been satisfied by the execution of the mortgage and the Court, which was then presided over by a different officer, sanctioned the arrangement and struck off the execution application. *Held* that the Judge had a discretion as to whether he would sanction the agreement for the satisfaction of the judgment-debt and the discretion was not limited by the fact that his predecessor had already in the previous proceedings refused to sanction the same agreement. GANESHDAS KRISHNAJI v. RAISING, **3 C.P.L R. 54.**

(62-a)—*Ss. 244 (c), 257-A, 258, Act XIV of 1882, Civ. Pro. Code, kistbundi or instalment-bond executed by way of adjustment of decree—Court not certifying in accordance with provisions of ss. 257-A and 258.*—A Court executing a decree was not competent to take cognizance, under s. 244 of the Code, of an instalment-bond executed by way of adjustment of decree but not certified to the Court under ss. 257-A and 258 of the Code, and the decree must be executed not withstanding the adjustment. RAM DOYAL BANERJEE v. RAMHARI PAL, **20 C. 32.** [*F.*, 7 C.L.J. 15, Note, 12 C.W.N. 485; *R.*, 8 C.W.N. 395=31 C. 480, 27 P.L.R. 1905; *D.*, 7 C.W.N. 54.]

(63)—*Ss. 244, 257-A, 258, 617—Application for adjustment of decrees—Questions relating to execution of decree—Reference.*—On an application made to a Subordinate Judge for adjustment of decrees more than three years old, the Judge referred, for the decision of the High Court, the question whether such application could be granted and sanction accorded to a *sankhat* purporting to have been passed in satisfaction of the decrees. *Held* that there could be no reference made of the question under s. 617 of the Civ. Pro. Code. Whether the application be regarded as an application under s. 257-A of the Civ. Pro. Code, for the sanction of the Court, or one to have the adjustment recorded as certified under s. 258, the question will equally be one relating to the satisfaction of the decree within the meaning of s. 244 of the Code, and the order made thereon will be appealable under s. 2. RANGJI v. BHAIJI HARJIVAN, **11 B. 57.** [*F.*, 7 C.W.N. 172; *Appr.*, 16 A. 129=A.W.N. 1894, 6; *R.* 18 M. 26, 5 M.L.J. 140, U.B.R. 1897—1901, Vol. II, 254.]

(64)—S. 245—*See* NO. 56, *supra*.

(65)—S. 248—*See* NOS. 57, 58, *supra*.

(66)—*Ss. 257, 257-A and 258—Agreement for payment of judgment-debt—Judgment-debt, payment of, to decree-holder Sanction of Court as to agreements relating to judgment-debt.*—In may 1898, the plaintiff-respondent obtained a decree for Rs. 195 including cost against the applicant. In May 1899, the latter executed a bond in favour of the plaintiff for Rs. 300 payable in monthly instalments, and, at the foot of the bond, it was stated that the consideration consisted of the Rs. 195 due under the decree Rs. 35 in cash and Rs. 70 on account of future

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interest. On the 17th, July 1899, the plaintiff notified to the Court under s. 258, Civ. Pro. Code, that his decree against the defendant for Rs. 195 had been satisfied by the execution of a bond for that amount together with other sums. Thereupon, the decree was recorded as satisfied. In May 1900, the plaintiff applied for sanction under S. 257-A, Civ. Pro. Code, to proceedings by which his decree had been satisfied, and on the 11th June, 1900, the Court recorded the following order : " The parties appear to-day. The executant admits the document. The execution-proceedings were struck off on the decree-holder's application on the 17th July, 1899..... I grant the sanction asked for." The plaintiff brought a suit for the recovery of the first thirteen instalments due on the bond, and the defendant pleaded that, as the bond provided for the payment of interest on the judgment-debt and was without the sanction of the Court, it was void under s. 257-A, Civ. Pro. Code. The plaintiff's suit was decreed. *Held*, that the agreement in the bond was not one for the satisfaction of the judgment-debt, and providing for the payment, directly or indirectly, of any sum in excess of the sum due under the decrees. It was an agreement for the payment of the amount by which the judgment-debt was satisfied with interest on that amount. *Held*, therefore, that the suit was rightly decreed. MIRZA MOHAMMAD ZAKIR v. GIR. DHARI LAL, **4 O.C. 284**. (18 A. 479, 3 O C. 165, *D.*)

(67)—*S. 257-A—Agreement to give time —Adjustment of decree—Reservation of right to execute decree—Suit on agreement—Maintainability—Agreement unstamped document—Admissibility in appeal—Stamp Act, 1879, s. 34.*— Plaintiff obtained a decree against the defendant. In execution thereof, an agreement was entered into between the parties, by which time was given to the defendant to satisfy the decree, and it was stipulated that, if the defendant failed to satisfy the decree at the time appointed, he should put the plaintiff in possession of certain lands which he hypothecated as security for the amount of the decree. A further clause empowered the decree-holder, in case of any injury to the hypothecated holding within the stipulated time, to recover his decree-money by executing his decree. A petition to this effect was filed in Court on the 14th March, 1878. The defendant failed to perform his promise The plaintiff, after his unsuccessful attempt in the execution department to recover possession of the property, filed the present suit for possession under the terms of the agreement dated the 14th March, 1878. *Held* by the Full Bench (*Stuart, C.J.* and *Oldfield, J.* (*dissenting*) that the document of the 14th March, 1878, was a written contract between the decree-holder and the defendant in respect to the hypothecation to him of his land and not a mere petition meant only to inform the Court that an oral contract to that effect had come into existence between them. As the contract expressly reserved to the decree-holder the right of executing his decree on a given contingency, he could not be deemed to have abandoned or extinguished his rights thereunder. Therefore the suit was held to be not maintainable. The abovesaid agreement was stamped with a stamp of one anna. *Held* that the stamp was insufficient in either case, whether it was regarded as a deed of mortgage or as an agreement to mortgage only. Ordinarily, an appellate Court will not direct the reception of an unstamped document to which the provisions of s. 34 of the Stamp Act apply, unless the amount of stamp duty, and prescribed penalty has been tendered when the admissibility of the document in evidence was first challenged, and the document was on this ground rejected. RUP. CHAND v. THAKUR DIAL, **A.W.N. 1883, 93, F.B.** (4 C. 213, 7 W.R. 439, 10 B.H.C. 441, *R.*)

(68)—*S. 257-A.*—The provisions of s. 257-A, Civ. Pro. Code, apply only as between parties to the suit and decree. MAUNG YWA v. MAUNG PO CHAN, **U.B.R. 1897—1901, Vol. II, 252.** (6 M. 101, 13 B. 671, *F.*; 18 A. 435, *D.*; 17 M. 382, 9 B. 176, 12 B. 499, 15 B. 419, 16 B. 618, 21 B. 808, 11 C. 671, 16 C. 504, L.B.R. 1872—1892, 644, *R.*) [*R.*, U.B.R. 1907, 1st Qr., Civ. Pro. Code 1.]

(69)—*S. 257-A — Adjustment of judgment-debt out of Court.*—The provisions of s. 257-A of the Civ. Pro. Code, are only intended to prevent any binding agreements between judgment-debtors and judgment-creditors for extending the time for *enforcing decrees by execution*, without consideration and without the sanction of the Court; they are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment-debt by instalments or in any other way. Any such fresh contract could of course be enforced only by a fresh suit. JHABAR MAHOMED v. MODAN SONABAR, **11 C. 671**. [*F.*, 7 C.L.J. 15, Note, 16 C. 504. L.B.R. 1872—1892, 644, 17 M. 382; *Appr.*, 4 O.C. 284, 29 P.R. 1908; *Expl.*, 12 M. 61; *Expl. & D.*, 20 C. 32; *Diss.*, 88 P.R. 1904; *R.*, 11 B. 6. F.B., 15 B. 419, 16 B. 618, 2 M.L.J. 221, 21 B. 808 22 B. 693, F.B., U.B. R. 1897—1901, Vol. II, 252. 25 A. 317=23 A.W. N. 45, F.B., 27 P.L.R. 1905, 61 P.L.R. 1907= 71 P.W.R. 1907, F.B., 35 C. 870=12 C.W.N. 674, 7 C.L.J. 543, 6 A.L.J. 726.]

(70)—*S. 257-A — Object.*—The object of s. 257-A was simply to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, *in execution of the decree*; but it could never have been intended to take away a right which parties certainly possess of entering into a fresh contract, either for the payment of the judgment debt, to give time for such payment, or for the payment of a larger sum than what may be covered by the decree, if it be for a proper consideration. HUKUM CHAND OSWAL v. TAHARUNNESSA BIBI, **16 C. 504**. [*Appr.*, 4 O.C. 284; *Diss.*, 18 A. 435=16 A.W.N. 130; *F.*, 22 B. 693, F.B., 88 P.R. 1904; *R.*, 16 B. 618, 6 C.P.L.R. 133, 21 B. 808, U.B.R. 1897—1901, Vol. II, 252, 3 O.C. 165, 25 A. 317=23 A.W.N. 45, F.B., 61 P.L.R. 1907=71 P.W.R. 1907=29 P.R. 1908, F.B., 6 A.L.J. 726.]

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(71)—*S. 257-A—Extension of time for payment of decretal debt without Court's sanction—Application for sanction after decree barred.*—On the 3rd of October, 1885, the parties to a decree for redemption entered into an agreement whereby the time to pay the decretal debt was extended to five years, but the sanction of the Court was not obtained. On the 18th February, 1888, after the execution of the decree had become barred, the parties applied to the Court to sanction the agreement of 1885. *Held* that the agreement required the sanction contemplated by s. 257-A of the Civ. Pro. Code, that it was void for want of such sanction so far as it related to the judgment-debt, and that the sanction applied for could not be given on that date. NARU KOLI v. CHIMA BHOSLE, **13 B. 54.** [*R.*, 7 Bom. L.R. 995, 30 B. 226.]

(72)—*S. 257-A—Adjustment of decree by persons not parties to decree—Validity—Civ. Pro. Code, 1882, s. 257-A — Applicability.* — X obtained a decree against Y. In adjustment of the decree, the son of Y executed in favour of the son of X an instalment-bond in respect of the judgment-debt without the Court's sanction. A suit was instituted to recover the instalments due on the bond. On a reference to the High Court it was held that the suit was maintainable, s. 257-A of the Civ. Pro. Code 1882, applying only to agreements between the parties to the suit or decree. RAMJI PANDU v. MAHOMED WALLI, **13 B. 671**. [*F.*, U.B R. 1897—1901, Vol. II, 252, 23 B. 502; *R.*, 19 M. 230, 28 B. 383.]

(73)—*S. 257-A—Barred decree, bond executed in adjustment of—Sanction of Court not necessary—Contract Act, IX of 1872, s. 25, cl. (3) judgment-debt, a debt within the meaning of.*—*Held* that no sanction was necessary under s, 257-A of the Civ. Pro. Code for the execution of a bond passed in satisfaction of a debt due under a time barred decree, as that section must be deemed to relate to judgment-debts which are still enforceable. An unsatisfied debt, although barred, is good consideration for a bond, by reason of s. 25 (3) of the Contract Act, the word "debt" in that section including a judgment-debt as well. SHRIPATRAV v. GOVIND NARAYAN, **14 B. 390**. [*R.*, 26 A. 36=23 A. W.N. 179.]

(74)—*S. 257-A—Execution of decree—Compromise.*—A *sulehnama* or petition of compromise, between a judgment-debtor and a decree-holder, which provides for the payment of the decree by instalments, and enhances the rate of interest made payable by the decree, when sanctioned by the Court executing the decree, comes within the terms of s. 257-A of the Civ. Pro. Code, and the decree may be executed in accordance with its provisions. SITA RAM v. DASRATH DAS, **5 A. 492, F.B.=A.W.N. 1883, 68.** [*F.*, 11 A. 228; *R.*, 12 A. 571, 61 P.L. R. 1907, F.B.=71 P.W.R. 1907=29 P.R. 1908; *D.*, 19 A. 186.]

(75)—*S. 257-A—Power of executing Court.*—The power given by s. 257-A, to sanction certain agreements provided therein, can be exercised only by the Court which passed the decree and not by the Court executing it. PARAMANANDA DAS v. MAHABEER DOSSJI, **20 M. 378 =7 M.L.J. 195.**

(76)—*S. 257-A—Bond passed in satisfaction of judgment-debts, void when executed without sanction of Court.*—Where in satisfaction of two decrees obtained by the plaintiffs' father, one against the defendants' father alone, and the other against the defendant and his father, a debt-bond was executed without the necessary sanction of the Court and the plaintiff sued to recover the amount due under the bond, the High Court *held*, on a reference, that the agreements in the bond to give time and to allow interest were void under s. 257-A of the Civ. Pro. Code (Act XIV of 1882). GANESH SHIVRAM v. ABDULLA BEG, **8 B. 538**. [*Diss.*, 11 C. 671, *Not F.*, 16 C. 504; *Appr.*, 18 A. 479; *R.*, 15 B. 419, 25 B. 252.]

(77)—*S. 257-A—Agreement between parties to decree—Provision for interest not allowed by decree—Necessity of sanction of Court*—An undertaking by a judgment debtor to pay interest not awarded by the decree is inoperative under s. 257-A, in the absence of the sanction of the Court which passed the decree. This would not, however, invalidate any remaining portion of the agreement, if the void part could be properly separated from the rest. Where, however, the parties have treated the moneys payable under the void and valid portions of the agreement as one lump sum, the contract must be deemed to be an integral one and therefore void. DAVALATSINGH v. PANDU, **9 B. 176.** [*Diss.*, 11 C. 671; *Not F.*, 16 C. 504; *R.*, 15 B. 419, 18 A. 479=16 A.W.N. 160, U.B.R. 1897—1901, Vol. II, 252, 28 B.62=5 Bom.L.R. 672, 29 P.R. 1908, F.B.=61 P.L.R. 1907=74 P.W.R. 1907, *D.*, 25 B. 252.]

(78)—*S. 257-A—Decree—Agreement for the satisfaction of the judment-debt in excess—Sanction of the Court—Agreement is void if made without sanction — The decretal debt included with other debts in a mortgage-deed—Deed void only to the extent of the decretal debt — Contract Act (IX of 1872), s. 23.* — The plaintiff owed the defendant, a judgment-debt of Rs. 442-9-0 not bearing interest, which with other debts were incorporated in a mortgage, the total mortgage-debt being Rs. 2,500 the whole of which bore interest. Sanction of the Court, prescribed by s. 257-A, of the Civ. Pro. Code, was not obtained to this arrangement. *Held*, by *Russel, Ag. C. J.*, that, the bond contained several and distinct promises made for one and the same lawful consideration, and if the law will not enforce the promise as to the decretal amount and interest thereon, still it can and will enforce the promises for payment of the other sums therein mentioned. *Held*, by *Heaton, J.*, that the whole mortgage was not void; but the decretal amount should be omitted from the principal of the mortgage-debt. The agreement in question was not

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"unlawful" within the meaning of s. 23 of the Contract Act, 1872. BHAGABAI v. NARAYAN, **9 Bom. L.R. 590=31 B. 552.**

(79)—*S. 257-A—Applicability of—Quoere.*—Whether s. 257-A of the Civ. Pro. Code, 1882, relates exclusively to agreements to extend the time for enforcing decrees by execution as ruled by the Calcutta High Court in 11 C. 671, or is applicable to all agreements according to the view of the Bombay High Court in P.J. for 1881, p. 315. SWAMI RAO NARAYAN DESHPANDE v. KASHI NATH KRISHNA MUTALIK DESAI, **15 B. 419.** (6 B. 538, 300, 9 B. 176, *R.*) [*R.*, 21 B. 808.]

(80)—*S. 257-A—Decree—Satisfaction—Mortgage—Sanction of the Court.*—Where a decree is satisfied by taking out a mortgage-deed, which makes provision for future interest over the amount, such mortgage to be valid must be made with the sanction of the Court, under s. 257-A (2) of the Code of Civil Procedure. DHANRAM v. GANPAT, **4 Bom. L.R. 872=27 B. 96.**

(81)—*S. 257-A—Decree—Satisfaction—Agreement—Agreement to give time.*—The agreement, contemplated by the first para of s. 257-A of the Code of Civil Procedure, is one which merely suspends and does not destroy the rights of execution consequent on the decree; such an agreement *ex vi termini* implies that there has been no actual satisfaction but merely a stipulation for a future satisfaction. TUKARAM v. ANANTBHAT, **2 Bom. L.R. 1012 =25 B. 252.**

(82)—*S. 257-A—Decree—Satisfaction—Sanction of the Court.*—Where in satisfaction of a decree, relating to an ancestral debt, obtained against a Hindu father, the father and his son, living in a joint family, execute an agreement for a sum in excess of the decretal amount, and no sanction of the Court is obtained to the arrangement, the agreement is void, under s. 257-A of the Civ. Pro. Code, as against the father and also as against the son. The true test of the application of s. 257-A of the Civ. Pro. Code, is—Is the debt in question a judgment-debt as to the person executing the agreement in the sense that it is binding upon him as if he were bound by the decree. GOVIND v. SAKHARAM, **6 Bom. L.R. 344=28 B. 383.**

(83)—*S. 257-A — Decree — Satisfaction — Sanction of the Court.*—Where an agreement in satisfaction of a decree makes provision for interest, which carries the sum beyond the amount of the decretal debt, the provision for interest is void but the agreement is not thereby rendered void. RAIGHAND v. NARAN BHIKHA, **6 Bom. L.R. 62=28 B. 310.**

(84)—*S. 257-A—Decree—Satisfaction.*—In full satisfaction of a decree which was for Rs. 529-10-0 and which awarded no interest, defendants executed a mortgage agreeing to pay Rs. 500 within three months from the date of the bond. The bond also contained a provision that if the sum of Rs. 500 were not so paid, interest at Re. 1-8-0 per cent. per month should run on it until payment: *Held*, (1) that as the sum to be paid was less than the decretal amount the agreement so far did not fall within para 2 of s. 257-A of the Civ. Pro. Code, 1882; (2) that the agreement to pay interest was void under para 2 of s. 257-A of the Code; but this provision did not vitiate the whole of the agreement. BHAGCHAND v. RADHAKISAN, **5 Bom. L.R. 672=28 B. 62.**

(85)—*S. 257-A — Rent-decree—Instalment-bond executed by some of the judgment-debtors in decree-holder's favour in respect of decretal amount—Enforcement by suit—Agreement to give time.*—Where two of the judgment-debtors executed a *kistbundi* bond in favour of the decree-holder hypothecating certain property in order to secure the decretal amount, and the bond further provided that, on failure of payment of the instalments, the decree-holder would be competent to execute the decree; *Held*, that it was more than a mere agreement to give time within the meaning of s. 257-A, Civ. Pro. Code; and although the agreement to give time, not having had the sanction of the Court, was incapable of enforcement, there was nothing to taint the rest of the agreement with illegality or prevent the decree-holder from suing upon it. BELCHAMBERS v. SARAT CHANDRA GHOSE, **12 C.W.N. 674=7 C.L.J. 543=35 C. 870.**

(86)—*S. 257-A—Mortgage-deed in satisfaction of decrees—Sanction of Court not obtained—Mortgage-deed valid.*—A suit was brought on mortgage-deed, the consideration for which was the complete discharge of two decrees and a present advance of money, in addition. The sanction of Court had not been obtained under this section. *Held*, the mortgage was valid. It was one to which the provisions of this section applied. MAHARAJA OF VIZIANAGARAM v. NIRANJAN MUKERJI, **A.W.N. 1905, 57=2 A.L.J. 683.** (25 A. 317, F.B., *F.*, 18 A. 435, *D.*)

(87)—*S. 257-A—Agreement by person other than judgment-debtor or his representative—Death of debtor—Representative not on record.*—Where the judgment-debtor is dead and his representative has not been brought upon the record, s. 257-A of the Code does not strike at an agreement to pay more than the judgment-debt by a person other than the judgment-debtor or his representative. LOD GOVINDA DOSS KRISHNA DOSS v. POTTI NAICKEN, **8 M.L.T. 326=8 Ind. Cas. 415.** (28 B. 383, 23 B. 502, *F.*)

(88)—*S. 257 A—Adjustment of decree out of Court—Bond—Consideration.*—A bond executed by the judgment-debtors in favour of the decree-holder and in consideration of the benefit of the decree being given up is not void as an agreement under s. 257-A of the Civ. Pro. Code. SUKHU RAM v. UMED, **20 P.L.R. 1900.**

(89)—*S. 257-A—Execution of decree—Havala or oral undertaking by third party to pay decretal-debt—Partial payment as per havala—*

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Subsequent execution of bond by judgment-debtor for payment of balance—Court's sanction not obtained—Suit on bond—Maintainability—In execution of a money-decree obtained by G against H, property belonging to the latter was attached. At the request of H, five persons gave a *havala*, or oral undertaking to pay the decretal debt and the attachment was raised. Some amount was paid under the *havala*, and, for the balance of the decree amount, H executed a bond, agreeing to pay the same with interest. The sanction of Court was not obtained either to the *havala* or to the bond. The decree having been destroyed, the plaintiff, G brought the present suit to enforce payment of the amount due under the bond. The District Judge being of the opinion that the portion of the bond providing for payment of interest was void and that the other portion under which the principal amount of the decree was agreed to be paid was not void, referred the matter to the High Court under s. 617, Civ. Pro. Code, 1882. *Held* that the bond was void *in toto*. The *havala* being an agreement such as is contemplated in para 1, s. 257-A, Civ. Pro. Code, 1882, was void for want of sanction by the Court which passed the decree. The bond also either regarded as one in consideration of the *havala* or as an agreement for the satisfaction of the decree, came under para 2, s. 257-A of the Code and was void for want of sanction. VISHNU VISHWANATH v. HAR PATEL, **12 B. 499**. [*Overruled*, 23 B. 502; *Diss.*, 3 O.C. 165; *N. F.*, 16 C. 504; *F.*, 18 A. 479; *R.*, 21 B. 808, 88 P.R. 1904; *D.*, 25 B. 252.]

(90)—*S. 257-A.—Execution of decree—Agreement for satisfaction of decree—Sanction to such agreement not given by Court which passed decree.*—A decree having been transferred for execution and property having been sold in execution thereof, but before the sale had been confirmed, the decree-holder and the judgment-debtors entered into an agreement, which was filed in the Court executing the decree to the effect that the judgment-debtors should pay Rs. 500 to the decree-holders and that they should pay the amount of the decree within three months and that the sale should be cancelled. The judgment-debtors paid the Rs. 500, but, on their failing to pay the decretal money, the sale was confirmed. *Held* that the above agreement was an adjustment of the decree within the meaning of s. 257-A of the Code of Civil Procedure, but that, not having been sanctioned by the Court which passed the decree, it was void. SANT LAL v. SRI KISHAN, DAS, **A.W.N. 1895, 149.** (A.W.N. 1891, 12 and 12 A. 571, *R.*)

(91)—*S. 257-A—Agreement between decree-holder and judgement-debtor and a third person not party to decree for satisfaction of decree—Sanction of Court.*—In a previous suit the plaintiff obtained a decree for a sum of money against K. Subsequently the defendants K and R who was no relation of K executed a bond in favour of the plaintiff, accepted liability for the debt and agreed to pay it by instalments. In default the plaintiff was empowered to recover the debt from either debtor. On this bond the plaintiff sued the defendant for the recovery of his money. *Held*, that the bond was void and unenforceable against the parties to the decree. The terms of s. 257-A, Civ. Pro. Code, appear to include within their scope an agreement between the judgment-creditor and a person other than the judgment-debtor, whereby such person in consideration of the postponement of the execution of such decree against the judgment debtor undertakes to pay certain sum of money. *Held*, therefore, that the bond was unenforceable against the defendant R. BANKEY LAL **v.** KHAMMI BEGAM, **3 O C. 165**. [*Diss. & F.*, 4 O. C. 284.]

(92)—*S. 257-A—Agreement by judgment-debtor to pay in excess of decretal amount—Sanction of Court.*—A suit was brought by a decree-holder for realising money representing interest in excess of that provided by the decree held by him against the defendant, alleging that such enhanced interest was due under a certain agreement entered into between him and the judgment-debtor without the Court's sanction. *Held* having regard to the provisions of s. 257-A, of the Civ. Pro. Code, that the suit was not maintainable. DALU MALWAHI v. PALAKDHARI SINGH, **18 A. 479 = A.W.N. 1896. 160.** (18 A. 435, 8 B. 528, 9 A. 176, 12 B. 499, 15 B. 419, *R.*) [*Diss*, 4 O.C. 284: *F.*, 88 P.R. 1904; *R.*, 3 O. C. 165; *D.*, 25 A. 317 = 23 A.W.N. 45.]

(93)—*S. 257 A—Agreement out of Court giving time to judgment-debtor—Hundi given as consideration, not enforceable by decree-holder.*—The hundi sued on by the plaintiffs, certain decree-holders, had been given by their judgment-debtor, as the consideration for an agreement to give him time for the satisfaction of the judgment-debt. The agreement was made without the necessary sanction of the Court which passed the decree. It was therefore void under the circumstances by reason of its falling within the provisions of s. 257-A. of the Civ. Pro. Code. The plaintiffs could not recover on the hundi, for, otherwise, the Court would, in the result, by, allowing them to enforce an agreement by obtaining the consideration therefor, when the Legislature has declared such an agreement to be void. DAN BAHADUR SINGH v. ANANDI PRASAD, **18 A. 435 = A.W.N. 1896, 130.** (16 C. 504, *Diss*); [*F.*, 18 A. 479, 88 P.R. 1904); *Appr.*, 22 B. 693, 3 O C. 165 *R.*, U.B. R. 1897—1901, Vol. II, 252 *D*, 25 A. 317 = 23 A.W.N. 45, A.W.N. 1905, 57 = 2 A.L.J. 683.]

(94)—*S. 257-A—Adjustment of decree out of Court—Instalment-bond—Consideration.*—Where a judgment-debtor executes an instalment bond in favour of the decree-holder, in consideration of the latter giving up the benefit of the decree, the bond is not void as an agreement falling under s. 257-A, Civ. Pro. Code. Such an agreement is void only so far as it affects the right to execute the decree, and may be the foundation of a fresh suit. JUJI KAMTI v. ANNAI BHATTA, **17 M. 382.** (12 M. 61, 11

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C. 671, 16 C. 504, *F.*) [*Diss.*, 88 P.R. 1904 ; *F.*, 16 P.R. 1900, 4 O.C. 284 ; *Appr.*, 61 P.L. R. 1907=71 P.W.R. 1907=29 P.R. 1908 ; *R.*, 21 B. 809, U.B.R. Civil, 1897—1901, Vol. II, 252, 22 B. 693, 3 O.C. 165, 26 M. 19=12 M. L.J. 113, 25 A. 317, 35 C. 870=12 C.W.N. 674=7 C.L.J. 543.]

(95)—*S. 257-A— "Void," meaning of—Agreement to give time—Not illegal.*—There is no sufficient reason for construing the expression "void" in s. 257-A of the Code as equivalent to illegal, in the sense of prohibited by law. The object of the section is to avoid inconvenience and delay in executing decrees and also to afford some protection to the parties against unfair arrangements. This object is insured by holding that agreements to give time cannot be enforced unless made with the sanction of the Court. (16 C. 507, *R.*) When an agreement to give time, not sanctioned by the Court, formed part of the consideration of a bond and had been actually enjoyed by the obligee, it was held that such consideration, not being illegal in its nature and not having, as a fact, failed, the obligor could enforce the terms of the bond. BANK OF BENGAL v. VYABHOY GANGJI. **16 B. 618.** [*F.*, 35 C. 870 =12 C.W.N. 674=7 C.L.J. 543 ; *R.*, 21 B. 808, 25 B. 252=2 Bom. L.R. 1012, 6 C.W.N. 27, 6 Bom. L.R. 344=28 B. 382, 31 B. 552=9 Bom. L,R. 950, 9 Bom. L.R. 1380.]

(96)—*S. 257-A — Agreement for satisfaction of judgment-debt without sanction of Court — Agreement to pay more than decretal amount — Agreement void.— Held*, that under the cl. 2 of s. 257-A of the Code of Civil Procedure, every agreement between the decree-holder and the judgment-debtor for the satisfaction of a judgment-debt, which provides for the payment of any sum in excess of the decretal amount, is void for all purposes and unenforceable as a contract, unless made with the sanction of the Court which passed the decree. PALA MAL v. HARI RAM, **88 P.R. 1904.** (12 B. 499, 22 B. 693, F.B., 25 B. 252, 18 A. 435, 18 A. 479, 28 B. 62, *Cited and F.*; 16 P.R. 1900, 11 C. 671 16 C. 504, 17 M. 382, 26 M. 19, *Diss.* 25 C. 86 25 A. 317. F.B., 20 C. 22, 14 B.L.R. 287, 18 W.R. 279, *R.*)

(97)—*S. 257-A—Execution of decree—Agreement varying or satisfying decree.—Held*, by the Full Bench, *Robertson, J. dissentiente* (overruling 88 P.R. 1904), that agreements under s. 247-A of the Code are not void for all purposes, but merely for the purpose of execution. *Per Robertson, J.*—That the provision of s. 257-A second part, are of general application, and not restricted to operations in the execution of the decree only to which the agreements in question refer. ATMA SINGH v. BANKE RAI, **61 P.L. R. 1907, F.B. =71 P.W.R. 1907=29 P.R. 1908.** [*Overruled*, 81 P.R. 1908=148 P.W.R. 1908 ; *R.*, 16 P.R. 1910.]

(98)—*S. 257-A—Mortgage—bond superseding decree—Increased rate of interest.*—A bond given to the decree-holder in full settlment of

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the amount due under a simple money-decree, so that the decree ceasee to be capable of execution or enforcement thereafter, does not infringe the provisions of s. 257-A, Civ. Pro. Code, even though it provides for the payment of a rate of interest higher than that allowed by the decree and thus amounts to an agreement to pay a sum in excess of that due or to accrue due under the decree. BINDRABAN v. ANGAD, **1 A.L.J. 390.** (25 A. 317, F.B., *F.*)

(99)—*S. 257-A.—Scope—Object—Sanction, absence of—Effect—Entry of satisfaction.*—The first paragraph of s. 257-A. Civ. Pro. Code, relates to an agreement by which the decree-holder undertakes to give time to his judgment-debtor for the satisfaction of the judgment-debt. The second paragraph relates to an agreement made for the satisfaction of the judgment-debt when such agreement secures to the decree-holder either directly or indirectly payment of any sum in excess of what may be payable under the decree. In regard to both these agreements, the section enacts that such agreements shall be void unless made with the sanction of the Court which passed the decree, and it is indicated that the Court is to accord its sanction only if it deems that the consideration for such agreement is under the circumstances reasonable and not oppressive or unconscionable. The policy of the section is clear and the provision made therein is really in the nature of a rule of substantive law which, however, is enacted in the Procedure Code inasmuch as it is connected with execution of decrees, and the object is to debar a decree-holder from using the process of Court, though lawfully, as an instrument of oppression, and entering into unconscionable bargains with the judgment-debtor in consideration of his postponing the process of execution or otherwise agreeing for the satisfaction of the decree. The whole object would be defeated by construing the section as rendering such an agreement (unless it has received the sanction of the Court) void only for the purposes of execution of the decree but efficacious for securing to the decree-holder the benefit of the oppressive or unconscionable bargain if he brings a suit. Such construction of the section not only frustrates the object of the Legislature by importing into the section the words "for purposes of execution of the decree" which do not exist there, but proceeds also upon a misapprehension that the agreement referred to, if sanctioned by the Court, is to be regarded as incorporated into the decree and the decree executed as thus varied or added to. A sanctioned agreement to give time for the payment of the judgment-debt operates as a stay of execution under s. 244. An agreement of the kind contemplated by paragraph 2 of s. 257-A, Civ. Pro. Code, will be perfectly valid as the basis for a suit even if it had not received the sanction of the Court, provided it does not secure to the decree-holder either directly or indirectly payment of any sum in excess of the amount due or to accrue due under the decree. The agreement will operate as a bar to the execution of the decree if it be certified or

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recorded as certified under the provisions of s. 258, Civ. Pro. Code, and it can be enforced by a suit. In the case of payment made or received in pursuance of an agreement sanctioned by the Court under paragraph 2 of s. 257-A, such payment can be recognised by the Court executing the decree only if it be certified or recorded as certified under s. 258, Civ. Pro. Code. VENKATAGIRI IYER v. SADAGOPACHARIAR, **14 M.L.J. 359.** [*R.*, 18 M.L.J. 548, 4 M.L.T. 233.]

(100)—S. *257-A—Agreement to pay sum in excess of decree amount—No consideration for agreement—Agreement not enforceable*—What s. 257-A declares to be void is not merely the agreement to pay a sum in excess of the sum decreed, but the whole agreement for the satisfaction of the judgment-debt. The agreement does not stop the decree-holder from executing the decree. The promise to accept the agreement as an adjustment, of the decree not being binding on the judgment-creditor, there is no consideration for its agreement. MT. JASURI BAI v. GORI, **4 C.P.L.R. 41.**

(101)—S. *257-A—Execution of mortgage-bond by judgment-debtors for sum due under decree—Decree also kept alive—Agreement to give time—Suit on mortgage — Maintainability.*—A decree-holder obtained a mortgage-bond payable by instalments for the sum due under his decree. On the true construction of the bond the document purported to give a two-fold remedy to the mortgagee on failure by the mortgagors to pay the instalments mentioned in the bond, first, a right to sue for the balance due under the bond, secondly, a right to recover the balance by executing the decree. After payment of certain instalments, the mortgagors fell into arrears, and hence the present suit on the mortgage. *Held*, that the mortgage was a contract to pay the amount of the judgment-debt with a stipulation that it was not payable at the time when, under the decree, it became payable. The relation of judgment-creditor and judgment-debtor still existed by the express agreement of the parties. The debt was still enforceable as a judgment-debt. That being so, the bond could not be construed otherwise than as an agreement to give time for the satisfaction of a judgment-debt. The sanction of the Court not having been obtained, the bond was void. *Held*, also that the agreement was none the less void because a party who appeared to be the legal representative of one of the judgment-debtors became a party to the mortgage-bond, though he was not a party to the suit in which the decree was obtained. VENKATA SUBRAMANI AYYAR v. KORAN KANNAN AHMOD, **26 M. 19=12 M.L.J. 113.** (17 M. 382, 16 C. 504, *Cons.*) [*F.*, 32 C. 917=9 C.W.N. 1004; *R.*, 25 A. 317=23 A.W.N. 45, F.B., 88 P.R. 1904, 61 P.L.R. 1907=71 P.W.R. 1907=29 P.R. 1908, F.B., 35 C. 870=12 C.W.N. 674=7 C.L.J. 543.]

(102)—S. *257-A—Suit on agreement in contravention of provisions of—Maintainability.*—S. 257-A was intended simply to prohibit the

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enforcement of an agreement mentioned therein in execution of the decree. There is nothing to prevent a suit being filed on the agreement, MT. CHUNNA BAI v. KAMARALI, **6 C.P.L.R. 133.** (1 C.P.L.R. 70, *F.*, 6 M. 101, 13 B. 672, 16 C. 504, *D.*)

(103)—*S. 257-A, Civ. Pro. Code, 1882—"Court which passed the decree," meaning of.—Part-payment not appearing in judgment-debtor's hand—S. 20, Limitation Act.*—The words "Court which passed the decree" in s. 257-A, Civ. Pro. Code, 1882, mean the Court which passed the first decree and not the appellate Court and does not include the Court which executes the decree, unless the executing Court and the Court which passed the decree are identical. Payments made out of Court by the judgment-debtor and certified by the decree-holder in an execution application will not bring the application within time under s. 20, Limitation Act, because, assuming that ss. 18 and 20 of the Limitation Act apply to execution proceedings, a part payment to take effect under s. 20 must appear in the handwriting of the person making the payment—CHAJJU v. GULAB, **61 P.R. 1886.** [*D.*, 96 P.R. 1900; *F.*, 26 P.R. 1894.]

(104)—*S. 257-A—Agreement contained in an application signed by the parties but not verified before the Court, sanction of—Verification of an agreement under s. 257-A, necessary before sanction of Court—Complete agreement necessary before sanction.*—A decree was passed in favour of R. D. against M B. in July, 1908. In November, 1908 an application was presented, signed by the parties and their pleaders, giving time to judgment-debtor and allowing a higher rate of interest than that provided in the decree. No action was taken upon this application on the date it was filed, but subsequently the decree-holder asked for time to summon the judgment-debtor personally in order to verify the application. No further action was taken on the application and the agreement remained unverified. In July, 1909, the decree-holders again applied for execution, entering therein a calculation based upon the terms of the agreement of November, 1908. The judgment-debtor objected to the enforcement of the agreement on the ground that it had been obtained from him under undue influence and could not be enforced, because it had not been verified by him in Court and also because the Court had not sanctioned it as required by S. 257-A of the Civ. Pro Code, 1882. The Court executing the decree held on evidence that the plea of undue influence was not made out and sanctioned the agreement. *Held*, that, as the decree-holders had not obtained the presence of the judgment-debtor in order to verify the agreement in Court, there was no such complete agreement between the parties as should have been sanctioned by the Court passing the decree after a period of more than eighteen months. RAJA NUNESHAR BAKSH SINGH v. RAGHUBER DAYAL, **7 Ind. Cas. 337.**

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(105)—*S. 257-A—Bond given in satisfaction of decree for excess amount—Necessity for sanction of Court.*—A bond given in satisfaction of a decree and providing for the payment of a sum due or to accrue due under the decree is void and cannot be enforced, if it had not been satisfied by the Court, which passed the decree. MURLIDHAR v. NATHU RAM, **1 C.P.L.R. 70.** [*Not F.*, 6 C.P.L.R. 133.]

(106)—*S. 257-A—Adjustment of decree—sanction not obtained at the time—power of executing Court to accord sonction several years after.*—An adjustment of the kind referred to in the section should be at once reported to the Court and its sanction obtained. Where sanction was not obtained at the time when the adjustment was effected, it was not competent to the executing Court to revive it by according its sanction several years after. SITARAM v. NANDLAL, **5 C.P.L.R. 187.** (13 B. 55, *R.*)

(107)—*S. 257-A—Scope.*—The agreement referred to in s. 257-A is an agreement which, whilst keeping alive the judgment-debt as such suspends the operation of the decree. The section pre-supposes the existence of a judgment-debt. Where the judgment-debt is extinguished in whole or in part, by the substitutions for it of a contract of mortgage, such a contract cannot be regarded as an agreement to give time for the satisfaction of judgment-debt within the perview of s. 257-A, as the judgment-debt, to the extent to which it has been extinguished, is no longer in existence. *Quære*:—Whether or not an agreement made in contravention of s. 257-A is void for all purposes when the decree in reference to which it is made is still enforceable. LALJI SINGH v. GAYA SINGH, **25 A. 317 = A. W.N. 1903, 45 F B.** (25 B. 252, *Appl.*, 7A. 124 11 C. 671, 16 *C.* 504, 17 M. 382, 26 M. 19, 6 C. W.N. 27, *R.*; 18 A. 435, 18 A. 479, *D.*; 22 B.693 27 B. 96, *Diss.*) [*F.*, 1 A.L J, 390, A.W.N. 1905, 57 = 2 A.L.J. 683, 32 C. 917 = 9 C.W.N. 1004; *R.*, 88 P,R. 1904, 61 P.L.R. 1907 = 29 P.R. 1908, F.B.,35 C. 870 = 7 C.L.J.543 = 12 C W.N. 674, 6 A.L.J. 726.]

(108)—*S. 257-A—Agreement in satisfaction of judgment-debt—Sanction of Court not obtained—Suit to enforce agreement*—S. 257-A, Civ. Pro. Code, is a bar only to execution proceedings in respect of agreements therein mentioned and does not prohibit their enforcement by separate suit. (16 B. 18, *R.*) HURKISSEN DAS SEROWGEE v. NIBARAN CHANDER BANERJEE, **6 C.W.N. 27.** [*F.*, 71 P W.R. 1907 = 29 P.R. 1908 = 61 P.L R. 1907, F B.; *R.*, 25 A. 317, F.B. = 23 A W.N. 45, 35 C. 870 = 12 C,W.N. 674 = 7 C.L.J. 543; *D.*, 32 C. 917 = 9 C.W.N. 1004.]

(109)—*S. 257-A—Execution of money-decree—Application embodying agreement hypothecating immoveable property and granting time filed by parties in execution proceedings—Objection in a subsequent suit as to non-registration of the application—Evidence Act (I of 1872), s. 91—Admission as to agreements requiring registration.*—In execution of a money-decree, an agreement was arrived at between the parties, which was embodied in an application filed in Court, under which the equity of redemption of the two houses, which had been attached, was hypothecated for the sum due on account, of the decree including costs, and four months' time was given for payment. The plaintiffs applied for execution after the expiry of the term, but it was held that the agreement was a complete satisfaction of the decree which was not, therefore, capable of execution. The plaintiffs brought the present suit for recovery of the amount due, basing their claim on the agreement, and it was contended by the defendant, that the agreement was void under s. 257 A of the Civ. Pro, Code, the application embodying the agreement was not admissible in evidence for want of registration, and that suit was barred by s. 244 of the Civ. Pro. Code. *Held*, that the proper reading of the application was that it contained merely a statement of the fact that an oral agreement, such as was mentioned in the application, had been made previously, the application was not inadmissible in evidence, and the suit was not in any way barred. The want of registration of an agreement requiring registration does not invalidate it, and s. 91 of the Evidence Act does not prevent admissions made by the executant of such a deed to be admitted in evidence in proof of the agreement. PRABH DIAL v. GURMUKH, **18 P.L.R. 1903 = 98 P.R. 1902.**

(110)—*S. 257-A—Agreement in satisfaction of decree—Sanction of Court*—Onus *of proof—Entry of satisfaction of decree in register of suits—No presumption of sanction to particular agreement*,—There is nothing wrong in the Court raising the question, whether a bond or agreement in satisfaction of a decree has received the sanction of the Court which passed the decree. When the sanction of the Court in respect of an agreement under s. 257-A is in question, such sanction cannot be presumed unless it is proved. According to all ordinary rules of evidence, it lies on the party who asserts that the Court has given its sanction, to prove the assertion to be true. Because in the register of suits a note is made that the decree as been fully satisfied, it cannot be presumed that the Court has accorded its sanction to the particular agreement. NAND KISHORE v. GANPAT, **4 C.P L.R. 148.**

(111)—*S. 257-A, Civ. Pro. Code, 1882—Execution of decree-Power of Court to compel decree-holder to grant time to judgment-debtor.*—A Court executing a decree is incompetent to compel the decree-holder to grant the judgment-debtor time to pay the decree-holder. Even if the decree-holder himself agrees to give time without consideration and if the debtor relies upon it as a bar for immediate execution, the Judge under s. 257-A, Civ. Pro. Code, 1882, would be bound to hold the agreement void. TEJA SINGH v. BHAI GHAMANDA SINGH, **127 P.R. 1886.**

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(112)—*S. 257-A—Decree — Satisfaction of decree — Mortgage-deed — Sanction of Court—Dekkhan Agriculturists Relief Act (XVII of 1879), ss. 12, 13—Taking of accounts.*—In the case of a mortgage passed in satisfaction of a decretal debt with the sanction of the Court under s. 257-A, Civ. Pro. Code, 1882, the Court can, under the provisions of the Dekkhan Agrioulturists' Relief Act, 1879, go into the question whether the principal sum shown in the deed consisted partly of interest. KISANDAS MANEKCHAND v. RAMCHANDRA MURAR PATIL, **13 Bom. L.R. 1009.**

(113)—S. 257-A—Repeal—Effect on s. 13 (*c*), Act XVII of 1879—*See* BOM. ACT XVII OF 1879, s. 13, cl. (*c*), 13 Bom. L.R. 508.

(113 *a*)—S. 257-A—*See* BOND, 16 P.R. 1900 =20 P.L.R. 1900.

(114)—S. 257-A—*See* CIV. PRO. CODE, 1908, O. XXI, r. 62, 2 C.P.L.R. 243.

(115)—S. 257-A—Effect of prohibition in—Failure to obtain sanction under—Effect—*See* COMPROMISE—ENFORCING, 9 M.L.T. 487.

(116)—S. 257-A—Decree payable by instalments—Default in payment of instalments—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1905, 268=28 A. 249.

(117)—S. 257-A *See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1891, 12.

(118)—S. 257-A—*See* JUDICIAL COMMISSIONER, PUNJAB, 25 P.R. 1887.

(119)—S. 257-A—Instalment decree—Option of decree-holder—Instalment arrangement put an end to—Subsequent acceptance of instalments—New arrangement—Sanction of Court—*See* LIMITATION ACT, 1908, s 20, art. 182, 2 A.L.J. 828=28 A. 249=A.W.N. 1905, 268.

(120)—S. 257-A—*See* LIMITATION ACT, 1908, arts. 181, 182, 5 A. 596=3 A.W.N. 143.

(121)—S. 257-A—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 19 M, 67.

(122)—S. 257-A—*See* MORTGAGE—FORECLOSURE, 2 C.P.L.R. 243.

(123)—S. 257-A—Agreement to give time for satisfaction of judgment-debt—*See* PRINCIPAL AND AGENT—MISCELLANEOUS, 6 C.L.J. 639.

(124)—S. 257-A—*See* RES JUDICATA—MISCELLANEOUS, 6 Bom. L.R. 853=20 B. 96.

(125)—S 257-A—*See* NOS 6, 51, 52, 53, 61, 62, 62-*a*, 63, 66, *supra* and NO. 137, *infra*.

(126)—*Ss. 257-A and 210—Execution of decree—Parties agreeing to payment by instalments—Limitation Act, 1877, sch. II, arts. 175, 178, 179.*—During the pendency of an application for the execution of a decree, passed on the 3rd February, 1888, the Court sanctioned an agreement *inter partes* for the payment of the decree amount by instalments. As the application leading to this Court sanction was not made under s. 210, and as it was not

Civ. Pro. Code (Act XIV of 1882)—*continued.*

presented within the six months period prescribed by art. 175, sch. II, Limitation Act, for the presentation of applications under s. 210, the order sanctioning the agreement did not fall under s. 210, but fell under s. 257-A, Civ. Pro. Code, 1882, the decree to be executed in such a case being the original decree which the sanction of the Court to the agreement does not alter. On the 8th April, 1892, four years and more after the date of the original decree, and on the 5th July, 1892, again, applications were made for execution of the decree against the judgment-debtors. These applications were applications for execution or to take some step-in-aid of execution, which came under the purview of art. 179, not art. 178, Limitation Act, and hence the decree, dated 3-2-1888, became barred by limitation. NANAK CHAND v. ANANT RAM, **26 P.R. 1894**. (61 P.R. 1886, 12 A. 571, *F.*; 5 A. 596, *Not F.*) [*D.*, 96 P.R. 1900.]

(127)—*Ss. 257-A. 258—Civ. Pro. Code—Execution of decree—Estoppel.*—The parties by petition under s. 259, Civ. Pro. Code, informed the Court executing the decree, that part of the decretal money had been realized, and that they had agreed that the balance of the decree should be paid in two instalments with interest at 8 annas per cent. per mensem; that, in default of payment of the instalments on the due dates, interest at 1 anna per rupee per mensem should be charged from the date of the agreement: *Held*, that in so far as the agreement provided for the payment of interest in excess of the sum due under the decree, it undoubtedly required the sanction of the Court under s. 257-A, Civ. Pro. Code. *Held*, that the sanction of the Court, under s. 257-A, should be given in terms and under circumstances to show that it had considered the propriety of the proposed compromise, and that it should state in such sanction that it regarded the consideration for which it had been made a reasonable consideration. *Held*, that no question of estoppel arises when the previous warrants of attachment either proved ineffectual or were not executed. JAGEN NATH v. SHEO RATTAN, **1 O.C. 71**. (A.W.N. 1891, 12, *F.*)

(127 *a*)—*Ss. 257-A and 258—Scope of—Applicability of each section—Difference between them*,—S. 257-A, Civ. Pro. Code, 1882. applies only to agreements which suspend, but do not extinguish, the right of execution consequent upon the decree, and s. 258 of the same Code provides, *inter alia*, for such adjustments of the decree, wholly or in part, as to extinguish that rights to the extent contemplated by the adjustment, under the principles of novation, (25 B. 253, 22 B. 693, *Not F.*, 6 C.P.L.R. 133, 18 A. 435, 25 A. 17, 1 C.P.L.R. 70, 3 C.P.L.R. 187, 4 C.P.L.R. 41, 61 C. 504, *R.*, The agreement made void by s. 257-A is open to rejection by the Court, while that dealt with by s. 258 is beyond the power of interference by the Court. SUKHANDAN v. LAKHMICHAND, **7 N.L.R. 136.**

Civ. Pro, Code (Act XIV of 1882)—*continued.*

(128)—*Ss. 257-A, 258—Judgment-debt satisfied—Adustment not certified.*—S. 258, and not s. 257-A, will be applicable to a case where a judgment-debt is fully satisfied, though not so certified to the Court. It could be recognised as an adjustment by a Civil Court except in execution. KALU RAM v. KHUDA BAKHSH, **54 P.R. 1894.** [*R.*, 29 P.R. 1908=71 P.W.R. 1907=61 P.L.R. 1907.]

(129)—*Ss. 257-A, 258—Application.*—S. 258, Civ. Pro. Code, contemplates cases where moneys are payable in accordance with the terms of a decree and also payments made in pursuance of lawful agreements under s. 257-A of the Code, *viz.*, such agreements as have received the sanction of the Court. Therefore, the section has no application where a sum was paid in disregard of the terms of the decree, and any agreement to pay such amount was void under the provisions of the second clause of s. 257-A, Civ. Pro. Code. NARAYANA DEVU v. VENKATARAMANAYYA, **1 M.L.J. 382.** [*R.* 25 C. 86, 12 C.L.J. 65.]

(130)—*Ss. 257-A, 258—Vesting of property of judgment-debtor in trustees under composition-deed—Decree-holder party to composition-deed—Adjustment of decree—Necessity for sanction of Court—Right of decree-holder to execute decree without such sanction.*—A judgment-debtor vested all his properties in trustees under the terms of a composition-deed entered into for the purpose of discharging all his debts. Notwithstanding the said arrangement, a decree-holder who was a party to the composition-deed applied for execution of his decree. *Held* that, as the composition-deed purported *inter alia* altogether to release the debtor and was not a mere agreement to give time, s. 257-A did not apply. It was an adjustment contemplated by s. 258 and required to be certified by the Court. In the absence of such a certificate, the composition-deed could not prevent the decree from being executed. *Parker, J.*—No period of limitation was prescribed by law for obtaining the sanction of the Court required by s. 257-A and such sanction could be obtained at any time during which the decree was alive. RAMASAMI CHETTI v. VENKATESA TAWKER, **2 M.L.J. 221.**

(131)—*Ss 257-A, 258—Agreement giving time to judgment-debtor — Sanction of Court.*—An agreement was entered into between the judgment-creditor and judgment-debtors, whereby the latter promised to pay certain amount at once and execute a sale-deed in respect of some of his property and pay the balance some time afterwards. The judgment-debtors applied to have the adjustment certified. The decree-holder opposed the application. *Held*, that the agreement was an agreement to grant time within the meaning of s. 257-A of the Code and not having been sanctioned by the Court, it was void. *Held* further, that the Courts below were justified in refusing to sanction the agreement under the circumstances of the case. FATEH SINGH v. SHAM LAL, **6 A.L.J. 726=6 M.L.T. 180=2 Ind. Cas. 991.**

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(132)—*Ss. 257-A and 258—Suit on an agreement for satisfaction of judgment-debt.*—Where an arrangement without the sanction of the Court for the payment of the judgment-debt in instalments is effected, a suit for the recovery of the instalment due is maintainable. MA MI v. MAUNG HME, **L.B.R. 1872—1892, 644.** (11 B. 6, *R.*, L.B.R. 1872—1892, 555, 11 C. 671, 16 C. 504, *F.*) [*R.*, U.B.R. 1897—1901, Vol. II, Civil, 252.]

(133)—*Ss. 257-A, 258—Adjustment of decree out of Court, suit upon*—Since the amendment made in s. 258 of the Civ. Pro. Code, 1882, by s. 27 of Act VII of 1888, a private agreement made out of Court in satisfaction or adjustment of a degree, without the sanction of the Court which made the decree, may be recognised by a Civil Court *except when executing the decree*. And, therefore, a suit based upon such payment or adjustment is maintenable. And the concluding clause of s. 258 of the Civ. Pro. Code, 1882, as amended, has no direct bearing on s. 257-A, as it relates to a different subject-matter. In the present case, plaintiff held a decree for Rs. 315 against the defendant and the latter paid a portion thereof to the plaintiff and for the balance executed a bond in plaintiff's favour. These transactions took place without the knowledge of the Court. The present suit was by the plaintiff for recovery from the defendant of the amount due under the bound executed in adjustment of the said decree. The defendant contended that the agreement to pay the amount of the decree at a deferred date was void for want of sanction of the Court making the decree according to s. 257-A of the Civ. Pro. Code, 1882. *Held* on a reference to the High Court, that the plaintiff was entitled to maintain the *suit*, as such adjustment cannot be recognized under s. 258 of the Civ. Pro. Code, 1882, only *in executing the decree*, and not for other purposes. SWAMI ROW NARAYANA DESPANDE v. KASHANATH KRIHNA MUTLIC DESTHI, **15 B. 419.** [*F.*, 16 B. 589; *Cons.*, 21 C. 437, 25 B. 232; *R.*, 19 B. 204, 18 A. 479, U.B.R. 1897—1901, Vol. II, 252, 20 P.L.R. 1900=16 P.R. 1900.]

(134)—Ss. 257-A, 258—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1890, 68.

(135)—Ss. 257-A, 258—Application under s. 258—Step-in-aid of execution—Applicability of s. 257-A to s. 88, Transfer of Property Act—*See* LIMITATION ACT, 1908, art. 182, 7 A. L.J. 251=5 Ind Cas. 295=32 A. 257.

(136)—S. 258—See Nos. 62-*a* 63,66,127, 127-A, 128, 129, 130, 131, 132, 133, 144, 135, *supra*.

(137)—*Ss. 258 & 257-A—Sum paid under agreement void under s. 257-A—Effect—Agreement for satisfaction of debt not sanctioned under s. 257-A, nature of.*—A sum paid under an agreement, void under s. 257-A, cannot be acknowledged or recognised in execution of a decree under s. 258, unless it has been certified within the proper time. S. 257-A refers to two-

Civ. Pro. Code (Act XIV of 1882)—*continued.*

kinds of agreement:—(1) "Agreement to give time for the satisfaction of a judgment-debt," (2) "Agreement for the satisfaction of a judgment debt." If the Court does not sanction them, they are void. If the Court sanctions them, they may be carried out in execution. DURGA PRASAD BANERJEE v. LALIT MOHON SINGH ROY, **25 C. 86.** (1 M.L.J. 332, 3 M. 113, *R.*) [*Appr.*, 61 P.L.R. 1907=71 P.W.R. 1907=29 P.R. 1908. F.B., *R.*, 88 P.R. 1904.]

(138)—*S. 258 A—Discharge of decree on adjustment out of Court—Adjustment left uncertified—Execution by decree-holder—Suit by judgment-debtor to recover excess realised.*—Where on the adjustment of a decree out of Court, the judgment-debtor paid a certain sum in full discharge of the judgment-debt and the decree-holder accepted the same, but applied for execution, more than two years after the adjustment which had not been certified to the Court, and realised the decree amount, the judgment-debtor was *held* to be entitled to sue for and recover the money paid at the adjustment in satisfaction of the decree. PERIATAMBI UDAYAN v. VELLAYA GOUNDAN, **21 M. 409=8 M. L.J. 51.** [*F.*, 29 M. 312=16 M.L.J. 33, 17 M L.J. 527, 30 A. 464=5 A.L.J, 475=A.W.N. 1908, 220; *D.*, 16 M.L.J. 54.]

(139)—SS. 265, 360 — *See* PARTITION—SUIT FOR PARTITION, JURISDICTION OF CIVIL COURT IN, 19 M. 435.

(140)—SS. 278, 351, 354—*See* CLAIM TO PROPERTY ATTACHED, 9 A. 232=A.W.N. 1887, 20.

(140-*a*)—S. 295— *See* LIMITATION ACT, 1908, Art, 13. U.B.R. 1904, 4th Qr., LIMITATION ACT, sch. II, art. 13.

(141)—*Ss. 310-A, 312, 588, 612 — Order under s. 312—Revision* —An order under s. 312 Civ. Pro. Code, or one refusing to set aside a sale under s. 310-A, Civ. Pro. Code, is appealable under s. 588 of the Code, and a revision petition to the High Court does not lie from such order in the first instance. VEMBA PILLAI v. MARUDAYA PILLAI, **4 M.L.T. 96.** (30 M. 507, *R.*)

(142)—S. 312—*See* NO. 141, *supra*.

(142-*a*)—*S. 32 H—Alienation by judgment-debtor without permission of Collector—Right of third persons to interfere.*—The section does not render any alienation or mortgage made without the sanction or permission of the Collector absolutely and wholly void. The section was intended only to secure to the Collector full and unrestricted power to deal with the property and postpone all the rights and powers of the owner as against the Collector. The judgment debtor would be incompetent to deal in any way with the property, but unless the Collector saw fit to interfere with any act of ownership exercised by the judgment-debtor, no one could be permitted to interfere as against *bona fide* purchasers. JHABULAL KALAR v. RAMPERSHAD, **4 C.P.L.R. 156.** [*Diss.*, 3 N.L.R. 171.]

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(143)—Ss. 336, 337, 344, 357—*See* INSOLVENCY— INSOLVENCY UNDER CIV. PRO. CODE, 9 O.C. 42 (B.)

(144)—Ss. 336, 341, 344, 349—*See* ARREST, 8 M. 503.

(145)—*Ss. 336, 344*—Res judicata, *applicability of rule to insolvency proceedings—Duty of Court to give information to judgment-debtor arrested and brought before Court.*—The points decided in this case are:—(1) when an applicant applies for insolvency, under s. 344, and his application is rejected on the merits, a subsequent application by him to be declared an insolvent on the same facts is barred by the rule of *res judicata*, which can be applied to insolvency proceedings, under the above section under the general maxim "*Nemo bisvexari debet pro eadem causa.*" (2) When a judgment-debtor, after failing in insolvency proceedings under the Civ. Pro. Code, is re-arrested, the question of insolvency being *res judicata* as held above, it is not the duty of the Court to inform him that he may apply under Ch. XX to be declared an insolvent or take other steps indicated in s. 336 of the Code. ARJAN SINGH v. GAMAN, **75 P.R. 1905. (F.B.)=198 P.L.R. 1905,** (1897, A.W.N. 29, 6 A. 269, P.C. *F.*, 145 P.R. 1884, *Overruled.*)

(146) — *Ss. 336, 344 — Judgment-debtor, release of, on furnishing security — Failure to apply under s. 344 whether a bar to subsequent application.*—If a judgment-debtor, who has been arrested in execution of a decree and released on furnishing security that he will, within one month, apply to be declared an insolvent, fails to put in the application within the time agreed upon, and is not arrested again, it is still open to him to apply at a subsequent date under s. 344, Civ. Pro. Code, to be declared an insolvent on the strength of the permission previously given. ALAGAPPA CHETTI v. SARATHAMBAL, **25 M. 724=12 M.L.J. 438.**

(147)— Ss. 336 and 344—Judgment-debtor applying for insolvency—Liability of surety—*See* SURETY—LIABILITY OF SURETY, **15 C. 171.**

(148)—Ss. 336, 344—*See* SURETY—LIABILITY OF SURETY, 13 A. 100=11 A.W.N. 5.

(149)—*Ss. 336, 344, 345, 346, 351, Ch. XX—Unrealized interest in father's estate not entered in application.*—An insolvent in his application under ss. 344, 345 and 346, Civ. Pro. Code, stated that his father had property in sundry villages, but would not give him any share, in it or pecuniary help, and that he had no assets or means except vessels and garments worth Rs. 5-4-9. *Held* that it was impossible to treat the applicant's chance of obtaining from his father by an action at law, whatever share at some future time he might succeed in proving to be partible in his favour from the family estate now exclusively held by the father, as being in any practical sense equivalent to "the property not consisting of money, the amount, kind, and particulars" of which an applicant

Civ. Pro. Code (Act XIV of 1882)—*continued.*

has to set out in part (*b*) of his application, and that therefore the applicant was not disqualified under s. 351, Civ. Pro. Code, from obtaining the protection of the Court under Ch. XX of the Code and that the applicant should be declared an insolvent and was entitled to his discharge. SUKRIT NARAIN LAL v. RAGHUNATH SAHU, **A.W.N. 1886, 45.**

(150)—Ss. 336, 341, 633—*See* ARREST, 8 M. 276.

(151)—*Ss. 336, 349—Security for production of judgment-debtor within certain time—Death of judgment-debtor before expiry of specified time—Liability of surety in execution—Release of surety—Appeal.*—When a judgment debtor was arrested and brought to Court a surety undertook to produce him within a specified time and thereupon the judgment-debtor was released. Before the expiry of that time, however, the judgment-debtor died. Thereupon, the decree-holder applied for execution to proceed against the surety for the decree amount, and an order was made for the issue of a warrant against him. *Held* that the obligation of the surety was discharged by the death of the judgment-debtor, and that the Court had no jurisdiction to enforce the obligation as a decree. The High Court treating the appeal of the surety as a petition under s. 622, Civ. Pro. Code, set aside the order for his arrest. KRISHNAN NAYAR v. ITTINAN NAYAR, **24 M. 637.** [*R.*, 29 A. 466=4 A L.J. 437=A. W. N. 1907, 120; *D.*, 13 M.L.J. 484,]

(151-*a*)—S.337—*See* NO. 143, *supra*,

(151-*b*)—S.341—*See* NO. 144, *supra*.

(152)—Ss. *341, 349—Application for re-arrest of judgment-debtor—Application for re-arrest in accordance with law—Limitation Act (IX of 1908), sch. I, art. 182.*—An application was made for the arrest of a judgment-debtor. He was arrested but was released from jail on his applying to be declared an insolvent. The judgment-creditor again made an application for the arrest of the judgment-debtor: *held* that the second application for re-arrest of the judgment-debtor was an application in accordance with law and saved limitation. SURAJ DEEN v. MAHABIR PERSHAD, **6 Ind. Cas 748=8 A.L.J. 40.** (12 C. 652, *Not. F.*; 26 B. 652, 4 Bom. L R. 483, *R.*)

(153)—Ss. 343, 359—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 3 L.B. R. 172.

(154)—*Ch. XX, s. 344—Joint Application for insolvency, not maintainable—Several judgment debtors, separate application, if necessary—Joint decree—Joint property attachment of—Insolvency.*—S. 344 of the Code does not contemplate a joint application by several judgment-debtors to be adjudged insolvents. If, in execution of a joint decree against several persons, their joint property is attached, and all or some of them desire to be declared insolvents, each must make a separate application under s. 344 and the case of each should be tried separately from that of the others. SARADA PRASAD UKIL v. RAM SUKH CHANDRA, **2 C L.J. 318**

(155)—Ch. XX—*See* INSOLVENCY—GENERAL, A.W.N. 1885, 275.

(156)—Ch. XX—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 19 C. 730.

(157)—Ch. XX—*See* Nos. 2, 149, *supra* and No. 197, *infra*.

(158)—*S. 344—Insolvent.*—In this case, a petition under s. 344 for declaration of insolvency was dismissed on the grounds that the petitioner had not produced his account books and had not explained how he disposed of a sum of Rs. 1,000 received by him sometime previously. *Held*, that the order of dismissal was wrong, as there was nothing to show that the petitioner possessed any account books, or that he was in possession of Rs. 1,000 or any part thereof subsequently to the institution of the suit or the objections, in the absence of proof, it was impossible to hold that the petitioner concealed, &c., any part of that sum since the institution of the suit. PHUSA RAM v. RALLI BROTHERS AND CO., **P.L.R. 1900. 511.**

(159)—*S. 344—Right to apply for insolvency—Arrest and release.*—It is only a person against whom proceedings under s. 344 of the Civ Pro. Code, are actually pending, that can apply for being declared an insolvent. The section does not apply to a person who had been arrested in execution of a decree, but who was released for non-payment of subsistence money after a few hours' detention. JUMAI v. MUHAMMAD KAZIM ALI, **25 A. 204=A.W.N. 1903, 11.**

(160)—*S. 344—Insolvency—Application to be declared insolvent—Dismissal of application—Appeal—Parties to appeal.*—Where an application to be declared insolvent is dismissed and the applicant appeals, all the creditors are necessary parties to the appeal, and, if some are not made parties, the whole appeal must fail. MUNSHI LAL v. CHIMMAN RAM, **A.W. N. 1897, 102.**

(161)—*S. 344—Appeal—Order rejecting an application to be declared an insolvent—District Court—High Court.*—An appal from an order passed by the first class Subordinate Judge rejecting an application to be declared an insolvent, under s. 344 of Civ. Pro. Code, where the subject is Rs. 5,000 in value, lies to the District Court, under s. 589 of the Code. MANEKSHAH v. DADABHAI, **5 Bom. L R. 591=27 B. 604.**

(162)—*S. 344—Jurisdiction—Application under s. 344, not cognisable by Insolvent's Estates Court constituted under Act IV of 1872—Course of appeal—Power of revision.*—*Held* that an Insolvent's Estates Court constituted under the provisions of Act IV of 1872 has no jurisdiction to entertain and dispose of an application under s. 344, Civ. Pro. Code, 1882.

Civ. Pro. Code (Act XIV of 1882)—*continued.*

Held, also, that the Chief Court, acting under s. 70 (*a*) of Act XVIII of 1884 to determine whether the Lower Appellate Court had jurisdiction to hear the appeal, *suo moto* quash the proceedings even of the first Court, when it comes to know it had no jurisdiction to hear the case. BUDBA SINGH v. SADDA SINGH, **161 P.W.R. 1908.**

(163)—*S. 344—Application to be declared insolvent—Stay of execution in another Court till declaration of insolvency.*—There is nothing in Ch XX of Civ. Pro. Code, 1882, which authorizes a Court, to which an application under s. 344 has been made, to stay the execution of a decree in another Court against the applicant's property, before the applicant is declared an insolvent and a receiver is appointed. MOHAN LAL v. MR. J. POTTS, **5 C.P.L. R. 112.**

(164)—S 344—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 59 P.R. 1887.

(165)—S. 344, Ch. XX—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, A.W. N. 1886, 137.

(166)—S. 344—*See* NOS. 7, 142, 144, 145, 146, 147, 148, 149, 150, 154, *supra.*

(167)—Ss. 344 to 330—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 19 P. R. 1900.

(168)—Ss. 344, 348, 350, 351, 368, 553, 582, 590—*See* LIMITATION ACT, 1908, art. 171, 7 A. 734=A.W.N. 1885, 217.

(169)—Ss. 344, 350, 352, 357, 358—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 16 C. 592.

(170)—*Ss. 344, 351—Application for declaration of insolvency—Grounds upon which such application may be rejected.*—A Court, before which an application to be declared an insolvent is filed under s. 344 of the Code of Civil Procedure is empowered to reject the application, if, in its view, the assets of the applicant in fact exceed his liabilities, although none of the grounds mentioned in cls. (*a*), (*b*), (*c*), or (*d*) of s. 351 of the Code may be shown. JWALA PRASAD v. MANIK CHAND, **A.W.N. 1901, 79.** (4 A. 337, 14 C. 691, 19 A. 125, *R.*)

(171)—Ss. 344, 351—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 21 B. 681.

(172)—*Ss. 344, 360—Insolvency jurisdiction conferred by Local Government on Second Class Subordinate Judge—Application under s. 344—Debt of one creditor exceeding Rs. 5,000, whether affects jurisdiction of Subordinate Judge.*—Application under s. 344 of the Civ. Pro. Code, to a Second Class Subordinate Judge invested by the Local Government with powers conferred on District Courts by ss. 344 to 359. The applicant had been arrested in execution of a decree for money passed by that Court. It appeared that the amount of the debt due to one of the scheduled creditors exceeded Rs. 5,000. *Held*, that this fact did not affect the competency of the Court to entertain the application and make the declarations and orders referred to in ss. 344 to 359 and that the Court had therefore jurisdiction to make the order that it did, in the present case, under s. 352, and the lower appellate Court should not have set it aside on the ground that it had been made without jurisdiction. SHANKER v. VITHAL, **21 B. 45.** [*F.*, 23 A. 56=A.W.N. 1900, 194].

(173)—Ss. 344, 360—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 45 P.R. 1887.

(174)—Ss. 344, 588—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 11 M. 136.

(175)—S. 345—*See* Nos. 149, 167, *supra.*

(176)—*Ss. 345, 346, 350—Insolvent, examination of.*—The examination of an insolvent under s. 450, Civ. Pro. Code, 1882, is only necessary where the judgment-debtor is declared an insolvent upon his own application not where he is adjudicated an insolvent at the instance of the judgment creditor. There does not seem to be any precise procedure laid down as to how the Court should hear cases where the decree-holder is the applicant. GOURI KANT BURMAN v. DAMODAR DAS BURMAN, **5. C W.N. 90.**

(177)—*Ss 345, 350, 351—Application by judgment-debtor to be declared insolvent.*—In some cases, it may be necessary for the applicant desiring to be declared an insolvent, to produce evidence in support of his statements. But the wording of s. 350 shows that this is not ordinarily necessary. If any statements in the application are challenged, or if the applicant's examination is not satisfactory, the Court may no doubt require him to produce evidence. But if the Court is satisfied, on the examination of the applicant, that the statements in the application are substantially true, it is then for the opposing creditors to show cause against the application. It is certainly not the intention of the law that an applicant, under s. 345 of Civ. Pro. Code, should produce at the hearing strict proof, independently of his own oath, of every point in his application. SITHAMBARAM CHETTY v. MAUNG SAN HLA, **U B.R. 1897—1901, Vol II, 282.** (4 C. 888, 25 W.R. 95, *R.*)

(178)—*Ss. 345, 351, 352—Insolvent—Omission to frame schedule—Creditor's right to sue—Res judicata.*—A list of debts filed under s. 345, prior to a declaration under s. 352, is not a schedule as required by s. 352. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts and then frame a schedule of such persons and debts. In the absence of any such determination by Court, the declaration under s. 351, that the applicant was an insolvent, cannot be deemed to be a decree in favour of the creditor for the amount due to him. And a suit by the

creditor is therefore maintainable and is not barred as *res judicata*. HARYA v. MUL CHAND, **64 P. R. 1907=89 P.L.R. 1908.** (7 M. 818, *F.*; 76 P.R. 1899, *D.*)

(179)—S. 346—See NOS. 149, 167, 176, *supra*.

(180)—*S. 347—Notice—Directory—Application by decree-holder.*—The provision of s. 347, Civ. Pro. Code, with regard to posting up the notice of insolvency in Court, is, especially in the case of an application by the decree-holder, merely of a directory character, and non-compliance with it does not go to the jurisdiction of the Court. RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB, **5 C.W.N. 91.**

(181)—S. 347—*See* NO. 167, *supra*.

(182)—S. 348—*See* NOS. 167, 168, *supra*.

(183)—*S. 349—Assignment of security bond from District Judge—Right of assignee.*—An assignment of a security bond from the District Judge,—to whom it was given under s. 349, Civ. Pro. Code, 1882, for the production of a judgment-debtor when called upon to appear—, on the judgment-debtor not being produced on the fixed date, is a valid assignment. (19 B. 694, *R.*) The assignee of such bond is entitled to sue upon the security-bond. GOPI NATH CHOWDHRY v. BENODE LAL ROY CHOWDHRY, **31 C. 162.**

(184)—*S. 349—Surety-bond—Summary enforcement.*—A surety-bond given under s. 349, Civ. Pro. Code, cannot be enforced summarily; and no appeal lies from an order refusing summary enforcement of such a bond. The only course open to the party, who desires it should be enforced, is to move the Court to put it in suit. MOIDIN v. CHANDU, **7 M. 273.** [*R.*, 19 B. 694, 31 C. 162.]

(185)—S. 349—Court not competent to release judgment-debtor once put in jail—Civ. Pro. Code, 1882, s. 349—Distinction between arrest and imprisonment—*See* ARREST, 12 B. 46.

(186)—S. 349 — *See* SURETY—MISCELLANEOUS, **19 B. 694.**

(187)—Ss. 449, 351—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 11 C. 451.

(188)—S. 350—*See* NOS. 46, 167, 168, 169, 176, 177, *supra*.

(189)—*Ss. 350, 351, 352, 355, 356—Insolvency proceedings—Summary order for distribution of assets—Procedure* —The intention of s. 350 seems to be that the applicant should be examined on his application with a view to ascertaining whether the requirements of s. 351 have been fulfilled. Any creditor, who opposes the application, may either cross-examine the applicant or suggest questions to be put to him by the Court. There is no provision in the Code for the filing of written objections to the application. Any opposing creditor may be

heard and an opportunity should be afforded him to produce evidence in support of his objections. The Code does not expressly provide for the production of evidence by the applicant. But no doubt it is within the power of the Court to allow or require him to produce evidence to rebut any evidence produced by any opposing creditor. Where a Court, after declaring the applicant to be an insolvent, proceeded to pass a summary order for the distribution of the assets of the insolvent, and without any proof on the record of the existence or terms of any mortgage, declared a person referred to as the mortgagee to be entitled to have his debt first satisfied out of the proceeds of the sale of the applicant's property, and then proceeded to appoint a receiver, *held*, that the summary order, besides being made in contravention of the provisions of the Code, was clearly incorrect. Before declaring the mortgagee to be entitled to priority in the distribution of the insolvent's property the Court was bound to have the mortgage proved and to inquire into its terms. MANA PAVANNA PADYACHI v. ORMOGUM PADAYACHI, **1 L.B.R. 229.**

(190)—Ss. 350, 357—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 5 C.W.N. 91.

(191)—*Ss. 350 and 359—Power of Court to send insolvent to Magistrate on an enquiry independent of that under s. 350.*—Where, on an application for declaring petitioner an insolvent, an enquiry is held under s. 350 and an order is passed under s. 351, declaring the petitioner an insolvent, the Court has no jurisdiction to make a fresh enquiry under s. 359 and to send the petitioner to a Magistrate upon the basis of such fresh enquiry. Though s. 359 does not say that an application under that section must be made at the hearing, under s. 350 or soon thereafter, any order, under that section (s. 359), must be based on the findings arrived at in an enquiry under s. 350. No new enquiry is contemplated by s. 359. NARASAYYA v. SUBBAYYA, **18 M.L.J. 12.**

(192)—*S. 351—Insolvent—Burden of "satisfying" the Court.*—The burden of satisfying the Court in the sense of s. 351 of the Code lies on the insolvent applicant and not on the opposing creditors. BAIJ NATH v. ELLIS, **A.W.N. 1883, 187.**

(193)—*S. 351—Application by debtor for declaration of insolvency and appointment of receiver—Unfair preference to creditors—Disposition of property—Bad faith—Test of unfair preference—Presumption.*—Where the object of a compromise entered into by a debtor with some of the creditors was to put an end to ruinous litigation, and not to benefit them, though it may be that the transaction was in fact beneficial to them, such a compromise does not amount to an act of bad faith within the meaning of s. 351. It is sufficient to constitute an unfair preference, if preferring the creditor was the substantial, effectual or dominant view with which the debtor made the preference,

Civ. Pro. Code (Act XIV of 1882)—*continued.*

and it is not necessary that it should have been the sole view. If a man, on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment, with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that that view was expressed in so many words by the bankrupt; it is a presumption which would arise from the transaction. The same principles apply to assignments of "actionable claim" which are "dispositions of property." But where dispositions of property were made by a debtor, not with the dominant view of preferring some of his creditors but with the object that he might continue to receive financial support from such of the creditors, and were made under pressure by these creditors, such circumstances negative a preference being the dominant view with which the dispositions were made. ANGAPPA CHETTY v. NANJAPPA ROW, **2 M.L.T. 57=18 M.L.J. 189.**

(194)—S. 351—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE. 85 P.R. 1890, 12 B. 424, 14 C. 691. 17 A. 218=A.W.N. 1895, 63, 26 A. 517=A.W.N. 1904, 93=1 A. L.J. 259.

(195)—S. 351—*See* INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR, 16 M. 499.

(196)—S. 351—*See* Nos. 140, 149, 167, 168, 170, 171, 177, 178, 187, 189, *supra* and No. 313, *infra*.

(197)—*S. 351. Ch. XX—Unfair preference to one creditor—Appellate Court.*—S. 351, Civ. Pro. Code, deals with the discretionary power which is vested in the Courts acting under Ch. XX, Civ. Pro. Code, and unless the appellate Court sees that that discretion has been wrongly or perversely exercised by the lower Court, it is not a part of the duty of the appellate Court to interfere with the decision of the lower Court. In an application to be declared an insolvent, it appeared that a few days before stopping payment, the petitioner, under pressure from some of his relations to whom he was indebted in the sum of Rs. 3,000 and who were fully aware of his pecuniary position, transferred to them property worth Rs. 2,963, while in the case of a number of other creditors to whom he owed about Rs. 9,330 in all, he made payments aggregating to Rs. 888 only. *Held* that, under the circumstances, the lower Court had acted rightly in dismissing the application. MATTA MAL v. RADHE LAL, **A.W.N. 1887, 93.**

(198)—Ss. 351, 352—*See* HINDU LAW—USURY, 10 C.W.N. 884=33 C. 1269.

(199)—Ss. 351, 352—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 10 C. W.N. 884=33 C. 1269.

(200)—Ss. 351, 352—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 7 M. 318.

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(201)—Ss. 351 and 352—*See* PRE-EMPTION, RIGHT TO PRE-EMPT, A.W.N, 1905, 149=2 A.L.J. 390=27 A. 670.

(202)—Ss 351, 352, 354—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, A.W.N. 1890, 101, 102.

(203)—*Ss. 351, 355—Insolvent—Discharge, conditional order of—Breach of the conditions—Revival of the order of arrest.*—A judgment-debtor was arrested in execution of a decree passed against him, and the Court in discharging him as an insolvent under s. 351, Civ. Pro. Code, made his discharge conditional upon his paying Rs. 75 every month for two years. He made a default in paying the instalments. On an application to order his arrest for the default, the lower Courts held that he having been arrested before and having placed his estate at the disposal of the Court could not be arrested again: *Held* that, as the order of discharge was conditional, the order of arrest would revive and could be put in force on a breach of the imposed condition. BAI JAIJI v. MERWANJI, **1 Bom. L.R. 468.**

(203-*a*)—S. 10—*See* NO. 190, *supra*.

(204)—*Ss 351, 355, 356 and 357—Liability of judgment-debtor, declared insolvent or discharged, to arrest or imprisonment.*—When a judgment-debtor is declared an insolvent under s. 351, after an enquiry under s. 350, Civ. Pro. Code, he is entitled to be discharged from jail and cannot be again arrested under the decree, in execution of which he was imprisoned (s. 341, Civ. Pro. Code). After a judgment-debtor obtains his discharge either under s. 351 in the manner mentioned above or under ss. 355 and 356, (if a Receiver has been appointed), he cannot again be arrested or imprisoned on account of any of the scheduled debts (s. 357, Civ. Pro. Code). A judgment-debtor, in respect of whose estate a Receiver has been appointed, but who has not been discharged under s. 355, cannot be arrested by a scheduled creditor. SEETARAMAYYA v. RAMCHANDRADU, **15 M.L.J. 1=28 M. 152, F B.** (14 A. 358, *R*.)

(205)—Ss. 351, 356—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 9 B. 368.

(206)—*Ss. 351 (a) and 588 (17)—Appeal against order rejecting application to be declared insolvent.*—In this case, the judgment-debtor was arrested in execution of a decree for Rs. 1,304. He applied for a declaration of insolvency. The District Judge rejected the application under s. 351 (*a*), Civ. Pro. Code. On appeal, *held*, that the order of the District Judge rejecting the application was appealable to the Divisional Court. Appeal was given by s. 588 (17), and the course of appeal was determined by s. 589. By Punjab Government Notification No. 940, dated 24th October, 1888, the Divisional Court is deemed to be the District Court for proviso (*a*), s. 589, Civ. Pro. Code. The ruling in 17 M. 377 was not applicable as the value of the suit in this case was under Rs. 5,000 BHAGWAN DAS v. JAI RAM DAS, **169 P.L.R. 1901=58 P.R, 1901.**

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(207)—*Ss. 351, 588, 589—Rejection of application for declaration of insolvency—Appeal.*—An order made by a District Judge under s. 351 of the Code, rejecting on application for a declaration of insolvency, is, by virtue of Punjab Government Notification No. 940, dated 24th October, 1898, appealable to the Divisional Court, irrespective of the value of the subject-matter involved. RAJA RAM v. PRABH DIAL, **98 P.R. 1908=159 P W.R. 1908.**

(208)—Ss. 351, 588, 622—Wrongly rejecting insolvency application—Appeal—Revision—*See* INSOLVENT, 2 Ind. Cas. 856=14 C.W.N. 143.

(209)—Ss. 351, 589—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 23 A. 56 =A.W.N. 1900, 196.

(209-*a*)—S. 352—*See* NOS. 167, 169, 178,189, 198, 199, 200, 201, 202, *supra.*

(210)—*Ss. 352, 588, cl. (17), 622—Application to prepare schedule of creditors—Appeal—Revision.*—An order rejecting an application to prepare a schedule of creditors, under s. 352 of the Code of Civil Procedure, is appealable under s, 588, cl. (17) of the Code and, therefore, cannot be made the subject of an application for revision under s, 622 NONNIDHI RAM v. HIRA LALL, **A.W.N. 1893, 64.**

(211)—*S. 353, Civ. Pro. Code—One creditor requiring another creditor to prove his claim—Onus of proof.*—Under s. 353, Civ. Pro. Code, when any creditor requires any other creditor, to prove his claim, the *onus* is upon the creditor who has to prove his claim to establish it. It is a matter to be dealt with by the Judge upon the evidence forthcoming in the case. RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB, **5 C.W.N. 91.**

(212)—S. 353—*See* NO. 167, *supra.*

(213)—*S. 354—Declaration of insolvency—Schedule of debts—Publication in Gazette.*—Under s. 354 of the Code, the declaration of insolvency need not be gazetted. Nor is there any necessity to publish in the Gazette the schedule of debts. But orders under s. 357 should be gazetted. GEORGE SLANEY v. RAMBAX SONAR, **1 C.P.L.R. 83.**

(214)—S. 254—*See* NOS. 140, 167, 202, *supra.*

(215)—S. 354 and 356—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 12 B. 272.

(216)—S. 355—*See* NOS. 167, 189, 203, 204, *supra.*

(217)—*Ss. 355, 356, 358—Insolvency—Discharge of insolvent—Order not expressly made—Appeal—Revision.*—The insolvent applied to the Insolvent Estates Court, Delhi, for an order to the Receiver to pay him the surplus in his hands. The application was rejected and the order was confirmed on appeal. *Held*, that it must be assumed that the Court did pass an order of discharge under s. 355 of the Civ, Pro. Code, 1882, as soon of the conditions laid down in that section had been complied with, that s. 358 would therefore apply, and under s. 356 the petitioner was entitled to receive the surplus in the hands of the Receiver. *Held*, also, that the Divisional Judge was right in holding that no appeal lay to him from the order of Insolvent Estates Court, but, as the order appealed against was obviously wrong, it must be set aside on revision. HARJI MAL v. RECEIVER OF THE INSOLVENT DEBTORS' ESTATE, **26 P.L.R. 1910=8 Ind. Cas. 222.**

(218)—*Ss 355, 578—Appeal—Legal representative—Application for substitution of name—No order passed on application, but applicant treated as if a party to the record.*—An appellant in a pre-emption suit having died during the pendency of the appeal, application was made by his son to have his name placed on the record as representative of the deceased appellant. On this application, the Court made no order whatsoever, but, nevertheless, when the appeal came on for hearing, allowed the applicant to be represented and ultimately decreed the appeal. On appeal by the respondents, the High Court declined to allow the appellant's plea that the person in whose favour the appeal in the Court below had been decreed had not properly been made a party to the appeal. NAMDAR CHAND v. BANSIDHAR, **A.W.N. 1893, 181.**

(219)— S. 356—*See* PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 46 P.R. 1909=72 P. L.R. 1909=41 P.W.R. 1909=1 Ind. Cas. 474.

(220)—S. 356—*See* RECEIVER, 15 M. 233.

(221)—S. 356—*See* NOS. 167, 189, 204, 205, 215, 217, *supra.*

(222)—*S. 357 (d)—Insolvent—Distribution of assets — Dower-debt—Mortgage-debt—Priority.*—Among the creditors of an insolvent Muhammadan were (1) his mother who had obtained a decree against him for her dower (2) another who held a mortgage-decree against the insolvent. The question was as to the distrubution of the assets of the insolvent. *Held* that a claim for dower, simply as such, was not on the estate. The debt of the other being secured by a mortgage had priority under s. 356 (*d*) of the Civ. Pro. Code. NARAIN DAS v, ALLADEHI, **A.W.N. 1884, 33.** (4 C, 402, *F.*)

(223)—*S. 357—Creditor whose debt is not included in the scheduled debt can proceed with the execution of his decree.*—A creditor whose debt has not been included in the scheduled debts within the meaning of s. 357 of the Code of Civil Procedure is entitled to proceed with the execution of his decree against the insolvent's property notwithstanding his discharge. AMTHLAL v. CURSETJI, **9 Bom. L.R. 466.**

(224)—*S. 357—Insolvent—Relinquishment of property—No discharge—Effect.*—There is no provision to be found in the chapter relating to insolvent judgment-debtors, which enacts that immediately upon a declaration of insolvency being made, the property of the insolvent vests in the Court, analogous to s. 17 of the English Bankruptcy Act. When a person is

Civ. Pro. Code (Act XIV of 1882)—*continued.*

declared an insolvent and no order of discharge is granted to him nor is a receiver appointed, the person so declared an insolvent can alienate his property. KISHEN SAHAI v. RIAZUDDIN, **A.W.N. 1883, 174.**

(225)—*S. 357—Insolvent—Discharge—Subsequent acquisition of property—Right to attach and sell such property.*—The provisions of s. 357, Civ. Pro. Code, declare that the property of an insolvent discharged under s. 351 or 355, whether previously or subsequently acquired, shall, by order of the Court, be liable to attachment and sale, until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiration of 12 years from the date of the order of discharge. SALIGRAM v. CHUNI LAL, **A.W.N. 1883, 21.**

(226)—*S. 357—Provision of limitation under independent of Limitation Act.*—S. 357 of the Civ. Pro. Code, provides a limitation of its own, and in substitution for the limitation provided forthe execution of decrees by theIndian Limitation Act. It could not have been the intention of the Legislature that, when there was no property other than that previously vested in the Receiver and exempted from execution, and no property subsequently acquired possibly until eleven years after the discharge of the insolvent, the judgment-creditors, in order to keep their decrees alive, should be obliged to make fruitless applications for execution during the period to which the provisions of s. 357 apply. LALMAN v. GOPI NATH, **19 A. 144 = A.W.N. 1897, 18.**

(227)—*S. 357—Debt not in schedule—Right of creditor.*—Though the debt was not included in the scheduled debts under s. 357 of the Code, the creditor can proceed with the execution of his decree against the property of the insolvent, not withstanding his discharge. ASHRAFUDDIN AHMED v. BEPIN BEHARI MULLICK, **30 C. 407.** (16 C. 592, *F.*, 21 A. 227, *R.*) [*F.*, 9 Bom. L.R. 466.]

(228)—*S. 357—Legality of attachment of insolvent's property before discharge.*—Where an insolvent has not been discharged, the Court has no power under s. 357 of the Code to attach his property and distribute the same among his creditors. GEORGE SLANEY v. RAMBAX SONAR, **1 C.P.L.R. 83.**

(229)—S. 357—*See* INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 16 C. 85.

(230)—S. 357—*See* NOS. 143, 167, 169, 190, 204, *supra.*

(231)—Ss. 357, 358 — *See* INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 14 P. R. 1887, 91 P.R. 1891.

(232)—S. 358—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO CODE, 30 P.R. 1885.

(233)—S. 358—*See* **NOS. 167, 169, 217, 231,** *supra.*

(234)—S. 359—*See Nos.* **153, 167, 191,** *supra.*

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(235)—*Ss. 359 and 622—Imprisonment, simple or rigorous—Order, subsequent, declaring it rigorous, unauthorised, may be discharged under s. 622.*—Imprisonment under s. 359 of the Civ. Pro. Code may be either simple or rigorous. The order must specify the character of the imprisonment ; if it omits to do so, the imprisonment must be taken to be simple. A judge after having made an order for imprisonment under s. 359 of the Civ. Pro. Code, cannot, subsequently, by a separate order, declare it to be one for rigorous imprisonment. If he does so, his order is not authorised by any provisions of the Civ. Pro. Code, and may be discharged by the High Court in the exercise of its revisional jurisdiction. AMIR ALI v. MITHU SAHU, **5 C.L.J. 445 = 14 C.W.M. 740.** (18 W.R. Cr. 3, *F.*).

(236)—S. 360 — *See* PROVINCIAL INSOLVENCY ACT, 1907, s. 3, cl. (1), 6 A.L.J. 483 = 2 Ind. Cas. 223.

(237)—S. 360—*See* Nos. 2, 139, 167, 172, 173, *Supra.*

(238)—Ch. XXI—*See* BOM. ACT III OF 1876, 17 B. 645.

(239)—S. 361—*See* No. 58 *supra.*

(240)—Ss. 362 to 367—*See* No. 58, *supra.*

(241)—S. 368—*See* INDIAN SUCCESSION ACT, 1865, L.B.R. 1893—1900, 305.

(242)—S. 368—*See* Nos. 26, 58, 168, *supra.*

(243)—Ss. 369 to 371—*See* No. 58, *supra.*

(244)—S. 372—*See* Nos. 26, 58, *supra.*

(245)—*Ch. XXVI—Application for leave to defend* in forma pauperis—*Provisions in.*—The defendant, in a suit pending against him, applied for leave to defend the suit *in forma pauperis. Held*, that the defendant cannot be allowed to defend a suit *in forma pauperis*, inasmuch as there is no provision in the Code authorizing such a course. COATES v. THE SECRETARY OF STATE, **54 P.R. 1905 = 121 P.L.R. 1905.** (5 C. 819 = 6 C.L.R. 120, *R.*)

(246)—Ss. 402, 407—*See* ACT XX OF 1863, s. 18, 24 M. 419.

(247)—S. 407—*See* No. 246, *Supra.*

(248)—Ss. 407 (*c*), 622—*See* PAUPER SUITS, 7 A. 661, F.B. = A.W.N. 1885, 156.

(249)—S. 437—*See* No. 26, *Supra.*

(250) Ch. XXXI—*See* LUNATIC, 20 A. 2 = A.W.N. 1897, 155.

(251)—S. 444—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, A.W.N. 1907, 255 = 29 A. 675.

(252)—S. 460—*See* No. 57, *Supra.*

(253)—S. 491—*See* COMPENSATION, L.B.R. 1893—1900, 411,

(254)—S. 492—*See* INJUNCTION UNDER CIV. PRO. CODE, L.B.R. 1893—1900, 414.

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(255)—*Ss. 503, 505—Receiver, appointment of—Subordinate Judge—Order refusing to appoint a receiver—Appeal.*—A Subordinate Judge, when considering the expediency of the appointment of a receiver, is really acting under s. 503 as limited and explained by s. 505 of the Civ. Pro. Code, and an appeal lies against his order refusing to recommend to the District Judge the appointment of a receiver. SANGAPPA v. SHIBASAWA, **1 Bom L.R. 502=24 B. 38.**

(256)—*Ss. 503 and 505—Receiver, appointment of—Receiver, if may sue in his own name—District Judge sanction of, to the appointment—Sanction subsequently obtained, if validates proceedings commenced.*—The order of appointment of receiver can be made by a Subordinate Judge only after he has been authorised to do so by the District Judge. The question whether the appointment is invalidated, if it is made by the Subordinate Judge without the previous sanction of the District Judge, but is subsequently approved by him, is a question rather of power than of jurisdiction of the Court. It is not essential, in all cases, where a power may be exercised with the assent of a third person, that such assent must be given before the execution; there may be a ratification by subsequent consent. (9 I.A. 8=8 C. 422 and 23 C. 87, *R.*) There may be cases in which the nature and object of the power and the surrounding circumstances point to a previous consent as essential, in which event the consent must be obtained, before the execution and subsequent consent is insufficient. (25 A. 187, 26 A. 162, *R.*) Where the order for the appointment of a receiver was made by a Subordinate Judge and the nomination was subsequently approved by the District Judge, the requirements of the law were substantially complied with, and whatever defect there was in the form of the proceeding, it was remedied by the subsequent order of the Subordinate Judge, although it was made after the institution of the suit in which the question of the validity of the appointment was raised. (30 C. 699. *D*; 2 C.L.J. 70 and 4 C.L.J. 421, *R.*) S. 503 of the Code authorises the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section, and full powers are granted to the receiver, powers are conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. (25 C. 642. *R.*) It is competent to a Court to authorise a receiver to sue in his own name, and a receiver who is authorised to sue, though not expressly in his own name, may do so by virtue of his appointment with full powers under s. 503, of the Code. JAGAT TARINAL DASI v. NABAGOPAL CHAKI, **5 C.L.J. 270=34 C. 305.** (10 C. 713, 733, *R.*; 10 W.R. 430, 12 W.R. 117, 6 B., L.R. 486, 8 M. 418, 9 M. 334, 14 C. 323. 18 C. 477 and 26 C. 715, *R.*) [*R.*, 7 M.L.T. 253=5 Ind. Cas. 343.]

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(257)—Ss. 503, 505 & 588—*See* RECEIVER, 1 O.C. Sub. 21.

(258)—Ss. 503, 505, 622—*See* RECEIVER, 21 B. 328.

(259)—Ss. 503, 508 (24)—*See* RECEIVER, 6 M. 355.

(260)—*S. 505—Receiver, appointment of—Recommendation by Subordinate Judge to District Judge—Refusal by the latter to appoint—Appeal.*—A Subordinate Judge recommended to the District Judge the appointment of a receiver under the provision of s. 505 of the Civ. Pro. Code. The latter refused to make any appointment. On appeal to the High Court, *held* that no appeal lay against the order which was passed under s. 505 and not under s. 503 of the Civ. Pro. Code, and respecting which no appeal was provided for by s. 588 of the Code. BAIMANI v. KHIMCHAND GOKAL DAS, **10 Bom. L.R. 1037=33 B 104.**

(261)—*S. 505—Order of Magistrate for maintenance of possession under s. 145, Crim. Pro. Code—Appointment of receiver, if can be made by Civil Court.*—The powers of a Civil Court trying an action for ejectment, to appoint a receiver under s. 505, Civ. Pro. Code, are not in any degree controlled by reason of a Magistrate making an order maintaining possession on behalf of one of the litigants under s. 145, Crim. Pro. Code. The Magistrate's order under s. 145, in such cases, is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be necessary for the protection of the property. BARKAT-UN NISSA v. ABDUL AZIZ, **22 A. 214=A.W.N. 1900, 22.**

(262)—*S. 505—Report recommending appointment of a receiver—Order refusing to make the appointment—Appeal.*—Where a Subordinate Judge recommended a person to the District Judge for receivership, and the District Judge declineded to appoint a receiver and the petition was then dismissed, *held*, no appeal lies against the District Judge's order under s. 505 refusing to authorize the appointment of a receiver. KAYARUNNISA BEGUM v. SAKINA BIVI, **20 M.L.J. 78=8 Ind. Cas. 99,** (10 M. 179, F.B. Foot note, *F.*)

(263)—S. 505—*See* RECEIVER, 18 A. 453=A.W.N. 1896, 141.

(264)—S. 505—*See* No. 255, 256, 257, 258, *supra.*

(265)—*Ch. XXXVII—Award made otherwise than on a reference under—Suit to set aside such an award, maintainability of—Civil Court, Lower Burma, jurisdiction of.*—*Held*, that a suit to set aside an award made otherwise than on a reference under Ch. XXXVII of the Code is entertainable by a Civil Court in Lower Burma. S. 39 of the Specific Relief Act. LU THA v. MA SHWE ME, **3 L.B.R. 4.** (1898, P.J.L.B. 480, *Overruled.*)

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(266)—Ch. XXXVII, applicability of—to proceedings in execution—*See* ARBITRATION—REFERENCE TO ARBITRATION, 8 O.C. 263.

267—S. 508 (24)—*See* No. 259, *supra.*

(268)—Ch. XXXVIII—*See* AWARD, U.B.R. 1892—1896, Vol. II, 11.

(269)—*Ch. XXXIX— Summary procedure—Negotiable instruments—Extension of time for leave to defend—S. 4, art. 159, Limitation Act, XV of 1877.*—In a suit under ch. XXXIX, Civ. Pro. Code, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time. S. 4 of the Limitation Act, 1877, is mandatory. (3 B.L.R. O.S. 83, *Expl.* 3 C. 539, 23 C. 573, *R.*) *Quære*—Whether the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired? QUAZIE MAHUMDAR ROHMAN v. SARAT CHUNDRA DUTT, **5 C.W.N. 259.**

(270)—*Suit under Ch. XXXIX—Right to question date of service—Limitation.*—The only date to which reference could be made as regards limitation, is the date shewn in the Sheriff's return. The defendant cannot be allowed to go into the question whether the summons was served on the date mentioned in the Sheriff's return or not at all. MADHUB LALL DURGUR v. WOOPENDRANARAIN SEN, **23 C. 573.** [*R.*, 5 C.W.N. 259.]

(271)—Ch. XXXIX, applicability of, where defendant is agriculturist—*See* SMALL CAUSE COURT, MOFUSSIL. JURISDICTION OF—GENERAL, 1 S.L.R. 243.

(272)—*Chs. XLI, XLII—Remand by appellate Court for revised finding on evidence.*—The powers of the High Court, on appeal to remand the case to the lower Court for further consideration of the evidence by that Court, are limited to and defined by the provisions of the Code of Civil Procedure. A revised finding on the evidence by the lower Court, except upon an order authorised by any one of ss. 562 to 567 of the Code, is irregular. VENKATA VARATHA THATHACHARIAR v. ANANTHACHARIAR, **16 M. 299=3 M.L.J 150. P.C.** [*Cons.*, 17 M.L.J. 123 *R.*, 138 P.R. 1908.]

(273)—S. 541—See No. 26, *supra.*

(274)—*Ss. 542, 562, 564—Remand—Order, ostensibly under s. 562 in case tried on merits in first Court—Remand order and all subsequent proceedings illegal—Second appeal—Plea allowed to be taken at hearing which was not taken in memorandum of appeal.*—The Subordinate Judge, in a case on appeal before him from the Court of the Munsif, made an order of remand ostensibly under s. 562 of the Civ. Pro. Code, though the suit had not been disposed of by the Munsif on a preliminary point, but been tried and decided by him on the merits. *Held* that such order of remand was illegal, as also all the proceedings in the same matter subsequent thereto. *Held*, also, that the validity of the remand order above-mentioned could be questioned in second appeal from the decree in the suit; and that, even though the plea of its illegality was not taken in the memorandum of appeal, such a plea was one which might reasonably be allowed under s. 542 of the Civ. Pro. Code. MULLU KHAN v. THAN SINGH, **A.W.N. 1891, 187.** (12 A. 510 and A.W.N. 1891, 105, *F.*) [*R.*, 23 A. 167.]

(275)—*Ss. 542, 562, 564—Plea allowed in second appeal though not taken in memorandum—Remand in contravention of s. 564—Remand and all subsequent proceedings illegal—Omission to appeal from order of remand—Objection to order allowed in appeal from final decree.*—The lower appellate Court made an order purporting to remand a case under s. 562 of the Civ. Pro. Code, not because the case had been dismissed on a preliminary ground by the Court of first instance, but on the ground that a report which had been called for from an amin regarding the subject-matter of the litigation was founded upon imperfect materials and unreliable. *Held* that such an order of remand was illegal and must be set aside together with all proceedings in the same litigation subsequent to the said order. *Held*, also, that the validity of the remand order could be questioned in second appeal from the decree in this suit and that, even though the plea of its illegality was not taken in the memorandum of appeal. MAGHU KUAR v. FAUJDAR KUAR, **A.W.N. 1891, 105.** (12 A. 510, *F.*) [*R.*, 23 A. 167.]

(276)—Ss. 542, 566—*See* HUSBAND AND WIFE, 1 L.B.R. 184.

(277)—S. 544—See No. 26, *supra.*

(278)—S. 553—See No. 168, *supra.*

(279)—S. 559—See Nos. 26, 30, *supra.*

(280)—*Ss. 560, 584 (c).*—When the remedy of a respondent to an appeal, which has been decided *ex parte* under s. 560, Civ. Pro. Code, has been barred by limitation through no fault of his own, the High Court has power to afford him an alternative remedy in second appeal under cl. (c), s. 584 of the Code. BALAJI RAU v. SITHABHOY, **19 M. 414.**

(281)—S. 562—See Nos. 25, 30, 37, 274 275, *supra.*

(282)—*Ss. 562, 564—Order of remand by first appellate Court—Preliminary point—Jurisdiction.*—Where a Court of first appeal fully considers all the evidence upon the record and decides the case upon the merits and not upon any preliminary point, and remands the case to the original Court for a second decision under s. 562, Civ. Pro. Code, the order of remand is illegal and bad for want of jurisdiction, as it contravenes the plain and mandatory rule of s. 564, Civ. Pro. Code. Such an order of remand is not a mere irregular proceeding; it is an order which is forbidden by the Civ. Pro. Code, and therefore an order which the Court has no jurisdiction to make and which is therefore not

Civ. Pro. Code (Act XIV of 1882)—*continued.*

saved by the terms of s. 578, Civ. Pro. Code, because the error goes to the root of the jurisdiction of the Court. Where such an order of remand was made by a Subordinate Judge sitting in first appeal, and in pursuance of the order, the Munsiff re-tried the suit and dismissed it, and the Subordinate Judge on appeal reversed the decree of the Munsiff. *Held* that the order of remand was illegal, and that the necessary consequence of that was that all proceedings taken under it by the Munsiff were equally void in law, so also was the appeal from the decree made thereunder, and the judgment and decree of the Subordinate Judge on appeal before the High Court. Therefore all those proceedings were ordered to be cancelled, and the Subordinate Judge was directed to restore the first appeal to its place in his register of first appeals and to try it himself upon the record as it then stood, according to law. JARBHANDAN SINGH v. NAKCHHED SINGH, **A.W.N. 1887, 224.** [*Appl.*, 12 A. 510, F.B.]

(283)—*Ss. 562, 564—Remand order, if proper.*—Under the circumstances mentioned in para (1), the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point of law, and judgment having been given on all the issues, the remand order by the Commissioner was bad under ss. 562 and 564, Civ Pro. Code, and was liable to be set aside. HAFIZ ABDUL RAHIM KHAN v. RAJA HARI RAJ SINGH, **22 A. 405=A W.N 1900 157.**

(284)—*Ss 562, 564*—Ex parte *decree against defendant, power of appellate Court on appeal from, to remand suit for re-trial.*—Notwithstanding the provision in ss. 562 and 564 of the Civ. Pro. Code, on an appeal from a decree passed on evidence given by the plaintiff only, the defendant having been *ex parte*, the appellate Court has inherent power not only to reverse such a decree but also to direct a re-trial of the case. The Court has such power on an appeal against an order passed, on an application, under s. 108 of the Code, refusing to set aside an *ex parte* decree, and it can hardly be supposed, therefore, that, if on an appeal against such *ex parte* decree, it considers that the decree ought to be set aside and a re-trial had, it has not the same power. PERUMBRA NAYAR v. SUBRAHMANIAN PATTAR, **23 M. 445 =10 M L.J 61.** [*F.*, 91 P.R. 1904.=5 P.L R. 1905, 30 M. 54=16 M.L J 479=1 M.L,T. 268, 138 P.R. 1908; *D.*, 23 M, 447, 28 M. 437=15 M.L. J, 236, 6 C.L J. 547.]

(285)—*Ss. 562 564 Remand by appellate Court otherwise than under s. 562—Scope of s. 564.*—S. 564 of the Civ. Pro. Code, must be read subject to the other provisions of the Code such as those in ss. 27, 32 or 53. An appellate Court has the power to make an order under any of those sections, and in order to give effect to such of the sections as may be applicable, it may be necessary, for the ends of justice to send back the case to the Court of first instance. The power of an appellate Court to remit a case to the original Court, under the above

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circumstances, cannot be taken to be precluded by the terms of s. 564. HABIB BAKHSH v. BALDEO PRASAD, **23 A. 167=A.W.N. 1901, 39.** (12 A. 510, A.W.N. 1891, 105, A.W.N. 1891, 187, 17 A. 29, 18 A. 131, 18 A. 332, 18 A. 396, 10 B. 398, 19 M. 157, *R.*) [*Diss.*, 138 P. R. 1908, 30 M. 54=16 M.L.J. 479=1 M.L.T. 268, F.B.; *Appr.*, 2 L.B.R. 245; *R.*, 2 L.B.R. 277, 28 M. 437=15 M.L.J. 236, 33 C. 927=3 C.L J. 67, 12 O.C. 25=1 Ind. Cas. 329; *D.* 69, P.R. 1906=118 P.L.R. 1906.]

(286)—*Ss. 562 and 564—Erroneous order of remand—Subsequent proceedings, if illegal—Merits of a case—Dispossession, meaning of.*—When a Court of first appeal, purporting to act under s. 562 of the Civ. Pro. Code, remands a case to the Court of first instance, which had not decided the suit merely on a preliminary point, the order is erroneous; but it cannot be said that the subsequent proceedings, before the lower Courts, are void, merely because of such error. If, in consequence of such erroneous remand, there has been a wrong decision affecting the merits of the case, then and then only will the subsequent proceedings be set aside. (28 C 324, *F.*) Where the Court of first instance originally decreed the plaintiff's suit, but after an erroneous remand, dismissed it. *Held*, that the reversal of the former judgment was not a wrong decision affecting the merits of the case. Before a party can be said to have acquired a title by adverse possession against another, whom he had dispossessed, it is necessary to find, not only that that other has been dispossessed, but that that the party claiming title has been in possession and has exercised rights of possession over the disputed tract. DURGA KINKAR NORHA v. KONCHAI RONZA, **5 C.L J 71.** [*R.*, 12 C.W.N. 590=6 C.L J. 547, 5 C.L.J. 328.]

(287)—*Ss. 562, 564—Appellate Court, has power to remand the case for second decision except as provided by s. 562.*—The language of s. 564, Civ. Pro. Code, prohibits an appellate Court from remanding a case for second decision except as provided in s. 562. AZIMAN v. BHURIA, **138 P.R. 1908.** (16 M. 299, P.C., *F.*; 23 A 167, 23 M. 445, *R.*)

(288)—*Ss. 562, 564—Partial decision of case on merits—Legality of order of remand—"Shall not", meaning of.*—Where a case has been partially decided on the merits, it is ordinarily right for the appellate Court to keep it on its file and dispose of all questions of facts by the further record of evidence, but where the points decided at the time bear a small proportion to the questions left to be decided and the matter decided can be kept separate from the matter left for decision, a remand under s. 562 of the Code is not absolutely prohibited. The Court may for good reasons construe the words "shall not" in s. 564 to mean "shall not without very good grounds." HARCHAND v. MAKUND RAM SUKAL, **12 C.P.L.R. 119.** (16 M. 207, 19 M. 157, *R.*)

Civ. Pro. Code (Act XIV of 1882)—*continued.*

(289)—Ss. 562 and 564—Alternative but not co-existent remedy—*See* APPEAL—GENERAL, 6 C.L.J. 547=12 C.W.N. 590.

(290)—*Ss. 562, 564, 566—Order of remand when proper—Addition of necessary parties, if good ground for remand in first appeal.*—A Court of first appeal cannot remand a case for the addition of necessary parties. It can add the parties, frame fresh issues and remand the case for their trial only under ss. 562 and 564, the provisions of which are to be strictly followed by all Courts of first appeal. So, where the original Court did not dispose of the suit "upon a preliminary point, so as to exclude any evidence of fact" which appeared to the lower appellate Court "essential to the determination of the rights of the parties" *held* that the lower appellate Court was wrong in remanding the case on the ground that all the necessary parties had not been joined. GANESH BHIKAJI JUVEKAR v. BHIKAJI KRISHNA JUVEKAR, **10 B. 398.** [*F.*, 1 Bom. L R 29; *R.*, 14 B. 232, 19 M. 157; 1 Bom. L R. 369; 23 A. 167.]

(291)—*Ss 562, 564, 566, remand—Judgment not on preliminary point—No change in law.*—The new Code of Civil Procedure does not contain the express limit on remands which was embodied in s. 564 of the Code of 1882. But rr. 23 and 25 of O. XLI represent the old ss. 562 and 566, and the law does not appear to have been changed. Where the two principal issues were, (1) whether the plaintiff had title, and (2) whether, if so, he was entitled to *khas* possession, and the Munsiff held that the plaintiff had no title and so dismssed the suit without dealing with the question of *khas* possession, and the Sub-Judge held that the plaintiff had title, and after setting aside the decree of the Munsiff, remanded the case to decide the question of *khas* possession. *Held (by Chitty, J.)* that the decision of the Munsiff was not upon a preliminary point and the order of remand by the Sub-Judge was bad (*Coxe, J., doubting*). ABDUL KARIM v. FAYEZ BUKSH, **9 Ind. Cas. 224=15 C.W.N. 576.**

(292)—Ss. 562, 564, 566, 584, 588 (28), 590—*See* APPEAL—PRACTICE AND PROCEDURE, **7 A.** 136=A.W.N. 1884 294.

(293)—*Ss. 562, 564 and 578—Remand by lower appellate Court—First Court's decision not on a preliminary point, but on the merits—Legality of remand order—Proceedings subsequent to remand—Nullity—Consent of waiver.*—When a Court of first instance, decided the suit, not upon a preliminary point, but on the merits, the lower appellate Court remanded the case under s. 562, Civ. Pro. Code, for having a new plan prepared. *Held*, that the order of remand was illegal. (18 M 421, 19 M. 479, *App. and F.* 28 M. 430. *R.*). Even though the plaintiff was not prejudiced by the order of remand, the High Court had jurisdiction to interfere with the remand. The illegal remand could not be treated as a mere irregularity. 24 M. 61, P.C., *F.* and s. 578., Civ. Pro. Code, has no application. The illegality is not cured by the plaintiff's consent or waiver. Failure on plaintiff's part to appeal under cl. (28) of s. 588 cannot be treated as consent or waiver. (28 M. 437, *Disc.*), as he had the alternative remedy of taking objection to the remand in second appeal. (18 M. 421, *F.*) Nor was it in the power of the plaintiff to prevent the trial, after remand, before the first Court, from going on. The High Court, had no alternative but to set aside all the proceedings subsequent to the remand—the decree of the lower appellate Court, the second decree of the first Court and the remand order of the lower appellate Court and to remand the original appeal to the lower appellate Court for disposal according to law. PALANI CHETTY v. RANGIADOSS NAIDU, **4 M.L.T. 479=32 M. 83 1 Ind. Cas. 746.**

(294)—Ss. 562, 588, (28)—*See* LETTERS PATENT, HIGH COURT, 1865, MADRAS, cl. 15, 19 M. 422=4 M.L.J. 263.

(295)—*S. 564—Appeal—Order of remand directing addition of parties—Preliminary point—Legality of order.*—An order of remand, under s. 564, Civ. Pro. Code, by an appellate Court, directing addition of new parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit, and is perfectly legal. JADAB GOBINDA SINGH v. ANATH BANDU SAHA, **37 C. 171=5 Ind. Cas. 998.** (23 A. 167, *F.*)

(296)—*S. 564—Suit decided on merits and not on preliminary point by appellate Court—Order of remand by appellate Court with consent of parties, legality of—Equitable estoppel—Waiver.*—Suits were instituted before a Deputy Collector for compelling the acceptance, by the respective defendants of *pattas* for a certain *fasli*. The main contest before the Deputy Collector was as to whether the rent was payable in kind as contended on behalf of the plaintiff, or in money as contended for the defendants, under express contracts alleged by them. The Deputy Collector held that the contracts alleged were not made out and directed that *waram* patta should be accepted. On appeal, the District Judge found the contracts were proved and remanded the suit for disposal on the basis that rent was payable in money in accordance with the contracts. It appeared that the order of remand was passed with the consent of both the parties. However, the plaintiff appealed to the High Court against the order of remand. *Held.*—*Per Subrahmania Ayyar, J.*—A remand in contravention of s. 564 of the Code is a violation of a mandatory provision of the law, which makes the order of remand illegal and one that ought to be set aside at the instance of a party entitled to object to such a procedure, but which, nevertheless, is of such a character that the defect can be cured by consent. The provision of s. 564 is one introduced for the benefit of litigants, who may, consequently, waive it if they find it to be the more advantageous course to take. The doctrine that consent does not give jurisdiction, applies where the

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Court has "no inherent jurisdiction over the subject matter." It would not apply to violation of rules of procedure though they are more than irregularities. Consequently, on the principle of equitable estoppel, the plaintiff could not rely on the impropriety of the remand. Further the question whether the express contracts set up by the defendants were true and valid, was the crucial question between the parties. Consequently, the finding of the Judge in the matter was an adjudication rightly made at the stage in which it was made, and binding unless duly set aside on appeal or otherwise. The fact that an illegal remand followed could not affect what had already been properly done. There was nothing to impeach the decision of the District Judge on the question of contract. Therefore, the appeal should be dismissed. *Per Moore, J.*—The order of remand by the District Judge was clearly illegal. The order of remand being illegal, consent of parties would not make it legal. Appeal should be allowed, an order of remand set aside. MANAGER, KALAHASTI ESTATE v. RAMASAMI REDDI, **15 M.L.J 236=28 M 437.** (28 C. 324, 19 M. 479, 25 M. 97, 23 A. 167, 13 I.A. 134, P. C., 27 M. 118, 21 B. 205, 8 M.H.C. 14, 2 M. 400, 15 M. 82, 23 M. 445, *R.*) [*F.*, 32 M. 83=4 M L.T. 479; *R.*, 30 M. 54=16 M.L.J. 479=1 M.L.T. 268, F.B., 6 C.L J. 547=12 C. W.N. 590, 17 M.L.J. 300.]

(297)—*S. 564—Decision of case on merits—Power of appellate Court to remand case for trial on ground of faulty and imperfect procedure.*—Where the question in issue between the parties to a suit was as to the payment of consideration money for a mortgage and the first Court held on the evidence produced that the passing of consideration had not been proved, it was not competent to the appellate Court to remand the case for trial on the ground that the proceedings of the first Court were imperfect and faulty and the remand was contrary to the provisions of s. 564 of the Code. DHANNULAL v. NATHURAM, **3 C.P.L.R. 131.**

(298)—S. 564—*See* NOS. 25, 30, 274, 275, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, *supra*,

(299)—Ss. 564, 565, 574, 578, 584—*See* JUDGMENT—FORM AND CONTENTS. 9 A. 26.

(300)—S. 565—*See* NO. 299, *supra*.

(301)—S. 566—See NOS. 276, 290, 291, 292, *supra*.

(302)—S. 571—*See* NO. 48, *supra*.

(303)—S. 574—*See* NO. 299, *supra*.

(304)—S. 578—*See* BUR. ACT II OF 1876, ss. 19, 55, 56, 17, 1 L.B.R, 277.

(305)—S. 578—*See* SUITS VALUATION ACT, 1887, 1 L.B.R, 85.

(306)—S. 578—*See* NOS. 218, 293, 299, *supra*.

(307)—S. 582—*See* NO. 168, *supra*.

(308)—S. 583—*See* EXECUTION OF DECREE—MISCELLANEOUS, L.B.R. 1893—1900, 16.

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(309)—S. 583—*See* NO. 58, *supra*.

(310)—Ch. XLII—*See* NO. 272, *supra*.

(311)—S. 584—*See* NOS. 280, 292, 299, *supra*.

(312)—S. 588—*See* NOS. 1, 141, 174, 206, 207, 208, 210, 257, 292, 294, *supra*.

(313)—*Ss. 588 (17), 351, 519 (2)—Order specified in s. 588 (17) passed by Court inferior to District Court, appeal lies to District Court and not to High Court from*—Where an order under s. 351, appealable under s. 588 (17), has been made by a Court subordinate to the District Court, cl. (*a*) of the proviso to s. 519 of the Code lays it down that an appeal from such an order shall lie to the District Court. The appellate tribunal is fixed with reference to the grade of the original Court passing the order, from which the appeal has to be made, and, if such Court is one subordinate to the District Court, then irrespective of the jurisdiction, value of the suit, in which the order has been made, appeal from such order lies to the District Court and not to the High Court. (23 A. 56, 27 B 604, *appr.*, 17 M. 377, *Diss.*) The word "subordinate" in s. 589 must, in the absence of the expreee provision or clear inference from the context to the contrary, be taken to be used in the same sense as in the definition of "District Court" in s. 2 of the Code. HARDAYALMAL v. K. C. SARKAR, **2 N.L R. 54**

(314)—S. 589—*See* NOS 207, 209, *supra*.

(315)—S. 590—*See* NOS. 168, 292, *supra*.

(316)—S. 596, 598, 599—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 18 M. 484.

(317)—S. 598—*See* NO. 316, *supra*.

(318)—S. 599—*See* LIMITATION ACT, 1908, ss. 4, 5, art. 179, 15 A. 14=A W.N. 1892, 152.

(319)—S. 599—*See* No. 316, *supra*,

(320)—S. 602 (*a*)—*See* COSTS—MISCELLANEOUS, 1 L.B.R. 177.

(321)—S. 612—*See* NO. 141, *supra*.

(322)—Ch. XLVI—*See* REFERENCE TO HIGH COURT, 7 Bom. L.R. 995=30 B. 226.

(323)—S. 617—*See* NO, 63, *supra*.

(324)—S. 622,—*See* NOS. 15, 208, 210, 235, 248, 258, *supra*.

(325)—*Ss. 622 and 643—Criminal revision—Offence committed in course of judicial proceedings—Penal Code, ss. 193, 199, 471—Preliminary inquiry—Order committing accused for false evidence, &c.—Civ. Pro. Code, sz. 622, 643 Crim. Pro. Code, s. 476—Application for revision.*—In a Civil case, the Court, after delivering judgment, recorded an order which was stated to have been passed under s. 643, Code of Civil Procedure, sending "the case with document to the District Magistrate for inquiry. Ss. 193, 199, 471, Indian Penal Code, relate to the offence committed." The applicant applied to

Civ. Pro. Code (Act XIV of 1882)—*continued.*

the Court of the Judicial Commissioner for a revision of this order under s. 435, Act V of 1898 (Code of Criminal Procedure). There was nothing to show that any inquiry was made by the lower Court to satisfy itself that there were sufficient grounds for sending the case under s. 643, Code of Civil Procedure, to the Magistrate for investigation. *Held*, that, although the application was headed as one under s. 435, Crim. Pro. Code, yet it might be regarded as one under s. 622, Code of Civil Procedure, and disposed of accordingly. *Held*, that inasmuch as in the order said to have been passed under s. 643, Code of Civil Procedure, the lower Court did not state the reasons which led it to consider that there were sufficient grounds for sending the charge to the Magistrate for investigation, it was illegal and should be set aside. If the order was to be treated as one passed under s. 476, Crim. Pro. Code, it was equally open to objection on the ground that there was no preliminary inquiry by the lower Court. RAM ADHIN v. DURGA, **4 O.C. 96.**

(326)—S. 623—*See* NO. 46, *supra*.

(327)—S. 638—*See* NO. 150, *supra*.

(328)—S. 643—Order of Munsiff to prosecute certain person for offences under ss. 193, 463, 471, I.P.C., whether amounts to complaint—Limitation—*See* CRIM. PRO. CODE, 1898, ss. 195, 476, 7 A. 871, F.B., A.W.N. 1885, 267.

(329)—S. 643—*See* DIVISION BENCH OF HIGH COURT, 23 C. 532.

(330)—S. 643—*See* NO. 325, *supra*.

(331)—S. 647—*See* GUARDIAN AND WARDS ACT, 1890, s. 13, U.B.R. 1892—1896, Vol. II, 407.

(332)—*Sch. IV. Forms 113, 132 and 133—Partnership—Suit for dissolution—Form of decree.*—In a suit for dissolution of partnership, the Court should first prepare a decree in accordance with form 132 of the fourth schedule of the Code, so far as it is applicable to the circumstances, declaring the partnership dissolved and ordering accounts to be taken. When this has been done, in due course, a final decree should be prepared in the terms of form No. 133 of the schedule. LEKHRAJ v. SAUDAGAR MAL, **A.W.N. 1883, 220.** (7 C. 428, *F.*)

(333)—*Sch. IV, Form 130—Suit for administration—Preliminary decree—Case pending before the Commissioner—Power of Court to sanction compromise—Decree, form of.*—A testator left a will appointing defendants, Nos. 1 and 2 as his executors. The plaintiffs, the grandsons of the deceased testator, brought a suit for the administration of the estate and for an account against the said executors. Defendant No. 3, widow of another grandson of the testator, was impleaded as a party to the suit. A preliminary decree was made, and the decree also declared that defendant No. 3 was entitled to a fourth share of the estates, and a Commissioner was appointed to take accounts.

Civ. Pro. Code (Act XIV of 1882)—*concluded.*

While the case was going on before the Commissioner, a petition of compromise between the plaintiffs and the executors (defendants-Nos. 1 and 2) to the effect that the entire estate should be made over to the plaintiffs and the executors be released from further accounting, was submitted to the Court, which sanctioned it, despite the protest made by defendant No. 3 against the compromise, inasmuch as her right, were entirely ignored in the partition. *Held*, that the Court was wrong in having sanctioned such a compromise, ignoring the rights of defendant No. 3, especially when the preliminary decree had declared her right to a certain share in the estate. In suits for administration, the Courts ought to follow the form prescribed in No. 130, sch. IV of the Code in drawing up decrees. AJOY KUMARI DEBI v. MANINDRA NATH CHATTERJEE, **32 C. 561.**

(334)—Sch. IV, Form 132—*See* NO. 332, *supra*.

(335)—Sch. IV, Form 133—*See* NO. 332, *supra*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859).

[S. 120 (2) REP., ACT 2 OF 1909, FROM 1ST JANY., 1910: SOME LOCAL MODIFICATIONS IN FORMER CODES, WHICH ARE TO BE READ INTO THE PRESENT CODE BY VIRTUE OF S. 158 OF THE LATTER:—AJMERE, REG. I OF 1877, S. 28; BOMBAY PRESIDENCY, BOM. ACT IV OF 1903, S. 10 (2); CENTRAL PROVINCES ACT XX OF 1875, SS. 11, 12 (ADDED BY ACT II OF 1879, S. 2); COORG, REG. I OF 1901, Ss. 11, 12; LOWER BURMA, ACT VI OF 1900, S. 16 (3); N. W. FRONTIER PROVINCE, REG. VII OF 1901, Ss. 46, 78, 84 (3); OUDH ACT XVIII OF 1876, Ss. 19, 20, 22; PUNJAB ACT XVIII OF 1884, Ss. 68, 70 (3) (INS., ACT XXV OF 1899, Ss. 5, 6); SANTHAL PARGANAS, REG. V OF 1893, S. 10.]

(1)—*Provisions of Code, if exhaustive—Right of lunatic to sue.*—The provisions of the Civ. Pro. Code are not exhaustive. A lunatic may sue through his next friend, even though not adjudged a lunatic under any law. RASIK LALL DUTT v. BIDHU MUKHI DASI, **10 C.W.N. 719=4 C.L.J. 306=33 C. 1094.** (6 M. 380, *Diss.*) [*R.*, 10 C.L.J. 91, 36 C. 193=5 C.L.J. 611.]

(2)—*Provisions of Civ. Pro. Code inconsistent with those of Probate and Administration Act—Procedure.*—If the provisions of Civ. Pro. Code are inconsistent with those of the Probate and Administration Act, those of the Code must prevail, as it is the latter enactment. ESOOF HASSHIM BOOPLY v. FATIMA BIBI, **24 C. 30 =1 C.W.N. 8.**

(3)—*Summons by the respondent on the appellant—Non-appearance of the appellant as witness—Suit to recover batta.*—When the appellant failed to appear in pursuance of the summons served on him at the instance of

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the respondents, he had no right to retain the batta paid to him to cover the expenses of his attendance, and the respondents whose money was paid are entitled to recover it as money had and received by the appellant. There is nothing in the Code or in the rules enacted thereunder, restricting the respondents to proceedings to be taken in the cause by way of application for taxation of costs and recovery of it as such. NATARAJA DESIKAR v. VEERABADRAN CHETTY, **17 M.L.J. 143.**

(4)—*Suit to set aside a Court sale—Same parties—Fresh suit barred.*—If the object of a suit is to set aside a proceeding had in execution, to wit, a sale, as between the parties to the suit the Court executing the decree is the only Court by which this relief can be granted and no fresh suit lies to set aside the proceeding. *Semble.* If fraud is alleged and the suit is to recover damages, it may be maintainable. VIRARAGHAVA v. VENKATA, **5 M. 217.** [*F.*, 28 M. 87=14 M.L.J. 475, *Appr.*, 11 C. 376, 17 C. 763, F.B., *R.*, 7 M. 255, 10 C. 410, 11 B. 588, 16 C. 33, 12 M. 454, 13 M. 504, 16 M. 287, 16 M. 447, 19 M. 230, 12 C.P.L.R. 82, 23 A. 478, 31 A. 82=6 A L.J. 71, *D.*, 15 M. 226.]

(5)—*Court of first instance—Duty of Judge to assist parties.*—Where professional advice is obtainable, the Court will not interfere with the conduct of a suit by the advocates and will merely take and consider such evidence as the parties through their legal advisers think proper to submit to it. But the circumstances in which the Judges in the interior are placed are wholly different from those of sea port towns. At many Courts, there are no advocates at all, and, where advocates are to be found, they are not always possessed of the experience and professional knowledge of their *brethren* at the larger centres. For many years to come, the Judges of the rural Courts will be obliged to hold a brief for both sides and to assist the parties in setting out and in selecting evidence in proof of their respective claims. District Judges should not disturb findings of fact in civil suits by a Court of first instance. Such a finding ought not to be disturbed until it is shown to be wrong. MA SHWE MI v. MA U MA, **L B. R. 1872—1892, 418.** [*R.*, L.B.R. 1893—1900, 64 209.]

(6)—*Erroneous order for withdrawal of suit—Plaintiff's ignorance of the defendant's whereabouts.*—The Court should not ask the plaintiff to withdraw his suit, if he does not know the address of the defendant. **No. 15 of 1893, U. B.R. 1892—1896, Vol. II, 261.**

(7)—*Ejectment—Cause of action.*—If there is not a sufficient disclosure of the cause of action in the plaint, it should be amended. MA SO v. MA O, **U B.R. 1892—1896, Vol. II, 251.**

(8)—*Res judicata.*—The abandonment of a point, which ought to have been put forward, amounts to a substantial determination of the point against the party giving it up. MANA PEENA SECUNDUR v. ASHA BEE, **U.B.R. 1892—1896, Vol. II, 242.**

(9)—Mamlatdar's Courts — Procedure—Civ. Pro. Code, if applicable—*See* BOM. ACT III OF 1876, ss. 17, 18, 13 B. 552.

(10)—Officer having insolvency jurisdiction under both Punjab Laws Act and Civ. Pro. Code, how to proceed—*See* PUN. ACT IV OF 1872, 5 P.W.R. 1909=6 P.L.R. 1909=1 Ind. Cas. 55.

(11)—Provisions of, not strictly applicable to arbitration proceedings—*See* ARBITRATION —GENERAL, 4 S.L.R. 196=9 Ind. Cas. 712.

(12)—*See* AWARD, 11 M. 85.

(13)—Retrospective operation—Construction of statute—*See* CONTRACT ACT, 1872, s. 2 (*h*), (*c*), (*d*), 5 Ind. Cas. 102=7 M.L.T. 296.

(14)—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 8 W.R. 200.

(15)—Effect of change of law of procedure on execution proceedings—*See* EXECUTION PROCEEDINGS, 4 Ind. Cas. 492.

(16)—*See* INSOLVENCY—CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE, 2 Ind. Jur. N.S. 188.

(17)—*See* LIMITATION—LAW OF LIMITATION, 6 W.R. 296.

(18)—*See* LIMITATION ACT, 1908, art. 12, 4 W.R. 34.

(19)—Applicability of art. 178 of Limitation Act to applications under—*See* LIMITATION ACT, 1908, art. 181, 11 C.P.L.R. 141.

(20)—*See* MESNE PROFITS — RIGHT TO MESNE PROFITS, 6 W.R. 108.

(21)—*See* RENT, SUIT FOR, 18 W.R. 99=15 B.L.R, 261, Note.

(22)—*See* REVIEW—GROUNDS OF REVIEW 9 W.R. 23. P.C.=11 M.I.A. 487.

(23)—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 8 W.R. 105.

(24)—*See* VARIANCE BETWEEN PLEADINGS AND PROOF, 1 W.R. 300.

——S. 2 (=1882, s. 2=1877, s. 2=1859, s. 356)

(25)—*S. 2—"Decree," definition of—Order striking off certain defendants to be treated as order dismissing the case—Order dismissing the case to be treated as a decree—Appeal, right of, from such an order.*—Where a Court, before deciding a case finally, orders the names of certain defendants to be struck off from the record on the ground that the plaintiff made out no cause of action against them, such order is tantamount to a dismissal of the case against those defendants, and the plaintiff can treat the order as a "decree." An appeal, therefore, lies against such an order. IDAN KHAN v. MENDI LAL, **8 Ind. Cas. 409.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(26)—*S. 2 (=Civ. Pro. Code, 1877, s. 2)*—"*Rejecting the plaint.*"—The words "rejecting the plaint" in s. 2 of the Civ. Pro. Code are not limited to the cases provided for in ss. 53, 54 of the Code. BENNI RAM BHUTT v. RAM LAL DHUKRI, **13 C. 189.**

(27)—*S. 2 (=s. 2, Civ. Pro. Code, 1882).*—*Order amounting to decree—Appeal.*—An order in a partition-suit, declaring the specific rights of the parties and the property to be partitioned is a decree and is appealable as such. BOLARAM DEY v. RAM CHUNDRA DEY, **23 C. 279.** [*Overruled*, 29 C. 758=5 C.W.N. 617, F.B. *R.*, 24 C. 725, F.B., 56 P.L R. 1902.]

(28)—*S. 2 (=Civ. Pro. Code, 1882, s. 2)—Decree—Settled accounts, order directing re-opening of—Attorney and client—Settlement of untaxed bills, when liable to be re-opened—Fiduciary relationship—Onus of showing good faith—Indian Contract Act (IX of 1872), s. 16—Evidence Act (I of 1872), s. 111—Independent advice, opportunity to obtain—Promissory note, assignment of, without endorsement.*—Plaintiff, a solicitor, had advanced various sums of money to a client from time to time on a mortgage-bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's favour, (2) certain promissory notes executed by the client in favour of a third party, which the plaintiff is said to have "taken up," (3) balance of amount due as interest on the mortgage and two further charges, and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills, a large remission having been allowed in consideration of all the bills not being taxed. In a suit by the plaintiff against the heirs of the deceased client to realize the amounts due on the mortgage and the three further charges, the plaintiff obtained a decree on the first three bonds, but the 4th bond was ordered to be re-opened, and it was directed that the plaintiff "do get all his bills of costs up to the 3rd August, 1903, taxed by the Taxing Officer of the High Court, and then re-filed the bills in this Court, that then a Commissioner be appointed to take accounts in the light of the observations in this case: that after the Commissioner's report is received and the parties are heard thereon, final decree will be drawn up under s. 89 of the Transfer of Property Act." *Held*, that this order was a decree. The fact that the Subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudication that the contract, as it stood, was not binding on the defendants. (9 B. 183, *Doubted*; 15 B. 155=18 I.A. 6, *R.*) As between attorney and client, the existence of fiduciary relationship alone, or the fact that certain bills of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *prima facie* shewn to be extortionate. S. 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable. To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct. Under the practice obtaining in the original side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation. The case of *Monohur Doss v. Romanath Law* (I.L.R. 3 C. 473) was decided on the special circumstances of that case and does not lay down any general rule of law. An attorney may be bound under certain circumstances to advise his client to take independent advice. It is not his business to see that the attorney selected by his client fulfils his duties to his client and is not guilty of any remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more, or to be responsible for another's omissions. If the parties to a promissory note agree that on the promisor executing a bond for the amount due in favour of a third person, the promisee would cancel the note, this arrangement would be a perfectly valid contract, whether the third party paid any money to the promisee or not. Although a negotiable instrument can only be assigned by endorsement, that does not prevent any arrangement not to negotiate the note but to put an end to it. SHAMULDHONE DUTT v SRIMUTTY SUSILA BALA DEBI, **12 C.W.N. 1102=36 C. 493=2 Ind. Cas. 553.**

(29)—*S. 2—Decree—Decision of an issue in a case—No degree drawn up embodying the decision—Appeal.*—In the administration suit, the Courts of first instance decided on one of the issues a substantial question of right between the parties, and having so decided it appointed receivers of all the property in dispute. In appeal to the District Judge, the finding on the issue was sought to be challenged, on the ground that it was a decree. The District Judge held that there was no decree and therefore no appeal lay to his Court. Before the High Court, it was contended that there was a decree with reference to the question raised in the issue in the first Court, and that an appeal lay from it: *Held*, that no appeal lay to the High Court, for there was in fact no formal decree upon the question raised in the issue. BAIDIVALI v. VISNAY MANORDAS. **11 Bom. L.R. 1326=34 B 182=4 Ind. Cas. 829.**

(30)—*S. 2 (=Civ. Pro. Code, 1882, s. 2)—Decree-holder, who is.*—A decreee-holder within the meaning of s. 2, Civ. Pro. Code, must be the person whose name is on the record

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859) *continued.*

of the suit and in whose favour the decree is passed, and the only other person who is included in the definition of decree-holder is the person to whom the decree is transferred. The beneficial owner of a decree cannot be regarded as a decree holder within the meaning of the Code. SHEORAJ SINGH v. AMIN-UD-DIN KHAN, **20 A. 539 = A.W.N. 1898, 146.**

(31)—*S. 2—Interlocutory order —'Decree'—Preliminary decree.*—The definition of decree is not intended to include an interlocutory decision in ordinary suit upon each and every point in controversy between the parties, even in those cases, where the decision upon any such question is embodied in a separate and distinct order passed during the pendency of the proceedings. An order cannot be regarded as a decree unless it is formally drawn up as such or at all events, unless it could be so drawn up A 'preliminary decree' properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. KASHI NATH v. NATHU RAM, **116 P.L.R. 1911.**

(32)—*S. 2—Meaning of 'legal representative'* —The phrase should be liberally construed. See s. 2 of the Civ. Pro. Code (Act V of 1908). DINAMONI CHAUDHURANI v. ELAHADUT KHAN, **8 C.W.N. 843.** [*R.*, 34 C. 642, F.B. = 11 C.W.N. 593 = 5 C.L.J. 491 = 2 M.L.T. 207, 9 C.L.J. 346 ; *D.*, 6 C.L.J. 462.]

(33)—*S. 2 (= Civ. Pro. Code, 1877, s. 2)—Meaning of the words "signed" and "stamped."* —The expression "person referred to" in s. 2 of the Civ. Pro. Code, means person referred to in subsequent sections of the Code as being required to sign or verify certain documents ; and it is not a condition precedent to such person being able to use a stamp, that he should be unable to write his name. THE MAHARAJA OF BENARES v. DEBI DAYAL NOMA, **3 A. 575.**

(34)—*S. 2 (= Civ. Pro. Code Act X of 1877, s. 2) —Judicial proceeding, meaning of—Crim. Pro. Code, Act X of 1872.*—The definition of 'judicial proceeding' given in the Crim. Pro. Code, (Act X of 1872) is inapplicable to the term as used in s. 2 of Civ. Pro. Code (Act X of 1877), where it means a judicial proceeding of the same nature as a suit for such proceedings as are referred to in ss. 333, 522, 526 and 531 of the Civ. Pro. Code. DALPATBHAI BHAGUBHAI v. AMARSANG KHEMABHAI, **2 B. 553.**

(35)—S. 2—Order on an application under s. 19, Arbitration Act, 1899, a decree—*See* ACT IX OF 1899, ss. 2 and 19 = 144 P.R, 1908.

(36)—S. 2—*See* MAD. ACT II OF 1864, s. 40 5. M.L.J. 91.

(37)—S. 2— Decree, meaning of—*See* PUN. ACT XVII OF 1884, s. 39 = 4 P.R. 1887.

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(38)—S. 2—'Decree'— Rent-suit— Order of Collector returning plaint for presentation to proper Court – *See* U.P. ACT II OF 1901, ss. 175, 180 and 193, 27 A. 21 = 1 A.L.J. 308 = A.W.N. 1904, 155.

(39)—S. 2—Order of an Assistant Collector of the First Class under Act II of 1901 (N.W.P. Tenancy), when amounts to a 'decree' within the definition of—*See* U.P. ACT II OF 1901, ss. 176, 177 and 193, 27 A. 31 = 1 A.L.J. 305 = A.W.N. 1904. 156.

(40)—S. 2—*See* APPEAL—DECREE AND EXECUTION OF DECREES, 23 C. 406.

(41)—S. 2—Objections against award—Order disposing of objections — Not a decree — No appeal or revision—*See* AWARD, 1 P.L.R. 1911 = 9 Ind. Cas. 385 = 12 P.W.R. 1911.

(42)—S. 2—*See* CHIEF COURT, PUNJAB, JURISDICTION OF, 93 P.R. 1909 = 172 P.W.R. 1909 = 4 Ind. Cas. 852.

(43)—S. 2— Valuation by plaintiff if determines *forum* of appeal—*See* COURT FEES ACT, 1870, s. 12, 14 C.W.N 343 = 5 Ind. Cas. 18.

(44)—S. 2—*See* DECREE - GENERAL, 29 B. 13.

(45)—S. 2—*See* DECREE—MISCELLANEOUS 2 A.L.J. 18 = A.W.N. 1905, 10 = 27 A. 380.

(46)—S. 2—*See* ENGLISH COURT, 28 C. 641 = 5 C.W.N. 741.

(47)—S. 2 - *See* ENGLISH LAW, 28 C. 641 = 5 C.W.N. 741.

(48)—S. 2—*See* FARIDKOT, 191 P.R. 1888, 112 P.R. 1894.

(49)—S. 2 = "Foreign Court," meaning of— *See* INJUNCTION—SPECIAL CASES, 13 C.W.N. 346 = 36 C. 233 = 1 Ind. Cas. 927.

(50)—S. 2.— *See* INSOLVENCY — INSOLVENCY UNDER CIV.PRO. CODE, 43 P.R. 1894.

(50-a) -S. 2—*See* NOS. 189, 278, 901-*a*, 1205 1904, 2660, 3217-*m*, 3636, 4669, 5921, *infra.*

(50-b)—*S. 2 (2)—'Decree' (preliminary)—Right of parties — Meaning—Provision for appeal against decree—Interlocutory order—No revision.*—The 'rights of the parties' referred to by the definition of the term 'decree' in s. 2 (2), Civ. Pro. Code, 1908, must be taken to be the rights of the parties *inter se* in regard to the subject-matter of the suit. An interlocutory order passed by a Court on any objection raised by a defendant, however frivolous, cannot be treated as coming within the definition of a decree, and therefore justifying an immediate appeal to a higher Court. Orders made with reference to :—(1) an objection as to part of the suit based upon the terms of the Pensions Act ; (2) a question as to how that portion of the claim dealing with profits is to be determined ; (3) a demand by the defendant that

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

security should be taken from the plaintiff before the case proceeds further, and (4) an allegation that the stamp-fee required from the plaintiff was largely deficient, do not amount to 'preliminary decrees' within the meaning of s. 2 (2), and are not appealable. Where an appeal lies against the decree that might be passed in a suit, the Court will decline to interfere in revision with interlocutory orders passed in that suit. MIR KUMAR ALI v. MUSSAMMAT NASIB-UN-NISSA, **82 P.R. 1911 (Civil)**. (146 P.R. 1908, *D.*)

(51)—S. 2 (12)—*See* MORTGAGE—REDEMPTION, 5 Ind. Cas. 529.

(52)—Ss. 2, 3 (=s. 2, Civ. Pro. Code, 1882—An award under ss. 26, 30 and 54 of Act I of 1894 (Land Acquisition) is a decree within the meaning of—*See* ACT I OF 1894, ss. 26, 30, 54, 53 P.R. 1906=103 P.L.R. 1906.

(53)—Ss. 2, 3 — Order merely determining point of law arising incidentally or otherwise—*See* APPEAL—ORDERS, 18 C. 469.

(54)—Ss. 2, 3—*See* LIMITATION ACT, 1908, ss. 4 and 5, art. 151, 91 P.L.R. 1903=22 P.R. 1903.

(55)—Ss. 2, 3—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 29 C. 60.

(56)—Ss. 2, 3, 96, 108, O. VII, r. 11—*See* COURT FEES, A.W.N. 1889, 124.

(57)—Ss. 2, 3, 104, O. XLIII, r. 1—Withdrawal of suit brought under s. 14 order as to plaintiff's costs on, no appeal lies from—*See* APPEAL—COSTS, 21 M. 421=8 M.L.J. 74.

(58)—Ss. 2, 4, 107 (2), O. XXII, r. 11, s. 96—*See* JUDGMENT—FORM AND CONTENTS, 9 B. 452.

(59)—Ss. 2, 3 and O. III, r. 1—Presidency Court of Small Causes, Bombay, exclusive right of Barristers and Attorneys to practice in—Pleaders of Bombay High Court, whether entitled to practise in Presidency Small Cause Court—Right of High Court pleaders to practise in Mofussil Court—Civ. Pro. Code, 1882, ss. 2, 36—Power of Presidency Small Cause Court to make rules as to practitioners therein — *See* LEGAL PRACTITIONERS — PLEADERS, 8 B. 105, F.B.

(60)—*Ss. 2, 11, 96, O. XXVI rr. 13 and 14 (=Civ. Pro. Code, 1882, ss. 2, 13, 396, and 540)—Suit for partition—Preliminary order not appealed against—Appeal against final decree not barred—Punjab Courts Act, 1884, as amended by Act XXV of 1899, s. 70 (1) (b)—Revision—Second application for—Fresh security.*—When an application under s. 70 (1) (*b*) of the Punjab Courts Act, as amended by Act XXV of 1899, was dismissed for default of appearance before it was admitted to a hearing, and a second application was filed by the petitioner, *held*, that the second application was

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admissible under 54 P.R. of 1901=45 P.L.R. 1901. *Held*, also, that it was not necessary for the petitioner to file fresh security. An appeal against a final decree passed in a suit for partition is not barred by reason of no appeal having been filed against the preliminary order passed in the suit adjudicating on the rights of the parties. RUSTOM KHAN v. LATIF KHAN, **56 P.L.R. 1902=49 P.R. 1902**, (23 C. 279, 19 C. 463, 23 C. 406, 62 P.R. 1897, *R.*)

(61)—Ss. 2, 14—*See* FOREIGN COURT, JUDGMENT OF, 28 C. 641=5 C.W.N. 741.

(62)—*Ss. 2, 22, 23 (2), 25=ss. 2, 23, 25, Civ. Pro. Code, 1882,—Reference by District Judge—Transfer of suit—Bengal Civil Courts Act (XII of 1887), ss. 9, 39—Courts of Subordinate Judge, if subordinate to the Court of the District Judge—Delay*—The Court of the Subordinate Judge is subordinate to the District Court for the purposes of s. 23 of the Civ. Pro. Code (Act XIV of 1882), no matter what the *forum* of appeal may be in the particular case for the transfer of which the application is made. The jurisdiction of a superior Court to transfer a suit from one Subordinate Court to another ought to be exercised with extreme caution. The choice of *forum* given to a plaintiff by the Legislature ought not to be lightly interfered with, and the Court will not transfer a suit properly laid, except upon proof of special circumstances. A well recognised ground exists when the convenience of necessary witnesses and the ends of justice will be promoted by the transfer; but the ground alleged must be clearly established. Under s. 25 of Code of Civil Procedure (Act XIV of 1882) the Court has, no doubt, ample power to make the order even after the issues have been framed; but satisfactory reasons ought to be given in explanation of the delay. UMATUL MEHDI v. KULSOOM, **10 C.L.J. 208=3 Ind. Cas. 539**.

(63)—*Ss. 2 and 47 (=ss. 2 and 244, Civ. Pro Code, 1882)—Order in the exercise of inherent powers to punish for contempt—Appeal, maintainability of—Revision—Appeal memorandum treated as application for revision.*—Certain debts due to the defendant were attached in execution of a decree. Some third persons collected the debts in defiance of the Court's order of attachment. The attaching-creditor having applied to the Court for an order on the third persons to discharge the amount realized by them and pay the same into Court, the Court directed them to pay in not only the amount actually collected by them, but also the amounts which they had spent in realising the amount and which they had realized as costs from the debt. *Held*, the order of the Court directing the payment of the costs realized was wrong, all, that Court could legally enforce payment of, being the amount actually collected and not the costs of the litigations leading up to the realization of the amounts. *Held*, also, that no appeal lay

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against the order of the Court, directing a refund of the money improperly collected, since the order was one not in execution of the decree nor one coming under ss. 2 and 244, but one passed in the exercise of its inherent powers to punish for contempt. Case, in which the High Court treated an appeal-memorandum as a petition for revision, when it was found that the appeal did not lie GODU RAM v. SURAJ MAL, **A.W N. 1905, 10=2 A L J. 18=27 A. 380.**

(64)—*Ss. 2, 47 (=ss. 244, Civ. Pro. Code, 1882.)*—Proceedings by the Court, in the exercise of its inherent power to punish for contempt, do not come under s. 244; and an order passed therein is not a 'decree' within the meaning of s 2. GODU RAM v. SURAJ MAL, **2 A.L J. 26=A.W.N. 1905, 9=27 A. 378.**

(65)—*Ss. 2, 47 (=Civ Pro. Code, 1882, ss. 2 & 244)—Execution of decree—Order dismissing application for execution without fixing date for disposal—Appeal*—Where the Court executing a decree dismissed an application for execution of a decree without fixing a date for its disposal and giving a notice of such date to the decree holder, *held* that the order of dismissal was a decree and appealable as such, and was *ultra vires*. The Lower Court was apparently actuated by a desire to clear its files of a long pending execution case. RAM CHAND v. RAHIM DAD, **130 P.L.R. 1902.**

(66)—*Ss. 2, 47 (=Civ. Pro. Code, 1882, ss. 2, 244)—Order — Decree, copy of, to file with appeal memo—No necessity—Application to set aside an execution-sale—Fraud of decree-holder auction-purchaser, stranger to suit—Sale confirmed pending application to have it set aside—No bar to setting it aside.*—An order determining any question referred to in s. 244, Civ. Pro. Code, is a decree under s. 2, Civ. Pro. Code; when, therefore, an appeal is preferred against such an order, it is sufficient to attach to the memorandom of appeal a copy of the order itself and it is not necessary to attach to the memorandum, a copy of the decree, even though such a decree may have been drawn up. In the case, however, of a suit or proceedings which have the character of a suit (*e.g.*, contentions, probate-proceedings, etc,), it is necessary to file a copy of the decree. [*D.*, 32 C. 175.] A judgment-debtor is entitled, by an application under s. 244, Civ. Pro. Code, to have an execution-sale of his property set aside if he alleges and proves fraud on the part of the decree-holder, though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit. (19 C. 683, 2 C.W N. 691, 4 C.W.N. 541, 3 C.W.N. 403, *F.*) [*R.*, 8 C.W.N. 230, 6 C.L J 111.] When, during the pendency of an application under s. 244, Civ. Pro. Code, to set aside an execution-sale, the sale is confirmed, such confirmation is no bar to the maintenance of the application, even though the auction-purchaser is a stranger to the suit. The decision of the Privy Council in 19 C. 683. P.C., must be taken to have overruled, in effect, the Full Bench case of 17 C 769. KHIRODE SUNDARI DARI v. JANENDRA NATH PAL, **6 C.W.N. 283.** (3 C.W.N. 399, *R.*)

(67)—*Ss. 2 and 47 (=ss. 2 and 244, Civ. Pro. Code, 1882)—Second appeal by auction-purchaser, maintainability of—Order setting aside on ground of fraud*—An order on an application by a judgment-debtor, against the decree-holder and the auction-purchaser, who was a third party, to have a sale set aside on the ground of material irregularity, as also on the ground of fraud, falls, within s. 244, and a second appeal lies even at the instance of the auction-purchaser. (19 C. 683, *F*; 2 C.W.N. 691, 3 C.W.N. 399, *Appr.*; 1 C.W.N,, p. cc., *Disappr.*) The circumstance that the auction-purchaser is a party to the application, does not make it any the less a case under the section. (19 C. 683, F.) The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within this section. [*F.*, 25 B. 418, 12 C.W.N. 136, Note, 6 C.W.N 283, 31 C. 385, 10 Bom. L.R. 752, 32 B. 572; *Appr.*, 6 C.W.N. 279; *R.*, 27 C. 197.] Here, the order setting aside the sale on the ground of fraud, is a decree within the meaning of s. 2, Civ. Pro. Code,—*Per Banerji, J.* HIRA LAL GHOSE v. CHUNDRA KANTO GHOSE. **26 C. 839=3 C.W N. 403.**

(68)—Ss. 2, 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 10 C. 150.

(69)—Ss. 2. 47—Pre-emptor—Mesne profits—*See* PRE-EMPTION—MISCELLANEOUS, 6 Ind. Cas. 648.

(70)—Ss. 2 (2), 47 (1)—Order directing distribution of sale proceeds between several mortgagees — Whether a decree — Appeal—*See* MORTGAGE—GENERAL, 8 Ind. Cas. 4.

(71)—*Ss. 2, 47, 96 (=ss. 2, 244 (c), 540, Civ. Pro Code, 1882) (amended by Act VII of 1888 and Act VI of 1892)—Order dismissing objections to the execution of decree for default*,—An order dismissing for default, objections to execution of a decree under s. 244 (*c*) is a decree within the meaning of s. 2, and is appealable, under the addition to s. 540, made by the Amending Act VII of 1888. LALNARAIN SINGH v. MAHOMED RAFIUDDIN **28 C. 81.** (15 A. 359, 23 C. 115, 827, *D.*)

(71-*a*)—Ss. 2, 47, 104 (2), 154, O. XXI, rr. 90, 92—Application for setting aside sale for fraud or irregularity—Second appeal—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 Ind. Cas 3.

(72)—*Ss. 2 (2), 47, 104, O. XXI, r. 66, O. XLIII, r. 1—Order settling valuation to be published in sale-proclamation—Whether appealable.*—An order under O. 21, r. 66, settling the valuation to be published in the sale-proclamation of the properties to be sold is appealable

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under ss. 47 and 2 (2). But the learned Judges stated that, in view of the conflict of decisions, they would have considered it their duty to refer the question to a F.B. but for the fact that the appellant's case had no merits. LAKHPATIKOER v. HARKHO SINGH, **6 M.L.T. 252=3 Ind. Cas. 342.** (8 C.W.N. 257, 12 C.W.N. 542, 30 C. 617, 27 M. 259, 25 M. 568, *R.*)

(73)—*Ss. 2, 47, 104, O. XXI, rr. 66, 70, O. XLIII, r. 1 (=Civ. Pro. Code, 1882, ss. 2, 244, 287, 588)—Objection to valuation of properties in sale-proclamation — Maintainability of appeal—Objections not raised in previous petition and when proclamation prepared—Similar petition before appellate decree, rejected—Effect.*—An order by which objections raised by a judgment-debtor to the valuation of the properties sought to be sold in execution and to the accuracy of their description were overruled by the Court, is a decree within the meaning of ss. 2 and 244 of the Civ. Pro. Code, and an appeal lies therefrom, though no appeal is provided from such an order under s. 588. It is the judgment-debtor's right to have a just and true valuation placed upon his property and to have the properties described accurately in the proclamation of sale. And the Court is bound to inquire into the objection under s. 287 (9 C. 214, 9 A. 500 and 18 C. 469, *Commented on*; 23 M. 560, 25 I.A. 146 and 15 I.A. 171, *Relied on*). [*Doubted*, 6 M.L.T. 252.] The fact that the objections above described were not mentioned in a previous petition put in by the judgment-debtor to have the execution transferred to another district where the bulk of the properties were situated, is no objection to an inquiry into the same by the Court. The judgment-debtor should raise such objections as early as may be possible after he came to know of the details of the proclamation, and since proclamations are usually prepared behind his back, the fact that he did not raise them before the proclamation was settled on, does not debar his application. Where objections substantially the same as the above were preferred in answer to an execution proceeded with during the pendency of an appeal from the original decree and were overruled, *held* that the petition for execution of the decree of the appellate Court was a different one from the original application and not a continuation of it and that the objections must again be inquired into by the Court. RAJA RAMESSUR PRASHAD NARAIN SINGH v. RAI SHA KISSEN, **8 C.W.N. 257.**

(74)—*Ss. 2, 47, 104, 145, O. XXI, r. 71, O. XLIII, r. 1 (=ss. 2, 244, 253, 293, 588)—Execution of decree—Defaulting purchaser—Loss by re-sale—No appeal from order under Civ. Pro. Code, ss. 293 244, "decree"—Civ. Pro. Code, s. 244—"Representative" of judgment debtor.*—No appeal lies from an order under s. 293 of the Civ. Pro. Code for recovering from a defaulting purchaser of a deficiency of price happening on a re-sale of the property. Such an order is not a "decree" within the meaning of s. 2 of the Code. Where property is knocked down at a sale in execution of a decree, the maker of default in payment of the earnest money does not in fact become finally the purchaser, and cannot be treated as a "representative" of the judgment-debtor within the meaning of s. 244 of the Code. SOUDAGAR MAL v. ABDUL RAHMAN KHAN, **A.W.N. 1890, 85.** [*Appl.*, 14 A. 201, F.B., 12 A. 397; *F.*, 13 A. 569.]

(75)—*Ss. 2, 47, 104 O. XXI, r. 72 O. XLIII, r. 1 (=ss. 2, 244, 294, 588 (16), Civ. Pro. Code, 1882)—Leave to bid, refusal of, to decree holder—Appeal.*—No appeal lies against an order forbidding a decree-holder to bid at a sale held in execution of a decree, the matter being one of administration. KO THA HNYIN v. MA HNIN I, **15 C.W.N. 862, P.C.** (13 C. 174, *R.*)

(76)—*Ss. 2, 47, 144—Decree—Appeal—Pre-emption suit—Execution-proceedings—Mesne profits—Order allowing mesne profits to pre-emptor.*—When a decree for possession of land is passed in a suit for pre-emption, a question, whether mesne profits should be allowed to the plaintiff for the period between the institution of his suit and the final obtaining of his decree on appeal, is not included in the words "relating to the execution, discharge or satisfaction of the degree" as used in s. 47 of the Civ. Pro Code, 1908. The case does not come under s. 144 of the Code, as there is really no question on restitution. It is really a claim to compensation or damages for wrongful exclusion from possession of the land. The question could be carried only by a separate suit. When an order was passed in favour of the paintiff by the District Judge in execution proceedings, *held* that the order was a decree within the meaning of s. 2 of the Code and was therefore appealable. Since it was illegal, it must be set aside. CHAUDHRI HOA RAM v. RAMA PALIYA, **44 P.L.R. 1910.**

(77)—*Ss. 2, 47, O. XXI, r. 16 (=Civ. Pro. Code, 1882, ss. 2, 244, cl. (c), 232)—Execution of decree—Assignees of decree—Estoppel—Jurisdiction.*—When the plaintiffs, the assignees of a decree, appealed from the order of the Subordinate Judge dismissing their application under s. 232, Civ. Pro. Code, for execution of the decree, the defendant, who was then judgment-debtor, contended that the order was not a decree within the meaning of ss. 2 and 244, cl. (*c*), Civ. Pro. Code, and was, therefore, not appealable. The District Judge accepted the contention and dismissed the appeal. The plaintiffs took up the position which the defendant assigned to them, and brought a suit for the determination of the question as to whether they were the assignees of the decree and entitled to execute it. The defendant contended that the order was a decree within the meaning of ss. 2 and 244, cl. (*c*), and the

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question in dispute could not be decided by a separate suit under the provisions of s. 244 *Held*, on the principle that a party in a litigation cannot be allowed to take up inconsistent positions, that the defendant could not be allowed to take up the position that s. 244 barred the suit. The circumstance that the objection taken by the defendant raised a question as to the jurisdiction of the Court did not prevent the application of the principle. When the question as to the jurisdiction of the Court is not raised, or cannot be allowed to be raised, the Court is not bound to consider, *suo moto*, whether it has jurisdiction. MOHAMMAD MEDHI ALI KHAN v. SHARFUNNISA, **3 O.C. 32.** [*R.*, 4 O.C. 409.]

(78)—Ss. 2, 47 O. XXI, r. 29—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 13 C. (1).

(79)—Ss. 2, 47, O. XXI, r. 66 (2) *(c)*—Sale-proclamation—Under-statement in valuation of property sold—Appeal—Order, when decree—*See* APPEAL—GENERAL, 14 C.L.J. 35.

(80)—Ss. 2, 47, O. XXI, r. 69—*See* DECREE—GENERAL, A.W.N. 1888, 71.

(81)—*Ss. 2, 47, O. XLI, r. 5 (=ss. 2, 244 and 545, Civ. Pro. Code, 1882)—Order of appellate Court refusing stay of execution of decree under appeal—No appeal lies from such order—Exercise of discretion, interference with—Decree.*—An order of an appellate Court refusing to stay execution of the decree under appeal is not a decree within the meaning of s. 2 of the Code. Nor is it an order under s. 244, since the appellate Court is not the Court executing the decree under appeal. No appeal, therefore, lies from such order. (12 B. 279, *Doubted*). *Held*, further, that Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. RAMACHANDRA v. BALMUKUND, **29 B. 71.** (26 A. 238, P.C., *Appl.*)

(82)—Ss. 2, 54, 109, O, XXVI, r. 13, O. XLIII, r. 1—*See* APPEAL — DECREES AND EXECUTION OF DECREES, 19 C. 463.

(83)—Ss. 2, 60—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 25 M. 402, 143 P.L.R. 1902.

(84)—*Ss. 2 and 80 (=ss. 2 and 424, Civ. Pro. Code, 1882)—Official Assignee—Public officer—Notice.*—The Official Assignee of the Insolvent Court is a public officer as defined in s. 2 of the Civ. Pro. Code; consequently, a suit, regarding acts done by him in the capacity of Official Assignee, cannot be filed against him without giving him the notice prescribed by s. 424 of the Code. JOOSUB HAJI v. N.W. KEMP, **4 Bom. L.R. 929=26 B. 809.**

(85)—Ss. 2, 80—*See* COLLECTOR, 3 A. 20, F.B.

(86)—*Ss. 2, 96 (=Civ. Pro. Code, 1882 ss. 2, 540)—Order determining period for which mesne profits are recoverable—Decree—Appeal.*—An order made in the course of execution-proceedings determining the period for which mesne profits are recoverable, is a decree within the meaning of s. 2 of the Civ. Pro. Code, and is appealable both under general principles and under s. 540, Civ. Pro. Code. RAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH. **5 C.W.N. 52=27 I.A. 209=23 A. 152, P.C.=2 Bom. L.R. 978.**

(87)—*Ss. 2, 96, 104, O. XLIII, r. 1 (=ss. 2, 540, 588, Civ. Pro. Code, 1882)—Decree—Order—Order adjudicating rights of defendants in an interpleader suit—Appeal.*—The adjudication upon the claims of the defendants in an interpleader suit is a decree, and stands on the same footing as an adjudication of any other claims, and is appealable under the provision of s. 540. The direction as to interpleading is an order and appealable under s. 588 only. MAHARAJ SINGH v. CHHITTAR MAL, **4 A.L.J. 683=A.W.N. 1907, 270=30 A. 22.**

(88)—*Ss. 2, 96 (=old s. 540), 105 (=old s. 591), 115 (=old s. 622) O, IX, r. 8 (=old s. 102)—Order under—Appealability—Old s. 622=s. 115, Civ. Pro. Code, 1908—Meaning of "case"*—An order under this section, being a decree within the meaning of s. 2, is appealable under s. 540 The word "case", as used in s. 622, does not necessarily mean the whole case, but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided in the Code, and may include an interlocutory order not falling under (old s. 591)=s. 105. An appellate Court, that does not accept an appeal against a dismissal for default, when the default was accounted for alleging that the default had not been explained commits a material irregularity. PANDIT RAM KANT v. PANDIT RAJDEV, **60 P.R. 1897.** [*R.* 122 P.R. 1907=51 P.W.R. 1907, 77 P.R. 1909, 6 P.R. 1910. 83 P.R. 1902; *Observed in* 12 O.C. 405; *F.*, 77 P.R. 1909.]

(89)—Ss. 3, 96, O. XXI, r. 71—*See* APPEAL—ORDERS, 13 A. 569=11 A.W.N. 156.

(90)—Ss. 3, 96, O. XLI, r. 17—*See* APPEAL—EX-PARTE CASES, 3 A. 382.

(91)—Ss. 2, 100, O XLI, r. 17—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 23 C. 827.

(92)—*Ss. 2, 100, 104, O. XLIII, r. 1, O. IX, r. 9, O. XLI, rr. 17 and 19 (=ss. 2, 584, 588, 103, 556, 558, Civ. Pro. Code, 1882—Dismissal of appeal for default of appearance—Judge's discretion to restore appeal—Order dismissing appeal for default whether a decree.*—An order was made before the recess adjourning an appeal to the 22nd June to fix the date of hearing. On the 22nd June the appeal was posted to the 1st July on which date it was called for hearing and, appellant not being present either in person or by pleader, was dismissed for default. *Held*, the Judge did

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not exercise his discretion wrongly in declining to hold that the appellant was prevented by any sufficient cause from attending when his appeal was called on. A decision, dismissing a suit under s. 102 for default of appearance of the plaintiff or dismissing an appeal under s. 556 of the Code for default of appearance by the appellant, is not a decree within the meaning of s. 2 of the Code, inasmuch as there is no 'formal' expression of an adjudication upon any right claimed or defence set up. DAKSHINA-MURTHY PILLAI v. THE MUNICIPAL COUNCIL OF TRICHINOPOLY BY ITS CHAIRMAN, **3 M.L.T. 336=31 M. 157.** (22 M. 221, 2 M. 75, 8 A. 354, 30 C. 660, 16 B. 23, 9 A. 427, *D.*)

(93)—*Ss. 2, 104, O. IX, r. 8, O. XLIII, r. 1 (=Civ. Pro. Code, 1882, ss. 2, 102, 588)—Dismissal for default—Maintainability of appeal.*—An order dismissing a suit under s. 102 of the Civ. Pro. Code, is as much a decree as an order under any other section deciding a suit, and an appeal therefore lies from such an order. GOSTO BEHARY SARDAR v. HARI MOHAN ADAK, **8 C.W.N. 313.** (A.W.N. 1883, 171, 9 A. 427 and 30 C. 660, F.B., *R.*). [*R.*, 121 P.R. 1907. F.B. =51 P.W.R. 1907.]

(94)—*Ss. 2, 104, O. IX, r. 13, O. XLIII, r. 1 (=ss. 2, 108, 588, Civ. Pro. Code, 1882)—Applicability of s. 108 to execution-proceedings—'Ex parte decree,' meaning of—Appeal from order rejecting application to set aside ex parte decree—Inherent power of Court to set aside its own order, made ex parte.*—S. 108 of the Code of Civil Procedure applies to execution-proceedings. When, therefore, an order was passed *ex parte* in the execution-proceedings, directing the payment of a certain sum of money by the judgment-debtors to the decree-holder in satisfaction of the decree, the order was one under s. 244, Civ. Pro. Code, and was a 'decree' within the meaning of s. 2 of the Code, and if it was passed without service of any notice under s. 248, Civ. Pro. Code, upon one of the judgment-debtors, he may apply under s. 108, Civ. Pro. Code, to have the *ex-parte* order set aside. An appeal would lie, under s. 588, cl. (9), Civ. Pro. Code, from an order, dimissing an application under s. 108 of the Code on the ground that s. 108 of the Code did not apply to execution-proceedings, if the application could be entertained under that section. The Court has an inherent power to prevent an abuse of its processes and is competent to revise an order made in the absence of the opposite party and without service of notice upon him, which the law directs should be served. KRISHNA CHANDRA PAL v. PROTAB CHANDRA PAL, **3 C.L J. 276.**

(95)—*Ss. 2, 104, O. XXI, r. 95, O. XLIII, r. 1, (=Civ Pro. Code, 1882, ss. 2, 318, 588)—Application by auction-purchaser to be put into possession—Order allowing application—Appeal.*—When an application is made by the auction-purchaser under s. 318, Civ. Pro. Code to be put into possession of the property sold, and the Court makes an order allowing the application, there is no appeal from the order. NARAIN SINGH v. PARGASH, **A W N. 1886, 45.** [*F.*, 6 A.L.J. 71, F B.=5 M.L.T. 185=31 A. 82=1 Ind. Cas. 416].

(96)—*Ss. 2, 104, O XXII, rr. 10, 3 (1), O. XLIII, r. 1, ss 2 372, 365 (=588, Civ. Pro. Code, 1882)—Application to be brought on to record of appeal as assignee of deceased appellant—Rejection of application—Appeal from order of rejection not maintainable—Applicability of.*—An order *disallowing* the application of a person claiming under s. 372 to be brought on record as being the assignee of the deceased sole appellant, is not a decree within the meaning of s. 2, Civ. Pro. Code, nor does an appeal lie from such order under s. 558 (21) of the Code. (14 C. W.N. 403, *F.*; 22 A. 380, *Overruled*; 19 A. 142, *D.* [*R.*, 172 P.L.R. 1903=57 P.R. 1903.] Such application as is mentioned in para (1), *supra*, cannot be treated as an application under s. 365 of the Code, because the section is applicable only in the case of legal representatives and not in the case of mere assignees. JAMNA BIBI v. SHEIKH JHAW, **24 A. 532. F.B. = A.W.N. 1902, 112.**

(97)—*Ss. 2, 104, O. XXII, r. 10 (1), O. XLIII, r. 1 (=ss. 2, 372, 588, Civ. Pro. Code, 1882)—Order allowing objection under s. 372—Appeal—Order or decree,*—S. 588, cl. 21, provides that an appeal shall lie from an order *disallowing* an objection under s. 372; but as the section does not allow an appeal from any order except those specially set out in s. 588, it follows that no appeal lies under s. 588 from an order *allowing* an objection under s. 372 of the Code. *N.B.*—*Cf.* the new Code which allows an appeal in the latter case also). (22 A. 380, 19 A. 142; *D.*; 4 C.W.N. 403, *R.*) An order allowing an objection under s. 372 is not a decree within the meaning of s. 2 of the Code. TEJ SINGH v. CHABELI RAM, **24 A. 342= A.W.N. 1902, 84.**

(98)—Ss. 2, 104, O. XXIII, r. 1, O. XLIII, r. 1—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 18 C. 322.

(99)—Ss. 2, 104, O. XXXV, r. 5 and O, XLIII, r. 1—*See* LEASE—GENERAL. 4 Ind. Cas. 319=7 M.L.T. 49.

(100)—*Ss. 2, 104, O. XLIII, r. 4 (=ss. 2, 588 Civ. Pro. Code, Act XIV of 1882)—S. 84, Bengal Tenancy Act (VIII of 1885), nature of order made under.*—Reading the whole of s. 2, Civ. Pro. Code, it is clear that a decree can only be in a suit. An order made by a Civil Court, under s. 84 of the Bengal Tenancy Act, authorising a zemindar to acquire a certain portion of the raiyt's holding and finding the price at which he is to acquire it, is not a decree within the meaniug of s. 2, Civ. Pro. Code, and is not appealable, for no appeal is given by s. 588 of the Code or by any provision of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Bengal Tenancy Act. PEARI MOHUN MUKERJEE v. BARODA CHURN CHUCKERBUTTY, **11 C. 485**. (18 C. 271, *F.*)

(101)—Ss. 2, 107 (2), O. XXII. rr. 11, 115—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 7 A. 42=A.W.N. 1884, 223.

(102)—*Ss. 2, 109, sch. I, O. 45—Practice—Appeal to the King in Council—Order of remand—Cardinal point—Order, final and interlocutory.*—An order of remand, which determines only a part of be case and leaves other matters still to the determined is not a 'final order' within the meaning of s. 109, Civ Pro. Code. Final and interlocutory orders distinguished. BAIJ NATH DASS v. SOHAN BIBI, **6 A.L.J. 786 =6 M.L.T. 94=31 A. 545=3 Ind. Cas, 967.** (17 A. 112, *R.*)

(103)—*Ss. 2, 115—Decree or order—Preliminary issue whether a party is an agriculturist—Decision on that issue—Preliminary decree—Dekkhan Agriculturists Relief Act (XVII of 1879), s. 23—Revisional application to the District Judge—High Court Revision.*—The plaintiffs, alleging that they were agriculturists, filed a redemption suit. The Subordinate Judge raised a preliminary issue whether the plaintiffs were agriculturists, and found it in the plaintiffs' favour. The defendant applied to the District Judge in revision under s. 53 of the Dekkhan Agriculturists' Relief Act, 1879; but he, being of opinion that the decision on the preliminary issue was not a decree, declined to consider the correctness of the decision of the Subordinate Judge. The defendant next applied to the High Court under s. 115 of the Civ. Pro. Code, on the ground that the District Judge had declined to exercise the jurisdiction vested in him by law under s. 53 of the Dekkhan Agriculturists' Relief Act: *Held*, (1) that the formally expressed decision upon the point would be a preliminary decree within the meaning of s. 2 of the Civ. Pro. Code, 1908, being an adjudication which, so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to the manner in which accounts between them should be taken, notwithstanding the written contract that they had entered into before suit, that, therefore, the District Judge should not have declined jurisdiction in the case. KRISHNAJI v. MARUTI, **12 Bom. L.R. 762.**

(103-*a*)—*Ss. 2 (2), 15—Decree—Order holding portion of claim not sustainable and directing amendment—Appeal—Revision—Specific Relief Act (I of 1877), ss. 42, 54—Declaration—"Property" meaning of—Birt, right to—'Spes successionis'—Injunction when can be claimed—Birt, nature of*—Plaintiffs, as the heirs of a deceased *parohit*, sued for possession of his immoveable property and for a declaration that as such heirs they were entitled to realize *birt* offerings from the deceased's *jujmans*. On defendant's objection, the first Court held that plaintiffs could not ask for a declaration

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in regard to rights of *birt* which might exist hereafter but did not exist at the moment. The Court further held that plaintiffs should ask for an injunction and it directed the plaintiffs to comply with this order within a certain period. *Held*, that, as the order merely returned the plaint for amendment within a specific period it was not a decree, preliminary or otherwise, within the meaning of s. 2 (2) of the Civ. Pro. Code, and was consequently not appealable, nor was it open to revision. The so-called right on the part of a *parohit* to *birt* or priestly offerings is, in law, no right at all and does not amount to property for the purposes of s. 42 of the Specific Relief Act. It is at most a mere *spes successionis* or contingent right which is admittedly dependent for its existence upon the pleasure of the *jujmans* and which, therefore, may never have any existence. It cannot as such form the basis of a declaratory decree. In the absence of an agreement with plaintiffs that defendants would not visit the *jujmans*, plaintiffs cannot claim an injunction restraining defendants from visiting the *jujmans*. Before an injunction can be granted, the plaintiff's case must disclose a breach, whether actual or threatened, by the defendant of some present legal right vested in the plaintiffs. Not having any legal right to *birt* vested in plaintiffs, they could not claim an injunction to restrain a threatened breach of that right. GUR DAS v. BHAG, **216 P.L.R. 1911**.

(104)—Ss. 2, 119, O. III, rr. 1, 4—*See* LEGAL PRACTITIONERS—ADVOCATE, 9 A. 617, F.B. =A.W.N. 1887. 153.

(104-*a*)—*S. 2—O. I, r. 8—Practice—O. XXII—Representative suit—Death of plaintiff—Member of the class entitled to continue—Legal representative.*—S, a voter in a Devastanam circle, instituted a suit with sanction under O.I, r. 8, for a declaration that the election of a member of a Devastanam Committee was void, and for an injunction to restrain him from exercising the office of such member. He died pending the suit, and R, another voter, was brought on record as the legal representative of S, and the suit was revived at R's instance. *Held* that R, though not a legal representative within the definition of that term in s. 2 of Act V of 1908, could be allowed to continue the suit. Mere misdescription as legal representative would not in itself justify the setting aside of the order of revival. O. I., r. 8 applies not only to cases where concurrent interests are concerned, but also where they are similar though distinct, and the sanction granted to a voter whose interest is personal to himself is not therefore bad. A plaintiff who has obtained sanction under O. I. r. 8, has, so far as continuing or not continuing the suit is concerned an entire control of the action. In this sense, he is undoubtedly *dominus litis* and not a trustee of the action. It does not follow that other members of the class have no interest in the

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suit, and such interest as they have still subsists after the death of the plaintiff so as to enable them to pursue the action. The Legislature has imposed no limit of time within which applications must be made by persons interested in such suit to be made parties, and if any member of the class is competent by a future application to come in as a plaintiff or defendant in order to safeguard his interest or to get rid of the effects of improper conduct of the suit by the plaintiff, it stands to reason that he should be allowed to do so in a case where the plaintiff is dead and his legal representative is not competent to maintain the suit. SIVAGURUNATHA CHETTIAR v. RAMASWAMY IYENGAR, **(1912) 1 M.W.N. 105** (23 M. 28, *Appr*).

(105)—*S. 2, O. VI, r. 17, O. VII, r. 11, O. V, r. 18, O. XLI, r. 3, s 107 (2), O. XVII, r. 11 (=ss. 2, 53, 54 543, 582 Civ. Pro. Code, 1882)—Order rejecting memorandum of appeal —Stamp Duty—Decree—Appeal.*—The terms of s. 582 of the Civ. Pro. Code, 1882, read in conjunction with ss. 53 and 54 and with the definition of "decree" in s. 2 empower a Court to reject a memorandum of appeal, not only for non-compliance with the provisions of s. 543, but inadvertence to the directions contained in ss. 53 and 54 in so far as they are applicable. An appeal lies from an order rejecting a memorandum of appeal, the order being an adjudication which disposes of the appeal finally. ZAINULABDIN v. ALTAF HUSAIN, **A.W.N. 1885, 323.**

(106)—*S 2. O. IX, r. 8 (=ss. 2 and 102, Civ. Pro. Code, 1882) - Order dismissing a suit for default — Whether decree—Provincial Small Causes Court Act, s. 17 —Held* by a majority of Full Bench (*Birks, J., dissenting*) that an order dismissing a suit under s. 102 of the Code does not involve the making of a decree within the meaning of s. 2 of the Code. *Held* also (*Birks, J., dissenting*) that, even if the contrary view prevails, a decree passed on an order of dismissal for default, under s. 102 of the Code, is not a decree passed *ex parte* and, therefore, the proviso to sub-s. 1 of s. 17 of the Provincial Small Cause Courts Act does not apply to it. MANECK BAI v. P.L.S.A. MOOTHIAH CHETTI, **4 L.B R. 17 F.B.**

(107)—*S. 2. O. XI, r. 21 (=Civ. Pro. Code, 1882, ss 136,2)—Order dismissing suit, if a decree—Appeal—Practice—Procedure.*—An order dismissing a suit under s. 136, Civ. Pro. Code, is a decree under the definition contained in s. 2 of the Code and as such is appealable. MAHARAJAHDHIRAJ MAHARANA SHRI MANSINGI v. MEHATA HARIHARRAM NARHARRAM, **19 B. 307.** [*F.*, 6 C.L.J. 374 ; *R*. 4 L B.R. 17, 121 P.R 1907 = 51 P.W.R. 1907.]

(108)—S. 2, O. XXI, r. 6—*See* APPEAL—DECREES AND EXECUTION OF DECREES, **12 C. 610.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(109)—S. 2, O. XXI, rr. 10, 21, s. 48—*See* ARREST, 7 B. 301.

(110)—*S. 2, O. XXI, r. 16 (=ss. 2 and 232, Civ. Pro. Code, 1882)—Application for execution by assignee from decree holder—Court's sanction unnecessary before transfer of decree.*—"Decree-holder" is defined in s. 2 as including a person, to whom a decree has been transferred, and s. 232 itself appears to recognise that the decree has been transferred, before the transferee applies to execute it. There is nothing in s. 232 to make transfers of decrees conditional upon obtaining the sanction of the Court. It is the assignment in writing, which effects the transfer. ABBOY NAIDU v. MUTHUKRISHNA NAIDU, **2 M.L.T. 93.** (16 A. 483, *R.*, 2 M. 216, *Expl.*)

(111)—*S. 2 O XXI, r. 16 (=ss. 2 and 232, Civ. Pro. Code, 1882)—Application by transferee of decree-holder—Limitation Act, art. 179.*—An application by the transferee of a decree for execution, under s. 232 of the Code, is an application by a decree-holder, and is, therefore, in accordance with law. SUBBAYA CHETTY v. RANGASWAMY CHETTY, **2 M.L.T. 339.** (14 M.L.J. 393, *F.*, 20 C. 388, *D.*)

(112)—*S. 2, O. XXII, r. 3 (1)—Suit by Hindu widow—Death of plaintiff—Legal representative—Reversioner.*—Where a Hindu widow died after the institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of her husband, being her legal representatives, should be brought upon the record. RIKHAI RAI v. SHEOPUJAN SINGH, **7 Ind. Cas. 97 = 7 A.L.J. 960.** (9 M.I.A. 543, 2 W.R. P.C., 31, 23 C. 636, 20 A. 341, *F.*)

(113)—S. 2, O. 22, r. 3 (2), O 43, r. 1—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 3 A. 844.

(114)—S. 2, O XXIII, r. 1, O. XLI, r. 19—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 27 C. 362 = 4 C.W.N. 41.

(115)—S. 2, O. XXVI, rr. 13, 14—*See* APPEAL — DECREES AND EXECUTION OF DECREES, 12 C. 273.

(116)—*S. 2, O. XLI, r. 5 (=ss. 2 and 545, Civ. Pro. Code, 1882)—Order refusing to stay execution of a decree under appeal—Decree—Appeal.*—An order by District Judge refusing to make an order for stay of execution of a decree under appeal, is a decree, and is therefore appealable. PAMANDAS GIANCHAND v. VARIALDAS DHANOOMAL, **2 Sind L.R. 24.** (29 B. 72, *Diss.*; 25 B. 243, *R.*)

(117)—S. 2, O. XLI, r. 10—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 5 A. 380 = 3 A.W.W. 60.

(118)—S. 2, O. XLI, r. 17—*See* APPEAL—EX PARTE CASES, 23 C. 115.

(119)—*S. 2, O. XLI, rr. 17, 9. (=Civ. Pro Code, 1882, ss. 2, 556, 558)—Order under s. 56*

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Civ. Pro. Code, dismissing an appeal for default not a decree under s. 2.—Where a special procedure is provided the proper course is to follow that special procedure. An order under s. 556 is not a decree within the meaning of s. 2. It does not adjudicate upon a right claimed or defence set up, and is not specially declared in s. 2 to be a decree. FATEN SHAH v. AKBAR SHAH, **U.B.R. 1897—1901, Vol. II, 206.** (14 A. 361, 15 A. 359, 23 C. 115, *F.*, 16 B. 23, *Diss.*).

(120)—S. 2, O. XLI, r. 23—Order of remand under s. 562. Civ. Pro. Code, order of appellate Court setting aside is a decree—Limitation Act, sch. II, art. 179—*See* EXECUTION OF DECREE—GENERAL, 5 O.C. 301.

(121)—*S. 2, O. XLI, r. 23, ss. 141, 101 (1), O. XLIII, r. 1 (=ss. 2, 562, 583, and 588, Civ. Pro. Code, 1882)—Restitution—Decree ex parte, property taken in execution of—Decree set aside and case remanded in appeal, effect of—Court, remanding a case, power of.*—When a decree is set aside on appeal and the case is remanded under s. 562, the appellant is entitled to restitution of the property taken possession of, in execution of the decree so set aside, although an appeal has been preferred against the order of remand. Every Court, which sets aside an order or decree, has inherent power to order restitution of anything taken in execution of the decree or order set aside. SARODA PROSAD CHATTERJEE v. SAUDAMINI DEBYA, **3 C.L.J. 181.** (14 C. 484, 21 C. 989, *F.*)

(122)—S. 2, O. XLI, r. 28—*See* JUDGMENT—GENERAL, 23 W.R. 77.

(123)—S. 2, sch. II, rr. 14, 16, 17, 19—*See* ARBITRATION—MISCELLANEOUS, 3 A. 286.

(124)—*S. 2, sch. II, r. 17 (=ss. 2, 525, Civ. Pro. Code, 1882)—Agreement to refer to arbitration—Order of reference—Decree—Appeal.*—Where a Court, acting under s. 523 of Civ. Pro. Code, causes an agreement to refer to arbitration to be filed and makes an order of reference, the order is a decree, within the meaning of that expression as defined in s. 2 of the Code, and is, therefore, appealable. NARPAT RAI v. DEVI DAS, **126 P R 1907=88 P.W.R. 1907=60 P.L.R 1908.** (84 P.R. 1907, F.B., 25 P.R. 1902. P.C., 27 M. 255, 29 M. 303, 33 M. 757, *F.*; 26 A. 205, 28 A. 21, *Not Appr.*)

(125)—S. 2, sch. II, r. 17—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 5 A. 333, F.B.=3 A.W.N. 50.

(126)—S. 2, sch. II, rr. 20, 21, s. 96—*See* APPEAL—ARBITRATION, 3 A. 427.

(127)—S. 2, sch. II, r. 21, s. 96—*See* APPEAL—ARBITRATION, 18 M. 423, F. B.

(128)—*Ss. 2 (12) 47, O. XX, r. 12, O. XXI r. 12 (=ss 212, 244 312, Civ. Pro. Code, 1882)—Mesne profits, order ascertaining—Necessity for formal decree.*—Where an order under s. 244 is passed, it is not necessary to draw up a decree. Similarly, no decree need be drawn up in respect of an order, passed under s. 312, dismissing an application to set aside a sale. But where, in pursuance of a decree for possession directing, under s. 212, an enquiry into the amount of mesne profits, the amount of the mesne profits is ascertained, a formal decree, embodying the amount thus ascertained, should be drawn up. GOPAL CHANDRA CHAKRAVARTI v. PREONATH DUTT, **32 C. 175.** (6 C.W.N. 283, *D.*)

(129)—*S. 2 (12), O. XX, r. 12 (=ss. 2, 211, Civ. Pro. Code 1882)—"Decree"—Future mesne profits.*—An order of dismissal of an appeal for default amounts to a decree within the meaning of s. 2, Civ. Pro. Code (*Prinsep, J., contra*). Where an appeal is dismissed for default, and the lower Court's judgment awards future mesne profits, the three years' period should be computed from the date of the appellate decree dismissing the appeal for default. *Per Prinsep, J.*). RADHA NATH SINGH v. CHANDI CHARAN SINGH, **30 C. 660 F.B.=7 C.W.N. 486.** (23 C. 115, 827, 16 B. 823, *F.*) [*F.*, 10 Bom. L.R. 160 Note. 8 C.W.N. 313, 16 C.P.L.R. 151, 34 C. 403, F.B.=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 133; *D.*, 17 C.P.L.R. 1, 121 P.R. 1907=51 P.W.R. 1907, F.B; *Diss.*, 4 L.B.R. 17, 31 M. 157=3 M.L.T. 336.]

(130)—*S. 2 (12), O. XX, r. 12 (=Civ. Pro. Code, 1882, s. 244)—Mode of assessing mesne profits—Striking average between statements of both parties not proper method.*—It is not to be understood from the definition of "mesne profits" in s. 211 of the Code that the object of a Court's inquiry in order to the assessment of mesne profits should ordinarily be to ascertion the maximum amount of profits derivable from the land. If this were so, the words "*actually received*" would be altogether unnecessary. It is only where actual receipts are denied or are alleged to have fallen short of the amount which might, with ordinary diligence, have been received that there is any occasion to imagine how much might have been received. The procedure of simply striking an average between the extreme statements on both sides is not a legitimate method of assessing damages. RAMCHANDRA BHAGWANT v. ZIBLYA, **7 C P.L.R. 59.**

(131)—*S. 2 (12), O. XX, r. 12 (=Civ. Pro. Code, 1888, s. 211)—Mesne profits awardable after institution of suit.*—Under s. 211, Civ. Pro. Code, mesne profits can be granted from the date of the institution of the suit only up to three years from the date of the decree, although the party dispossessed may recover possession in execution beyond the said period. The words "*whichever event first occurs*" should be construed strictly. TRAILOKYA NATH ROY CHAUDHURI v. JOGENDRA NATH ROY, **35 C. 101.** (23 A. 152=27 I.A. 209, 24 B. 149, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(132)—*S. 2 (12). O. XX, r. 12 (=s. 211, Civ. Pro. Code, 1882)—Mesne profits*—Khamar *land—Interest.*—In determining the amount of mesne profits payable in respect of *Khamar* land, 5 per cent., on the value of the actual produce was held to be a sufficient allowance to meet the costs of supervision and any other incidental charges, for which a proprietor, who is not an ordinary cultivator of his *Khamar* land, may be liable. Principle upon which mesne profits of *Khamar* land should be assessed discussed. Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by s. 211, Civ. Pro. Code. Interest at 6 per cent. and not 12 per cent., was allowed on mesne profits after possession was delivered. IJATULLA BHUYAN v. CHANDRA MOHAN BANERJEE, **12 C.W.N. 285=7 C.L.J. 197.** [*R.*, 12 C.W.N. 650.]

(133)—*S. 2 (12), O. XX, r. 12 (=s. 211, Civ. Pro. Code, 1882)—Mesne profits—Interest.*—In the ascertainment of mesne profits due to a decree-holder, he is entitled to receive interest year by year, on the amount found to be due, and not only on the amount actually ascertained and embodied in the decree. RADHRAMAN MUNSHI v. SURNOMOYI DEBI, **30 C. 506=7 C.W.N. 437.** (8 C. 332, *D.*)

(134)—*S. 2 (12), O. XX, r. 12 (=s. 211, Civ. Pro. Code, 1882)—Suit for mesne profits—Defendant excluded from possession for a certain period.*—In the case of every wrong, the liability of the defendant is limited to damages for the wrong, which he himself has done. If a defendant, who is sued for mesne profits, was excluded from possession for a certain period, she can scarcely be said to have been in wrongful or any possession. She cannot be said to have actually or even impliedly received the profits, nor could she, with ordinary or extraordinary deligence, have received them. So she will not be liable for the mesne profits during that period. ABBAS v. FASSIH-UD-DIN, **24 C. 413.** (11 W.R. 444, *F.*) [5 C.W.N. 720.]

(135)—*S. 2 (12), O. XX, r. 12 (=Civ. Pro. Code, 1882, s. 211)—Proceedings to determine mesne profits.*—There are numerous sections in the Code which direct that, for certain relief, an application may be made ; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal application from time to time, asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. The object of the Legislature in enacting s. 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits. Proceedings in determining the amount of mesne profits are not proceedings in execution of decree in regard to any fixed sum, but merely a continuation of the original suit carried on in the same way as if a single suit were brought for mesne profits by itself. PURAN CHAND v. ROY RADHA KISHEN, **19 C. 132, F.B.** [*Appr.*, 22 C. 425 ; *R.*, 21 C. 550.]

(136)—*S. 2 (12), O. XX, r. 12 (=s. 197, Civ. Pro. Code, 1859=s. 212, Civ. Pro. Code, 1882) —Decree for possession and mesne profits—Assessment of mesne profits—Determination of amount of mesne profits reserved by decree—Realisation—Limitation* —When a decree is made under s. 197 of Act VIII of 1859, proceedings, taken after the original decree for possession, for determining the amount of mesne profits payable to the plaintiff, are, in effect, proceedings in continuance of the original suit, and until they are brought to a close, and the amount actually due has been declared, no decree for a specific sum of money can be said to exist. (21 W.R. 212, 22 W.R. 328, *F.* ; 24 W.R. 339, *R.*) [*F.*, 14 C. 50. 22 C. 425 ; *Appr.*, 8 M. 137, 19 C. 132, F.B.] The wording of the above section is perfectly consistent with the view that, where the enquiry as to the amount of mesne profits is reserved, the decree for possession of land is only a partial decree in the suit and that there is to be a further enquiry and a further decree in respect of mesne profits. The words " for the execution of the decree " refer only to the execution of the decree for the land, and cannot refer to execution of what has not yet taken the form of a decree. So, where a decree for possession of land and mesne profits left the amount of mesne profits to be ascertained subsequently, an application for realisation of the amount of mesne profits is within time, if brought within three years from the date of the order determining the amount of mesne profits. DILDAR HOSSEIN v. MUJEED-UN-NISSA, **4 C. 629.**

(137)—*S. 2 (12), O. XX, r. 12 (=s. 211, Civ. Pro. Code, 1882)—Mesne profits, calculation of —Allowance of expenses of collection of rent by trespasser* —In estimating the mesne profits which the owner of land is entitled to recover from a trespasser, the costs of collecting rents which are ordinarily incurred by the owner should be allowed to the trespasser only when such trespasser entered on the land in the exercise of a *bona fide* claim of right. But, when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bona fide* belief that he was entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as government-revenue or ground-rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. DUNGAR MAL v. JAI RAM, **24 A. 376= A.W.N. 1902, 90.** (1 A. 518, F.B., *F.*; 23 A. 252, *D.*; 27 C. 951=27 I.A. 110, P.C., *R.*) [*D.*, 6 A.L.J. 327.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*Continued.*

(138)—*S. (12), O. XX, r. 12 (=Civ. Pro. Code, 1882, s 211)*—*Mesne profits*—Res Judicata.—Where the defendant in a suit for possession was not in wrongful possession, mesne profits could not be claimed from him under s. 211, Civ. Pro. Code, and a subsequent suit for the recovery of mesne profits is not barred by *res judicata*. SUBBIER v. RANGA AIYANGAR, 9 M.L.J. 168.

(139)—*S. 2 (12), O. XX, r. 12 (=s. 211, Civ. Pro. Code, 1882)*—*Execution of decree*—*"Mesne profits," whether include interest on such necessarily*—*Decree for mesne profits against trespasser in possession*—*Costs of collection of rents not to be deducted in calculating amount of mesne profits.*—The term 'mesne profits' in the Civ. Pro. Code, does not necessarily carry with it, as an essential ingredient, interest on such profits. It may, and ordinarily does, include such interest, but s. 211, Civ. Pro. Code, leaves the matter in the discretion of the Court which determines the original suit. It is for that Court to say upon a consideration of the facts of the case whether any interest shall be allowed, and if allowed, at what rate it is to be allowed. If that Court in express terms refuses to grant interest or if, when such interest is claimed, it passes a decree, the terms of which are silent as regards interest, in either case, the Court which executes the decree, even when the amount of mesne profits is left for future inquiry, cannot add to the original decree interest which the original Court refused to grant. (8 C. 332, 11 I. A. 88, *R.*) Where a trespasser in possession had not entered upon the property with a *bona fide* belief that he was entitled to do so, he is not entitled to charge the expenses for collecting rent incurred by him while in possession of the property, in reduction of the mesne profits awarded against him to the rightful owner. ABDUL GHAFUR v. RAJA RAM, 22 A. 262=A.W.N. 1900, 67. [*Reversed on appeal*, 28 A. 252; *R.*, 24 A. 376.]

(140)—*S. 2 (12), O. XX, r. 12 (=Civ. Pro. Code, 1882, s. 211)*—*Decree for possession with future profits*—*Order by executing Court as to period for which mesne profits was payble, appealability of*—*Construction of decree affirmed by order in Council.*—The decree for possession of the suit land 'with future profits' obtained by the plaintiff from the District Court entitled him, under s. 211 of the Civ. Pro. Code to recover mesne profits from the date of instituting the suit until delivery of possession or until the expiration of three years from the date of the decree, the 12th November, 1887, whichever event should first happen. This decree was reversed by the High Court but restored by an order of the Privy Council. In proceedings in execution of the decree, the Court *held* that, as the judgment of the Court of final appeal had merely restored the decree of the Court of first instance, the plaintiff was not entitled to recover mesne profits for more than three years from the date of the original

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decree, and this order of the Court was held to be a final order within the meaning of s. 2 of the Civ. Pro. Code, so as to be appealable under s. 540 of the Code. Also the order of the Privy Council being the enforceable decree in effect, the award of mesne profits had to be construed as made with reference to the date of such order and not to that of the original decree. Consequently, on the construction of the appellate decree which, affirming the decree of the lower Court, had adopted its terms and carried on their effect down to a later date, the plaintiff was held to be entitled to mesne profits until delivery of possession or three years from the date of the final appellate decree. BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH, 23 A. 152, P.C.=27 I.A. 209=5 C.W.N. 52. [*R.*, 35 C. 1017, 29 C 758, 30 C. 660; *D.*, 58 P.R. 1905=59 P.L.R 1905, 31 M. 28=17 M. L.J. 495=3 M.L T. 26]

(141)—S. 2 (12), O. XX, r. 12—*See* BUR. ACT II OF 1876, L.B.R. 1872—1892, 451.

(142)—S. 2 (12), O. XX, r. 12—*See* DECREE—DECREE, CONSTRUCTION OF, 9 M.L.J. 334.

(143)—S. 2 (12), O. XX, r. 12—*See* LIMITATION—GENERAL, 32 C. 175.

(144)—S. 2 (12), O. XX, r. 12—*See* MESNE PROFITS—GENERAL, 21 A.425, F.B.=A.W.N. 1899, 153.

(145)—S. 2 (12), O. XX, r. 12—*See* MESNE PROFITS—MODE OF ASSESSMENT, 27 C. 951, P.C.=26 I.A. 110=4 C.W.N. 631, 15 C.W.N. 825.

(146)—S. 2 (12), O. XX, r. 12—Calculation of mesne profits—Deduction of valid expenses incurred by judgment-debtor—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 6 A.L.J. 327=2 Ind. Cas. 464.

(147)—S. 2 (12), O. XX, r. 12—*See* MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 2 Bom. L.R. 978, 8 Ind. Cas. 34.

(148)—S. 2 (12), O. XX, r. 12—*See* RES JUDICATA—CAUSE OF ACTION, 9 M.L.J. 163.

(149)—S. 2 (12), O. XX, r. 12, ss. 145, 65, O. XXI, r. 94, O. XXI, r. 95, O. XLV, r. 15—*See* EXECUTION OF DECREE—PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 15 M. 203=2 M.L.J. 1.

(150)—S. 2 (12) O. XX, r. 12, O. XXI, rr. 10, 21, ss. 48, 47, O. XXI, r. 6—*See* HINDU LAW—WIDOW, 6 C.L.J. 462.

(151)—*Ss. 2 (17), 80*—*Public servant*—*Cantonment Committee is a public servant*—*Notice of claim*—*Notice compulsary*—*Actions ex delicto*—The Cantonment Committee, constituted under the Indian Cantonments Acts, 1889, is for the purposes of s. 80 of the Civ. Pro. Code, 1908, a "public officer" as defined in s. 2 (17)

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of the Civ. Pro. Code, S. 80 of the Civ. Pro. Code, 1908, applies to actions sounding substantially in tort, although those sections may, by operation of law, be treated, for certain purposes, as actions *ex contractu*. CECIL GRAY v. THE CANTONMENT COMMITTEE OF POONA, **12 Bom.L.R. 615.** (20 B. 697, *Expl.*)

——S. 3 (=1882, s. 2).

(152)—S. 3—*See* NOS. 52, 53, 54, 55, 56, 57, 58, and 59, *supra*.

(153)—S. 3, 107 (2), O. XXI, r. 11, s. 104, O. XLIII, r. 1—Order by appellate Court directing that the plaint be returned to be presented to proper Court if decree — *See* DECREE—GENERAL. P.L.R. 1900, 137.

——S. 4 (=1882, s. 4.)

(154)—S. 4 does not bar a suit in the Civil Court by the transferee of a grant for a declaration that his title has not been affected by an order under s. 34 of Act I of 1879 (Chota Nagpur Landlord and Tenant)—*See* BEN. ACT I OF 1879, s 34, 1 C.L.J. 557.

(155)—Ss. 4, 100—*See* BEN. ACT I OF 1879, 27 C. 508. F.B. = 4 C.W.N. 333.

(156)—Ss. 4, 100—*See* MAD. ACT VIII OF 1865, s. 69, 10 M.L.J. 398.

(157) *Ss. 4, 115 (=ss. 4, 622, Civ. Pro. Code, 1882)—Rent Recovery Act. s. 76.*—Orders passed under Madras Act VIII of 1865 by a Collector are not open to revision under s. 622, Civ. Pro. Code. VENKATANARASIMMA NAIDU v. SURANNA, **17 M. 298.** (9 M. 332, *F.*)

(158)—Ss. 4, 120 (2), 141, O. XLI, r. 5—Applicability of, to insolvency proceedings in Rangoon—*See* INSOLVENT. **3 L.B.R. 241.**

——S. 6 (=1882, s. 6, last para=1859, ss. 383, 384.)

(159)—Ss. 6, 38—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 16 C. 457.

(160)—*Ss. 6, 38, 39, 41 O XXI, rr 4 and 5=Civ. Pro. Code, 1882, ss. 6 and 223—Execution of decree of Superior Court.—Held*, by the Full Bench that the term "*suit*" in s. 6, Civ. Pro Code, includes execution-proceedings; the provisions of s. 223 are governed by s. 6; and that a Court, to which a decree has been sent for execution, has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court. (45 P.R. 1882, 31 P.R. 1887, F.B. *Overruled*; 7 M. 397 and 17 M. 309. *Diss.*; 12 B. 155 and 16 C. 457 and 465, *F.*) *Held*, also, that the appeal against the order passed by the Munsif, 1st Class, to whom the decree was transferred for execution lay to the Divisional Court and not the Chief Court, although the original decree was appealable to the Chief Court; the Chief Court, however, transferred the appeal from the Divisional Court, with the consent of the parties. KHAN BAHADUR NAWABZADA SHAMSHER ALI KHAN v MUSSAMMAT AHMAD (ALLADHI) Begam, **1 P.L.R. 1901=9 P.R. 1901.**

——S. 9 (=1882, s. 11=1877, s. 11 = 1859, s. 1.)

See JURISDICTION OF CIVIL COURTS.

See RIGHT OF SUIT.

(161)—*S. 9 (=Civ. Pro. Code, 1882, s. 11), scope of.*—The scope of the section is very vast, including even what are known as rent-suits or suits cognizable by the Revenue Courts, but for the circumstances that such suits, though civil in their nature, are expressly excluded from the jurisdiction of Civil Courts, by dint of some special Statutes. SHANKARAHAI v. DIN DIAL, **12 A. 409, F.B.=10 A.W.N. 145.**

(162)—*S. 9, Act V of 1908—Jurisdiction of Civil Courts—Suit of a civil nature—Suit by temple committee against temple servants, for declaration as to their right to have the services performed by others.*—The plaintiffs held the office of members of the committee of management of a certain temple under a *sanad* from Government, and received annually a certain sum of money for defraying the expenses of certain kinds of religious worship in the temple. The obligation attached to the office was, to get the worship performed by the hereditary officers or servants attached to the temple. Plaintiffs alleged that those failed to perform the worship owing to differences among themselves, with the result, that the duties owing to the idol were neglected and the funds in the hands of the plaintiffs remained unexpended. The plaintiffs, therefore, asked for a declaration of their right to disburse the funds, by getting the worship performed by a suitable person or persons, in the event of the hereditary officers or, servants of the temple concerned failing to perform it; and for an injunction to restrain those servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected that the Civil Court had no jurisdiction to try the suit, in which the prayer was for a bare declaration of the plaintiff's right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office. *Held*, overruling the objection, that the plaintiffs were trustees of a public charitable trust, holding moneys in their hands for disposal in a certain manner for certain defined purposes. An action would lie against them by the Advocate-General acting on behalf of the public, to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds, after getting the religious worship, for which those funds were intended, properly performed. Such

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a right was not less of a civil nature, though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rights and ceremonies, but only to decide the rights of the trustees to fulfil the trust unhindered. TRIMBAK GOPAL PARICHARAK v. KRISHNARAO PANDURANG; KRIHNARAO PANDURANG v. VISVANATH GOPAL BADRE, **11 Bom. L.R. 389=33 B. 387=2 Ind. Cas. 419.** (5 B. 92, *D.*)

(163)—*S. 9 (=s. 11, Civ. Pro. Code, 1882)—Suit by trustee against co-trustee—Cognizability of qustions of ritual by Civil Courts—Right to restrain interference with the Namams in a temple—Introduction of new idols, effect of—Position of Dharmakarthas.*—Under s. 11, a Dharmakartha of a temple has a right to sue his co-trustees, for an injunction prohibiting them from changing the form of, or in anyway interfering with, the Thengalai Namams in the temple, and directing them to remove from the temple a copper image of Vedanta Desikar introduced thereinto by them. The stone and chunam Namams are part of the property of the temple vested in the trustees, and their removal or alteration is an inteference with the right of the plaintiff, in respect of the property. Although the putting on or taking off of such things as Namams are ordinarily not matters of civil nature, the wholesale substitution of Vadagalai for Thengalai emblems in a Thengalai temple is an interference of the temple structure, and the interference of the Civil Courts may be justified, on the ground that the temple is property and that the Thengalais, for whose worship it is and must be taken to have been largely, but not exclusively dedicated, have a right to object to alterations in the temple structure, which would affect its character as a Thengalai institution. In such temple matters, the only safe guide in this country is usage and if the usage of an institution is found to be Thengalai in character a departure from such usage, by a whole-sale alteration of the form of the Namam displayed in the temple and the consequent change in the character of the predominating influence therein, is *prima facie* not within the power of the trustees, and the trustees can, in the absence of any justification, be restrained from making such a change. There is *prima facie* no reason why the trustees should not permit the devotees of Vedanta Desikar, whose image in stone stands in the temple, to introduce a second and portable image to be used, if necessary, in professional ceremonies. To permit this does not in any way change the distinctive Thengalai character of the temple, nor is the introduction of the image a sacrilegious act; and the fact that the Thengalais object to the presence of this image is not necessarily a reason for removing it, and no injunction, therefore, need be granted against the trustees in this matter. Whether the Dharmakarthas of a Hindu

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temple are trustees in whom the temple properties are vested, or whether the temple properties are vested in the temple deities, and the Dharmakarthas are rather in the position of manager, it may, in practice, be necessary for Civil Courts to deal with them as trustees for the general body of worshippers of the temple. If, as Dharmakarthas, they commit a breach of trust cognizable by the Civil Courts, they may be restrained at the suit of the other Dharmakarthas or worshippers. A suit is not a suit of civil nature, merely because the facts constituting the cause of action are alleged to amount to a breach of trust. If, on examination, it should appear that they relate merely to religious rites or ceremonies, such questions may, of course, be gone into, as stated in the explanation to s. 11, if the right to property or an office depends on them. But it cannot be contended that, as the trustees hold on trust to provide for carrying on public worship at the temple, according to the mamul or usage of the institution, every departure from such usage is a breach of trust, for which they can be sued in a Civil Court. The right of a worshipper to worship at a given temple is recognised by the Courts as a civil right, and the Courts will enforce by suit a right of worship, to which the plaintiff proves himself entitled, and will also protect such a right in various ways. KRISHNA SAMI IYENGAR v. SINGARACHARIAR, **17 M.L.J. 1=2 M.L.T. 69=30 M. 158.** (5 B. 80, 1 M. H.C. 301, 2 M. 62, 4 M. 315, 13 M. 293, 16 M. 299, 23 M. 298, 28 M. 23, 11 M.L.J. 215, 12 M.L.J. 355, 16 M.L.J. 150, 7 C. 767, 18 C. 448, 32 C. 1072, *R.*)

(164)—*S. 9 (=s. 11, Civ Pro. Code, 1882)—Offering—Sacrifice—Suit for offering, maintainability of.*—A and B were the owners of the zemindari within which was an idol X. According to an immemorial custom, the flesh of the first goat offered to X by the *sebaits* was taken by the zemindars. Upon the death of A, the sebaits refused to allow his representative, C, to have a share of the goat. C sued for declaration of right to share in the flesh of the sacrificial goat: *Held*, that the suit was maintainable. DURGA CHARAN PATHAK v. RAJABALA DEBI, **4 C.L.J. 469.**

(165)—*S. 9 (=Civ. Pro. Code, 1882, s. 11)—Hereditary right to settle caste disputes—Maintainability of suit to enforce such right.*—The Civil Courts cannot enforce an hereditary exclusive right to settle caste disputes, though a right to collect money is incidental to the right claimed. SUBBARAYA v. VENKATNARASU, **2 M.L.J. 83.** [*F.*, 17 M.L.J. 421.]

(166)—*S. 9 (=s. 11, Civ. Pro. Code, 1882)—Suit of a civil nature—Idol, location of.*—Suits as to religious rites and ceremonies, which involve no question of the right to property or to an office, are not suits of a civil nature and, therefore, not cognizable by a Civil Court. A worshipper of certain idols cannot, therefore, maintain a suit against the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

custodians of these idols to locate them in a certain temple, instead of in another temple, so long as his right to worship the idol is not denied. LOKENAH MIRSA v. DASRATH TEWARI, **2 C.L.J. 590=32 C. 1072=10 C W.N. 505.** (5 B. 80, 11 M.L J. 215, *F.*; 21 C. 463, *D.*) [*R.*, 30 M. 158=17 M.L.J. 1=2 M.L.J. 69.]

(167)—*S. 9 (=s. 11, Civ. Pro. Code, 1882)—Right of hereditary joshi to recover marriage fees from an intruder*—Where a person claimed to be the hereditary joshi of a certain village and to recover from an intruder certain village and to the joshi, but paid to the intruder, *held* that the fact that emoluments are claimed makes the dispute of one of Civil nature within the meaning of s. 11, and that, therefore, the johi's suit to recover the fees is maintainable. YESHWANT RAO v. BHASKHAR RAO PATWARI, **3 N.L.R. 47.** (7 M. 424, 14 B. 167, *R.*; 11 B.H. C. 6, *F.*)

(168)—*S. 9=(s. 11, Civ. Pro. Code, 1882)—Man-pan—Right to sue in Civil Courts*—A suit to enforce the following rights, which are usually described in Berar by the word *man-pan*, does not lie in a Civil Court. Right to have precedence in leading one's bullock at Pola (2 B. 476, 6 B. 110. *F.*). Right to give the first blow to a buffalo at Dasehra. (10 B. 233, R.). Right to gifts of cake and fuel at the Holi festival and betel-nuts at weddings. Right to *Pandharegandh*, which means a small present of money given by the bridal party to the senior member of the Patel family at weddings. SHIWAJI v. MAHADEO, **3 N L.R. 131.** (16 B. 281, 11 M. 450, 15 C. 159, 2 M. 62, P.C., 21 C. 463, *D.*) [*Confirmed*, 5 N.L.R. 79.]

(169)—*S. 9 (=s. 11, Civ Pro. Code, 1882)—Explanation—Suit of civil nature—Right of burial and of reciting prayers before burial.*—In suits relating purely to rituals or religous observances, the Civil Courts have no jurisdiction; but the Courts are bound to enquire into the questions of religion or ritual, which are material for determining civil rights in dispute between the parties. (7 B. 323, *R.*) When the matter is of a mixed spiritual and temporal character, the question will depend upon the nature of the connection between the facts, and will be, in fact, whether the spiritual question is so intrinsically connected with the temporal as to be inseparable from it. If so, it would be the duty of the Courts, in trying the civil disputes, to enquire into the spiritual matter thus intimately related. The right of burial is a civil right (26 B. 198, *R.*) and, if the recitation of prayer at a particular spot in the mosque is a necessary part of the burial, and the plaintiffs are hindered from exercising their customary right in such matter, the interference by the defendants would mean invasion of their right, giving rise to a suit cognizable by Civil Courts. KOONI MOHAMADAN MEERA SAHIB THARAGAN v. M. MAMADU MEERA SAHIA THARAGAN, **16 M.L.J. 471=1 M.L.T. 423=30 M. 15.** [*R.*, 32 M. 478=1 Ind. Cas. 716.]

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(170)—*S. 9 (=Civ. Pro. Code, 1882, S. 11—) Civil Courts, Jurisdiction of—Suit for redemption of mortgage of State land barred by Upper Burma Land and Revenue Regulation, s. 53 (2) (ii)—Possession.*—As claims to the ownership or possession of any State land are cognizable by Revenue Courts only under s. 53 (2) (ii) of the Upper Burma Land and Revenue Regulation, a suit for redemption of mortgage of State land is barred in the Civil Courts. MAUNG THA AUNG v. MAUNG SAN KE, **U.B.R. 1897—1901, Vol. II, 207.** [*R.*, U.B.R. 1897—1901, Vol. II, 443, 258; *F.*, U.B.R. 1897—1901. Vol. II, 211, 209; *Cited*, U.B.R. 1905, 4th Qr., Land Revenue Regulation, p. 1,]

(171)—*S. 9 (=Civ. Pro. Code, 1882, s. 11), Civil Courts, Jurisdiction of—State land—Upper Burma Land and Revenue Regulations, s. 53 2)(ii).*—Claims to the ownership or possession of any State land are congizable by Revenue Courts only under s. 52 (2) (ii) of the Upper Burma Land and Revenue Regulation and not by Civil Courts. MAUNG NUT v. MA MI., **U.B.R. 1897—1901 Vol. II, 209.** (U.B.R. 1897—1901. Vol. II, 207, *F.*,) [*F.*, U.B.R. 1897—1901 211; *R.*, U.B.R. 1897—1901, 258. 443, U.B.R. 1906. 1st Qr., Land and Revenue Regulation p. 1; *R.*, U.B.R. 1905, 4th Qr., Land Revenue Regulation, p. 1.]

(172)—*S. 9 (=Civ. Pro. Code. 1882, s. 11,) —Question of Jurisdiction—State land.*—It is for the Civil Courts to decide questions as to their own jurisdiction. Civil Courts are to be guided by the decision of Revenue authorities in deciding the question whether land is State land. MAUNG KE v. MAUNG PO NI, **U B.R. 1897—1901. Vol. II, 211.** (U.B.R. 1897—1901, Vol. II. 207. 209, *F.*) [*R.*, U.B.R. 1897—1901 Vol. II. 443, U.B.R. 1906. 1st Qr., Land Revenue Regulation, p. 1.]

(173)—*S. 9 (=s. 11, Civ. Pro. Code. 1882) —Suit for rent of State land.*—A suit for rent of State land is not cognizable by the Civil Courts. MAUNG NYUN v. MAUNG PAW, **U.B.R. 1902—1903, Vol. II, Civ. Pro. p. 1.** (U.B.R. 1892—1896, Vol. II. 634, 2 U.B. R. 1897—98, Civ. Pro. 25, 2 U.B.R. 1897—98, Civ. Pro. 41, *R.*)

(174)—*S. 9. (=s. 11, Civ. Pro. Code 1882)—Exclusion of jurisdiction, — S. 33, City of Bombay Municipal Act. 1888.*—There is enough in s. 33 of the City of Bombay Municipal Act, 1888, to bring it within the exception to s. 11 of the Civ. Pro. Code, 1882, and bar the cognizance of suits falling under the Act by any other Court. The jurisdiction of Courts can be excluded not only by express words, but also by implication. BHAISHANKAR v. MUNICIPAL CORPORATION OF BOMBAY, **9 Bom. L. R. 417=31 B. 604.**

(175)—*S. 9*—Butwarra *proceedings—Limitation.*—Where a Munsiff found, as a matter of fact, that plaintiffs had been holding certain lands up to the time when some *butwarra* pro

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ceedings took place, but that they have been dispossessed by those proceedings; and held that they were entitled to sue for recovery of the said lands within 12 years, and also found that their present suit had been brought within that period: *Held* by the High Court that the lower appellate Court was wrong in finding that the suit had not beed brought within proper time, and in holding that it was barred by s. 2, Act VIII of 1859. HURRUCK NARAIN THACOOR v. MUSST. LUTCHMEE KOUR, **26 W.R. 105.**

(176)—S. 9—Whether Civil Courts override jurisdiction of Revenue Courts under s. 36, Central Provinces Tenancy Act—*See* C.P. Act IX OF 1883, 5 N.L.R. 176.

(177)—S. 9—*See* ADMINISTRATION-SUIT, 10 Bom. L.R. 519=32 B. 381.

(178)—S. 9—*See* BUTWARA PROCEEDINGS, 6 B.L.R. 663, Note=15 W.R. 291.

(179)—S. 9—Order of Magistrate refusing maintenance—Suit in Civil Court notwithstanding such order—*See* CRIM. PRO. CODE, s. 488. 32 C. 479=13 C.W.N. 150.

(180)—S. 9—*See* EVIDENCE—MISCELLANEOUS, 13 C.W.N. 501=4 Ind. Cas. 523.

(181)—S. 9—Suit by plaintiff pleading his own fraud--Maintainability of suit—*See* FRAUD—MISCELLANEOUS, 3 O.C. 278.

(182)—S. 9—*See* INJUNCTION—SPECIAL CASES, 11 M. 450.

(183)—S. 9—Jurisdiction of Court—Suit of which it is not possible to estimate the value—Lower Burma Courts Act, s. 25—Guardians and Wards Act (VIII of 1890)—*See* JURISDICTION—QUESTION OF JURISDICTION, 2 L.B.R, 140.

(184)—S. 9—*See* BEN. REG. VII OF 1799, s. 15 B.L.R. Sup. Vol. 626=I Ind. Jur. N.S. 119.

(184-*a*)—S. 9—*See* BEN. REG. I OF 1886, ss. 96 to 98, 119, 154, sub-s. (1), cl. (*e*), 1 C.L.J. 421=32 C. 1036.

(185)—S. 9—*See* RES JUDICATA—ADJUDICATION, 111 P.R. 1882.

(186)—S.9—*See* SALE—SALE FOR ARREARS OF RENT—DEPOSIT OF MONEY AND STAYING SALE, 4 B.L.R. 77, F.B.=13 W.R. 1.

(187)—S. 9—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 2 B.H.C. 19.

(188)—S. 9—Declaration that a person is not plaintiff's son—Suit of civil nature—Powers of Court—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 12 Bom. L.R. 697=34 B. 676.

(189)—Ss. 9, 2 (12), O. XX, r. 12—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 27 C. 30=4 C.W.N. 79.

(190)—Ss. 9, 10—*See* BEN. ACT VIII OF 1885, ss. 103, 111, 28 C. 28.

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(191)—Ss. 9, 20—*See* HIGH COURT, JURISDICTION OF, CALCUTTA. 30 C. 369=7 C.W.N. 353.

(192)—S. 9, 47, O. XXI, rr. 66, 90, 92, 94, O. XLIII, r. 1, ss. 104, 109—*See* BEN. ACT VII OF 1880, s. 19, 29 C. 94, Note=6 C.W.N. 246.

(193)—*Ss. 9, 47, O. XXI, r. 93 (=ss. 11, 244 315, Civ. Pro. Code, 1882)—Suit for refund of purchase money, when judgment debtor has no saleable interest in property sold—Maintainability of*—Benami—*Execution-purchaser a* benamidar—*Plea raised first in appellate Court.*—S. 315 of the Civ. Pro. Code, is not exhaustive and does not confine an execution-purchaser to the special remedy provided therein, and a suit lies under s. 11 of the Code for refund of the purchase-money when the judgment-debtor is found to have no saleable interest in the property sold. (5 A. 577, 13 A. 383, 11 M. 269, *R.*) [*F.*, 13 C.W.N. 1080.] The question whether an auction-purchaser is entitled to receive back his purchase money by reason of the judgment-debtor having no saleable interest in the property sold, cannot be regardeed as a question between the parties to the suit. Where the question of *benami* was not taken in the written statement, nor made the subject of an issue, nor even raised in the memorandum of appeal, the appellate Court was right in refusing to allow the question to be raised. HARI DAYAL SINGH ROY v. SHEIKH SAMSUDDIN, **5 C.W.N. 240.**

(194)—Ss. 9 and 60, 70, 71—Successive sales in execution of decrees—Priority—Confirmation—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1887, 267.

(195)—*S. 9 O. VI, r. 17 and O. VII, r. 11 (=ss. 11, 53, Civ. Pro. Code, 1882)—Upper Burma Land and Revenue Regulation s. 53 (1).*—In Revenue proceedings of a judicial nature a Revenue Officer has inherent power to execute his own orders. S. 53 (1) of the Upper Burma Land and Revenue Regulation provides that a Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the Regulation to dispose of. A suit will not lie in a Civil Court to execute the order of a Revenue Officer, whether by restitution or otherwise. MAUNG PO NWE v. MAUNG THA YE, **U.B.R. 1902=1903, Vol. II, Civ. Pro. 13.**

(196)—*S. 9, O XX, r. 6, ss. 152, 114, O. XLVII, r. 1 (=Civ. Pro. Code 1882, ss. 11, 206, 623)—Suit to rectify mistake in decree.*—Where a mistake is common to both the judgment and the decree, s. 206 of the Civ. Pro. Code cannot apply and s. 623, being an enabling section only, does not bar a separate suit to rectify the mistake. JOGESWAR ATHA v. GANGA BISHNU GHATTAOK, **8 C.W.N. 473.** [*Disc.*, 15 N.L.R. 159; *R.*, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129; *D.*, 10 C.W.N. 1024.]

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——S. 10 (=1882, s. 12=1877, s. 12.)

(197)—*S. 10 (=Civ. Pro. Code, 1882, s. 12) —First suit for cancellation of patni and for mesne profits, whether bars second suit to recover arrears of rent for same period.*—A plaintiff who has already instituted a suit for the cancellation of a patni lease held under him by the defendant and for mesne profits can, without infringing the provisions of s 12, Civ. Pro. Code, maintain a second suit against the same defendant to recover arrears of rent for the same period, and he can simultaneously prosecute the two suits. But where the second suit has been decreed while the first is yet pending in appeal, the decree cannot be allowed to be executed till the appeal is decided. RAJA RANSGIT SINGHA v. BHAGABUTTY CHARAN ROY, **7 C.W.N. 720.** [*Appl.*, 8 C.L.J. 303.]

(198)—*S. 10 (=Civ. Pro. Code, 1882, s. 12), —Suit for mesne profits—Pendency of appeal from decree for possession—No bar of suit.*—The section does not bar a suit for mesne profits during the pendency of an appeal from a decree for possession passed by another Court. MOTI RAM SETH v. CHUNNI LALL SETH, 4 **C.P.L. R. 27.**

(199)—*S. 10 (=Civ. Pro. Code, 1882, s. 12)—Suit for money due—Defendant's application to have accounts taken.*—In a suit brought by plaintiff for money due by the defendant, the latter admitted the existence of money dealings between himself and plaintiff, and claimed that accounts might be taken with a view to ascertain what was due to him by plaintiff, and to pass a decree in his favour therefor. The Court dismissed the plaintiff's suit without taking an account as against the plaintiff. *Held*, that as the suit was not a suit for an account, the defendant was not entitled to have an account taken, and that there was nothing in s. 12 of the Civ. Pro. Code, to prevent the defendant suing for accounts during the pendency of plaintiff's suit, since the nature of the relief claimed in the two suits would be different. **RAMALINGA CHETTY v. RAGUNATHA RAU, 20 M. 418.**

(200)—*S. 10 (=s. 12, Civ. Pro. Code, 1882) —Court of Political Agent at Muscat—Whether established by Governor-General in Council—Jurisdiction of British Court, whether ousted by pendency of a prior suit in Muscat Court.*—The Court of the Political Agent at Muscat, is a Court beyond the limits of British India, and it is not established by the Governor-General in Council. But it is established by Her Majesty's order in Council. Hence, the jurisdiction of the British Indian Court is not ousted by a prior suit pending in the Muscat Court, by reason of s. 12. Civ, Pro, Code. **RAHIMTULLAH MUKHI RAMZAN v. DAMODHAR DHARAMSI, 1 S.L.R. 166.**

(201)—**S. 10—Applicability to arbitration proceedings—*See* ACT IX OF 1999, s. 14, 4 S. L.R. 187.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(202)—**S 10—*See* BEN. REG. VII OF 1828, s. 20, A.W.N. 1881, 116.**

(203)—**S. 10—*See* NO. 190, *supra*.**

(204)—*Ss. 10, 11 (=Civ. Pro. Code, 1882), ss. 12, 13—Suit for account against agent— —Cross-suit by agent—Separate trial, if illegal —One suit if should be stayed pending decision in the other*—Res judicata.—C, being sued as agent to account for moneys given to him, instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him; *Held*—That the decision in the former suit cannot operate as a bar to the trial of the latter on the principle of *res judicata*; that, though it was desirable that the two suits should have been tried together, there was no legal bar to their being tried separately, though the same ground might have to be traversed over again. S. 12. Civ. Pro. Code, has no application to suits of this kind. CHANDRA KUMAR MAJUMDAR v. PRAMATHO NATH RAY, **15 C.W.N. 930.**

(205)—*Ss. 10, 11 (=Civ. Pro Code 1882 ss. 12, 13)—Res Judicata*—The findings, in the previous suit brought by the mortgagor, on the issues as to the amount of debt due under the mortgage, and as to what extent the mortgagor's estate was liable for the sum so due, were *held* to constitute *res judicata*, under s. 13 of the Code of Civil Procedure, in the subsequent suit by the purchaser of the equity of redemption. The fact that applications for leave to appeal to the Privy Council were pending in the High Court, in respect of applications, to carry out the prior decree, rejected by that Court, would not, however, bar, under s. 12 of the Code, the second suit by the purchaser. NAINAPPA CHETTI v. CHIDAMBARAM CHETTI, **21 M. 18.**

(206)—**Ss. 10 and 11—*See* RES JUDICATA—GENERAL. 8 C.L.J. 303.**

(207)—*Ss. 10, 11, 125 (=ss 12, 13 and 622, Civ. Pro. Code, 1882)—Scope of s 12 and 13—Procedure to be adopted under both the sections —Dismissal of suit rightly, though on wrong grounds—High Court's power of revision*—Where a suit is first instituted in a Sub-Judge's Court, and a second suit is instituted for the same relief in a District Munsiff's Court, the District Munsiff ought to dismiss the suit before him, as barred by s. 12, and not merely keep it, pending the decision of the earlier suit in the Sub-Judge's Court. S. 12 is in some respects similar to the principle of s. 13 (11 A. 154, *R.*), and both are aimed against superfluous suits, and the procedure under both the sections ought, therefore, to be the same. Where the Munsiff, under the above circumstances, did not dismiss the suit, but kept it pending, and then it was moved into the Sub-Judge's Court, and dismissed by him, the District Judge has jurisdiction to hear the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

appeal against that decision, and should do so. Where the District Judge rightly dismisses such an appeal, though on wrong grounds, the High Court will not interfere in revision. VENKAPPACHARI v MANJUNATHA KAMTI, **16 M.L.J. 526 = 2 M.L.T. 40.**

(208)—*Ss. 10, 26, O. IV, r. 1, s. 47 (=Civ. Pro. Code, 1882, ss. 12, 48, 244)—Same subject-matter—"Suit"—Meaning of.*—A plaint prayed for relief on the ground that a debt, on which a decree had been obtained and properties sold thereunder, was not binding on the plaintiff, and impeaching the sale as being in contravention of s. 99 of the Transfer of Property Act. A petition in execution of the said decree, put in before the plaint, asked the sale to be set aside as in contravention of s. 99 of the Transfer of Property Act. *Held* that the two proceedings did not deal with the same matter within the meaning of s. 12 of the Civ. Pro. Code, and the Court should proceed with the suit though the petition was pending. A suit, according to s. 48 of the Civ. Pro. Code, must commence with a plaint; and a proceeding, which is capable of terminating in a decree or an order having the force of a decree, cannot on that ground" alone be deemed a suit, if it had not commenced with a plaint. In this view, a proceeding under s. 244 is not a suit within the meaning of s. 12. (*Obiter*). VENKATA CHANDRAPPA NAYANIVARU v. VENKATARAMA REDDI, **22 M. 286.** [*R.*, 14 C.P. L.R. 100, 17 C.P.L.R. 178, 1 S.L.R. 86, F.B.]

(209)—Ss. 10, 141—*See* EXECUCTION OF DECREE—MISCELLANENOUS, A.W.N. 1889, 205.

(210)—*S. 10, O. IX. r. 3, O. XXIII, r. 1 (=Civ. Pro. Code, 1882, ss, 12, 98 and 373.*—The plaintiff's first suit was dismissed under s. 98, Civ. Pro. Code, on the 25th October, 1898, without summonses having been served on the defendants. A second suit was filed on the 20th October, 1898, on grounds almost identical with those of the first one. No application had been filed under s. 373, Civ. Pro. Code, to withdraw the first suit with permission to file another. An objection was taken by the defendant, that the second suit was barred by s. 12, Civ. Pro. Code. *Held*, that the objection has no force as s. 13 of the Civ. Pro. Code does not bar the institution of a suit; it merely provides that, when two are pending, only one can be allowed to proceed, and the suit first filed takes priority. SULTAN v. MURAD, **19 P.L.R. 1900.**

—S. 11 (1882, s. 13 = 1877, s. 13 = 1859, s. 2.)

See RES JUDICATA.

(211)—*S. 11*—Res judicata—*Decision not necessary for the suit—Test of* res judicata—*Finality of judgment.*—To constitute *res judicata*, something substantially and materially in issue between the parties must have been finally decided by the Court empowered to deal with it. And while, no doubt, everything which is necessary for the dispossal of the suit, even though incidentally necessary, yet necessary, does fall within the scope of those words and would constitute *res judicata*, yet once a decision has been come to upon any preliminary point, which is sufficient in itself to dispose of the whole suit, if the Judge goes on to discuss other questions, the decision of them would not be final and would not operate as *res judicata*, A decision upon any question. which does not open the door to the parties aggrieved to carry it to the next Court, is not any sense a final decision, unless the Court which has decided it is itself the Court of final jurisdiction for that suit. A decision *obiter*, of any question not necessary to the disposal of the suit is not a final decision. AHMEDBHOY HABIBHOY v. SIR DINSAW M. PETIT, BART **11 Bom. L.R. 366 = 6 M.L.T. 200 = 3 Ind. Cas. 124.**

(212)—*S. 11 (=s, 13, Civ. Pro. Code, 1882)*—Res judicata—*Desition erroneous in law over ruled by a later decision.*—The respondents, superior proprietors of a village, sued the appellants, *birt-holders* under a decree of the Settlement Court, according to which the appellants were bound to pay as rent to the respondents ¾ths of the *nikosi* of the village. The respondents asserted that they were entitled to the ¾ths of *nikasi* the of each year while the appellants contended that they were not bound to pay more than ¾ths of the *nikasi* assumed by the Settlement Officer for the puppose of assessing Government Revenue, that is, ¾ths of double the amount of Government Revenue. In a previous case between the parties, it was decided that the rent payable by the appellants depended upon the *nikasi* of each year and had not been fixed for the term of a settlement. The appellants contended that the decision was not binding upon them, first, because the point now in issue was not then definitely decided, and secondly, because that decision was based on Rent Act Ruling No, 62, which was overruled by a later decision of the Judicial Commissioner's Court. *Held*, that the previous decision operated as *res judicata*, and that a decision *inter partes*, if, in other respects, it fulfilled the requirements of s. 13 of the Code, could not be avoided by showing that it was erroneous in law. HUDDAR v. MUSSAMAT SHAHZADA KHANAM, **9 O.C. 243 B.** (32 C. 749, *Diss.*, 26 M. 104, 15 A. 327, 5 O.C. 181, R)

(213)—*S. 1 (=Civ. Pro, Code. 1882, s. 13)*—"*Suit,*" *meaning of.*—The word *suit*, as it occurs in s. 13, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the several provisions of the Code which enable a person to unite several causes of action in one and the same suit. CHAODHRI POHAPSINGH MALGUZAR v. KHUBSINGH, **12 C.P.L.R. 91.** (7 A. 247, *F.*)

Civ Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(214)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)—'Res judicata'—Decision between parties as co-defendants in first suit—Same point in issue in both suits—Decision in first suit binding and conclusive in second suit.*—The words "suit between the same parties" include a suit in which the same parties were engaged though not marshalled in the same way as plaintiff and defendant. Where the question to be decided in the second suit was substantially and directly in issue in the prior suit, the fact that the parties to the second suit were ranged as co-defendants in the first suit did not prevent the decision in the first suit from being binding and conclusive between them in the second suit. HAYAT BI v. MURTIZA KHAN, **2 C.P.L.R. 52** AND NAHOO *alias* PARMESHWARDASS v. BALDEO SNNDAL, **2 C.P.L.R. 55.** (9 C. 120, *F.*; 4 A. 92, *R.*) [*R.*, 6 C.P.L.R. 87.]

(215)—*S. 11 (=Civ. Pro. Code, 1882, s. 13)—Suit on foreign judgment—Enquiry into merits of foreign judgment.*—S. 14 of the Code of 1882 as amended by the Code of 1888 (=s. 13 of the present Code) empowers a British Court to enquire into the merits of a case decided by a foreign Court on whose judgment the suit is based. RAMJI DAS v. MOKANDI LAL, **102 P.R. 1892.**

(216)—S. 11 (=*Civ. Pro. Code, 1882*, s. 13)—*Judgment of foreign Court, when operative as 'res judicata.'*—When a judgment of a foreign Court is pleaded as a bar to any suit, it must be proved that the judgment relied upon is that of a duly and regularly constituted Court of Law having independent jurisdiction to try the matter in dispute and to decide it finally so far as that Court is concerned. SHAHBAZ KHAN v. NUR MUHAMMAD KHAN, **2 P.R. 1899.**

(217)—*S. 11 (=s. 13, Civ. Pro. Code, 1882,) application of.*—S. 13 applies to two classes of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit, by reason of the subject-matter of the two suits being the same, and in the other the trial of an issue in a subsequent suit is barred by adjudication upon the same issue in a former suit though the subject-matters of the two suits are different. There is nothing in the section to indicate that the judgments in two suits must be open to appeal in the same way in order that the decision upon any issue in the earlier suit can bar the trial of the same issue in the later one. So, a decision of an issue in a suit in which no second appeal lies to the High Court, bars the trial of the same issue in a subsequent suit, wherein such second appeal is allowed. RAI CHARAN GHOSE v. KUMUD MOHUN DUT CHOWDHRY, **25 C. 571=2 C.W.N. 297.** (9 C. 183, *F.*; 9 B. 75, 15 M. 111, *Diss.*; 9 I.A. 197, 8 W.R. 175, *D.*) [*F.*, 28 C. 78=5 C.W.N. 483; *Relied upon*, 10 C.W.N. 529=2 C.L.J. 508; *R.*, 33 C, 353=12 C.W.N. 359=7 C.L.J. 470; *Not F.*, 29 M. 195, F.B.=16 M.L.J. 41 =1 M.L.T. 25; *D.*, 9 C.W.N. 656, 57 P.R.1907 =66 P.W.R. 1907.]

Civ. Pro. Code (Acss V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(218)—*S. 11 (=Civ. Pro. Code, 1882, s. 13, Expl. 5), applicability of.*—S. 13 of the Civ. Pro. Code is not exhaustive as to the law of *res judicata*, but Expl. V to the section may be held applicable to the case of the karnavan of a tarwad. The explanation applies to claims made by a defendant as well as to those by a plaintiff. VASUDEVAN v. SANKARAN, **20 M. 129, (F.B.)=7 M.L.J. 102.**

(219)—*S. 11—Applicability of s. 2, Civ. Pro. Code, 1859—Plaintiff's name expunged from list of defendants in former suit—Burden of proof.*—S. 2, Act VIII of 1859 does not apply where present plaintiff's name was ordered to be expunged from the list of defendants in a former suit, but appeared notwithstanding by some mistake some 2 years after in the decretal order, the *onus* being on the present defendant to show how that happened and that the former suit was decided in the present plaintiff's presence. KALEE COOMAR DUTT ROY v. PRAN KISHOREE CHOWDHURAIN, **18 W.R. 29.**

(220)—*S. 11 (=Expl. 2 to s. 13 of the Civ. Pro. Code of 1877).*—Applies to a case of a suit having been decreed against a defendant on account of his not having brought forward a defence which he had and which he might and ought to have brought forward; he would be as much bound by the adverse decree as if he had set up the defence and estopped from setting it up in any future suit under similar circumstances. The explanation was never intended to enable a party to treat a point as having been decided in his favour in a former suit, which was in fact not so decided, and which was not necessary for the purposes of the suit to decide at all. GURSOBHIT AHIR v. RAMDUTT SINGH, **5 C. 923=6 C.L.R. 537.**

(221)—*S. 11*—Res judicata—*Matter directly and substantially in issue.*—S and M brought a joint suit against their mother, N and one H M, to recover their share in the estate of their father, B. The defence was that M was the daughter of N by C. The Court of first instance acceded to the plea and granted S a decree for a portion of what had been claimed. S and M appealed, and they contended (1) that M was the daughter of N by B, and (2) that, in any case, there being no specification, S was entitled to the whole of what had been claimed. The appellate Court held that M was the daughter of N by C, and that S was entitled to the whole of what had been claimed. In a subsequent suit brought on foot of a mortgage executed by S and C, the defendants were M and the sons of C. *Held*, that the former judgment did not operate as *res judicata* so far as the rights of M as the daughter of B were concerned, inasmuch as it was not directly and substantially in issue between S and M who, in the previous suit, had been arrayed on the same side, there being no difference whatever between them. HUB ALI v. MAMMUN, **8 A.L.J. 807.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(222)—*S. 11 (=Expl. 2, s. 13, Civ Pro. Code, 1882)—Scope—"Matter directly and substantially in issue," meaning of—Landlord and Tenant—Rent-suit.*—The Code does not define the expression "matter directly and substantially in issue." The only explanation of the expression that is given is in Expl. 2, Civ. Pro. Code, 1882. This explanation relates to cases where a matter is said to have been directly and substantially in issue constructively, though it was not directly and substantially in issue actually. The word "substantially" signifies "in effect though not in express terms." And the word "directly" is used in contradistinction to the words "incidentally" and "collaterally." The decision on an issue in a rent-suit, as to whether land, whose rent was claimed, was *lakhiraj or mal*, will operate as *res judicata* in a subsequent suit for land, if the question has been raised directly in the rent-suit. KASISWAR MUKHOPADHYA v. MOHENDRA NATH BHANDARI, **25 C. 136.** (15 C. 756, *F.*; 24 C. 569, *D.*) [*R.*, 54 P.R. 1904, 10 C.W.N. 820.]

(223)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)*—Res judicata *in rent-suits—Incidental or collateral issues—Adjudication upon title to the land in rent suits when* res judicata *in a subsequent title suit.*—Where, in a suit for rent, the defendant denies the relationship of landlord and tenant and either sets up the title of a third person to the land for which rent is claimed, or pleads that she is not in occupation of the land, or that the tenancy which existed has expired, the only material issue to be decided in the suit is, whether the relationship of landlord and tenant subsisted between the parties for the period covered by the suit, and the issue, if any, raised as to the title to the land is an incidental or collateral issue not necessary for the decision of the suit; therefore, the adjudication on this latter issue cannot operate as *res judicata* in a subsequent suit between the parties for the establishment of title to the land. (24 C. 569, 11 C. 301, P.C. 3 C.W.N. 266=26 C. 428, F.B., *R.*) But where, in a rent-suit, the alleged tenant denies the plaintiff's title to the land and sets up his own title to the same, the issue as to the title to the land becomes a substantial issue in the suit, and the decision of the Court on the question of title becomes *res judicata* in a subsequent suit between the parties for establishment of title to the land. (21 W.R. 349, 15 C. 756, 25 C. 136, *R.*) Where, in a suit brought by the plaintiff against the defendant for rent in respect of an alleged *jama* of Rs. 7, the defendant pleaded that he did not hold any separate *jama* of Rs. 7 under the plaintiff, but that the lands covered by the suit were included in a *jama* of Rs. 33 and odd which they held under the plaintiff and the Court held that the defendant did not hold any separate *jama* of Rs. 7 under the plaintiff and the lands of the alleged *jama* were included in the defendant's *jama* of Rs. 33 and odd. *Held*, that the decision that the lands were included within the defendant's *jama* of Rs. 38 and odd, was not necessary for the decision of the suit, and, consequently, could not be *res judicata* in a subsequent suit, brought by the plaintiff against the defendant for the declaration of his title to those lands and for *khas* possession thereof. SAHADEB DHALI v. RAM RUDRA HALDAR, **10 C.W.N. 820.**

(224)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)*—Res judicata—*Ground of decision as clearly stated in the prior judgment can alone form basis of—Non-collection of rent, effect of.*—Suit by a zemindar for recovery of *kattubadi* in respect of certain inam lands. A previous suit for *kattubadi* for certain prior *faslis*, in respect of the same inam, was dismissed by the appellate Court as barred on the ground that the plaintiff had not collected any *kattubadi* within twelve years prior to the date of that suit, but the necessary issue, whether the plaintiff was refused the enjoyment of the right for those twelve years was left undetermined. This previous judgment was pleaded as *res judicata* in bar of the present suit. *Held*, there was no *res judicata*, since the finding, in the prior judgment, as to the non-collection of *kattubadi* for twelve years, was not one of final adjudication on the essential point of denial of the plaintiff's right to the *kattubadi*. It is neither competent nor proper for the Court to depart from the clear statement in the judgment as to what was decided and, because such decision would, by itself, be unsound with reference to the reason assigned for it, to substitute something else quite different, in order to make it seem right so as to enable one of the parties thereto to found a plea of *res judicata*, thereon. JALASUTRAM LAKSHMINARAYAN v. BOMMA DEVARA VENKATA NARASIMHA NAIDU, **16 M.L.J. 35=29 M. 42.**

(225)—*S. 11—Suit for arrears of rent—Consent decree—Question as to future years not decided—Subsequent suit for arrears of subsequent years—No* res judicata.—Where the parties consented to a decree in favour of the plaintiff for arrears of rent due for certain faslis on a particular basis, and the question as to rent payable for future years was not decided; *held* that the consent decree will not operate as *res judicata* in a subsequent suit for arrears of rent due for subsequent faslis. HYDER SYED BATCHA SAHIB v. KARUPPANNA PILLAI, **21 M.L.J. 449.**

(226)—*S. 11 (=Civ. Pro. Code, Act VIII of 1859, s. 2).*—There is nothing in Act VIII of 1859, Civ. Pro. Code 2, which requires a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them. SADAYA PILLAI v. CHINNI, **2 M. 382.** [*R.*, 14 B. 31; *D.*, 25 B. 189.]

(227)—*S. 11 (=Civ, Pro. Code 1882, s. 13)*—*Omission to bring forward in former suit what then would have been a defence—Lease of mortgage property — Equities.*—A matter which

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ought to have been made a ground of defence in a former suit between the same parties, cannot be raised in the subsequent suit. So where the mortgagee of certain property also obtained a lease of the same from the mortgagor, the object of such transaction being to enable the mortgagor to recover his property from the mortgagee and to secure the re-payment of moneys advanced, *held* that, although an equity had been raised in favour of the mortgagor and an account should have been taken and the rents payable to the mortgagor for the lease should have been credited against the sums due by the mortgagor to the mortgagee, yet the proper occasion for enforcing it would have been in defence of the suit brought by the mortgagee upon the mortgage, and not in a subsequent suit brought by the mortgagor after the mortgagees have executed their decree upon the mortgage and purchased the property themselves after having obtained leave to bid. MAHABIR PERSHAD SINGH v. MACNAGHTEN, **16 C. 682=16 I.A. 107 P.C.** [*F.*, 31 C. 79; *D.*, 1 C.L.J. 248; *R.*, 20 A. 110, F.B., 20 A. 81, 25 B. 115, 26 B. 661, 1 C.L.J. 337, U.B. R. 1906, Civ. Pro. Code, 46, 47, 5 C.L.J. 192 =34 C. 223. 5 C.L.J. 611=36 C. 193, 31 A. 82 =6 A.L.J. 71=5 M.L.T 185, 3 S.L.R. 17.]

(228)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)—Decision in a previous suit of small cause nature tried as original suit—Subsequent suit involving same issue, if barred by* res judicata—The point that arose for decision and was referred to the Full Bench in this case was whether the decision upon a matter which was directly and substantially in issue between the same parties in a previous suit, which, though tried by a District Munsif as an original suit, was one of small cause nature and, therefore, in which no second appeal lay, was binding as *res judicata* in respect of the same matter in a subsequent suit, in which a second appeal lay. *Held*, that the decision in the former suit could not operate as *res judicata*, the fact that the former suit was one of a small cause nature preventing the decision therein from operating as *res judicata* in the latter suit. AVANASI GOUNDEN AND OTHERS v. NACHAMMAL, **16 M.L.J. 41=1 M.L.T. 23=29 M. 195.** (25 C. 571, 28 C. 78. *Diss.*; 15 B. 104, 17 M. 169, 15 M. 111, 18 M. 189, *R. and F.*; 17 M. 273, 24 M. 244, 13 M.L.J. 23, *Overruled.*)

(229)—*S. 11 (=Civ. Pro. Code, 1877, s. 13, Expl. II).*—Pending a suit to establish her right to property attached in execution of a decree against her husband, the plaintiff (claimant) died, devising such property by will to her sons, and the suit proceeded in the names of the sons who claimed the property under the will. Eventually it was decided by both the lower Courts that the property belonged to the claimant and not to her husband, and was, therefore, not liable to be sold in execution of the decree against him. In second appeal, however, the High Court allowed the claim of the execution creditor to proceed against a fourth share of such property, on the ground that the husband was entitled to such share as heir of his deceased wife. The sons, however, did not contend before the High Court that they were entitled to the whole of the property under the will. The High Court having allowed the execution-creditor's contention, and a fourth share of the property having been brought to sale in execution of the decree, and purchased by the execution-creditor, *held*, in a suit by the sons claiming such property under the will, that such ground of claim should have been made a ground of defence by the sons in the course of the second appeal, and not having been pleaded in such appeal, it was *res judicata* in the sense of Expl. II, s. 13 of the Civ. Pro. Code. SULTAN AHMAD v, MAULA BAKHSH, **4 A. 21=A.W.N. 1881. 110.**

(230)—*S. 11 (=Civ. Pro. Code, 1882, s. 13)*—Res judicata—*Mortgage—Money-decree given in mortgage-suit—Suit to enforce lien.*—Where, in a suit for enforcement of the plaintiff's lien against the mortgaged property, a simple money decree was given, and no appeal or application for review is filed, the plaintiff must be taken to have acquiesced in such decree and cannot afterwards enforce his mortgage lien. MAUNG MYAT MIN v. NGA PAN, MI SAN MA, NGA AUNG AND MI ON BAW, **L.B.R. 872—1892, 311.** [*R.*, L.B.R. 1892—1900, 14.]

(231)—*S. 11 (=s. 13, Civ. Pro Code, 1882)*—Res judicata—*First suit—Taking money-decree on mortgage—Second suit for realisation of money by sale of mortgaged property.*—A mortgagee first sued for recovery of the mortgage-money by sale of the mortgaged property, but, at the hearing, took a simple money-decree by consent. Failing to realise the same, he sued for realisation of the amount by sale of the mortgaged property. *Held*, the present suit was barred by Expl. 3, s. 13, Civ. Pro. Code. SHIBU BERA v. CHANDRA MOHAN JANA, **33 C. 849.** (7 C. 78, 7 C. 714, *D.*) [*R.*, 31 A. 19=8 A.L.J. 732=A.W.N. 1908, 265.]

(232)—*S. 11*—Res judicata — *Plea which ought to have been raised—Competent to try—Munsiff's jurisdiction—Act to consolidate and amend the law relating to Principal Sadar Amins etc.*—(*Act XVI of* 1868), *s. 13—Valuation of suits in 1868—Market-value—Act to amend the law relating to stamp duties* (*Act XXVI of 1867*), *sch. B, art. 11—Hindu Law—Reversioners—Suit during the lifetime of the widow for a declaration that an alienation made by her is invalid—Subsequent suit after widow's death for possession against the alienee.*—In 1868 Munsiffs were empowered to try suits of which the subject-matter did not exceed in amount or value Rs. 1,000. According to Act XXVI of 1867, stamp duty on plaints was fixed on the market-value of the property, which, where the property was a revenue paying property and the settlement was temporary, was eight times the revenue so payable, and

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unless and until the contrary was proved. Plaintiff, who was a remote reversioner in respect of an estate left by a Hindu in the hands of his widow, brought a suit in the Court of the Munsiff, along with the next reversioner, in 1868, for a declaration that a certain alienation made by the widow was invalid. He valued the suit at Rs. 237-9, eight times the Government Revenue. The alienations were declared invalid as against his interests. He subsequently brought the present suit, after the death of the widow, for possession, in the Court of the Subordinate Judge. The Revenue payable was still Rs. 52-14: *Held*, that the former suit of 1868 operated as *res judicata* between the parties. In order to see whether in 1868 the Munsiff would have had jurisdiction to try the present suit, one must look to the state of affairs in 1868. The present valuation cannot be looked at for the purpose. The decision of the Munsiff was that of a competent Court, and his findings, which were upheld on appeal, were binding on the parties, and they were not entitled to go behind them. The plaintiff being the next reversioner, his right to sue for possession arose on the death of the widow; the former decision was conclusive between the parties only upon the point that the alienation by the widow was invalid as against the plaintiff's interest. A plea that an alienation made by a widow is valid, owing to the next reversioner having given his consent, ought to be raised when a reversioner sues for a declaration that the alienation is invalid. If it is not raised then, it cannot be raised in a subsequent suit by the revesioner for possession. CHURAMAN KANDU v. ADJUDHIA SINGH, **3 Ind. Cas. 117.** (5 A.L.J. 1=3 M.L.T. 1=12 C.W.N. 74=9 Bom. L.R. 1348=6 C.L.J. 766 =30 A. 1, *D.*)

(233)—*S. 11 (=Civ. Pro. Code, 1882, s. 13)—Dismissal of part claim as against some defendant—Right of other defendants to prefer appeal against dismissal and to bring fresh suit against co-defenddnts.*—Where the plaintiff's claim was dismissed in part as against some of the defendants in the suit and the dismissal did not affects the interest of the other defendants, the latter defendants should not be permitted to prefer an appeal against the dismissal of the plaintiff's claim. S. 13 of the Code did not bar a fresh suit by them against the co-defendants in respect of their interest in the property affected. SETH NANHEYAL v. KALURAM, **6 C.P.L.R. 87.** (12 C. 580, 8 A. 91, *Appr*; 2 C. P.L.R. 52, *Diss*; 2 M. 204, 9 C. 120, 4 A. 92, 7 W.R. 366, *R.*) [*R.*, 16 C.P.L.R. 142]

(234)—*S. 11—Suit for possession—Mortgage party—Failure by mortgagee to deny plaintiff's title—Suit for sale by mortgagee*—Res judicata—*Transfer of Property Act (IV of 1882), s. 41—Ostensible owner—Creditor making no enquiry*—Bona fide *transferee*—C was the owner of the property in dispute. After his death his widow R got into possession. On her death one Rudra got it as next reversioner. R had contracted certain debts, Rudra borrowed money on the security of the property and paid up R's debt. The defendant P brought a suit against Rudra and his transferees, the plaintiff, N being among them, for possession of R's entire property, on the ground that it belonged to him. N pleaded that P had no right to question the transfer made in his favour. No specific issue was framed. P obtained a decree against all the defendants, N being one of them. N then brought a suit against P for sale upon his mortgage executed by Rudra and pleaded that P was estopped from denying his title as mortgagee. *Held*, that the plaintiff ought to have raised the question of estoppel in the previous suit brought by P, and not having done so, the present claim was barred by the rule of *res judicata*. When N advanced money to Rudra, he did not make any enquiry as to his title. It was found that he resided in the same locality as Rudra and had been lending money to the family for a long time. *Held*, he could not claim to be a *bona fide* transferee within the meaning of s. 41, Transfer of Property Act. The fact that money advanced to Rudra was applied in payment of R's debts did not make a mortgage made by Rudra a valid mortgage. PATERSHRI PARTAB NARAIN SINGH v. NAGESHAR PERSHAD PANDE, **8 A.L.J. 358.**

(235)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)*—Res judicata—*Hindu widow representing estate—Question whether mortgage by widow binds estate—Widow, executrix of her husband's estate—Probate and Administration Act (V of 1881), s. 4.*—A Hindu widow borrowed money by a mortgage of her husband's property. The mortgagee brought a suit on the bond and she contested it as the executrix of her husband's estate. The question raised in that suit was, whether the estate of her husband was bound by the mortgage, and it was found that the debt was contracted by her as executrix for the benefit of the estate. Her adopted son subsequently brought a suit for a declaration that the mortgage by his mother was void. *Held*, that the question whether the mortgage-debt bound the estate is *res judicata*, and the plaintiff cannot be allowed to re-open the question; that, as, in the first suit, the widow was sued as executrix to her husband's estate, and she represented the estate, the plaintiff is bound by the decision in the previous suit. SHIBA LAKHAN BHAKAT v. SRIMATI TARANGINI DASI, **4 Ind. Cas. 483.**

(236)—*S. 11 (=Civ. Pro. Code, 1882, s. 13)—Suit for possession of certain trees—No bar by suit for damages for loss of fruits or for declaration of title to such trees.*—Where the Malguzars sued for possession of certain *harra* trees from the defendant, who held a lease of the village exclusive of *harra* trees, for value of produce of the same, the suit was not barred by *res judicata* under s. 13 of the Code, by the

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dismissal of a prior suit for damages for the *harra*, collected by the defendant, instituted by the plaintiff's lessee of those trees and by the dismissal of another suit brought by the plaintiff for a declaration of his right to the fruit of all the *harra* trees. L. ROOKE v. DOSAI SONAR, **7 C.P.L.R. 63.** (1 C.P.L.R. 145, *R.*)

(237)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)* —Res judicata—*Cause of action, identity of —Origin of suit different.*—Where the cause of action is identical, though the origin of the suit is different, and the point at issue in both the suits is the same, the subsequent suit is barred as *res judicata*. MAUNG LU GYI v. MAUNG GYI, **L.B.R. 1893—1900, 490.**

(238)—*S. 11, Civ. Pro. Code, 1882, s. 13, Expl. V).*—A former suit brought by one of the *uralars* of a devasom, to question the alienation of devasom lands by some of the other *uralars*, having been dismissed, operates as *res judicata* to bar a subsequent suit brought for the same purpose by another *uralar*, whose position had not been recognised at the first litigation, and who had not been brought on the record in those proceedings. MADHAVAN v. KESHAVAN, **11 M. 191.** [*D.*, 28 M. 457, F.B.=14 M.L.J. 404.]

(239)—*S. 11 (=Civ. Pro. Code, 1882, s. 13, Expl. III).*—The plea of adverse possession raised by the defendant was opposed by the plaintiff on the ground that the defendant had not made such adverse possession a ground of attack in his previous suit. It was found, however, that the question of the character of the possession by the defendant then plaintiff had been considered by the Court in the previous suit, in which the Court came to the conclusion that the present defendant had long enjoyed the office and its lands adversely to the plaintiff's family. Defendant was, therefore, not precluded by the terms of Expl. II of s. 13 of the Code of Civil Procedure. ALAGIRISAMI NAICKER v. SUNDARESWARA AYYAR, **21 M. 278.**

(240)—*S. 11 (=s. 13, Civ. Pro. Code, 1882)—Question of status as daughter in administration proceedings—Question of status as daughter in regular suit—Incidental determination of question—Competent Court—Res judicata.*—Where the appellant, A, applied as the daughter of B for letters of administration to the estate of B and an issue in that case was framed as to whether she was the daughter of B. *Held*, that the question which there arose as to whether A was the daughter of B was a question which it was necessary for the Judge to determine incidentally, for the purpose of determining whether she had a prior right to have letters of administration granted to her, and that the District Judge in disposing of A's application for letters of administration was not a competent Court within the meaning of s. 13 of Act XIV of 1882 to determine with conclusive effect her status as daughter of B. *Held*, therefore, that the question as to whether A was the daughter of B was not *res judicata* in a regular suit where such status required to be determined. MA CHEIN v. MAUNG THA GYI, **L.B.R. 1893—1900, 653.** [*F.*, 5 L.B.R. 78.]

(240 *a*)—*S. 11*—'Res judicata'—*Consent decree — Estoppel, distinguished.* — A consent-decree has, to all intents and purposes, the same effect, as *res judicata*, as a decree passed *per invitum*. A consent-decree, come to between the predecessors-in-interest of the parties, touching matters substantially and directly in issue between them, is *res judicata*. *Res judicata* differs from estoppel. The former ousts the jurisdiction of the Court, while the latter does no more than shut the mouth of a party. To put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. BHAISHANKAR v. MORARJI, **13 Bom. L.R. 950.**

(240-*b*)—*S. 11 (=s 13, Expl. II, Civ. Pro. Code, 1882)*—Res judicata—*Ground of attack in former suit—Heard and finally decided.*—In order to make s. 13 of the Civ. Pro. Code, 1882, applicable to a case to which Expl. II of the section applies, it is not necessary that the matter of the subsequent suit should have been heard or finally decided by a competent Court in the former suit. (6 C.W.N. 889, *Rel. on.*) The plaintiff sued for the ejectment of the defendant on the allegation that the defendant's interest (under-raiyati) was an encumbrance which he had annulled by a notice under s. 167 of the Bengal Tenancy Act; the suit was dismissed because the notice was not served within the statutory period. The plaintiff then brought the suit to eject the defendant as a trespasser with an alternative plea that, even if the defendant's under-raiyati be admitted to be valid, he can be evicted on notice under s. 49, which has been given. *Held*, that the plaintiff's claim to eject the defendant as a trespasser ought to have been made a ground of attack in the former suit, and that the cause of action in both cases was exactly the same, namely, that the plaintiff is entitled to possession of the land and was being wrongly kept out of it by the defendants. If, however, the plaintiff could show that the defendant's under-raiyati was terminated by a legal notice under s. 49, he would be entitled to eject the defendants. SHERJAN GAZI v. ASMUTTULLAH GAZI, **11 Ind. Cas. 127.**

(240-*c*)—*S. 11 (Act VIII of 1859, s. 2)*—*Suit for* khas *possession.*—S. 2 does not apply to a suit for ejectment and *khas* possession brought after plaintiff had in a former suit obtained a declaration that the land was his *mal* land and

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not defendant's *lakhiraj*, and had served defendant with a notice to quit, which was not complied with. ESHAN CHUNDER GHOSE v. HURISH CHUNDER BANERJEE, **10 B.L.R. App. 5=18 W.R. 19.**

(240-*d*)—*S. 11*—Res judicata—*Co-plaintiffs, res judicata as between—Civ. Pro. Code (Act XIV of 1882) s. 26*—D (the plaintiff) and R (the defendant) both together sued one C for recovery of certain ornaments, which were alleged to belong to the estate of M, who was the father of D and the husband of R. The claim was decreed in favour of R on the ground that she was absolute owner of the property. Later on D brought a suit against R claiming that the ornaments belonged to the estate of M and praying for a declaration that he was entitled to succeed as his son and heir. The claim was resisted on the ground of *res judicata*: *Held*, that the plea of *res judicata* must be disallowed, inasmuch as, in the first suit, there was no final adjudication as between R and D, and it was a matter of no consequence whatever to the defendant therein, for the purposes of relief to be given against him, whether R or whether D succeeded. As between co-plaintiffs a finding to become *res judicata* must have been essential for the purpose of giving relief to the plaintiff in the previous suit. The Court ought not to hold apoint to be *res judicata*, unless it is clear from the pleadings and the findings in the previous suit. No Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit. RAKHMINI v. DHONDO, **11 Bom. L.R. 128.**

(240-*e*)—*S. 11*—Res judicata—*Point not decided in appeal—Hindu Law*—Mitakshara—*Mortgage of family property by father—Son's pious duty to pay debt—Redemption of mortgaged property by sons, after sale, if allowed—Son not impleaded in suit on mortgage.*—B and N mortgaged ancestral property to R, to pay off debts incurred by their father. N's interest in the property was sold in execution of a money-decree and purchased by M. R. Afterwards R sued B N and M R on his mortgage and obtained a decree in execution of which he purchased the property himself. The sale was confirmed, but the certificate was not obtained by R for more than three years. R applied for certificate and it was granted to him. Upon appeal, R objected that no appeal lay. The lower appellate Court held that an appeal did lie, but rejected the application as barred by limitation. In second appeal by R, the High Court pronounced no opinion as to whether an appeal would lie, but dismissed the appeal holding the application barred by limitation. In a suit by R for possession, *held*, by *Chameir, J.* (1) that the suit was not barred by the rule of *res judicata* inasmuch as the judgment of the High Court which was the final judgment in the case expressed no opinion on the question whether an appeal lay or not; (2) that, the property having been sold in execution of a decree

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on a mortgage made to pay off the family debt, the son was not entitled to redeem it on the sole ground that he was no party to the suit on the mortgage. *Per Karamat Hussain, J.*—A private sale by the father in a joint Hindu family or an auction-sale by a Court is held to be binding upon his sons because of their pious duty to pay their father's debt, and not because the sale has taken place, and as there is no pious duty to abstain from redeeming the mortgage made by the father, an auction-sale cannot extinguish the right to redeem. When they claim redemption, they, in fact, come forward to perform the pious duty cast upon them by the Hindu Law, and an auction-sale cannot stand in their way. The right to redeem a mortgage is quite distinct from the right to get back a share in a property sold in execution of a decree upon a mortgage. BALDEO SINGH v. HIRA LAL, **9 A.L.J. 67.** (25 A. 214, *Expl.*)

(240-*f*)—*S. 11 (=Civ. Pro. Code, 1859, s. 2)*—Res judicata—*Respondents in same interest—Costs.*—Where a plaintiff in a former suit admitted that no portion of the land then sued for was included within her taluk as originally settled and defined by the dowl, but that she had, as talukdar, acquired title to the taluk as *taufir*, *held* that she could not bring her present suit and claim to fall back upon the other title. *Held* also, that there was no ground in this case for departing from the general rule of allowing but one set of the costs to respondents in the same interest, since the Collector, as Court of Wards and representing the infant defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if he had left the defence in the hands of the other defendants, or at the most applied for leave to join in their case. WOOMATARA DEBIA v. UNOPOORNA DASSEE, **11 B.L.R. 158, P.C.=18 W.R. 163.** [*F.*, 3 C.L.R 253, 4 C.L.R. 599; *R.*, 11 B.H.C. 224, 22 W.R. 464, 24 W.R. 304, 2 C. 152, F.B. 6 C. 559=8 C.L.R. 10, 8 B. 174, F.B., 11 B. 703, 14 B. 31, 21 M. 91, 13 M.L.J. 448=26 M. 760, 31 M. 385; *D.*, 24 C. 83.]

(240-*g*)—*S. 11 (=Civ. Pro. Code, 1859, s. 2)*—*Multifariousness—Dismissal of suit—Determination of suit.*—The objection to a suit on the ground of multifariousness or misjoinder of causes of action, is an objection to the hearing of the suit, and if it prevails at whatever time, it has the effect of preventing a determination of the suit as after hearing. Where a suit has been dismissed for multifariousness, the suit is not within the meaning of s. 2, Act VIII of 1859, heard and determined FATTEH SINGH v. LACHMI KOOER, **13 B.L.R. App. 37.**

(241)—S. 11—An order pronounced by a Court in terms of a *rajinamah* though unregistered, is in itself a step of judicial procedure, and constitutes *res judicata*—*See* COMPROMISE—EFFECT OF, 1 Bom. L.R. 394.

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(241-*a*)—S. 11—Amendment of decree—Successive applications to amend—*See* DECREE—AMENDMENT OF DECREE, 14 C.L.J. 481.

(242)—S. 11—Question of right of way—*Res judicata*—*See* EASEMENT, 3 Ind. C s. 271.

(243)—S. 11—*See* EASEMENTS ACT, 1882, s. 13, 9 Ind. Cas. 813.

(244)—S. 11—*See* ESTOPPEL—DENIAL OF TITLE, 10 W.R. 22=1 B.L.R. A.C. 1.

(245)—S. 11—*See* ESTOPPEL—ESTOPPEL BY JUDGMEMT, 28 C. 318.

(246)—S. 11—*See* ESTOPPEL—MISCELLANEOUS, 1 Bom. L.R. 709.

(247)—S. 11—*See* EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 16 C. 300.

(248)—S. 11—*See* EVIDENCE ACT, 1872, ss. 13 and 43, 9 Bom. L.R. 65=31 B. 543.

(249)—S. 11—Soope—Submission to jurisdiction of foreign Court when arises—*See* FOREIGN COURT—GENERAL, 26 C. 931=3 C. W.N. 614.

(250)—S. 11—*See* HINDU LAW—REVERSIONER'S, 2 C.L.J. 144.

(251)—S. 11—*See* JURISDICTION OF CIVIL COURTS 3 A. 521.

(252)—S. 11—*See* JURISDICTION OF REVENUE COURTS, 73 P.W.R. 1908=124 P.L.R. 1908=12 P.R. 1909=Ind. Cas. 321.

(253)—S. 11—*See* LAKHERAJ TENURE, 2 W.R. 207.

(254)—S. 11—*See* LANDLORD AND TENANT—FORFEITURE, 8 Ind. Cas. 660.

(255)—S. 11—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 9 C.L.J. 479=13 C.W.N. 746=1 Ind. Cas. 539.

(256)—S. 11—*Res judicata*—Point taken in defence but not considered—Adverse decision against defendant — Effect — *See* LEASE—GENERAL, 13 C.W.N. 513=9 C.L.J. 362=5 M.L.T. 247=1 Ind. Cas. 66.

(257)—S. 11—An order passed by a Mamlatdar in a possessory suit does not give rise to the bar to which Expl. 2 of s. 13 of the Civ. Pro. Code, 1882, relates—*See* LIMITATION ACT, 1908, art. 47, 5 Bom. L.R. 932=28 B. 215.

(258)—S. 11—*See* LIMITATION ACT, 1908, art. 109, 6 W.R. 78.

(259)—S. 11—*See* MAHOMEDAN LAW—WILL, 9 C.W.N. 938, P.C.=1 C L.J. 594=2 A.L J. 758=15 M.L.J. 336=7 Bom. L.R. 876=33 C. 116=32 I.A. 244.

(260)—S. 11—*See* MORTGAGE—GENERAL, 5 C.L.J. 653.

(261)—S. 11—*See* MORTGAGE—REDEMPTION, 13 Bom. L.R. 162, 34 C. 223=5 C.L.J. 192, 7 A.L.J. 185=5 Ind. Cas. 269=32 A. 215.

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(262)—S. 11—*See* PRE-EMPTION—MISCELLANEOUS, 157 P.W.R. 1909.

(262-*a*)—S. 11—*Res judicata* between co-defendants—*See* RES JUDICATA—PARTIES, 10 Ind. Cas. 324.

(263)—S. 11—*See* SANAD, 7 C.L.J. 202.

(264)—S. 11—Suit for the amount of stamp duty and penalty—Stamp Act, 1879, s. 41—Costs—*See* STAMP DUTY, 6 A. 70=3 A.W.N. 211.

(265)—S. 11—*See* TRANSFER OF PROPERTY ACT, 1882, s. 92, 25 M. 300, F.B.=12 M.L.J. 128.

(266)—S. 11—*See* WITHDRAWAL OF SUIT, 3 B.L.R. 48, P.C.=13 M.I.A. 160=12 W.R. P. C. 43.

(266-*a*)—S. 11—*See* NOS. 60, 205, 206, 207, *supra*, AND NOS. 902, 903, 2660-*a*, 3626, 4037, 4644, *infra*.

(267)—*S. II, Expl. II (=Expl. II, s 13, Civ. Pro. Code, 1882)—Scope and application.*—Expl. II, s. 13, applies only to two suits between the same parties, for the same reliefs on different titles, but not where the subject-matters in the two suits are different. SARKUM ABU TORAB ARDUL WAHEB v. RAHMAN BUKSH, **24 C. 83.** (11 M.I.A. 50, 12 B.L.R. 304, 1 C. 144, P.C., 4 C. 190, P.C., 20 C. 79, P.C., 11 B.L.R. 158, 2 C. 152, *D.*) [*F.*, 24 C. 711=1 C.W.N. 565; *Appr.*, C.L.J. 337; *R.*, 25 B. 189, 8 C.W.N. 385, 1 C.L.J. 248, 8 C.L.J. 82=12 C.W.N. 862=35 C. 979.]

(268)—*S. II, Expl. 2—Suit for rent—Patta improper—Extent of land overstated—Prior suit for rent for previous faslis—Issue as to patta being proper—Finding as to extent—Not necessarily to be assumed—No* res judicata—B, a landlord, sued his tenants, P and others for rent for fasli 1316. P raised the plea that the *patta* tendered was improper because it overstated the extent of the land cultivated under the *patta*. In a prior suit for rent for faslis 1314 and 1315 between the same parties, a similar *patta* was tendered and was held to be proper, and it was contended that the question being *res judicata* could not be raised in the present suit. *Held* per *Sankaran Nair, J.* (*Munro, J., Diss.*) that the decision in the prior suit did not operate as *res judicata* Where a question (*e.g.*, extent or ownership of the land) need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, a party is not, in the absence of a clear and express finding, precluded from raising any question in a subsequent suit. BAMMIDI BYYA NAIDU v. BAMMIDI PARADESI NAIDU, **21 M.L.J. 344.** (8 M. 219, 24 C. 616, P.C., 24 A. 429, 12 B.L.R. 391, P.C., 16 C 682, P.C., 9 C. 439, 15 C. 800, P.C., 2 C. 152, 2 A. 582, 4 A. 69, 3 C. 145, 9 C. 426, 11 C. 301, 21 C. 236, 24 C. 711, 28 C. 17, 1 C.L.J. 248, 337, 13 M. 287, 17 M.L.J. 518, 30 M. 498, 20 A. 110, *R.*)

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(269)—S. 11. Expl. II.—Matter which 'ought' to have been made ground of defence—Question to be decided on the facts of each case—*See* C. P ACT XVIII OF 1881, ss. 71, 138 (*a*), 5 N.L.R. 189.

(270)—S. 11, Expl. II—*See* HINDU LAW—WIDOW. 9 Bom.L.R. 591=5 C.L.J. 344=11 C.W.N. 474=4 A.L.J. 232=2 M.L.T. 145=17 M.L.J. 233.

(271)—*S. 11, Expl. 4 (=13, Expl. II, Civ. Pro, Code, 1882)—Question which ought to have been raised to former suit, by way of defence.*—A question which ought to have been raised by way of defence to the former suit, must, by virtue of Expl. II to s. 13, Civ. Pro. Code, 1882, be treated as having been directly and substantially in issue in that suit. SHYAMA CHARAN BANERJI v. MRINMAYI DEBI, **31 C. 79**. (12 A. 51, P.C. D.; 16 C. 682, P. C., 20 C. 79, P.C. *R.*) [*R.*, 1 C.L.J. 337, 6 C.L.J. 622, 8 C.L.J. 369.]

(272)—*S. 11, Expl. 4 (=Expl. II, s. 13, Civ. Pro. Code, 1882)—Suit by subsequent mortgagee—Prior mortgagee made a party—Prior mortgagee's omission to set up his prior right—Subsequent suit by prior mortgagee.*—Where, in a suit on a mortgage-bond by a subsequent mortgagee, the earlier mortgagee of the same property, who is made a party, omits to set up his prior right and claim what he should be paid off or that the property should be sold subject to his mortgage-line, a subsequent suit brought by the prior mortgagee or his heirs will be barred(his mortgage-lie having been extinguished) GOPAL LAL v. BENARASI PERSHAD CHOWDHRY, **31 C. 428**. (24 A. 429, P.C., *F.*) [*F.*, 2 C.L.J. 574, 36 C. 193=5 C.L.J. 611 ; *Cons.*, 1 C.L.J. 327 ; *D.*, 9 C.L.J. 79.]

(273)—*S. 11, Expl. (4)*—Res judicata—*Defendant omitting to put forward a plea in his defence, effect of—Plaintiff bound to set up all possible claims in his suit—Pleadings.*—A mortgagee instituted a suit for sale of the property based on his mortgage executed by the mother of the plaintiff, impleading him and the mother on the ground that she had after the mortgage gifted the property to him. In that suit it was found that the mother of the plaintiff had full rights in the property and that she was competent to mortgage. A decree for sale was passed and the decree-holder purchased the property. Subsequent to the purchase, the plaintiff sued to recover a share of the property on the ground that his mother was not competent to mortgage it and that the defendant in execution of his decree had purchased only the life-interest of his (plaintiff's) mother which terminated with her death. *Held*, that the suit was barred by the rule of *res judicata*. It was necessary for the plaintiff to have raised all the please available to him in that suit in order to defeat the defendant, and if any plea was not taken and the defendant got his decree, it was no more open to the plaintiff

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to bring the suit for possession on the ground that his mother had only a life-estate and as such the mortgage and the sale held in execution of the decree were not binding on him. A plaintiff and a defendant are both bound to take every possible plea in support of his action or defence as the case may be. GIRJA DAYAL v. BRIJ BHUKHAN, **10 Ind. Cas. 29**. (11 M.I. A. 50, 10 W.R. 1, 12 O.C. 347, 4 Ind. Cas. 763, *R.*)

(274)—*S. 11, Expl. IV—'Might and ought'—Mortgage*—Res judicata.—Plaintiffs brought a suit for sale on foot of their mortgages of 1879 and 1883. They held another mortgage of 1884. In suit for sale on foot of this mortgage, they put up the mortgaged property to sale and themselves became purchasers thereof. The sons and grandsons of the mortgagor, who were defendants to the present suit, brought a suit to set aside the auction-sale in respect of their two-thirds share in the property. The mortgagees in that suit set up a usufructuary mortgage in their favour made in June 1879. A decree was made in favour of these sons and grandsons conditional upon their paying the amount due under the usufructuary mortgage. The mortgagees did not in that suit set up their rights under the mortgages of 1879 and 1883 which were the subject-matter of the present suit ; *held*, that the plaintiffs were debarred from maintaining the suit by the principle of *res judicata*, inasmuch as what the plaintiffs acquired by the auction-sale was the full proprietory title over the property originally mortgaged, what they paid for it was not the trifling sum paid at the auction-sale, but this sum *plus* all that was due to them under the usufructuary mortgage of 1879 and the two simple mortgages of 1879 and 1883, and they ought to have pleaded in reply to the suit brought by the present defendants that the latter were entitled at most to a conditional decree subject to payment of whatever was due to the auction-purchasers on account of the antecedent mortgages subject to which the property was sold. GOKUL CHAND v. GANGA BAKHSH, **8 A.L.J. 936**.

(275)—*S. 11, Expl. IV*— Res judicata—*Matter which might have been made a ground of defence or attack—Causes of action in the two suits—Identity not necessary.*—On June 3rd, 1904, A executed a usufructuary mortgage-deed and also a deed of further charge in favour of the plaintiffs. on September, 4th, 1905, he executed another mortgage-deed, the consideration for which consisted of the amounts due on the previous deeds and a further advance. In 1906, A sued through his next friend for cancellation of the deed dated 4th September, 1905, and for possession of the property. The claim was decreed and in execution of the decree the plaintiffs were dispossessed of the mortgaged property. The plaintiffs brought the present suit for recovery of the property on the basis of the usufructuary mortgage-deed

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dated 3rd June, 1904. *Held*, that the present suit was barred by Expl. IV to s. 11 of the Civ. Pro. Code. *Held* further that a matter in the sense of a ground of defence or attack within the meaning of Expl. IV may be *res judicata*, even though it has not been actually decided in the previous suit. *Held* also, that the fact that the causes of action in the two suits are different is no ground for holding that a matter is not a *res judicata*. NAWAZISH AHMED v. MURTAZA HUSAIN, **14 O.C. 117=11 Ind. Cas. 346.** (24 C. 71, 20 A. 110, 32 B. 315, 16 C 682, 11 M.I.A. 73, 26 M. 760, 27 M. 102, 12 C.W.N. 292, *D.*)

(275-*a*)—*S. 11, Expl. IV*—Res Judicata—*suit for redemption—Failure of suit—Second suit in ejectment—Court—Discretion—In ejectment-suit a redemption decree can be passed—Mortgage—Redemption—Practice.*—Where a person sues to redeem a mortgage from the defendant and fails, he can bring a second action against the defendant in ejectment. The second action is not barred by *res judicata*. The question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each case. One important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion. The matter involved in a suit in ejectment is essentially different from that involved in a suit for redemption. In the first place, where a person sues to eject, he sues as owner of the property; where he sues to redeem, he sues as owner of an interest in it, namely, the equity of redemption and the defendant as mortgagee is sued as holding the property as security for the debt. Secondly, in a suit for redemption, no question of title to the property is necessarily involved, because, if the mortgage set up by the plaintiff is proved and alive, the mortgagee cannot deny the mortgagor's title but must allow him to redeem and sue him separately on the question of title. If the mortgage is not proved, the suit fails, independently of the question of title. It has been the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment. This is purely in the exercise of the Court's discretionary power; and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right. MAHOMED IBRAHIM ABDUL RAHIMAN v. SHEIKH HAMJA MAHOMED ALLY, **13 Bom. L.R. 895=35 B. 507.**

(276)—*S. 11, Expl. VI — Community of interest—Persons not parties to former suit.*—B sued certain persons for ejectment in Revenue Court. Defendants pleaded that they were proprietors on half the property in dispute and the other half belonged to J and others. The Revenue Court held that B was not the proprietor. She then brought the suit in the Civil Court for

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declaration of title. *Held*, that the parties to the former suit did not litigate in respect of the private right claimed in common for themselves and others within the meaning of s. 11, Expl. VI of the Code. In order that Expl. VI might be applicable, there must be community of interest. *Held* that the dismissal of the suit did not bar the trial of the issue as to title as regarded J and others who had not been made parties to the previous suit. *Per Karamat Husain, J.*—The doctrine of *res judicata* with certain limitations *prohibits* a Court of justice from deciding in a subsequent suit an issue which has been *decided* in a previous suit. When a Court, with reference to an issue involved in a subsequent suit, is of opinion that *res judicata* bars the trial of that issue, it *refrains* from *deciding* that issue. To call this action of the Court a *decision* of that issue in the subsequent suit is a misnomer and can in no way deprive it of the power of deciding that issue between the plaintiff and the rest of the defendants. JAIMENGAL DEO v. BED SARAN KUAR. **8 A.L.J. 345. F.B.=9 Ind. Cas. 819=33 A. 493.**

(277)—*S. 11, Expl. VI—Suit for ejectment in Revenue Court—Question of title decided by Assistant Collector—Decision becoming final*—Res judicata.—In a suit for ejectment in the Revenue Court, the defendants to that suit pleaded title in themselves, and the Assistant Collector held that the plaintiff had failed to prove title as against them. This decision became final. In a subsequent suit in the Civil Court for declaration of title against the former defendants and also certain others, *held* that the decision of the Revenue Court operated as *res judicata* so far as concerned those persons who had been defendants to the previous suit, but not as against those who were no parties to the suit. BED SARAN KUAR v. BHAGAT DEO, **8 A.L.J. 341, F.B.=33 A. 453=10 Ind. Cas. 924.**

(278)—*Ss. 11, 2, 12, O. 20, r. 12 (=ss. 13; 212, Civ. Pro. Code, 1882)—Claim in fact included in prior dismissed suit—Reference to pleadings and judgments to explain decree—Mesne profits.*—S. 13 of the Civ. Pro. Code does not enact that no property comprised in a suit, which is dismissed, shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit, in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided. That a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it. In order to determine whether anything ought to have been set up in the previous suit, the scope of that litigation ought to be determined; and, when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment in the suit, to see what were the points

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actually heard and decided. [*F*, 31 C, 95 =8 C.W.N. 30; *R.*, 25 B. 115, 1 C.L.J. 337, 12 C.W.N. 127=6 C.L J. 735=35 C, 961; *Cited*, 60 P.R. 1894; *D.*, 9 C.W.N. 679] As to mesne profits, it is quite competent to the High Court to direct an enquiry under s. 212 of the Civ. Pro. Code. JAGATJIT SINGH v. SARABJIT SINGH, **19 C. 159=18 I.A. 165 P.C.=6 Sar. 80.**

(279)—*Ss. 11, 44. 47, O. II, r. 2 (=Civ. Pro. Code*, 1882, *ss.* 13, 43 244)—*Suit for value of trees standing on land—Suits for its ownership —Custom as regards standing crops and trees on land.*—The consideration of the question of the ownership of the tari trees which was not substantially in issue in the previous suit was held not barred in the subsequent suit, though the parties were the same. As an ordinary rule, standing crops go with the land. But, in parts of Burma at least, it is recognized that trees, and especially tari trees, frequently belong to a different person from the owner of the land and the custom as to be proved. MA MO YWA v. MAUNG LU THA, **U.B.R. 1897—1901. Vol. II, 213.** (U.B.R. 1892—1896, Vol. II 548, U.B.R. 1897—1901, Vol. II, 286, 360, 13 W.R. 104, *F.*

(280)—Ss. 11 and 14, O. II, r. 2, O. III, r. 2—RENT, 7 O.C. 109.

(281)—Ss. 11, 26, O. IV, r. 1—*See* RES-JUDICATA—MISCELLANEOUS, 27 M. 102.

(282)—*Ss. 11, 47 (=ss. 13 and 244, Civ. Pro. Code 1882), difference between.*—S. 244 bars a suit brought for the determination of certain questions specified therein, but it does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. S. 244 in this respect differs from s. 13, Civ. Pro. Code, 1882, which not only bars the trial of a suit or of an issue where the suit or the issue has actually been previously heard and determined, but also the trial of an issue which might and ought to have been raised in a previous suit by either party. BHIRAM ALI SHAIK SHIKDAR v. GOPI KANTH SHAHA, **24 C. 355=1 C.W.N. 396.** (8 A. 146, *D.*) [*F.*, 26 C. 946, 4 M.L.T. 285=19 M L.J. 1=1 Ind. Cas. 193; *Appl.*, 27 C. 187; *Rel. on*, 7 C.W.N 607; *R.*, 27 C. 415= 4 C.W.N. 557. 32 M. 242=5 M.L.T. 248=1 Ind, Cas. 221.]

(283)—*Ss. 11, 47 (=Civ. Pro. Code, 1882, ss. 13, Expl. III, 244)*—Res judicata—*Question arising in execution—Separate suit, maintainability of*—H sold a share in a village to B. The plaintiff thereupon brought, as co-sharer, a suit for pre-emption and obtained a decree. In that suit he pleaded that the cash-payment to the vendor was less than Rs 700; that out of a total of Rs. 1,078, Rs. 350 and Rs. 84 had been left with the vendee to meet mortgages on the property; and he claimed to pre-empt on the same terms. The Court found that Rs. 1,078 was the true consideration and the decree was for payment of that sum and

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nothing was said as to who was to receive that sum or whether the Rs. 350 forming a portion of that sum was to be deducted on account of the alleged mortgage. The plaintiff deposited the sum decreed, and at the same time protested that the whole sum was not payable to the vendee, B. He then brought the present suit to make B pay off the mortgage of Rs. 350 or, in the alternative, that plaintiff should have a decree for recovery of that sum to be applied in discharge of that mortgage. *Held* that the suit was not maintainable, that its subject-matter referred to a matter which was the subject of the first pre-emption suit, the decree in which made no mention of who was to draw the money when deposited in Court by the plaintiff or who was to benefit, that there was nothing whatever to show that when B drew the sum of Rs. 1,078 he overdrew any sum, and that the question came within the purview of s. 244 (c) of the Civ. Pro Code. BRAHMAJIT GIR v. BAHADUR, **A.W N. 1886. 100.**

(284)—*Ss. 11, 47 (=ss. 13, 244, Civ. Pro. Code, 1882)—Issue arising out of execution of decree, not raised and determined under s. 244 —Effect.*—Issue arising out of execution of a decree, not being raised and determined under s. 244, Civ. Pro. Code, not barred. So that section does not preclude a defendant, in his subsequent separate suit, from raising that particular issue. NIL KAMAI MUKERJEE v. JAHNABI CHOWDHURANI, **26 C. 946.** (24 C. 355, *F.*) [*F.*, C.W.N. 607, 4 M.L.T. 285= 19 M L.J. 1.]

(285)—*Ss. 11, 47 (=ss. 13, 244, Civ. Pro. Code, 1882)—Decree under ss. 88, 89 of Transfer of Property Act, IV of 1882—Decree not in accordance with judgment — Construction of decree.*—In a suit for the recovery of the amount due under a mortgage deed, certain property not comprised in the mortgage was included in the plaint. The defendant overlooked this in his defence, and judgment was given in favour of the mortgagee declaring that "a decree be given against the hypothecated estate." In the decree that followed, the property affected was described as "the property specified in the *plaint*." After the sale of the properties, the defendant instituted a suit for the recovery of the portion of the property sold which was erroneously included in the plaint. *Held* that it was not intended by the Court to give a decree over any property other than that hypothecated, and that the description in the decree, *viz.*, "the property specified in the plaint," must be held no mean only the *hypothecated* property mentioned in the plaint; and that the suit was maintainable, not being concluded either by s. 13 or s. 244 of the Civ. Pro. Code. RAM CHANDER v. KONDO, **22 A. 442=A.W.N. 1900, 155.** [*R.*, 7 M.L.T. 191.]

(286)—Ss. 11, 47—*See* MESUE PROFITS—RIGHT TO MESNE PROFITS, 19 B. 532.

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(286-*a*)—Ss. 11, 47—Second suit for redemption — *Res judicata*—*See* MORTGAGE—REDEMPTION, 14 O.C. 257.

(287)—Ss. 11 and 47— *See* MORTGAGE—REDEMPTION, 24 A. 44, F.B.=A.W.N. 1901, 194, 6 O.C. 239.

(288)—Ss. 11, 47— *See* RES JUDICATA — CAUSE OF ACTION, 4 C.L.J. 211, 18 B. 327.

(289)—Ss. 11 and 47—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 60, 62, 3 O.C. 371.

(290)—*Ss. 11, 47. O. XXI, rr. 58, 63 (=ss. 13 244, 278, 283, Civ. Pro. Code, 1882)—Execution—Legal representative of judgment-debtor in possession as trustee—Objection—Defence raised in separate suit,*—*Held*, that though a legal representative of a judgment-debtor who alleges that the property sought to be sold in execution was not the property of the judgment-debtor but was property possessed by the legal representative as trustee for others, may file an objection under s. 278 of the Code, there is nothing to compel the filing of such an objection and it is open to the legal representative to raise the defence in a subsequent suit brought by the auction-purchaser for possession. RANI INDOMATI v. JAGESHAR, **A.W.N. 1906, 158=3 A.L.J 565=28 A. 644.**

(291)—*Ss. 11, 47, O. XXI, rr, 60, 99 (= Civ. Pro. Code, 1882, ss. 13, 244 280 and 321)—Execution-proceedings*—Res judicata.—One M. M. had a decree for money against four persons of whom R. R, and J. R., were two. The decree was against each of the four for one-fourth of the total sum decreed. R. R. having died, leaving J.R., co-judgment-debtor, as his heir, M. M. applied for execution as regards R. R.'s one-fourth share by attachment of his share in certain house property. J.R., objected to the attachment, and his appeal against the order rejecting the application was dismissed. On revision, the Chief Court remanded the case for inquiry on the merits and disposal according to law. The original Court executing the decree, on the date fixed for evidence, on the decree-holder not appearing when the case was called, passed two orders, first, in the execution case, to the effect that the decree-holder being absent, the file should be consigned to the record-room; and, secondly, in the objection case, to the effect that "the decree-holder is absent, and under s. 331, Civ. Pro. Code, the decree-holder is a quasi-plaintiff, and the objector a quasi-defendant, and that, therefore, in the absence of the decree-holder, the objection must be allowed, and the property released." The decree-holder did not attempt to have these orders set aside, but subsequently applied again for execution attaching the same property. J. R., again objected, urging that the decree-holder had finally lost his right of executing the decree against that property, because of the previous order passed in the objection case. The executing Court disallowed the objection. On appeal, the Divisional Judge held that the previous order was a bar against a subsequent application for execution of the decree by attachment of the property then released. The decree-holder appealed to the Chief Court. *Held*, that the order in the execution case was not a bar to further execution; that the order passed in the objection case could not legally be passed under s. 331, Civ. Pro. Code, (that section only relates to cases in which a decree for possession is in question, and resistance or obstruction is offered to the officer charged with the execution of the warrant by a person who is not the judgment-debtor); that s. 244 (*c*) was applicable to the case, and the objection must be deemed to have been allowed under the section. J.R., the objector, being a judgment-debtor, s. 278 was not applicable. Where the heir and representative of a deceased judgment-debtor being himself a judgment-debtor under the same decree objects to the attachment of the property of the deceased man, on the ground that the objector has a lien upon it, the matter falls within the scope of s. 244 (*c*), that taking the order as one under s. 244 (*c*), the acceptance of the objection and release of the property in the absence of the decree-holder without any evidence being taken from the objector amounted to nothing more than a dismissal for default of the execution application, that the decree-holder was entitled again to apply for execution against the same property, and the first Court was right in declining to treat the matter *res Judicata*. MAGHAR MAL v. JOTI RAM, **20 P.L.R. 1903 =90 P.R. 1902.**

(292)—Ss. 11, 47, O. XXI, r. 99—Objection to execution by reversioner—Decree-holder directed to get a declaration against the reversioner—Reversioner brought upon the record as judgment-debtor—Former order, no bar—*See* HINDU LAW—WIDOW, 4 A.L.J. 117=A.W.N. 1907, 64.

(292)—Ss. 11, 72—*See* RES JUDICATA—MATTERS IN ISSUE, 4 P.R. 1903.

(294)—*Ss. 11, 92 and 93 (=ss. 13, 539, Civ. Pro. Code, 1882)*—Res judicata—*Parties under whom they claim—Persons disputing validity of waqf—Necessary parties.*—Persons, who dispute the existence of a trust, can be made parties to a suit under s. 532, Code of Civil Procedure, 1882, and it follows that they will be bound by the decision arrived at in that suit. The words in s. 13 "parties under whom they claim" are very wide MANOHARI v. MUHAMMAD ISMAIL. **8 A.L.J. 896=33 A. 752.**

(295)—Ss. 11, 96. 100; O. XLI, r. 22—*See* RES JUDICATA—GENERAL, 7 A. 606, F.B.

(296)—Ss. 11, 114, O. XLVII, r. 1—*See* RES JUDICATA—ADJUDICATIONS, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.

(297)—Ss. 11, 115—*See* RES JUDICATA—COMPETENCY OF COURT, 2 O.C. 261.

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(298)—Ss. 11, 141—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 3 A. 141, F.B.

(298-a)—*S. 11. O. I, r. 3, O. I, r. 10 (2), O. I, r. 13. O. II r. 3. O. II, r, 6, O. II, r. 7. O. XIV, r. 1 (5); O. XVIII, r, 1—Specific performance of contract of sale of land—Parties to the contract proper parties to the suit—Costs—Powers of appellate Court with regard to question of costs—Practice—Raising of issues—Waiver*—Res judicata—*Misjoinder of parties and causes of action.*—A son of the plaintiff had filed a suit against the plaintiff and his other son in 1884 for a partition of the property in the plaintiff's possession. The two main questions in that suit were, first, whether the property in the hands of the plaintiff was ancestral property and as such belonging to the joint family, and, secondly, whether the son could, during the plaintiff's life-time, claim partition of that property against his wishes. The Court of first instance decided both the question in favour of the plaintiff's son. The appeal Court reversed the decree of the Court of first instance holding that the plaintiff's son could not claim partition of ancestral property during the plaintiff's life-time. Having found this, the appeal Court observed that that was sufficient for the decision of the case, but they thought it "advisable to express an opinion on the question" whether the property was ancestral. On that question the appeal Court came to the conclusion that the son had failed to give such proof, that the property that came to the hands of his grandfather contributed materially to the funds which the grandfather employed in the business. In 1907 the plaintiff entered into a contract for the sale of a plot of land with one Awabai. Under the agreement it was provided "That the vendor will clear at his own expense, all incumbrance, and claims on the said property and will otherwise make out a good title thereto free from all reasonable doubts, claims and demands." As some sons and grandsons of the plaintiff objected to the alienation of the property by the plaintiff, Awabai's solicitors called upon the plaintiff to obtain concurrence and consent of all persons who would be entitled to an interest in the property on the footing that it was ancestral. The plaintiff thereupon sued Awabai for specific performance of the contract. On her death the plaintiff brought on the record her executors. He made also his sons and grandsons parties to the suit, praying that, should they or any of them set up any claim against the said premises, his sole and absolute rights to the said premises might be declared and given effect to. The executors (defendants I & II) denied the right of the plaintiff to enforce the contract on the ground that he had failed to make out a good title to the property by removing or clearing the claims of his male issues, and submitted that the plaintiff had no right to drag them as parties to a litigation between him and his sons, and that they could not be expected to wait for the completion of the sale of the land until such litigation was over. Defendant No. III, one of the sons of the plaintiff, contended that the plaintiff had misjoined causes of action and that the had interest in the property in the suit which was ancestral. The other sons also contended that the property was ancestral and sought for a declaration that the property was joint family property, and prayed for an injunction restraining the plaintiff from alienating the same. It was contended on behalf of the plaintiff that the question as to the nature of the property was *res judicata* in view of the decision of the Appeal Court in the suit of 1884. The Court of the first instance *held* that the question as to the nature of property was not *res judicata*, as all that the Court of appeal in the prior suit decided was that a son could not according to Khoja Law enforce partition against his father, that the suit was bad for misjoinder of parties and causes of action, and that the plaintiff was not entitled to enforce specific performance of the contract. On appeal; *Held*, confirming the decree of the lower Court, (1) that the only question decided by the appeal Court in the suit of 1884 was as regards partition, that the question as regards the character of property, although directly and substantially in issue between the parties to that suit, was not heard and finally decided between the parties, so as to estop the plaintiff's sons and grandsons from claiming to have the question tried and determined when properly raised. (2) That the suit was bad for misjoinder of causes of action and parties. (3) That the plaintiff was not entitled to enforce specific performance of the contract owing to the dispute between him and his sons regarding the character of the property. Before different sets of defendants can be joined in the same suits or different causes of action united in one suit, two conditions must be fulfilled; first, the right to relief sought in the suit must arise against all the defendants from the same act or transaction or, the same series of acts or transactions; and, secondly, some common questions either of fact or law should arise against the defendants if separate suits were brought against such persons. In a suit for specific performance of sale or purchase of property, parties other than those who are parties to the contract cannot be joined in the suit. Where there are claimants adverse to the vendor-plaintiff whose claims are not purely illusory or manifestly unmaintainable, the existence of such adverse claims entitles the defendant-purchaser to a decree in his favour in a suit for specific performance. The appellate Courts have the fullest power and the widest discretion to alter, vary, or reverse any portion of a decree under appeal, including the portion that deals with costs. It is the settled practice of the appeal Court never to interfer with the Judge below in his order as to costs, unless the order offends against some well-recognised principle, or unless the

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appeal Court feels that it would be unjust to the party against whom it is made if the order be allowed to stand. A question arose whether the defendants, by not urging the objection as to non-joinder or mis-joinder of parties or mis-joinder of causes of action, in the form of an issue, were to be taken as having waived the objection: *Held by Davar, J.*—That there was no waiver; for 'though it has been the practice of the Bombay High Court to allow the defendants' counsel to raise issues soon after the pleadings are read, the duty of framing and recording issues is cast by law upon the Court. Defendants' counsel is under no obligation to raise or frame issues. He is only bound to give such information to the Court on behalf of his client as may be necessary to form a correct appreciation of the disputes and differences between the parties. Any omission on his part, when suggesting issues to the Court, ought not to prejudice his client to the extent of holding that they had waived the objection." *Held* by *Robertson, J.*—That the objection was waived: for "in the Bombay High Court it has always been the practice for counsel for the defendant, after the reading of the pleadings, to suggest to the Court the issues which he desires raised. These are generally recorded by the presiding Judges with but slight modification. It is, no doubt, due to the fact that these Courts can and do rely on the assistance of an able and highly trained bar, that the provisions of O. I, rr. 3 & 4, have for all practical purposes dropped out of use. AHMADBHAI HABIBHOY v. SIR DINSHAW MANECKJI PETIT BARTO, **13 Bom. L.R. 1061.**

(299)—*S. 11, O. I. r. 8 (1) (=ss. 13, 30, Civ. Pro. Code, 1882)—Application under s. 30 presented too late—Suit dismissed on that ground*—Res judicata—*Subsequent suit not barred.*—In a suit the Court decided that the application for permission to sue on behalf of other persons interested, under s. 30, Civ. Pro. Code, 1882, had come too late, and dismissed the suit. Held that the suit could not be said to have beenfinally decided. It could not operate as *res judicata* to a subsequent suit brought upon the same cause of auction. MUSAMMATPHIKNA v. RAHMATULLAH SARDAR, **2 Ind. Cas. 622** (21 A. 505 *R.*,)

(300)—*S. 11, O. I, r. 8 (1) (=Civ. Pro. Code 1882, ss. 13 and 30)—Suit in respect of matter in which several persons are interested—Leave of Court not obtained—Effect of decree in suit on rights of persons other than parties to suit.*—Expl. V to s. 13 of the Code has no application where the procedure prescribed by s. 30 has not been followed. UCHHA BO BARIK v. BANMALI **16 C.P.L.R. 161.** (8 M. 496 14 M. 57, 23 M. 28, F.)

(301)—S. 11, O. I, r. 8 (1)—*See* RES JUDICATA—PARTIES, **8 Ind. Cas. 129=8 M.L.T. 445.**

Civ. Pro. Code (Acts V of 1908, XIV of 9882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(302)—S. 11, O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* PARTNERSHIP—GENERAL, 142 P. W.R. 1910=97 P.L.R. 1910=8 Ind. Cas. 999.

(303)—S. 11, O. II, r. 1—*See* RES JUDICATA—GENERAL, 31 M. 385.

(304)—S. 11, O. II, r. 1—*See* RES JUDICATA—ADJUDICATIONS, 26 M. 760=13 M.L.J. 440.

(305)—*S. 11. O. II, rr. 1 and 2 (=Civ. Pro. Code, 1877, ss. 13, 42, 43)—First suit to redeem plaintiff's share—Second suit for pre emption of brother's share.*—Three brothers joined in mortgaging their shares and the mortgagee assigned his sights to M. Two brothers joined in mortgaging their shares and the mortgagee assigned his sights to M. Two brothers subsequently sold their shares to M, and the other brought a suit against M to redeem his own share and obtained a decree. He subsequently brought the present suit against M to enforce his right of pre-emption, in respect of the sale to the latter by his brothers of their shares. *Held* that the suit could not be dismissed on the ground of false analogies in connection with ss. 13, 42 or 43 of the Civ. Pro. Code, 1877, by reason of the plaintiff not having raised his right of pre-emption in his previous mortgage suit. BALGAR SINGH v. MINATULLAH, **A.W.N. 1881. 163.**

(306)—S. 11, O. II. rr. 1, 2, O. IX, rr. 8, 9, O. XVII, rr. 2, 3 — *See* RES JUDICATA—CAUSE OF ACTION, 6 Ind. Cas. 233=8 M.L.T. 60=20 M.L.J. 535.

(306-*a*)—*S. 11, O. II. rr. 1, 2, O. XXI, r. 35—Omission of relief — Second suit barred—Decree for joint possession—Execution of decree.*—Where the plaintiff omitted to ask for a relief which he could have demanded in a former suit, he was barred from seeking the same relief in a subsequent suit. O. XXI, r. 35 of the Civ. Pro. Code of 1908 has not conferred on Civil Courts a new power of granting a decree for joint possession. It only shows in what manner a decree for joint possession should be executed. A right to joint possession is a right which existed long before Act V of 1908 came into force. In 1908, plaintiff brought a suit for exclusive possession of certain property. The suit was dismissed on the ground that, on plaintiff's own statement, the property was part and parcel of an undivided *mahal*. In 1909, plaintiff instituted a fresh suit on the same cause of action paying for a declaration of ownership, for possession of the property and for joint possession if the plaintiff was entitled to that. *Held*, that the suit was barred partly by s. 11 and partly by O. II, rr. 1 and 2 of Act of 1908. SHEO PHER SINGH v. BHOLA SINGH, **11 Ind. Cas. 87.**

(307)—*S. 11, O. II, r. 2 (=ss. 13, 43, Civ. Pro. Code, 1882) — Mortgage — Redemption—Suit for possession of proprietary holding without mentioning* shamilat—*Mortgage created by decree—Execution of decree barred—Subsequent*

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suit for possession of the same land by way of redemption—Adverse possession— Construction of decree—Bar to recovering shamilat—Res judicata.—In 1897, S sued G and A for possession of 246 *kanals* and 18 *marlas* of land, without mentioning anything about the *shamilat* appertaining thereto, on the allegations that he was the owner of that area, but the defendants had taken forcible possession of it under an alleged title of mortgagee. S got a decree therefor, conditional on his paying to G and A Rs. 837-8-0. The decree was in the following terms :—" *Yeh hukm diya jata hai ke agar mudai 857 Rupia 8 anna barai muda alai adalat mendakhal kare to dakhal arazi mutdawiya par pawe.*" S failed to execute the above decree. In 1907, S claimed possession of the said proprietary holding (which then measured 237 *Kanals* and 6 *marlas*) with 373 *kanals*, 17 *marlas* of *shamilat* land on payment of the amount above-mentioned : *Held*, that (1) The first suit was clearly not one for redemption of a mortgage, but simply for possession, but even if it be considered a suit for redemption, it did not bar the second suit. (133 P.W.R. 1908, 93 P.R. 1908, *F.*) The decree created a judicial *hypotheca* and established between the parties the relation of mortgagor and mortgagee. (9 3 P R. 1879, F.B., 57 P.R. 1883. 10 P.R. 1888, 137 P.R. 1879, *R.*) The claim as regards the *shamilat* land is barred by s. 43. Civ, Pro. Code, 1882, as the 1st suit did not cover a proportionate share of the *shamilat*, which cannot be treated as a mere accessary to the proprietary holding. SHER SINGH v. GOBIND SAHAI, **4 Ind. Cas. 410=30 P.W.R, 1909.** (113 P.R. 1901, *F.*)

(308)—*S. 11, O. II, r. 2(=Civ. Pro. Code, 1882, ss. 13, 43)—Mortgage bond--Principal and interest payable on default--Suit for interest alone on default—Second suit for principal and subsequent interest—Maintainability—Suit to recover principal and interest due under a mortgage-bond.*—The bond provided that interest accruing on the principal sum should be paid by a certain date each year and in default of payment regularly each year, the plaintiff should be at liberty at once to claim payment of the principal and interest in arrears. The first year's interest not having been paid on the due date, a suit was first brought to recover the same. The plaint therein stated that plaintiff had agreed to receive yearly the interest due for each year and the principal at the stipulated time, and that he would accordingly receive the interest for the subsequent years and the principal at the time stipulated in the bond. *Held*, that the alternative provision in the bond was intended for the exclusive benefit of the plaintiff, and he had an option to sue either for the first year's interest, or for the same together with the principal amount. The real test under s. 43 of the Civ. Pro. Code, was whether the option was so exercised as to determine the plaintiff's *locus penitentiae*. The plaintiff having manifested his intention of

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waiver by the overt act of a suit which could not be recalled, the second suit for the principal and subsequent interest was not barred. *Held* also, that there was nothing to prevent a person, against whom the Court trying the first suit had passed a decree, from claiming exemption from liability in the second suit over which such Court had no jurisdiction. BADI BIBI SAHIBAL v. SAMI PILLAI, **18 M. 257.** [*D.*, 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907.]

(309)—*S. 11, O. II, r. 2 (=ss. 13 and 43, Civ. Pro. Code, 1882)—Dismissal of a previous suit for redemption of a mortgage—Subsequent suit for redemption of the same properities based on a different mortgage, whether barred.*—A previous suit for redemption brought on a mortgage of 1860 by the plaintiff's predecessor to the defendant's tarwad, had been dismissed on the ground that the mortgage sued on was not true and the present suit was instituted for redemption of the same properties in respect of another mortgage of 1854. On a reference to the Full Bench of the question, whether the present suit was barred under ss. 13 or 43, Civ. Pro. Code, or under both, *held*, that it was not barred under either of the sections. MADATHIL RAMAN v. KRISHNAN NAIR, **16 M.L.J. 48=29 M. 153, F.B.** (26 M. 760, 27 M. 102, *F.*; 22 M. 259, *Overruled.*) [*R.* 31 M. 385, F.B., 5 Ind. Cas. 478.]

(310)—*S. 11, O. II, r. 2 (=Civ. Pro. Code, 1882, ss. 13, 43)—Suit by mortgagee for mortgage money—No prayer for sale—No bar to subsequent suit for sale.*—If a mortgagee sue for a money decree with lien over the mortgaged property without asking for its sale, although the terms of his mortgage deed entitled him to do so, he may nevertheless bring a separate subsequent suit for an order for sale of the property. Such subsequent suit will not be barred either by ss. 13 or 43 of the Code. Similarly, if the prior suit had contained a prayer for sale also and the Court from inadvertence or other cause took no notice of the prayer and passed a money decree only there will be no bar to a subsequent suit for sale. But it would be different, if, in the former suit, this right of the mortgagee to sell the property had been distinctly refused. In that case, s. 13 would clearly apply. GANPAT RAO v. MT. SAKHOO BAI, **3 C.P.L.R. 170.**

(311)—*S. 11, O. II, r. 2 (=ss, 13, 43, Civ. Pro. Code, 1882)—Mortgage—Money decree—Enforcement of money decree against mortgaged property sold to a third party—Mortgagee's lien*—Res judicata.—It seems to be quite clear that, in provinces in which the Transfer of Property Act is not in force, it is open to a plaintiff, holding a money-decree on a mortgage-bond, to attach the mortgaged property so long as it is in the judgment-debtor's possession and his interest in it has not been alienated. But where the property has already

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been sold to a third party, not a party to the suit, he cannot enforce such decree against such property. S. 43, Civ. Pro. Code, 1882, is clear enough, and shows that the obligation to pay the debt and collateral security constitute but one cause of action. As the plaintiff did not originally sue to enforce his mortgage lien, and merely claimed a money decree, he is precluded from bringing a second suit on the same cause of action. MAUNG PO THIT v. KUTRAN CHETTY, **L.B.R. 1893—1900, 14.** [10 C. 299, Selected Judgments I, p. 311, *R.*]

(312)—*S. 11, O. II, r. 2 (=ss. 13, 43, Civ. Pro. Code, 1882)—Will—Probate—Revocation—Suit*—Res judicata—*Causes of action, joinder of—Probate by consent.*—A applied for grant of probate of a will, X entered a caveat on behalf of B, an infant. X subsequently withdrew the opposition, and, by consent, probate was granted to A. B attained majority, and alleging that the estate was being mal-administered, applied that the probate might either be revoked or jointly granted to her. The application was refused. B then applied for revocation of the probate on the ground that the will was a forgery and that probate had been obtained by fraud without any evidence. *Held*, that assuming that s. 13 of the Code was applicable, the second application for revocation was not barred by constructive *res judicata*, inasmuch as, it was not obligatory upon B to take the ground now urged, in her previous application. *Quære*: Whether an application for revocation of probate is a suit. KHIRODAMOYI BARMANI v. BAGALA SUNDARI BARMANI, **4 C.L.J. 492.**

(313)—*S. 11, O. II, r. 2 (=Civ. Pro. Code, 1882, ss. 13, 131)*— Res judicata.—A person instituted a suit for a declaration that a certain will was a forgery, and it was found upon evidence that the will was genuine. In a subsequent suit to recover moveable property, he averred that the will was invalid as it sought to dispose of property contrary to caste usage. The decision in the former suit did not operate as *res judicata*, and the plaintiff is not estopped from questioning the validity of the will, as it was not necessary for him to make this a ground of attack in the former suit. THANDAVAN v. VALLIAMMA, **15 M. 336=2 M.L.T. 130.** [*R.*, 26 M, 760, 4 L.B.R. 32.]

(314)—*S. 11, O. II, r. 2 (=Civ. Pro. Code, 1877, ss. 13, 43)—Act I of 1877 (Specific Relief Act), s. 42.*—Where a previous suit for declaration of title to immoveable property and for the setting aside of a deed of gift of such property has been dismissed, with reference to the provision of s. 42 of the Specific Relief Act, on the ground that the plaintiff had failed to sue for possession, though he was not in possession and was able to sue for it, a subsequent suit for recovery of possession is not barred by s. 43 of the Civ. Pro. Code, whether or not a fresh cause of action has accrued between the institution of the firstsuit for a declaratory decree and the second suit for possession. RAM SAWAK SINGH v. NAKCHED SINGH, **4 A. 261, (F.B.)** [*F.*, 7 C.P.L.R. 63; *R.*, 17 A. 174.]

(315)—*S. 11, O. II, r. 2 (=Civ. Pro. Code, 1882, ss. 13, 43)—Agreement for sale—Vendee put in possession subsequently ejected by vendors—Sale not completed—Suit by venaee for possession and injunction—Similar suit by vendors—Subsequent suit by vendee for specific performance—Omission to set up ground of defence*—Res judicata.—Plaintiffs and defendants entered into an agreement for sale of a coffee plantation subject to certain mortgages. The plaintiffs paid a part of the consideration-money and were put in possession of the estate subject to the supervision of the defendants. The sale was to be completed and the balance of the price was to be paid after a certain time. The purchasers cultivated the estate and paid off the mortgages and made some other payments on behalf of the vendors. Then disputes arose and each party accused the other of delay. The vendors eventually sued for possession of the estate and for general relief. The purchasers defended themselves in that suit, and sued for possession under s. 9 of the Specific Relief Act and for damages and for an injunction. There was no relief prayed and no issue framed in either suit on any point except possession and compensation. The purchasers did not ask for completion of the agreement, nor the vendors for its cancellation. Plaintiffs were allowed the management of the estate, but refused possession thereof. After the disposal of both the suits, the plaintiffs instituted the present suit for specific performance of the agreement for sale. *Held* that the suit was barred by s. 43, Civ. Pro. Code. The agreement was the cause of action in the prior suit also by the plaintiffs. The vendors having asserted that the agreement was no longer in force, the obvious course for the purchasers was to demand completion of it. Plaintiffs, having failed to assert that right in the prior suit, could not be permitted to do so now. The High Court had, also, held that the suit was barred as *res judicata* also, but the Judicial Committee, without deciding the point, affirmed the decision of the High Court on s. 43. RANGAYYA GOUNDAN v. NANJAPPA RAO, **24 M. 491=6 C.W.N. 17 P.C.=3 Bom. L.R. 799 =8 Sar. 117.** [*F.*, 10 O.C. 44 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907; *R.*, 8 O.C. 389, **10 O.C. 145.**]

(316)—*S. 11, O. II, r. 2 (=ss. 13, 43, Civ. Pro. Code, 1877)—Karnavan's right to recover property in Anandravan's possession—Improvements by Anandravan—Charge for.*—The Karnavan of a Malabar tarwad has a right to demand at any time, the restoration of the property of the tarwad, in the hands of the Anandravans, and a suit, therefore, for the recovery of those properties is not barred, under ss. 13, 43 of the Civ. Pro. Code by the fact that in a previous suit between the same parties, certain items now claimed were not included, or that there

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was a decree of dismissal in pursuance of a Karar according to which the Anandravan had to but did not surrender his lands. [*R.*, 20 M. 129.] An Anandravan is not entitled to charge for improvements made in the course of the use of the tarwad property. KANNAN v. TENJU, **5 M. 1.**

(317)—*S. 11, O. II, r. 2 (=s. 13, Expl. 2 and s. 43, Civ, Pro. Code, 1882)*—Res Judicata. —H, S, maternal grand-father of the plaintiff and defendants, Nos. 1 and 2; owned a share in a village. On his death in 1877, the defendant No. 1 took possession of the property. In June, 1895, the plaintiff brought a suit for possession of one-third share in the property on the basis of a gift, alleged to have been made by H. S. in favour of himself and defendants Nos. 1 and 2. That suit was dismissed on the ground that the deed of gift was not registered and was inadmissible in evidence. In that suit, defendant No. 2 filed a written statement in which he said that he had no right whatever to any of the property which, he said, solely belonged to defendant No. 1. Subsequently the plaintiff brought a suit for his share by inheritance in the property and in view of the relinquishment by defendant No. 2, he claimed a half-share in the property. *Held*, that the suit was not barred by s. 13, Expl. 2, nor by s. 43 of the Code. MIR IHTISHAM HAIDER v. MIR BAQAR ALI, **9 O.C. 235**, (7 N.W.P. 60, 11 B.H.C. 224, *R.*) [*R., and Rel.*, 12 O.C. 347.]

(318)—*S. 11, O. II, r. 2 (=ss. 13, 42, Civ. Pro. Code, 1882)—Relief omitted in former suit, suit for—Declaration of title—Relief claimed in subsequent suit which could have been claimed previous suit*—Res Judicata.—The appellant (talukdar) caused a notice of ejectment to be served on the respondents as *thekadars* of a village, under the provisions of ss. 54 and 55, Oudh Rent Act. The respondents sued to contest their liability to be ejected, and the notice was set aside. Thereupon, the appellant brought a suit against the respondents in the Court of the Subordinate Judge for possession of the village, alleging that they were *thekadaras* and liable to be ejected by the Revenue Courts. The appellant did not ask in his plaint for a declaration of his title. His suit was dismissed. The appellant subsequently instituted the present suit against the respondents in which he alleged that they were *thekadars* of the village and claimed a declaration that he was the absolute proprietor of the village, and the only right which the respondents had was to receive one-tenth of the proceeds of the village, and that they were liable to be ejected by the Rent Court. The suit was dismissed on the ground that it was barred by the provisions of s. 43 or s. 13 of the Code of Civil Procedure. *Held*, that the present suit could not be held to be barred by s. 13, Civ. Pro. Code, for, it could not be said that the appellant claimed a declaration of his title in the former suit and that the Court refused

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to grant him relief. But it was barred by s. 43, Civ. Pro. Code. The causes of action in the two suits were the same; the Courts which heard the former suit were competent to grant the appellant a declaration of his title; the appellant had an opportunity of obtaining in the former suit the relief which he now sought; and, having omitted to sue for it in the former suit, he could not sue for it now. PARTAB NARAIN SINGH (THE HON'BLE SIR MAHARAJA) v. MUSSAMMAT SARJU DEI, **5 O.C. 173.** [*R.*, 8 O.C. 389, 13 O.C. 19; *F.*, 10 O.C. 44.]

(319)—*S. 11, O. II, r. 2 (=Civ. Pro. Code, 1882, ss. 13, 43)—Partition of house-sites by Revenue Court—Ouster—Suit for possession—Dismissal—Subsequent suit for partition, whether barred.*—On an application to the Revenue Court for partition, the sites to certain houses were partitioned and certain portions allotted to the plaintiffs, who were under the belief that by the partition not merely the site but the houses were partitioned. The defendants ousted the plaintiffs from possession of the portions of the houses which the plaintiffs so believed had fallen to them on partition, and in consequence of this they instituted a suit for recovery of possession, which was dismissed on the ground that the Revenue Court had no power to partition house property and that, consequently, the plaintiffs had not acquired any title to the specific portions of the houses which they claimed. They then brought a second suit for partition of the house property which was contended to be barred by the provisions of ss. 13 and 43, Civ. Pro. Code. *Held* that the suit was not barred either by s. 13 or by s. 43, as the cause of action was not the same, and the property, the subject-matter of the two suits, was not identical, nor was the title upon which the two suits were based identical. BALBHADDAR NATH v. RAM LAL, **26 A. 501=1 A.L.J. 228.**

(320)—*S. 11, O. 2, (=ss. 13, 43, Civl. Pro. Code, 1882)—Cause of action— Damages.*—A plaintiff cannot include in a claim for mesne profits arising out of an act of dispossession committed against him in 1886, a demand for compensation in respect of damage said to have been done to him when he was still in possession of the land in 1885. The two causes of action being different, s. 43, Civ. Pro. Code, does not bar the suit. Nor does s. 13 apply where the claim for damages was left undecided in a former suit on the ground that the Court had no jurisdiction to deal with it. MAHABEER SINGH v. RAMBHAJAN SAH, **16 C. 555.**

(321)—S. 11, O. II, r. 2—*See* BOM. ACT XVII OF 1879, 7 B. 377.

(322)—S. 11, O. II, r. 2—*See* JOINDER OF CAUSES OF ACTION, 17 W.R. 380.

(323)—S. 11, O. II, r. 2—*See* MORTGAGE—GENERAL, 32 P.R. 1910=50 P.W.R. 1910=5 Ind. Cas. 655=57 P.L.R. 1910.

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(324)—S. 11, O. II, r. 2—*See* MORTGAGE—REDEMPTION, 6 Ind. Cas. 336=14 C.W.N. 1001.

(325)—S. 11, O. II, r. 2—*See* RES JUDICATA—GENERAL, 1 Bom. L.R. 76=23 B. 597, 7 M. L.J. 288, A.W.N. 1903, 97, 26 P.L.R. 1901, 48 P.L.R. 1902=2 A.L.J. 342.

(326)—S. 11, O. II, r. 2—*See* RES JUDICATA—ADJUDICATIONS, 8 A.L.J. 47=9 Ind. Cas. 53.

(327)—S. 11, O. II, r. 2—First plaint alleging interference with possession—Second plaint alleging dispossession—Cause of action different—*See* RES JUDICATA—CAUSE OF ACTION, 4 Ind. Cas. 97=6 M.L.T. 375.

(328)—S. 11, O. II, r. 2—*See* RES JUDICATA—CAUSE OF ACTION, 8 Ind. Cas. 9, 7 A.L.J. 29=32 A. 119=5 Ind. Cas. 451, 14 Bur. L.R. 334, 7 M.L.T. 84=5 Ind. Cas. 756, 10 O.C. 145.

(329)—S. 11, O. II, r. 2—*See* RES JUDICATA—COMPETENCY OF COURT, 16 M. 481.

(330)—S. 11, O. II, r. 2—*See* RES JUDICATA—MATTERS IN ISSUE, 28 M. 406, 16 M. 11=2 M.L.J. 265, 12 O.C. 347=4 Ind. Cas. 763.

(331)—S. 11, O. II, r. 2—*See* RES JUDICATA—MISCELLANEOUS, 6 C.W.N. 314.

(332)—S. 11, O II, r. 2, s. 73—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1865, s. 6, A.W.N. 1890, 21.

(333)—S. 11, O II, r. 1, s. 141—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 2 Ind. Cas. 105.

(334)—S. 11, O. II, rr. 2, 3, 6—*See* RES JUDICATA—CAUSE OF ACTION, 8 O.C. 65.

(335)—S. 11, O. II, rr. 2, 4 and 5—*See* RES JUDICATA—CAUSE OF ACTION, 58 P.W.R. 1908.

(336)—S. 11, O. II. r. 2. O. XX, r. 12—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 4 B. L.R. 173, F.B.=13 W.R. 15=14 W.R. 151.

(337)—S. 11, O. II, r. 2, O. XXII, r. 1—*See* RES JUDICATA—CAUSE OF ACTION, 8 O.C. 389.

(338)—S. 11, O. II, r. 2, XXXII, r. 7—*See* RES JUDICATA—ADJUDICATIONS, 25 P. L.R. 1909=14 P.W.R. 1909=1 Ind. Cas. 400.

(339)—*S. 11, O. II, rr. 1, 5 (=ss. 13, 44 (b), Civ. Pro. Code, 1882*—Res judicata—*Prior purchaser—No estoppel by judgment against him in an action after sale—Privity of estate—Misjoinder of causes of action.*—A donee of a house cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the date of the gift. (15 A. 108, *F.*,) A person claiming property as the heir of his father, on the ground that his mother had no title to the property which she

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1871, XXIII of 1861 and VIII of 1859)—*Continued.*

purported to dispose of by way of gift to her daughter, cannot join in the same suit another cause of action based on the ground that the daughter had obtained a good title to the property from her mother and he was entitled to it as the daughter's father. ABDULALI ABDULHUSEIN v. MIAKHAN ABDULHUSEIN, **13 Bom. L.R. 268.**

(340)—S. 11, O. VII, r. 11, C. VI, r.18—*See* PLAINT—AMENDMENT OF PLAINT, 4 O.C. 108.

(341)—S. 11, O. VII, r. 13, O. XLIII, r. 1—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 4 B.H.C. A C., 110.

(342)—S. 11, O. IX, rr. 3, 4—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 5 B.L.R. App. 64=14 W.R. 81.

(343)—S. 11, O. IX, r. 9—*See* PUN. ACT, XVI OF 1887, SS. 5 (1), (c) and 110 (1), 144 P.L R. 1904.

(344)—*S. 11, O. IX, r. 9, O. XXVI, rr. 1, 14, (ss. 13, 103, 396, Civ. Pro, Code, 1882,)—Partition suit—Preliminary decree—Execution struck off for default—Fresh suit, if lies.*—A previous suit for partition brought by the plaintiffs having been compromised, an Amin was appointed to effect a partition in terms of the compromise. Subsequently the parties not appearing, the execution-proceedings then pending were dismissed for default. *Held*, that a fresh suit for partition is not barred by s. 13 or s. 103 of the Code. S. 103 has no application to execution-proceedings. MADON MOHON MONDUL v. BIKANTA NATH MONDUL, **10 C.W.N. 839.**

(345)—S. 11, O. IX, r. 11—Suit dismissed in defendants' absence on plaintiff's failure to adduce evidence—Fresh suit, if barred—*See* RES JUDICATA—MISCELLANEOUS, 10 C.W. N. 40.

(346)—*S. 11, O. IX, r. 13, s. 47 (=ss. 13, 108, 244, Civ. Pro. Code 1882)—Suit to set aside ex-parte decree—Sale in decree impeached on ground of fraud—Appeal against appealable decision not preferred—Effect.*—A suit to set aside an *ex-parte* decree and sale in execution thereof, on the ground of fraud, is maintainable although an application under s. 108, Civ. Pro. Code, 1882, has been made unsuccessfully. (21 C. 605, *Affr.*) [*Appr.*, 28 C. 475, P.C., 21 A. 289=19 A.W.N. 67, 5 C.W.N. 559; *Appr.*, 27 C. 197; *D.*, 29 A. 418=A.W.N. 1907, 112=4 A.L.J. 392; *F.*, 13 C.W.N. 493=9 C. L.J. 367=5 M.L.T. 360=1 Ind. Cas. 86; *R.*, 10 C.L.J. 336, 13 C.W.N. 1197=10 C.L J. 420.] When there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth; so far as concerns any other modes of relief available, the person not appealing is in no worse position

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

than if he had appealed and failed. PRAM NATH ROY v. MOHESH CHANDRA MOITRA, **24 C 546.** (21 C. 605, *Appr.*; 17 W.R. 413, *D*). [*Appr.*, 28 C. 475, P.C., 21 A. 289=19 A.W.N, 67, 5 C.W.N. 559 ; *Appr.*, 27 C. 197 ; *D.*, 29 A. 418=A.W.N. 1907, 112=4 A.L.J. 392 ; *F.*, 13 C.W.N. 493=9 C.L.J. 367=5 M.L.T. 360=1 Ind. Cas. 86 ; *R.*, 10 C.L.J. 336.]

(347)—S. 11, O. IX, r. 13, s. 47, O XXI, r. 42—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 5 Ind. Cas. 387=11 C.L.J. 501.

(348)—S 11, O. XVII, r. 3—*See* RES JUDICATA—ADJUDICATIONS, 18 M. 466=5 M.L.J. 189.

(349)—S. 11 and O. XVII, r. 3—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, A.W.N. 1889, 163.

(350)—*S. 11, O. XX, r. 5 (=ss. 13, 204, Civ. Pro. Code, 1877)*—S. 204, Civ. Pro. Code, while it renders it imperative upon the Court to pronounce its opinion upon such issues as may be necessary for the disposal of the suit, does not disable the Court from determining other issues also, whose determination may be desirable in some cases. To see whether a matter is *res judicata*, we must look to the former decree. If the decree does not decide the question, it is not *res judicata*. The words " has been heard and finally decided by such Court " apply, not to the expression of opinion in the judgment, but to what has been decided by the decree. DEVARAKONDA v. DEVARAKONDA, **4 M. 134.** [*Ap.*, 157 P.R. 1889, 17 A. 174, 9 C.W.N. 60, 68, 121 P.R. 1907=51 P.W.R. 1907 ; *R.*, 17 A. 196.]

(351)—S. 11, O. XX, r. 6, s. 152—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 15 M. 403=1 M.L.J. 535.

(352)—S. 11, O. XX, r. 6, s. 152—*See* RES JUDICATA—GENERAL, 5 Ind. Cas. 119=7 M.L.T. 266.

(353)—S. 11, O. XX, r. 12, s. 47—*See* RES JUDICATA — RELIEF NOT GRANTED, 17 C. 968.

(354)—S. 11, O. XXI, r. 2—*See* RES JUDICATA— ADJUDICATIONS, U.B.R. 1909, 2nd Qr., Civil Procedure, 31.

(355)—S. 11, O XXI, r. 2—*See* RES JUDICATA—MATTERS IN ISSUE, 2 Ind. Cas. 524=6 A.L.J. 836=31 A. 590.

(356)—S. 11, O. XXI, r. 22—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 5 M.L.T. 293.

(357)—S. 11, O. XXI, rr. 22, 53=*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 2 C.L.J. 499.

(358)—S. 11, O. XXI, r. 34 (5), O. II, r. 2—*See* RES JUDICATA—MATTERS IN ISSUE, 18 B. 537.

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(359)—S. 11, O. XXI, r. 53, O. XXIII, r. 1—Dismissal of suit for default after partial evidence adduced, effect of—*See* RES JUDICATA—ADJUDICATIONS, 9 C.W.N. 679.

(360)—S. 11, O. XXI, rr. 58, 63,—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 99 P.L.R. 1909=122 P.W.R. 1909=4 Ind. Cas. 970.

(361)—S. 11, O. XXI, rr. 58, 63—*See* RES JUDICATA—MISCELLANEOUS, 11 B. 114.

(362)—S. 11, O. XXI, r. 63—*See* RES JUDICATA—PARTIES, A.W.N. 1890, 177.

(363)—S. 11, O. XXI, rr. 66 and 73—See RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, A.W.N. 1905, 138=2 A.L.J. 401, F.B. =27 A. 684.

(364)—S. 11, O. XXI, r. 99—*See* RES JUDICATA—COMPETENCY OF COURT, 5 Ind. Cas. 573=11 C.L.J. 478.

(365)—S. 11, O. XXIII, r. 1—*See* RES JUDICATA—CAUSE OF ACTION, 15 M.L.J. 462, F.B.

(366)—S. 11, O. XXIII, r. 1—By plaintiff with permission to sue afresh—Subsequent suit on same cause of action—*Res judicata*—*See* WITHDRAWAL OF SUIT, A.W.N. 1888, 151.

(367)—*Ss. 11, O XXIII, rr. 1, 3 (=Civ. Pro. Code, 1882, ss 13, 372 and 375)—Evidence Act (I of 1872), s. 92—Suit for settlement of accounts referred to arbitration—Compromise of suit stating that accounts were understood and claim settled—Suit dismissed—Fresh suit based on oral promise that accounts would be settled on failing of compromise in Court—Matter directly and substantially in issue—Award—Oral evidence to contradict compromise.*—The plaintiff on the allegation that the defendant was his agent sued him for settlement of accounts and recovery of amount that might be found due to him. The parties referred the whole case to an arbitrator. Two days before the date fixed for the delivery of the award, the arbitrator asked for time. On the same date, the parties executed a razinamah to the effect that the plaintiff had understood all the accounts and had settled them and that, they had no further dispute. This was forwarded to Court with a petition by the arbitrator setting forth, that he had explained the accounts to the parties and that they, after fully understanding the accounts, had executed the razinama and that the suit should, therefore be consigned to the record room. The parties were examined by Court and the plaintiff stated that he had fully gone into the accounts and considered and understood them and that then and thereafter he and the defendant had no further dispute relating to them. The defendant attested the razinama and the Court thereupon dismissed the suit. The present suit was subsequently filed and the plaint was in substance to the same purport as that in the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

former suit with the important addition that the defendant had, in the presence of the arbitrator, promised to explain the accounts to him and to pay whatever sum was found due thereon, provided the plaintiff first filed a razinama in the case already instituted, and that in pursuance of this agreement, the razinama was drawn up and filed in Court and the case dismissed, but subsequently the defendant failed to render such accounts, though demanded by the plaintiff. The defendant denied the promise on which the suit was brought and pleaded that it did not lie as the claim on the agency was barred by time and by s. 13 of the Civ. Pro. Code, and that the plaintiff was estopped by the razinama. *Held*, that the contentions of the defendant were not valid. That the petition of the arbitrator was not an award ; that the matter directly and substantially in dispute in the present and the previous suits was not the same ; that the provisions of s. 373 of the Civ. Pro. Code, which should be strictly construed, had no bearing on the present claim, the former suit being disposed of under s. 375 ; that the plaintiff was in no way estopped from making the present claim ; and that proof of oral promise was not excluded by the provisions of s. 92 of Evidence Act. PANDIT TAKUR DAS v. R.B. DR. JASWANT RAI, **41 P.L.R. 1904=1 P.R. 1904.**

(368)—S. 11, O. XXXII. r. 7—*See* COMPROMISE—GENERAL, 21 M. 91=8 M.L.J. 28.

(369)—S. 11, O. XLI, r. 2—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 4 A. 69, F.B.=A.W.N. 1881, 116,

(370)—*S. 11 and O. XLI, r. 20 (=ss. 2 and 73, Civ. Pro. Code, 1859,—Intervention by defendant in former suit—Decree in such suit reserving all questions—Bar of suit.*—Defendant having intervened and been made a party under s. 73, Act VIII of 1859 in a former case, in which not only was no decision come to, but the decree expressly reserved all questions as between himself and plaintiff, the case was held not to come under s. 2, Act VIII of 1859. SYUD MOBARUCK HOSSEIN v. SHEO GOBIND MISSER, **18 W.R. 61.**

(371)—*S. 11, O. XLI, r. 13 (=Civ. Pro. Code, 1882, ss 13, 562)*—Res Judicata—*Order of remand by first appellate Court, power of High Court on appeal from*—Where the first Court, holding that s. 13 of the Civ. Pro. Code applied, dismissed the suit of the plaintiff, but the first appellate Court, being of opinion that that section did not apply, remanded the suit under s. 562 of the Code, it would be competent to the High Court, on appeal from the order of remand, to itself dispose of the appeal preferred to the lower Court by dismissing the appeal on the ground of *res judicata*. HASAN ALI v. SIRAJI HUSAIN, **16 A. 252=A.W.N. 1894, 64.** (14 B. 14, 17 C. 168, *R.*) [*F.*, 20 M. 152, 19 A. 517.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(372)—S. 11, O. XLI. r. 23, ss. 99, 100—*See* RES JUDICATA—PARTIES, 11 C.W.N. 380.

(373)—S. 11, sch. II, r. 16—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 21 B. 465.

——S. 12 (New).

(374)—S. 12—*See* BEN. ACT VIII OF 1885, s. 183 B. 14 C.W.N. 364=5 Ind. Cas. 781.

——S. 13 (=1882, s. 14=1877, s. 14.)

See FOREIGN COURTS—JUDGMENT OF.

(375)—*S. 13 (=s. 14—Civ. Pro. Code, 1882)—Foreign judgment—Jurisdiction—Contract—Place where breach took place*—B, a British subject living in India, entered into a contract with K, carrying on business in London, for the supply of a newspaper ; B failed to pay the subscription for the paper, and K sued him for breach of his contract in the Court of the King's Bench, obtained an *ex-parte* decree against B, and brought the present suit thereon. *Held*, that the subscription was payable in London, on the maxim that the debtor must seek out his creditor. *Held*, also, that there has been breach of a contract, which should have been performed by B by payment within the jurisdiction of the English Court, and consequently the Court of the King's Bench had jurisdiction under O. XI, r. 1, cl. (*e*) of the Rules of Supreme Court and its decree is therefore conclusive. BRAGANZA HENRY SEYMOUR KING, **3 S.L.R. 81=3 Ind. Cas. 892.** (28 C. 641, *R.*)

(376)—*S. 13 (=s. 14, Civ. Pro. Code, 1882)—Foreign decree*, ex parte—*Against Indian Law of Limitation—But with jurisdiction—Suit upon—Maintainability.*—*Held*, that the Indian Law of Limitation has no application to suits in England, and that a foreign judgment passed *ex parte* with jurisdiction, and according to the English Law of Limitation, but without regard to the Law of Limitation, which is in force in India, is conclusive in a suit in Indian Courts based upon that judgment. SIR HENRY SEYMORE KING v. MAJOR M. B. BRAGANZA, **2 Sind. L.R. 51.**

(377)—S. 13—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 15 M. 82.

(378)—S. 13—*See* FOREIGN COURT, JURISDICTION OF, 1 Bom. L.R. 539=24 B. 86.

——S. 14 (=1882, s. 13, Expl. 6=1877, s. 13, Expl. 6.)

See FOREIGN COURTS—JUDGMENT OF.

(379)—*Ss. 14, 151 and O. XLVII, r. 1—Second appeal decided on facts—Application for review—Whether entertainable.*—*Held* that the High Court in second appeal cannot entertain

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

an application for a review of judgment sought on the ground that since the disposal of the appeal, documentary evidence has been discovered which, if sufficiently proved, would have led the Court below to come to a different finding. If the fact of the discovery of the new evidence is brought to the notice of the High Court at the hearing of the appeal, it cannot consider the weight of such evidence, nor can it remand the case to the lower appellate Court with a view to the consideration of such evidence by that Court. It can, however, allow the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence. NAND KISHORE v. ANWAR HUSAIN, **6 A.L.J. 979=4 Ind. Cas. 809=32 A. 71.** (4 B.L.R.A.C. 213, 18 M. 480, *R. & F.*)

——S. 15 (=1882, s. 15=1877, S. 15=1859, s. 6, para 1.)

See JURISDICTION—CAUSES OF JURISDICTION.

(380)—*S. 15 (=Civ. Pro. Code, 1882, s. 15—Construction.*—This section is a proviso to ss. 19 and 20 of the Bengal Civil Courts Act. The word "shall" in that section is imperative on the suitor and not upon the Court for whose benefit it is intended. (*Petheram, C.J.*). This section is a rule of procedure, and not of jurisdiction. (23 W.R. 301, 25 W.R. 219 F.)(*Brodhurst and Mahmood, JJ.*) The words, "shall be," in s. 57 of the Civ. Pro. Code, are an instruction which the Courts are bound to follow; and they are therefore a restraint upon jurisdiction. (*Duthoit, J.*) A Subordinate Judge trying a Munsiff's Court suit does not act without jurisdiction; and his decree could not be reversed in appeal on the ground of want of jurisdiction. NIDHI LAL v. MAZHAR HUSSAIN, **7 A. 230, F.B. A.W.N. 1885, 1.** (*F.*, 23 M. 367=9 M. L.J. 263; *R.*, 8 A. 438, F.B., 14 M. 183, L.B. R. 1872—1892, 527, 15 M. 241, 18 A.W.N. 74, 2 L.B.R. 193, 8 Bom. L.R. 516.]

(381)—*S. 15 (=Civ. Pro. Code, 1882) s. 15.*—When a suit which should have been brought in the Subordinate Court, is brought in the District Court, the District Judge has jurisdiction to try it. AUGUSTINE v. MEDLYCOTT, **15 M. 241.** [*Appr.*, 23 M. 367 =9 M.L.J. 263 *R.*, 2 L.B.R. 194.]

(382)—*S. 15 (=s. 15, Civ. Pro. Code, 1882) —Jurisdiction of Sub Judge.*—A Subordinate Judge is not precluded by the provisions of s. 15 Civ. Pro. Code, from trying a suit within the jurisdiction of the Munsiff's Court. MATRA MONDAL v. HARI MOHUN MULLICK, **17 C. 155.** (13 I.A. 134, *D.*) [*F.*, 15 M. 241, 9 M. L.J. 263=23 M. 367. [*R.*, 2 L.B.R. 117, and 192, 8 C.W.N. 705=31 C. 649, 8 Bom. L.R. 516.]

(383)—S. 15—*See* CANTONMENT MAGISTRATE, 12 B. 169.

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(384)—S. 15—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 1 A. 180, F.B.

(385)—S. 15—Effect of provisions relating to arbitration—*See* HIGH COURT, JURISDICTION OF, BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

(386)—S. 15—Value of suit—Court of lowest grade—*See* JURISDICTION — QUESTION OF JURISDICTION, 2 L.B.R. 1903—1904, 192.

(387)—S. 15—*See* JURISDICTION OF SUBORDINATE JUDGE, 6 C. 6.

(388)—S. 15—*See* POSSESSION—SUITS FOR POSSESSION, 24 W.R. 316.

(389)—S. 15—*See* SMALL CAUSES COURT, MOFUSSIL JURISDICTION OF—GENERAL, 13 M. 145.

(390)—S. 15—*See* TRANSFER OF PROPERTY ACT, 1882, s. 52, 14 C.W.N. 522=5 Ind. Cas. 691.

(391)—*Ss. 15, 20 (=ss. 15, 17, Civ. Pro. Code, 1882)—S. 144, Bengal Tenancy Act (VIII of 1885)—Suit for rent of patni tenure—Jurisdiction when claim is below Rs. 1,000—Capital value of tenure over Rs. 1,000.*—S. 144, Bengal Tenancy Act, lays down where the cause of action in suits between landlord and tenant shall "for the purpose of Civ. Pro. Code" be deemed to have arisen: it does not say in which Court the suit is to be instituted. For this purpose that section must be read with ss. 15 and 17, Civ. Pro. Code, 1882. A suit for rent for a sum not exceeding Rs. 1,000 is cognizable in a Munsiff's Court, although a suit to recover possession lies in a Sub-Judge's Court, the capital value of the tenure being over Rs. 1,000. FAZLUR RAHIM v. ABU AHMED, **30 C. 453=7 C.W.N. 402.**

(392)—*Ss. 15, 21, O. VII, r. 10—Jurisdiction—Want of jurisdiction found during original proceedings—Plaint to be returned—Two Courts having concurrent jurisdiction—Court of lowest grade—Proper tribunal.*—When it is discovered, at any stage in the original proceedings, that the suit ought to have been instituted in a different Court, the plaint must be returned for presentation to that Court under O. VII. r. 10, Civ. Pro. Code (1908) (1 S.L.R. 121, *F.*) The discovery at a late stage is a matter for consideration only on appeal under s. 21, Civ. Pro. Code. Even where two Courts have concurrent jurisdiction to try the same suit, in view of the imperative wording of s. 15, Civ. Pro. Code, every suit must be instituted in the Court of the lowest grade having jurisdiction to try the same. BIBI HAYATU v. SAYAD GHULAM HUSSAIN SHAH IBRAHIMSHAH, **4 S.L.R. 265.** (7 A. 230, *D.*)

(393)—Ss. 15 and 24—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 22 W.R. 301.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(394)—Ss. 15 and 24—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S URISDICTION, Marsh 195=1 Hay 459.

(395)—Ss. 15, 24—*See* JURISDICTION—QUESTION OF JURISDICTION, 2 B.H.C. 40.

(396)—Ss. 15 and 24—*See* MUNSIFF, 22 W. R .457.

(397)—Ss. 15, 24—*See* TRANSFER OF CIVIL CASES, W.R. 1864, 14.

(398)—Ss. 15, 24, 99—Case tried by Court of higher grade than that ordinarily having jurisdiction—Court in which appeal should be brought—Remand by appellate Court for further evidence—Ss. 566, 569—*See* JURISDICTION—MISCELLANEOUS, 2 L.B.R. 1903—1904, 117.

(399)—Ss. 15, 24, O. XVIII, rr. 4 to 14 except r. 7, O. XVIII, r. 16, O. XX, r. 1 and s. 33—*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 4 B.H.C A.C. 98.

(400)—Ss. 15, 24, O. XL, rr. 1, 2, 3, 5, O. XXXIX, r. 1—*See* INJUNCTION—UNDER CIV. PRO. CODE, 2 B.H.C. 98.

(401)—*Ss. 15 and 99 (=ss. 15 and 578 of old Code)—Suit heard by Court not of the lowest grade competent to hear it—Effect of such irregularity.*—S. 15 is merely directory and is not intended to deprive a Court of the jurisdiction which it may otherwise possess. An irregularity caused by contravening s. 15 will be cured by s. 578 of the old Code (=s. 99 of the new), and an appellate Court would not be justified in reversing a decree so passed. MIRZA NAJIB BEG v. JODHA, **184 P.R. 1888.**

——**S. 16 (=1882, s. 16=1877, s. 16=1859, s. 5.)**

See JURISDICTION—CAUSES OF JURISDICTION.

(401-*a*)—*S. 16 (=Civ. Pro. Code, 1882 s. 16—Object—Power of Indian Courts*—Varashasans *(annual allowances) charged on villages situated in Nizam's territory—Their nature—Suit in Court in British territory for share in such allowances—Jurisdiction.*—The object of the detailed provisions of s. 16, Civ. Pro. Code, 1882, is to limit jurisdiction in respect of claims to immoveable property to the Court within whose local jurisdiction such property may be situated; and as a rule, Indian Courts have no power to decide on rights and interests in immoveable property lying outside their local jurisdiction. *Varashasans* (or annual allowances) charged, on certain villages situated in the Nizam's territory are, in their nature, immoveable property. So, a suit by the plaintiffs for obtaining a declaration that they are entitled to a certain share in such allowances, being one for determination of their right to, or interest in, immoveable property, must, under s. 16, Civ. Pro. Code, 1882, be brought in the Courts of the Nizam in whose territory the *Varashasans* are granted and paid to the defendants. Such a suit should not be brought in a Court in British territory, simply because the defendants (the recipients of such allowances) happen to reside there. KESHAV v. VINAYAK, **23 B. 22.** [*Appl.*, 11 Bom. L.R. 353=33 B. 373; *R.*, 122 P.R. 1908, 552; *D.*, 24 B 407.]

(402)—*S. 16 (=s. 16, Civ. Pro. Code, 1882) —Proviso to—'Personal obedience,' interpretation of—Applicability of the proviso where all the defendants do not reside within the jurisdiction of the Court where the suit is instituted.*—The expression 'personal obedience' in the proviso to s. 16 must be interpreted with special reference to the fact that the defendants reside or work within the jurisdiction of the Court, whose order is to be obeyed. The obedience must be such as the defendants could render without going beyond that jurisdiction. In the case of more than one defendant, the proviso is inapplicable, unless all the defendants reside or carry on business or personally work for gain within the jurisdiction of the Court where the suit is filed, if that is not the Court within the local limits of whose jurisdiction the property is situate. BHOJRAJ MAHESARI BANIA v. HIRALAL, **1 N.L.R. 121.** (23 B. 756, *F.*)

(403)—*S. 16 (=s. 16 of old Code)—Jurisdiction of Court* re *suit for determination of right to immoveable property.*—*Held* that, under s. 16(*d*), Civ. Pro. Code, the District Court of Lahore might entertain a suit for the specific performance of a contract to sell a house at Sialkot to the defendant and that the proviso to that section did not apply, as the suit house was not held by or on behalf of the defendant at the date of the suit. DIWAN LACHMAN DAS v. W. HASLAT, **39 P.R. 1891.** (6 M. 344, *R.*)

(404)—*S. 16 [=Civ. Pro. Code, 1882, s. 16 (d)]—Immoveable property—Decree for sale on mortgage.*—Although a suit for sale upon a mortgage is a suit for the determination of a right or interest in immoveable property, yet, after a decree has been passed in such a suit, and a right to or interest in immoveable property has thus been determined, it would be a straining of language to hold that the decree itself is immoveable property. Therefore, a suit for a declaration that the plaintiffs were the persons really beneficially interested in such a decree, though the decree is not in their names, is not a "suit for the determination of a right to or interest in immoveable property," within the meaning of cl. (*d*) of s. 16, Civ. Pro. Code. AHMAD KHAN v. ABDUL RAHMAN KHAN, **26 A. 603.** (13 A. 89, 23 C. 450, *R.*)

(405)—*S. 16 (=s. 16, Civ. Pro. Code, 1882) —Sale of immoveable property in foreign territory by order of British Insolvency Court—Property not solely that of insolvent—Two-thirds of property owned by plaintiffs—Suit to recover two-thirds of purchase-money, whether a suit for the determination of an interest in immoveable property—Jurisdiction—Revision.*—A house, which

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

was the joint property of the plaintiffs and the defendant, their brother, who became an insolvent, was situate in a place within the jurisdiction of a foreign state. It was sold by the order of a British Insolvency Court during certain insolvency proceedings taken against the defendant. The proceeds of the sale, after deducting commission, were made over to another defendant, who was the mortgage-creditor of the defendant, and the plaintiffs sued the mortgagee-creditor for a refund of their two-thirds share of the purchase-money. *Held* that the suit directly affected an interest in immoveable property, and, as such, was one "for the determination of any right to or interest in immoveable property," within the meaning of s. 16 (*d*) of the Civ. Pro. Code, that it could only be taken cognizance of by the Court within whose jurisdiction the property was situate, and as such was not maintainable in British Courts. (28 M. 227; *F.*, 4 B H.C. 173, 6 B.H.C. 29, 23 B. 22, 24 B. 407, 6 M. 344, *R.*) Nor, should there be any doubt on the question of jurisdiction, was it a proper case for interference on revision. HARI RAM v. KANSHI RAM, **122 P. R. 1908.**

(406)—*S. 16 (=s. 16, Proviso 2, Civ. Pro. Code, 1882)—Suit for trespass on land in plaintiff's possession outside the limits of Court's jurisdiction, and for an injunction.*—Where a suit was brought in the Court of the Recorder of Rangoon to recover damages for trespass on land in the possession of the plaintiff, situate outside the limits of the jurisdiction of that Court (though the plaintiff and defendant resided within the limits of the jurisdiction of the said Court), and for an injunction restraining the defendant from further acts of trespass, *held*, that in the plaint it having been alleged that the land in dispute was in the possession of the plaintiff, he was not entitled to the benefit of the proviso to s. 16. Civ. Pro. Code, that a claim for damages to land cannot be said to be a claim which can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction, and that for these reasons the Recorder of Rangoon had no jurisdiction to entertain the suit. CRISP v. WATSON, **20 C. 689.** [*F.*, 12 C.P.L.R. 48; *R.*, 23 B. 22.]

(407)—*S. 16 (=s. 16 (d), Civ. Pro. Code, 1882, Suit for recovery of price of land sold—Not one relating to immoveable property—Provincial Small Cause Courts Act, IX of 1887, ss. 16, 23—Effect of order under s. 23.*—A suit for the recovery of the price of land sold to the defendant is not a suit for the determination of a right to, or interest in immoveable property, within the meaning of s. 16, Civ. Pro. Code, 1882, and is cognizable by the Court of Small Causes (6 M. 344, 26 A. 603, *F.*, 28 M. 277, *Diss.*) The effect of an order under s. 23, Provincial Small Cause Courts Act, 1887, is merely to remove the bar of jurisdiction of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

ordinary Courts imposed by s. 16 of the same Act. SOWDAGER NABHEEKHAN SAHIB v. MUHAMMAD HUSSAIN SAHIB, **9 M.L.T. 372.**

(408)—*S. 16 (=s. 16, Civ. Pro. Code, 1882)—Reg. XVII of 1806 Interest: Redemption*)—S. 16, Civ. Pro. Code, had not the effect of creating, for the mofussil of Bengal, a new form of suit, wholly inconsistent with the express provisions of the Regulation of 1806, which in their terms in s. 8 expressly exclude any other mode of relief than that provided by them. The Regulation was not repealed by the Court expressly, and it cannot be held that, from the terms of s. 16 of the Code (and only because that section does not apply to the High Court), it was by implication affected. SHURNOMOYEE DASI v. SRINATH DAS, **12 C 614.**

(408-*a*)—*S. 16 (=Civ. Pro. Code, 1859, s. 5.)—Suit on contract—Jurisdiction—Cause of action—Place of performance of contract not prescribed.*—(*a*) An action may be brought either in the *forum* of the place where the contract was made, or in that where the performance ought to have taken place. (*Per Markby, J.*) (*b*) *Semble*:—This rule may possibly not apply if *both* parties to the contract were, at the time when it was made, in a district in which neither of them had either a dwelling or any place of business. [*F.*, 1 M. 375, 4 A. 423=A.W.N. 1882, 101, 9 C. 105, 5 A. 277=A.W.N. 1883, 34; *R.*, 5 C.L.R. 268, 25 A. 48=A.W.N. 1902, 179; *D.*, 11 B. 649, 15 B 93.] When no place of performance is prescribed by the agreement, or exacted by the necessities of the case, what we have to look to is the intention of the parties. If, from the surrounding facts and the acts of the parties, we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction (*Per Birch, J.*). The ordinary rule is that the obligor is bound to seek the obligee and tender the money due at the place where the engagement was entered into or at the residence of the creditor, and failure to fulfil this obligation is a cause of action. (*Ibid*). GOPIKISHNA GOSSAMI v. NILKOMUL BANERJEE, **13 B.L.R. 461=22 W.R. 79.** [*F.*, 3 C.L.R. 459, 11 B. 649.]

(408-*b*)—*S. 16 (=Civ. Pro. Code, 1859, s. 5)—Cause of action—Contract for supply of goods—Payment at plaintiff's residence.*—A contract for the supply of indigo seeds was entered into at Beerpore, in the District of Nuddea, where the defendant resided, and the delivery of the seed was to be made to the defendant. It was agreed that the seed was to be paid for on delivery by an order for payment being sent by the defendant to the plaintiff on receipt of the seed. The plaintiff resided and carried on business at Berhampore in the District of Moorshedabad. The plaintiff delivered the seed as agreed upon and the defendant failed to pay the price thereof. The plaintiff sued in the Moorshedabad Court for the recovery of the price of the seed. *Held*, that the Moorshadabad Court had

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

jurisdiction to try the case. The plaintiff's cause of action consisted in this,—that the defendant refused to pay the price of the seed which payment ought to have been made at the plaintiff's residence. There was therefore an expectation of the fulfilment of the contract within the District of Moorshedabad, and the refusal of payment was a sufficient cause of action to entitle the plaintiff to sue in the Moorshedabad Court, within the meaning of S. 5 of Act VIII of 1859. [*F.*, 4 A. 423=A.W.N. 1882, 101; *Appr.*, 9 C. 105: *R.*, 5 C.L.R. 268, 18 A 131=A.W.N. 1896, 2.] It is not necessary to interpret the words 'cause of action' in s. 5 of Act VIII of 1859 as meaning, the whole cause of action. JAMES HILLS v. CLARK, **14 B.L.R. 367=23 W.R. 63.**

(408-*c*)—*S. 16*—"*Dwelling*" — *Temporary absence whether consistent with dwelling.*—In the absence of anything to show an intention of not returning, the temporary absence is consistent with dwelling in a particular place. GUNDA MULL v. MULLA MULL, **17 P.R. 1871.**

(408-*d*)—*S. 16 (=Civ. Pro. Code, 1859)*—"*Dwelling*"—*Temporary residence for three months, sufficient.*—Defendant left Calcutta and lived at Delhi for 3 months, while his wife and children lived all along in their ancestral house at Delhi. *Held* that these facts proved a dwelling at Delhi to give the Courts there jurisdiction over defendant under s. 5, Act VIII of 1859. TOTA RAM v. RAMJEE DASS, **63 P.R. 1870.**

(409)—S. 16—*See* ACT X OF 1870, 6 M. 344.

(410)—S. 16—Suit to remove obstruction under s. 335 of the Civ. Pro. Code, 1882, lies in the Court within the local limits of whose jurisdiction the property in dispute is situated—See CIV. PRO. CODE, 1908, O. XXI. rr. 97, 99, 103, 6 Bom. L.R. 301.

(411)—S. 16—Wrong to immoveable property—Suit for compensation—Venue of suit—*See* JURISDICTION — QUESTION OF JURISDICTION, 12 C.P.L.R. 48.

(412)—S. 16—*See* JURISDICTION — SUITS FOR LAND, 9 B.H.C. 12, 17 B. 570, 18 W.R. 269.

(413)—S. 16—*See* JURISDICTION OF CIVIL COURTS, 2 B. 19.

(414)—S. 16—*See* SUMMONS, SERVICE OF, 9 C. 733=13 C.L.R. 161.

(415)—*S. 16, Act. (d) (=s. 16, Civ. Pro. Code, 1882)*—*Specific performance—Suit by vendor to enforce.*—*Of an agreement to purchase immoveable property—Whether suit for the "determination of a right to immoveable property."*—A suit by a vendor for specific performance of an agreement to purchase the plaintiff's house or, in the alternative, for damages is a suit for "the determination of a right to immoveable property," within the meaning of cl. (*d*), s. 16,

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Civ. Pro. Code, 1882 (=s. 16, Civ. Pro. Code, 1908). ABDOOL v. JAGANNATH, **5 N.L.R. 128 =3 Ind. Cas. 576.** (28 M. 227, *Appr.*; 27 M. 157, *R.*)

(416)—S. 16 (*d*)—*See* JURISDICTION — CAUSES OF JURISDICTION, 28 M. 277.

(417)—Ss. 16, 15, 24—*See* TRANSFER OF CIVIL CASES, 1 Agra 178.

(418)—*Ss. 16, 17 (=ss. 16, 19, Civ. Pro. Code, 1882)*—*Misjoinder of parties—Multifariousness—Suit by heir to recover property from co heir and transferees from him—Property situate in different districts—Compromise of part of claim—Jurisdiction.*—The plaintiff sued as heiress of her father to recover from her brother and from certain transferees from him her share in the property of her deceased father. The suit was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated in the Bareilly district and part in the district of Bara Bangi in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone. *Held* (1) that the plaintiff had properly impleaded her brother and the transferees from him as co-defendants in one suit, and (2) that, there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the Court at Bareilly, that Court was not by reason of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh. KUBRA JAN v. RAM BALI, **A.W.N. 1908, 233 =5 A.L.J. 647=4 M.L.T. 392.** (A.W.N. 1885, 125; *Overruled*, 11 A. 33, 24 A. 358, 29 A. 267, 24 C. 531; 29 C. 871; *R.*, 16 A. 279. *D.*, 12 M. 380. *F.*)

(419)—Ss. 16, 17—*See* JURISDICTION—CAUSES OF JURISDICTION, A.W.N. 1885, 125.

(420)—*Ss. 16, 17, O. II, r. 2 (=Civ. Pro. Code, 1882)*—*Ss. 16, 19, 43—Vested Right—Course of procedure—Estates in different districts—Same cause of action.*—First suit for immoveable property situated within jurisdiction of one Court. Second suit for other immoveable property situated within the jurisdiction of another Court was barred, as the plaintiff ought to have included the second claim in the first suit. S. 43, Civ. Pro. Code, read with Ss. 16 and 19, operates as a bar to a suit in which a claim is made to immoveable property situated in a different district from that in which a previous suit has been brought on the same cause of action for immoveable property situated in the latter district. (11 B.H.C. 117, 6 B. 26, 7 B. 182, 272, 3 M.H.C. 376, 2 W.R. 149, 3 W.R. 25=14 W.R. 253, *R.*) There is no vested interest in any course of procedure and statutes of procedure have immediate force, unless otherwise expressly provided and the circumstance that the provisions of s. 43 were not enacted in the Civil Justice Regulation does not imply that there was any intention on the

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

part of the Legislature that these provisions should not take effect at once upon the introduction of Civ. Pro.Code, which contains them. MAUNG TU v. MA DAW, **U.B.R. 1897—1901, Vol. II, 222.**

(421)—*Ss. 16, 18, 20, O. XXIII, r. 1 (=Civ. Pro. Code, 1882, ss. 16, 16 A, 17, 373)—Letters Patent, art, 12—Suit instituted in High Court by leave—Withdrawal of suit with liberty to bring fresh suit—Subsequent refusal of leave for institution of fresh suit—Discretion of Court.*—An application was made for leave to institute a suit in the High Court on the original side in respect of the management of a *devasthanam* under art. 12 of the Letters Patent. Leave having been granted, the petitioners instituted the suit, but on the date of the settlement of issues they withdrew with liberty to bring a fresh suit. When, however, they again applied for leave to file a fresh suit, the Court refused the application. *Held*, that the force of the order granting leave was exhausted by the institution of the suit in pursuance of the order. Consequently, when the application for leave to institute a fresh suit was made regarding the same subject-matter, there was nothing to prevent the Court from dealing with the application and granting or refusing leave as it deemed proper. *Held* also that the order passed by the Court in the exercise of its discretion could not be interfered with in appeal. SABHAPATHI GURUKKAL v. LAKSHMU AMMAL, **24 M. 293.**

(422)—*Ss. 16, 20 (=Civ. Pro. Code, 1882, ss. 16, 17)—Short period of living or dwelling within the jurisdiction of Court sufficient to constitute residence.*—Under ss. 16 and 17 of the Code of Civil Procedure, a very short period of actual living or dwelling within the jurisdiction of a Civil Court has been held sufficient to constitute residence so as to give such Court jurisdiction in suits by or against person said to be residing within its jurisdiction. *In the matter of* F. DE. MAMET, **21 C. 634.**

(423)—Ss. 16, 20, 17, O. VII, r. 10—Return of, to be presented to proper Court—Appeal from order of return—*See* PLAINT—RETURN OF PLAINT, 5 C.L.J. 580=11 C.W.N. 765.

(424)—*Ss. 16, 33, 41, O. XXI, rr. 4, 5, ss. 36, 37 (=ss. 16, 223, 649, Civ. Pro. Code, 1882) —Property situate out of jurisdiction—Execution of decree—Sale.*—S. 16, Civ. Pro. Code, 1882, shows that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property that they are to deal with. A comparison of S. 223 with the last paragraph of S. 649 indicates that territorial jurisdiction is a condition precedent to a Court executing a decree. So a Court, in execution of a decree, has no jurisdiction to sell property, over which it had no territorial jurisdiction at the time it passed the order of sale. Mortgaged property, which was situate within the territorial jurisdiction of one Court, passed under

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the territorial jurisdiction of another Court, by an order of Government, before the order for sale was passed in execution. *Held*, the former Court had no jurisdiction to sell the property. PREM CHAND DEY v. MOKHODA DEBI, **17 C. 699. F.B.** [*F.*, 18 C. 526; *R.*, 9 C.P.L.R. 137, 23 B. 22, 27 M. 118; *D.*, 19 C. 13, 21 C. 639, 22 C. 871, 163 P.L.R. 1901, 14 C.P.L.R. 92.]

(425)—*S 16, O. VII, r. 10, O. XXI, rr. 60, 61, 62, 63 (=Civ. Pro. Code, 1882, ss. 16 (d,) 57 (b), 280, 281 282, 283—Jurisdictions of Court—Return of plaint to be presented to the proper Court—Removal of attachment—Regular suit.*—A suit, instituted under S. 283, Civ. Pro.Code, to establish a right to immoveable property must be brought in the Court within the local limits of which the land is situated in accordance with clause (*d*) of S. 16. The principle of local jurisdiction with respect to questions concerning immoveable property is not a mere technical rule of procedure, but is a fundamental matter of general importance. *D'Souza* v. *British South Africa Co.*, 8 Times, L.R. 369; *The British South Africa Co.* v. *The Companhia De Mo Cambique*, 61 L.J.R. Q.B. 663, *F.*, Objections to jurisdiction cannot be passed over and they can be taken at any stage of the suit. (20 B. 86, *F.*) The omission of provisions as to local jurisdiction in the Civil Justice Regulation never prevented the ordinary rules on the subject from being observed, such rules being in practice the same as if the Code had been the prescribed guide in such matters, with some exceptions in regard to pecuniary limits of jurisdiction. MA TOK v. VILLIAPPA CHETTY, **U.B.R. 1897—1901, Vol. II, 216** (13 C. 162, *R.*)

—S. 17 (=1882, s. 19=1877, s. 19=1859, Parts of ss. 11 and 12.)

See JURISDICTION—CAUSES OF JURISDICTION.

(426)—*S. 17—Jurisdiction—Suit for possession of immoveable property situate in several districts and based on different causes of action—Power of Full and Division Benches on cases referred to them respectively.*—*Held*, that:—A suit for possesion of immoveable property is one for obtaining relief respecting the property. It can be entertained by any Court within the local limits of whose jurisdiction any portion of the property is situate, if the entire claim is cognizable by such Court. But a suit relating to several properties situate within the jurisdiction of different Courts and based on separate and distinct causes of action cannot be tried anywhere, being bad for multifariousness, until it is confined to the property, claim to which, is based on one of the causes of action. Several separate invasions of plaintiff's rights constitute different causes of action and each one arises on the day of infringing the right. (1 P.R. 1905, 127 P.R. 1892, 24 P.R. 1899, 18 A, 432, *D.*) *Obiter—Practice*:—Where a case is referred by a single Judge to a

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Division Bench for deciding a difficult question of law, the Bench hearing it is competent to deal with all the points whether of law or fact involved therein, and is not bound by the single Judge's finding thereon. Similarly a Full Bench can interfere, when it finds that some point has been wrongly decided by the referring Bench. CHIRANJI LAL SHAH v. BANKTA CHARI, **12 P.W R. 1910=5 Ind. Cas. 838=59 P.L R. 1910.** (10 P.R. 1891. 91 P.R. 1898, *R.*)

(427)—*S. 17 (=old s. 19)—Property situate in several districts—Sanction of superior Court.*—After the Code of 1882, though not before, the plaintiff's right was absolute to institute his suit in any of the districts, in which his property was situate, without getting the sanction of a superior Court. ANUP SHAH SINGH v. JASWANT SHAH SINGH, **10 P.R. 1891.** [*R.*, 25 P.R. 1900. Civ.]

(428)—*S. 17 (=Civ. Pro. Code. 1882 s. 19—"Family domains" of the Maharaja of Benares—Jurisdiction—Bengal Regulation, VII of 1828, s. 13.—Held* that a Civil Court at Mirzapur, in a suit for sale upon a mortgage affecting property partly in the district of Mirzapur and partly in the family domains of the Maharaja of Benares, was not competent to give a decree for sale of the property within the family domains. MAHABIR PRASAD v. JAWAHIR LAL, **A.W.N. 1894, 4.** (1 A. 431, 3 A. 568, *R.*)

(429)—*S. 17 (=Civ. Pro. Code. Act VIII of* 1859, *s. 11)—Execution of decree.*—In taking out execution, a decree-holder is not bound to produce his original decree, or even a copy thereof. A privately executed endorsement on a decree, unregistered and unproved, is no evidence of the transfer of the decree. Where a decree-holder is opposed by the debtor in taking out execution and imputes fraud to the debtor, *held*, this being a question arising between the parties to the suit, the executing Court should examine the allegations. RAMDHAN RAKHIT v. PANCHANAN CHUCKERBUTTY, **1 B.L.R.S.N. 9 (C) 10 W.R. 144.**

(430)—S. 17—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 8 C. 703.

(431)—S. 17—*See* JURISDICTION—SUITS FOR LAND, 3 M.H.C. 376 Cor. 125.

(432)—S. 17—*See* JURISDICTION OF CIVIL COURTS, 12 W.R. 328.

(433)—S. 17—See PRE-EMPTION—RIGHT TO PRE-EMPT, 4 O.C. 397.

(433,*a*)—S. 17—*See* NOS. 418, 419, 420, 422, *supra.*

(434)—Ss. 17, 38—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 19 C. 13, 14 C. 661.

Civ. Pro. Code (Acts V of 1908. XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

(435)—S. 17, O. II, rr. 2, 3, 6—*See* CAUSE OF ACTION, 91 P.R. 1898.

——S. 18 (= 1882, s. 16-A).

See JURISDICTION—CAUSES OF JURISDICTION.

(436)—*S. 18 (=Civ. Pro, Code, 1882, s. 16-A* (2).—In a suit by the proprietors of village B in the Muzaffargarh District for a declaration that certain land awarded to the proprietors of village K, in the Multan District by the Settlement authorities in a boundary dispute, belongs to them, and should be included in their village, the Munsiff of Muzaffargarh, in whose Court the suit was filed, not being certain whether he had jurisdiction to try the case, determined the question before the merits were gone into, and decided that he possessed jurisdiction. The Divisional Judge on appeal set aside the decree passed by the Munsiff, holding that it was passed without jurisdiction, as the land was situate within the boundaries of the Multan District settled by the Revenue authorities, and that the Civil Courts cannot question the boundaries so settled. *Held* that Revenue officers have not complete power to settle the boundaries of districts, Civil Courts can question boundaries so settled, and the Divisional Judge was wrong in setting aside the decree passed by the Munsiff for want of jurisdiction, ignoring the provisions of s. 16-A (2) of the Civ. Pro Code. ALLAH DITTA v. ABDUL QADIR KHAN, **25 P.L.R. 1901=1 P.R, 1901.**

(436,*a*)—S. 18—*See* NO. 421, *supra.*

(437)—Ss. 18, 21, 20, O. VII, r. 10—S, 2, Court to proceed under,—where objection to jurisdiction taken for first time on appeal—Uncertainty—*See* JURISDICTION—GENERAL, 7 C.L.J. 152.

——S. 19 (=1882, s. 18=1877, s. 18.)

See JURISDICTION—CAUSES OF JURISDICTION.

(438)—*S. 19 (=s. 18, Civ. Pro. Code, 1882,) Compensation for wrong to moveables, suit for, Courts which can entertain.*—This was suit for damages for wrongful seizure of two cargo boats of the plaintiff, alleged to be seized in Rangoon by order of a Magistrate of some other place, where all the defendants resided. The question to be decided was, whether, on the allegations in the plaint, "the wrong was done" in Rangoon, so as to bring the suit within the jurisdiction of the Chief Court. *Held*, that, the seizure of the boats having been made at Rangoon, it was the place, where the "wrong was done" within the meaning of s. 18 of the Code and the Chief Court of Rangoon, consequently, was competent to entertain the suit. MAY MYIT v. SHWE THA, **3 L.B.R. 164.** (6 B. L.R. 141, *R.*)

(438,*a*)—S. 19—*See* NO. 466, *infra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——S. 20 (=1882, s. 17=1877, s. 17).

See JURISDICTION—CAUSES OF JURISDICTION.

(439)—*S. 20 (=s. 17, Civ. Pro. Code, 1882)—Cause of action—Meaning.*—The words "cause of action" in s. 17 of the Civ. Pro. Code, are not so limited as to mean the whole cause of action but include any material part of it, not necessarily all the facts constituting the right to sue. BANKI BEHARI LAL v. POKHE RAM, **25 A. 48=A.W N. 1902, 79.** (4 A. 423, 5 A. 277, 13 B.L.R. 461, 14 B.L.R. 367, 9 C. 105, 22 C. 823, *R.*) [*R.*, 28 P.R. 1907=93 P.L.R. 1908 =140 P.W.R. 1907.]

(440)—*S. 20 (=Civ. Pro. Code, 1882, s. 17—"Cause of action"—Illustrations.*—The illustrations to s. 17 of the Civ. Pro. Code, afford no safe guide as to the meaning of "cause of action" as used in the Code. LALJEE LALL v. HARDEY NARAIN, **9 C. 105.** (13 B.L.R. 461=22 W.R. 79, 1 M. 377, *F.*) [*R.*, 25 A. 48=22 A.W.N. 179.]

(441)—*S. 20 (=s. 17, Civ. Pro. Code, (1882) —Jurisdiction of Civil Court—Cause of action —No specific contract as to place of payment of debt—Place where payment made—Punjab Courts Act (XVIII of 1884), ss. 40, 70 (1) (a) (b)—Further appeal—Small cause—Further appeal treated as revision under s. 70 (1) (a).*—The plaintiff sued the defendant in the Court of the additional District Judge of Delhi for recovery of Rs. 2,351-15-0, on the allegation that the defendant owed money to the firm of M, at Cawnpore, that that firm owed money to the firm of J, at Delhi, that the defendant credited himself with Rs 2,286 in the books of the Cawnpore firm, debited that amount to the Delhi firm and executed at Cawnpore a promissory note in favour of the plaintiff who paid the money to the Delhi firm. The Court returned the plaint for presentation in the proper Court. On appeal the order was set aside. Both Courts found that specifiic contract for payment at any particular place was proved. *Held*, that the finding of the lower Courts must be accepted, and, this being a small cause, no further appeal lay, and that, for the same reasons, no appeal lay under s. 70 (1) (*b*) of the Punjab Courts Act. The Chief Court treated the further appeal as an application under s. 70 (1) (*a*) of the Courts Act to consider the question of jurisdiction, and held that the Delhi Court had jurisdiction, the cause of action having arisen at Delhi, by reason of the fact that the plaintiff paid on the defendant's behalf money to the Delhi firm at Delhi. CHIRANJI LAL v. JIT MAL, **96 P.L.R. 1909=108 P.W.R. 1909.** (31 M. 223, 32 C. 884, 30 B. 167, 7 Bom. L.R. 993, 9 Bom. L.R. 903, *R.*)

(442)—*S. 20 (= Civ. Pro. Code (Act XIV of 1882), s. 17, Explanation III, clause 1) —Cause of action—Hundis.*—When the plaintiff, at the defendants' request, remitted Rs. 5,000 from Delhi to Ajmere, and received from defendants *hundis* drawn on their firm at Bombay in satisfaction of the loan, and on the *hundis* being dishonoured, brought a suit in the Court of the District Judge of Delhi for refund of the amount due. *Held*, that the Court was competent to try the suit. Since the plaintiff expended money on the defendants, behalf at Delhi, he was entitled to be reimbursed there and the defendants forwarding him *hundis* on Bombay made no real difference, and further, that as the *hundis* were accepted at Delhi, that place must be regarded as the place of contract, giving jurisdiction to the Court at Delhi. MINA MAL v. KANAK MAL, **42 P.L.R. 1903=10 P.R. 1903.**

(443)—*S. 20 (=s. 17 of old Code)—Suit on 'hundi'—Jurisdiction.*—When a plaintiff sues the drawer, acceptor and subsequent endorsers of a hundi, the cause of action arises out of the original contract, *i.e.*, hundi, in the place where it was made and payable, though the *hundi* might have been endorsed to him by some of the defendants at the different place. SHIVJI RAM v. HEM RAJ, **57 P.R. 1900** [*D.*, 10 P.R, 1903=42 P.L.R. 1903.]

(444)—*S. 20 (=s. 17, Civ. Pro. Code 1882), —Cause of action—Contract of service—Place of performance.*—Where a deed covenanting a contract of service provided that the service was to be performed at Surat but was silent as to the place at which the salary was to be paid, the salary was held impliedly payable at the place where the plaintiff worked and resided, *i.e.*, at Surat; and the cause of action, to recover the salary, was deemed to arise at that place. BEG MAHOMED v. KAVASJI, **2 Bom. L.R. 514.**

(445)—*S. 20 (=Civ, Pro. Code, 1882, s. 17) —Contract of sale—Place of suing.*—Where it appears that the advertisement which the vendor has given with reference to a contract of sale, and the letters that have passed between the parties, make it perfectly clear that the contract should be performed at K which is within the jurisdiction of the Court at S, and it also appears that from the contract the price is payable to the vendor at S, the Court at S has jurisdicton to try a suit by the vendor for the price of goods delivered in pursuance of the said contract. W. SHERIFF v. H. MANNERS, **7 C.W.N. 912.**

(446)—*S. 20 (=s. 17, Civ. Pro. Code, 1882) —Place of suing.*—Under s. 17 of the Civ. Pro. Code, 1882, a person can be sued at a place where he carries on business through an agent. ANNAMALAI v. MURUGASA, **5 Bom. L.R, 494.**

(447)—*S. 20 (=s. 17, Civ. Pro. Code, 1882)—Residence—Place of business—Family home.*—A person is to be deemed to reside at the place where he actually and voluntarily resides and carries on business, he cannot be said to reside at a place where he has the family home and which he only occasionally visits. UGARCHAND v. SURAJMAL, **2 Bom. L.R. 605.**

Civ. Pro. Code (Acts V of 1908. XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(448)—*S. 20 (=s. 17, Civ. Pro. Code, 1882)*—*Place of suing—Contract with commission agent for sale of goods.*—Plaintiff who resided at Kasur, in the Lahore District, sent *bhusa* from the Ferozepore District to the defendant, who was trading at Jhelum for sale as a Commission Agent. Disputes having arisen between the parties with reference to the *bhusa* transactions, plaintiff filed a suit at Kasur to recover the amount due to him. *Held* that, as under the Contract Act, there is no liability for a Commission Agent to render accounts to his principal at his place of business, unless there is an express agreement to do so, no cause of action arose in Kasur, and that the Munsif of Kasur had no jurisdiction to try the case. DEVI DYAL v. HARI CHAND, **79 P.R. 1902.**

(449)—*S. 20 (=Civ. Pro. Code, 1882, s. 17)*—*Partnership-suit—Jurisdiction — Misjoinder — Handwriting.*—A suit for dissolution of partnership, settlement of accounts and for any sum due from the defendants was laid in Ludhiana, though the residence of all the parties was the District of Jullundur. It was held that, as the contract was come to between the parties at Ludhiana had the plaintiffs had a share in a shop there carrying on the same business as the firm of the parties, the Court of Ludhiana had under Civ. Pro. Code. 1882, s. 17 (3) (ii), jurisdiction over the matter ; *held* also, that all the partners and the representatives of the partners were necessary parties to the suit and hence there was no misjoinder ; that the representative of a deceased partner would be liable to the extent of the deceased's assets in his hands and, in the absence of reliable evidence as to the amount of assets in his hands, to the full extent of the plaintiff's claim ; (this question might ordinarily be decided after decree) and that the unsupported evidence of an expert as to handwriting is not always a safe test. JAGNA v. GAINDA, **62 P. R. 1897.** [*R.*, 49 P.R. 1902=56 P.L.R. 1902.]

(450)—*S. 20 (=Civ Pro. Code, 1882, s. 17)*—*Neglect of agent—Suit for compensation by principal—"Suit arising out of contract."*—A suit for compensation which an agent is bound to make to his principal in respect of the direct consequences of his own neglect, or want of skill or misconduct, is one arising out of a contract within the meaning of Expl. III to s. 17, Civ. Pro. Code ; and cl. III of the Explanation is inapplicate to such a suit. KAMISETTI SUBBIAH v. KATHA VENKATASAWMY, **27 M. 353.** [*R.*, 36 P.R. 1908=85 P.W.R. 1908.]

(451)—*S. 20 (=s. 17, Civ. Pro. Code, 1882)*—*Letters Patent, cl. 2—Small Cause Courts Act (Bombay), s. 18—Cause of action—Jurisdiction of Civil Courts extends over defendants resident in foreign territory.*—The Civ. Pro. Code empowers a British Court to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.

Civ. Pro. Code (Acts V of 1908. XIV of 1882, X of 18877, XXIII of 1861 and VIII of 1859)—*continued.*

RAMBHAT v. SHANKAR, **3 Bom. L.R. 82=25 B. 528.** [*R.*, 26 M. 69, 29 M. 239=16 M.L. J. 238=1 M.L.T. 71.]

(452)—*S. 20 (=Civ. Pro Code, 1882, s. 17)*—*Jurisdiction—Provincial Small Cause Courts Act, s. 16.*—Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the forum in which to bring the suit. When a suit on a promissory note which would be of a Small Cause nature can be brought in place A or in place B, and there is no Small Cause Court in place A, it may be brought in the District Munisiff's Court. RATNAGIRI PILLAI v. SYED VAVA RAVUTHAN, **19 M. 477.**

(453)—*S. 20 (=s. 17 of old Code)—Military officer's contract—Army Acts, 1881, s. 151—Army Act, 1895, s. 5.*—S. 5, Army Act, 1895, has repealed s. 151 of the Army Act, 1881 ; and s. 17, Civ. Pro. Code, 1882, contains the test for ascertaining whether a Civil Court has jurisdiction over actions against military officers not residing within the jurisdiction of the Court where the cause of action arose originally. PHELPS & CO. v. CAPT. HAMMOND, **93 P.R. 1900.** (1 P.R. 1893, F.B., *Overruled*).

(453-*a*)—*S. 20 (=s. 17, Expl. I), Civ. Pro. Code, 1882—Jurisdiction—Suit on a pro-note executed in the mofussil but endorsed at Rangoon — Cause of action — Endorsement, part of the cause of action—Residence—Temporary — Government servant.*—The endorsement and delivery of a negotiable instrument within the territorial limits of the jurisdiction of a Court is sufficient to bring a suit on the instrument within the jurisdiction of that Court, even though the note was executed outside the limits of the Court's jurisdiction. "Cause of action" means and includes every fact which, if traversed, it would be necessary for a plaintiff to prove in order to support his right to the judgment of the Court. Endorsement being one of these facts, a part of the cause of action arises at the place where a pro-note is endorsed. A person in Government service, who is liable to be sent to various places and may possibly be left at one place for several years, cannot be said to have a lodging, at the place where he is stationed, for a temporary purpose only, within the meaning of Expl. I to s. 17 of the Civ. Pro. Code, 1882. SUBRAMANIAN CHETTY v. MAUNG PO THA, **11 Ind. Cas. 851.**

(453-*b*)—*S. 20—Contract between firms at Ranchi and Cawnpore—Goods to be delivered at Ranchi—Suit for damages for breach if lies at Ranchi*—Where the plaintiffs, who owned a shop at Ranchi, signed an order form supplied to them at Ranchi by the defendant company, which had its place of business at Cawnpore, requesting the Company to forward certain specified articles by goods train to their address at Ranchi (packing and freight free) and to be

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despatched on a specified date, and the defendant Company agreed to do so: *Held* that the contract was to be performed by the delivery of the goods at Ranchi, and the Court at Ranchi had jurisdiction to entertain a suit by the plaintiffs for damages for breach of the contract by the defendant. A. T. BHUTTACHARYA & CO. v. CAWNPUR WOOLLEN MILLS CO. LTD., **16 C. W. N. 325.**

(454)—S. 20—*See* CIV. PRO. CODE, 1882, ss. 20, 53, 13 B. 178.

(455)—S. 20—Jurisdiction—Place of suing—Contract with commission agent for sale of goods—*See* CONTRACT—MISCELLANEOUS, 79 P.R. 1902.

(456)—S. 20—Contract—Offer and acceptance—Place of suing—*See* CONTRACT—MISCELLANEOUS, 12 O.C. 17=1 Ind. Cas. 325.

(457)—S. 20—Debtor and creditor—Place of payment not specified—Debtor to follow his creditor and pay the debt—*See* CONTRACT—MISCELLANEOUS, 11 O.C. 191.

(458)—S. 20—Contract entered into by correspondence — Cause of action—*See* CONTRACT ACT, 1872, ss. 4, 7, 6 A.L.J. 213=1 Ind. Cas. 77.

(459)—S. 20 — Suit on foreign judgment—Business carried on within jurisdiction by member of defendant's family, whether and when amounts to carrying on business within s. 17, French law—*See* FOREIGN COURT—JUDGMENT OF, 23 M. 458=10 M.L.J. 39.

(460) S. 20—*See* FRAUD—MISCELLANEOUS, 25 A. 48=A.W.N. 1902, 179.

(460-*a*)—S. 20—Breach of contract—Compensation—Commission agent—Cause of action—Revenue—*See* JURISDICTION OF CIVIL COURTS, 8 A.L.J. 1160.

(461)—S. 20—*See* JURISDICTION OF CIVIL COURTS, 29 M. 69, 79 P.R. 1902.

(462)—S. 20—Jurisdiction—Suit for money paid by mistake or coercion—Contract Act, s. 72—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1865, s. 21, A.W.N. 1888, 59.

(463)—S. 20—*See* REGISTRATION ACT, 1908, s. 33, A.W.N. 1896, 170.

(464)—S. 20—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHTS OF PURCHASER ON ASIDE SALE, 6 B.H.C. A.C., 258.

(464-*a*) S. 20—*See* NOS. 191, 391, 421, 422, 423, 437, *supra.*

(465)—S. 20, Expl. III—*See* JURISDICTION—CAUSES OF JURISDICTION, 36 P.R. 1908=85 P.W.R. 1908, 31 M. 223=4 M.L.T. 97.

(466)—Ss. 20, 19, 104, O. XLIII, r. 1—"Actually and voluntarily resides," meaning of—Residence in jail—Revision of appellate

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orders under s. 588, Civ. Pro. Code—*See* JURISDICTION—CAUSES OF JURISDICTION, 77 P. R. 1909=124 P.L.R. 1909=125 P.W.R. 1909=3 Ind. Cas. 607.

(467)—S. 20, O. I, rr. 1, 4 (*a*) and 9—*See* JOINDER OF PARTIES, 22 C. 833.

(468)—*S. 20, O. V, rr. 25, 26 (=Civ. Pro. Code, 1882, ss. 17, 89, 90, Ch. XXVIII—Jurisdiction of Civil Courts in suits against absent—Foreigners.*—The Code of Civil Procedure makes provision for suits against foreigners not resident in British India, and a Court is bound to entertain such a suit if the cause of action has arisen within the local limits of its jurisdiction. English and Indian law distinguished. Effect of decree in such a suit discussed. COOVERJEE LADHA v. SULEMAN ISMAIL & Co., **L.B.R. 1903—1904, Vol II, 47.** (25 B. 528, 28 C. 641, *Whaley* v. *Busfield*, 32 Ch. D. 123, *F.*; 29 C. 509, 22 C. 222, *R.*)

(469)—*S. 20, O. VII, r. 10, s. 115 (=Civ. Pro. Code, 1882, ss. 17, 57, 622)—Maintenance—Cause of action—Revisional powers of High Court.*—A High Court can under s. 622, Civ. Pro. Code, revise any order or decree of a subordinate Court, from which no appeal lies to the High Court. (8 A. 112, *F.*) A suit for maintenance by a wife against her husband is not a suit arising out of contract, and, therefore, Explanation III, s. 17, Civ. Pro. Code, has no application. (5 W. R. 5, 2 B. 624, *F.*) Such a suit, must, therefore, be instituted either in the district where the defendant first refused to maintain, or where he, at the time of the commencement of the suit, resides, or is carrying on business, or is working for gain. MA ME v. MAUNG GYI, **L. B. R. 1872—1892, 487.**

(470)—S. 20, O. XX, rr. 15, 16—Provisions imperative—Partnership accounts, examination of—Preliminary decree for dissolution is a condition precedent—*See* PARTNERSHIP—GENERAL, 100 P.W.R. 1908.

(470-*a*)—S. 21, *See* NOS. 392, 437, *supra.*

——S. 21 [=1882, s. 16-A (2).]

(471)—S. 21, O. I. r. 13—Non-joinder of parties—Defendant not objecting to such non-joinder till a suit with fresh parties was barred—Plaintiff getting names added after limitation period—Objection to non-joinder to be dismissed under s. 34, Civ. Pro. Code—*See* LIMITATION—GENERAL, 5 A.L.J. 554=A.W.N. 1908, 246=4 M.L.T. 447=30 A. 538.

(472)—S. 21, O.I. r. 13—Waiver of objection to want of parties—*See* TRANSFER OF PROPERTY Act, 1882, s. 44, 3 A.L.J. 474=A.W.N. 1906, 199.

(472-*a*)—S. 22—*See* NO. 62, *supra.*

——S. 22 (=1882, s. 22).

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(473)—*Ss. 22, 23 (3), 24, Civ. Pro. Code, 1882—Application for transfer by decree-holder—Jurisdiction of Court—Application by judgment-debtor to be declared as insolvent.—Held*, that proceedings under Chap. XX of the Code of Civil Procedure are necessarily proceedings in execution of a decree and the judgment-debtor throughout such proceedings is in the position of a defendant. *Held*, further, that the Court has no jurisdiction to pass an order for transfer under s. 24, Civ. Pro. Code, on an application made by the judgment-creditor. RAMA MONI DASI v. NITYA GOPAL SARKHEL, **10 O. C. 139.** (22 B. 778, *D.*)

(474)—Ss. 22, 23 (3)—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 24 P.R. 1896.

(475)—*S. 22, O. VII, r 10—Order that suit shall proceed in another Court—Effect—Return of plaint—Proper course.*—A High Court, by directing under s. 22 that a suit shall proceed in a Court in another jurisdiction, and not in the Court in its own jurisdiction, in which it has been instituted, in effect, stays further proceedings in the latter Court, and makes that Court incompetent to proceed with the case. The only course open to it is then to return the plaint to the plaintiff for re-presentation in the proper Court, *i.e.*, the Court in the other jurisdiction, in which the High Court has determined that it shall proceed. (O VII, r. 10.) MILON MA GYI v. NGA BA, **U B.R. 1909 Civ. Procedure, 25.**

——S. 23 (=1882, ss. 23, 24=1877, ss. 23, 24 =1859, s. 13.)

(476)—S. 23—*See* TRANSFER OF CIVIL CASES, 5 A. 60=2 A.W.N. 1882, 164, 2 A. 241, P.C.=4 C.L.R. 331=6 I.A. 126=2 C L.R. 352, 3 A. 569.

(476) (*a*)—S. 23—*See* NOS. 62, 473, 474, *supra.*

(477)—*S. 23, cl. 3—Jurisdiction of Civil Court—Suit triable by several Courts—Transfer of suit—Ground for.*—A Court of Small Causes is not competent to make a reference in a case, under s. 23, cl. 3 of (Act V of 1908), if the Court has no jurisdiction to hear the suit. And the Chief Court will not order transfer of the suit, when no great inconvenience will be caused to the defendant by the trial of the suit in the Court in which it is filed. H. A. GILMOUR v. RAM LAL, **77 P.L.R. 1909.**

——S. 24 (=1882, s. 25=1877, s. 25=1859, s. 6, latter part).

(478)—*S. 24 (=old s. 25)—Withdrawal of case—Procedure subsequent.*—After the withdrawal of a case for trial before itself, the Court, which does so, may follow any of the established lines of procedure laid down by the Civ. Pro. Code. BANARSI DAS v. RAM KISHAN DAS, **167 P.R. 1889.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(479)—*S. 24 (=S. 25 of old Code)—"Withdrawn," meaning of.*—A suit cognizable by the Small Cause Court and tried by the local Munsiff under the orders of the District Judge, to whom the suit was submitted after it was returned by the Small Cause Court, which then had no jurisdiction above Rs. 50, can be said to be "withdrawn" by the District Judge, within the meaning of s. 25 of Code. *Held*, also, a suit cognizable by a Small Cause Court was not, under s. 16 of the Small Cause Courts Act, cognizable by a Munsiff having jurisdiction within the local limits of such Court. SAIDHU MAL v. HASSU, **58 P.R. 1897.** [*F.*, 83 P.R. 1903=154 P.L.R. 1903.]

(479-*a*)—*S. 24 (=Civ. Pro. Code, 1882, s. 25)—Meaning of expression "Court of Small Causes" as used in.*—The expression, "a Court of Small Causes" as used in the last clause of s. 25 of Act XIV of 1882, must be construed to mean a "Court properly and strictly so called" and not to include "a Court only invested with the jurisdiction of a Court of Small Causes." RAMCHANDRA v. GANESH, **23 B. 382.** [*R.*, 83 P.R. 1903=154 P.L.R. 1903, 31 C. 1057, 9 Bom. L.R. 327=31 B. 314.]

(480)—*S. 24 (=s. 25, Civ. Pro. Code, 1882)—Institution of suit or appeal in wrong Court—Power to transfer—Jurisdiction of High Court and District Court.*—The jurisdiction given by this section does not clothe the High Court or District Court with greater powers than that which the lower Court had, so far as the question of jurisdiction is concerned. If the lower Court had no jurisdiction to try the case, whether the defect in jurisdiction be with reference to the value or with reference to the situation of the property in dispute, or with regard to any other matter which concerns jurisdiction, the High Court or District Court could have no jurisdiction. When an appeal is transferred under this section it must be heard subject to all the objections, which could be taken before the Court from which it has been transferred. The High Court, therefore, has no jurisdiction to hear an appeal, which was wrongly presented and filed in a District Court and subsequently withdrawn by the High Court. RAM NARAIN JOSHY v. BARMESWAR NARAIN MAHTA, **25 C. 39.** (6 C. 30, 9 A. 191, P.C., *Appl.*) [*R.*, 2 L.B.R. 117.]

(481)—*S. 24 (= s. 25, Civ. Pro. Code, 1882) Re-transfer by District Judge of file already transferred.*—Under S. 25, Civ. Pro. Code, a District Judge has no power to re-transfer a case from his file to the Subordinate Judge from whom he had originally transferred the case to his own file. The powers conferred by the section became exhausted when the original transfer was made. AMIR BEGAM v. PRAHLAD DAS. **24 A. 304=A.W.N. 1902, 66.** (21 A. 230, 13 B. 654, *R.*) [*F.*, 24 A. 356, 10 C.W.N. 902; *R.*, 36 C. 193=5 C.L.J. 611=1 Ind. Cas. 913; D., 25 A. 183=A.W.N. 1903, 4.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(482)—*S. 24 (=old s. 25)—Power to transfer case—Punjab CourtsAct. ss. 33, 34.*—S. 25 Civ. Pro. Code, read with ss. 33, 34 of the Punjab Courts Act, gives to the District Judge power to transfer a case from a Small Cause Court to his own. MUSST. BEGAM v. MAJOR COOK. **77 P.R. 1889.**

(483) — *S. 24 (=s. 25 of old Code)—District Judge—Small Cause—Final—Non appealable*—Where a District Judge decides a case with the powers of a Small Cause Court Judge, his decision is final under s. 25 and is not appealable. PARRSICK v. BUTU MAL. **10 P.R 1887.** (95 P. R. 1877, *R.*) [*F.*, 83 P.R. 1903=154 P.L.R. 1903; *R.*, 47 P. R, 1888, 59 P.R. 1892.]

(484)—*S. 24 (=Civ. Pro. Code, s.25)—Transfer of case—Grounds for transfer—Procedure.*—This section is only intended to provide for those cases, where, on the ground of expense or convenience or some other good reason, the Court thinks that the place of trial ought to be changed. Parties, who desire to have a case transferred from one forum to another, ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence, and what the issues are; they should state what evidence will be required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed. KHATIJA BIBI v. TARUK CHUNDER DUTT, **9 C. 980=13 C.L.R. 182.** [*R.*, 10 C.L.J. 414=14 C.W.N. 153.]

(485)—*S. 24 (=Civ. Pro. Code, 1882, s. 25)—Notice.*—The notice prescribed by s. 25 of the Code of Civil Procedure is intended for the benefit of the party other than the one applying for transfer, and he may waive his right to object, when he has received no notice, by going to trial and appealing against the decree, in which case any defect in the jurisdiction of the Court may be held to have been cured. SANKUMAM v. IKORAN, **13 M. 211.**

(486)—*S. 24 (=Civ. Pro. Code, 1882, s. 25)—Application for transfer by party to suit—Necessity for notice to opposite party.*—Where an application is made by a party for the transfer of a suit, it is not legal to pass an order of transfer without issuing notice of the application to the opposite party. BALKRISHNA GANGADHAR v. RAM NARAIN BATHI. **10 C.P. L.R. 94.**

(487)—S. 24—Judge personally interested in suit in his Court—Transfer of case—*See* BUR. ACT VI OF 1900, 2 L.B.R. 281.

(488)—S. 24—*See* U.P. ACT III OF 1901, ss. 191 and 192, 7 O.C. 142.

(489)—S. 24—*See* APPEAL—GENERAL, 5 A. 274.

(490)—S. 24—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 22 C. 871.

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(491)—S. 24—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, cl. 13, 7 Bom. L.R. 143.

(492)—S. 24 — *See* PRESIDENCY SMALL CAUSES COURTS ACT, 1882, s. 31, cl. (*b*), 14 C.W.N. 662=6 Ind. Cas. 97=37 C. 574.

(493)— S. 24 — *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 35 (1), 127 P.L.R. 1903, 31 C. 1057.

(494)—S. 24—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 O.C. 143.

(495)—S. 24—*See* TRANSFER OF CIVIL CASES., 6 C. 30, 5 A. 371=A.W.N. 1883, 62, 13 B. 654, 13 A. 324=A.W.N. 1891, 96, U. B.R. 1905. Civ. Pro. Code. 28, 1 O.C. 117, 17 P.L.R. 1904=88 P.L.R. 1903, 10 P.L.R. 1900, 154 P.L.R. 1903=88 P.R. 1903, 25 A. 183=A.W.N. 1903, 4, 10 M.L.J. 238, 9 C.W.N. 705=32 C. 875, 20 A, 395=A.W.N. 1898, 89.

(495-*a*)—S. 24—*See* TRIAL OF CIVIL CASES, 11 W.R. 189.

(496)—S. 24—*See* NOS. 62, 393. 394, 395, 396, 397, 398. 399, 400, 417, *supra* AND NOS. 561, 576, *infra.*

(496-*a*)—*S. 24 (3)—Transfer of case—Power of District Judge to transfer to Additional District Judge—Revision—Material irregularity—Failure to consider important evidence—Misunderstanding position of parties—False assumption—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a) and (b).*—A District Judge has the power, under s. 24 (3) of the Civ. Pro. Code, 1908, to transfer a case pending before him to the Court of the Additional District Judge. Where, in dealing with a possessory suit under S. 9 of the Specific Relief Act, the Court entirely misunderstood the position of the plaintiffs, ignored material and important evidence, misconstrued a material document and failed to apply its mind to the distinction between possession and use or occupation. *Held*, that the Court acted with material irregularity within the terms of S. 70 (1) (*a*) of the Punjab Courts Act and that a retrial of the suit was necessary. O'BRIEN v. ABDUL RAHMAN, **14 P.L R. 1912=28 P.W.R. 1912.**

(496-*b*)— *Ss. 24, 36, O XXI. r. 32, O. XXXIX, r. 2 (3)—Court granting the injunction, meaning of the expression in O. XXXIX, r. 2 (3)—Transfer of suit—Absence of notice—Effect.*—Where the transfer of a suit is at the instance of a party, the transfer without notice to all parties is a material irregularity. But, as the irregularity is a mere defect of form the High Court did not interfere in this case, as the District Court could have transferred the case *suo motu* without notice. Where, subsequent to the passing of an *ad interim* injunction, the suit has been transferred to another Court for trial, an application under cl. 3 of r. 2 of O. XXXIX of the Code cannot be transferred to the Court to which the suit itself ha-

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been transferred. (20 M. 378, *R.*) *Semble.*—The *ad interim* injunction would probably be enforceable under s. 36, read with r. 32, O. XXI, by the Court to which the suit has been transferred. MATHRA DASS v. VENKAT RAO, **21 M.L.J. 829.**

(497)—Ss. 24, 38, 39, 41, O. XXI, rr. 4, 5—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 17 M. 309=4 M.L.J. 91.

(498)—Ss. 24, 107 (2), O. XXII, r. 11—*See* TRANSFER OF CIVIL CASES, 8 M.L.T. 347=8 Ind. Cas. 492.

(499)—Ss. 24, 115—*See* REVISION—GENERAL, A.W.N. 1882, 62.

(500)—Ss. 24, 115—*See* TRANSFER OF CIVIL CASES, 6 A. 233=A.W.N. 1884, 45.

(501)—Ss. 24, 141—*See* ACT VI OF 1882, s. 219, 9 A. 180=A.W.N. 1887, 7.

(502)—Ss. 24, 141—*See* EXECUTION OF DECREE — TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 5 B. 680, 18 B. 61=P. J. 1893, 258.

(503)—S. 24, O. I, rr. 3, 4 (*b*), O. XXXIX, rr. 1 and 2—*See* TRANSFER OF CIVIL CASES, 53 P.L.R. 1907.

(504)—S. 24, O. II, rr. 3, 6—*See* MISJOINDER OF PLAINTIFFS AND CAUSES OF ACTION, **1 A.L.J 188.**

(505)—S. 24, O. VII, r. 10, and O. XLIII, r. 1—*See* JURISDICTION — QUESTION OF JURISDICTION, 4 A. 478=A.W.N. 1882, 113.

(506)—S. 24, O. XVIII, r. 15—*See* TRANSFER OF CIVIL CASES, 10 C.W.N. 12, 26 M. 595.

(507)—S. 24, O. XX, r. 15—*See* PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 4 A. 437=1 A.W.N. 1882, 87.

(508)—*S. 24, O. XXXIII, r. 8 (=ss. 25, 410, Civ. Pro. Code, 1882—Application to sue* in forma pauperis *filed in Sub Court—Transfer of application by District Judge to his file—Subsequent transfer of suit to Sub Judge* ultra vires *of District Judge—Continuity of proceedings.*—An application for leave to sue as a pauper made to a Subordinate Judge was taken on to the District Judge's file and heard and granted by him. The District Judge was *held* to be incompetent under s. 25 of the Code to afterwards transfer this pauper suit back again to the file of the Subordinate Judge. (24 A. 304, A.W.N. 1902, 66, *R.*) [*R.*, 10 C.W.N. 902, 36 C. 193=5 C.L.J. 611=1 Ind. Cas 913.] There is no breach of continuity between the application to sue *in forma pauperis* and the suit into which that application matures. According to s. 410, Civ. Pro. Code, the application, as soon as it is granted, is deemed the plaint in the suit, and in such a case the plaint really dates back to the date of the application and not to the day when the application is granted and registered. NANDAN PRASAD v. W.C. KENNEY, **24 A. 356 =A.W.N. 1902, 92.**

(509)—S. 24, O. XXXVIII, r. 5—*See* TRANSFER OF CIVIL CASES, 6 Ind. Cas. 746=20 M.L.J. 980.

(510)—S. 24, O. XXXIX, r. 2, cl. (3)—*See* TRANSFER OF CIVIL CASES, 8 M.L.T. 374=8 Ind. Cas. 7.

(511)—S. 24, O. XLI, r. 23—Not exhaustive—*See* TRANSFER OF CIVIL CASES, 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913, 21 A. 230=A.W.N. 1899, 38.

—S. 25 (New.)

(512)—*S. 25—Transfer of Small Cause Court Judge—Change of pecuniary jurisdiction—Power of District Judge.*—A District Judge is competent to transfer to the Court of a Subordinate Judge issues remanded to a Small Cause Court for decision, where the Judge, who first heard the suit, was transferred and a new Judge with a limited pecuniary jurisdiction had succeeded him. BARU v. KIRPA RAM, **69 P.R. 1899.**

(513)—S. 25, O. XX, r. 6 (3) *See* COSTS—GENERAL, 2 Bom. L.R. 254, 4 Bom. L.R, 109.

— S. 26 (=1882, s. 48).

(513-*a*)—S. 26—*See* NOS. 208, 281, *supra* and 2704, *infra.*

(514)—S. 26, O. IV, r. 1—A suit is commenced by the presentation of the plaint—*See* LETTERS PATENT, 1865—MADRAS, HIGH COURT, cl. 12, 1 M.L.T. 71=16 M.L.J. 238 =29 M. 239.

(515)—*S. 26, O. IV, r. 1, O. VII, r. 11 and O. VI, r. 18 (=ss. 48, 55, Civ. Pro. Code, 1882) —Limitation Act, s. 4—Court Fees Act, ss. 6, 9, 10, 28—Plaint filed on the last day of limitation insufficiently stamped owing to the requisite stamp not being procurable in time—Stamp procured later on during the day but not filed owing to Court rising early.*—A plaint was filed in the Court of a Dt. Judge on the 14th April, 1903, the last day of limitation for the suit. The plaintiff affixed an 8 anna Court-fee stamp to his plaint and stated that the treasurer had no Court-fee stamps of the proper denomination and the plaintiff was told by the treasurer to wait until the Treasury Officer should come down to the Treasury and open double locks. The District Judge recorded an order making over the case to the Subordinate Judge, first class, and adding a direction that the deficiency should be made up. The plaintiff, on the same day, procured the requisite stamp but, on taking it to the District Judge's Court, found that Officer had gone home. Nothing was done on the 15th April, 1903. On the 16th,

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the plaintiff filed the full stamp in the Court of the Subordinate Judge. It was contended that the suit was barred by limitation. *Held*, by the Full Bench, that the contention was not valid, for the plaint must be treated as properly stamped on the 14th April, 1903, when the plaintiff had procured the requisite stamps. MEHTAB RAI v. GOPAL RAI, **152 P.L.R. 1905, F.B.=104 P.R 1906.** (130 P.R. 1890, 3 P.R. 1893, 38 P.R. 1900=P.L.R. 1900, 189, *R.*)

(516)—S. 26, O. IV, r. 1, O. VII, r. 11, O. VI, r. 18.— Presentation of insufficiently stamped plaint—Making up of stamp duty subsequent to the period of limitation for the suit—Validity—*See* LIMITATION ACT, 1908, s. 3, 123 P.R. 1907=82 P.W.R. 1907=3 M.L.T. 63.

——S. 27 (=1882, s. 64=1877, s. 64=1859, s. 41.)

See SUMMONS.

(516 *a*)—S. 27—*See* NO. 3035, *infra*.

(517)—*S. 27, O. V, rr. 1 and 5 (=s. 41, Civ. Pro. Code, 1859)*—Ex-parte *judgment—Appeal—Dismissal—Case where it was held that a lower appellate Court acted properly in.*—Refusing to hear an appeal from a decision disposing of a case in the absence of defendants, who, being summoned under s. 41, Act VIII of 1859, did not appear and give sufficient reasons for non-attendence. JOY PROKASH SINGH v. MEGHRAJ SINGH, **12 W.R. 207.**

(518)—S. 27, O. V, r. 1, O. IX, rr. 6, 7, 13, O. XVII, r. 2—*See* APPEAL—EX PARTE CASES, 7 A. 538=A.W.N. 1885, 144.

——S. 28 (=1882, s. 85=1877, s. 85=1859, s. 89.)

See SUMMONS.

(518-*a*)—S. 28—*See* NO. 2735, *infra*.

(519)—*S. 28, O. V, rr. 21 and 23 (=s. 85, Civ. Pro. Code, 1882) practice under—Sufficiency of service.*—S. 85 does not require the Court which served the summons to make a return to the Court from which it issued, touching the sufficiency of the service. (10 B. 202, *D.*) The duty of the serving Court under s. 85 is to proceed, on receipt of the summons, as if it had itself issued it, and then to return it, with the record (if any) framed under the section, to the Court from which it orginally issued. (10 B. 202, *D.*) It then devolves upon the latter Court, when the defendant does not appear, to determine upon the sufficiency of the service before proceeding to try the suit. (10 B. 202, *D.*) Such, moreover, has been the practice on the original side of the Calcutta High Court. ROMANATH BURAL v. JUGGODONANDAN, **22 C. 889.**

——S. 33 (=1882, s. 198=1877, s. 198=1859, s. 183.)

See JUDGMENT.

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(520)—*S. 33—Effect of—previous order in execution*—Res judicata.—Where a decree has been interpreted in a particular sense as between the parties, that interpretation has the force of *res judicata*, and the subsequent amendment of the law has no effect on this question. THE COLLECTOR OF SHAJAHANPUR v. KUNJ BEHARI LAL, **7 A.L.J. 190=5 Ind. Cas. 210=32 A. 210.**

(520-*a*)—S. 33—*See* No. 339, *supra* AND NOS. 3090, 3177, 3179, 3180, *supra*.

(521)—S. 33, O, XX, r. 1—*See* DISMISSAL OF SUITS, 82 P.R. 1901.

(522)—S. 33, C. XX, r. 1—*See* JUDGMENT—MISCELLANEOUS, 8 Bom. L.R. 229=30 B. 455.

(523)—*S. 33, O. XX, r. 1, s. 99 (=ss. 198 and 578, Civ. Pro Code, 1882)—Judgment without hearing parties or pleaders, irregular—Irregularity not cured by s. 578—Powers of Chief Court.*—A Judge is not justified in passing his judgment, in a civil suit, without affording an opportunity to parties or their pleaders to appear before him, state their respective case and advance their arguments. Failure to do this will amount to an irrgularity not cured by s. 578. The Chief Court, as the Court of the highest appellate authority in the province, has inherent jurisdiction to rectify errors, omissions and defects which, unless so rectified, would result in serious miscarriage or failure of justice. If, therefore, a judgment of a lower Court is irregular as pointed above, the Chief Court has power to remand the case to the lower Court for a fresh decision according to law. SHER ALAM v. BHAHADUR SHAH, **5 P. L.R. 1905.** (17 A. 29, 23 M. 445, *F.*)

——S. 34 (=1882, s. 209=1877, s. 209=1861, s. 10).

See INTEREST.

(524)—*S. 34 (=s. 209, Civ. Pro. Code, 1882)—Construction.*—The words of s. 209 of the Civ. Pro. Code, 1882, are large enough to include the case of a sum of money payable to the plaintiff out of a sum, and it may be that the Legislature considered that the power of the Court to allow interest after the fixed day was sufficiently provided or preserved by that section, the two Acts being co-temporary. Or it may be that the provisions of the Transfer of Property Act are not exhaustive and were not intended to overrule the established practice. RANI SUNDER v. RANI SHAM KRISHEN, **9 Bom. L.R. 304=11 C.W.N. 249=17 M.L.J. 43 =2 M.L.T. 78=34 C. 150=4 A.L.J. 109=8 C.L.J. 106.**

(525)—*S. 34=(s. 209, Civ. Pro. Code, 1882)—Decree for money—Mortgage-decree.*—S. 209 of the Civ. Pro. Code, 1882, relates to a decree for money; and a mortgage-decree, until it reaches the stage shown by s. 90 of the Transfer of Property Act, 1882, cannot be so termed. HARGOANDAS v. MOHANBHAI, **2 Bom. L.R. 225.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(526)—*S. 34 (=s. 209, Civ. Pro. Code, 1882)—Interest on decretal amount, power of Court to allow, from date of suit to date of decree.*—S. 209, Civ. Pro. Code, gives the Court discretion to allow or disallow interest on the decretal amount from the date of suit to date of decree. RAJA PEAR MOHAN MOOKERJEE v. NARENDRA NATH MUKERJEE, **9 C.W.N. 421=32 C. 582.**

(527)—S. 34—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 16 A. 269=A.W.N. 1894, 79.

(528)—S. 34—*See* HINDU LAW—STRIDHANAM, 3 O.C. 130.

(529)—S. 34—Discretion of Court in matters of interest in special cases—*See* MORTGAGE—GENERAL, 10 C.L.J. 203.

(530)—S. 34—Inapplicability of, to mortgage decrees—*See* RES JUDICATA—COMPETENCY OF COURT, 29 M. 65.

(531)—Ss. 34 and 35—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 68, 88, 2 O.C. 37.

(532)—Ss. 34, 35 (3)—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 24 C. 766=1 C.W.N. 550.

(533)—S. 34, O. XX. r. 12, award of interest and of mesne profits under, distinction between—*See* COURT FEES ACT, VII OF 1870, s. 11, 33 C. 1232.

(534)—*S. 34, O. XXI, r. 2, O. XXIV, r. 3 (=Civ. Pro Code, 1882, ss. 209, 257, 378)—Payment into Court after decree—Interest.*—S. 378, Civ. Pro. Code, refers to payment into Court during the pendency of the suit, and cannot be extended to payments made into Court after decree which are provided for in ss. 209, 257, Civ. Pro. Code. Therefore, the judgment-debtor is not bound to pay interest on the decree amount between the date of his deposit in Court of that amount and the date when the decree-holder has notice of the same. MAHA LAKSHMI v. VENKATACHALAPATI, **1 M.L.J. 334.**

——**S. 35, para (1) (=s. 5. Judicature Act, 1890); para (2) (=1882, s. 220=1877, s. 220=1859, s. 187) and para (3) (=1882, s. 222=1877, s. 222=1859, s. 187.)**

See COSTS.

(535)—*S. 35 (2) (=s. 220, Civ. Pro. Code, 1877)—Costs—Appeal—Discretion of Court.*—In a case where the discretion of the Court with regard to costs had not been judicially exercised, the higher Court will interfere. SEHJEE MAL v. PANJABA, **21 P.R. 1883**

(536)—S. 35 (2)—*See* APPEAL—COSTS, 2 W.R. 33, 1 M.H.C. 74.

(536-*a*)—S. 35—*See* NOS. 531, 532, *supra*, and NOS. 1707, 3226, 4746, *infra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(537)—*S. 35 (3), O. XX, r. 6 (Ss. 222, Civ. Pro. Code, 1882)—Scope of section.*—S. 222, Civ. Pro. Code, is a new provision, the object of which is to secure the payment of costs, and it is of special value in partition suits to which it is now generally applied. KHELLERPAL SRITIRUTNO v. KHEELAL KRISTO BHUTTACHARJEE, **21 C. 904.** [*R.*, 5 C.L.J. 642=34 C. 878.]

(538)—*S. 35, O. XX, r. 6 (=s. 220, Civ. Pro. Code, 1882)—Costs—Arbitrary exercise of discretion—Appeal regarding costs only—Maintainability of appeal.*—An appeal will lie on the question of costs alone, where the lower Court has, in awarding or assessing costs, acted arbitrarily in exercising the discretion vested in it by law and not in accordance with general principles. WAHIP ALI v. GHAFUR-UN-NISSA, **A.W.N. 1905, 75.** (15 A. 333, *F.*)

(539)—*S. 35, O. XX, r. 6 (3) (=Civ. Pro. Code, 1882, s. 220)—Discretion of Court as to costs—Successful plaintiff not guilty of misconduct, neglect or omission, entitled to costs—Defendant's admission of liability before suit, effect of.*—The discretion of the Court under s. 220, Civ. Pro. Code, is one to be exercised with reference to general principles. Where a successful plaintiff is not guilty of any misconduct, neglect or omission, he is entitled to costs. The fact that the defendant has, previous to the suit, admitted his liability to pay to the suit debt to the plaintiff, affords no ground for depriving the plaintiff of his costs. KUPPUSAMY CHETTY v. ZAMINDAR OF KALAHASTI, **27 M. 341.**

(540)—*S. 35, O. XX, r. 6 (3) (=Civ. Pro. Code, 1882, s. 221)—Mortgagor's right to deduct amount of costs payable to him under decree from mortgage-debt payable by him.*—The mortgagor is entitled to set off or deduct the amount of the costs payable to him under the decree in the redemption suit against or from the mortgage-debt payable by him. If the costs are of larger amount than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance of the costs from the defendant. SIDU v. BALI, **17 B. 32.** (4 C. 742, *Appr.*) [*R.*, 16 C.P.L.R. 73.]

(541)—S. 35, O XX, r. 6 (3)—*See* COSTS—GENERAL, 4 Bom. L.R. 109.

(542)—*S. 35, O. XX, r. 6 (3), s. 96 (=Civ. Pro. Code, 1882, ss. 220, 540)—Costs—Appeal—Misapprehension of law and fact—Discretion.*—Courts should interfere with the exercise of discretion by the lower Court as to costs when there has been any misapprehension of facts or violation of any established principle or where there has been no real exercise of discretion at all. Where there is a clear misapprehension of fact and law, an appeal lies under ss. 220 and 540 of the Code against an order for costs so erroneously made. RANCHORDAS VITHALDAS v. BAI KASI, **16 B. 676.** [*F.*, 6 O.C. 52; *Appr.*, 22 B. 164; *R.*, 4 C.W.N. 90.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(543)—*S. 35, O. XX. r. 6 (3), s. 100 (= Civ. Pro. Code, 1882, ss. 220, 584)—Costs, order as to—Second appeal against order as to costs—Discretionary power of Court, jurisdiction to interfere with.*—The plaintiff brought a suit against the defendant for arrears of rent for 1304 and the kharif of 1305 Fasli. The suit was founded on the provisions of s. 127, Oudh Rent Act. The defendant pleaded that the land had been in his possession for many years, that he was the owner of it, and that the provisions of s. 127 were not applicable. The Assistant Collector held that the defendant was not the owner of the land, but, as he had not occupied it without the landlord's consent, the suit would not lie under s. 127; and upon this ground he dismissed the suit. The plaintiff subsequently brought another suit against the defendant in which he claimed arrears of rent for 1305 Fasli in respect of the land, founding the suit on the provisions of the same section. The defendant pleaded that the suit was barred by s. 13, Civ. Pro. Code, and that he was proprietor of the land. The Court of first instance decreed the suit. On appeal, the District Judge dismissed it upon the ground of *res judicata*, but he ordered that the defendant should pay the plaintiff's costs in both Courts; the reasons given for this order being that the defendant, in spite of the judgment of the Assistant Collector in the previous suit, dishonestly alleged that he was owner of the land and pleaded adverse possession, etc., etc. The defendant preferred a second appeal to the Court of the Judicial Commissioner on the question of costs only. Following the law laid down in 16 B. 676, *held* that an order of an appellate Court as to costs is "contrary to law," within the meaning of s. 584, Civ. Pro. Code, not only when the Court's discretion has been exercised contrary to law, in the ordinary sense, but, also, when that discretion has been exercised in such circumstances as would justify the correction of the order by the appellate Court, had it been passed by a Court of original jurisdiction. *Held* further, that there had been an illegal exercise of discretion on the part of the District Judge in the matter of costs and that, therefore, a second appeal would lie from his order. MADHO SINGH v. LALTU, **6 O.C. 52.**

(544)—*S. 35, O. XX, r. 6 (3), s. 100 (= ss. 220 and 584, Civ. Pro. Code, 1882)—Costs, Court's power to give and apportion—Discretionary power of Court—Second appeal against—Grounds of second appeal, particulars to be observed in drawing up—Second appeal.*—Under s. 220 of the Code of Civil Procedure, a Court has full power to give and apportion the costs in any manner it thinks fit, and a second appeal does not lie from the legal exercise of a discretionary power. The grounds taken in second appeal should be full and specific and should clearly indicate the error of law assigned, or the substantial error or defect in law or procedure or investigation which is imputed, and, in the latter case, it should be made to appear, on the face of the grounds of appeal, that such error or defect probably produced error or defect in law in the decision on the merits by stating what bearing the supposed error or defect had on the merits of the case. CHABHA RAM v. THAKUR JAWAHIR SINGH, **6 O.C. 39.** [*R.*, 6 O.C. 52, 7 O.C. 49; *R. and Diss.*, 8 O.C. 251.]

(545)—S. 35, O. XX, r. 6 (3), s. 107 (2), O. XXII, r. 11, O. XLI, r. 23—*See* COSTS—SPECIAL CASES, A.W.N. 1892, 215.

—— S. 36 (= New).

See EXECUTION OF DECREE.

(545-*a*) —S. 36—*See* NOS. 424, 496-*b*, *supra* and NOS. 555-*c*, 569, 578, 3546, 3661, *infra*.

(546)—*Ss. 36 and 37 (= Civ. Pro. Code, 1882, s. 649, para 2)—Decree passed by Political Agent's Court against Sirdar — Execution against heirs of Sirdar who was dead—Civil Court—Jurisdiction.*—A decree was passed in the Court of the Political Agent against a Sirdar who died after the passing of the decree. The decree-holder applied for execution of the decree against his heirs. The Political Agent rejected the application on the ground that he had no jurisdiction over the heirs who were not Sirdars. The applicant therefore applied to the Civil Court of D which would have had jurisdiction to try the suit, had the deceased defendant not been a Sirdar, and the Court declined to pass an order for execution, being of opinion that s. 649, para 2 of the Civ. Pro. Code applied in cases where the territorial jurisdiction is changed and not in cases where the status of parties is changed. On appeal, this order was reversed and it was *held* that the terms of s. 649, para 2, are general and draw no distinction as to the nature of the cause which puts an end to the jurisdiction and that the section applied to this case. GAUSKHA v. ABUUL ROPKHA, **17 B. 162.** (11 B. 153, *R.*)

(547)—*Ss. 36, 37 (= Civ. Pro. Code, 1882, s. 649)—Provincial Small Cause Courts Act, s. 35 (1)—Withdrawal of powers—Civil Courts Act, s. 28.*—As regards suits tried by a Munsiff under the extended Small Cause jurisdiction, when such jurisdiction is withdrawn, execution proceedings in such suits must be had in the Court in which the jurisdiction at the time of application vests. ZAMINDAR OF VALLUR AND GUDUR v. ADINARAYADU, **19 M. 445.**

(548)—Ss. 36, 37—*See* ACT I OF 1894, ss. 32, 54, 2 C.L.J. 595 = 32 C. 921.

(549)—Ss. 36 and 37—Transfer of local jurisdiction—Application for execution, to which Court to be made—*See* EXECUTION OF DECREE—MISCELLANEOUS, 9 O.C. 281.

(550)—*Ss. 36, 37, 38, 39, 41, O. XXI, rr. 4, 5 (= ss. 223, 649, Civ. Pro. Code, 1882)—Court which passed the decree—Transfer of jurisdiction—Execution of decree.*—If, after decree, the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

local jurisdiction *re* the subject-matter is transferred from the Court which passed the decree to some other Court, execution of the decree may be taken either in the Court which passed the decree or in the Court to which the local jurisdiction has, since the decree, been transferred. The terms of s. 649 are permissive. JAHAR v RAMINI DEBI, **28 C. 238=5 C.W.N. 150.** (6 C. 513, *F.*; 25 C. 315, *D.*) [*F.*, 9 O.C. 281, 35 C. 974=12 C.W.N. 859.]

(551)—*Ss. 36, 37, O. XIV, r. 7 (=ss. 649 and 151, Civ. Pro. Code, 1882)—Commissioner—Amount drawn by Commissioner in excess of his fees—Writ of attachment for recovery of that amount—Inherent power of Court—Appeal*—A writ of attachment was issued for the recovery of an amount drawn by a Commissioner in excess of what was allowed by the Court as his fees. *Held* that the order falls within s. 649 of the Code of 1882, and is appealable. *Held*, also, that the order must be taken to be one which is contemplated by s. 151 of the Code of 1908, and valid under the inherent powers of the Court. UPENDRA MOHAN DAS GUPTA v. RAJA JYOTI PROSAD SINGH DEO, **6 Ind. Cas. 386.** (34 C. 850, 11 C.W.N. 856, *F.*; 10 C.W.N. 234, *R.*)

——**S. 37 (=1882, s. 649, cl. 2).**

(551-*a*)—S. 37—*See* NOS. 424, 546, 547, 548, 549, 550, 551, *supra* and NOS. 553-*c*, 569, 578, 3546, 3661, *infra*.

——**S. 38 (=1882, s. 223, para 1=1877, s. 223, para 1=1859, parts of ss. 285 and 286.)**

See EXECUTION OF DECREE.

(551-*b*)—S. 38—*See* NOS. 159, 160, 424, 434, 497, 550, *supra* and NOS. 1506, 1507, 3346, *infra*.

(552)—Ss. 38, 39, 41—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION — EXECUTION OUT OF COURT'S JURISDICTION, 15 C. 667.

(553)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (=old s. 223)—Execution of decree—Attachment of salary disbursed outside local limits of Court's jurisdiction—Attachment of half the salary—Judgment-debtor residing out of Court's jurisdiction—Legality of.*—A Civil Court cannot attach a moiety of the judgment-debtor's salary under ss. 266, 268, Civ. Pro. Code, 1882 (= new s. 60, O. XXI, r. 21, r. 46) in execution of a money-decree, if the judgment debtor resides out of the limits of the Court's jurisdiction. SHEO KARAN DAS v. EARLE, **40 P.R. 1895.** [*R.*, 6 P.R. 1903.]

(553-*a*)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (=Civ. Pro. Code, 1882, s. 223)—Transfer of decree to subordinate Court—Decree beyond jurisdiction.*—A Court which passed a decree cannot, of its own motion, send it for execution to any Court subordinate to it, when the value of the subject-matter of the suit, in which the decree was passed, exceeds the pecuniary limits of the ordinary jurisdiction of that Subordinate Court. MAHOMED SASI v. MAUNG KIN, **12 Ind. Cas. 27.**

(553-*b*)—Ss. 38, 39, 41, O. XXI, rr. 4, 5—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 7 M. 397.

(553-*c*)—Ss. 38, 39, 41, O. XXI, rr. 4 and 5, 36 and 37—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 25 C. 315.

(554)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (=s. 223, Civ. Pro. Code, 1882)—Application for transmission of certified copy—Notice under s. 248, Civ. Pro. Code, not necessary—Nature and effect of order issued after notice.*—An application for the transmission of a certified copy of a decree to another Court is not an application to execute. [*R.*, 8 C.W.N. 575.] On an application for such transfer, there is no necessity for the issue of a notice under s. 248. [*D.*, 36 C. 543=9 C.L.J. 271.] Even when a notice is issued and an order is made subsequently, for transferring the decree, such an order is not an order for execution. It has not the effect of a revivor. SUJA HOSSEIN v. MONOHUR DAS, **22 C. 921.**

(555)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (=s. 223, Civ. Pro. Code, 1882)—Transfer, by Munsiff, of execution of Small Cause decree to original side—Necessity for application by party—Appeal—Act IX of 1887, s. 27.*—A Munsiff, invested with Small Cause jurisdiction, cannot, of his own motion and without any application on the part of the decree-holder, transfer, to the Original side of his Court, the execution of a Small Cause decree, because s. 223 of the Code requires a petition to be put in by the decree-holder moving for the transfer. When such a transfer is made to the regular side, an appeal will lie in the ordinary course against orders passed in execution on the regular side. JIWAN v. MUNSHI RAM, **3 P.L.R. 1905.**

(556)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (Civ. Pro Code, 1882, s. 223—Transfer of decree to another Court caused by false representation—Sale by such Court cannot be impeached.*—Where the District Munsif's Court at B which passed a decree ordered the transfer of execution of the decree to the District Munsif's Court at G, on a false representation made by the judgment-creditor as to the existence of property in G, and the Court at G executed the decree and attached and sold a mortgage-bond of the judgment-debtor, *held* that the sale could not be impeached on the ground that the order of transfer had been brought about by a false representation, and that the fact of the Court at B having been misled did not affect the validity of the order of transfer. ACHAMMA v. BASAPPA, **8 M.L.J. 1.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(557)—Ss. 38, 39, 41, O. XXI, rr. 4, 5—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 16 C. 465, 15 B. 28, 20 A. 129=A.W.N. 1897, 218.

(558)—Ss. 38, 39, 41, O. XXI, rr. 4, 5—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1899, 17, 3 M.L.T. 261=17 M.L.J. 616.

(559)—Ss. 38, 39, 41, O XXI, rr. 4 and 5—*See* LIMITATION ACT, 1908, art. 182—STEP-IN-AID OF EXECUTION, 22 C. 375, 8 C.W.N. 575, 55 P.R. 1904.

(560)—*Ss. 38, 39, 41, 48, O XXI, rr. 4, 5, 10, 21 (=ss. 229, 230, Civ. Pro. Code, 1882) —Transfer of decree to another Court—Application for execution.*—A decree for money made by the Court of G was transferred for execution to the Court of A The decree-holder some three years after applied to the Court at G for execution. As no information as to what had been done by the Court at A in the matter of the execution of the decree had been received from that Court by the Court at G, the latter Court was of opinion that the application should be made to that Court and rejected it. *Held* that the order of the Court was correct and that the application was correctly dismissed. S. 230, Civ. Pro. Code, lays down the general rule which governs all applications for execution. It is that "when the holder of a decree desires to enforce it he shall apply, if the decree has been sent (under s. 223) to another Court, to such Court." GAJADHAR v. HANUMAN, **A.W.N. 1886, 31**. [*R.*, 20 A. 129.]

(561)—*Ss. 38, 39, 41, O. XXI, rr. 4 and 5, ss. 24, 47 (=Civ. Pro. Code, 1882, ss. 223 and 244)—Execution of decree—Jurisdiction of Court to attach and sell property situate outside its territorial jurisdiction—Questions relating to execution—Separate suit.*—In this case the suit was transferred from the Court of the District Judge of Amritsar to the Court of the District Judge of Lahore which passed a money decree in favour of the plaintiff. After the final decision of the case by the Chief Court the District Judge of Lahore upon the application of the plaintiff attached and sold immoveable property belonging to the defendant situate in the Amritsar District. The present suit was filed by the judgment-debtor against the plaintiff for possession of the property sold and purchased by the plaintiff contending, *inter alia*, that the Court of the District Judge of Lahore had no jurisdiction to attach and sell property situate outside its territorial jurisdiction, and the order of attachment passed by it was a nullity. *Held*, that the suit was barred by s. 244 of the Civ. Pro. Code, and the order passed by the Court of the District Judge of Lahore was not a nullity. The terms of s. 223, Civ. Pro. Code, are not mandatory. SARDAR GURBACHAN SINGH v. RAM SAHAI, **163 P.L.R. 1901=8 P.R. 1902.** (15 A. 324, 15 C. 667, 19 C. 17, 9 P.R. 1901, 20 C. 105, 17 C. 526, 22 C. 871, 17 A. 478, 16 M. 447, 24 C. 62, *R.*; 17 C. 699, F.B., *D.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(562)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5, s. 42 (=old ss. 223, 228)—Further transmission, whether allowed.*—S. 228, Civ. Pro. Code, 1882, does not allow the transmission of the transmitted decree to another Court for execution. A decree-holder can move the Court, which passed the decree, to grant, or to prevent it from granting several certificates concurrently or successively, enabling other Courts to execute its own decree. NAUFAT RAI v. JAFFARJI, **83 P.R. 1887.**

(563)—Ss. 38, 39, 41, O. XXI, rr. 4, 5, ss. 42, 102—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 12 A. 579=10 A.W.N. 206.

(564)—Ss. 38, 39, 41, O. XXI, rr. 4, 5, s. 42, O. XXI, r. 23, s. 115—*See* DISTRICT JUDGE, JURISDICTION, 11 M. 130.

(565)—*Ss. 38, 39, 41, O. XXI, rr. 4 and 5, s. 43 (=ss. 223, 229, Civ. Pro. Code, 1882) —Foreign territory — Execution — Court at Kondh.*—The Court of the Subordinate Judge of Kondh is not a Court established in the territory of a foreign Prince or State within the meaning of s. 229, Civ. Pro. Code. A decree of the Court of the Native Commissioner or Sub-Judge of Kondh was transferred for execution by the Court of the Sub-Judge at Saran. *Held* that it may be executed in the Court of Sub-Judge of Saran. S. 223, Civ. Pro. Code, is not limited in its application to Courts established under, and governed by the Bengal Courts Act and the corresponding Acts of the other provinces. MAHARAJA PRABHU NARAYAN SINGH BAHADUR v. SALIGRAM SINGH, **11 C.W.N. 622=6 C.L.J. 30=34 C. 576.**

(566)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 and s. 55 (=Civ. Pro. Code, 1882, ss. 223, 336)—Security to enable judgment-debtor to present insolvency application—Failure of judgment debtor to apply - Assignment of decree—Right of assignee to obtain recognition of transfer against surety also.*—A third person having offered himself to stand as surety to enable the judgment-debtor to apply to be declared an insolvent the judgment-debtor was set at liberty. The judgment-debtor however did not so apply. Thereupon the decree-holder applied for execution of the decree against the surety and the petition was granted after notice to him. Subsequently, the decree was assigned to another. The assignee then applied to be brought on record and for transfer of the decree to another Court for execution. The Court ordered recognition of the transfer but not as against the surety. *Held* that as the lower Court saw no objection to recognise the assignment and send the decree for execution to another Court as prayed for, it was not warranted in limiting

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

the execution against the judgment-debtor alone. CHATHOTH KUNHI PAKKI v. SAID-INDAVIDE KUNHAMMAD, **26 M. 258.**

(567)—*Ss 38, 39, 41, O. XXI, rr. 4 and 5, s. 73 (=ss. 223, 295, Civ. Pro. Code, 1882)—Money-decree transferred to another Court for execution—Application by decree-holder to Court which passed decree for rateable distribution of assets realised in execution of other decrees against same judgment-debtor — Application refused—Suit by decree-holder to recover his share of assets, maintainability of.*—The present plaintiff held a money-decree in his favour. He had it transferred to another Court for execution. Meantime the judgment-debtor's properties, in the place where plaintiff's decree was obtained, were attached and sold in execution of some other decree against him and the proceeds of the sale were paid into Court. Thereupon, the present plaintiff applied that the proceeds of the execution sale might be rateably distributed under s. 295. The application was refused, on the ground that, as the decree obtained by him had been transferred to another Court and was in course of execution there, no application under s. 295 of the Code could be entertained by the Court, which passed the decree, till the decree had been re-transferred and the certificate contemplated by s. 223 of the Code obtained. Hence the present suit by the plaintiff to obtain his share of the assets paid under s. 295 of the Code to the defendants. The lower Court dismissed plaintiffs' suit on the ground that he was not competent to apply to the Court, which passed the decree so long as the execution was pending in another Court. *Held*, s. 295 of the Code provides that, whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have, prior to the realisation, applied to the Court by which such assets are held, for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be divided rateably among all such persons. There could be no doubt that the plaintiff complied with the requirements of the section, for, before the realisation of the assets, he did apply to the Court by which the assets were to be realised, for execution of his decree for money against the same judgment-debtor. It was also clear that he did not obtain complete satisfaction of his decree in the Court to which it was transferred. The contention that, once the decree was transferred, the Court to which passed it had no jurisdiction to entertain any application for execution thereof and that there could not be two simultaneous executions of the same decree could not be accepted as correct. (8 C. 687, 14 M.I.A. 529, 27 C. 488, 25 A. 443, *R.*) [*R.*, 11 C.L.J. 69=14 C.W.N. 396=3 Ind. Cas. 105.] A decree may be executed simultaneously in two or more districts. And, although a decree may have been transferred for execution, it is open to the decree-holder to make an application for execution, in order to enable him to obtain rateable distribution under s. 295 of the Code, to the Court which passed the decree and which holds the assets realised. Upon such application being made, the Court to which the decree has been transferred should be called upon to certify, under s. 223 of the Code, what portion, if any, of the decree has been satisfied; and upon obtaining such certificate, the assets may be rateably distributed. It is not necessary to have the decree formally transferred before the application under s. 295 of the Code can be made. Appeal allowed and case remanded for trial on the merits. BAIJ NATH GOENKA v. F. H. HOLLOWAY, **1 C.L.J. 315.**

(568)—Ss. 38, 39, 41, O. XXI, rr. 4, 5, s. 73—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 15 M. 345=1 M.L.J. 595.

(569)—*Ss. 38, 39, 41, O. XXI, rr. 4 and 5, O. XXI, r. 2, ss. 36, 37 (=ss. 223, 258, 649, Civ. Pro. Code, 1882)—Court passing decree—Transfer of jurisdiction—Application for transfer of decree made to Court passing decree—Limitation Act, art. 179, cl. 4—Step-in-aid of execution—Meaning of "judgment-debtor."*—The Court, which passed a decree ordering sale of certain property, does not cease to exist for the purpose of s. 649 of the Code, when the area, in which the property ordered to be sold is situate, is transferred to the jurisdiction of another Court. Nor does the Court passing the decree cease to have jurisdiction to execute the decree by virtue of the transfer. S. 223 provides that a decree may be executed by the Court that passed it. Therefore, that Court, in spite of the transfer of jurisdiction, has power to execute the decree. (25 C. 315, *R.*) The decree-holder is bound to apply to the Court which passed the decree, for a transfer to the other Court, and such an application is a step-in-aid of execution within the meaning of cl. (4), art. 179 of the Limitation Act. The word "judgment-debtor" in s. 258 should be construed as including those who claim through him or in his right, *e.g.*, an assignee from the judgment-debtor of the equity of redemption after decree. PANDURANGA MUDALIAR v. VYTHILINGA REDDI, **17 M.L.J. 417=2 M.L.T. 469=30 M. 537.** [*Diss.*, 35 C. 974=12 C.W.N. 859; *R.*, 7 Ind. Cas. 55.]

(570)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5, 6, (=Civ. Pro. Code, 1877, ss. 223, 224)—Execution—Transfer of decree—Certificate.*—The Court to which a decree is transferred for execution, and which has executed the decree partly, need not require a fresh certificate under s. 224 (*b*) of the Code when the decree-holder applies for further execution of the decree. The case is with the Court for execution until execution has been certified to the Court which passed the decree. RANGILI v. RAIYAT HUSAIN, **A.W.N. 1883, 247.** [*R.*, 20 A. 129.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(571)—Ss. 38, 39, 41, O. XXI, rr. 4, 5, O. XXI, r. 6, s. 42—Revival of execution proceedings by the Court which passed the decree, after it had been once transferred to another Court for execution and returned — Relief against representatives of judgment-debtor, by attachment and sale of joint property—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 C.L.J. 239=4 Ind. Cas. 46.

(572)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5, 8 (= ss. 223, 226, Civ. Pro. Code, 1882)—Execution—Transfer of decree—Order of transfer signed by* sheristadar *as "by order," validity of—Pecuniary limits of District Munsif's jurisdiction for purposes of execution.*—An order of the District Court, transferring a decree for execution to a District Munsif, signed by the *sheristadar* of the former Court as "by order" of the District Judge, is a valid endorsement and fulfils the requirements of ss. 223 and 226, Civ. Pro. Code, 1882. The jurisdiction of a District Munsif in regard to the execution of a decree transferred to him for execution is not subject to any pecuniary limit. VLAZORATH KIBULA v. SYED GHULAM GHOSE; SHAL SAHIB KADIRI v. SUNNI LAL AGARWALA, **5 Ind. Cas. 155=7 M.L.T. 132.** (7 M. 397, 17 M. 309, *F.*; 16 C. 457, 16 C. 465, 12 B. 155, note, *F.*)

(573)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 (= old s. 223), O. XXI, rr. 10, 21, s. 48 (=old s. 230)—Punjab Courts Act, XVIII of 1884, s. 35—Executing Court—Pecuniary jurisdiction—Petition-decree—Procedure.*—A Court to which a decree has been sent under s. 35, Punjab Courts Act for execution, can pass orders regarding property in excess of its jurisdiction, as there is no limitation on the power of an original Court to execute decree of any value, s. 223 allowing a Court, which passed a decree, to send it for execution to any Court subordinate to it. GANGA RAM v. GURU SARN DAS, **81 P.R. 1887, F.B.** (45 P.R. 1892, *R.*) [*R.*, 9 P.R. 1901=1 P.L.R. 1901.]

(574)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5 and 22 (=ss. 223, 248, Civ. Pro. Code, 1882)—Practice—Notice—Application for transmission of decree—Execution—Court which should issue notice.*—The notice under s. 248 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under s. 223 of the Code. The Court has a discretion whether or not it will issue a notice before ordering transmission. Ordinarily, in a case like the present, it should be left to the Court to which the decree is to be transmitted to issue the notice. RAJA SREENATH ROY v. ROMESH CHANDRA ACHARAYA CHAUDHURI, **12 C.W.N. 897.**

(575)—*Ss. 38, 39, 41, O. XXI, rr. 4 and 5, 26 (1) (2) (=Civ. Pro. Code, 1882, ss. 223, 239)—Court to which decree transferred for execution, whether can question propriety of transfer order.*—In this case, the Bombay Presidency Court of Small Causes empowered under s. 31 of Act XV of 1882 so to do, sent the decree for execution to be Court of Surat, which under the same section had to follow the Civ. Pro. Code, 1882. The District Judge, on the mere statement of the judgment-debtor, not a party to the execution proceeding before him, *held* that the debtor had sufficient property, in Bombay, stating, as his sole reason for dismissing the application that "the darkhast shows that no attempt has been made to satisfy that decree out of the Bombay property, and, therefore, no execution can be taken out here." *Held*, that the District Judge was wrong in holding that no execution could be taken out in Surat while there was sufficient property in Bombay to satisfy the decree. He was bound to execute the decree which was transferred to him for execution and it was not competent to him to question the propriety of the order transferring the decree for execution to his Court. MULLA ABDUL HUSSAIN v. SAKHINABOO, **21 B. 456.** [*Rel. on*, 156 P.L.R. 1905.]

(576)—*Ss. 38, 39, 41, O. XXI, rr. 4, 5, O. XLVI, r. 1, ss. 113, 24 (=ss. 223, 617 and 25, Civ. Pro. Code, 1882)—Decree passed by a Court of Small Causes—Attachment and sale of immoveable property—Decree sent for execution to Munsiff—Appeal—Ss. 27 and 35, Provincial Small Causes Courts Act.*—A decree passed by a Court of Small Causes sought to attach and sell immoveable property and was, therefore, sent for execution to the Munsiff's Court under s. 223, Code of Civil Procedure. Application having been made for execution in the Munsiff's Court, the judgment-debtor raised certain objections which were overruled. *Held*, that the appeal lay to the District Judge, neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree having been sent under s. 223 of the Code. Had the suit or the execution proceedings been transferred to the Munsiff's Court under s. 25 of the Code or the execution proceedings instituted in the Munsiff's Court under s. 35, Provincial Small Causes Courts Act, the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes. S. 27 of the Small Causes Courts Act has no application to a case of this kind. ATWARI v. MAIKU, **5 A.L.J. 612=A.W.N. 1908, 254=31 A. 1=1 Ind. Cas. 553.**

(577)—Ss. 38, 39, O. XXI—Transfer of decree passed by Civil Court for execution to a Rent Court—*See* EXECUTION OF DECREE—MISCELLANEOUS, 13 O.C. 119=6 Ind. Cas. 994.

(578)—S. 38, O. XLV, r. 15, ss. 36, 37—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURTS' JURISDICTION, 20 C. 105.

—S. 39 (=1882, s. 223, paras (2) & (3)=1877, s. 223, paras (2) & (3)=1859, parts of ss. 285, 286.)

See EXECUTION OF DECREE.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(578-*a*)—S. 39—*See* NOS. 160, 497, 550, 552, 553, 553-*a*, 553-*c*, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569 570, 571, 572, 573, 574, 575, 576, 577, *supra*, and NOS. 1506, 1507, 3346, *infra*.

(579)—Ss. 39, 41, O. XXI, rr. 4, 5—*See* LIMITATION ACT, 1908, art. 183, 26 A. 361 = A.W.N. 1904, 51 = 1 A.L.J. 80.

——S. 41 (=1882, s. 223 (4) = 1877, s. 223 (4).

(579-*a*)—S. 41—*See* NOS. 160, 424, 497, 550, 552, 553, 553-*a* to *c* 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 579, *supra*, and NOS. 1506, 1507, 3346, *infra*.

——S. 42 (=1882, s. 228 = 1877, s 228 = 1859, s. 294.

See EXECUTION OF DECREE.

(579-*b*)—*S. 42—Order in execution—Small Cause suit—Only one appeal — No right of second appeal.*—In all orders in execution of decrees of Small Cause suit, there is a right of only one appeal and no second appeal lies. VEERAMATHARI v. SUBRAMANIA IYER, **1911, 2 M.W.N. 585.** (12 Ind. Cas. 169, *F.*)

(579-*c*)—S. 42—*See* NOS. 562, 563, 564, 571, *supra*.

(580)—*Ss. 42, 102 (=Civ. Pro. Code, 1882, ss. 228, 586)—"Suit of the nature cognizable in Courts of Small causes," in s. 586, Civ. Pro Code, 1882, construction of—Execution proceedings—Subject-matter of suit less than Rs. 500.*—The construction of the words "suit of the nature cognizable in Courts of Small Causes," does not depend upon the tribunal in which the suit is brought, and is equally applicable whether the suit be brought in a Court of Small Causes or in any other Court. (12 A. 579, *Appr.*) Where a Court of Small Causes passed a decree in a suit the subject-matter of which was less than Rs. 500, and transferred it for execution to the Munsiff, no second appeal would lie from an order passed in execution by the Munsiff, s. 586 controlling s. 228 in a case of this kind. LALA KANDHA PERSHAD v. LALA LAL BEHARY LAL, **25 C. 872.** (12 A. 579, *Appr.*) [*R.*, 27 C. 484 = 4 C.W.N. 269, 8 O.C. 405.]

(581)—S. 42, O. XXI, r. 16—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION — EXECUTION OUT OF COURT'S JURISDICTION, 2 A. 283.

(582)—S. 42, O. XXI, r. 16, s. 99—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 27 C. 488.

(583)—S. 42, O. XXI, r. 26 (1)(2)—*See* EXECUTION OF DECREE—STAY OF EXECUTION, 7 A. 330 = A.W.N. 1885, 21.

——S. 43 (=1882, s. 229 = 1877, s. 229 = 1859, s. 284.

See EXECUTION OF DECREE.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(584)—*S. 43 (=s. 284, Civ. Pro. Code, 1859)—Court of Dewan, Abilkar of Cooch Behar—Transfer of decree—Execution.*—The Court of the Dewan Abilkar of Cooch Behar is not a Civil Court within any part of the territory of British India, and is not a Court established by the authority of the Governor General of India in the territories of a foreign State, within the terms of s. 284, Act VIII of 1859, and consequently the Munsiff of Shahazadpoor has no jurisdiction to execute a decree of that Court. JADAB CHANDRA TAI PARAMANIK v. DINANATHDAS, **4 B.L.R.A.C. 134 = 13 W.R. 154.**

(584-*a*)—*S 43 (=Civ. Pro. Code, s. 284)—Execution—Decree transferred for execution—Limitation of transferred decree—Jurisdiction.*—Having regard to the scope of s. 284 and the following sections of the Civ. Pro. Code, 1859, the Court to which a decree is, under those sections, transferred for the purpose of being executed, does not thereby acquire a jurisdiction to entertain and determine a question with regard to limitation or otherwise which arose between the parties antecedent to the date of transfer. LUTFULLAH v. KIRAT CHAND, **13 B.L.R. App. 30** [*Diss.*, 23 C. 839; *Disappr.*, 5 C. 897.]

(584-*b*)—S. 43—*See* LIMITATION ACT, 1908, art. 182, 11 W.R. 269.

(585)—S. 43—*See* NO. 565, *supra*.

(585-*a*)—*Ss. 43, 45—Sikkim, Political Resident's Court at=Decree if may be executed in British India—Question of fact not raised in first Court if may be urged on appeal.*—The Governor General in Council having declared by notifications that s. 229 A of the Civ. Pro. Code of 1882 (now s. 45) should apply to the Court of the Political Agent at Sikkim. *Held*—That this showed that the Court of the Political Agent at Sikkim was a Court established or continued by the authority of the Governor-General in Council within the meaning of s. 43 of the Code, and a decree of that Court can be executed by the Court of the Subordinate Judge at Darjeeling. The question whether the decree could "be executed within the jurisdiction of the Court by which it was passed" was one of fact, and the plea that it could, not having been raised in the lower Court, the High Court refused to entertain it, JAMIL AHAMAD v. HIS HIGHNESS THE MAHARAJA OF SIKKIM, **15 C.W.N. 992.**

(586)—S. 43, O. XXI, r. 26 (1)—*See* EXECUTION OF DECREE—STAY OF EXECUTION, 9 W.R. 361.

—— S. 44 (=1882, s. 229-B.)

(586-*a*)—S. 44—Decree obtained in Native State, nature of—Civ. Pro. Code, 1882, s. 229-B—Want of jurisdiction in Court which passed decree—*See* EXECUTION OF DECREE—NATIVE STATES, DECREES OF COURTS OF, 15 B. 216.

(586-*b*)—S. 44—*See* NO. 587, *infra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

——S. 45 (=1882, s. 229-A).

See EXECUTION OF DECREE.

(586-c) S. 45—*See* NO. 585-*a*, *supra* AND NO. 3217-*f*, *infra*.

(587)—Ss. 45, 44—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION — EXECUTION OUT OF COURT'S JURISDICTION, 29 C. 400=6 C.W.N. 573.

(588)—S. 45, O. XLV, r. 15—*See* APPEAL TO PRIVY COUNCIL—MISCELLANEOUS, 2 A. 604, F.B.

——S. 47 (=1882, s. 244=1861, s. 11.)

See EXECUTION OF DECREE.

(589)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Construction of section.*—A liberal interpretation ought to be given to the language of s. 244 (*c*), Civ. Pro. Code. The intention of the Legislature appears to be to dispose, in a single litigation, of all questions in reference to the subject-matter of that litigation arising between the parties once properly brought before the Court. GOWRI v. VIGNESHVAR, **17 B. 49**. [*Diss.*, 23 A. 346, 6 C.W.N. 30=30 C. 134; *F.*, 15 C.P.L.R. 106, 6 Bom. L.R. 697; *R.*, 23 M. 361, F.B., 3 Bom. L.R. 858=31 B. 33.]

(590)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Construction.*—The words, "The following questions shall be determined by order of the Court executing a decree," in s. 244 of the Civ. Pro. Code, must be interpreted to mean the Court executing the decree at the time when the application is made; they do not include the Court, which has executed the decree, and has thereby become *functus officio*. FAKAMDDIN MAHOMED AHSAN v. THE OFFICIAL TRUSTEE OF BENGAL, **10 C. 538**. [*Cons.*, 2 O.C. 366; *R.*, 18 A. 106, U.B.R. 1905, 4th Qr., Civ. Pro. 36, 244.]

(591)—*S. 47 (=Civ. Pro. Code, s. 244 of 1882 (c), scope of.*—The widest meaning should be given to s. 244 (*c*) so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree, and relating to its execution. GHAZIDIN v. FAKIR BAKHSH, **7 A. 73=A.W.N. 1884, 226**. [*F.*, 12 B. 30, 18 M. 26; *R.*, 2 O.C. 315.]

(592)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) whether bars the trial of an issue involved in the questions mentioned in the section—Issue raised at the instance of a defendant in a suit brought against him.*—The effect of s. 244, Civ. Pro. Code, is to debar a plaintiff from bringing a suit for the determination of a question relating to the execution, discharge, or satisfaction of a decree which has arisen between himself and the defendants as parties to the suit in which the decree was obtained, but not to debar a defendant from setting by way of defence a matter which relates to the execution, discharge, or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties. All that s. 244 enacts is that certain questions therein specified shall be determined by the order of the Court executing the decree and not by separate suit; the section bars a suit brought for the determination of certain questions, but does not bar the trial of any *issue* involved in those questions, if the *issue* is raised at the instance of a defendant in a suit brought against him. VENKATARAMANACHARIYAR v. MEENAKSHISUNDARAMAIYER, **4 M.L.T. 285=19 M.L.J. 1=1 Ind. Cas. 193**. (24 C. 355, 26 C. 946, *F.*)

(593)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Purchaser under decree of puisne mortgagee obtaining possession of mortgaged property —Subsequent purchase under decree on the first mortgage—Suit for possession by subsequent purchaser—Redemption.*—A puisne mortgagee obtained a decree against the mortgagor without impleading the first mortgagee, and bought the property in execution of his mortgage-decree, and also obtained possession thereof. The first mortgagee then sued on his mortgage and bought the property in execution of his own mortgage-decree. The first mortgagee afterwards sued the puisne mortgagee, and claimed that the puisne mortgagee should either give up possession or redeem him. *Held*, that the suit was not barred by s. 244, Civ. Pro. Code. (25 B. 631, *R.*) In order that s. 244, Civ. Pro. Code, should apply, two conditions must be fulfilled. The question must relate to the execution, discharge or satisfaction of the decree, or stay of execution thereof; the question must arise between parties to the suit or their representatives. In the present case the question at issue arose only after the satisfaction of the original decree, and it was not between parties to the same suit or their representatives, but between representatives of the same party. *Held*, also, that, the defendant being a puisne mortgagee, his only right was to redeem the plaintiff. (20 B. 390, 19 A. 527; 33 C. 590, *R.*) He was not concerned with the account taken in the plaintiff's suit to which he was not a party, nor was he concerned with the price paid by the plaintiff at his purchase. THAKURDAS WD. MULCHAN v. GANGARAM WD. TOLARAM, **1 Sind. L.R. 172**.

(594)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Application of.*—To appreciate whether a case is or is not within s. 244, Civ. Pro. Code, 1882, it is necessary to consider what the application was and whether, at the time it was made, it was an application under the section. KOKIL SINGH v. EDAL SINGH, **31 C. 385**. (25 C. 539, *Appr.*)

(595)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Applicability of.*—S. 244, Civ. Pro. Code, applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree *after* it has been

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executed, as it would to a dispute between such parties relating to the execution of a decree *before* it had been executed. IMAD v. JAGAN LAL, **17 A. 478 = A.W.N. 1895, 109.** [*F.*, 2 O. C. 366, 24 A. 291, 3 A.L.J. 605 = A.W.N. 1906, 233; *R.*, 21 B. 314, 19 A. 332, 20 P.R. 1898, 163 P.L.R. 1901, 6 M.L.T. 271; *D.*, 23 A. 476.]

(596)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Execution of decree—Application to recover sale-proceeds from decree-holder after sale set aside.*—S. 244 of the Civ. Pro. Code, applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution. (17 A. 478, 22 A. 79, 2 A. 61, *R.*; 7 A. 641, *D.*) Hence, an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, was *held* to be one falling within s. 244, Civ. Pro. Code. COLLECTOR OF JAUNPUR v. BITHAL DAS, **24 A. 291 = A.W.N. 1902, 67.**

(596-*a*)—*S. 47 (=Civ. Pro. Code, 1882, s. 244, cl (c)—Decree referring to mismanagement of devasthan property—Execution—Application to be put in management—Decree not purely declaratory, capable of execution under s. 244*—The decree in question by which the management of certain devasthan lands was given to respondent No. 1, provided that on his mismanaging or alienating the devasthan lands, plaintiff appellant and his brother, respondent No. 2, should enjoy the inam lands and carry on the management. On plaintiff applying for execution of the decree, the Court of first instance held that the question of the alleged mismanagement by respondent which had to be determined did not fall within cl. (*c*) of s. 244 and that plaintiff should therefore bring a separate suit. On appeal this order was confirmed by the District Judge on the ground that the decree in respect of the devasthan property was declaratory only, and not capable of execution. On second appeal, the High Court *held*, reversing the orders of both the lower Courts, that the portion of the decretal order sought to be executed was not declaratory only so as to be incapable of execution under s. 244 of the Code. MADHAVRAO v. RAMRAO, **22 B. 267.** [*R.*, U.B.R. 1905, Civ. Pro. Code, 36.]

(596-*b*)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Validity of decree not impeachable in execution proceedings under.*—Objections impeaching the validity of the decree of which execution is sought, cannot be entertained in execution proceedings under s. 244 of the Civ. Pro. Code. CHINTAMAN VITHOBA v. CHINTAMAN BALAJI, **22 B. 475.** [*F.*, 6 C.W.N. 796; *R.*, 30 B. 101 = 7 Bom. L.R. 659 = 7 O.C. 199, 29 M. 556 = 16 M.L.J. 486 = 1 M.L.T. 315.]

(597)—*S. 47 (=Civ. Pro. Code, 1882, s. 244 —Execution of decree.*—In July, 1895, the respondent obtained from the Rent Court a decree for Rs. 251-8-6 against the appellant and in

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November, 1886, realized the amount of his decree from a sum of Rs. 300 standing in a deposit to the credit of the appellant, when full satisfaction was entered upon the decree, some other creditors of the appellant brought a suit against the respondent alleging that they also were entitled to a portion of the Rs. 300 in deposit. The appellant was a party to that litigation. The suit was decreed against the respondent, who again applied for execution of his decree against the appellant. *Held*, that the decree was capable of execution; s. 244 of the Civ. Pro. Code applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree after it has been executed, as it would lead to a dispute between such parties relating to the execution of a decree before it had been executed. RAM KUMAR v. DEPUTY COMMISSIONER, GONDA, MANAGER, RAM NAGAR ESTATE, **2 O C. 366.**

(598)—*S. 47 (=Civ. Pro. Code, 1882, s. 244 —Jurisdiction of execution Court to entertain application for refund after termination of execution proceedings—Review—Appeal.*—S. 244 of the Code of Civil Procedure applies only to a Court executing a decree, at the time when an application connected with execution is made, and does not apply to a Court which has fully executed a decree and has thereby become *functus officio*; and where an application for execution has been struck off, the proper remedy to obtain a refund of money paid is by application for review of the order which declared the decree satisfied and struck off the execution proceedings. Where no objection to the procedure adopted is taken in the original Court, *held* that, in such a case, it is not necessary an appeal to set aside proceedings of the Court below as the *forum* both for the application for review of judgment and for an appeal, if any, from the order passsd in review would have been the same as the *forum* selected for the application for refund and for the appeal from the order dismissing that application. CHOWDHRI GURMUKH SINGH v. MUSSAMMAT MIRZANUR, **101 P.L.R. 1901 = 63 P.R. 1901.**

(599)—*S. 47 (=s. 244 of Civ Pro. Code, 1882) —Principle applicable to a suit for restitution of money levied in execution.*—According to the law of England (and there is no reason to hold that it is otherwise in India) money recovered under a decree or judgment cannot be recovered back in a fresh suit or auction whilst the decree or judgment, under which it was recovered, remains in force, but this rule of law rests on this ground, *viz.*, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded, by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded and is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is whether the decree or judgment

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

under which the money was originally recovered has been reversed or superseded. Reading s. 244 of the Code of Civil Procedure in the light thrown by the principle thus laid down by the Privy Council, it must be taken to relate to decrees which are still subsisting and in force and which have not been superseded in appeal, and to be no bar to the institution of a suit for restitution after the decree has been reversed. NARAYANA v. NARAYANA, **13 M. 437.** [*R.*, 24 M. 341.]

(600)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Ben. Act I of 1897, s. 10—Execution proceedings under Act.*—S. 244, Civ. Pro. Code, does not apply to the case of execution proceedings held under the Public Demands Recovery Act. RAMRUP SAHAY v. KHUSHAL MISSER, **6 C.W.N. 630.** (6 C.W.N. 246=29 C. 94, 6 C.W.N. 331, *Rel.*) [*Not F.*, 34 C. 787=11 C.W.N. 745, *Expl.*, 1 C.L.J. 538=10 C.W.N. 130=33 C. 84; *R.*, 1 C.L.J. 542=32 C. 1130, 5 C.L.J. 696=11 C.W.N. 756, F.B.=34 C. 811=2 M.L.T. 371.]

(601)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Application — Agreement in derogation of decree.*—S. 244 presupposes the existence of a decree which is validity susceptible of execution. It does not apply to a case where the object is to impugn the decree itself, to set up an agreement inconsistent with the decree which it is sought to execute. The Court cannot go behind the decree in any application under s. 244 HASSAN ALI v. GAUZI ALI MIR, **31 C. 179.** (29 C. 810, 6 C.W.N. 796, *F.*; 22 B. 463, *Diss.*) [*F.*, 4 C.L.J. 475; *R.*, 7 O.C. 199, 5 C.L.J. 328, 30 M. 402=2 M.L.T. 360, 17 M.L.J. 288.]

(602)—*S. 47, cl. (c) (=s 244, cl. (c), Civ. Pro. Code, 1882)—Mortgage-decree against mortgagor's representative, execution of—Contention that mortgaged property did not belong to mortgagor, maintainability of.*—An *ex parte* decree for sale of the mortgaged property was passed against a person as the representatives of the mortgagor. Thereupon, the judgment-debtor applied, under s. 108, Civ. Pro. Code, to have the decree set aside, on the ground that summons had not been served upon him in the suit. This application was rejected; and, when, in execution of the decree, the property was advertised for sale, the judgment-debtor applied, under s. 244, cl. (*c*), to have the sale stayed, on the ground that the property, attemped to be sold, was not the property of the mortgagor, but belonged to himself. The Subordinate Judge overruled, but the District Judge allowed, the objection. On second appeal, *held*, that cl. (*c*) of s. 244, is not intended to apply to a case, like the present, where the judgment-debtor tries to set aside the effect of a decree, but it refers to proceedings in execution based on the decree as if it was perfectly good and valid. KHETRAPAL SINGH ROY v. SHYAMA PRASAD BARMAN, **32 C. 265.** (19 A. 480, 21 A. 277, 21 A. 356, *F.*; 27 C. 242, *D.*) *F.*, 30 M. 26=16 M.L.J. 545; *R.*, 8 C.L.J. 20.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(603)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Decree for delivery of possession of equity of redemption—Wrongful delivery of land, instead of equity of redemption—Suit by mortgagee for restitution of land so delivered—Application of s. 244*—S. 244 bars a regular suit, where the question relating to execution of a decree is raised *bona fide*. But when the decree itself is, on the face of it, wholly irrelevant to the question raised, and the wrong-doer takes the plea of bar to shield his unlawful gain secured even against the express orders of the executing Court, possibly in collusion with the officer executing the decree, and in the absence of the judgment-debtors, s. 244 would seem to have no application. So, where a person sued to enforce his right of pre-emption, in a property subject to mortgagee, and got a decree directing delivery of possession of the equity of redumption therein, but, in execution, of the decree, the Patwari delivered possession of the property itself, instead of the equity of redemption, a regular suit by the mortgagee, claiming restitution of the property so wrongfully delivered cannot be said to be barred by s. 244, as the question raised in the suit does not relate to the execution, discharge or satisfaction of the decree. (11 W.R. 516, *F.*). Even if there were any room for doubt on this point, the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered by the Patwari in executing the decree. KARAM CHAND v. KHUDA BAKHSH, **5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908.** (22 C. 483, 22 A. 121, 28 M. 64, 32 C. 332, *F.*; 5 M. 391, 7 M. 255, 23 M. 55, 26 M. 287, 4 M. 285, 12 W.R. 85, 14 W.R. 39, 12 B. 449, 9 A. 229, 8 C.W.N. 353, 9 P.R. 1889, 63 P.R. 1901, 45 P.R. 1904, *R.*)

(604)—*S. 47 (=Civ. Pro. Code, 1882, s. 224, cl. (c))—"A copy of any order for the execution of the decree," meaning of.*—The words "a copy of any order for the execution of the decree in s. 224, cl. (*c*) of Civ. Pro. Code, 1882 mean a copy of any *subsisting* order. HATHIBHAI NAHAUNSA v. PATEL BECHAR PRAGJI, **13 B. 371.**

(605)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—"Executing decree," meaning of*—The words "a Court executing a decree" in s. 244 of the Civ. Pro. Code, should not be taken to refer only to proceedings pursuant on an application by the decree-holder for execution. The section covers not only cases of proceedings initiated by the decree-holder but relates to any application (relating to the execution discharge or satisfaction of the decree including those made by the judgment-debtor. ERUSAPPA MUDALIAR v. COMMERCIAL AND LAND MORTGAGE BANK, LD., **23 M. 377=10 M.L.J. 91.** [*Diss.*, 12 M.L.J. 390, 3 S.L.R. 17; *Not F.*, 27 M. 428; *Disspr.*, 24 M. 96; *R.*, 7 O.C. 307, 8 O. C. 327, 30 M. 313=2 M.L.T. 181=17 M.L.J. 163, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320.]

Civ. Pro. Code (Acts V of 1908, XIV of 1888, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(606)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Suit barred under s. 244—Plaint whether can be treated as execution application,*—A plaint in a suit barred under s. 244. Civ. Pro. Code, 1882, can be treated as an execution application within the meaning of that section. POONTHOTATH AMMALU AMMA v. OTHALAKATTIL T. MAMMI KUTTI, **7 M.L.T. 428=6 Ind. Cas. 776.**

(607)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) Agreement not to execute decree—"Satisfaction"*—The words "relating to execution" in s. 244, Civ. Pro. Code, are doubtless very general, but they must be restricted to "the contents of the order made or to how far it has been carried out" and do not therefore include an agreement not to execute the decree. The satisfaction contemplated by s. 244, Civ. Pro. Code, must have arisen out of some transaction between the parties subsequent to the decree. MUKUND HARSHET v. HARIDAS KHEMJI, **17 B. 23.** (10 Bom. H.C. 361, *R.*) [*F.*, 6 C.W.N. 796; *R.*, 21 C. 437, 5 M.L.J. 140, 22 B. 267, 22 B. 463, F.B.]

(608)—*S. 47 (=old s. 244)—Application made for further execution of decree—Rejection of application as barred by limitation—Effect of order of rejection.*—A Moonsiff is right in rejecting an application made on the 1st September, 1870, for the further execution of a decree, on the ground that when an application was made on the 19th May, 1865, for execution (although proceedings were taken on such application), the decree had been barred by the law of limitation; but his order does not declare the previous proceedings to be invalid or set them aside. *Quære.*—What is the effect of not executing a decree for three years? ZUMEER SIRDAR v. ASSEEMOODDEEN SIRDAR, **23 W. R. 257.**

(609)—*S. 47—Decree-holder's omission to certify names of judgment-debtors—Effect.*—A decree-holder's omission to certify names of some judgment-debtors in any former execution-proceedings does not do away with effect of decree against them. BABOO MOKOOT NATH PERSHAD *alias* FOOLYANA BABOO v. GUJADUR PERSHAD, **25 W.R. 156.**

(610)—*S. 47 (=Civ. Pro. Code, 1882, s 244, cl. (c)—Execution of decree—"Representative."*—The word "representative" as used in cl. (c), s. 244, of the Civ. Pro. Code, only means a person who succeeds to the right of any of the parties to the suit after the decree is passed; if such rights are transferred by a party to the suit before decree, and if the transferee is made a party to the suit before the decree, then he comes within the words "parties to the suit." KAMESHAR PERSHAD v. RUN BAHADUR SINGH, **12 C. 458.** [*F.*, 11 A. 74=8 A.W.N. 275; *Relied on*, 6 C.W.N. 127; *Expl.*, 16 C. 1; *D.*, 23 C. 454; *Diss.*, 17 C.P.L.R. 178, 9 C. W.N. 824=32 C. 1031; *R.*, 16 C. 603, 23 A. 346, 6 C.W.N. 10=30 C. 134, 29 C. 696, 15 C.P.L.R. 106, 8 C.W.N. 843, 9 C.W.N. 134.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(611)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—"Legal representative"*—*Representatives after decree and before decree, no distinction between.*—No distinction can be drawn in this respect between the positions of a legal representative after decree and one before decree. The term "representative" in cl. (c) of the section contemplates and provides for cases arising in execution between either the representatives of the deceased defendant who become judgment-debtor themselves, or the representatives of the judgment-debtor who have been brought into execution proceedings subsequent to the decree and subsequent to his death before execution has been taken out. SETH CHAND MAL v. DURGA DEI, **12 A. 313, F.B.=A W.N. 1890, 137.** (16 A.1, *Appr.*; 4 A. 190, 6 A. 109, *Overruled*; 8 A. 26, *D.*) [*R.*, 1 O.C. Suppl. 60.]

(612)—*S. 47 (=s. 244, Civ. Pro. Code, 1882,—"Representation" who is—Beneficial owner.*—A person, for whom the predecessor of the judgment-debtors was the *benamidar* and who is, therefore, really interested in protecting the property, is a "representative" of the judgment-debtors within the meaning of s. 244 of the Civ. Pro. Code. The word "representative" has a wide import, and includes not only heirs and executors, but also assignees or legal representatives in the strict sense of the words, that is, persons interested in saving the property from being sold, and whose interest would be jeopardized if the sale were not set aside. SHIBKUMAR LAL PANDAY v. MAIDHUR GAZI, **7 C L.J. 299.**

(613)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—"Legal representative" of judgment-debtor—Court-sale, purchaser at.*—The term "*representative*" in s 244 does not mean only his heir, executor, or administrator, but it means his representative in interest and includes a purchaser of the judgment-debtor's interest, who, so far as such interest is concerned, is bound by the decree. An execution-purchaser of the interest of a judgment-debtor is a legal representative of the judgment-debtor within the meaning of the section, so far as that interest is affected by the decree. ISHAN CHUNDER SIRKAR v. BENI MADHUB SIRKAR, **24 C. 62, F.B.=1 C.W.N. 36.** (16 C. 355, *Overruled*; 8 W.R. 304, *Disappr.*) [*F.*, 26 C. 250=3 C.W.N. 272, 27 C. 264=4 C.W.N. 13, 10 C. L.J. 150, 7 C.W.N. 54, 32 C. 1031=9 C.W.N. 824, 11 C.W.N. 163=5 C L.J. 80, 11 C.W.N. 36, Note=5 C.L.J. 27, Note, 11 C.W.N. 312, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347, 11 C.W.N. 497=5 C.L.J. 45, Note, 13 C.W.N. 98=8 C.L.J. 327, 1 Sind L.R. 158; *Appr.*, 26 A. 447=24 A.W.N. 61=1 A.L.J. 65; *Appl.*, 9 C.W.N. 134, 10 C.W.N. 240; *Rel. on*, 6 C.W. N. 127; *R.*, 9 C.L.J. 485=1 Ind. Cas. 213, 3 O.C. 32, 31 A. 82, F.B =5 M.L.T. 185=6 A. L.J. 71=1 Ind. Cas. 416, 13 C.P.L.R. 1, 28 C. 492=5 C.W.N. 654, 163 P.L.R. 1901, 24 M. 689, 25 M. 529, 29 C. 813, 8 C.W.N. 843,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

14 M.L.J. 475=28 M. 87, 8 O.C. 370, 11 C.W.N. 433=6 O.L.J. 437, 5 C.L.J. 61, Note, 6 C.L.J. 659=3 M.L.T. 38, 7 C.L.J. 644; *D.*, 5 C.W.N. 403.]

(614)—*S. 47 (=1882, Civ. Pro. Code, s. 244, (c)—Execution of decree—Representatives of parties to suit—Auction-purchaser at sale in execution of money decree against judgment-debtor.*—*Per Stanley, C.J.*—The term "representative" as used in s. 244, Civ. Pro. Code, when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor, or administrator, but it means his representative-in-interest, and includes a purchaser of his interest who, so far such interest is concerned, is bound by the decree. There is no reason for excluding from its signification an execution-purchaser of the judgment-debtor's interest. *Per Banerji, J.*—Every purchaser of the judgment-debtor's interest who is bound by the decree is a representative of the judgment-debtor within the meaning of the section, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a compulsory sale held in execution of a decree obtained against the judgment-debtor. There is no distinction between the case of a purchaser under a private sale and an auction-purchaser, provided that the decree in execution can be enforced against him. The word "representative" means a person against whom the decree can be enforced either as legal representative of the judgment-debtor or as his representative in interest. *Per Curiam*:—An auction-purchaser at a sale held in execution of a simple money-decree against a judgment-debtor whose property has been ordered to be sold at the suit of mortgagees in a mortgage-suit, is a representative of the judgment debtor within the meaning of s.244, sub-s. (c), Civ. Pro. Code. GULZARI LAL v. MADHO RAM, **26 A. 447=A.W.N. 1904, 61=1 A.L.J. 65.** (24 C. 62, *Appr.*; 17 A. 232, *Diss.*; 8 A. 146, 16 A. 286, 19 A. 332, 21 A. 20, 22 A. 86, 22 A. 108, 24 A. 239, 9 B. 468, 7 M. 255, 19 C. 683, 26 C. 324, 326, 23 A. 216, 5 A. 452, 15 C. 756, *R.*) [*F.*, 27 A. 155, A.W.N. 1906, 43=3 A.L.J. 110=28 A. 337, 1 S.L.R. 158; *R.*, 3 A.L.J. 234=A.W.N. 1906, 87, 4 A.L.J. 135=29 A. 275=A.W.N. 1907, 64, A.W.N. 1908, 122=5 A.L.J. 285, 5 A.L.J. 557=A.W.N. 1908, 157=30 A. 379, 31 A. 82, F.B.=5 M.L.T. 185=6 A.L.J. 71, 9 C.L.J. 485=1 Ind. Cas. 213; *D.*, 5 A.L.J. 547=A.W.N. 1908, 93=30 A. 231, 5 L.B.R. 85.]

(615)—*S. 47 (=Civ. Pro. Code, 1882, s. 244*—*Purchaser at private sale of interests of mortgagor, if entitled to apply.*—The purchasers at a private sale of the interests of a mortgagor who has obtained a decree to set aside the mortgage decree and the sale in execution thereof already obtained by the mortgagee, are to be regarded as representatives of certain of the parties to the suit within the meaning of s. 244, Civ. Pro. Code. BASUDER GIRI v. BROJO MOHAN JANA, **7 C.W.N. 54.** (24 C. 62, *F.*)

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*Continued.*

(616)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)*—*Mortgage under the judgment-debtor, whether representative of the judgment-debtor.*—A person who claims as a mortgagee under the judgment-debtor must be regarded as a representative of the judgment-debtor for the purpose of s. 244, Civ. Pro. Code. KUKKIL KURUNAKARAM NAIR v. PANOIKKAT NARAYNA NAMBI, **4 M.L.T. 85.** (17 M.L.J. 321, *F.*)

(617)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)*—*Lessee under a lease from the judgment-debtor, legal representative—Right of suit.*—A lessee under a lease from the judgement-debtor while his property was under attachment, is a representative of the judgment-debtor, within the meaning of s. 244. (24 C. 62, *R.*) A matter which can form the subject of an enquiry under s. 244 cannot be the subject-matter of a separate suit under s. 42, Specific Relief Act, 1887. So a decree-holder's suit against the judgment-debtor and his *ijaradar* to have it declared that the *ijara* was null and void will not lie, because that is a question which should be decided by the Court executing the decree. MATHEWSON v. GOBARDHAN TRIBEDI, **28 C. 492=5 C.W.N. 654** (16 A. 286, 21 A. 20, *R.*) [*R.*, 17 M.L.J. 321.]

(618)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)*—*Official assignee.*—The official assignee is a representative of the insolvent judgment-debtor within the meaning of s. 244. MILLER v. LUKHIMANI DEBI, **28 C. 419=5 C.W.N. 761.** (7 A. 752, 21 B. 205, *R.*)

(619) *S. 47 (=s 244, Civ. Pro. Code, 1882)*—*Representative—Auction-purchaser at sale in execution of decree against transferee of occupancy holding—Decree against recorded tenant.*—The purchaser at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a "representative" of the recorded tenant within the meaning of s. 244, Civ. Pro. Code, and is entitled to apply for the setting aside of a sale in execution of a rent decree against the recorded tenant, on the ground of fraud. HARADHAN RAKSHIT v. GRISH CHANDRA MUKHERJI, **8 C.L.J. 327=13 C.W.N. 98=4 Ind. Cas. 326.** (24 C. 62, *F.*)

(620)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)*—*Purchaser at Court-auction whether representative of decree-holder.*—Purchaser at Court auction, who did not purchase from the decree-holder, who did not derive title from him, is not a representative of the decree-holder within the meaning of s. 244, Civ. Pro. Code. KRISHNA SATAPASTI v. SARASWATULA SAMBASIVA ROW PANTULU, **3 M.L.T. 306=31 M. 177.** (14 C. 644, *F.*; 28 M. 87, *D.*; 30 M. 507, *Diss.*)

(621)—*S. 47 (=s. 244, Civ. Pro. Code, 1882), Representative of judgment-debtor—Rent-decree against recorded tenant—Transferee of portion of occupancy holding before decree.*—Where the landlord of an occupancy holding obtains a decree for rent against his recorded tenant, an unregistered transferee of the tenant, into whose

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

hands a portion of the holding had previously passed, is bound by the decree and is, therefore, a representative of the judgment-debtor within the meaning of s. 244 of the Civ. Pro. Code. GOPINATH CHATTOPADHYA v. SAJANI KANTA SINGH, **10 C.W.N. 240.** (24 C. 62, *Appl.*; 9 C.W.N. 134, *F.*) [*F.*, 11 C.W.N. 112, Note; *R.* 13 C.W.N. 98=8 C.L.J. 327.]

(622)—*S. 47 (=Civ Pro Code*, 1882, *s. 244)*—*Sale of property under attachment—Purchaser—Representative.*—Where a decree-holder brought a suit for a declaration that in execution of his decree a certain property, which had been attached at his instance, but which had, subsequent to the said attachment, been sold to another party, was liable to be brought to sale in execution of his decree, such purchaser was held to be a representative within the meaning of s. 244 of the Civ. Pro. Code, and the suit was held barred by that section. A person to whom s. 244 of the Code applies cannot avoid coming under the provisions of that section merely by filing his objection to execution as under s. 278. LALJI MAL v. NAND KISHORE, **19 A. 332=A.W.N. 1897, 73.** (16 A. 286, 17 A. 245, 17 A. 478, *R.*) [*F.*, 21 A. 20; *Appr.*, 28 C. 492; *R.*, 13 C.P.L.R. 1, 26 A. 406=A.W.N. 1904, 74, 26 A. 447=A.W.N. 1904, 61, 2 A.L.J. 265, 11 C.W.N. 163=5 C.L.J. 80, 5 A.L.J. Note 15; *D.*, 20 A.W.N. 107.]

(623)—*S. 47 (=Civ Pro. Code*, 1882, *s 244)*—*Mortgagee subsequent to attachment—Representative.*—A mortgagee from the judgment-debtor of property attached in execution of a money-decree, who takes his mortgage subsequent to the attachment, is a representative of the judgment-debtor within the meaning of s. 244 of the Civ. Pro. Code, PARAMANANDA DAS v. MAHABEER DOSSJI, **20 M. 378=7 M.L.J. 195.** [*F.*, 17 M.L.J. 321; *R.*, 13 C.P.L.R, 1, 24 M. 689.]

(624)—*S. 47 (=s. 244, Civ, Pro. Code*, 1882) —*"Representative" when used with reference to decree-holder, scope of the term.*—The word "representative," when used with reference to a decree-holder, includes the purchaser of the decree from the decree-holder by an assignment in writing. DWAR BUKSH SIRKAR v. FATIK JALI, **26 C. 250=3 C.W.N. 222.** (24 C. 62, 16 A. 483, *F.*,) [*F.*, 27 C. 670, 25 M. 529, 28 M. 87=14 M.L.J. 475, 31 A. 82=5 M.L.T. 185=6 A. L. J. 71.]

(625)—*S. 47(=s. 244, Civ. Pro. Code*, 1882)—*Rent-sale of occupancy holding—Application by mortgagee to set aside sale—Transferable holding—Representative of judgment-debtor.*—A person, to whom a transferable occupancy holding was mortgaged, before its sale in execution of a rent-decree, is a representative of the judgment-debtor, within the meaning of s. 244, Civ. Pro. Code, and may apply to set aside the sale, under that section. SRIMATI NISSA BIBI v. RADHA KISHORE MANIKYA, **11 C.W.N. 312.** (24 C. 62, F.B., 9 C.W.N. 134, *F.*) [*F.*, 3 Ind. Cas. 39.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(626)—*S. 47 (=s. 244, Civ. Pro Code*, 1882)—*Debt of judgment debtor before sale—Sons and grandsons, if bound—Representatives for purposes of execution.*—*Held*, that the perons, who take the judgment-debtor's share in the joint family property by survivorship, are representatives of the judgment-debtor within s. 244, Civ. Pro. Code, and that it is not open to them to object that the debt, for the recovery of which the decree had been obtained, was tainted with immorality and illegality. PEARY LAL SINHA v. CHANDI CHARAN SINHA, **11 C.W.N. 163=5 C.L.J 80.** (24 C. 62, *Appl.*; 9 C.W.N. 134, *R.*) [*R.* 34 C 642=11 C.W.N. 593=5 C. L. J. 491=2 M.L.T. 207.]

(627)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244)* —*Purchaser from judgment-debtor of property attached — Money-decree — Representative.*—Where the decree in execution is a decree for sale of hypothecated property, a purchaser who had purchased, under a private sale from the judgment-debtor, the property or part of it, should be regarded as a representative within the meaning of s. 244; but, in the case of an application for execution of a simple money-decree a person cannot be regarded as the representative of the judgment-debtor merely on account of his having purchased from the judgment-debtor property against which the decree was sought to be executed, but which was not affected by the decree itself and would not be affected until an order for attachment or sale was made. MADHO DAS v. RAMJI PATAK, **16 A. 286=A.W.N. 1894, 84.** [*Diss.*, 21 A. 22; *Appr.*, 19 A. 332, 22 A. 243; *R.*, 20 A.W.N. 107, 28 C. 492, 26 A. 447=A.W.N. 1904, 61, 9 C.L.J. 485.

(628)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244)* —*Second mortgage during pendency of suit by first mortgagee—Second mortgagee representative of mortgagor.*—A mortgagee who takes a mortage from a defendant mortgagor during the pendency of a suit by a prior mortgage, should be treated as a representative of the defendant in execution of decree within the meaning of s. 244, Civ. Pro. Code, the reason being that such mortagee *pendente lite* is bound by the decree and should, therefore, be allowed to make any objection in the execution department which the parties to the decree or any one else bound by it would be competent to make. SHEO NARAIN v. CHUNNI LAL, **22 A. 243=A.W.N. 1900, 51.** (16 A. 286, *R.*)

(629)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244)*—*Execution of decree—Property under attachment —Purchaser-Representative of judgment-debtor.* —Where, at the time of the purchase of certain property by a person, such property happened to be under an attachment in execution of a decree, the purchaser must be regarded as a representative of the judgment-debtor so as to fall within the category of persons specified in s. 244 of the Civ. Pro. Code. GUR PRASAD v. RAM LAL, **21 A. 20=A.W.N. 1898, 160**

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(19 A 332, 16 A. 286. *R.*) [*F.*, 5 A.L.J. 16, Note ; *Appr.*, 28 C. 492 ; *R* , 13 C.P.L.R. 1, 26 A. 447=A.W.N. 1904, 61=1 A.L.J. 65, 11 C. W.N. 163=5 C.L.J. 80 ; D., 20 A.W.N. 107.]

(630)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Execution of decree—Representative of judgment-debtor purchaser by private sale.*—The purchaser by private sale of the rights of a judgment-debtor is a representative of such judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure. MOHAN LAL v. JWALA DEI, **A.W.N. 1894, 145.** (A.W.N. 1894, 38. *F.*)

(631)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Purchaser at execution-sale—Whether representative of judgment-debtor.*—Auction-purchaser, at a sale held in execution of his decree on a second mortgage is liable, under s. 244, Civ. Pro. Code, to be joined as a representative of the judgment-debtor, by the first mortgagee decree-holder in execution of his decree. GOKALSING SURATSING v. AWATMAL SOBAANMAL, **1 Sind L.R. 158.**

(632)—*S. 47 (=s. 244 of 1882)—Execution purchaser and private purchaser—"Representative" of judgment-debtor.*—A person who purchases at a public sale in execution of a decree is not the representative of the judgment-debtor within the meaning of s. 244 of the Code ; but a person who claims by private purchase from the judgment-debtor is his representative within the meaning of that section. GOUR SUNDAR LAHIRI v. HEM CHUNDER CHOWDHRY, **16 C. 355.** (7 C. 107, 14 M. I. A. 1. 14 C. 401, *R.*) [*Overruled*, 24 C. 62, F.B.; *F.*, 14 A.W.N. 59, 7 M.L.J. 89 ; *Appr.*, 16 A. 284 ; *R.*, 16 A 483, 20 M. 378, 13 C.P.L.R. 1, 10 C.L.J. 151.]

(633)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Decree directing sale of property subject to prior charge in favour of certain defendants—Decree-holder-purchaser seeking to recover possession from the charge-holders—Question in execution.*—The question whether a decree-holder who, in execution of his decree directing the sale of certain properties subject to a prior charge in favour of certain defendants, becomes the purchaser and seeks to recover possession of the properties purchased from the charge-holders, is entitled, under the terms of the decree, to be put into possession without paying the amount of the prior charge (the defendants dispossessed being left at liberty to bring a separate suit for enforcing the charge in thier favour), relates, within the meaning of s. 244 (*c*), Civ. Pro. Code, to the execution or enforcement of the decree against these defendants (charge-holders), and an appeal lies from an order on that question ; in such a case, the defendants who hold the charge cannot be ousted until the total amount due to them is paid off. Even if the purchaser were not the decree-holder, he must be held to be a representative of the judgment-creditor. *Per Moore, J.*—The order appealed against is none the less under

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s. 244 because it is also passed under ss. 318 and 334, neither of which is specified in s. 588—*Per Bhashyam Ayyangar, J.* KASINATHA AYYAR v. UTHUMANSA ROWTHAN, **25 M. 529=12 M.L.J. 1.** [*F.*, 13 M.L.J. 237=26 M. 740, 14 M.L.J. 474=28 M. 87 ; *Discussed*, 2 M. 119 ; *R.*, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347, 5 A.L.J. 285=A.W N. 1908, 172, 6 A.L.J. 17, F.B.=5 M.L.T. 195=31 A. 82.]

(634)—*S. 47 (=Civ. Pro. Code, 1882, s 244)=Purchaser of plaintiff's interest in suit property, a representative of plaintiff.*—Where a plaintiff sold his interest in certain suit property, the purchaser was his representative to the extent of such interest, within the meaning of s. 214, Civ. Pro. Code. MINAKSHI ACHI v. CHINNAPPA UDAYAN, **24 M. 689.**

(635)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Parties to the suit or their representatives—Questions relating to execution, discharge or satisfaction of the decree.*—Certain lands were purchased, by the decree-holder in a suit, at Court-sale in execution of a decree. His application under s. 318, for delivery of possession, was dismissed. Subsequent applications made by the heirs of the decree-holder-purchaser, after his death, were also dismissed. Plaintiffs, the purchasers of the same lands from the heirs of the decree-holder-purchaser, sued the judgment-debtor for possession. *Held*, that the suit would not lie, regard being had to the provisions of s. 244, Civ. Pro. Code, that plaintiff's right to delivery of possession was purely one of execution, discharge or satisfaction of the decree. (5 M. 217, 12 M. 454, 13 M. 504, 24 M. 185, 25 M. 529, 26 M. 740. 27 C. 34, *R.*) And, that a person purchasing from the decree-holder-purchaser or his heirs is a 'representative' within the meaning of s. 244. SANDHU TARAGANAR v. HUSSAIN SAHIB, **28 M. 87=14 M.L.J. 474.** (26 C. 250, 24 C. 62. 25 M. 529, *R.*) [*F.*, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347 ; *Cons.*, 31 M. 177=3 M.L.T. 306 ; *R.*, 1 S.L.R. 158, 172, 31 A. 82=6 A. L.J. 71=5 M.L.T. 185.]

(636)—*S 47 (=s. 244, Civ. Pro, Code, 1882)—Application in execution—Rightful representative of party to the decree and of estate—Purchaser from the judgment-debtor.*—Plaintiffs obtained, in a suit based on a mortgage, a decree against the property of one S. deceased. That suit was brought against an alleged adopted son of S, and two widows of S's father. One of the widows died after suit. The widows would have represented the estate if the alleged adoption had failed. In execution, plaintiffs purchased a portion of the lands and applied for delivery of possession. They were resisted by a third person, who alleged himself to be the nearest reversioner to the estate and to be in possession in his own right, because S himself was said to have been adopted by his father in conjunction only with the deceased widow and because the surviving widow had, under

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such circumstances, no interest in the estate at all. He also relied on a release deed, alleged to have been executed in his favour by the survivor of the two widows, who were defendants in the suit. The lower Court dismissed the application for delivery of possession. Hence the present appeal. There was a preliminary objection to the effect that no appeal lay. *Held*, that, if the objector had inherited the estate on the death of the deceased widow, he would be the person entitled to represent the estate; if, on the other hand, the surviving widow were in possession as the adoptive mother of S, even then the objector must be a person claiming from the surviving widow, who was one of the parties to the suit. In either view, the objector was a 'representative' within the meaning of s. 244 and the matter must be dealt with and decided in execution-proceedings only. The appeal therefore, did lie. SIVARAMA SASTRIAL v. SOMASUNDARA MUDALI, **28 M. 119.** (25 M. 529, *D.*) [*R.*, 17 M. L.J. 321, 32 M. 429=19 M.L.J. 401=2 Ind. Cas. 18.]

(637)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882) —*Representative—Purchaser of a* putni *tenure bound by rent-decree against recorded tenant—Landlord and tenant.*—A person, who acquired a *putni* tenure at a sale in execution of a decree for money against the *putnidar*, but who did not get his name registered in the landlord's office, is bound by the decree for rent against the recorded tenant and is, therefore, a representative of the judgment-debtor within the meaning of s 244, SURENDRA NARAYAN SINGH v. GOPI SUNDARI DASI, **9 C.W.N. 824 =32 C 1031.** (24 C. 62, 9 C.W.N. 134, *F.*; 6 C.W.N. 128, 12 C 458, *Not F.*) [*R.*, 11 C W. N. 163=5 C.L.J. 80, 1 S.L.R. 158.]

(638)—*S. 47=(old s. 244 (c)*—"*Representative*"—*Meaning of.*—This section refers only to *de facto* representatives admitted as such on the record and does not include persons who are not admitted on the record as parties or representatives though they claimed to be such and the Court disallowed their claim NIHAL SINGH v. CHAIT SINGH, **97 P.R. 1887.**

(639)—*S. 47 (=Civ. Pro. Code*, 1882, s. *244)*—*Representative—Assignee of auction-purchaser—Application to be placed on record—Appeal.*—The expression "representative of a party" in the last paragraph of the section does not mean the representative of a party to the execution proceedings but it means the representative of a party to the suit. An application by the assignee of an auction purchaser to be placed on record cannot be dealt with under the section, and no appeal or second appeal lies from an order refusing such application. SREE NATH GHOSE v. ROMA NATH SANTRA, **3 C. W.N. 276.**

(640)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882, *cl. (c)*—"*Representative,*" *meaning of*—"*Or*

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their representatives," *meaning of—Transferee of judgment-debtor, objection to execution of decree by—Execution of decree.*—The respondent obtained, against the appellant's father, a decree for sale on a mortgage of certain villages, which became absolute in 1897. The respondent applied for execution of his decree and, on the 16th January, 1904, a compromise was made between him and the mother of the appellant as his guardian. The respondent applied for possession of the mortgaged property and got it on the 11th September, 1904. On the 14th September, the appellant, claiming the property under an alleged deed of gift from his father and as an assignee of a subsequent mortgage, filed objections on the ground that he was not bound by the compromise of 16th January, 1904. His application was dismissed. He appealed to the Court of the Judicial Commissioner. *Held*, (*per Scott, J.C.*), that the appellant was not a representative of the judgment-debtor, within the meaning of s. 244 of the Civ. Pro. Code, that the order dismissing his objections was not one under that section, and that, therefore, no appeal lay. (15 B.L. R. 383, P.C.=2 I.A. 219, 24 C. 62, *Not F.*). *Held* (*per Ryves, A.J.C.*), that, in s. 244, the word 'representative' means the legal representative and does not include a transferee; and in cl. (c) of that section 'or their representatives' does not mean 'and their representatives. LALJI v. MUNNU LAL. **8 O.C. 370.** (24 C. 62. 1904 A.W.N. 61, *R.*)

(641)—*S. 47 (=s. 244—Civ. Pro. Code*, 1882, *Representative of judgment-debtor — Money-decree—Sale of property before attachment by judgment-debtor.*—The judgment-debtor in a money decree sold certain property belonging to him. On the same day, the decree-holder applied for execution and some time afterwards attached the property and purchased it himself in execution. *Held*, that the first private purchaser, was in no sense a representative of the judgment-debtor, inasmuch as the decree which was being executed had no relation to the property, and that his title was superior to that of the subsequent execution purchaser. KALI KUMAR BIDYARATNA v. MISRI JAN, **9 Ind. Cas. 307=15 C W.N. 711.** (16 C. 335, 24 C. 62, 1 C.W.N. 36, 29 C. 813, *D.*)

(642)—*S. 47*—"*Representative*"—*Unrecorded co-sharer, if representative of recorded co-sharer—Bengal Tenancy Act (VIII of* 1882), *s. 173, order under, when appealable.*—An unrecorded co-sharer in a tenancy sold in execution of a rent decree against the recorded co-sharer is not a representative of the recorded co-sharer within s. 47 of the Code. (9 C.W.N. 134, *R.*) It cannot be laid down generally that an order under s. 173 of the Bengal Tenancy Act, is in no case appealable. Whether an appeal will lie or not will depend upon whether the questions relates to the execution of the decree and whether it is between the parties to the original suit or their representatives so as to

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bring the order under s. 47, Civ. Pro. Code. SREEMATTY JOY TARA v. PRAN KRISTO SEAL, **15 C.W.N, 812.**

(643)—*S. 47 (=s. 244, Civ. Pro. Code,* 1882) —*Execution of decree—Question as to representative capacity of persons sought to be made parties to proceedings in execution.*—A Hindu widow mortgaged property which had been of her husband in his life-time. The mortgagee sued for and obtained a decree for sale and an order absolute for sale against the mortgagee. The mortgagee died before execution, and the decree-holders then applied to bring on to the record as her representatives the reversionary heirs of the judgment-debtor's husband. These persons resisted the application upon the ground that they were not the legal representatives of the widow, and the lower appellate Court decided that they were not and dismissed the decree-holders' application for execution. *Held* that, inasmuch as the reversionary heirs had repudiated the notion of their being legal representatives of the mortgagor from the outset and established to the satisfaction of the Courts that they were not such representatives, the order of the Court was correct. KHUMAN SINGH v. MAKHAN SINGH, **A.W.N. 1908, 93 = 5 A.L.J. 555.** (21 A. 277, *D.*)

(644)—*S. 47 (=s. 244, Civ. Pro. Code,* 1882) —*Question between auction-purchaser and judgment-creditor—Auction-purchaser whether "representative" of judgment-debtor.*—The auction-purchaser of property sold in execution of a simple money-decree is not a "representative" of the judgment-debtor within the meaning of s. 244 (c) of the Code of Civil Procedure, 1882. MAHOMED HASSIM v. MASEIN BWIN, **5 L.B.R. 85 = 3 Ind. Cas. 713.** (28 C. 73, 26 A. 447, 29 A. 275, *Expl.*; 21 B. 709, *Not Appl.*; 19 C. 683, P.C., *Cons.*)

(645)—*S. 47 (=s. 244, Civ. Pro. Code,* 1882)— *Stranger auction-purchaser, suit against, to set aside sale not maintainable—Auction-purchaser not representative of decree-holder.*—It is well settled that, as between the judgment-debtor and the decree-holder, an objection to the sale in execution can only be taken in execution, and s. 244, Civ. Pro. Code, prohibits a suit by a party or his representative against an auction-purchaser to raise a question which, as between the judgment-debtor and the decree-holder, must have been determined under that section. The auction-purchaser derives his rights from the sale, which the party to the execution-proceeding should not be permitted to impeach except by application to the executing Court. A suit against an auction-purchaser is not maintainable, as s. 244 is a bar to set aside the sale except in a proceeding between the parties. A stranger purchaser in execution of a money-decree can never be treated as representative of the decree-holder. He purchases the rights of the judgment-debtor in the property attached, and not those of the decree-holder between whom and himself there is no privity of estate.

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The true rule is that, where the decree is a mortgage-decree, the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money-decree, a stranger purchasing the property obtains the rights of the judgment-debtor in the property, but is not the representative even of the judgment-debtor; still less can he be the representative of the decree-holder. NADAMUNI NARAYANA IYENGAR v. VEERABHADRA PILLAI, **8 Ind. Cas. 429.**

(646)—*S. 47 (=Civ. Pro. Code,* 1882, *s. 244)* —*Execution of decree—Representative of judgment-debtor—Purchaser at auction-sale of property of judgment-debtor.*—A purchaser at an auction-sale of the property of a judgment-debtor is not that judgment-debtor's representative within the meaning of s. 244 of the Code of Civil Procedure. BADRI PRASAD v. SARJU PRASAD, **A.W.N. 1894, 59.** (16 C. 355, 15 B. 290, *F.*)

(647)—*S. 47 (=s. 244, Civ. Pro. Code* 1881)— *Execution of decree—Fraud by the decree-holder alone or by the decree-holder and auction purchaser together, allegation of—Auction-purchaser, not a representative of the decree-holder* —*Held*, that the question whether fraud has been committed in an execution sale, either by the decree-holder alone or by the decree-holder and auction-purchaser together, is one which arises between the parties to the suit and is as such triable under s. 244. But the question whether a fraud has been committed in connection with such a sale by auction-purchaser alone is not triable under that section. *Held* further, that an auction-purchaser cannot be taken to be a representative of the decree-holder. MUHAMMAD AHMAD JAN v. BANK OF UPPER INDIA AND ANOTHER, **12 O.C. 175 (B)** (19 C. 683, 24 C. 707, *R.*)

(648)—*S. 47 (=s. 244, Civ. Pro. Code,* 1882) —*Legal Representative—Purchaser at sale in execution of money-decree—Subsequent attachment of property in execution of mortgage-decree for sale,*—In execution of a decree on a mortgage, the mortgaged properties were attached, and certain persons who had purchased the properties at an auction-sale held in execution of a money-decree against the judgment-debtors intervened and asked to be heard as the representatives of the judgment-debtor under s. 244, Civ. Pro. Code. *Held* that they were not entitled to do so, because a purchaser at an auction-sale is not a representative of the judgment-debtor whose interests he has purchased, within the meaning of s. 244, Civ. Pro. Code. MAHABIR PRASAD v. PARTAB CHAND **22 A. 450 = A.W.N. 1900, 171.** (17 A. 222 F.B. *F.*; 19 C. 683 P.C. *D.*)

(649)—*S. 47 (=s. 244, Civ. Pro. Code,* 1882 —*Official Assignee—Disallowance of Claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him—Appeal.*—**Held**, that, the Official Assignee not being the representative of

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an insolvent judgment-debtor no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. GREY. OFFICIAL ASSIGNEE v. HAZARI LAL, **A.W.N. 1908,203=5 A.L.J. 553.** (7 A. 752, 21 B. 205, 32 C. 259, *R.*)

(650)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Purchaser of the interest of a tenure from the judgment-debtor—Purchase prior to decree—Legal representative or not*—When a person purchases a tenure from the judgment-debtor who was the recorded tenant, prior to a decree obtained for arrears of rent, he is not the representative of the judgment debtor within the meaning of s. 244, cl. (*c*), Civ. Pro. Code, and has, therefore, no *locus standi* to apply in the course of execution-proceedings to have the sale set aside. KALU SAHA v. BHAGABATI DEBYA, **6 C.W.N. 127.** (12 C. 458, 24 C. 62, F.B., Rel. on.) [D., 9 C.W.N. 134.]

(651)—*S. 47 (=Civ Pro. Code, 1882, s. 244) —Execution of decree—Representative of party to the suit.—Held* that a mortgagee, who has purchased the mortgaged property at a sale in execution of his decree on the mortgage, is not the representative of the mortgagor so as to entitle him to come in under s. 244 of the Code of Civil Procedure and object to the execution of the decree of another mortgagee against the same mortgaged property. BALDEO PRASAD v. MADAN MOHAN LAL, **A.W.N. 1900, 42.** (17 A. 222, *R.*)

(652)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Execution of decree—Representative of a party to the suit—Transfer of property before attachment.*—The transferee of property, which at the time is not attached, does not, on the subsequent passing of a money decree against the transferor, become a representative of such transferor, within the meaning of s. 244 of the Code of Civil Procedure. SHEO KUNWAR v. ELAHI BAKSH, **A.W.N. 1900, 107.** (16 A. 286, *F.*; 19 A. 332, 21 A. 20, *D.*)

(653)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Question for Court executing decree—Separate suit—"Representative" of judgment-debtor.*—M sued S for possession of certain property claiming partly under a deed of gift, and, under the decree, S's title to a part of the property claimed by M, *viz.*, a zemindari estate called *mauza dilawal* was established, and M became entitled to possession of certain other property claimed by him. In execution of this decree against S, M obtained possession of a seventh share of a "bagh" called '*Inam Bakhshwala.*' F, who held a decree against M, brought to sale in execution of that decree M's one-seventh share of the grove in question and purchased it himself. S, alleging that the grove was a part of the zemindari estate known as *mauza dilawal*, and therefore belonged to him, brought the present suit against F to set aside the sale. The lower Court *held* that the suit was not maintainable, having regard to the provisions of s. 244 of the Civ. Pro. Code, and on that ground dismissed the suit. *Held*, on appeal, that F had not become, by virtue of the transaction, the "representative" of M in the sense of s. 244; and that still less can the question as to the title to this grove, now raised between S and F, be regarded as a question arising between the parties to the suit between M and S, or as a "question in anyway relating to the execution, discharge, or satisfaction of that decree;" and that, therefore, s. 244 was no bar to the present suit. SHIB CHARAN v. FAZL ALI, **A.W.N. 1884, 59.**

(654)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Execution of decree -Deceased judgment-debtor —Execution against person not legal representative.*—A person who is brought on the record as having realized a portion of the assets of a deceased judgment-debtor, but not as his legal representative, is not a representative of the judgment debtor within the meaning of the section. A judgment-creditor ought not to apply for execution against a person not a legal representative of the deceased judgment-debtor, simply because he is in possession of property alleged to belong to the deceased, and the proper course would be to attach the property, if any. ANGAN LAL v. GUDAR MAL, **10 A. 479=A.W.N. 1888, 189.** (3 I.A. 24, 3 C.L.R. 437. *R.*)

(655)—*S. 47 (=Civ. Pro. Code, 1882) s. 244, —Party to suit—Representatives—Order—Appeal.*—To attract the applicability of s. 244 (c) of the Civ. Pro. Code, the question at issue must not only be "relating to the execution, discharge or satisfaction of the decree or the stay of execution thereof" but must also be "arising between the parties to the suit in which the decree was passed or their representatives." The section, therefore, does not apply where the question lies between a judgment-debtor and the purchaser of his interests in land. MAGANLAL v. MULJI, **3 Bom. L.R. 255 =25 B. 631.**

(656)—*S. 47 (=Civ. Pro Code, 1882, s. 244) —Question relating to execution.*—Regard being had to the language of s. 244, Code of Civil Procedure, a question relating to the execution of a decree pre-supposes a person against whom execution is sought, and cannot arise as between the decree-holder and persons who, as far as concerns execution, are complete strangers. NAGAMUTHU v. SAVARIMUTHU, **15 M. 226=2 M.L.J. 109.** [*F.*, 19 M. 331, 23 A. 346; *R.*, 23 M. 361; F.B., 15 C.P.L.R. 106; *D.*, 22 M. 131.]

(657)—*S. 47 (=Civ. Pro. Code, 1882) s. 244, —Purchaser at Court-sale—"Party" and "representative of party"—Civ. Pro. Code, 1882, s. 244—Purchaser if bound by order passed in summary proceedings under ss. 280, 281, or 282, Civ. Pro. Code—Rights of such purchaser.*—A purchaser at a Court-sale is not a "party or the

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representative of a party" within the meaning of the expressions as used in s. 244 of the Civ. Pro. Code, 1882. [*F.*, 14 A.W.N. 59 ; *R.*, 12 Bom. L.R. 539.] Orders passed by the Court in summary proceedings under ss. 280, 281, or 282 of the Code are therefore not binding on such purchaser. And he is also not bound by the specifications contained in the proclamation of sale of the claims of intervenors. They are inserted for his benefit, and no binding effect as against him is anywhere given to them. On his purchase he steps into the place of the former owner of the property, and it is quite open to him to exercise and use, as against the intervenors, all the rights and remedies that that owner had. VISHANATH CHARDU NAIK v. SUBRAYA SHIVAPA SHETTI, **15 B. 290**, [**R.**, 16 B. 1.]

(658)—*S. 47 (=s. 244 of Code of 1882)—Parties to suit--Representative.*--Where a decree has been passed and proceedings taken under it to obtain execution against a party in representative character, there seems to be no good reason for saying that he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree ; but (*semble*) a person who is a party to a suit in some capacity is not a party in every other capacity he may happen to fill. So, an objection by the judgment-debtor that the property attached was not his private property, but one held by him as trustee or executor does not fall under s. 244, Civ. Pro. Code, 1882, so as to bar a fresh suit. When the judgment-debtor sues to eject a stranger to the former suit, who has purchased the property at the auction, and not simply his decree-holder, the purchaser being neither a party to the former suit nor the representative of a party, does not come under the purview of s. 244 (c) of the Code of 1882 ; and if the auction-purchaser represents any body at all, it is the judgment-debtor ; and hence the dispute would virtually become one between a party and his representative. SODHI HUKAM SINGH v. SARDAR ARJAN SINGH, **12 P.R. 1887**. (11 B.L.R. 149, P.C. *F.*; 88 P.R. 1886, *R.*) [*Cited*, 58 P.R. 1888; *R.*, 47 P.R. 1887, 90 P.R. 1902=26 P.L.R. 1903.]

(659)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Execution against surety—"Party to the suit."*—An order refusing execution of a decree against a surety for execution is an order made against a 'party to the suit' under s. 244 and is covered by the definition of a decree under s. 2 of the Code. MUHAMMAD SADIK v. HAJI ATA MUHAMMAD, **104 P.R. 1886**. [*D.*, 99 P.R. 1887.]

(660)—*S. 47—Representative—Decree—Party to suit.*—Where, under a decree against a person in a representative capacity, proceedings are taken to obtain execution against him in such capacity, he must be treated as 'a party to the suit' in relation to any question arising between him and other parties as regards the

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execution of the decree. MUNSHI AZIZ-UD-DIN v. MUSSAMMAT DULHAN BEGAM, **88 P.R. 1886**. [*R.*, 12 P.R. 1887, 47 P.R. 1887.]

(661)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Representatives—Question as to property in representative's hand—Court executing decree—Parties to suit.*—The turning point upon which the application of the rule contained in the section, barring adjudication in a regular suit, depends, is, whether the judgment-debtor, in raising objection to the execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. Accordingly, the representative of a deceased judgment-debtor, who, as such representative, was a party to the proceedings in execution of the decree, not having taken an objection in these proceedings that the property was his own and not assets of the deceased judgment-debtor, and the property having accordingly been sold in execution of the decree, neither he nor his subsequent vendee could question the title of the purchaser at the sale under the decree. RAGHUBAR DIAL v. HAMID JAN, **12 A. 73=A.W.N. 1890, 13.** (7 A. 547, *F.*; 8 A. 626, *D.*; 9 A. 605, 15 C. 437, 10 M. 117, *R.*) [*R.*, 1 O.C. 60, 16 A. 449.]

(662)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Appeal—Order refusing to grant a sale-certificate—Decree-holder, auction purchaser—Party—Execution, relating to.*—No appeal lies against an order refusing to grant a certificate of sale to the decree-holder, auction-purchaser, the question determined being not one relating to the execution, discharge or satisfaction of the decree. (1 C.W.N. 658, *Appl.*) The auction-purchaser being also decree-holder is a party to the suit within the meaning of s. 244 of the Civ. Pro. Code. JAGARNATH MARWARI v. KARTICK NATH PANDEY, **7 C.L.J. 436**. (18 A. 36, *Not F.*; 27 C. 34, *F.*)

(663)—*S. 47 (=s. 244 of 1882)—Construction--Questions relating to execution—Parties to suit—Position of representatives added before or after decree.*—The words " or their representatives " in s. 244 apply to persons against whom or against the property in whose hands the execution is sought, on the ground that they are the heirs of a judgment-debtor who has died after decree. The cases fall into two classes. The first class consists of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree. In this case, such a person is a party to the suit within the meaning of s. 244, and a question between him and the decree-holder as to whether property has come to him as the representative of the judgment-debtor, and so is liable to be taken in execution of the decree against him as such representative, or on the other hand belongs to himself alone and

not in such representative character, is one that must be decided in the execution-proceedings and not by suit. The second class of cases consists of those in which the representatives have not been made parties to the suit before decree; but in which, in consequence of the death of the judgment-debtor after decree, a question arises as to the rights of the decree-holder to execute the decree against the representatives or the property said to have descended to them. In such cases questions arising between a decree-holder and the representatives of the judgment-debtor as to whether property has come to the representatives as such, and so is liable to be taken in execution, or is their own property derived from any other source, and therefore not so liable, must be decided in the execution-proceedings and not by suit. RAJRUP SINGH v. RAMGOLAM BOY, **16 C. 1.** [*F.*, 21 A. 323=19 A.W.N. 104; *Appr.*, 12 A. 313=10 A.W.N. 137, F.B., 17 C. 711, F.B.; *D.*, 6 C.W.N. 63; *R.*, 1 O.C. Suppl. 60, 23 B. 237, 23 M. 195, F.B., 6 Bom. L.R. 1043.]

(664)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Question for Court executing decree—Party to suit—Representative.*—In execution of a decree obtained on a bond against the legal representatives of the obligor, certain property was attached, and the judgment-debtor objected to such attachment, on the ground that the property did not belong to the obligor's estate and was not liable to be taken in execution of the decree, but that it belonged to them in their own right. *Held*, that the question was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, within the meaning of s. 244, of the Civ. Pro. Code, which ought to be decided by the Court executing the decree, and not by regular suit. (11 B.L.R. 155, 2 A. 752 and 7 A. 36, *R.*) *Per Mahmood, J.*—The turning point upon which the application of the rule contained in s. 244 of the Civ. Pro. Code, barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objection to execution of decree against any property pleads what may analogically be called a *jus tertii* or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. RAM GHULAM v. HAZARU KUAR. **7 A. 547=A.W.N. 1885, 132.** (6 C. 777, *Diss.*) [*F.*, 7 A. 733, 9 A. 605, 12 A. 73, 23 M. 195, F.B.; *Appr.*, 16 C. 1, 16 C. 603; *R.*, 8 A. 626, 15 C. 437; *D.*, 12 A. 313, F.B.]

(665)—*S. 47 (=Civ. Pro. Code, 1882), s. 244—Abandonment of claim against defendant—Non-removal of defendant's name from suit—Defendant, whether party to suit.*—Where the plaintiff in a suit abandoned his claim against the defendant, not being able to serve him with notice, *held* that the defendant was not a party to the suit, notwithstanding the fact that the defendant's name was not removed from the suit. VENKATAPATHI NAIDU v. SUBARAYA MUDALI, **17 M.L.J. 416.** (21 M. 15, 23 M. 361, *R.*)

(666)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Defendant.*—The words of s. 244, Civ. Pro. Code, go to show that the section does not apply as bar to the adjudication of a question raised by a party not seeking such adjudication as a plaintiff, but resisting the plaintiff's claim as a defendant. DURGA CHARAN AGRADANI v. KARAMAT KHAN, **7 C.W.N. 607.** (1 C.W.N. 396, 26 C. 946, *Relied.*) [*F.*, C.L.J. 464; *R.*, 9 O.C. 332.]

(667)—*S. 47 (=old s. 244)—Surety for performance of decree no party to suit.*—A person who, after the passing of the decree, undertakes to be a surety for the performance thereof is no party to the suit for purposes of s. 244, Civ Pro. Code, 1882. SRI RAM (INFANT SON OF) v. KANWAR HARI SINGH, **99 P.R. 1887.** (104 and 109 P.R. 1886, *D.*)

(668)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Person obstructing decree-holder in getting possession, at the instigation of judgment-debtor—Whether party to suit, under s. 244, Civ. Pro. Code*—A person, who, at the instigation of the judgment-debtor, obstructs the decree-holder in getting possession of the property, is not a party to the suit within the meaning of s. 244, Civ. Pro. Code and, therefore, orders passed against him under ss. 329 and 330 *Ibid*, are no bar to a suit. BISHEN DYAL SINGH v. SAGAR SINGH, **2 C.W.N. 311.**

(669)—*S. 47 (= Civ. Pro. Code, 1882, s. 244)—Execution against defendant exonerated—Right of such defendant to apply under.*—A defendant against whom no decree has been passed is entitled to come in under s. 244, if his rights are invaded in execution. VITHAL MUKUND v. GANESH MAL, **15 C.P.L.R. 106.** (22 M. 131, 17 B. 49, *F.*)

(670)—*S. 47 (=s. 244 of 1882)—Right of action—Execution — Parties to suit.*—Where certain lands belonging to *G*, after being included in a suit in which he was made a defendant, are released from the claim, and plaintiff, who obtains a decree against the other defendants, has *G*'s lands measured as part of the decreed lands, *G* must be considered as a stranger, and permitted to bring an action to establish his title. GOUR KISHORE CHOWDHRY v. MAHOMED HASSIM CHOWDHRY, **10 W.R. 191.**

(671)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Matters falling within s 244—Separate suit in respect thereof—Jurisdiction - Time for objecting to the maintainability of suit.*—Where a suit is brought to obtain a relief in respect of a matter which can be decided in execution under s 244, Civ. Pro. Code, *e.g.* (a suit to declare the plaintiff's right to attach certain property in execution of a decree), and where such a suit has been tried as an original suit, by the very Court which could have dealt with the matter

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1852)—*continued.*

in execution-proceedings, *held*, that the Court has not acted without Jurisdiction, even though there was already an application under s. 244, on which an order was passed against the person bringing the suit. The reason of the rule is that the question is only one of procedure and does not affect the jurisdiction of the Court. An objection as to the maintainability of a suit should be taken in the original Court. VENKATAKRISHNAMA CHARLU v. KRISHNA RAO, **32 M. 425=4. Ind. Cas. 723.** (19 W.R. 90, 14 C. 605, 22 C. 483, 22 A. 121, 22 M. 347, 28 M. 64, *R.*; 19 W.R. 90, 14 C. 605, *F.*)

(672)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Suit for recovery of land taken by decree-holder in excess of those awarded in decree—Procedure—Jurisdiction.*—A separate suit will not lie for the recovery of lands taken by a decree-holder in excess of those awarded in the decree if put in possession by the Court's Officer (12 B.L.R. 201, *R.*); but a suit instituted in a Court having jurisdiction to execute may be treated as an application to determine whether the lands are covered by the decree. Provided a suit, the institution of which is prohibited by s. 244, is instituted in the Court which would have to deal with an application under that section, this is a mere defect in form and there is no real want of jurisdiction. BIRU MAHATA v. SHAYMA CHURN KHAWAS, **22 C. 483.** (19 W.R. 19 and 14 C. 605, *F.*) [*F.*, 22 A. 121=19 A.W.N. 219, 22 M. 347=9 M.L.J. 37; 8 O.C. 327, B. 40 P.W.R. 1907=5 P.R. 1907; *R.*, 18 A. 106, 21 M. 494, 2 O.C. 366, 22 A. 376=20 A.W.N. 129, 8 C.W.N. 49, 5 Bom. L.R. 1036, 7 O.C. 213, 1 N.L.R. 1, 32 M. 425, 17 C.P.L.R. 178, 28 M. 64, 5 C.L.J. 328, 8 C.L.J. 20.]

(673)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Mesne profits—Execution-proceedings—Separate suit—Appeal.*—S. 244 (c) of the Code of Civil Procedure does not authorize the executing Court to determine the amount of mesne profits due to the decree-holder in a case in which the decree did not mention mesne profits. Where, in a suit for possession of land, valued at Rs. 3,000 for purposes of jurisdiction, a decree was passed for possession on payment of Rs. 1,430 raised for necessity, and the execution Court awarded also mesne profits of value in excess of the pecuniary jurisdiction of the Divisional Court; *Held*, that the suit was cognizable in appeal by the Divsional Court, and the fact that the decree-holder wrongfully claimed, in execution-proceedings, mesne profits in excess of the appellate jurisdiction of that Court, did not oust its jurisdiction to hold that such a claim did not lie. KHAZAN SINGH v. KHUSHAL SINGH, **83 P.L.R. 1902=29 P.R. 1902.** (60 P.R. 1890, 7 A. 170, 17 C. 968, 22 C. 443, P.C., 55 P.R. 1887, 40 P.R. 1892, *R.*)

(674)—*S. 47 (=old s. 244)—Application "struck off"—Fresh one—Jurisdiction of executing Court.*—Where an application for execution was sent to the record for being filed, the effect of such order was to "strike off" the application for execution from the file of business pending in Court, and therefore it can proceed with the execution on a fresh application made in time. *Quære*:—Whether a Court to which a decree had been transmitted for execution can execute the same, if it is in excess of the limits of its pecuniary jurisdiction. GOPAL DAS v. MUSST. GULAB DEVI, **70 P.R. 1897.** [*R.*, 9 P.R. 1901=1 P.L.R. 1901.]

(675)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Jurisdiction of Court—Appeal—Court to look into true nature of application—Proceedings for delivery of possession to auction-purchaser—Decree-holder, proceedings in execution.*—A case may come under s. 244, Civ. Pro. Code, and an appeal will lie, though it may be represented to be a case under a different section. To determine under which particular section of the Civ. Pro. Code a case comes, the Court must look into the true nature of the application, with reference to the relief sought and the parties before it. A party cannot be permitted to oust the jurisdiction, by a mere statement that his case is under one section of the Code of Civil Procedure and not another, and thereby defeat the just rights of the other party, when, in fact, the matter may and ought to be dealt with, under the other section. [*R.*, 17 M.L.J. 321.] Under s. 244, the Court is competent to afford final relief to contending litigants cheaply and speedily and without the necessity of a fresh suit on the same matter. [19 C. 683, P.C., *R.*] Proceedings, for delivery of possession to an auction-purchaser who is himself the decree-holder, are proceedings in execution of the decree, and a question raised between him and a defendant in the suit is a question which ought to be decided under s. 244, Civ. Pro. Code. RAM NARAIN SAHOO v. BANDI PERSHAD, **31 C. 737.** (27 C. 34, *R.*) [*Rel. on*, 9 C.L.J. 358; *R.*, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185, 1 S.L.R. 172.]

(676)—*S. 47 (=Civ. Pro. Code, 1882, s 244)—Loss or destruction of decree—Regular suit.*—A decree passed for money was lost or destroyed: the decree-holder, on suing out execution, was referred to a regular suit. *Held* that the existence of the decree and of its terms might have been enquird into the execution department and that the order of the Court, to which application for execution was made, could not confer jurisdiction on a Court to entertain such a suit. RANJEET v. CHOONEE LALL, **1 Agra 78.**

(677)—*S. 47 (=s. 244, Civ Pro. Code, 1882) and execution proceedings, whether applicable to cases under Act X of 1859—Suit by judgment-debtor whose property has been illegally sold, whether maintainable—Revenue Court, jurisdiction of, to sell under-tenure before selling moveables of judgment-debtor in execution of rent decree—Landlord and Tenant Procedure Act (X of 1859), s. 108.*—S. 244 of the Civ. Pro. Code, 1882, and the sections which deal with

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

proceedings after sale have no application to cases arising under Act X of 1859, and, therefore, the only remedy open to a judgment-debtor under that Act, whose property has been illegally sold, is by suit. S. 108 of Act X of 1859 provides that an application for the sale of an under-tenure shall not be received, unless execution shall have been first taken out against any moveable property which the judgment-debtor may possess in the district, and the sale of such property shall have proved insufficient to satisfy the judgment. If there be a failure to follow the provisions of this section, the Court selling the property acts without jurisdiction. DAMODAR MISRA v. ISWAR CHANDRA CHOWDHURY, **7 Ind. Cas. 387.** (10 W.R. 341, *Rel. on.*)

(678)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Question for Court executing decree.*—Where, in execution of a decree, the representative of the deceased judgment-debtor objects that the property attached is his own self-acquired property and not property inherited from the judgment-debtor and, therefore, not liable in execution, such question must be decided in the execution department under s. 244, Civ. Pro. Code. SITA RAM v. BHAGWAN DAS, **7 A. 733.** (7 A. 547, *R.*) [*F.*, 9 A. 605; *Appr.*, 16 C. 1; *R.*, 8 A. 626.]

(679)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Execution of decree—Questions relating to execution, what are.*—In 1851, the defendant's father sued the plaintiff's father for partition of certain village lands and obtained a decreee, one of its provisions being that the partition should be made without including certain *dhara* lands then occupied by the plaintiff's father. Execution of this decree was taken out in 1861, but the matter remained pending till 1882. In December 1882, the defendant obtained possession of the lands in suit, being a portion of the lands to which his father (then dead) was entitled under the provision of the decree. The plaintiff objected that these lands were not included in the decree and on application by him for an order that the same should be given back to him was dismissed on 31-3-1883. The plaintiff thereupon instituted the present suit to recover the lands from the defendant, which was dismissed by the Court of first instance on the ground that the question between the parties was a question relating to the execution of the decree, and, as such, could not, under s. 244 of the Civ. Pro. Code, 1882, be determined by a separate suit. On appeal by the plaintiff to the Assistant Judge the latter reversed the decree of the lower Court. The defendant preferred a second appeal to the High Court. *Held* that the plaintiff's suit should be dismissed under *s.* 244 of the Civ. Pro. Code, 1882, because the question whether the *dhara* lands received by the defendant in execution of the decree of 1853 were included in that decree or not was a question relating to the execution of the decree. No separate suit would lie for determining such a question. RAGHUNATH GANESH v. MULNA AMAD, **12 B. 449.** [*R.*, 14 B. 594, 1 Bom. L.R. 48, 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908.]

(680)—*S. 47 (=s 244, Civ. Pro Code, 1882),*—When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is one relating to the execution of the decree between the parties to it within the meaning of s. 244, Code of Civil Procedure, and the question must be decided by the Court executing the decree, and not in a separate suit. MUTTIA v. APPASAMI, **13 M. 504.** [*Disappr.*, 1 C.W.N. 658; *R.*, 16 M. 20, 17 A. 222, 26 M. 740=13 M.L.J. 237, 28 M. 87=14 M.L.J. 474, 1 S.L.R. 172, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185; *D.*, 15 M. 226, 19 M. 29.]

(681)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Decree—Execution—Question to be decided by Court executing decree*—The question whether the lands in dispute were covered by the decree was a question which arose between the parties to the suit in which the decree was passed and which related to the execution of the decree. Such question must be determined by the Court executing the decree and could not be the subject of a separate suit. MAUNG KYE v. MA E MAY, **U.B.R. 1897—1901 Vol. II, 249.** (12 B 449. 5 M.H.C. 185, 14 W.R. 39, *F.*) [*D.*, U.B.R. 1910, 4th Qr., Civ. 66.]

(682)—*S. 47—Suit for possession under usufructuary mortgage—Plaintiff obtains decree giving him conditional possession—Duty to certify amounts received and outstanding—Duty of executing Court—Act XXIII of 1861, s. 11.*—Where in a suit for possession under a usufructuary mortgage plaintiff obtains a decree giving him possession, but requiring him to restore the property after satisfaction of his claim, *held* that he must certify the amounts received and outstanding, and that the Court executing the decree is bound to require from him, from time to time, a statement of the amount received, and to deal with the matter under Act XXIII of 1861, s. 11. GOLAM RUSSOOL KHAN v. KISHEN MOHUN SHAHA, **23 W.R. 156.**

(683)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Proceedings in execution of mortgage decree—Party—Regular suit—Intervenor.*—An intervenor, who withdraws his defence but continues as a party on the record, comes under s. 244, Civ. Pro. Code. Proceedings in execution of a mortgage-decree, taken not against the plaintiff, the legal representative of the mortgagee, but against a person alleging that he was the legal representative although he was not, are ineffectual against the plaintiff, the true legal representative. A regular suit is not maintainable for recovery of possession of property, sold in execution of a mortgage-decree made in the presence of the plaintiff who, being represented in the mortgage-suit by the Court of Wards

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

had first denied the right of the mortgagor to mortgage, and afterwards withdrawn his defence. RAM CHANDRA MUKERJEE v. RANJIT SINGH. **27 C. 242=4 C.W.N. 405.** [*R.* 30 C. 142, 8 C.W.N. 843 : *D.*, 32 C. 265.]

(684)—*S. 47 (=s. 244, Civ Pro. Code, 1882) —Mortgage-decree, execution of, against the successor of the judgment-debtor—Fresh suit, if necessary, when successor claims by survivorship under the* Mitakshara *law.*—A mortgagee is entitled to execute his mortgage-decree against a successor of the judgment-debtor, even when he holds the property by survivorship under the *Mitakshara* law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage-decree. It is open to the successors to take the very defences in execution-proceedings which he might take in a fresh suit. CHANDRA PROSAD v. SHAM KOERI, **3 C L.J. 131=33 C. 876.** [*R.*, 34 C. 642, F.B.=11 C.W N, 593=5 C.L.J. 491=2 M.L.T. 207, 30 M. 26=16 M.L. J. 545, 32 M. 429=19 M.L J. 401.]

(685)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Foreclosure of.*—S made a gift of immoveable property to his two sons (the plaintiffs) then minors by a deed of gift dated 22nd January, 1883. The said deed of gift was duly registered. Some years after this, S mortgaged the property to the defendant. The latter sued on his mortgage and obtained an *ex-parte* decree for sale against the plaintiffs and their mother as heirs of S. The plaintiff filed the present suit to have it declared that the mortgages were void and that the plaintiffs were entitled to the property under the said deed of gift:—*Held*, that the order for sale under s. 89 of the Transfer of Property Act has nothing to do with the Civ. Pro. Code, and the proceedings under s. 89 of the Act were not the proceedings in execution of a decree, but in continuation of the original suit. MAHOMED v. COOVERBAI, **6 Bom. L.R. 1043.**

(686)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Application for redemption or foreclosure of decree* nisi—*Transfer of Property Act (IV of 1882) s. 93.*—An application for redemption of foreclosure under a decree *nisi* is not an application in execution under the Civ. Pro. Code but must be made in Court under the Transfer of Property Act, 1882; and until a decree *nisi* is made absolute there is no decree capable of execution. SIR JEHANGIR C JEHANGIR v. THE HOPE MILLS LD., **10 Bom. L.R. 1057=33 B. 273.**

(687)—*S. 47 (s. 244, Civ. Pro Code, 1882) — Consent-decree—Execution proceedings — Separate suit.*—A consent-decree declared the defendant the absolute owner of properties in dispute, but granted a concession to the plaintiff that if he could purchase the property from the defendant at a certain rate by a certain specified date he should be at liberty to do so, but that if he failed to do so by that date the defendant was to remain an absolute owner. The plaintiff failed to do his part and later on filed a suit to have determined and declared his rights under the decree: *Held*, (1) that the suit could not be treated as a suit for redemption, since from the date of the consent-decree the relation of mortgagor and mortgagee no longer subsisted between the parties; (2) that the question between the parties was one covered by s. 244 of the Civ. Pro. Code, and should therefore be decided in execution-proceedings under the consent-decree, and not by a separate suit; and (3) that it was not competent to the Court to entertain the suit and treat it as an application for execution. NOWROJEE v. BAPUJI, **5 Bom. L.R. 1036.**

(688)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Execution—Attachment—Illegal acts committed—Jewels attached not mentioned in attachment list.*—In execution of a decree, certain moveable properties were attached. Some jewels were taken away by the decree-holder without being credited to the decree. The judgment-debtor put in a petition asking that the value of the jewels might be credited in payment of the decree. *Held* that the question raisd related to the execution of the decree and as such came within s. 244 of Civ. Pro. Code, and no separate suit lay for the same. KRISHNAMURTHI IYER v. NARAYANASAMY IYER, **14 M.L J. 295.**

(689)—*S. 47 (=old s. 244—Objection to attachment of property on the ground of its being trust property—Objection to be considered under section.*—On the attachment of certain immoveable property as that of the judgment-debtors, the latter objected that the property, having been gifted away to a temple, belonged to it and that they were in possession therefore as trustees. *Held* that no separate suit lay to determine the question, but that it was to be considered in execution-proceedings under s. 244 Civ. Pro. Code. 1882. SRI NARAIN v. DAULAT RAM, **9 P R. 1882.** [*R.*, 5 P.R. 1907.]

(690)—*S. 47 (=s 244, Civ. Pro. Code, 1882) —Attachment, removal of—Application—Suit to remove the attachment.*—In a suit brought by the respondents against the appellants as the heirs of V, the Court passed a decree against the estate of the deceased V. The decree-holders in execution attached five fields as belonging to the deceased and as being in the possession of the appellants. The latter applied for the removal of the attachment with the result that the Court removed it as to two but rejected their application as to the other fields. The appellants then brought a regular suit to remove the attachment. *Held*, that the question can only be decided by a proceeding under s. 244 of the Civ. Pro. Code and not by a separate suit, as the appellants were parties to the previous suit. BHIMRAO v. AIYAPPA, **6 Bom. L.R. 697.**

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(691)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Irregular attachment and sale—Remedy in execution—Suit to set aside sale not maintainable.*—Where a mortgage-deed was attached and sold as moveable property in execution of a decree, the question was one arising between the parties to the suit in which the decree was passed and relating to the execution of the decree within the meaning of s. 244 and a suit to set aside the sale was not maintainable. MT. JANKI v. SARANGDHAR, 7 C.P.L.R. 14.

(692)—*S. 47 (=Civ. Pro. Code, 1882, s. 244 (c)—Claim to attached property—Execution proceedings—Order—Separate suit—Execution of decree.*—A decree having been passed against the plaintiff, certain property in his possession was attached; whereupon he claimed that the property, being service *vatan*, was not liable to attachment or sale, and that the attachment should therefore be removed. This claim was rejected. The plaintiff thereupon sued for a declaration that the property was not liable to attachment and sale. *Held* that the suit was barred under s. 244, Civ. Pro. Code. The Court which originally rejected the claim made in the execution-proceedings had jurisdiction to investigate the claim under the words of s. 244 (c), Civ. Pro. Code. TRIMBAK RAMRAO DESHPANDE v. GOVINDA, **19 B. 328.** [*R.*, 8 O.C. 405; *D.*, 22 B. 475.]

(693)—*S. 47 (=s. 244 of old Code)—Objection that attached property was sole property of one of the judgment debtors.*—H, sued the sons and widow of S, and obtained a decree against the property of S. In execution-proceedings, certain houses were attached. One of the judgment-debtors claimed one of the houses as his sole property and his claim was allowed. H sued to have the order set aside. *Held* that the remedy against the order complained of was by way of appeal and that no fresh suit could be brought regarding the same. The claim was a question that could be determined in execution-proceedings. KASHI RAM v. HARNAM DAS, **47 P.R. 1887.** (88 P.R. 1886, 12 P.R. 1887, *R.*; 11 B.L.R. 149, *F.*) [*Cited* 87 P.R. 1887, 58 P.R. 1888.]

(694)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Liability of attached property to sale in execution.*—The question whether property is liable to sale in execution must be determined under s. 244 of the Code. MUNGESHUR KUAR v. JAMOONA PRASHAD, **16 C. 603.** (11 B.L.R. 149=18 W.R. 185, *F.*) [*R.*, 12 A. 313=10 A. W.R. 137, F.B., 32 M. 429=19 M.L.J. 401.]

(695)—*S. 47 (Civ. Pro. Code, 1882, s. 244)—Execution of decree—Attachment of improvements effected in respect of land—Determination of question of ownership of improvements.*—In execution of a decree, improvements effected in respect of certain land were attached. The judgment-debtor having died, his legal representatives were brought on record. The legal representatives of the deceased judgment-debtor contended that the improvements belonged to them in their own right and were not the property of the deceased. The point for determination was whether the question of ownership of the improvements could be gone into in execution proceedings. *Held*, that with reference to s. 234 of the Code, this question could be and ought to have been decided only under s. 244 (c) and not by separate suit. VENGAPAYYAN v. KARIMPANAKAL PARVATI, **26 M. 501.**

(696)—*S. 47 (=Civ. Pro. Code, 1882, s.)—Execution of decree—Separate suit for value of crops cut while under attachment—Jurisdiction.*—In a previous suit for arrears of rent, the defendant had obtained two decrees against the plaintiff and had got the latter's crops attached in execution. Subsequently the plaintiff brought a suit for the value of the crops against the defendant on the allegation that the latter had forcibly carried away the produce of certain fields while under attachment and appropriated the same himself. *Held*, that the question was one that could properly be said to relate to the execution of decree within the meaning of s. 244 of the Civ. Pro. Code, and that, therefore a separate suit was not maintainable. *Held*, further, that if the Court had jurisdiction to decide the original suit and to execute the decree, it would not be deprived of its jurisdiction by the mere fact that under s. 244 of the Code, in deciding a question between the parties, it could have to award to one party or another something beyond the limits of its ordinary pecuniary jurisdiction. INDARDAWAN SINGH v. KAMAKYA SINGH, **2 O.C. 315.**

(697)—*S. 47, (=s. 244, Civ. Pro. Code, 1882)—Surety made himself liable for decree amount in another suit—Execution against surety—Suit by surety for his non-liability unsustainable—Proceedings in execution*—The present plaintiff stood surety in another suit, wherein the property of a defendant was attached before judgment and he made himself liable for any sum that might be decreed. A decree was passed and an order for its execution was made against the surety, the present plaintiff. No appeal was preferred against the order. Before the actual execution against the present plaintiff, he sued the decree-holders in the previous suit for a declaration that they were not entitled to execute a portion of their decree. *Held*, that the suit would not lie by reason of s, 244. (4 B.H.C. 119, 8 W.R. 24, 15 W.R. 538, 12 B. 71, 13 M. 1, *R.*) The surety should be treated as a party to the suit and the matter should be dealt with only in execution. LINGA REDDY v. HUSSAIN REDDY, **28 M. 117 =14 M L.J. 430.**

(698)—*S. 47, (=s. 244, Civ. Pro. Code, 1882, —Surety, proceedings against — Recovery of money from a surety of the judgment-debtor—Application in execution — Separate suit.*—S brought a suit to recover arrears of maintenance and for a declaration that her maintenance be made a charge on the family property

Civ Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in the hands of her husband's brother's sons. She succeeded. In the meanwhile one of the sons of her husband's brother sold some of the property to plaintiff who brought a suit to recover possession of the same; and as *S* sought to execute her maintenance decree against the property purchased by plaintiff she was added a co-defendant. During pendency of plaintiff's suit in appeal he applied for an injunction to stay the execution of *S*'s decree. The appellate Court ordered plaintiff to pay the decretal amount to *S*, on the latter furnishing a security and on condition that if the suit be decided against her she should refund the same to the plaintiff. The suit was decided against her; whereupon plaintiff applied for a refund of the said amount. *Held*, that the proper remedy to recover the amount was by an application in execution of the decree of the appellate Court and not by an independent suit. ANANT v. NARAYAN, **3 Bom. L.R. 549.**

(699)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Execution of decree—Surety, proceedings against—Appeal against pre-emption decree—Surety for payment of mesne profits.*—On an appeal against a pre-emption decree for possession of land passed by the District Judge, the appellant, vendee, judgment-debtor, applied to the Chief Court for stay of execution of the decree passed by the lower Court. It was ordered that the execution might take place on appellant giving security to the satisfaction of the District Judge for payment to the plaintiffs, pre-emptors, of the mesne profits of the land pending the appeal and the costs awarded against him. After dismissal of the vendee's appeal, the plaintiffs, pre-emptors, sought to recover mesne profits from the surety, who objected that he could not be proceeded against in execution and the plaintiffs should file a separate suit for the purpose. *Held*, that the objection was not valid. S. FAQIR ALI SHAH v. JASSUE RAM, **113 P.L.R. 1909=147 P.W.R. 1909.** (109 P.R. 1906, F.B.=1 P.L.R. 1907, *F.*)

(700)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Application by judgment-debtor to set aside execution sale—Fraud.*—An application by a judgment-debtor to have an execution-sale set aside, wherein circumstances are alleged which, if found in his favour, would constitute fraud on the part of the decree-holder or the auction-purchaser, comes within the purview of s. 244, Civ. Pro. Code. ROJONI KANT BAGCHI v. HOSSAIN UDDIN AHMED, **4 C.W.N. 538.** (19 C. 683, 24 C. 707, 2 C.W.N. 691, *R.*) [*Expl.*, 28 C. 4=5 C.W.N. 124.]

(701)—*S. 47 =(s. 244, Civ. Pro. Code, 1882) —Power of Court to correct its own mistake—Inherent power—Amendment of sale-certificate —Sale-certificate including a property not sold.* —A Court committing a blunder has power to rectify it of its own motion. Where two properties were advertised for sale and one property was sold but the sale-certificate included both the properties and the purchaser got possession of both. *Held* that the Court had inherent power to rectify the mistake by amending the sale-certificate and to direct that the delivery of possession of the second property be cancelled; that, the matter would also come under s. 244, Civ. Pro. Code, the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree. GOBINDA CHANDRA CHANDA v. ABHOY CHARAN BAGCHI, **12 C.W.N. 1027.**

(702)—*S. 47 (=s. 244. Civ. Pro. Code, 1882)—Execution-sale—Fraud, suit to set aside sale on ground of.*—A suit was brought to set aside a sale in execution of a decree, on the plea that, owing to the fraud of the judgment-creditor, the proclamation of the sale had not been duly made. It was said that the sale was not an ordinary sale of attached property in execution of decree, that it purported to be a sale in execution of a mortgagee-decree, which directed the sale of the mortgaged property in accordance with the provisions of ss. 88 and 89 of the Transfer of Property Act, but that there was no such decree in existence, as only a decree *nisi* had been made, and not a decree absolute directing the sale. It was further argued that, until a decree absolute was made for the sale, the right to redeem existed and that the suit, might be regarded as a suit to redeem: *held*, that the suit was not maintainable. SIVA PERSHAD MAITY v. NANDO LALL KAR MAHAPATRA, **18 C. 139.** (17 C. 769, *F.*) [*R.*, 7 C.P.L.R. 40, 25 M. 241, F.B. & 300, 164 P.L.R 1908=93 P.R. 1908; *D.*, 15 M. 389; *Doubted*, 164 P.L.R. 1908.]

(703)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Application to set aside sale—Auction-purchaser's fraud—Remedy by regular suit—No bar to apply under s. 244, Civ. Pro. Code, contest between parties—Appeal.*—Where a judgment-debtor applies to have an execution-sale set aside alleging fraud on the part of the auction-purchaser who happens to be agent, and such application is opposed by the decree holder, the question to be determined must be investigated under s. 244, Civ. Pro. Code, although no fraud may be alleged as against the decree-holder himself. [*R.*, 6 C.L.J. 111.] The fact that the judgement-debtor may be entitled to equitable relief against the auction purchaser by a regular suit for re conveyance of the property acquired by fraud, does not oust the jurisdiction of the Court to set aside the sale on the ground of fraud under s. 244, Civ. Pro. Code. In determining whether an application to set aside a sale comes within the scope of s. 244, Civ. Pro. Code, or not, the point to be considered is, whether there is a contract regarding the validity of the sale between the parties to the suit. ADHAR MANI DASSI v. MONMOTHA NATH BOSE, **6 C.W.N. 279.** (19 C, 683, 3 C.W.N. 403, 18 M. 436, 2 C.W.N. 691, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(704)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Suit to set aside sale on the ground of fraud, maintainability of—Third party, auction-purchaser.*—S. 244, Civ. Pro. Code, operates as a bar to a suit to set aside an execution-sale on the ground of fraud, notwithstanding that one of the parties to it is the auction-purchaser, who was not a party to the original suit. (19 C. 683, *F.*; 17 C. 769, *Cons.*) But where the plaintiff impugns, not only the sale, but also the decree itself on the ground of fraud, then the suit raises a question which does not relate to the execution, discharge, or satisfaction of the decree, and therefore s. 244 is no bar to such a suit. MOTI LAL CHAKERBUTTY v. RUSSICK CHANDRA BAIRAGI, **26 C 326, Note =3 C W.N. 395.** [*F.*, 2 O.C. 324, 59 P.R. 1903=129 P.L.R. 1903; *R.*, 27 C. 197, 24 A. 239=22 A W.N. 49, 7 O.C 199. 26 A. 447=A. W.N. 1904, 61=1 A.L.J. 65, 27 A, 702=2 A L. J. 469=A.W.N. 1905, 162, 5 C.L.J. 328.]

(705)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Suit for cancellation of sale held in execution on ground of fraud—Maintainability.*—A suit by the judgment-debtors against the decree-holders and the auction-purchasers for the cancellation of a sale held in execution on the ground that the sale had been brought about by fraud, the decree having been, in effect, previously satisfied, was held not maintainable because their proper remedy was by way of application under s. 244, Civ. Pro. Code. MATHURA DAS v. LACHMAN RAM, **24 A. 239=A.W.N. 1902, 49.** (19 I.A. 166, 22 A. 86, 22 A. 108, 26 C. 324, 26 C. 326, *R.*) [*F.*, A.W.N. 1907, 65=4 A.L.J. 142; *R.*, 59 P.R. 1903=129 P.L.R. 1903, 26 A. 101, 26 A. 447=A.W.N. 1904, 61; *D.*, 7 O.C. 199.]

(706)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Cancellation of license under s 27 of Madras Act IV of 1889—Decree in favour of licensee in default of payment of proper compensation—Amount of compensation determinable in execution proceedings.*—Suit, against the Secretary of State, for cancellation of his order resuming certain salt pans and for possession of those pans. Plaintiff obtained a decree entitling him to recover possession, if the defendant failed to pay the value of the proprietary right in the land. *Held*, the Court executing such decree is competent to determine the proper value of such proprietary right and no separate suit need be brought for the purpose. THE COLLECTOR OF CHINGLEPUT FOR THE SECRETARY OF STATE FOR INDIA v. SUBRAYA MUDALIAR, **29 M. 181.**

(707)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Purchase by decree-holder benami at a price less than that at which the decree-holder was permitted to bid—Fraud—Application to set aside execution sale—Art. 178, sch. II, Limitation Act, 1877.*—The purchase of property at an execution sale, by the decree-holder in the name of another person, at a price less than that at which the decree-holder had obtained permission to bid for the said property, constitutes fraud which would vitiate the sale. (10 C. 757, *R.*) [*D.*, 32 M. 242=5 M.L.T. 248.] An application for setting aside an execution sale on the ground of fraud on the part of the decree-holder, who purchased the property benami in the name of a third person, is governed by art. 178, sch. II of the Limitation Act. SRIMATI SARAT KUMARI DEBI v. NIMAI CHARAN DEY SIRCAR, **5 C.W.N. 265.**

(708)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Transferee of judgment debtor—Suit brought by decree-holder to question alienation by judgment-debtor.*—*Held* that s. 11, Act XXIII of 1861, does not apply to suits brought by a decree-holder to question an alienation made by the judgment-debtor, inasmuch as the transferee was not a party to the former suit, and only questions between the parties to the suit must of necessity be determined in the execution department. SURUBSOOKH v. USGUR ALLY KHAN, **2 Agra 380.**

(709)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Objection by judgment-debtor—Separate suit.*—S. 244, Civ. Pro. Code, ought to be liberally construed in order to avoid multiplicity of suit. Where a judgment-debtor does not challenge the validity of a decree, but contends that in execution thereof certain property should not be attached and sold, in consequence of circumstances arising subsequent to the decree, such contention ought to be dealt with under s. 244 and not by a separate suit. RAJBANSI ROY v. MAHABIR ROY, **9 C.L.J. 358=4 Ind. Cas. 121.** (19 A. 480, 25 C. 133, 8 C.W.N. 102, *D.*; 31 C. 737, *Rel. on.*)

(710)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Execution of decree—Objection by judgment-debtor to execution—Matters falling within the scope of section—Remedy by separate suit.*—In an execution proceeding, the judgment-debtor contended that he was entitled to deduct a larger sum than was allowed by the decree-holder on account of the transfer of certain properties by him to the decree-holder, and that the interest was erroneously claimed at a higher figure than what was due. There was also the question raised as to the date upon which credit ought to be allowed for the consideration money for the transfer. *Held*, that these questions were covered by s. 244 of the Civ. Pro. Code, 1882, and the Court should not decline to investigate into them on the ground that the remedy of the judgment-debtor was by way of a regular suit. SURENDRA NATH DUTT v. KUMAR MANMOTHA NATH MITTER, **9 Ind. Cas. 382.**

(711)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Money paid out of Court—Separate suit for refund of.*—*Held* that, a separate suit for refund of the money paid out of the Court in satisfaction of a decree is inadmissible under the provisions of s. 206, Act VIII of 1859 and s. 11.

Civ. Pro. Code. (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Act XXIII of 1861. The question should have been raised and decided in the Miscellaneous Department when execution was sued out, which not having been done, the suit was barred by the aforesaid section. TAJ v. GUNGA PERSHAD, **2 Agra 45.**

(712)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Prior suit by father as trustee held barred by s. 244—Subsequent suit by sons to cover same property — Decision in prior suit—Whether concludes latter suit.*—Where a prior suit brought by the father as trustee to recover certain property was dismissed as having been barred by s. 244, Civ. Pro. Code, 1882. *Held*, that a subsequent suit brought by the sons in the same capacity after the father's death was concluded by the decision in the prior suit. RAMAPAYYA v. AITHA MELANTA, **8 M.L.T. 221=7 Ind. Cas. 184.**

(713)—*S. 47 (=s. 244, Civ. Pro. Code, 1882) —Decree for sale against Hindu father—Suit by son—Injunction taken out to stay sale of 1½ biswas—Sale carried out and confirmed—Suit by mortgagor to set aside not maintainable.* —Two persons mortgaged their property (4 *biswas*) to appellants, who obtained a decree for sale. The sons of the mortgagors brought a suit for exemption of their shares. They obtained an injunction for staying the sale with the exception of 1½ *biswas*. But 1½ *biswas* were sold and sale confirmed. The claim of one of the sons was decreed and one *biswa* was exempted from sale. The mortgagors brought this suit to set aside the sale of ½ *biswa* held during the pendency of their sons' suits. *Held*, that the sale having been held under an order absolute, which was in full force, the fact that the sale was held during the pendency of a temporary injunction did not render the sale *ab initio* void. *Held*, further, that the remedy, if any, of the mortgagors judgment debtors, was by an application and not by a suit. HIMMAT SINGH v. HARDYAL SINGH, **2 A.L.J. 694.**

(714)—*S. 47 (=s 244, Civ. Pro. Code, 1882) —Decree—Execution—Decree against sons as legal representatives of their father—Sons' pious duty to pay father's debt under Hindu law—The question whether the property attached and sold in execution of the decree is self acquired or ancestral in the hands of sons can be gone into in execution proceedings—Auction purchaser's presence does not alter the character of proceedings.*—B sued V on a money claim. Whilst the suit was proceeding, V died, and his sons were placed on the record as his legal representatives. The suit was decreed in B's favour. In execution of this decree the property in dispute was sold to N at a Court sale. N then sold the property to B. The plaintiffs, the assignees of V's sons brought this suit against B to recover possession of the property on the ground that it was the self-acquisition of their assignors. The defence was that the decree in the previous suit and the purchase consequent upon it bound

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

V's sons and that s. 244 of the Civ. Pro. Code, 1882, was a bar. It was contended that s. 244 did not apply, because V's sons were parties to the decree in their representative, and not in their own personal capacity, and as such were not bound to plead that the property was theirs; and that the question arising in the suit was not one between parties to the decree, because the auction-purchaser was not a party thereto. *Held*, (1) that the decree in the previous suit having been against the plaintiff's assignors as V's sons, it was a decree against them in respect of a debt of their father, which it was their pious duty to pay; and that, when the assignors were brought on the record as their father's representatives, they were in their own as much as in their representative capacity (20 B. 385, *Appl.*) that the mere fact that the auction-purchaser was not a party to the previous decree, did not prevent the applicability of s. 244; (19 C. 683, *F.*) that the question whether the property was ancestral or self-acquired, liable or not, in the hands of the sons to satisfy their father's debt under Hindu Law, was one relating to the execution of the decree and could not be raised in a separate suit. KASHINATH MORESHWAR VAIDYA v. BAJI PANDURANG VAIDYA, **11 Bom. L.R. 699=8 Ind. Cas. 763.**

(715)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)— Ex parte decree against Hindu father and son personally on pro-note executed by father alone—Execution against son, personally—Competency of son to impeach decree as nullity.*—A decree having been obtained *ex parte* against a Hindu father and his son on a pro-note, executed by the former, and alleged to be for the expenses of the marriage of the latter, neither of the two having raised any contention, an application for execution was put in, praying for arrest of the son, the father being since dead. The judgment-debtor contended that the decree, so far as it made him (son) personally liable, was a nullity, and that he was not, therefore, liable to arrest. *Held*, that, though, when a decree is passed without any jurisdiction whatever, it is open to a judgment-debtor, in proceedings for execution, to impeach the decree as a nullity notwithstanding the fact that he took no steps to get it set aside in appeal or otherwise, this was not a case of that kind, for it would not have been incompetent to the Court to pass a decree personally against the son, if there should be evidence to warrant such a decree. Nor would the fact, that a decree was passed in the absence of such evidence, make it one passed without jurisdiction. In a case of such a character, a party to the suit will be precluded, in execution, from impeaching the decree, which was passed without opposition and which had not been set aside (21 B. 205, 27 M, 118, *F.*; 26 M. 31, *D.*) The High Court set aside the order of the lower Courts refusing execution and ordered the re-placement of the petition on file. RUNGASAWMY NAIKEN v. THIRUPATI NAIKEN, **28 M. 26.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(716)—*S. 47 (—s. 244 of old Code)—Objection that property is ancestral—Son liable to father's debt.*—Where the representative of a deceased judgment-debtor objects to the attachment and sale of property on the ground of its being ancestral, the question is one under s. 244 (c). Under the Hindu law, a son has no right to prevent the sale of ancestral property in satisfaction of a decree against his father, unless he can prove that the debt was for an immoral purpose. RAM CHAND v. GHOLU SHAH, **87 P. R. 1887.** (47 P.R. 1887, *R.*; 23 C. 21, *F.*)

(717)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Evidence Act I of 1872, s. 44—Suit and proceeding—Compromise—Fraud-Subsequent proceeding—Right to show that previous proceeding and compromise were in fraud of applicant's right*—An application for setting aside a sale purported to have been signed by the appellant and her brothers. In that application, a compromise petition purporting to have been signed by all of them was presented. Subsequently the appellant presented this application for setting aside the sale. *Held*, that she is entitled in this application to show that she had no part in the former proceeding, that the compromise was obtained behind her back and in fraud of her rights, and that it was not binding upon her, without having the compromise set aside either on review or in a regular suit. SREEMATY ASABAN BANU v. ANANDRA CHANDRA DUTT, **3 Ind. Cas. 116=14 C.W.N. 823** (27 C. 11=3 C.W.N. 660, *R.*)

(718)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Evidence admissible under—No restriction to documents on record—Acknowledgment of liablity.*—*S. 19, Limitation Act.*—The evidence admissible under s. 244 (c) need not be confined to documents already on record. An execution application is an application regarding a right within the meaning of s. 19, Limitation Act. A deed acknowledging receipt of certain houses in part of the money of a decree was held to contain an acknowledgment of liability as to the decree-holder's right within the meaning of s. 19, Limitation Act. (3 A. 247, *F.*) BHAGAT RAM v. CHINT RAM, **28 P.R. 1885.** [*F.*, 5 N.L.R. 8].

(719)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Contempt, motion for—Execution of decree.*—Where there is a genuine dispute between the parties about the right way of executing a decree, it should be formally dealt with under s. 244 of the Civ. Pro. Code, 1882, and not brought indirectly and incidentally before a Judge on a motion for contempt. JAMSETJI v. SORABJEE, **9 Bom L.R. 1361.**

(720)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Proceedings in exercise of inherent powers to punish for contempt—Order passed in such proceedings*—Proceedings by the Court, in the exercise of its inherent power, to punish for contempt, do not come under this section, nor does an order passed therein come within the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

definition of 'decree.' in s. 2. GODU RAM v. SURAJ MAL, **2 A.L.J. 16=A.W.N. 1905, 9=27 A. 378.**

(721)—*S. 47 (=Civ. Pro Cods. 1882, s. 244)—Non-payment of rent by tennnt—Compromise decree providing for forfeiture—Power of executing Court to relieve against forfeiture.*—A *razi* decree contained a stipulation that on failure by the defendant to pay the rent within the time fixed for each year, the lease was to be forfeited. The defendant not having tendered the rent for a particular year, the decree-holder applied for possession of the lands according to the terms of the decree. The defendant contended that the forfeiture clause in the decree was a penal provision and relief ought not to be granted against it. *Held* that as there was nothing more on the part of the Court than a mere adoption of the contract between the parties, the Court must be taken to have adopted the contract with all its incidents. It was competent to the Court to relieve against the forfeiture, provided there was nothing in the circumstances of the case to disentitle the tenant to be relieved against the consequences of his default. NAGAPPA v. VENKAT RAO, **24 M. 265.** (10 B. 435, *Diss.*; 10 I.A. 162, 10 C. 312, *R.*) [*F.*, 31 B. 15=18 Bom.L.R. 813=1 M.L.T. 370, F.B.; *R.*, 26 M. 31, 31 M. 474=18 M.L.J. 469.]

(722)—*S. 47 (=s. 244 (c), Civ. Pro. Code, 1882)—Application for execution of a decree—Another suit for mesne profits between the same parties—Findings on issues in a suit for mesne profits could be acted upon on the same issues in the execution proceedings of another suit.*—The applicant applied for the execution of a decree for possession of a piece of land, in the capacity of heir of the decree-holder, under a will made in his favour by the decree-holder. Pending this application, he brought a suit against the same judgment-debtors (opponents) for the recovery of mesne profits of the same land. In this suit, the question as to the validity of the will was gone into and decided in favour of the applicant. The Court, thereupon, granted the application for execution, taking into consideration the judgment as to the validity of the will in the suit for mesne profits and without taking any further evidence on the point in the execution proceedings. *Held*, that the Court was justified in doing so, under s. 244, cl. (c) of the Code of Civil Procedure. BHAWANISHANKAR v. NARANSHANKAR, **1 Bom. L.R 36=23 B. 536.**

(723)—*S. 47—Limitation Act (IX of 1908), art. 138—Transfer of Property Act (IV of 1882), s. 90—Purchase by decree-holder—Suit to recover possession by decree-holders representatives.*—At a sale in execution of redemption decree, the decree-holder (mortgagee) himself purchased the property in 1899. The sale was confirmed in 1900. In 1909, the representative of the decree-holder (auction-purchaser) brought a suit to recover possession of the property so

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

purchased. The defendants (representatives of the judgment-debtors, mortgagors) contended that, as the question involved in the suit related to the execution of the decree, the suit was not maintainable under s. 47 of the Civ. Pro. Code, 1908, and that the plaintiff's remedy lay under O. XXI, r. 5. The first Court decreed the claim. On appeal: *Held*, reversing the decree, that the suit was barred by s. 47 of the Civ. Pro. Code, 1908. A decree-holder, by becoming a purchaser at a Court-sale held in execution of his decree, does not cease to be a party to the suit within the meaning of s. 47 of the Civ. Pro. Code, (27 C. 34, 31 C. 737, 25 M. 529, *F.*; 31 A. 82, *Diss*) Proceedings for delivery of possession of property purchased by the decree-holder are proceedings in execution of the decree and fall within the scope of s. 47 of the Civ. Pro. Code, (27 C. 34, 31 C. 742, 26 M. 740, 25 M. 529, 13 M. 504, *F.*) Art. 138 of the Limitation Act (IX of 1908) does not override the provisions of s. 47 of the Civ. Pro. Code. The two should be read together. Where the auction-purchaser is also a party to the suit in which the decree was passed, his claim for delivery of possession of the property purchased must be determined by the Court in the execution department. But where the auction-purchaser is a third party, it is open to him to bring a suit for possession of the property purchased by him, and such a suit will be governed by art. 138 of the Limitation Act. Under s. 90 of the Transfer of Property Act, 1882, the execution proceedings do not terminate with the sale. Where the execution of the decree is barred at the date of the suit, it cannot be allowed to be treated as a proceeding in execution. SADASHIV MAHADHOLE v. NARAYAN VITHAL NAVAL, **13 Bom. L.R. 661.**

(724)—*S. 47 (= Civ. Pro. Code, 1882, s. 244)—Sale in execution—Representatives of judgment-debtor, objection as to non saleability of property raised by, question relating to execution.*—The sons of a deceased judgment-debtor, made parties to the execution-proceedings as his legal representatives, objected, after the sale of certain of their ancestral properties in execution, that the property was not that of the judgment-debtor and so not liable to be sold as such in execution. Where the parties on record at the time were the plaintiffs and the representatives of the defendant, the question whether the sale was valid was a question whether a proceeding had in execution should be set aside and so one falling under s. 244 of the Civ. Pro. Code. The objection as to the non-saleability of the property was therefore not one that should have been raised by a separate suit. Also if the proceeding sought to be set aside is one which relates to execution, and if the contest as to its validity is between the parties to the suit, the specific ground on which the proceeding is impeached is not material for the purposes of s. 244. KRISHNAN v. ARUNACHELAM, **16 M. 447=3 M.L.J. 612.** [*R.*, 163 P.L.R. 1901.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(725)—*S. 47 (=s. 244 Civ. Pro. Code* 1882) *—Order by competent Court under—Finality of order.*—Where the question whether the decree-holder was entiled to sell the whole or a portion of the mortgaged property was decided by an order, which the Court making the order had full authority to make under s. 244 of the Code, such order would, if not appealed from, become final, and the question disposed of by it would no longer be an open question. BASUDEO NARAIN SINGH v. BEOLOJY SINGH, **14 C. 640, F.B.**

(726)—*S. 47 (=Civ. Pro. Code.* 1882 *s. 244) —Question to be determined by Court executing a decree—Ground of objection.*—When the question is whether the property in dispute belongs to the judgment-debtor, or to his estate or not, and that question is raised in a proceeding in execution between the parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of the execution, and the question is one to be determined in execution, and s. 244, Civ. Pro. Code, bars a separate suit. UPENDRA BHATTA v. RANGANATHA BHATTA, **17 M. 399=3 M.L.J. 229.** (4 I.A. 66, *F.*) [*Cons.*, 23 M. 195.]

(727)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244) —Exonerated defendant in former suit whether could maintian suit to recover his property taken in execution.*—Where a party defendant in a suit is exonerated from such suit, the suit being dismissed as against him, and a decree is passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit, is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, the question of his claim to, and to recover possession of the property being one coming under s. 244, Civ. Pro. Code, so as to debar him from maintaining such a suit. RAMASAMI SASTRULU v. KAMESWARAMMA, **23 M. 361=10 M.L.J. 123, F.B.** (21 M. 45, *Expl.*) [*Diss.*, 23 A. 346; *Disappr.*, 30 C. 134=3 C.W.N. 10; *F.*, 14 M.L.J. 137; *R.*, 15 C.P.L. R. 106, 6 Bom. L.R. 697. 17 M.L.J. 416. 18 M.L.J. 32, Note; *D.*, 16 M.L.J. 433=30 M. 72.

(728)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882) *—S. 88, T.P. Act, 1882—Order absolute for sale made—Question regarding such order—Matters of procedure—Decision of various High Courts.*—When an order absolute for the sale of mortgaged property has been made after an ordinary decree in the mortgage suit has been made, any question that arises as to that order absolute for sale, is not a question relating to the execution of the decree with in the meaning of s. 244, Civ. Pro. Code. (21 C. 818, 22 C. 924, 16 A. 23, *F.*; 12 A. 61, 13 A. 278, *Diss.*] [*F.*, 30 M. 26=16 M.L.J. 545, 10 C.L.J, 91; *Rel. on*, 8 C.W.N. 102; *R.*, 12 C.P.L.R. 79, 12 C.P.L.R. 82, 13 C.P.L.R. 177, 29 C. 644,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

25 M. 244, 6 O.C. 114 B, 6 Bom. L R. 1041, 33 C. 867=4 C.L.J. 141, 12 C.W.N. 1028, 9 C. L.J. 358.] In matters of procedure, it is very important that the decisions of the various Benches of the High Court should, if possible, be in harmony. AKIKUNNISA BIBEE v. ROOP LAL DAS, **25 C. 133**. [*Cons*., 16 C.P.L. R. 111.]

(729)—*S. 47*—(=*s. 244, cl. (c), Civ. Pro. Code*, 1882)—*Fraud—Sale in violation of s. 99, Transfer of Property Act—Objection that no suit lay—When application put in objection raised that a suit lay—Estoppel*,—Cl. (c) of s. 244 of the Code covers a case, where it is sought to set aside a sale held in execution of decree on the ground of fraud, or as having been held in violation of s. 99 of the Transfer of Property Act. A regular suit does not lie to set aside a sale upon these grounds. *Per Aikman, J.*, that, where the appellant had successfully resisted a suit to set aside a sale on the ground that the suit was not the proper remedy but that the matter should be tried in execution, he should not be allowed to go behind that and object, in the execution department, that an application under s. 244 of the Code, did not lie, but that a suit should be brought. GAYA PRASAD MISIR v. RANDHAR SINGH, **3 A.L.J. 456=A.W.N. 1906, 206=28 A. 681.** [*Appl*., 6 C.L.J. 320, F B.=35 C. 61=11 C.W.N. 1011.]

(730) *S. 47—Suit for possession—Sale in execution of money-decree—No applicaton for possession in execution made for nearly 12 years.*—The plaintiffs sued for possession of an 8 anna share in a dwelling house which was alleged to have been sold to them in execution of a money-decree. It was found that no application was ever made by the plaintiffs as purchasers to the Court which executed the decree to have possession given to them under the provisions of s. 263, Act VIII of 1859, although the alleged sale took place 12 years ago. *Held* that the suit would not lie. LOLIT COOMAR BOSE v. ISHAN CHUCKERBUTTY, **10 C.L.R. 258**. (25 W.R. 372, *F.*) [*R.*, 11 C. 93, 12 C. 169, 16 M. 53; *Expl.*, 10 C. 402; *D.*, 14 C. 644.]

(731)—*S. 47* (=*s. 244, Civ. Pro. Code*, 1882, *Decree, validity of—Execution of decree, scope of.*—No question touching the validity of a decree can be raised in the course of proceeding in execution of that decree. RASHBEHARI SINGH v. THAKUR JOYNANDA SINGH, **4 C.L. J. 475**. [*R.*, 5 C.L.J. 328=17 M.L.J. 288.]

(732)—*S. 47* (=*Civ. Pro. Code*, 1882, *s. 244 cl. (c)* (—*Objection resisting execution overruled—Separate suit to set aside order.*—Where the defendants resisted a decree for possession, on the ground that they were cultivators and that the decree awarded possession only as proprietors, but the objection was overruled, and the defendants were ejected, *held*, a suit by them to set aside that order passed in execution proceedings was barred under s. 244 of the Civ. Pro. Code. NAJHAN v. MAHOMED TAKI KHAN, **9 C. 872=12 C.L.R. 571.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1871, XXIII of 1861 and VIII of 1859)—*continued.*

(733)—*S. 47* (=*Civ. Pro. Code*, 1882, *s. 244*). —The provisions of s. 244 enable the mortgagor to require the Court executing the decree to take account of the altered circumstances, when application is made for the execution of the decree. RAMUNNI v. SHANKU, **10 M. 367.**

(734)—*S. 47* (=*s. 244, Civ. Pro. Code*, 1882) —*Question for decision in execution of decree.*—A question as to whether the person who is said to have consented to a decree has authority to consent to it, is one which cannot be raised in execution proceedings. DHANI RAM MAHTA v. LUCHMESWAR SINGH, **23 C. 639.** (9 M. 80, *F.*,) [*Appl.*, 10 C. 49; *Relion*, 6 C.W.N. 796; *R.*, 7 O.C. 199.]

(735)—*S. 47* (=*s. 244, Civ. Pro. Code*, 1882) —*Questions arising after confirmation of execution-sale — Judgment-debtor's representative claiming adversely to judgment-debtor.*—Proceedings for the delivery of possession are proceedings in execution of the decree. Any question arising as to the kind of possession to which the auction-purchaser is entitled is a question relating to the execution of the decree within the meaning of s. 244. If the representative of a judgment-debtor opposes an application for possession, alleging that portions of the property are his and not the judgment-debtor's property, the question raised comes under s. 244, Civ. Pro. Code. Such question must be decided under that section and not by a separate suit. MADHUSUDAN DAS v. GOBINDA PRIA CHOWDHURANI, **27 C. 74=4 C.W.N. 417.** (17 C. 711, *Rel on.*) [*F.*, 7 C.L.J. 436, 26 M. 740=13 M.L J. 237, 28 M. 87=14 M.L J. 474, 30 A. 72=A.W.N. 1908, 12=5 A L.J. 20; *R.*, 8 C. W.N. 49, 31 C. 737, 3 A.L.J. 234=A.W.N. 1906, 87, 5 A.L.J. 285=A.W.N. 1908, 122, 1, S. L.R. 172; *Cons.*, 6 A.L.J. 71, 5 M.L.T. 185=31 A. 82; *D.*, 6 C.L.J. 749.]

(736)—*S. 47* (=*s. 244, Civ. Pro, Code*, 1882) —*Execution of money-decree by attachment and sale of occupancy holding—Question relating to transferability of occupancy holding according to custom or usage.*—In an application for execution of money-decree by attachment and sale of an occupancy holding; it is competent to the judgment-debtor, under s. 244, Civ. Pro. Code, to have the question as to whether such holding is saleable according to custom or usage, raised and determined by the executing Court. MAJED HOSSEIN v. RAGHUBUR CHOWDHRY, **27 C. 187.** (24 C. 355, 26 C. 722, *Appl.*) [*F.*, 4 C.W.N. 571; *R.*, 11 C.W.N, 83; *D.*, 4 C. W.N. 679.]

(737)—*S 47* (=*Civ. Pro. Code*, 1882, *s. 244*)— *Suit by judgment-debtor to set aside sale in execution—Proper remedy of judgment-debtor being by application under s. 244—Discretion of Court to treat plaint as such application.*—Where a judgment-debtor whose property has been sold in execution brought a suit to have the sale set aside, when his proper remedy was by applying under s. 244, Civ. Pro. Code, *held* that the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Court could exercise its discretion and may treat the plaint in a suit as an application under s. 244, Civ. Pro. Code. JAMMAN LAL v. KEWAL RAM, **22 A. 121—A.W.N. 1899, 219.** (22 C. 483, 22 M. 347, *R.*) [*Not. F.*, 5 Bom. L.R. 1036, 28 M. 64, 5 P.R. 1907=10 P.W.R. 1907=23 P.L.R. 1908; *R.*, 17 C.P.L.R. 178, 32 M. 425; *D.*, 20 A.W.N. 196.]

(738)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) Questions for Court executing decree—Suit by decree-holder and judgment-debtor against purchaser in auction sale, to set aside sale.*—S. 244, Civ. Pro. Code, not only bars a separate suit between the parties to the suit and their representatives, but also a suit by such parties or representatives against an auction-purchaser, the object whereof is to have a determination of a question properly arising between the parties or their representatives and relating to the execution, discharge, or satisfaction of the decree. (8 A. 146, 19 C. 683, *R.*) Where a decree-holder and a judgment-debtor as plaintiffs brought a suit against an auction-purchaser at a sale in execution of the decree, on the ground that the adjustment (not duly certified to the Court) had been arrived at between them before the sale, *held* that such a suit was barred by s. 244, Civ. Pro. Code. DHANI RAM CHATURBHUJ, **22 A. 86=A.W.N. 1899, 184.** [*R.*, 24 A. 239=22 A.W.N. 49, 26 A. 447=A.W.N. 1904, 61=1 A.L.J. 65; 11 Bom. L.R. 699.]

(739)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Execution of decree—Satisfaction of decree by sale—Amendment of decree in favour of judgment-debtors—Application by judgment-debtor to recover surplus from decree-holder.*—Where there had been a sale in execution of a decree, and by that sale the decree as passed was fully discharged, but the judgment-debtor afterwards obtained an amendment of the decree, and the decree as amended showed that the decree-holder had realised at the sale more than he was entitled to: *held* that the judgment-debtor had a right, under s. 244, Civ. Pro. Code, to apply to recover the excess realised by the decree-holder. DHAN KUNWAR v. MAHTAB SINGH, **22 A. 79, F.B.=A.W.N. 1899, 181.** [*F.*, 25 A. 441; *R.*, 24 A. 291=27 A.W.N. 67, 29 A. 348=4 A.L.J. 188=A.W.N. 1907, 90.]

(740)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Scope of.*—Questions arising between the decree-holder and the representative as to whether the attached property has come to the representative as such and so is liable to be taken in execution, or is the representative's own property derived from some other source, and therefore not liable to be taken in execution must, under s. 244, Civ. Pro. Code, be decided in execution proceedings and not by a separate suit. BENI PRASAD KUNWAR v. LUKHNA KUNWAR, **21 A. 323=A.W.N. 1899, 104.** (16 C. 1, 21 A. 313, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(741)—*S. 47 (=s. 244, Civ. Pro. Code, 1882,—Saleability of occupancy-holding, question of—When and how determined.*—As between the decree-holder and judgment-debtor, the question of the saleability or otherwise, of an occupancy holding can be determined in the execution stage under s. 244, Civ. Pro. Code. GAHAR KHALIPA BIHARI v. KASI MUDDI JAMMADAR, **27 C. 415=4 C.W.N. 557.** (24 C. 355, 26 C. 727, *R.*) [*R.*, 9 C.W.N. 972.]

(742)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Plaint treated as application under section—Limitation Act (1877), art. 178.*—Where a Court in its discretion treats a plaint in a suit, under the circumstances of the case, as an application under s. 244, Civ. Pro. Code, *held* that the limitation applicable is that which is appropriate for such application, *viz.*, art. 178 of the Limitation Act (1877). LALMAN DAS v. JAGAN NATH SINGH, **22 A. 376=A.W.N. 1900, 129.** (A.W.N. 1899, 219, 22 C. 483, *R.*)

(743)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Circumstances under which plaint may be treated as an application under s. 244.*—Plaintiff's father took a loan from the defendant. The latter sued the plaintiff and his brothers, after the death of the father, to recover the money, and obtained a simple money-decree, in execution of which certain ancestral property was attached. Objection was taken to the attachment, but was dismissed by the two lower Courts, whereupon the sons appealed to the High Court, Pending the decision of the High Court, the plaintiff deposited money in Court, which was realised by defendant. The High Court held that, on the true construction of the decree, the property could not be attached and sold. The plaintiff then brought the suit to recover the money newly because of the decision of the High Court. *Held*, that the suit was not maintainable, and the plaint could not be treated under the circumstances, as an application under s. 244, Civ. Pro. Code, 1882. SHEO NARAIN v. LALTA PRASAD, **6 A.L.J. 641=3 Ind. Cas. 493.**

(744)—*S. 47 (s. 244, Civ. Pro. Code, 1882)—Execution of decree—Sale of immoveable property—Purchased by decree-holder—Suit to obtain possession by assignee of auction purchaser—Practice—Full Bench reference—Bench not constituted—Powers and duties of a Divisional Bench.*—Where in execution of a simple money-decree certain property was sold and purchased by the decree-holder himself, and where after the confirmation of the sale the decree-holder failed to obtain possession of the property purchased, and it remained in the hands of the judgment debtor, *held*, that a suit by an assignee of the decree holder for possession of the purchased land was barred by s. 244 Code of Civil Procedure. (3 A.L.J. 234, *F.*) *Semble.*—A division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench by

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

hear the reference. *Held* that the division Bench could re-hear the case. BHANI MAL v. MOKKHAN LAL, **5 A.L.J. 288=A.W.N. 1908, 122.**

(745)—*S. 47—Decision as to title in proceedings in execution—Fresh suit not maintainable in respect of title.*—The plaintiff, against whom a decree had been obtained as the representative of his deceased uncle, objected to the attachment of his uncle's share which had vested in him as a surviving co-parcener and which was therefore not his uncle's assets liable under the decree. The objection having been decided against him, he brought this suit to establish his title to the share, but it was held by the High Court reversing the decree of the Courts below, that the plaintiff, having omitted to appeal from the decision against him in the execution-proceedings in the previous suit, could not be permitted to rectify such omission by a separate suit. NIMBA HARISHET v. SITARAM PARAJI, **9 B. 458.** [*F.*, 16 C. 1; *Appr.*, 16 C. 603; *R.*, 15 C. 437, 17 M. 399=3 M.L.J. 229; *R.*, 23 B. 237; *D.*, 11 A. 74.]

(746)—*S. 47* (=*s. 244, Civ. Pro. Code*, 1882) *—Agreement to stay or not to enforce decree—Validity and existence of—Matter to be determined in execution—Not in separate suit*—The existence and validity of an agreement to stay or not to enforce a decree ought to be determined in execution under the provisions of s. 244, Civ. Pro. Code, and not in a separate suit. RUKMANI AMMAL v. KRISHNAMACHARY (MINOR) BY HIS GUARDIAN ANDALAMMAL, **9 M.L.T. 464=8 Ind. Cas. 1071.** (22 B. 463, *F.*; 29 C. 810, *D.*)

(747)—*S. 47* (=*s. 244, Civ. Pro. Code*, 1882 *—Agreement before date of decree.*—A decree once made must be taken to be conclusive between the parties. An agreement entered into between the parties before the date of the decree, and not embodied in it, cannot be given effect to in the execution-proceedings. (22 B. 463, *D.*) Where a payment is alleged to have been made prior to the institution of a suit, it cannot be set up during the execution-proceeding for varying the decree; in the suit itself such a plea ought to have been made. BENODE LAL PAKRASHI v. BRAJENDRA KUMAR SAHA, **29 C. 810=6 C.W.N. 838.** [*F.*, 31 C. 179; *R.*, 7 O.C. 199.]

(748)—*S. 47—Execution—Money taken in execution—Decree reversed—Suit to recover money—Act XXIII of 1861, s. 11.*—Where a party seeks to recover money taken in execution of a decree which is afterwards reversed on appeal, such a case is not the subject of a new suit; the matter must be enquired into by the Court which passed the decree as a question arising between the parties relating to the execution of such decree. SALLIGRAM SING v. GOBIND SUHAI, **4 B.L.R. App. 64.** (2 W.R. 275, 4 W.R. 66, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(749)—*S. 47* (=*s. 11, Act XXIII of 1861*)—*Cause of action—Execution of decree.*—The plaintiff's father purchased a house on the 11th June 1854 at a sale in execution of a decree against *G.D.*, but was not put into possession of it; accordingly in 1866 he obtained a decree for possession which, however, was never executed. The defendant in 1870 obtained possession of the house by another sale made in execution of another decree against *G.D.* The present suit was instituted by the plaintiff in 1871. *Held* that not only was remedy on the cause of action, which accrued in 1854, and the decree of 1866 barred, but also that Act XXIII of 1861, s. 11, prevented the plaintiff from bringing a new suit on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." KISAN v. ANANDRAM, **10 B.H.C. 433.** (5 B.H.C. 375, *R.*) [*R.*, 6 B. 7, 7 B. 467, 26 M. 300, F.B.]

(750)—*S. 47—Claim for refund of execution sale-proceeds—Satisfaction of decree by compromise—Act XXIII of 1861, s. 11.*—Where a refund is claimed of the proceeds of an execution sale on the ground that the decree has been satisfied by compromise, the case ought to be tried under Act XXIII of 1861, s. 11. SYUD VELAYET HOSSEIN v. SYUD WULA AHMED, **23 W. R. 207.**

(751)—*S. 47* (=*old s. 244*)—*Judgment-debt reduced in appeal to amount below that realised in execution—Suit by judgment-debtor to recover excess—Duty of Court executing decree—Act XXIII of 1861, s. 11.*—*Held* with reference to Act XXIII of 1861, s. 11, where a judgment-debt has been reduced in appeal to a sum below the amount realized in execution that a suit by the judgment-debtor to recover the excess does not lie, but that the Court charged with the execution of the decree has jurisdiction to determine the question and order a refund. MOTHOORA PRASAD SINGH v. MOHUNT SHUMBHOOGEER, **19 W.R. 413.** [*D.*, 22 C. 501.]

(752)—*S. 47—Wrongful and invalid sale in execution of decree—right of suit—Act XXIII of 1861, s. 11.*—The decree under which A obtained possession of certain property was subsequently reversed. *Held* that A must restore the property itself, or its actual value as determined by evidence, and not the amount for which it may have been sold; and that under s. 11 of Act XXIII of 1861, its restoration need not be asked for a separate suit, a miscellaneous proceeding being sufficient therefor. NAGINDAS v. NATHA, **10 B.H.C. 297.**

(753)—*S. 47—Civ. Pro. Code (Act XXIII of 1861), s. 11—Seizure in execution of property to which decree did not relate—Question relating to execution.*—S. 11 of Act XXIII of 1861 takes away from the parties the right to try by a

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

fresh suit any question relating to the enforcement of the terms of the decree by process of execution, and, in accordance with the whole policy of the law of procedure, makes every such question determinable by an order in a summary proceeding before the same Court in the course of execution. A question as to the alleged seizure in execution of property to which the decree did not relate is one summarily determinable in the course of execution as a question relating to the execution of the decree; and such a question cannot be determined in a separate suit. MUTTUVELU PILLAI v. VYTHILINGA PILLAI, **5 M H.C. 185.** [*F.*, 23 M. 55; *R.*, 12 B. 449, U.B.R. 1897—1901, Vol. II, 249. 6 C.L.J. 527.]

(754)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Purchase by decree holder—Dismissal of application for delivery of property purchased as time barred—Subsequent suit by him to recover possession—Maintainability.*— The plaint property was sold in execution of a decree and purchased by the present plaintiff, the decree-holder therein. Plaintiff applied under s. 318, Civ. Pro. Code, for delivery of the property purchased by him, but his application was rejected as barred by limitation, having been made more than three years after the confirmation of the sale. He therefore brought the present suit to recover possession of the land from the defendant, who was the judgment-debtor in the prior suit. *Held* that the proceedings taken by the plaintiff to obtain possession were proceedings in execution of the decree in the prior suit and related to its execution within the meaning of s. 244 of the Code, and consequently the present suit was barred by the provisions of that section. KATTAYAT PATHUMAY v. RAMAN MENON, **26 M. 740=13 M.L.J. 237.** [*F.*, 28 M. 87=14 M.L.J. 475, 3 A.L.J. 234=A.W.N. 1906, 87, 30 A. 72=5 A.L.J. 20=A.W.N. 1908, 12, 5 A.L.J. 285, A.W.N. 1908, 122; *R.*, 1 S.L.R. 172; *Dist.*, 31 A. 82=6 A.L.J. 71.]

(755)—*S. 47 (=s. 244, Civ. Pro. Code.* 1882) —*Money wrongly paid in execution of a decree —Recovery of—Jurisdiction.*—Money wrongly paid in execution of a decree which is reversed in appeal, must be recovered by an order of the Court executing the decree and not by a separate suit. JODOO NATH GOSSAIN v. NOBA KISHEN CHATTERJEE, **4 W. R. 66.**

(756)—*S. 47 (=old s. 244)—Excess payment under decree—Mode of recovery.*—Sums paid in execution in excess of what was due under the decree can only be recovered by application to the Court which executed the decree. KASHEE KISHORE ROY CHOWDHRY v. KISHEN CHUNDER SANDYAL, **18 W.R. 160.**

(757)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Sale of larger extent of property than justified by decree—Separate suit if sustainable.*—Where a decree for sale on a mortgage directed the sale of the mortgagors' interests in an undefined share in a village, and the decree-holder estimated such share at a certain extent and brought the property to sale without being opposed by the representative of the judgment-debtor, *held* that no separate suit will lie at the instance of the latter alleging that the extent sold was larger than corresponded to the interests of the judgment-debtors, and that the objection should have been taken in execution proceedings. ANNU v. DEBI DAS, **26 A 152=A.W.N. 1908, 208.** (19 A. 480, *D.*; 25 B. 337, *R.*)

(758)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882)—*Decree-holders' taking possession of greater area than what was decreed—Suit by judgment-debtor for possession—Maintainability of.*—If a decree-holder in a foreclosure suit take possession of a greater area of land than what is actually decreed to him, the judgment-debtor cannot bring a regular suit to recover possession of that land. His only remedy is by an application under s. 244 of the Code. Where the plaintiff came to know in 1892, that the defendant had fraudulently taken possession of land in excess of that decreed to him and brought a suit more than 3 years after that date, *held*, that the plaint could not be treated as an application for execution, the remedy of the plaintiff having been barred at the date of suit. ARJUN SINGH v. MACHCHAL SINGH, **3 A.L.J. 601=A.W.N. 1906, 233.**

(759)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882)—*Execution of decree—Death of judgment-debtor pending execution proceedings—Questions arising between representatives of judgment-debtor and decree-holder.*—Where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on the record in execution-proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which, under s. 244 of the Code of Civil Procedure, must be determined in the execution department and not by separate suit. KALI CHARAN v. JEWAT DUBE, **A.W.N. 1905, 180=28 A. 51.** (12 A. 313, 17 C. 711, *F.*)

(760)—*S. 47 (=old s. 244)—Decree awarding mesne profits to plaintiff—Receiver—Costs.*—During the pendency of a suit, a Receiver was appointed on the motion of the defendant who was in the end unsuccessful and mesne profits were awarded to the plaintiff. If the plaintiff is unwilling to a deduction being made in respect of the expenses of the Receiver, he should object in the execution department. KAZEE MAHOMED IBRAHIM v. LALLAH JUSSODALAL, **W.R. 1864, 247.**

(761)—*S. 47 (=old s. 244)—Judgment-debtor party to suit in representative capacity—Right to execute decree against private property of such judgment-debtor.*—Any question arising as to the right to execute a decree under s. 203, Act VIII of 1859, against the private property

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of a judgment-debtor who is a party to the suit in a representative capacity, on the ground that he had received the property of the deceased, or that it was really that of the deceased, is cognizable, and may be determined during the execution-proceedings. OSEEMUNNISSA KHATOON v. AMEEROONNISSA KHATOON, **20 W.R 162.** [*F.*, 16 C. 603, 16 C. 1, 9 B. 458 ; *R.*, 8 A. 626.]

(762)—*S 47 (—old s.* **244**)—*Decre executed—Subsequent proceedings — Illegality.*—Proceedings subsequent to execution and continued after the decree has been satisfied are illegal. JUGUT CHUNDER BHADOOREE v. SHIB CHUNDER BHADOOREE, **16 W.R. 269.**

(763)—*S. 47—Separate suit for questioning validity of execution-proceedings* —The validity of proceedings in execution cannot be questioned by a separate suit. URDHUL CHURN DEBTA v. SOOKDEB DEBTA, **24 W.R.45.**

(764)—*S. 47 (=Civ. Pro. Code*, 1882 *s, 244,*) —*Sale in execution of decree—Compromise--Suit to set aside compromise and sale barred.*—In execution of a money-decree the decree-holder purchased the property of the judgment-debtor for three-fourths of a decree amount. During the pendency of an objection by the latter to the sale, the latter's son entered into a compromise with the decree holder (purchaser) to the effect that the sale was to be confirmed, as if it was in full satisfaction of the decree. A suit by the judgment-debtor for a declaration that the compromise and the confirmation of sale was collusive and not binding on him, was *held* barred by s. 244, Civ. Pro. Code. ADHAR SINGH v. SHEO PRASAD, **24 A. 209= A.W.N. 1902, 18.** (19 I.A. 168, *R.*) [*D.*, 10 O.C. 199.]

(765)—*S. 47 (=Civ. Pro. Code*, 1882, *s 244*) —*Suit by judgment-debtor to set aside execution-sale—Question for Court executing decree—Fresh suit.*—A suit by a judgment-debtor is not maintainable for recovery of possession of immoveable property, sold in execution of a decree, and for setting aside such sale, on the ground that the property was not liable, under s. 9 of the Rent Act, to be sold in execution of a decree. The question being one for the Court executing the decree, a fresh suit in respect of it is barred by s. 244 of the Civ. Pro. Code. JANKI SINGH v. ABLAKH SINGH, **6 A. 393= A.W.N. 1884, 135.** [*F.*, 6 A. 448 ; *D*, 7 A. 641.]

(766)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Fresh suit to set aside execution-sale—Relief as between co-defendants.*—Where the occupancy rights of a judgment-debtor are sold in execution of a decree, a fresh suit by him, to set aside such sale, on the ground that such sale is illegal, is not maintainable with reference to the terms of s. 244. Civ. Pro. Code. (6 B. 393, *F.*) [*D.*, 7 A. 641.] Where, under the above circumstances, the judgment-debtor sues the decree-holder and the auction-purrhaser, and the Court passes a decree that the sale may be set aside (assuming it can pass such a decree), it cannot order the decree-holder to refund the purchase-money to the purchaser, for that is a matter between co-defendants which could not be raised or decided in this suit. RAM GOPAL v. KHIALI RAM, **6 A. 448=A.W.N. 1884, 159.**

(767)—*S 47 (=Civ. Pro. Code*, 1882, *s. 244*)—*Auction-puschasers.*—Auction-purchasers must be regarded as within s. 244, Civ. Pro. Code, in all matters of dispute in which they are concerned. MOHIM CHANDRA BHUTTACHARJEE v RAM LOCHAN DEY, **7 C.W.N. 591.** (19 C. 683, *Rel. on.*)

(768)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Money paid on pre-emption-decree—Amount increased on appeal—Suit for refund of money paid by assignee of right.*—The successful plaintiff in a pre-emption-suit paid the purchase-money fixed by the Court. The appellate Court modified the decree by fixing a larger amount as the purchase-money. The pre-emptor, without paying the difference, assigned his right to recover the sum paid under the first decree to another ; and the assignee brought a suit to recover that amount. *Held* that he was the representative of the pre-emptor, and that, by virtue of the s. 244, the suit was not maintainable. ISHUR DAS v. KOJI RAM. **10 A. 354=A. W.N. 1888, 57.** [*R.*, A.W.N. 1907, 183.]

(769)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Suit to set aside order in execution of decree,* —Where the object of the suit was to set aside orders passed in the miscellaneous department relating to execution of decree, *held* that such suit was untenable ; s. 11, Act XXIII of 1861, having distinctly prohibited all remedy by separate suit and the remedy provided being an appeal from the order complained of. MUSST. AMRIT KOONWAR v. LUCHMEE NARAIN, **1 Agra 93.**

(770)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*). —Where a plaintiff obtained a decree against a trustee of a mutt whose title was subsequently negatived, and the title of another to the trusteeship was declared, the plaintiff is entitled, in execution-proceedings, to bring the legally declared trustee on the record, and execute the decree against the property of the mutt. Under s. 244, Civ. Pro. Code, the questions to be decided in execution are those relating to execution, discharge, or satisfaction of the decree. But the question whether the decree was obtained by fraud or collusion is not one, which relates to the execution of the decree, but one which affects its very subsistence and validity. Such a question can only be raised by a separate suit. SUDDINDRA v. BUDAN, **9 M. 80.** [*F.*, 29 M. 553=16 M.L.J. 415 ; *Appr.*, 23 C. 639 ; *R.*, 1 O.C. 49, 12 M. 503, 18 M. 131, 22 B. 475, 19 M. 419, 23 B. 237, 7 O.C. 199, 17 M L.J. 484, 19 M.L.J. 651.]

(771)—*S. 47 (=Civ. Pro. Code*, 1882) *s. 244,* —*Damages resulting from acts done under cover*

Civ. Pro. Code Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of execution-proceedings, suit for, maintainability of—Execution Court, jurisdiction—Execution, discharge or satisfaction, relating to—Small Cause Court, reasons for finding.—Under s. 244 of the Civ. Pro. Code, the Court executing the decree could only restore to the rightful owner land of which he had been deprived in the execution-proceedings in excess of that decreed, and that where damages had resulted from acts done under cover of the execution-proceedings, either by the decree-holder, or at his instigation or suggestion, a separate suit for the recovery of such damages lies against the decree-holder. (11 W.R. 516, 12 W.R. 85, 12 B.L.R. 201, *F.*) The question of an assessment of damages for injury arising from the fact that execution was taken out in excess of the relief granted under the decree, is not one relating to the "execution, discharge or satisfaction of the decree" itself but is one outside the decree. (7 W.R. 45, *R.*) A Small Cause Court Judge is not bound to fully set out the reasons for his findings. DENO NATH BANIKYA v. RAM KUMAR CHAKRABUTTY, **6 C.L.J. 527.** (23 B. 334, 13 A. 533, *D.*)

(772)—*S. 47 (=old s. 244)—Objection of third party—Small Cause Court Act (IX of 1887).*—Where property attached is released on the objection of a third party, not being a party to the suit, a fresh suit lay regarding the same question, no appeal being preferable under s. 244 of 1882. This suit, being instituted after the 1st July, 1887, was not cognizible by a Small Causes Court. (vide art. 20, sch. II of Act XI of 1887). DEVI DITTA v. MIRAN BAKHSH, **68 P.R. 1889.**

(773)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Execution of decree—Decree becoming incapable of execution by subsequent events—Option to parties—Questions arising between parties in execution—Fresh suit—Practice.*—Suit for a declaration of the rights of the plaintiff in certain property, moveable and immoveable, and for its partition between the plaintiff and the defendants. The suit was referred to arbitration, and the arbitrator awarded Rs. 1,05,000 to be paid by the first defendant to the plaintiff—Rs. 40,000 at once and Rs. 65,000 on the plaintiff handing over to the first defendant certain moveable and immoveable property and executing certain deeds of conveyances and releases. No objection having been filed to the awarded, a decree was passed in accordance therewith. Subsequent to the decree, one of the moveable properties which the plaintiff was to deliver to the first defendant before being entitled to receive Rs. 65,000 from the latter, *i.e.*, a vessel which was at sea—was lost in the voyage. The plaintiff offered to pay its value which he estimated at Rs. 1,000. The first defendant having refused it, the plaintiff issued a notice calling upon him to show cause why, in execution of the decree, the Court should not ascertain and fix some sum as the value of the vessel to be allowed to the first defendant out of Rs. 65,000, because the vessel could not be delivered to him. The Court dismissed the notice on the ground that what it was asked to do amounted to making a fresh decree. Thereupon the plaintiffs took out a summons for an order to be made under s. 244, Civ. Pro. Code, 1882, in one of 3 alternative ways, *viz.*, (1) to ascertain and fix a sum as the value of, or compensation for the vessel which had been lost, (2) to declare that the properties in the hands of the plaintiff may be retained, used and appropriated absolutely by them, seeing that the plaintiff could not hand over all the property referred to in the decree, and that, consequently, the first defendant was not liable to pay Rs. 65,000, and (3) to restore the suit and ascertain the rights of the parties. With reference to the first prayer, the Court *held* that it could not grant it, because such prayer, if granted, would amount to making a fresh decree. The second prayer also was refused because the Court *held* that the application was not one in execution of a decree, nor was the question one arising between the parties in the course of the execution of the decree, but that the decree having become incapable of execution, the summons asked the Judge to decide what were the rights of the parties in consequence of its non-execution. As to the third alternative relief, the Court, *held* that the matters in issue in the suit had been fully heard and determined and the rights of all the parties had been settled by the decree and consequently there was nothing further to be tried. The Court could not, in this suit, after passing a decree, proceed to ascertain the rights of the parties under a state of facts quite different from those which appeared in the pleadings and arising subsequent to the decree. AHMED *bin* SHEIKH ESSA KHALLIFFA v. SHAIK ESSA *bin* KHALLIFFA, **18 B. 495.** [*R.*, 5 Bom. L R. 1036.]

(774)—*S. 47 (=Civ. Pro. Code, 1882 s. 244.)—Injunction permanent—Decree for permanent injunction—Lands purchased from decree-holder by another person—Vendee bringing a fresh suit for injunction.*—The plaintiff's predecessor-in-title obtained a permanent injunction restraining the defendants from obstructing the former in his right of way. After the decree, the plaintiff became the purchaser of the property with reference to which the right of way was enjoyed. He was again obstructed by the defendants in using the way, and filed a suit against them. The lower Courts held that the plaintiff's remedy lay in executing the decree and not in filing a fresh suit. *Held*, there was no bar to the plaintiff's suit, inasmuch as the injunction did not run with the land. JAMSEDJI MANEKJI v. HARI DAYA, **10 Bom. L.R. 18=32 B. 181.**

(775)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Question relating to execution of decree—Separate suit.*—A party injured in execution-proceedings cannot claim relief by separate

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

suit, if he has not resorted to the remedy open to him under s. 244. GURBACHAN SINGH v. RAM SAHAI, **8 P.R. 1902=163 P.L.R. 1901.**

(776)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Question in execution of decree.*—A claim for damages for injury to certain goods belonging to the plaintiff, but attached by the defendant in execution of a decree held by him against the plaintiff pending such attachment, through the alleged negligence of the defendant, is a matter which should be determined by a separate suit and not by the Court executing the decree under which the goods were attached. LUCHMUN DOSS v. HEERA LAL, **3 N.W.P. 187.**

(777)—*S. 47 (=Civ. Pro. Code, 1882) s. 244, —Suit for actual Possession—Limitation proceedings in execution—Delivery of formal possession*—Delivery of formal possession in execution of a decree effects a complete transfer of the property and furnishes a good foundation for a suit when the defendant refuses to deliver up actual possession. S. 244 of the Code does not bar a suit for actual possession inasmuch as the proceedings in execution end with the delivery of formal possession. JAGAN NATH v. MILAP CHAND, **3 A.L.J. 504=A.W.N. 1906, 213=28 A. 722.** (11 C. 93, 24 C. 715, 19 A. 499, *R.*) [*R.*, 30 A. 231=A.W.N. 1908, 93=5 A.L.J. 547.]

(778)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Symbolical possession — Separate suit—Question of maintainability of suit—Second appeal.*—The delivery of formal possession in execution of a decree for possession gives a cause of action against a person in actual occupation of the property. His occupation in spite of the execution is that of a trespasser who commits a fresh act of dispossession, and a separate suit therefore lies for recovery of possession from him. A question was raised whether it was open to a defendant, who had contested a suit for possession on the ground of limitation in the lower Courts, could raise the contention for the first time in second appeal that the suit was barred under s. 244, Civ. Pro Code. But the point was not decided. HASSAN RAJA CHAUDRY v. KALIDAS CHANDRA SINGHA, **8 C.W.N. 49.**

(779)—*S. 47—Possession by decree-holder of land not included in decree—Decree relating to—Questions relating to execution of decree—Separate suit.*—The questions relating to the possession by a decree-holder of land not covered by the decree, are distinct from those relating to the execution of the decree, and should form the subject of a separate suit. SHURUT SOONDUREE DABEE v. PURESH NARAIN ROY, **12 W.R. 85.**

(780)—*S. 47 (=(c), Civ. Pro. Code, s 244 1882)—Application of, where objection is raised to the decree itself, and not to its execution, &c, —Objection by party defendant to sale of mortgaged property ordered to be sold by decree.*—Where, on an applicalion to make a mortgage-decree absolute and for an order for the sale of the property, a party defendant seeks to stop the sale, contending that the decree passed against him is not binding on the property, on the ground that, since the decree, he has been adopted into the family of another person to whom the property belongs, the objection is an objection to the decree itself, and not to the execution, discharge or satisfaction of the decree, and, therefore, s. 244 (*c*) does not apply to the case. KUMARATTA SERVAIGARAN *alias* CHINNASWAMI v. P.L.S.A.R. SABAPATHY CHETTIAR, **16 M.L.J. 548=30 M. 26.** (19 A. 480, 21 A. 277, 25 C. 133, 32 C. 262, *F.*; 7 M. 255, *D.*) [*R.*, 31 M. 135=18 M.L.J. 21=3 M.L.T. 325, 32 M. 429=19 M.L.J. 401=2 Ind. Cas. 18.]

(781)—*S. 47 (=Civ. Pro. Code, 1882, s 244)—Mortgage-decree against member of undivided family—Surviving member brought on record on death of judgment-debtor—Objection by surviving member to sale in execution—Determination by separate suit.*—Where, in a family consisting of two brothers, one of them mortgaged the entire family property and died after the decree on the mortgage had been made absolute, an objection to a sale in execution of the decree raised by the other brother on being brought on record as the judgment-debtor could not be adjudicated in execution-proceedings but could be determined only by a separate suit. RAMCHAND v. JADHO, **12 C.P.L.R. 73.** [19 A. 480, 25 C. 133, *F.*; 7 M. 255, note, *F.*]

(782)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Mortgage simple but to becomes usufructuary on default—Decree giving possession to mortgagee—Mortgagor's remedy to recover possession.*—Where a mortgage was simple but was to become an usufructuary one if the money due on it was not paid by a certain date, and the money was not paid, and the mortgagee obtained a decree declaring him entitled to remain in possession until the debt was satisfied from the usufruct, the mortgagor could not apply in the execution department, under s. 244, to recover possession on the ground that the debt had been discharged by the usufruct, and his proper remedy was by way of a suit for redemption. HAR PRASAD v. SHEO RAM, **20 A. 506=A.W.N. 1898, 139** (12 B.H.C. 160, 14 B. 327, *R.*)

(783)—*S. 47 (=s. 244, Civ. Pro. Code, 1882)—Mortgage—Redemption—Possession — Separate suit.*—In a suit for redemption by *B*, the eldest son of the mortgagor, a consent-decree was passed whereby *B* was to pay Rs. 250 in yearly instalment of Rs. 50, and he obtained possession of the property. In default of payment of any one instalment the property was to revert to the possession of the mortgagee; but *B* was at liberty to pay the whole of the balance due at the end of any Chaitra and the mortgagee was to re-deliver possession. On a default in payment by *B*. the property went into the possession of the mortgagee. *B* having died in the meanwhile. his younger

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

brother filed a separate suit to redeem the property: *Held*, that the separate suit was maintainable. GOVINDA v. BABAJI, **6 Bom. L.R. 1100.**

(784)—*S. 47—Decree—Execution—Act XXIII of 1861, s. 11—Mortgage—Redemption.*—The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an indenpendent suit for thatpurpose and not by means of an application to the Court, passing a decree for possession in favour of the heirs of a mortgagee for further execution thereof, by taking an account. RAVJI SHIVRAM JOSHI v. KALURAM, **12 B.H.C. 160.** [*Appr.*, 20 A. 506; *F.*, 12 B.H.C. 163; *R.*, 14 B. 327.]

(785)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Sale of mortgaged property by mortgagee—Suit to set aside sale—Right of judgment-debtor's son to sue for redemption.*—Where mortgaged property sold by the mortgagee in contravention of the provisions of s. 99 of the Transfer of Property Act, the judgment-debtor's son who was not a party to the proceedings, would not be barred by the provisions of s. 244, Civ. Pro. Code, from instituting a suit for redemption of his share. MUTHURAMAM CHETTI v. ETTAPPASAMI, **22 M. 372=9 M.L.J. 113.** [*F.*, 4 A.L.J. 787=1908. A.W.N. 1. 30 M. 362=17 M.L.J. 325; *R.*, 8 O.C. 327, 35 C. 61=11 C.W.N. 1011=5 C.L.J. 320, F.B.]

(786)—*S. 47 (Civ. Pro. Code, 1882, s. 244) —Decree for sale of mortgaged property—Power of Court executing decree—Objection not entertainable as to validity of mortgage and decree.*—The decree in this case was a decree for the sale of the property mortgaged, and plaintiffs who were parties to the execution-proceedings in the character of legal representatives of the judgment-debtor were held not entitled to dispute the validity of the decree or the mortgage. S. 244 of the Civ. Pro. Code, cannot cover such an inquiry. Where a decree specifically orders the sale of particular property, the Court executing the decree is bound to execute it as it stands and any question relating to the validity of the decree or the mortgage on which the decree was passed will have to be decided only in a separate suit. The case of a decree for money in which, after the death of the debtor, property is attached as the assets of the debtor and in which the legal representatives of the deceased debtor object to the attachment on the ground that the property attached is no part of the assets of the deceased debtor, is different from the case of a decree which order sale of specific property, for in such latter case no question of assets could arise. LILADHAR v. CHATURBHUJ, **21 A. 277=A.W.N. 1899, 64.** (22 B. 225, 12 A. 313, 19 A. 481, A.W.N. 1899, 24, *R.*) [*F.*, 32 C. 265. 31 A. 45=A.W.N. 1908, 288=5 A.L.J. 745; *Appr.*, 21 A. 356, 30 M. 26=16 M.L.J. 545; *R.*, 105 P.R. 1900, 6 Bom. L.R. 1043, 32 M. 429=19 M.L.J. 417; *D.*, 5 A.L.J. 550=A.W.N. 1908, 92.]

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(787)—*S. 47—Decree—Execution—Mortgage —Possession by mortgagee till payment of mortgage-debt—Procedure on payment of money.*—A mortgagee took possession of the mortgaged property, under a decree obtained by him against the mortgagor, directing that the mortgagee should remain in possession until the mortgage-debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application. *Held* that such an application was not the proper procedure for the mortgagor to rdeeem the property and to recover possession from the mortgagee, the former decree for possession having been fully executed when the mortgagee was put into possession. RAM CHANDRA BALLAL v. BABA ESGONDA, **12 B. H.C. 160.** *F.* [*Appr.*, 20 A. 506; *R.*, **14 B. 327.** 19 B. 140.]

(788)—*S. 47 (=Civ. Pro. Code. 1882 s. 244, —Partition decree—Partition under a decree—Suit—Application.*—Where a partition in interest is once effected by a decree between the co-parceners, a suit, and not an application under s. 244 of the Civ. Pro. Code. is the proper proedure whereby to obtain a partition by metes and bounds. LADE v. SADASHIVA **6 Bom, L.R. 35.**

(789)—*S. 47 (=Civ. Pro. Code. 1882 s. 244) —Question ralating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction-purchaser pendente lite.*—One Walayati Begam obtained a decree for possession of a share in certain joint and undivided zemindari property, and this decree was executed so far as might be by delivery of former possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money-decree against another co-sharer in the zemindari and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for partition of her share, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in s. 244 of the Code of Civil Procedure WILAYATI BEGAM v. NAND KISHORE, **A.W.N. 1908, 93 =30 A. 231=5 A.L.J.547.** (26 A. 447, *D.*; **28 A. 122, *R.*)**

(790)—*S. 47 (=Civ. Pro. Code, Act XIV of 1882, s. 244)—Decree for possession—Partition proceedings while suit pending and before execution, result of—Successon suit for declaring that judgment-debtor's interest in parent estate passed by partition proceedings to another estate.*—A purchased a portion of a joint estate from B, one of the co-sharers and also obtained a decree against the latter for possession. But

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before execution, a partition of the estate was effected by the Collector, as the result of which *B* got a separately numbered estate for his share, which was smaller than the original estate. *A* then sued to have it declared that *B's* share in the original parent-estate passed into that which he acquired by the partition. *Held*, that s. 244, Civ. Pro. Code, did not bar the suit. The transformation required could not be effected without altering the decree given in the former suit, and no Court of execution had any authority so to alter the decree that was sought to be executed in the execution-proceedings; the question arising in the subsequent suit, though it was between the same parties could not be regarded as one relating to the execution of the decree in the former suit. KISHEN ROY v. JAWAHIR SINGH, **20 C. 260.**

(791)—*S. 47 (=old s 244)—Question of mesne profits.*—If the question of mesne profits is not dealt within the decree, a seperate suit for its recovery is maintainable. Where a decree-holder, who had come into possession legally in execution, was finally held not entitled to such possession until he paid a certain sum, his possession was held to be wrongful for which mesne profits were claimable. JAMYAT SINGH v. NIHAL CHAND, **60 P.R. 1890.** [*R.*, 29 P.R, 1902=83 P.L.R. 1902; *Cited*, 29 P.R. 1902=83 P.L.R. 1902.]

(792)—*S. 47 (=old s. 244)—Money taken out of Court—Interest on such—Fresh suit barred.*—Interest on money taken out of Court in satisfaction of a decree is to be recovered in execution-proceedings and not by a separate suit. SHADI LAL v. MEHTAB CHAND, **82 P.R. 1896.**

(793)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Question of liability for wrongful seizure in execution — Separate suit*—Where property attached in execution of a decree is found by the Court executing the decree to have been wrongfully seized, the question of the legal liability of the plaintiff of the loss sustained can only be determined by a separate suit, and an order adjudging such liability passed in execution of the decree will be set aside as illegal. MRS. ELIZABETH WRIGHT v. SEETA RAM, **2 Agra 105.**

(794)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Monthly allowance, payment under decree—Cause of action—Separate suit on failure to pay.*—Where by a decree the plaintiff's right to a monthly allowance was declared, *held* that any failure on the part of the person bound to pay by the terms of the decree would constitute a good cause of action; and a fresh suit brought on the assertion of payment being withheld would not be affected by the provisions of s. 11, Act XXIII of 1861. NAWAZISH ALY BEG v. VILAYTEE KHANUM, **2 Agra 23.**

(795)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Decree—Satisfaction—Act XXIII of 1861, s. 11—Value of elephant taken in satisfaction of decree, but not delivered—Separate suit.*—The plaintiff held a decree against the defendants, and agreed to take an elephant in satisfaction, the defendants undertaking if satisfaction were entered up to be responsible for the value of the elephant, should it be claimed and recovered by any other person. It was so claimed and recovered, and the plaintiff sued for its value. *Held*, that the suit was not barred by s. 11 of Act XXIII of 1861. MUTHRA CHOWDRY v. SHEORUTTUN MULL, **6 N.W.P. 126.**

(796)—*S. 47 (=Civ. Pro. Code, 1882 s. 244,)—Representative—Purchaser from judgment-debtor during attachment subsequently set aside—Suit, maintainability of.*—A purchaser of the property of the judgment-debtor, during the pendency of an attachment subsequently set aside, cannot be deemed to be the representative of the judgment-debtor within the meaning of s. 244. Civ. Pro. Code, 1882, and, therefore, a suit against such purchaser by the decree-holder is not barred by s. 244. HAFIZ GHAFOOR-UD-DIN v. HAFIZ HAMID HUSAIN, **4 Ind. Cas. 406.**

(797)—*S. 47=(Civ. Pro. Code, 1882 s. 244,)—Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit.*—A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their ojections were overruled and they filed the present suit, *Held*, that the suit was not barred by the provisions of s. 244, Civ, Pro. Code, inasmuch as they could not contend in execution-proceedings that the mortgagor was not competent to make the mortgage. JAGARNATH SINGH v. SHIV GHULAM SINGH, **5 A.L.J. 745=31 A. 45=A.W.N. 1908, 288=1 Ind. Cas. 704.** (21 A. 277, *F.*)

(798)—*S. 47—Execution of decree against husband—Objection by widow on behalf of her minor son—Disallowance of—Suit by widow to set aside sale—S. 11, Act XXIII of 1861.*—Where a widow's objection, on behalf of her minor son, to the sale of her husband's property attached in execution is disallowed, s. 11 of Act XXIII of 1861 does not prevent her from instituting a suit to set aside the sale on the ground that the husband was not liable under the decree. ISSAN CHUNDER DOSS v. CHUNDRO BODINEE, **7 W.R. 361.**

(799)—*S. 47(=Civ. Pro. Code, 1882 s. 244,)—Hindu law—Liability of son for father's debt—Civ. Pro. Code, s. 244—Suit against son to enforce decree against father—Zemindari.*—A Zemindar represents the estate during his life for all practical purposes, and after his death, as the estate does not constitute assets which can be seized in execution, it is open to the creditor by a separate suit to enforce the debt so far as it is binding on him against the successor. A son, even in his father's life-time, is debarred from setting up that the whole undivided ancestral property is not liable for his

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father's just debts, but it is only after the father's death, when the whole estate has passed to him by survivorship, that he is under a distinct obligation to discharge the debts out of it. ARUNACHALA v. ZEMINDAR OF SIVAGIRI; ZEMINDAR OF SIVAGIRI v. ARUNACHALA, **7 M. 328.** [*F.*, 13 M. 265; *R.*, 10 M. 117, 16 M. 99, 17 M. 122, 9 B. 198, 32 M. 429=19 M.L.J. 401.]

(800)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244*) —*Hindu Law—Right of suit.*—S. 244, Civ. Pro. Code, is no bar to a suit, brought by a Shebait as such, to set aside the sale of trust property held in execution of a money-decree passed against him in his private capacity. RAM KRISHNA MAHAPATRA v. MOHUNT PADMA CHARAN DEB GOSWAMI, **6 C.W N. 663.** (17 C. 711, *R.*) [*F.*, 12 C.W.N. 308.]

(801)—*S. 47 (=Civ. Pro. Code*, 1882 *s. 244,*) —*Holder of maintenance decree—Questions between heirs of judgment-debtor and decree-holder —Questions whether to be considered in execution,* —Questions arising between the holder of a decree for maintenance and the heirs of her judgment-debtors cannot be determined in execution. *Quære.*—Where the original judgment-debtor is alive, can the holder of a decree for maintenance enforce her claim by execution without a fresh suit for each instalment unpaid. PREMOO BEEBEE v. DASSOO DEBIA, **10 W. R. 93.**

(802)—*S. 47 (=Civ. Pro. Code*, 1882 *s. 244,*)— *Simple money-decree against father—Objection to execution on sons—Fresh suit against sons instituted on strength of such objection—Estoppel.*—The defendants, the sons of a judgment-debtor objected to the execution of a decree obtained against the judgment-debtor, on the ground that the property, being ancestral, cannot be sold in execution of a simple money-decree obtained against the father, and that a fresh decree should be obtained against them. The Court dismissed the application for execution on that ground. *Held* that the defendants were not entitled to plead s. 244 of the Code as bar to a subsequent suit instituted on the strength of their former plea; and it matters nothing that the suit as framed was not exactly the suit suggested by the plea of the defendants. JAGANNADHA ROW v. KURMAYYA, **17 M.L.J. 314.**

(803)—*S. 47 (=Civ. Pro. Code*, 1882 *s. 244,*) —*One of two joint decree-holders recovering the entire decree amount, maintainability of suit against, by the other decree-holder for his share,* —Where one of two joint decree-holders receives the entire decree amount from the judgment-debtor and certifies to the Court the fact of such receipt, although such certificate does not absolve the judgment-debtor from liability, to the other decree-holder, yet the latter is not, if he elects to adopt such a course, precluded from suing to recover his share from his joint decree-holder, instead of proceeding against the judgment-debtor in execution. SOMASUNDARAM PILLAI v. KRISHNASAWMY NAIDU, **29 M. 183.**

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(804)—*S. 47 (=Civ. Pro. Code*, 1882 *s. 244,*) —*Transferee from auction-purchaser—Transferee from judgment-debtor in possession—Recovery of possession—Regular suit* —A transferee from an auction-purchaser can recover possession of property from the transferee of the judgment-debtor, by a regular suit, and not by an application under s. 244, Civ. Pro. Code. HIRA v. AMAR SINGH, **2 Ind. Cas. 454.** (31 A. 82, *R.*)

(805)—*S. 47 (=Civ. Pro. Code*, 1882 *s. 244,*) —*Auction-purchaser—Trespass by judgment-debtor, decree-holder and other persons—Suit by purchaser for compensation not barred by s. 244,* —The plaintiff purchased a *peramba* in Court auction and the sale was confirmed but before he obtained possession, the decree-holder and judgment-debtor, joined with other persons and carried away some of the materials of a building standing upon the land. *Held* that a suit for compensation against all these persons, who were joint wrong-doers was not barred by s. 244, Civ. Pro. Code, as the question between the parties was not one relating to the execution of the decree. KOLINTAVITA ANTANHODAN MAMA AMINA v. KOLINTAVITA MUYYARIKANDI BEVACHI HAJI, **17 M.L.J. 543=3 M.L.T. 97=31 M. 37.**

(806)—*S. 47 (Civ. Pro. Code*, 1882, *s. 244*)— *Delivery of property in execution of decree subsequently amended—Suit to recover property so taken away—Suit in same Court—No bar of suit,* —Where, in a prior suit by the defendant against the plaintiff and others for foreclosure of a mortgage, the Court held that the plaintiff was not liable, but the decree was wrongly drawn up against the plaintiff, also and on delivery of the plaintiff's share in execution of the decree, the plaintiff applied for and got the decree amended by bringing it in conformity with the judgment, a suit by the plaintiff to recover the property taken away from him in execution was not barred by the provisions of s. 244 of the Code, as the suit was brought in the same Court which could determine the matter in execution-proceedings and consequently there was, at most, only an error of procedure and not exercise, by the Court trying the suit, of a jurisdiction which it did not possess. SADARAM AND MOJIRAM v. DHANURJOY GOUTIA, **8 C.P.L.R. 3.** [*Cited*, 17 C.P.L.R. 178.]

(807)—*S. 47 Execution of decree—Attachment of grain—Setting aside of attachment—Suit for damages.*—*A* held a decree against *B* and in execution a certain quantity of grain belonging to *B* was attached. In appeal, the decree was set aside. Thereupon, *B* claimed damages for the injury sustained by the goods while under attachment. *Held*, that the

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matter cannot be disposed of under s. 11, Act XXIII of 1861, but must be made the subject of a separate suit. KASHEE KISHORE ROY CHODHRY v. NOOR KHAN, **7 W.R. 45.**

(808)—*S. 47—Execution of decree—Objection by judgment debtor, that the auction-purchaser had taken possession of property to which he was not entitled, maintainability of—Necessity of separate suit.* — Where a judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale-certificate gave him no title, *held*, that the question in dispute should be decided by a separate suit and could not be decided under s. 47, Civ. Pro. Code. MAHARAJ SINGH v. JAGAN NATH AND MAN RAI, **14 O.C. 70.** (31 A. 82, *R.*)

(809)—*S. 47 (=Civ. Pro. Code, 1882 s. 244.) —Decree, execution of—Interpretation.*—S. 244 of the Code pre-supposes a decree enforceable by the decree-holder, against a person between whom and the decree-holder the question has arisen, and does not apply to a question arising between a decree-holder and a person against whom there is no decree to be executed. (23 A. 346, *F.*) Hence, where, in a suit for sale upon a mortgage, a person was impleaded as defendant against whom no relief was claimed, *held* that a subsequent suit for redemption by him was not barred by s. 244, Civ. Pro. Code, 1882. SHEO PARGAS SINGH v. NAWAB SINGH, **7 A.L.J. 264=5 Ind Cas. 496=32 A. 321.**

(810)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Assignee not brought on record—Regular suit.* —The assignee of a decree applied to be brought on the record and for execution; but his petition was rejected, and he filed a regular suit for the cancellation of the order refusing execution, and for a declaration of his right to execute the decree. *Held*, that the suit was not barred by s. 244, Civ. Pro. Code, as he had not been brought on the record as decree-holder. RAMAN v. MUPPIL NAYAR. **14 M. 478.** [*R.*, 16 A. 483, 3 O C. 32, 26 M. 264.]

(811)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Objection to execution disallowed—Fresh suit for possession by objector.*—Where certain land was sold in execution, the Court having disallowed objections taken to the attachment, but the objector obtained a decree against the purchaser setting aside the Court-sale, a suit for possession by the objector was held to be not barred by the provisions of s. 244. KETLELAMMA v. KELAPPAN, **12 M. 228.**

(812)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Suit to set aside Court sale—Plaintiff no party to decree—Purchaser no party to fraud—Effect.*—It is clear that s. 244 does not bar a suit by a person who is no party to the decree from bringing a suit to set aside a sale held in execution of a fraudulent decree. In such a suit, it is not necessary to establish that the purchaser was also implicated in the fraud by which the collusive decree was obtained, and the execution-proceedings were conducted. HUNGSHA MAJILLYA v. TINCOWRI DAS KARMAKAR, **8 C.W.N. 230.** (24 W.R. 260, *D.*; 6 C.W.N. 283, *R.*)

(813)—*S. 47 (=s. 244 of 1882)—Execution-proceedings under Act X of 1859—Application of s. 244, Civ. Pro. Code, 1882 and s. 11, Act XXIII of 1861—Suit to set aside sael for fraud* —S. 244 of the Civ. Pro. Code, or the corresponding s. 11 in Act XXIII of 1861; can have no application to the proceedings in execution of a decree under Act X of 1859, and a suit lies in the Civil Court for the purpose of setting aside the sale upon the ground of fraud. BROJO GOPAL SIRKAR v. BUSURUNNISSA BIBEE, **15 C. 179.** [*R.*, 17 C. 769, F.B.]

(814)—*S. 47 (=Civ. Pro. Code, 1882 s. 244,) —Decree tainted with fraud, alleged—Suit to set aside sale in execution of* ex parte *decree.*— Proceedings, under s. 244, Civ. Pro. Code, 1882, pre-suppose the existence of a valid decree. A suit to set aside a sale on the ground of fraud, challenging the decree in execution of which the sale took place as fraudulent, is maintainable, although the said decree was set aside on the ground of non-service of summons. The plaintiff in such a case is entitled to show that the decree, under which the sale was held, was obtained by fraud as against him. RAM NARAIN TEWARI v. SHEW BHUNJAN ROY, **27 C. 197.** (21 C. 605, 24 C. 546, *Appr.*; 2 C. W N. 691, 26 C. 326, Note, 26 C. 324, 26 C. 539, *R.*) [*R.*, 5 C.L.J. 328.]

(815)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Exonerated defendant whether party to suit.* —A defendant who has been exanerated from a suit ceases to be a party to the suit within the meaning of s. 244 (*c*) of the Civ. Pro. Code. Consequently, it is open to the plaintiff-decree-holder to bring a separate suit against such defendant for recovering his share of the costs incurred in execution. GADICHERLA CHINA SEETAYYA v. GADICHERLA SEETAYYA, **21 M. 45.** [*Expl.*, 23 M. 361, F.B.; *R.*, 23 A. 346, 17 M.L.J. 416.]

(816)—*S. 47 (=Civ. Pro. Code, 1882, s 244)— Execution of decree—Questions relating to— Separate suit—Sale of property belonging to third person—Execution of decree against judgment-debtor—Rights of the person whose property has been thus sold.*—The first defendant obtained a decree on a mortgage against *X*, and in execution caused certain property to be sold which the plaintiff claimed as his own, under a sale to himself by the sons of *H*. The application of the plaintiff to have the sale set aside was rejected. He accordingly instituted the present suit against the decree-holder and the auction-purchaser for a declaration of his title to the property. The lower Court held that s. 244 was a bar to the suit. *Held*, on appeal, that s. 244 did not bar the suit. Is could have no application except as regards

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property affected by the decree, and a part of the property which was the subject of the suit was not included in the decree. The question in dispute in this suit did not arise between the parties to the former suit or their representatives. If the property of a third person is sold in execution of a decree, he is not obliged to wait until he is actually dispossessed by the auction-purchaser. The denial of his title entitles him to bring the suit. SHIVRAM CHINTAM v. JIVU. **13 B. 34.** [*Diss.*, 18 M. 13, 1 S.L.R. 158; *R.* 23 C. 62.]

(817)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Decree satisfied.*—Where a decree has been satisfied, it prevents an application under s. 244. Civ. Pro. Code, 1882. RASH BEHAR MANDAL v. RAKHAL CHARN MANDAL. **1 C.W.N. 708.** [R., 113 P.L.R. 1904=45 P.R. 1904.]

(818)—*S. 47—Decree containing penal clause —Relief against penalty in execution.*—Where a decree contains penal clauses, relief as agains the penalty cannot be granted in execution-proceedings. The general rule is laid down in s. 47 of the Code, which has been generally held to exclude all questions relating to the validity of the decree. DAYARAM JESAMAL v. ADAMJI KARIMJI, **4 S.L.R, 1=7 Ind Cas. 583.**

(819)—*S. 47 (=Civ. Pro. Code, 1882, s. 244 —No question of execution after sale unless sale set aside.*—Whether there has been a sale under a decree, and the decree-holder has been put in possession, and the judgment-debtor then presents a petition complaining of the action of the Amin in directing the delivery, the question raised by the judgment-debtor is not one arising in execution with the meaning of s. 244, Civ. Pro. Code, as, after sale, there can be no further question of execution unless, of course, it happens that the sale is set aside. KUPPUSAMI AIYAR v. RAMASWAMI AIYAR, **6 M L J. 256**

(820)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Sale-certificate, whether a separate suit to set aside a sale on the ground of fraud, is maintainable, when decree has ceased to be executable.*—Plaintiff sued to have a sale-certificate set aside. The decree in question was admittedly dead at the time he instituted the suit. It was clear, therefore, that, at the date of the suit, plaintiff could not have proceeded by way of application under s. 244 of the Code. *Held*, independent of the fact of his not having been able to make such an application at the time plaintiff became aware of the existence of the sale-certificate, there was nothing to prevent him from bringing a regular suit to set aside the certificate, if he was within limitation for a regular suit. NGA SA GYI v. NGA YE BAN, **U.B.R. 1905, Civ. Pro., 36.** (10 C. 538, 19 C. 683, 25 C. 718, 20 M. 349, 22 B. 267, 16 W.R. 269, *R.*) [*R.*, U.B.R. 1910, 4th Qr., Civ., 66.]

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(821)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Execution-sale—Suit by judgment-debtor to set aside sale.*—There is nothing in the Code which prevents a judgment-debtor from suing the purchaser to have the sale set aside on the ground that there is no saleable interest in the property, even though such a suit may not be maintainable against the decree-holder with reference to the terms of s. 244 of the Code. NARAIN v. PURAN, **A.W.N. 1883, 218.** [*R.*, 8 A. 146, F.B.]

(822)—*S. 47 (= Civ. Pro. Code, 1882, s. 244) —Party to suit not affected by decree—Separate suit.*—Where a decree passed against one defendant in a suit does not affect another defendant, nor decide the title to property set up by him, then on attachment of the property in execution against the former, it is competent to the latter as well as his transferee to maintain a separate suit for establishing his title to the attached property. The mere fact of a person having been added as a defendant in a suit, cannot, where no decree has been passed as against him, deprive him of his rights of suit and confine the determination of his rights to the execution department, if, in execution against another of the defendants, the decree-holder happens to attach the property of such person. S. 244 of the Civ. Pro. Code cannot apply so as to preclude a separate suit in such a case. The section pre-supposes a decree enforceable by the decree-holder against the person between whom and the decree-holder the question referred to arises, and has no application to questions arising between the decree-holder and persons against whom there is no decree to be executed. KALKA PRASAD v. BASANT RAM, **23 A. 346.** (11 B.L.R. 149, *F.*; 15 M. 226, 10 W.R. 191, 12 C. 458, A.W.N. 1893, 67, 11 A. 74, 18 A. 52, 23 M 361, 8 M. 473, 22 M. 131, 17 B. 49, *Diss.*; 8 A. 146, A.W.N. 1899, 184, 21 M. 45, *R.*) [*Diss*, 15 C.P.L.R. 106, 17 C.P.L.R. 178; *F.*, 29 C. 696; *R.*, 26 A. 447, 7 A.L.J. 264; *D.*, 6 Bom. L.R. 697.]

(823)—*S. 47 (=Civ. Pro. Code, s. 244)—Personal decree—Suit to establish right as trustee.*—A suit by a trustee for a declaration of his right, as trustee, to property attached in execution of a decree against him personally, is not barred by s. 244 of the Civ. Pro. Code. NATH MAL DAS v. TAJAMUL HUSAIN, **7 A 36=A.W.N. 1884, 218.** (5 A. 106, 2 A. 752, *R.*) [*F.*, 15 C. 437, 23 M. 195, F.B., 6 C.W.N. 63; *R.*, 8 A. 626=6 A.W.N. 228, 16 C. 1, 12 A. 313, F.B., 1 C.C. Sup. 11, 23 B. 237, 23 A. 263=21 A.W.N. 75; *D.*, 7 A. 547, 16 C. 603.]

(824)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Execution of decree—Question relating to execution—Claim for refund of amount realized in excess of what was allowed by decree.*—Where, after the execution of a decree is completed, the judgment-debtor applies that, as the decree-holder has realised from him more money than was allowed by the decree, refund be made to

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him of the amount due to him, the application can be treated as a review and the order granting the same is appealable. In such a case, the judgment-debtor is not required to file a separate suit for recovery of the money claimed by him. KALU KHAN v ABDUL LATIF, **113 P.L.R. 1904=45 P.R. 1904.** (P.R. 63 of 1901, S.C. 101 P.L.R. 1901, *R.*)

(825)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) Order made pursuant to an appellate decree by a subordinate Court, whether appealable.*—An order made pursuant to an appellate decree by a Subordinate Judge is an order made in execution and so appealable. PRAYAGA DOSS JEE VARU, MAHANT v. TIRUMALLIA ANANDAM PILLAI PURASA SRIRANGA CHARULU VARU, **4 M.L.T. 92=31 M. 406.** (17 M. 343, *F.*)

(826)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Property attached not private property of judgment debtor - Question in execution.*—In execution of a money decree, certain properties were attached as the private properties of defendants 2 and 3. The 6th defendant in the suit objected on the ground that the properties were not the private properties of defendants 2 and 3, but belonged to a *tavazhi* consisting of defendants 1 to 9. *Held* that the question was one falling within s. 244 of the Civ. Pro. Code, and an appeal lay from the order of the Court of first instance. (23 M. 361, *F.*) RANGAN PATTAR v. LAKSHMI NEITHIAR, **14 M.L.J. 137.** [*R.*, 30 M. 215=17 M.L.J. 377=2 M.L.T. 31, 8 C.L.J. 20.]

(827)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Legal representatives of a deceased decree holder—Representatives—Revision.*—The Code of Civil Procedure contains no provision under which a representative of a deceased decree-holder can have his name entered on the record when nothing remains to be done under the decree beyond its execution. An order refusing to such a representative his claim to continue the execution-proceedings, cannot be interfered with, by way of revision, but is open to appeal under s. 244 of the Code of Civil Procedure. JESHANKAR v. PANDYA FULIA, **2 Bom. L.R. 887.**

(828)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Death of respondent—Representatives brought on record—Dispute inter se as to right to execute decree—Question whether open.*—The plaintiff respondent to an appeal having died, some persons were brought on the record by the defendant-appellant as his representatives. On the dismissal of the appeal, some of the persons thus brought on the record applied for execution of the decree, excluding the rest on the ground that they were not real representatives. The application was objected to by the persons excluded, who claimed also to be entitled to the benefit of the decree. The first Court stayed proceedings and referred the parties to a regular suit. On appeal, the District Judge directed that the point in dispute should be determined in execution. *Held* that an appeal lay to the District Judge inasmuch as the first Court passed a definite order rejecting the application to execute the decree until it had been decided in a seperate suit as to who were the legal representatives of the original plaintiff. *Held*, also, that the first Court had no jurisdiction in execution to re-open the question as to whether certain persons brought on the record of the suit as representatives of the deceased plaintiff and as such made respondents in the appeal had been properly joined as parties or not. The matter was settled by the Appellate Court before passing its decree and therefore could not be questioned in execution. The orders of the first Court and the District Court were both set aside. VENKATACHALLA REDDI v. VENKATARAMA REDDI, **24 M. 665.**

(829)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) — Redemption — Enlargement of time.*—An order declining to enlarge the time fixed for redemption is appealable under s. 244, Civ. Pro Code, 1882 RANGO v BHOMSHETI, **3 Bom L.R. 554=26 B 121.** [*F.*, 5 Bom. L.R 719; *R.*, 28 B. 102, 6 A. L. J. 537.]

(830)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Conditional vendee purchasing from mortgagor —Representative of mortgagor.*—Persons holding a deed of conditional sale, but eventually become the owners of the property concerned by purchase under a private sale from their mortgagor, should be considered his representatives for the purposes of s. 244 of the Civ. Pro. Code, consequently on an order disallowing their objection to an execution against the property, of which they had become the owners, an appeal is the proper remedy and they are not entitled to bring a separate suit. JANKI PRASAD v. ULFAT ALI, **16=284 A, A.W.N. 1894, 151.** [*Appr.*, 20 M. 378=7 M.L.J. 89; *R.*, 1 N.L.R. 49.]

(831)—*S. 47 (=Civ. Code, 1882, s. 244) —Question as to the discharge or satisfaction of a decree—No application for execution pending.*—Where a Court is dealing with a question relating to the discharge or satisfaction of a decree, it may be said to be executing the decree in the sense of s. 244, Civ. Pro. Code, although no formal application for execution may have been made to it, and an order passed by the Court on such a question is a decree and is appealable RAM KAMLESSURI PERSHAD SINGH v. SUKHAN SINGH, **7 C.W.N. 172.** [*R.*, 12 C.W.N. 282=7 C.L.J. 581.]

(832)—*S. 47—Execution Court, if may investigation validity of decree—An order improperly passed under s. 47, if appealable.*—Where a jurisdiction is usurped by a Court in passing an order against which an appeal would lie, appeal against the order cannot be defeated by showing that the order was without jurisdiction. So where a Court purporting to act under s. 47, Civ. Pro. Code, directed execution

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to proceed against a minor, and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor, *held*—that the fact that, on the appellant's own showing, the minor would not be a party to the decree within the meaning of s. 47 and thus the order would not be an order under s. 47, would not make the appeal incompetent. An execution Court must proceed on the assumption that there is a valid decree capable of execution, and it is not open to it to investigate the validity of the decree or its binding character. MOHARAJ KUMAR BINDESWARI CHARAN SINGH v. THAKUR LAKPAT NATH SINGH, **15 C.W N. 725.**

(833)—*S. 47—Decree for possession of land—Execution—Objection by defendant—Appeal.*—On a plaintiff endeavouring to obtain possession of land which had been decreed to him and to pull down buildings, he was opposed by the defendant. The plaintiff thereupon applied to the Court executing the decree but was referred to a fresh suit on the ground that the decree was silent about the demolition of buildings. *Held* he should appeal against such order as a matter to be determined in execution and that no fresh suit lies. RADHA GOBIND SHAHA v. BROJENDER COOMAR ROY CHOWDHRY, **7 W. R 372.**

(834)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) Decree against debtor's representatives, attachment of property in execution of, order disallowing objection to, appealability of.*—Where the plaintiffs, executing a decree obtained by them against the representatives of their debtor, proposed to sell certain property which the defendants alleged was their own private property, and the Court passed an order against the defendants, *held* that, for the purposes of an appeal by the latter, such order was one passed under s. 244 of the Civ. Pro. Code, notwithstanding that the defendants had alleged that the property was their own private property and not such property as could come within the scope of the decree. MULMANTRI v. ASHFAK AHMED, **9 A. 603.** (7 A. 547, 7 A. 733 *F*; 2 A. 752, 4 A. 190, 6 A. 109, 11 B.L.R. 149, 20 W.R. 280, 7 M. 255, *R.*) *R.*, 12 A. 313, F.B., 12 A. 73, 17 M. 399; *D.*, 11 A. 74=8 A.W.N. 275, 15 C. 437.

(835)—*S. 47 (=Civ. Pro. Code, XIV of 1882, s. 244)—Under-valuation of property in sale-proclamation, order dismissing application for stoppage of sale on the ground of, appeal lies against.*—An application made by the defendants for an order that the sale under the execution petition put in by the plaintiff should not be proceeded with, because in the sale-proclamation, the value of the property had been under-estimated, was dismissed on the ground that the alleged under-valuation was immaterial. The question raised by the defendant's application was held to be a question falling under s. 244 of the Civ. Pro. Code, and so long as the order of dismissal of the application was one determining such a question, an appeal would lie from such order. SIVASAMI NAICKAR v. RATNASAMI NAICKAR, **23 M. 568=10 M.L.J. 314.** [*Diss.*, 27 M. 259=14 M.L.J. 57; *F.*, 8 C.W.N. 257; *R.*, 6 M.L.T. 252; *D.*, 31 C. 922 =8 C.W.N. 264.]

(836)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) Execution of decree—Property not in suit come into custody of Court, order dismissing application for delivery of, appealability of.*—Where, in the course of the execution of a decree, certain property not comprised in the decree was taken possession of by the Court's officer and brought to the Court, an order of the Court dismissing the application of the defendant for the delivery back of such property, was held to be an appealable order. The question which arose as to what should be done with the property was one between the parties to the suit, and as such property was interfered with in course of the execution, the question involved was also one relating to the execution of the decree. The above order, therefore, was one falling under s. 244 of the Civ. Pro. Code, and consequently an appeal lay therefrom. APPA RAO v. VENKATARAMANAYAMMA, **23 M. 55.** (5 M.H.C. 185, 12 B.L.R. 201, *R.*) [*R.*, 5 P.R. 1907=23 P.L.R. 1908=40 P.W.R. 1907.]

(837)—*S. 47 (=Civ. Pro. Code, 1882, s. 244)—Decree against karnavan as senior member and manager of tarwad—Objection by members of tarwad to attachment of tarwad property—Release of attachment—Suit to set aside order.*—Plaintiff had obtained a decree against a karnavan as senior member and manager of a tarwad. In execution of the decree he attached certain tarwad property. Some members of the tarwad objected that the tarwad property was not liable under the decree, and the attachment was raised. Plaintiff now sued to set aside the order releasing the property from attachment. *Held* that the defendants were, in the absence of proof of fraud, bound by the decree obtained against their karnavan, who was sued as senior member and manager of the tarwad. Since they were bound by the decree, they could not be treated as strangers to the decree for the purposes of execution. Their claim must be considered to have been dealt with under s. 244, Civ. Pro. Code. Plaintiff's remedy was therefore by way of appeal against the order of release and not by a regular suit. KAMAL KUTTI v IBRAYI, **24 M. 658.** [*R.*, 30 M. 215 =17 M.L.J. 377=2 M L.T. 31.]

(838)—*S. 47 (=Civ Pro. Code, 1882, s. 244)—Appealability of order falling within.*—If, as between the assignee of a decree and the judgment-debtor, any question is decided which falls within the scope of s. 244, the decision is open to appeal. CHHOGMAL SEPANI v. GOVIND PERSHAD MAHAJAN, **18 C.P.L.R. 69.** (7 A. 457, 11 C. 393, Note, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(839)—*S. 47 (=Civ. Pro. Code, 1882, s. 244) —Direction by High Court to take account of amount due under mortgage—Order of Court directed declaring amount due—Appeal* —A District Court passed an order declaring in Court, under s. 88, T.P. Act, the amount due to a decree-holder for principal and interest due on a mortgage on taking accounts as directed by a decree of the High Court. The decree-holder preferred an appeal against the order. *Held* that the order appealed against was one falling under s. 244 (*c*), Civ. Pro. Code, as it was a question arising between the parties to the suit in which the decree was passed on appeal by the High Court and relating to the execution of that decree. Consequently an appeal lay against the order. THE ARYAN BANK OF VIZAGAPATAM v. KAMMA VENKATA NARASAYYAMMA GARU, **26 M. 237.**

(840)—*S. 47 (=s. 244, Civ. Pro. Code*, 1882) —*Order passed in execution between parties to suit—Decree—Appeal — Execution of decree—Varying of decree.*—All orders passed in execution between parties to the suit in which the decree was passed, or their representatives, fall under s. 244, though they may be passed under any of the succeeding sections dealing with the execution of decrees, and, if such orders are not specified in s. 588, they are decrees and are appealable. A Court executing a decree has no power to vary the decree, however harsh it may seem. MAUNG LU NYO v. KAUNG HLA PYU, **L.B.R. 1893—1900, 375.**

(841)—*S. 47 (=old s. 244)—Pre-emption-decree—Question of payment in time in a pre-emption suit.*—Case where it was held that the question whether money was deposited in Court in time in a pre-emption suit was one under s. 244 and that an appeal lay from the decision thereof. SAGHAR MAL v. HYAT, **38 P.R. 1898.**

(842)—*S. 47—Application for execution of entire decree by one decree-holder—Dismissal of application—Appeal.*— Case where an appeal was held to lie to the Divisional Judge. Where an application, under O. 21, r. 15, was rejected without summoning the judgment-debtor and where such debtor was not impleaded on appeal, the appellate Court might have no jurisdiction to decide the appeal; but where, in such appeal the judgment debtor is made a party the question comes under old s. 244, Civ Pro. Code, and an appeal would then lie. MIR KHAN v. JUIDE KHAN, **28 P.R 1898.** (17 M. 394, *F.*)

(843)—*S. 47 (=Civ. Pro. Code*, 1882, *s 244) —Execution of decree—Joint decree—Purchase by decree-holders—Receipt for part of decretal amount given by one decree-holder on behalf of both—Sale set aside—Appeal* —An order setting aside a sale on the ground that only one of the two decree-holders-purchasers who were allowed to deduct the sale-price from the decretal amount had put in the receipt, when the other admitted that the receipt was presented on his behalf also, was held to be a decree under s. 244, Civ. Pro. Code, within the meaning of that word as defined in s. 2 of the Code, and was, therefore appealable. MAKKA v. SRI RAM, **24 A. 108 = A.W.N. 1901, 169.**

(844)—*S. 47 (=s 244, Civ. Pro. Code*, 1882) —*Delivery to auction-purchaser of more than what was contained in sale-certificate—Objection of judgment-debtor disallowed — Appeal.* — Certain landed property was put up for sale in execution of a decreee; and upon that property stood a house. After sale, the auction-purchaser obtained possession of the house. The judgment-debtor then objected that the house should not have been delivered over, on the ground that no mention of it was made in the sale-certificate; but the objection was disallowed. *Held* that the order of the Court disallowing the objection was not an order under s. 244, Civ. Pro. Code, nor was it otherwise appealable. RAM ADHAR v. NARAIN DAS, **24 A. 519 = A.W.N. 1902, 144.** (20 M. 487 13 C. 326, *R.*)

(845)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244) —Attachment of decree—Objection by judgment-debtor—Whether appeal lies.*—Where the respondent holding a money-decree against the holder of a mortgage-decree, attached that decree in execution, and obtained a decree for sale of the attached decree overruling an objection on the part of the judgment-debtor therein that the decree had been satisfied, *held* that there was no appeal from the order under s. 244 of the Civ. Pro. Code. The order was not passed in execution of the decree to which the objector was party but of the decree to which he was no party. ISHRI DAT v. MEWA LAL, **26 A. 136.**

(846)—*S. 47 (=Civ. Pro. Code, Act XIV of* 1882, *s. 244 (c)) —Application by auction-purchaser as to extent of land sold—Appealability.* —Where an application was made to the Court by the auction-purchaser after confirmation of sale but before issue of sale-certificate as to whether certain buildings were included in the property sold, the question raised was not one between the judgment-debtor and the judgment-creditor within the meaning of s. 244 of the Civ. Pro. Code, and there would be no appeal from an order on the application. The sale itself being valid between the parties, the judgment-creditor had no interest in the determination of the question. MAMMOD v. LOCKE, **20 M. 487.** [*F.*, 24 A. 519 = 22 A.W.N. 144; *R.*, 25 B 418, 45 P.R. 1904 = 113 P.L.R. 1904, 30 M. 507 = 17 M.L.J. 291.]

(847)—*S. 47 (=s. 244, Civ. Pro. Code.* 1882) —*Jurisdiction—Appeal — Executing Court—Order that the original Court had no jurisdiction to pass the decree.*—Where the executing Court, under s. 225 of Civ. Pro. Code, 1882, comes to the conclusion that the first Court had no jurisdiction to pass a decree and declines to become the executing Court, the

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

order so passed does not fall within the purview either of s. 245 or 588 of the Code and cannot be appealed against. BHAGVANTAPPA v. VISHWANATH, **6 Bom L.R. 342=28 B. 378.** [*D.*, 30 B. 101=7 Bom.R. 659.]

(848)—*S. 47 (=Civ. Pro. Code*, 1882, *s. 244) —Sale in execution of decree—Reversal of decree—Effect.*—Where the appellate Court made a new decree and set aside the decree passed by the first Court, the sale which took place in execution of the decree which was set aside by the appellate Court, cannot stand. CHANDAN SINGH v. RAMDENI SINGH, **31 C 499.** (10 A. 166, P.C. 27 C 810, *R.*) [*R.* 6 C.L.J. 92, 6 C.L.J. 102, 13 C.W.N. 710.]

(849)—*S. 47 (=old s. 244)—Sale in execution —Confirmation—Appeal—Remand for determination of title—Validity of sale.*—Where the sale in execution of two out of three parcels of land is confirmed before the appeal comes on for hearing, and the appellate Court, in ignorance of the fact, remands the case with a view to a determination of the title of the objectors: *Held*, that the sale cannot be set aside, but that before the third parcel is sold, the issue referred to the lower Court by the remand order should be tried. POOTEE BEGUM v. MAHARANEE INDURJEET KOOER, **12 P W R. 201.**

(850)—*S. 47 (=old s. 244)—Order as to costs —Reversal on appeal—Summary restitution.*—Where an order as to costs is reversed on appeal, the Court can order summary restitution of such costs if realised already. THAKAR MAHAN CHAND v. LALA GANDA MAL, **49 P. R. 1896.** [*R.*, 53 P.R. 1906=103 P.L.R. 1906.]

(850-a)—*S. 47—Court-sale—Defaulting purchaser—Re sale—Deficiency in price—Recovery of deficiency from defaulting purchaser—Suit for recovery of amount so realised—Not barred.*—S. 47 (1), Civ. Pro. Code, 1908, does not bar a separate suit by a person, who, as defaulting purchaser in a Court-sale, was ordered to make good the deficiency in price that resulted in consequence of a re-sale, for setting aside the order and for recovery of the sum of money realised from him on account of such deficiency. PARBAT v. BINDRAJ, **7 N L.R. 134.**

(850-b)—*S. 47 (=Civ. Pro. Code*, 1861, *s. 11 —Person sued in representative character——Party to suit.*—A person sued in a representative capacity cannot always be regarded as not a party to the suit, within the meaning of s. 11 of Act XXIII of 1861. There are cases, in which even a person sued in a representative character can be made personally liable, *e.g.*, where such person has inherited assets from a deceased person but has not duly accounted for the same. In a case, then, in which a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, there is no good reason for saying that he should not be considered a party to the suit with respect to any question, which may arise between him and the other parties, relating to the execution of the decree, within the meaning of s. 11 of Act XXVIII of 1861. In this case, where there was no decree in a previous suit warranting execution against the plaintiff's estate the (plaintiff having been sued in a representative character) *held*, there being no question in the previous suit properly relating to the execution of the decree therein, that, therefore, the present suit which called in question the validity, as against the plaintiff, of a sale in execution of the decree in such previous suit, was maintainable. CHOWDHRY WAHED ALI v. MUSSAMUT JUMAJEE, **11 B L R. 149=18 W.R. 185.** [*F.*, 7 A. 547, 9 B. 458, 88 P.R. 1886, 16 C. 603, 19 B. 328, 21 A. 323, 23 A. 346, 6 C.W N. 10=30 C. 134, 26 M. 501; *Appl.*, 87 P.R. 1897; *Rel. on*, 7 M. 255; *R.*, 20 W.R. 31, 20 W.R. Cr. 162, 20 W.R. Cr. 280, 2 C.L.R. 189, 5 M. 391, 11 C. 376, 9 A. 605, 11 M. 413, 15 C. 437, 16 C. 1, 12 A. 313, 12 M. 387, 17 B. 49, 18 B. 495, 16 A. 449, 23 B. 237, 23 M. 195, 14 M.L. J. 137, 34 C. 642=11 C.W.N. 593=5 C.L.J. 491, 11 Bom. L.R. 699=3 Ind. Cas. 763; *Cons.*, 6 C. 777=8 C.L.R. 117; *D.*, 8 A. 626, 6 Bom. L.R. 1043.]

(850—c)—*S. 47 (=Civ. Pro. Code*, 1861. *s. 11 —Suit to recover money paid in execution of decree—Party wrongly appearing on decree not party to suit.*—In a suit brought by S against K to recover possession of certain land, H claiming to be the owner of the property asked leave to come in and defend the suit, which leave was refused. The suit was dismissed and S appealed and in her appeal she named H as respondent and a notice was served upon him in the usual form. H did not appear and the judgment of the first Court being reversed, a decree for recovery of possession was given in which H was included. Subsequently, H brought a suit to have his title to the very property declared, one of the defendants being S herself. H obtained a final decree declaring his title to the lands claimed. While this second suit was pending, S took proceedings in execution of her former decree to recover a sum of money awarded her by that decree either for costs or mesne profits, whereupon H, in order to prevent a sale of the property, deposited in Court the amount claimed under protest and S received that amount on account of her decree. H brought the present suit against S to recover the amount so paid. *Held* that the plaintiff was entitled to recover. The judgment of the first Court having been set aside by the proceedings in the second suit, there was no bar to the suit by reason of the money having been paid in execution of the process of the Court. H was not a party to the first suit so as to make the question one between the parties, and relating to the execution of the decree. SHIROKUMARI DEBI v. SHITARAM HAZDRA, **13 B.L.R. App. 17.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(850-*d*)—S.47—*Execution—Sale in excess of decree—Suit to impeach sale—Non-maintainability—Matter relating to execution.*—The question whether the actual execution of a decree in excess of the decree itself is one relating to execution within the meaning of s. 244, Civ. Pro. Code, 1882. (6 M.H.C. 293, 22 C. 483 and 27 A. 485, *R.*) Therefore the question that a sale in execution of a mortgage-decree was invalid, on the ground that it was not warranted by the terms of the decree, cannot be raised in a separate suit. CUNNIAH VENKATACHALAPATHY AIYEN v. PERUMAL AIYEN, 10 M.L.T. 527=1912, 1 M.W.N. 44.

(850-*e*)—S. 47—Razinama—*Rights under—Suit for jewels—Not barred*—Razinama *prevails—Hindu Law does not apply.*—Where, in accordance with the terms of a *Razinama*, the wife is to wear certain jewels and, at other times, they should be in the husband's custody, and a suit was brought to recover them from the husband by the wife, the suit is not barred by s. 47, Civ. Pro. Code. When the rights of parties are reduced to writing and embodied in a *Razinama*, their rights cannot be governed by the Hindu law. CHELLAMMAL v. KRISHNASWAMY IYER, 1912, 1 M.W.N. 166.

(850-*f*)—S 47 (*Civ. Pro. Code*, 1861, s. 11)—*Execution—Purchase of decree by one of several judgment-debtors.—Suit for contribution—Appeal.*—One of several judgment-debtors who purchased a decree against himself and his co-debtors, cannot issue execution against his co-debtors and recover from them the whole amount of the common debt. His only remedy is to sue them in a regular suit for contribution and to compel them to pay him their shares of the amount for which the decree was purchased. An appeal under s. 11, Act XXIII of 1861, against the order for execution would not affect a purchaser at a sale under the execution. *In the matter of the petition of* DIGUMBUREE DABEE, B.L.R. Sup. Vol. 938=9 W.R. 230. [*F.*, 15 W.R. 372, 5 A. 27=A.W.N. 1882, 140; *Appr.*, 6 N.W.P. 1, 24 W.R. 359, 6 A. 351; *R.*, 23 W.R. 95, 24 C. 908=1 C.W.N. 597.]

(851)—S. 47—Unrecorded co-sharer whether representative of recorded tenant—*See* BEN. ACT VIII OF 1885, s. 173 cl. (3). 7 Ind. Cas. 769.

(852)—S. 47—*See* BENG. ACT I OF 1895, ss. 10, 15, 17, 19, 20, 31, 35.

(853)—S. 47—*See* U.P. ACT II OF 1901, ss. 176, 177 and 193, 27 A. 31=1 A.L.J. 305=A.W.N. 1904, 156.

(854)—S. 47—*See* ADMINISTRATION SUIT, 26 C. 891=3 C.W.N. 670.

(855)—S. 47—*See* ANNUITY, A.W.N. 1888, 230.

(856)—S. 47—*See* APPEAL — ACTS AND REGULATIONS, 1 C.W.N. 30.

(857)—S. 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 24 C. 725, F.B.=1 C.W.N. 374, 17 B. 49, 27 C. 670.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(858) S. 47—*See* APPEAL—FORUM OF APPEAL, 4 O.C. 255.

(859)—S. 47—*See* APPEAL—ORDERS, 26 C. 529=3 C.W.N. 374, A.W.N. 1887, 134.

(860)—S. 47—*See* APPEAL—MISCELLANEOUS, 9 C. 773, 8 Ind. Cas. 26.

(861)—S. 47—Applicability to person not party to proceedings—*See* ATTACHMENT—PRIORITY OF ATTACHMENT, 17 M.L.J. 334=2 M.L.T. 365=30 M. 413.

(862)—S. 47—*See* CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 15 A. 106=A.W.N. 1895, 240.

(863)—S. 47—*See* COURT-FEES ACT, 1870, sch. II, art. 11, cl. (*b*), 6 O.C. 86.

(864)—S. 47—*See* DECLARATORY DECREE SUIT FOR—MISCELLANEOUS, 25 C. 49=2 C.W.N. 76.

(865)—S. 47—*See* DECREE—DECREE, CONSTRUCTION OF, 17 M. 343=21 I.A. 71, P.C.

(866)—S. 47—*See* DECREE—DECREE, FORM OF, 26 C. 639=3 C.W.N. 628.

(867)—S. 47—*See* DECREE—MISCELLANEOUS, 2 Sind L.R. 33.

(867-*a*)—S. 47—'Representative,' who are—Decree binding endowed property—Judgment-debtor, no interest in property—*Shebait* if can object to execution—*See* EXECUTION OF DECREE—GENERAL, 14 C.L.J. 337.

(868)—S. 47—*See* FRAUD—MISCELLANEOUS, 6 B. 148.

(868-*a*) — S. 47 — Application to Agency Tracts—Right of third party to invoke s. 244 as a bar to suit—*See* GANJAM AND VIZAGAPATAM AGENCY RULES, 10 M.L.T. 261.

(869)—S. 47—*See* GRANT—CONSTRUCTION, 12 B. 80.

(870)—S.47—Nature of son's obligation under Hindu law out of scope—*See* HINDU LAW—DEBTS, 11 M. 413.

(871)—S. 47—First suit against one member of joint Hindu family—Subsequent suit against widow — Maintainability—*See* HINDU LAW—JOINT FAMILY, 7 M.L.T. 211=5 Ind. Cas. 362=20 M.L.J. 308=33 M. 423.

(872)—S.47—*See* HINDU LAW—PARTITION, 6 Bom. L.R. 35.

(873)—S. 47—Maintainability of suit based on order of the High Court in its insolvency jurisdiction—*See* INSOLVENCY—GENERAL, 9 C.W.N. 952=33 C. 560.

(874)— S. 47—*See* JURISDICTION OF CIVIL COURT, 3 N.W.P. 164.

(875)—S. 47—Confirmation of sale—Knowledge of judgment-debtor of execution-proceedings—His failure to object, effect of—*See* LANDLORD AND TENANT—MISCELLANEOUS, 9 C.W.N. 972.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(876)—S. 47—*See*—LIMITATION, GENERAL 6 C.W.N. 190.

(877)—S. 47—*See* LIMITATION ACT, 1908, art. 12, 5 Bom. L.R. 952.

(878)—S. 47—Applicability of, to Agency Tracts—*See* LIMITATION ACT, 1908, art. 14, 17 M.L.J. 147=2 M.L.T. 195=30 M. 280.

(879)—S. 47—Consent decree against a qualified female proprietor—Objection to its execution against reversioner—Overruling of such objection—Applicability of the section—*See* LIMITATION ACT, 1908, arts. 95, 120, 17 M. L.J. 288=2 M.L.T. 30=360 M. 402.

(880)—S. 47—*See* MAHOMEDAN LAW—GIFT, 6 Bom. L.R. 1043.

(881)—S. 47—*See* MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 7 A. 160=A.W.N. 1884, 319, F.B. 14 C. 605, 29 C. 622=6 C.W.N. 409.

(882)—S. 47—*See* MINOR—SUITS BY AND AGAINST MINORS, 8 W.R. 197.

(883)—S. 47—Sale under first mortgage—Disposal of surplus sale-proceeds—Appeal—*See* MORTGAGE—GENERAL, 4 A.L.J. 492=A.W. N. 1907, 201.

(884)—S. 47—*See* MORTGAGE—FORECLOSURE, 7 C.C. 137, 9 C.W.N. 577=27 A. 325= 2 A.L.J. 336=2 C.L.J. 173=7 Bom. L.R 427, =15 M.L.J. 191=32 I.A. 123.

(885)—S. 47—Payment by puisne mortgagee of amount due under prior mortgage-decree, to which he was party, and acceptance of amount by decree-holder—Suit by puisne mortgagee for foreclosure-decree in respect of amount so paid—Whether such suit barred by—*See* MORTGAGE—FORECLOSURE, 9 C.W.N. 577, P.C.=27 A. 325=2 A.L.J. 336=2 C.L.J. 173=7 Bom. L. R. 427=15 M.L.J. 191= 32 I.A. 123.

(886)—S. 47—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 27 A. 254=A.W.N. 1904, 236=1 A.L.J. 649.

(887)—S. 47—*See* MORTGAGE— MISCELLANEOUS, 24 A. 179=A.W N. 1902, 3.

(888)—S. 47—*See* OFFICIAL ASSIGNEE, 28 C. 419=5 C.W.N. 761.

(889)—S. 47—*See* PARTITION—GENERAL, A.W.N. 1899, 124.

(890)—S. 47—*See* PAUPER SUITS, 9 A. 64.

(891)—S. 47 *See* PRACTICE AND PROCEDURE, 4 M.L.T. 288=6 M.L.T. 325=19 M.L.J. 4=1 Ind. Cas. 390.

(892)—S. 47—*See* PRE-EMPTION—GENERAL, 113 P.L.R. 1902=76 P.R. 1902.

(893)—S. 47 — *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 31, sch. II, 7 Ind. Cas. 484= 12 C.L.J. 599.

(894)—S. 47—*See* RES JUDICATA—RES-JUDICATA IN EXECUTION PROCEEDINGS, A.W.N. 1899, 24.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(895)—S. 47—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 6 C.W.N. 283, 5 C.W.N. 559, 7 Ind. Cas. 48, 24 C. 707=1 C.W.N. 534.

(896)=S. 47—*See* SALE, SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 13 C. 326.

(897)—S. 47—*See* SMALL CAUSES COURT, MOFFUSSIL, JURISDICTION OF—GENERAL, 9 W.R. 210.

(898)—S. 47—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, A.W. N. 1886, 181.

(899)—S. 47—*See* SPECIFIC PERFORMANCE, 7 C.W.N. 158.

(899-*a*)—S. 47—*See* SUCCESSION CERTIFICATE ACT, 1860, 5 A. 212=A.W.N. 1882, 191.

(900)—S. 47—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 67, 74, 86 and 99.

(900-*a*)—S. 47—*See* NOS. 63, 64, 65, 66, 67, 68, 69, 70, 71, 71-*a*, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 128, 150, 192, 193, 208, 279, 282, 283, 284, 285, 286, 286-*a*, 287, 288, 289, 290, 291, 292, 346, 347, 359, 561, *supra* and NOS. 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1205, 1411, 1508, 1509, 1891, 1904, 2180, 2285, 2286, 2287, 2481, 2660, 2661, 2661-*a*, 2691-*a*, 2702, 2883, 2998, 2999, 3000, 3032, 3200, 3225 *f*, 3335, 3335-*a*, 3418, 3484, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3564, 3643, 3713, 3812, 3813, 3934, 4096, 4144, 4168, 4237, 4238, 4239, 4240, 4241, 4242, 4334, 4428, 4439, 4476, 4507, 4668, 5251, 5950, *infra*.

(901)—*S. 47 (c) (=s. 244, Civ. Pro. Code, 1882)—Order determining whether party applying for execution is or is not the representative of the decree-holder, whether appeal lies from.*—The effect of s. 244 (*c*), Civ. Pro. Code, is to give a right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree-holder. KRISHNAMACHARIAR v. APPASAMI MUDALIAR, **25 M. 545=12 M.L.J. 280.**

(901-*a*)—Ss. 47, (2)—Declaratory decree—Decision as to executability of—Appeal—*See* EXECUTION OF DECREE—GENERAL. 10 M. L.T. 437.

(902)—*Ss 47, 11—Execution-proceedings—Regular suit—Mistake—New plaint not inconsistent with original case.*—If the execution-proceedings are still going on, it is not material whether the dissatisfied party applies expressly under s. 47, Civ. Pro. Code, or purports to bring a regular suit, provided the Court is the same. This was held under the old Code, and now cl. (2) of s. 47 makes express provision for mistakes of the kind. To admit of an application under s. 47, the decree must be capable of execution, and must be still in course of execution. If an application has been made under

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s. 47 and disposed of, the decision is *res judicata*, and on that ground a subsequent regular suit will be barred. A suit was decreed by the original Court, but was dismissed summarily by the lower appellate Court on the ground that it was barred by s. 47, Civ. Pro. Code, and that plaintiff set up a new case in an amended plaint. *Held* that the order was bad, as it was not shown that the new plaint was inconsistent with the original case, or that the suit ought to be dismissed on any ground. NGA PO TUN v. MI THET PON, **U.B.R. 1910, 4th Qr. p. 66.** (U.B.R. 1904—1906, II, Civ. Pro. Code, 36, U.B.R. 1897—1901, II, 249, 10 C. 538, 9 Bom. L.R. 1020. R.)

(903)—*Ss. 47, 11 (=ss. 244, 13, Civ. Pro. Code, 1882)*—Res judicata—*Estoppel—Held*, that it is not necessary for the application of s. 13, Explanation II, Civ. Pro. Code, that the matter in question should have been finally heard and decided in the previous suit : *Held*, that Explanation II to s. 13 did not apply in this case. All the cases to which, notwithstanding that the matter in question had not actually been heard and finally decided in the previous suit, that Explanation was applied, are cases in which the party against whom it was sought to apply the rule of Explanation II was unsuccessful in the previous suit. It cannot be applied against a person who in the previous suit has been successful. *Held*, that disclaimer of title will not *per se* operate as an estoppel *Held*, that under s. 244 Civ. Pro. Code, itis the duty of a Court to construe the decree and give effect to it, not to re-try the suit. AWAZ ALI KHAN v. BAKER KHAN, 1 O.C. 22.

(904)—*Ss. 47, 49 O. 21, r. 2—Execution proceedings*—Res judicata — *Opportunity to contest validity of order—Objection by judgment debtor not heard as decree holder dropped proceedings—When r. 2 applicable—Contest between assignee of decree and execution purchaser of judgment debtor's interest—Question whether regular suit is maintainable, when not of practical importance—Assignee of decree—Equities and defences available to judgment-debtor.*—A party to an execution-proceedings who allows an order for execution to be passed against him at one stage of the proceeding where he had an opportunity to contest the validity of that order, cannot be permitted, at a subsequent stage of the proceedings, to re-open the whole matter in controversy. (8 C. 51. 11 C.L.R. 113, 8 I.A. 123, 6 A. 269, 11 I. A. 37, 7 A. 102, 11 I,A. 181, F.) This principle is based on the assumption that the person debarred had an opportunity to contest the validity of the order. It has consequently no application when it is proved that there was no adjudication by reason of the failure of the decree-holder to prosecute the execution-proceedings with due diligence. Consequently, where there has been no judicial determination of the objection of the judgment-debtor by

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reason of the default of the decree-holder, it cannot be held that the previous order operates as an effective bar to an enquiry into the merits of the objection on the occasion of a subsequent application for execution. In cases, to which the provisions of O. XXI, r. 2 of the Code, are applicable, if appropriate application has not been made within the prescribed time, the alleged payment or satisfaction must be ignored, and the party, who seeks the benefit thereof, cannot indirectly obtain an extension of the period of limitation, on the ground that the question falls within the scope of s. 47 and may be determined thereunder. Where the contest lies between the assignee of the decree and the execution-purchaser of the interest of the judgment-debtor in the properties covered by the decree, and the latter makes allegations of fraud and conspiracy between the decree-holder and the judgment-debtor in the matter of the assignment of the decree, O. XXI, r. 2, has no application to the case, which falls within the scope of s. 47 under which the matter may be investigated. The question whether a regular suit is maintainable for the determination of the question of fraudulent assignment, or whether it ought to be determined in execution-proceedings, does not become one of practical importance, where the Court, in which the question has been raised, is the Court competent to execute the decree as also to entertain the suit. The matter is one of form, and the Court will not, by a strict adherence to the form, defeat the ends of justice. Under s. 49 of the Code, the assignee of a decree stands in no better position than the assignor, and takes it subject to all the equities and defences subsisting at the time of the assignment which the judgment-debtor could have asserted against it in the hands of the judgment creditor, notwithstanding that the assignee may have had no notice thereof. MON MOHON KARMAKAR v. DWARKA NATH KARMAKAR, **7 Ind. Cas. 55=12 C.L J. 312.**

(905)—*Ss. 47, 50 (=ss 244, 234, Civ. Pro. Code, 1882)—Question arising in execution—Legal representatives of debtor—Decree-holder—Sons of a deceased Hindu debtor can raise questions of illegality or immorality of their father's debt, inexecution-proceedings—Separate suit not permissible.*—There is no substantial distinction in regard to question arising in execution between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under s. 234 of the Civ. Pro. Code (Act XIV of 1882). All questions between them and the decree-holder relating to execution must alike be disposed of under s. 244 of the Code. Where the sons of a deceased Hindu debtor are added as legal representatives in the course of a suit and before the decree is pronounced, it is open to them to dispute in execution-proceedings the liability of the ancestral properties for the debt of their father on the ground that the debt

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was tainted with immorality or illegality. They cannot insist on the decree-holder resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of the ancestral properties, because the question having arisen in execution-proceedings between the decree-holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of s. 244 of the Civ. Pro. Code, 1882. SHIVRAM v. SAKHARAM, **10 Bom. L.R. 939=33 B. 39.**

(1906)—*Ss. 47, 50 (=ss. 244, 234, Civ. Pro. Code, 1882)*— Mitakshara *family — Decree against father—Execution against son—Assets —Separate suit against the son, necessity of— Decree against the father in a representative capacity or not—Questions not in execution,*— The interest of the father in a *Mitakshara* family in the ancestral properties is not assets in the hands of the son when he dies, and consequently proceedings cannot be taken against the son as the legal representative of the father under s. 234, Civ. Pro. Code. If, after the death of the father in a *Mitakshara* family against whom alone a personal decree was passed, the creditor wishes to proceed against the son, it must be, not because he is the heir or the legal representative, but upon the ground of his obligation to pay his father's debts; and whether having regard to the character of the debt, the obligation can be enforced against the son, cannot be determined in a proceeding either under s. 234 or s. 244, Civ. Pro. Code., but ought to be determined by a separate suit. (20 B. 385, *Diss.*; 13, M. 265, 16 A. 449, *Relied on.*) The question whether the decree was obtained against the father in his representative capacity cannot be gone into in the course of execution of the decree. Where the decree agains the father is in his representative capacity, no proceeding under s. 234, Civ. Pro. Code, need be taken. JUGA LAL CHAUDHURI v. AUDI BEHARI PROSAD SINGH, **6 C.W.N. 233.** [*F.*, 31 C. 224; *Rel. on.* 3 A.L.J. 662=A.W.N. 1906, 281; *R.*, 6 O. C. 272, 8 C.W.N. 843, 1 N.L.R. 173, 5 C.L.J. 491, F.B.=11 C.W.N. 593=34 C. 642, *D.*, 3 C. L.J. 131=33 C. 676, 5 C.L J. 80=11 C.W.N. 163,]

(907)—*Ss 47, 50 (=old ss. 244, 234)—Power of Court to which decree sent for execution to implead representative of deceased judgment debtor,*—When the execution of a decree passed by one Court is pending in another Court there is no need to resort to the original Court to implead the judgment-debtor's representative, should the judgment-debtor die while execution is pending. GOPAL DAS v. MUSSAMMAT GULAB DEVI, **70 P.R. 1897.** [*R.*, 9 P R. 1901=P.L.R. 1901.]

(907-*a*)—*Ss. 47, 51. O. XL. r. 1—Decree-execution of—Preliminary obeection to hearing of appeal—Right to begin—Interlocutory order in execution-proceedings—Receiver—Appointment, effective—Court' duty when appeal*

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preferred.—It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by a Statute or by some authority equivalent to a Statute; consequently, if the right of appeal is challenged, it is incumbent upon the appellant to establish the right to appeal. But unless the objection was obviously sound, the appellant could hardly be expected to answer by anticipation the grounds that might possibly be assigned by the respondent in support of the objection. The practice therefore, usually followed in the Calcutta High Court, has been to require the respondent at the outset to indicate concisely the ground upon which his objection is based. (8 B. 287 *Not. F.*) The expression "an order relating to execution of a decree" is comprehensive enough to include an order relating to the stay of execution thereof. (29 B. 71, *Expl.*) An interlocutory order which does not conclusively determine the rights of the parties in controversy in the execution-proceedings is not a decree within the meaning of s. 47 read with s. 2 of the Code of Civil Procedure. On the plaintiff applying to execute the decree, the Court ordered that he might be allowed to do so if he fulfilled certain conditions at different stages of the proceedings. The Court determined various questions as to the character of the conditions to be imposed and called upon the decree-holder to comlpy with them. Before the time for compliance was over the jndgment-debtor appealed *Held*, that the orders were interlocutory and were not orders determining a question relating to execution within the meaning of s. 47. S. 51 of the Code is to be read with r. 11 of O. XXI and r. 1 of O. XL. When a Court appoints a Receiver for purposes of execution of a decree, the order is one under r. 1 of O. XL read with s. 51. If a Receiver is appointed without any direction given as to security, the order takes effect at once, and he is validly in possession though no security has been given. If the appointment is conditional upon the furnishing of security, the giving of security is a condition precedent, and there is no effective appointment till security has been given. Upon an appeal preferred under cl (*e*) of r. 1 of O. XLIII, the Court is bound to consider not only whether a Receiver should have been appointed, but also, whether a suitable person has been selected. No appeal lies till a final order for the appointment of a Receiver has been made. SRINIVAS PROSAD SINGH v. KESHO PROSAD SINGH, **14 C.L J. 489.**

(908)—*Ss. 47 and 52, 145 (=ss. 244 253, Civ, Pro. Code, 1882)—Execution of decree against surety—Appeal against order—Liability of surety as party.*—In a suit against, *B*, *M.* entered into a security—bond by which he pledged himself, in the event of B losing his case and not paying the debt and costs, to pay the same himself. The plaintiff, after a fruitless attempt to execute the decree against B,

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proceeded to execute against M, the surety, but execution was refused. In the appeal against this order, it was contended on behalf of M that he was not a party to the suit, and that therefore no appeal lay under s. 244 of the Civ. Pro. Code, from the order of refusal, but it was *held* that he had, under the terms of s. 253 of the Civ. Pro. Code, put himself in the position of a defendant in the cause and that therefore the appellant was entitled to enforce his right against the surety. MAKHAN LAL v. MUHAMMAD YAHIA, **A.W N. 1888, 13.**

(909)—*Ss. 47, 52, 115, 55 (=Civ. Pro. Code, 1882, ss. 244, 253, 336)—Security for judgment-debtor applying to be declared insolvent—Discharge of surety on judgment-debtor applying in a month—Order against surety for realization of security amount—Appealability of order.*—A surety to enable the judgment-debtor to apply for being declared an insolvent becomes discharged on the judgment-debtor so applying within one month. S. 336 of the Code extends the provisions of s. 253 to the enforcement of the bond against the surety. An order under s. 253 of the Code, directing that the security given by a surety under s. 336 should be realised in execution against the surety, is appealable in the same manner as orders under s. 244 of the Code in execution of a decree. RAJARAM v. BAPPU CHETTIAR, **13 M.L.J. 484.** [*F.*, 14 M.L.J. 430=28 M 117.]

(910)—*Ss. 47, 52, O. XXI, r. 41, s. 141 (=ss. 244, 252, 267, 647—Civ. Pro. Code, 1882)—Decree—Execution-proceedings — Legal representatives of the judgment-debtor—Plea that the property survived to them by survivorship—The plea should be raised in execution proceedings—Sale—Purchaser cannot be met with the plea in a separate suit.*—C sued M on a money-bond. During the pendency of the suit, M having died, his widow, R and his brother, N were brought on the record as his legal representatives. The suit proceeded to a decree, which awarded the claim out of the property of M. Before, however, the decree was executed, both R and N died. C thereupon brought on the record the defendants as the legal representatives of M, and applied for execution of the decree by attachment and sale of the property in dispute. The defendants denied that they were legal representatives of M, and that they had any property of M which could be liable for the decree. The Court negatived the objections and sold the property which was purchased by the plaintiff. The plaintiff sued to recover possession from the defendants. The defendants contended that the property was joint family property of M and defendants, and that at his death it survived to the defendants. The plaintiff contended that the defendants were debarred by s. 244 of the Code of 1882 from asserting their title. The lower appellate Court disallowed the contention. On second appeal; *Held*, that, so far as the sale of the property by the Court at the decree-holder's instance as that of the deceased was concerned, the question was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under s. 252 of the Code. It was, therefore, a question in relation to them falling within s. 244 of the Code by reason of the explanation to s. 647. The defendants, were, therefore, bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned. On further contention that, whatever might have been the result if the decree-holder had been a party to the suit, the dispute now was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that, therefore, s. 244 did not apply. *Held*, negativing the contention, that, though an action-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed, and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of s. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor should not be allowed to attach the sale in a suit, because he was precluded by s. 244 from raising the question by, or relying upon it as a defence in, any proceedings other than those under s. 244. (19 I.A. 166, 7 M. 255, *F.*) The test in all such cases is, whether the ground upon which the Court-sale is attached as conferring no title upon the auction-purchaser, affects the parties to the suit, and could have, as between them, been raised and determined under s. 244, and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. GOKUL SINGH BHIKARAM PARDESHI v. KISANSINGH GURU LAXMANGIR, **12 Bom. L.R. 539=7 Ind. Cas. 457=34 B. 546.** (25 B. 631, 3 Bom. L.R. 255, *Expl.*)

(911)—*Ss. 47, 55 (=old s. 336)—Civ. Pro. Code, 1882—Order under—Appeal.*—An order passed by the executing Court for the imprisonment of a judgment-debtor though not liable to be appealed against as an order, is appealable as a decree, for, such an order decides a question relating to the execution of a decree within the meaning of s. 244 (new s. 47), Civ. Pro. Code. SEVA SINGH v. DHAUNKAL, **69 P.R. 1895.**

(912)—*Ss. 47, 60, 65—O. XXI, r. 94 (=Civ. Pro. Code, 1882, ss. 244, 266, 316)—Questions for Court executing decree—Separate suit.*—The provisions of s. 244, Civ. Pro. Code, disallowing a separate suit to determine the questions referred to therein, apply to prohibit not only a suit between parties and their representatives, but also a suit by a party or his

representatives against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives, and relates to the execution, discharge or satisfaction of the decree. *Held* therefore by the Full Bench that the question arising between a judgment-debtor and the auction-purchaser as to whether certain property was liable to attachment and sale, with reference to the provisions of s. 266, Civ. Pro. Code, and s. 9 of the N.W.P. Rent Act, is one to be determined under s. 244 (c) of the Civ. Pro. Code; and a separate suit cannot be maintained by the judgment-debtor to recover from the auction-purchaser his occupancy tenure sold in violation of s. 9 of the Rent Act. BASTI RAM v. FATTU, **8 A 146. F.B.=A.W.N. 1886, 37.** (3 A.W.N. 218, *R.*) [*F.*, 22 A. 86. 22 A. 108; *R.*, 2 O.C. 315, 26 C. 727, 23 A. 346, 9 C.W.N. 972, 26 A. 447, F.B.=A.W.N. 1904, 61=1 A.L.J. 65, 8 O.C. 409; *D.*, 24 C. 355]

(913)—*Ss. 47, 60, O. XXI, rr. 90, 92 (=Civ. Pro. Code*, 1882, *ss. 244, 266, 311, 312)—Bengal Act VIII of 1885—Occupancy-holding—Not transferable by custom—Sale of such holding by co-sharer-landlord—Sale of occupancy-holding not transferable by custom, confirmation of—Application by judgment-debtor to have it declared that the sale was illegal—Order for sale—Sale held in furtherance of—Right of judgment-debtor, when not a party and when he is.*—A rent-decree obtained by some only of several co-sharer-landlords, and not by the whole body of them, cannot be regarded as a decree under the Bengal Tenancy Act. (14 C. 201, 15 C 47, *R.*). So, proceedings in execution thereof can only be in accordance with the provisions of Civ. Pro. Code and not with those of the Tenancy Act. Therefore, in execution of such a decree, an occupancy-holding not saleable by custom or usage, and the interest of the judgment-debtor in it cannot be sold. (24 C. 355, *R.*) [*Rel. upon*, 4 C.W.N. 571; *Appr.*, U.B.R. 1897—1901, Vol. II, 258; *R.*, 7 C.W.N. 572, 8 C.W.N. 472, 9 C.W.N. 34, 4 C.L.J. 68=10 C.W.N. 176, 5 C.L.J. 235=2 M.L.T. 155, 11 C.W.N. 83, 35 C. 331, P.C. =12 C.W.N. 249=10 Bom. L.R. 66=7 C.L.J. 139=3 M.L.T. 151=18 M.L.J. 43; *D.*, 157 P.L.R. 1906=2 P.R. 1907.] Confirmation of sale is no bar to an application by the judgment-debtor to have it declared that in execution of the decree the property sold could not be sold, that he had no disposing power in it, and that therefore the sale passed no interest to the purchaser. The enquiry to be made upon such an application would be an enquiry under s. 244, Civ. Pro. Code, uncontrolled by ss. 311 and 312, Civ. Pro. Code. (8 A. 146. 24 C. 355, *R.*) [*F.*, 27 A. 702=2 A.L.J. 469 =A.W.N. 1905, 162; *Appr.*, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320; *Appl.*, 27 C. 187; *R.*, 27 C. 415=4 C.W.N. 557, 27 C. 810 =4 C.W.N. 692, 29 C. 54=5 C.W.N. 763, 10 M.L.J. 110, 29 A. 612=A.W.N. 1907. 193=4 A.L.J. 519. 9 C.W.N. 972. 1 N.L.R. 167,] If judgment-debtors were aware of an order for sale in furtherance of which the sale is held, and did not object to it, they would be precluded from questioning the propriety of the order and consequently of the sale. If otherwise, they cannot be said to be a party to the order for sale, and can therefore question the propriety of the sale. DURGACHARAN MANDAL v. KALI PRASANNA SARKAR, **26 C. 727=3 C.W.N. 586.** [*R.*, 34 C. 199=11 C.W.N. 513=5 C.L.J. 294, 30 A. 146=A.W.N. 1908, 49=5 A.L.J. 121.]

(914)—*Ss. 47, 63 (=ss. 244, 285, Civ. Pro. Code*, 1882)—*Court of District Judge superior to that of Subordinate Judge—Power to realise property attached by two Courts of different grades—Decree-holder also a judgment-debtor—Right to appeal.*—Where the same property is simultaneously attached in execution of one decree of the District Judge, and another of the Subordinate Judge, the District Judge alone has the power to realise the property. The Court of a District Judge is of a higher grade than that of a Subordinate Judge. The fact that the judgment-debtor was also a rival decree-holder did not take away her right to raise the objection that the property could not be sold by the Subordinate Judge. A judgment-debtor-objector is entitled to prefer an appeal to the High Court, being a party to the suit within the meaning of s. 244. MUSSAMMAT NAJMUNNISSA BIBI v. LAL JAMNA DAS, **1 Ind. Cas. 78.**

(915)—Ss. 47, 63—Court of higher grade causing property to be put up for sale in execution of lower Court's decree—Legality—Appeal —*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 O.C. 41.

(916)—Ss. 47, 64 — Re-opening questions already decided, if allowable—*See* RES JUDICATA—GENERAL, 9 C.L.J. 356=4 Ind. Cas. 119.

(917)—*Ss. 47, 65. O. XXI, r. 94, O. XLI, rr. 25, 27 (=ss. 244, 316, 566, 568, Civ. Pro. Code*, 1882)—*Defence, if barred—Sale certificate no obstacle—Remand—Pleadings, construction of.*—A defendant in a suit is not debarred by s. 244, Civ. Pro. Code, from raising a point in defence of his title, even though he could have raised it but did not raise it in former execution proceeding to which he was a party. (7 C.W.N. 607, *F.*) If a party to a suit is not put out of Court by s. 244, Civ. Pro. Code, he is not affected by the grant of sale certificate to the auction-purchaser under s. 316 of the Code. The Court of appeal has no power under s. 566, Civ. Pro. Code, to frame issues for trial and refer them to the lower Court, when the latter has, rightly or wrongly, determined the question of fact arising for determination. The power can be exercised when the lower Court has omitted to determine an essential question

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of fact. The appellate Court can call for further evidence under s. 568 of the Code, and deal with that evidence when laid before it. Pleadings in this country should not be too strictly construed. CHANDRAMONI SAHA v. HALIJENNESSA BIBI, **9 C.L.J. 464=4 Ind. Cas. 168.**

(918)—Ss. 47, 66—*See* BENAMI TRANSACTIONS—CERTIFIED PURCHASERS, 20 M. 349 =7 M.L.J. 213.

(919)—*Ss. 47, 68, 70, 71 (=Civ. Pro. Code, 1882, ss. 244, 320)—Sale in execution of decree by Collector—Separate suit to set aside sale, on ground that property is not ancestral—Maintainability.*—In the case of a sale by a Collector, under s. 320, Civ. Pro. Code, of property as being ancestral, a separate suit would not lie to set aside such sale on the ground that the property not being ancestral, the decree ought not to have been transferred for execution to the Collector, nor on the ground that the real purchasers were the decree-holders who had not obtained leave to bid. Such questions really fall within the scope of s. 244, Civ. Pro. Code, DAULAT SINGH v. JUGAL KISHORE, **22 A. 108=A.W.N. 1899, 205.** (8 A. 146, 19 C. 683, *R.*) [*R.*, 24 A. 239=22 A.W.N. 49, 26 A. 477 =A.W.N. 1904, 61=1 A.L.J. 65.]

(920)—*Ss. 47, 68, 70, 71, 73 and O. XXI, rr. 88 and 89 (=ss. 244 (c), 320, 295, 310 and 310, A. Civ. Pro. Code, 1882)—Decree—Execution—Application by another decree-holder under s. 295 for rateable distribution—Execution proceedings transferred to the Collector—Sale of property by Collector—Judgment debtor applying to set aside the sale--Deposit in Court of the decretal amount and five per cent. of purchase money—Refusal to set aside the sale—Appeal—Confirmed sale can be set aside—Collector's power to set aside the sale.*—C, a decree-holder, in execution of his decree, attached certain properties belonging to his judgment-debtor. H, another decree-holder against the same judgment-debtor, applied to execute his decree and prayed for rateable distribution under s. 295 of the Civ. Pro. Code, 1882. The execution proceedings were transferred to the Collector under s. 320 of the Civ. Pro. Code. The properties were sold by the Collector in execution of C's decree. Within thirty days of the sale, the judgment-debtor, applied under s. 310-A of the Civ. Pro. Code to set aside the sale, and deposited in Court five per cent. of the purchase money as well as the decretal amount specified in the proclamation of sale. The Subordinate Judge declined to set aside the sale, inasmuch as the judgment-debtor had not deposited also the amount due under H's decree. The judgment-debtor appealed, but the District Judge dismissed the appeal on the ground that no appeal lay. On appeal to the High Court, it was contended, (1) that no appeal lay; (2) that inasmuch as the execution proceedings had been referred to the

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Collector, s. 310-A of the Civ. Pro. Code, had no application; (3) and that the judgment-debtor could not apply under s. 310 A because the sale had already been confirmed by the Collector. *Held*, (1) that an appeal would lie from an order under s. 310-A of the Civ. Pro. Code, where the case fell under s. 244 (*c*) of the Code; that the Code of Civil Procedure conferred no power on the Collector to set aside a sale under s. 310-A, nor was there any rule vesting that power in the Collector. The power to act under s. 310-A continued in the Court notwithstanding the transfer of execution to the Collector; that there was nothing in s. 310-A which precluded the Court from setting aside the sale merely because it had been confirmed, that it was erroneous on the part of the Subordinate Judge to hold that it was incumbent upon the judgment-debtor to deposit in Court anything except that for which s. 310-A has made provision. PITA MOTI v. CHUNILAL, **Bom. L.R. 15=31 B. 207.**

(921)—*Ss. 47, 73 (=Civ. Pro. Code, 1882, ss. 244, 295)—Puisne mortgagee—Surplus sale-proceeds—Civ. Pro. Code (Act XIV of 1882), ss. 244 and 295.*—Where a property was subject to four mortgages and the first mortgagee got a decree on his mortgage and caused the property to be sold, the sale realizing more than enough to satisfy his decree, and the third mortgagee also obtained a decree on his mortgage and sold the same, and the vendee under the latter sale applied, in the course of the execution of the first decree, under s. 295, Civ. Pro. Code, and got an order for the payment to him of the surplus sale-proceed, under the first sale. *held* in a suit by the purchaser of the equity of redemption of the mortgagor, to set aside the above order and recover the sale-proceeds from the vendee, (*a*) that the order passed under s. 295 of the Civ. Pro. Code, was one coming under s. 244, Civ. Pro. Code, and that the suit was therefore barred, and (*b*) that the case was not affected by the fact that the sale-proceeds were realised in execution of the decree of the first mortgagee and not that of the third, as the two execution cases were amalgamated and disposed of simultaneously. HURDWAR SINGH v. BHAWANI PERSHAD, **2 C.W.N. 429.** [*R.*, U.B.R. 1904, 4th Qr., Limitation, 1.]

(922)—Ss. 47, 73—Sale of mortgaged property at the instance of first mortgagee—Surplus sale-proceeds withdrawn by third mortgagee—Suit by second mortgagee to enforce his lien on surplus sale-proceeds—Maintainability of suit—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 9 C.W.N. 989=33 C. 92.

(922-*a*)—*Ss. 47, 73, O. XXI, r. 55—Decree—Execution—Attachment—Application for rateable distribution—Satisfaction of attaching creditor's claim by payment into Court—The payment cannot be rateably distributed—Attachment ceases to exist—Property cannot be*

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sold at the other creditor's instance under the attachment—Questions relating to execution—Second appeal—High Court.—In execution of their decrees, two decree-holders attached the judgment-debtor's property; other decree-holders also applied to execute their decrees against the judgment-debtor without issuing attachment. On the 22nd September, 1909, the day fixed for the sale, a third person, at the instance of the judgment-debtor, paid into Court, under O. XXI, r. 55 of the Code of 1908, money sufficient to satisfy in full the decretal claims of the two attaching creditors. On an *ex parte* application made to it, the Court ordered rateable distribution of the monies so paid into Court and sale of further properties which had been attached towards further satisfaction of the claims of the judgment-creditors. Against this order the judgment-debtor appealed to the District Court. During the pendency of the appeal, the other properties were sold in execution in January 1910, and the sale was, notwithstanding the judgment-debtor's objections, confirmed. The judgment-debtor appealed to the District Judge who dismissed the appeal on the 30th June, 1910. In June, 1911, the first appeal by the judgment-debtor came on before the District Court, but as the question of the confirmation of the sale had already been decided by that Court against the judgment-debtor, no further proceedings were taken. On appeal: *Held*, (1) that the order dated the 20th June 1910, having been a question in execution between the parties to decrees, fell under the provisions of s. 47 of the Code of 1908, and was appealable, (2) that the sale in January 1910 was not valid, for the propertywas not duly attached at the time of the sale, and the attachment already levied had come to an end by the payment into Court on the 22nd September, 1909. (3) That the money paid into Court under O. XXI, r. 55, was not "assets" held by the Court within the meaning of s. 73 of the Code, and could not be distributed rateably among other decree-holders who had merely applied for the execution of their decrees. SORABJI v. KALA RAGUNATH, **8 Bom. L.R. 1193.**

(923)—*Ss. 47, 99, 114, O. XLVI, r. 1 (=Civ. Pro. Code, 1882, ss. 244, 578, 623)—Satisfaction recorded—Mistake in calculating amount—Re-opening of execution proceedings.*—Where the Court passed an order in an execution case stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied, an application by the decree-holder to allow the execution proceedings to be re-opened on the ground that he had acted under a mistake of calculation in fixing the amount, is maintainable under s. 244, Civ. Pro. Code. (10 C. 538, *D.*) Where such an application was made by the decree-holder referring to both ss. 244 and 623, Civ. Pro. Code, and the first Court thought that the latter section was inapplicable and

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re-opened the proceedings under s. 244, Civ. Pro. Code, the order of the first Court could not, having regard to s. 578, Civ. Pro. Code, be interfered with in appeal, even if s. 623 only was applicable. NILRATAN KHASNOBISH v. RAM RUTTON CHATTERJI, **5 C.W.N. 627.**

(923-*a*)—*Ss. 47, 102—Second appeal—Execution of decree—Suit of nature cognizable by Small Cause Court and valued at below Rs. 500.*—No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500, of the nature cognizable by a Court of Small Causes. WARISH MUNSHI v. APTABUDDIN BEPARI, **10 Ind. Cas. 412.** (24 C. 707 1 C.W.N. 534, 2 C.W.N. 691, 26 C. 539, 3 C.W.N. 403, 3 C.W.N. 399, 26 C. 324, *D*; 25 C. 872, 27 C. 484, 4 C.W.N. 269, 18 A. 181, 30 M. 212, 17 M.L.J. 376, *Rel. upon.*).

(924)—Ss. 47, 102—Appeal against order passed under s. 244, Civ. Pro. Code, in execution of Small Cause Court decree—*See* SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF—GENERAL, 11 C.W.N. 861.

(925)—*Ss. 47, 104, cl. (i), O XXI, rr. 89, 92, O. XLIII, r. (1) (j)—Deposit by judgment-debtor—Order setting aside or refusing to set aside sale—Appeal—Second appeal.*—A deposit by the judgment-debtor to set aside a sale can only be made under r. 89 of O. XXI. It does not come under s. 47 of the Code. An order refusing to receive it and to set aside the sale, or an order setting aside the sale, is made under r. 92 of O. XXI, and an appeal lies to the District Judge under O. XLIII, r. 1 (*j*) and no second appeal lies to the High Court, SITA NATH ROY v. HARE KRISHNA SAHU, **6 Ind. Cas. 573.**

(926)—*Ss. 47, 104, O. XXI, rr. 90, 92, O. XLIII, r. 1, cl. (j)—Setting aside of sale—Material irregularity—Fraud—Civ. Pro. Code (XIV of 1882), s. 311—Change in the law—Second appeal.*—S. 311 of the old Civ. Pro. Code applied only to irregularity and made no provision for the case of fraud; and a second appeal was held to lie where a sale was sought to be set aside on the ground of fraud, the reason being that, as fraud was not included within the section, the case of fraud was attracted to the general provisions of s. 244, in which case there was a second appeal. But r. 90 of O. 21 of the present Code includes the case of fraud as well; and the result of the change in the law is to place the procedure in the case of the setting aside of sales on the same footing where the application is based on the ground of irregularity or of fraud. In either case there is no second appeal. BISSONATH RAI v. KAMALESWARI PRASAD SINGH, **9 Ind. Cas. 135.**

(927)—*Ss. 47, 104, O. XLIII, r. 1 (=s. 244 588, Civ. Pro. Code, 1882)*—Ex parte *decree set aside—Effect—Confirmation of sale refused—Second appeal.*—The effect of setting aside an *ex parte* decree at the instance of one of the

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defendants, is to dicharge the decree as against all the defendants in the suit. (25 C. 155, *R.*) On a decree in execution of which a sale took place being set aside, after the date of sale, but before the date of its confirmation, the sale falls to the ground and cannot be confirmed, the decree not subsisting on that date. An order refusing to confirm a sale for want of subsisting decree, relates to the execution or satisfaction of the decree and is appealable. Therefore, a second appeal lies to the High Court in such a case. DOYAMOYI DASI v. SARAT CHUNDER MOZUMDAR, **25 C. 175=1 C.W.N. 656.** (19 C. 683, *F.*) [*F.*, 26 C. 324; *R.*, 27 C. 810=4 C.W.N. 692, 15 C.P.L.R. 179; *D.*, 6 C.L.J. 226.]

(928)—Ss. 47, 104, O. XLIII, r. 1—*See* BEN. ACT VIII OF 1885, s. 153, 28 C. 116.

(929)—*Ss. 47, 104, O. XLIII, r. 1 and O. XXI, r. 89=(ss. 588 and 310-A, Civ. Pro. Code, 1882)—Execution of the decree—Appeal.*—The judgment-debtor applied under s. 310-A of the Civ. Pro. Code to the Subordinate Judge to set aside a sale in execution of a decree against him, and an order was made accordingly. The auction-purchaser appealed to the District Court against that order, but his appeal was dismissed on the ground that no appeal lay against that order as s. 310-A was not included in the sections enumerated in s. 598 of the Code. *Held*, that this case did fall within the terms of s. 244 (c) of the Civ. Pro. Code and an appeal therefore lay against that order to the District Court. PANDURANG v. KRISHNABAI, **1 Bom. L R. 74.**

(930)—Ss. 47, 108, O. XLIII, r. 1—*See* ASSIGNMENT OF DECREE, 26 C. 250=3 C.W. N. 222.

(931)—Ss. 47, 109, 110—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 3 A. 633, F.B.=A.W.N. 1881, 32.

(932)—Ss. 47, 113, O. XLIII, r. 1, s. 141—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 12 B. 30.

(933)—*Ss 47, 115 (=ss. 244, 622, Civ. Pro. Code, 1882)—Execution of decree—Question not relating to the execution of the decree—Appeal—Revision—Practice—Exercise of High Court's revisional jurisdiction.*—The plaintiff, in a suit for an injunction, obtained, a decree prohibiting the defendant from obstructing him in building within a certain area, and also giving costs. This decree was executed for the costs awarded. Subsequently, the judgment-debtor applied to the executing Court, asking that the decree-holder should be ordered to demolish certain structures, which had been erected beyond the limits prescribed by the decree, and obtained an order as prayed. *Held*, that no appeal would lie from such an order. *Held*, also, that the High Court is competent, of its own motion, to call for the record of a civil case and pass such orders as it thinks fit, and

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the exercise of its powers of revision on the civil side will not invariably (though such is ordinarily the case) be confined to matters in respect of which no other remedy is open to the party aggrieved. DEBI DAS v. EJAR HUSSAIN, **A.W.N. 1905, 191=2 A.L.J. 749=28 A. 72.** (21) A. 133, 15 A. 405, *R*; 7 C.L.R. 191, *D.*)

(934)—Ss. 47, 115—*See* APPEAL—DECRRE AND EXECUTION OF DECREES, 16 M. 20.

(935)—*Ss. 47, 135 (=ss. 244, 642, Civ. Pro. Code, 1882)—Execution of decrees—Order negativing exemption from arrest—Appealability—Powers of Court to release.*—An order dismissing the petition of a judgment-debtor, pleading exemption from arrest under s. 642, Civ. Pro. Code, is an order under s. 244, Civ. Pro. Code, as it determines a question between the parties to the decree relating to the execution of the decree, and is appealable. A Judge, who has power to issue a warrant for the arrest of a judgment-debtor, has also power to issue orders for his release, if he is found to have been illegally arrested at a time when he was exempt from arrest. NAYANA NAICKEN v. HAJARET KIBULIAI SYED GULAM, **20 M.L J. 136=5 Ind. Cas 909=8 M L.T. 122.**

(936)—Ss. 47 (*c*), 141, O XLI. r. 5 (1), (2), (3)—*See* EXECUTION OF DECREE—STAY OF EXECUTION, 28 C. 734=5 C.W.N. 67.

(937)—*Ss. 47, 144 (1) (=ss. 244, 583, Civ. Pro. Code, 1882)—Execution—Review—Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit—Application in execution.*—Where M. D., defendant in a partition suit was deprived by the High Court of a house allotted to him by the first Court and, subsequently, the High Court, acting under Ch. XLVII, set aside its decree and M. D., having recovered possession of the house, applied under s. 583 of the Code for mesne profits. *Held*, that s. 583 had no application, the order entitling M. D to restitution having been passed under Ch. XLVII, not in appeal under Ch. XLI. *Held*, further, that, it was not necessary for M. D., to bring a separate suit, one of his remedies was by "summary process," *i.e.*, by an application under s. 244, and the application might be deemed to be one under that section. (10 M.I.A. 203, *R.*; 9 W.R. 402, 25 A. 411, 27 A. 485, *Appr.*) *Semble*, also, that the lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken. (14 C. 484, 22 C. 981, *R.*) It was further urged that, in any case, M. D. could not recover more than three years mesne profits. *Held*, that the applicant, having been guilty of gross laches in not applying for review for many years, should get mesne profits only from the date of the High Court's decree in review. COLLECTOR OF MEERUT v. KALKA PERSHAD, **A.W.N. 1906, 171=3 A.L.J. 556=28 A. 655.**

(938)—*Ss. 47, 144 (1) (=ss. 244 and 583, Civ. Pro. Code, 1882)—Execution of decree—Decree reserved on appeal—Mesne profits, suit to recover*

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Where, under an erroneous decree, which is since reversed on appeal, the party succeeding in the lower Court has obtained possession of the land, the successful appellant may recover back the land, with mesne profits for the period during which he was out of possession, though the appellate Court does not award him mesne profits. But, he is not restricted to taking proceedings for such mesne profits only by way of execution. He may bring a regular suit for the purpose. He cannot obtain the relief, by way of execution of the appellate decree, when that decree does not award him such profits He cannot execute the original decree because that decree has ceased to exist. CAFFIN v. KARBARI RAWAT, **22 C. 501**. (20 W.R. 238, 415, 22 W.R. 435, 25 W.R. 327, 3 C. 720, 7 A. 170, 14 C. 484, *R.*, 19 W.R, 413, *D.*)

(939)—*Ss. 47, 144 (1) (=ss. 244, 583, Civ. Pro. Code*, 1882)—*Execution of decree—Decree subsequently set aside—Application for restitution of amount realized in execution.*—The plaintiff, who had obtained an *ex parte* decree against the defendant, put the decree into execution and realized a certain amount. On the defendant's application, the *ex parte* decree was eventually set aside by the appellate Court and the suit was dismissed. The defendant applied to the Court which had executed the *ex parte* decree for restitution of the money realized in execution of that decree. *Held* that he could obtain the restitution by that application and that no new suit was necessary. SARAN v. BHAGWAN, **25 A. 441=A.W.N. 1903, 100.** (22 A. 79, *F.*) [*R.*, A.W.N. 1906, 171=28 A. 665=3 A.L.J. 556, 29 A. 348=A.W.N. 1907, 90=4 A.L.J. 188.]

(940)—*Ss. 47 and 144 (1) (=ss. 244 and 583, Civ. Pro. Code*, 1882)—*Application for restitution—Suit barred—Suit tried as application.*—Where a decree-holder obtains possession of the property without intervention of Court and the decree is reversed on appeal, no suit lies for possession of the property so taken possession of after the decree of the lower Court. Ss. 244 and 583 bar such a suit, the language of these sections being imperative. (22 A. 79 and 25 A. 441, *R.*) Where instead of an application for restitution, the plaintiff brought a suit for possession but prayed that his suit may be treated as an application for execution, *held*, that his prayer should be granted. SHEODAHAL v. BHAWANI, **4 A. L. J. 188=A.W.N. 1907, 90=29 A. 348.** [*R.*, 118 P.R. 1908.]

(941)—*Ss. 47, 144 (1) (=ss. 244, 583, Civ. Pro. Code*, 1882)—*Applicability of s. 244 to proceedings under s. 583—Restitution of property—Execution of decree.*—S. 244 does not apply in its entirety to proceedings had under s. 583 for restitution of property taken in execution of a decree, which is reversed in appeal. MATIRAM MARWARI v. RAMKUMAR MARWARI, **33 C. 265.** (10 M.I.A. 203, 9 W.R. 402, 4 C. 625, 33 C. 857, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(942)—*Ss. 47, 144 (1) (=Civ. Pro. Code*, 1882, *ss. 244, 583 (—Power of Court—Appeal*—An appeal lies against an order passed under s. 583, Civ. Pro. Code, as against any order passed in execution. S. 583, Civ. Pro. Code, gives no rights which a successful party did not otherwise possess. It only regulates the exercise of his right to claim the restoration of the state of things as it stood before the erroneous decree was passed. The Court must determine all questions between the parties necessary to restore the parties to the original state of things. VELLANKI VENKATARAMA RAO v. VENKATASUBBAMMA RAO, **8 M.L.J. 276.**

(943)—*Ss. 47, 144 (1) (=ss. 244, 583) Civ. Pro. Code*, 1882)—*Decree ex parte—Sale under—Decree set aside—Second decree satisfied—Suit for possession by judgment-debtor—Not barred*—S. 583, Civ. Pro. Code, only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in appeal. K obtained an *ex parte* decree for sale on foot of a mortgage. The property mortgaged was sold in execution of that decree, and purchased by the decree-holder who obtained possession. The *ex parte* decree was subsequently set aside and another decree was obtained after contest. That decree was satisfied before the property could be sold a second time. K however, continued in possession and this suit was brought to recover possession from him. The Court below dismissed the suit on the ground, that it was barred by ss. 244 and 583 of the Code. *Held* that s. 583 did not bar the suit. *Held*, further, that s. 244 has no application, inasmuch as the decree had been satisfied and the defendant had no interest left in the property, and the question was not one as to execution, discharge or satisfaction of the decree. GRIDHARI LAL v. KHUSHALI RAM, **6 A.L.J. 383=31 A. 364=1 Ind Cas. 744.**

(944)—*Ss. 47, 144 (1) (=Civ. Pro. Code*, 1882, *ss. 244, 583)—Applicability to Revenue Court—Refund of money collected in excess of decree—Remedy—N.W.P. Rent Act, XII of 1881.*—Where a decree-holder in a Revenue Court collected money in excess of the amount awarded in the appellate decree modifying the decree executed, the judgment-debtor might apply in execution to the Revenue Court or institute a separate suit. No prohibition of a separate suit such as is created by s. 244 of the Civ. Pro. Code can be read into the Rent Act which contains no such provision. MASSIH-ULLAH KHAN v. MAJID-UN NISSA, **26 A. 149=A.W.N. 1903, 207.** (3 W.R.P.C. 11, *R.*)

(945)—Ss. 47, 144 (1)—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1889, 163.

(946)—Ss. 47, 144 (1)—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 21 C. 989, 7 A. 197=A.W.N. 1884, 332.

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(947)—Ss. 47, 144 (1)—Reversal or modification of decree—Restitution of payment made under decree—Execution — Fresh suit—*See* REVERSAL OF DECREE, 7 A. 432=A.W.N. 1885, 167.

(948)—*Ss. 47, 144* (1), *115* (=*Civ. Pro. Code*, 1882, ss. *244*, *583*, *622*)—*Claim for rateable distribution rejected—Amount detained pending application to High Court—Interest—Procedure.*—Where the amount which would have fallen to the share of a creditor, if his application for rateable distribution had been allowed, was, at his request, detained in Court pending an application for revision by him to the High Court (which was rejected), interest on such sum could not be awarded to the party entitled to it, in execution-proceedings. SANJIVI v. RAMASAMI, 8 M.494. [*R.*, 11 M. 220, F.B.]

(948-*a*)—*Ss. 47, 145—Decree—Execution—Surety—Surety-bond—Liability of the surety under the bond—Suit can lie to enforce liability—Practice—Procedure.*—The liability of a surety under his bond for the performance of any decree or for the restitution of any property taken in execution of a decree, can be enforced by a separate suit. MOTILAL VIRCHAND v. CHANDRASANGJI HIMATSANGJI, **13 Bom. L.R. 909.**

(949)—*Ss. 47, 145, O XLI, r. 5* (=*ss. 244, 253 and 545, Civ. Pro. Code*, 1882)—*Surety in appellate Court—Execution against surety—Procedure.*—S. 253, Civ. Pro. Code, does not apply to a surety who becomes security for an appellant in the appellate Court under s. 545 of the Code. So, a security bond cannot be enforced against the surety in execution of the decree of the appellate Court under s. 253, Civ. Pro. Code, without a separate suit being brought against him. TOKHAM SINGH v. UDWANT SINGH, **22 C. 25.** (15 C. 497, *F.*) [*F.*, 23 C 212; *Cons*, 25 B. 409; *R*, 13 C.P.L.R. 104; *Diss.*, 17 A. 99=15 A.W.N. 19, 109 P.R. 1906=1 P.L.R. 1907, 4 L.B.R. 197=14 Bur. L.R. 170.]

(950)—*Ss. 47, 151—Execution of decree—Question relating to execution—Question as to what was sold at execution sale—Inherent power of Court to rectify mistake*—Res judicata—*Question of mistake.*—The question of what was sold at an execution sale is a question relating to the execution of the decree and no decision as to the validity of the decree or as to the validity of the sale held under the decree on the ground of fraud can possibly operate as *res judicata* in a question of mistake which occurred in the execution proceeding itself. The Court has full jurisdiction under s. 151 of the Code to rectify it. EKADASHI DAS v. CHANDRA MOHAN SHAHA, **7 Ind. Cas. 91.**

(951)—*Ss. 47, 158—Execution—Fraudulent decree—Separate suit or application—Nullity—Remedy against fraudulent decree—Application for execution treated as suit—Rules of procedure, alteration in—Retrospective effect.*—A judgment or decree obtained by fraud upon a Court binds neither the Court, which passes it, nor any other Court; and its nullity upon the ground of fraud, though it has not been set aside or reversed, may be alleged in a collateral proceeding. In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of Judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as nullity a judgment which can be clearly shown to have been obtained by manifest fraud. Where a decree has been obtained by fraud, the remedy is by a separate suit and not by an application under s. 47 of the Code (9 M. 81, 21 C. 605, 24 C. 546, 26 C. 326, 3 C.W.N. 395. 27 C. 197, 26 B. 545, 20 A. 370, *R.*) No person has any vested rights in procedure. Alterations in the procedure are always retrospective unless there be some good reasons against it. SHAMSHERYAR KHAN v. GOPAL CHAND, **7 Ind. Cas. 11.** (16 W.R. 540, 8 B. 511, 12 C. 583, 18 B. 42, 21 B. 822, 27 M. 538, 14 M.L.J. 340, *R.*)

(952)—S. 47 (2), O. rr. 1, 2—Mortgage—Second suit not maintainable for same cause—*See* MORTGAGE—GENERAL, 8 A.L.J. 599.

(953)—S. 47, O. IX, r. 13—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 21 C. 605.

(953-*a*)—*S. 47 and O. XX, r. 11—Agreement to delay execution—Sanctioned by Court not to be resiled from—No fresh suit necessary.*—A jugdment-debtor, who had the benefit of the arrangement for delay in execution which was sanctioned by Court, is not at liberty to resile from it. (14 M.L.J. 359, 18 M.L.J. 548, *overruled*). The arguments in 14 M.L.J. 359 and 18 M.L.J. 548 have lost their force under the new Civ. Pro. Code. The old s. 257-A is dropped and s. 213 re-appears in O. 20, r. 11 of the new Code. And s. 47 allows Courts to treat applications as suits and *vice versa*. SUBBARAYA AIYAR v. RAMASAMY PILLAI, 1912. **1 M.W.N. 9.** (4 C. 27, 25 C. 86, *F.*)

(954)—*S. 47, O. XXI, r. 2* (=*ss. 244, 258 Civ. Pro. Code*, 1882)—*Applicability of s. 258, —Suit by judgment debtor as part-purchaser of decree.*—Where some of the decree-holders sold their 10/16 share of the decree to two of the judgment-debtors, and then the other decree-holders who owned the remaining 6/16 share, were, upon giving security under s. 231 of the Code, allowed to receive the whole decretal amount from those two judgment-debtors notwithstanding their objection on the ground of their purchase, *held* that these two debtors were entitled to sue for declaration of their right of purchase and to recover 10/16 share of the money in the hands of those of the decree-holders who executed the whole decree. *Held* also that, as the suit in this case, was brought not upon the allegation that the decree was satisfied by the plaintiff's purchase, but, on the other hand, was based upon the proposition that

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the decrees were not so satisfied, s. 258 of the Code did not affect the suit. It was further held that, as no question was raised in respect of the furtherance of, or hindrance to, or the manner of carrying out the execution of the decrees, the claim was not within the words "relating to the execution of the decree" in s. 244, Civ. Pro. Code. HARAGOBIND DAS KOIBURTO v. ISSURI DASI, **15 C. 187**. [*R.*, 2 M.L.J. 14.]

(955)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code, 1882, ss. 244, 258)—Suit for declaration of satisfaction of decree—Satisfaction out of Court.*—The effect of s. 258 of the Civ. Pro. Code is only to exclude proof of an uncertified agreement in satisfaction of a decree in execution proceedings. It does not limit the operation of s. 244. An action for the breach of the contract to certify adjustment of a decree may be brought. But a suit to declare that a decree has been satisfied will not lie. BAIRAGULU v. BAPANNA, **15 M. 302=2 M.L.J. 112.** [*F.*, 12 C.W.N. 485; *Appr.*, 21 C. 437, 31 C. 480=8 C.W.N. 395; *R.*, 20 A. 254.]

(956)—*S. 47, O. XXI, r. 2 (=ss. 244, 258, Civ. Pro. Code, 1882—Satisfaction of decree not certified—Suit for declaration of satisfaction—Maintainability—S. 56, Specific Relief Act, I of 1877.*)—S. 258, Civ. Pro. Code, 1882, does not limit the operation of s. 244 of the Code. (19 C. 683, 21 C. 437, 15 M. 302, *F.*) A separate suit, to declare that a decree has been satisfied though such satisfaction has not been certified under s. 258 of the Code, is not mainatinable. (15 M. 302, *F.*) S. 56, Specific Relief Act, precludes the Court from granting an injunction restraining the execution-proceedings in this case.—Per *Hill, J.* DENO BUNDHU NUNDHY v. HARI MATI DASEE **31 C. 480=3 C.W.N. 395.** [*Expl.*, 12 C.W.N. 485.]

(957)—*S. 47, O. XXI, r. 2 (=ss. 244 and 258, Civ. Pro. Code, 1882)—Adjustment out of Court, suit to prove.*—An Adjustment of decree out of Court, not certified by the decree-holder, cannot, having regard to the provisions of s. 258, Civ. Pro. Code, be pleaded against an application for execution of the decree. But a regular suit by the judgment-debtor will lie for proving the adjustment out of Court which is not cognisable under s. 258, and for establishing his title to a *jote* sold by the executing Court, which under s. 258 did not take the adjustment out of Court into account. ISWAR CHANDRA DUTT v. HARIS CHANDRA DUTT, **25 C. 718=2 C.W.N. 247.** (21 C. 437, *D.*) [*F.*, 44 P.R. 1906=82 P.L.R. 1907; *R.*, 31 C. 480=8 C.W.N. 395, U.B.R. 1905, 4th Quarter, Civ. Pro. Code, 15, 244; *D.*, 2 O.C. 315.

(958)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code, 1877, ss, 244, 258)—Questions for Court executing decree — Adjustment out of Court — Separate suit.*—When a decree is adjusted by payment out of Court, but is again executed in spite of the objections of the judgment-debtor, which

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are overruled on the ground that the adjustment was not certified, the judgment-debtor can maintain a separate suit for the recovery of the money paid by him out of Court. Such a suit is not barred by the provisions of s. 244, as the discharge or satisfaction of the decree made out of Court could not, being uncertified, be entertained by the Court executing the decree, and could not therefore be a question for such Court. Nor is it barred by the last paragraph of s. 258, which refers only to execution proceedings and to the Court or Courts executing a decree. SHADI v. GANGA SAHAI, **3 A. 538.** [*Doubted*, 10 B. 155, 11 B. 6 F.B.; *F.*, 5 A. 269, 7 A. 124, 10 C. 354, 17 C. P.L.R. 60, 5 A.L.J. 475=A.W.N. 1908, 220=30 A. 464; *R.*, 10 B. 288, 18 M. 26, 20 A. 254, 6 A.L.J. 403; *D.*, 16 M.L.J. 54.]

(959)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code 1877, ss. 244, 258)—Questions for Court executing decree—Assignment of decree—Adjustment out of Court—Separate suit.*—Where a decree-holder assigns his decree to his judgment-debtor and agrees to deliver to him the decree and the sale certificate for immoveable property, the subject of such decree, on payment of the balance of purchase-money, the latter can maintain a separate suit for the specific performance of the agreement. Such a suit is not barred by s. 244, as the questions raised by it cannot be disposed of by the Court executing the decree. Nor is the suit barred by the last paragraph of s. 258 on the ground that the assignment of the decree amounts to an uncertified adjustment of such decree; for the words "any Court" in that paragraph refer to proceedings in execution and to the Court or Courts executing a decree. SITA RAM v. MAHIPAL, **3 A. 533.** [*Doubted*, 10 B. 155, 11 B. 6, F.B.; *F.*, 5 A. 269, 7 A. 124, 10 C. 324; *Appr.*, 15 C. 187; *R.*, 10 B. 288, 18 M. 26.]

(960)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code, 1882, ss. 244, (c) and s. 258)—Adjustment of decree outside Court not certified—Maintainability of separate suit to enforce agreement to adjust.*—Where a decree is compromised out of Court, then, under s. 244 (c) and s. 258 of the Civ. Pro. Code, 1882, no Court will recognise such a compromise unless it has been duly certified under the provisions of the latter section. Nor will a separate suit lie under the circumstances, for enforcing such compromise. *N.B.*—Case law reviewed in detail. HARMASJI DORABJI VANIA v. BURJORJI JEMSETJI VANIA, HAJI ABDUL RAHIMAN v. KHOJA KHOPI ARUTH; THE LONDON BOMBAY AND MEDITERRANEAN BANK v. PESTONJI DHANJIBHOY, **10 B. 155.** [*R.*, 20 C. 32.]

(961)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code 1882, ss. 244, 258)—Order certifying part payment of small cause decree—Suit to restrain execution of decree on ground that it had been completely satisfied—Maintainability.*—The party against whom an order under s. 258 was passed could prefer an appeal, though

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the decree that was executed was a small cause decree. A suit by the judgment-debtor for a declaration that the decree had become satisfied and to retrain the decree-holder, from executing the decree was barred under the provisions of s. 244. KARUPPA PILLAI v. ATHAMSA ROWTHER, **5 M.L.J. 140.**

(962)—*S. 47, O. XXI, r. 2 (=ss. 244, 258, Civ. Pro. Code, 1882)—Suit by judgment-debtor to stay execution of decree based on agreement, maintainability of.*—A suit was instituted by a judgment-debtor to stay execution of a decree, based on an agreement on the part of the decree-holder not to execute it. Such agreement had not been certified to the Court. *Held* (Per *Piggot, Macpherson, JJ., Banerji, J. dissentiente*), the suit was not maintainable. S. 258 does not limit the operation of s. 244 of the Procedure Code. Per *Piggot, J.*—S. 244 of the Civ. Pro. Code does not absolutely bar a suit. The Legislature has deliberately so framed s. 244 as to prohibit, in a separate suit between the parties to a decree, any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree. Per *Banerji, J.*—A suit on the agreement referred to was maintainable. S. 258 by enacting that an uncertified adjustment cannot be recognised *as an adjustment of the decree* by any Court *executing the decree*, implies that it may be recognised *as such* by a Court *trying the matter as a regular* suit. AZIZAN v. MATUK LAL SAHU, **21 C. 437.** [*Appr.*, 22 B 463, 31 C. 480=8 C.W.N. 395; *R.* 17 C.P.L.R. 60, 20 A. 254=18 A.W.N. 37, 13 C.P.L.R. 179, L.B.R. 1893--1900, 621; *D.*, 25 C. 718, 23 B. 394.]

(962-*a*)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code, 1882, ss. 244, 258)—Contract by decree-holder not to execute decree—Breach—Suit for damages—Maintainability.*—The provisions of s. 244 of the Civ. Pro. Code, 1882, do not operate as a bar to a suit to recover damages for breach of a contract not to execute a decree. HANMANT v. SUBBABHAT, **23 B. 394.**

(963)—*S. 47, O. XXI, r. 2 (=Civ Pro. Code, 1882, ss. 244, 258)—Limitation Act XV of 1877, sch. II, art. 173-A—Decree for possession—Application to enter satisfaction—Limitation.*—An application was made by a defendant for an order that the lands ordered to be surrendered under the decree were surrendered by him to the plaintiff. The application was made more than ninety days from the date of surrender. *Held* that, as s. 258, Civ. Pro. Code, applied only to money-decree and not to decree for possession of immoveable property, the application was not governed by art. 173-A, sch. II of the Limitation Act, XV of 1877. *Held* also that, though s. 258, Civ. Pro. Code, did not apply, yet under s. 244 of the Code, the Court had a general authority to make orders determining any questions which arose between the parties to the suit and relating to the satisfaction of the decree. SANKARAN NAMBIAR v. KANARA KARUP, **22 M. 182=8 M.L.J. 175.** [*Diss.*, 82 P.R. 1907; 427=44 P.R. 1906; *R.*, 24 M. 412, 9 Bom. L.R. 1380.]

(964)—*S. 47, O. XXI, r. 2 (=ss. 244, 258, Civ. Pro. Code, 1882)—Payment twice over—Suit for recovery of that amount maintainable.*—Ss. 244 and 258 of the Civ. Pro. Code, do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree-holder privately and the payment of which, not being certified, could not be recognised, and for which the decree-holder had taken out execution over again. GENDO v. NEHAL KUNWAR, **5 A.L.J. 475=A.W.N. 1908, 220=30 A. 464.** (30 A. 538, 409, *F.*)

(965)—*S. 47, O. XXI, r. 2 (=Civ. Pro. Code, 1882, ss. 244, 258)—Decree, execution of, application for—Certificate of adjustment—Application, if can be treated as one under s. 258—Fraud—Damages*—The provision of s. 258, Civ. Pro. Code, 1882, are express, and no payment or adjustment shall be recognised by the execution Court unless it has been certified and, therefore, an alleged adjustment relied on by the judgment-debtor is no answer under s. 244 of the said Code to an application for execution of a decree. The application cannot be treated as one under s. 258 of the Code. If in point of fact the decree-holder agreed with the judgment-debtor that he would not execute his decree and that the matter should be settled between them, then if he broke that agreement he would be liable for an action for damages. BAJRANG BIHARI LAL v. LACHMI NARAIN, **15 C.L.J. 88.**

(966)—S. 47, O. XXI, r. 2—*See* APPEAL—DECREES AND EXECUTION OF DECREES. 18 M. 26.

(967)—S. 47, O. XXI, r. 2—*See* CONSIDERATION, 7 A. 124=A.W.N. 1884, 277.

(968)—S. 47, O. XXI, r. 2—*See* EXECUTION OF DECREE—GENERAL, A.W.N. 1889, 95.

(969)—S. 47, O. XXI, r. 2—*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 C.L.J. 91=4 Ind Cas. 402=14 C.W.N. 357.

(970)—S. 47, O. XXI, r. 2—Payment not certified not to be proved under s. 244, Civ. Pro. Code, 1882—*See* LIMITATION ACT, 1908, art. 183, 4 Ind. Cas. 402.

(971)—S. 47, O. XXI, r. 2—Sale in execution of decree—Suit to set aside sale on ground of adjustment of decree out of Court—Adjustment not certified—Suit not maintainable—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 20 A. 254=A.W.N. 1898, 37.

(972)—S. 47, O. XXI, r. 11 (1)—Adjustment between mortgagor and mortgagee after order

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absolute for sale has been passed—Competency of Court to deal with the matter—*See* TRANSFER OF PROPERTY ACT, ss. 89 and 104, 12 C. W.N. 282=3 M.L.T. 202=7 C.L J. 581.

(973)—*S. 47, O. XXI, r. 15 (=Civ. Pro. Code, 1882 ss 244 and 231)—Decree for moiety in favour of defendant—Right of such defendant to claim moiety of money realized in execution.*—In a suit on a mortgaged bond executed in favour of the plaintiff and sixth defendant, a decree was passed for a moiety of the mortgage amount in favour of sixth defendant. The plaintiff in execution of his half-share brought the mortgaged property to sale. Then the sixth defendant applied that it should again be sold for his half-share, but was informed it could not be sold twice over. Thereupon, he applied for payment to him of half the sale proceeds. *Held* that his remedy lay by a separate suit and not in execution proceedings, inasmuch as the decree had not been passed jointly in favour of plaintiff and sixth defendant within the meaning of s. 231. Civ. Pro. Code, but was in favour of each separately for his own moiety. KUTTIANA GOUNDAN v. MUTTIA GOUNDAN, **2 M.L J. 14.**

(974)—*S. 47, O. XXI, r. 17 (=ss. 244 (c), 245, proviso, Civ. Pro. Code, 1882)—Execution of decree—Attachment—Appeal.*—In execution of a decree, the decree-holder having first attached the landed property of the judgment-debtor which was more than sufficient to satisfy the claim, again attached his household property of inconsiderable value. The judgment-debtor objected to the latter attachment and prayed under the last clause of s. 245, Civ. Pro. Code, or its release. On his application being summarily rejected, he preferred an appeal. *Held* that an appeal validly lay from the order passed by the Court below, which was a *quasi*-decree determining a question raised between the parties to the suit under s. 244 (c) of the Civ. Pro. Code. JASWANT SINGH v. BISHUN LAL, **A.W.N. 1888, 155.**

(975)—*S. 47, O. XXI, r. 15 (=ss. 244 and 246—Civ. Pro. Code, 1882)—Decree ordering recovery of money by sale of property is a decree for money within s. 246—Attaching creditor, a representative of the decree-holder.*—On an application in execution of a decree, for realisation of the entire amount due by sale of the properties directed, by the decree, to be sold, the judgment-debtor claimed to set off against such amount, certain money due to him under a money decree in his favour. Overruling the contention that the above decree, which only ordered sale of property and no direct payment of money, was not a decree for money, so as to allow a set off against it under s. 246 of the Code, it was *held*, that it was open to the judgment-debtor to set off against such decree any decree for money held by him. (28 M. 473, *F.*) An attaching creditor becomes the representative of the decree-holder for the purpose of

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s. 244 of the Code and any order passed in execution, as between him and the judgment-debtor, is therefore open to appeal. KRISHNAN v. VENKATAPATHI CHETTI, **29 M. 318.** (16 M. 20, *F.*) [*R.*, 6 C.L.J. 437=11 C.W.N. 433.]

(976)—*S. 47, O. XXI, r. 22 (=ss. 244 and 248, Civ. Pro. Code, 1882)—Decree satisfied—Application by judgment-debtor for refund on the ground of fraud—Jurisdiction of the Court.*—A Court, to which a decree has been transferred for execution, is competent to entertain an application, by a judgment-debtor, to the effect that, when the decree was executed, it was barred by time, and he paid in the decretal amount on account of the fraud practised upon him by the decree-holder, in not mentioning the fact of a previous application being dismissed as barred by time, and asking for a refund of the amount paid by him. The jurisdiction of the Court does not cease by the fact that satisfaction of the decree was entered and execution proceedings had terminated. PANNA LAL v CHAKKAN SINGH, **4 A.L.J. 142 =A. W.N. 1907, 65.** (24 A. 239, *F.*)

(977)—*S. 47, O. XXI, rr. 22, 23, 90 (=ss. 244, 248, 249, 311, Civ. Pro. Code, 1882)—Sale, setting aside of—First application for execution barred—Notice issued under second application—No objection by judgment-debtor—Effect of order.*—Where the first application for execution was barred, but the judgment-debtor did not appear and object, and a second application was made and notice was issued to the judgment-debtor who did not appear, and his property was sold in execution: *Held*, that the order in the second application for execution, to the effect that attachment and sale proclamation should issue, was an order under s. 244, Civ. Pro. Code, and relating to the execution of the decree; that, the judgment-debtor not having appealed against it, it became final between the parties; and that the sale was good. FAZAR BANU v. UZIR ALI MIAN, **1 Ind. Cas. 284.** (10 C.W.N. 209, 8 C.L.J. 193, 6 A. 269, P.C., 11 I.A. 37, 8 C. 51, P.C., 11 C.L.R. 113, 8 I. A. 123, *R.*)

(978)—*S. 47, O. XXI, rr, 22, 90 (=ss. 244, 248, 311—Civ. Pro. Code, 1882)—Auction sale, setting aside of—Notice under s. 248, service of, object of—Objection not raised in first Court—Limitation (Act XV of 1877), sch. II, arts. 11, 178.*—Where an auction-sale was impeached on the ground that the attachment was not properly levied and the sale proclamation had not been served. *Held*, that an application to set aside a sale, on the ground that a notice under s. 248 of the Civ. Pro. Code, 1882, had not been served, could not be made under s. 311 of the said Code, when the validity of the sale was not attached on the ground that there was irregularity in the publication or conduct of the sale. As the question of the validity of the sale was a matter relating to the execution of the decree and arose between the parties to the suit, the appropriate procedure was not by

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way of suit to be brought within one year from the date of the sale, but by way of application to be made under s. 244, and such application might be made within three years from the date of sale under art. 178, Limitation Act The object of the service of notice under s. 248 of the Code is not merely to give the judgment-debtor an opportunity to show cause why the decree should not be executed, but also to give an opportunity to satisfy it before execution issues. (11 C.L.J. 489, *R.*) Where the omission to take any objection as to the non-service of notice under s. 248 of the Code has not prejudiced the auction-purchaser, the appellate Court is justified in entertaining the objection. LAKSHMI CHARAN v. SRIS CHANDRA ROY, **13 C.L.J. 162=9 Ind. Cas. 584.**

(979)—S. 37, O. XXI, rr. 22, 90—Non-service of notice on judgment-debtor, if ground for setting aside the sale—Effect of confirmation of sale—*See* RECEIVER, 14 C.W.N. 560=5 Ind. Cas. 390=11 C.L.J. 489.

(980)—*S. 47, O. XXI. r. 32 (=ss. 47, 260, Civ. Pro. Code.* 1882)—*Partnership-suit—Decree directing both parties to take certain amount in equal shares.*—Where a decree finds that both the defendants and the plaintiffs are entitled to a certain sum in equal shares, the plaintiffs can recover their shares of the money in execution proceedings from the defendants, if realised or realisable by the defendants. This question falls under s. 244, Civ. Pro Code, 1882, and not under s 260. TIKAYA RAM v. MEGA RAM, **48 P.R. 1900**. [*R.*, 100 P.R, 1902 =131 P.L.R. 1902.]

(981)—*S. 47, O. XXI, rr. 36 and 35 (=ss. 244, 263, 264, Civ. Pro. Code,* 1882)—*Decree for possession—Delivery given—Subsequent dispossession—Remedy by way of suit.*—The plaintiff in a suit having obtained a decree for possession of her share in the family properties, got joint possession in pursuance of the decree. Subsequently at her instance the decree was amended into one for partition. Latter on being dispossessed she brought the present suit for possession She did not make any attempt to execute the amended decree. *Held* that the amendment of the decree the satisfaction of which had been recorded was nullity. The fact that she was ousted from joint possession gave her a fresh cause of action in respect of which a fresh suit was maintainable PATHAMBI v. MYTHEEN BIBI, **12 M.L.J. 96**.

(981-*a*)—*S. 47, O. XXI, r. 50—Civ. Pro. Code (Act XIV of* 1882), *ss. 244, 258—Judgment-debtor objection by, how to be treated—Objection on the ground that judgment-debtor was holding property as trustee for religious purposes—Appeal against an order dismissing judgment-debtors objection*—Where a judgment-debtor sets up a claim to the effect the certain property attached in the execution of a decree is in his possession, not on his own account, but on account of or in trust for some other person, and in particular where he claims that the property in question has been set apart for religious charitable purposes and is held by him as a trustee, his objection must be treated as falling under O. XXI, r. 58 of the Code of 1908 (corresponding to s. 278 of the Code of 1882) and not under s. 47 of the Code of 1908 (corresponding to s. 244 of the Code of 1882). Consequently, no appeal lies from such an order SAJID ALI v. ALI MOHAMMAD KHAN, **12. Ind. Cas. 411.**

(982)—*S. 47, O XXI, r. 53, ss. 64, 73 (= ss. 244, 273, 276, 295, Civ. Pro. Code,* 1882)—*Mortgage of decree by decree-holder—Attachment of decree on same date by decree-holder's creditor—Subsequent attachments by other creditors—Priority—Withdrawal of first attachment—Rateable distribution—Rights of mortgagee of decree—Lien—Burden of proof.*—The first defendant mortgaged a decree to the plaintiff on 3rd November, 1904. The tenth defendant, who had obtained a decree against the first defendant, on the file of the Sub-Judge's Court, attached the decree, and the order of attachment was communicated to the Munsiff on the same day as the date of the mortgage, *viz.*, 3rd November 1904. Subsequently defendants Nos. 11 and 12 also attached the same decree. The tenth defendant having afterwards withdrawn his attachment, the first defendant executed his own decree, and the amount realised was kept in deposit in Court. The plaintiff sued for the recovery of his mortgage amount from the amount in deposit in Court. Defendants Nos. 11 and 12 claimed priority: *Held*, that s. 244, Civ. Pro. Code, 1882, was no bar to the plaintiff's suit; that the mortgage by first defendant to the plaintiff was not made "during the continuance of the attachment" so as to invalidate it under ss. 273 and 276, Civ. Pro. Code, 1882; that the receipt by the Munsif of the notice of attachment by tenth defendant was a not a judicial act to justify the presumption that it was received as the earliest point of time on the date of receipt, and to cast on the private alienee the burden of proving that his transaction was prior; that eleventh and twelfth defendants where not entitled to a rateable distribution of the amount in deposit in Court, as it is essential to a valid claim for rateable distribution that the assets should have been realisd by the tenth defendant executing the first defendant's decree by way of executing his own decree; that the plaintiff had a lien on the amount in deposit in Court and not merely a personal claim against the first defendant; as a mortgagee is entitled to a charge upon the property which, through no fault of his, takes the place of the mortgaged property. VENKATRAMA IYER v. ESUMSA ROWTHEN, **5 Ind. Cas. 92=7 M.L.T. 143=20 M.L.J. 330=33 M. 429.**

(983) *S. 47, O. XXI, rr. 54, 60 (=ss. 244, 274, 280, Civ. Pro, Code,* 1882)—*Parties to suit—Party preferring claim to attached property, against whom suit is dismissed.*—When

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a suit is dismissed against one of the parties, but decreed against the rest, the party cannot be regarded as party to the suit in relation to execution, discharge, or satisfaction of the decree, within the meaning of s. 244, Civ. Pro. Code. RAHIMUDDI SIRKAR v. LOLL MEAH, **29 C. 696=6 C.W.N. 727.** (12 C 458, 17 711, 6 C.W N. 10, 23 A. 346, *R.*) [*Diss.*, 17 C.P.L.R. 178.]

(984)—*S. 47, O. XXI, rr. 55, 88, 89, 90, 92, s. 100, O. XLIII, r. 1 (=ss. 244, 275, 310, 310-A, 311, 312, 588, Civ. Pro. Code, 1882) —Whether an auction-purchaser is a party to the suit or is the representative of a party to the suit.*—Before the sale of property, attached in execution of a decree, A. the judgment-debtor, deposited the amount due, but the receipt given by the bailiff was not filed in the execution record but in the regular record and on that account was overlooked by the Judge, in consequence of which the Township Judge ordered the land to be sold and confirmed the sale. When, however, the fact of A's payment before the sale was brought to the notice of the Judge, he, after hearing all the parties concerned, cancelled the sale and ordered A to refund to the auction-purchaser Rs. 530 *plus* 5 per cent. On appeal to the District Court, this order of refund was set aside. *Held*, that an order of the above kind, to be appealable under s. 244 of the old Code (s. 47 of the new), must be an order determining a question arising between the parties or their representatives, to the suit, in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree. *Held*, further, that the auction-purchaser at a Court sale, who is a stranger to the suit, does not, by his purchase, become a party or a representative of either party, within the meaning of s. 244, and that the order of the District Court must, therefore, be reversed. *Held*, also, that the purchaser under a sale in execution is not bound to inquire into the correctness of an order for execution. MAUNG PO THET v. P. R. V. ANAMALAY CHETTY, **9 Ind. Cas. 472.**

(985)—*S. 47, C. XXI, r. 58 (=Civ. Pro. Code, 1882, ss. 244, 278)—Judgment-debtor in possession of the property not on his own account —Claim—Appeal.*—Where a property is attached in execution of a decree and the judgment-debtor objects on the ground that although he is in possession of the same, such possession not in his account but on account of two idols and the property is *debutter* and he has no personal right in it, *held*, that the objection does not fall under s. 244, Civ. Pro. Code, but it is a claim under s. 278, Civ. Pro. Code, and no appeal lies against an order passed in such a case. BHAJAHARI PAL v. RAM LAL DAS, **6 C.W.N. 63.** (16 C. 1, 17 C. 711, 23 B. 246, 2 A. 752, 7 A. 36, 15 C. 437, 23 B. 237, *R.*)

(986)—*S. 47, O. XXI, r. 58 (=Civ. Pro. Code, 1882, ss. 244, 278)—Party to suit not to prefer objection petition as third party.*—**A party to a suit, whether discharged or not by the Court cannot prefer an objection under s. 278, but must come under s. 244 of the Code. A proceeding taken by him under s. 278 does not debar him from exercising his rights under s. 244.** BALARAM KUNBI v. SADOBA MALI, **17 C.P.L.R. 178.** (15 C.P.L.R. 106, *F.*; 29 C. 696 and 30 C. 134, *D.*)

(987)—*S. 47, O XXI, r. 58 (=Civ. Pro. Code, 1882, ss. 244, 278—Execution of decree —Attachment—Judgment-debtor declared insolvent—Claim by Official Assignee to attached property—Rejection of claim—Appeal—Stat. 11 and 12 Vic., Chap. 21, ss. 7, 49.*—In execution of a decree, property was attached, and an order was made for sale. Prior to the sale, the judgment-debtors applied to be declared insolvents, and an order was passed under s. 7 of the Insolvent Act vesting their property in the Official Assignee, who applied to the Court executing the above decree that the property might be released from attachment and made over to him. The application having been dismissed and an appeal by the Official Assignee to the District Judge having been allowed,—*held*, that the application to the Court executing the decree made by the Official Assignee was not one under s. 49 of the Insolvent Act, which refers only to cases in which the insolvents have filed their schedule, and only to debts or demands admitted in such schedule (whereas in this case, no schedule had been filed)——that the application could be entertained only under the provisions of the Civ. Pro. Code, relating to the execution of decrees—that it was not one under s. 244, as the Official Assignee is not a representative of the judgment-debtor, and the application was not for his benefit, nor had it any reference to the execution, discharge, or satisfaction of the decree—that it was properly one under s. 278, Civ. Pro. Code, by third parties (the general body of creditors whom the Official Assignee represents); and that, therefore, the District Judge should not have entertained an appeal from the order disallowing the Official Assignee's application. KASHI PRASAD v. MILLER, **7 A. 752=A.W.N. 1885, 166.** [*Diss.*, 28 C. 419; *Appr.*, 16 C. 603; *R.*, 22 C. 259, 21 B. 205, 30 A. 486=5 A.L.J. 533=A.W.N. 1908, 203.]

(988)—*S. 47, O XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code, 1882)—Act IV of 1882 (Transfer of Property Act, ss. 88, 89—Execution of decree—Appeal—Revision.*—Certain property comprised in a decree under s. 88 of the Transfer of Property Act was proclaimed for sale. As to a portion of this property, an application was made by a person, who alleged himself to be the owner thereof, praying for its exemption from sale. This application purported to be and was dealt with by the Court as, an application under s. 278 of the Code of Civil Procedure, and was allowed. The decree-holder appealed, and her appeal was entertained as an appeal under s. 244 and was allowed. *Held*, on appeal by the objector, to the High

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Court, that neither s.278 nor s. 244 of the Code were applicable, the former because the property in question had not been attached, the latter because the objector was not the representative of the judgment debtors, but claimed adversely to them. No appeal lay to the High Court, but the memorandum of appeal was treated as a petition in revision. MUHAMMAD YAHYA v. LALTA DEI, **A W N. 1906, 62.** [*R.* 11 C.W.N. 433; *F.* 6 A.L.J. 437.]

(989)—*S. 47, O. XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code,* 1882)—*Execution proceedings—Parties unnecessarily impleaded—Failure to prefer claim—Estoppel.*—Some persons, who were wrongly impleaded as defendants in execution proceedings, did not prefer any claim to plaintiff's attachment and sale of property therein. *Held*, that they were not estopped, by the said circumstance, from making a claim in any subsequent suit or proceedings. AKKAMAD MOHIDEEN v. SOWMYA NARAYANA AYANGAR, **8 Ind. Cas 161.**

(990)—*S. 47, O. XXI, r. 58 (=Civ. Pro. Code.* 1882, *ss. 244, 278.*)—*Claim by judgment-debtor as shebait to deity—Appeal—Revision*—A claim to property attached in execution of a personal debt, preferred by the judgment debtor in his capacity as *shebait* to a Hindu deity, comes within s. 244 of the Civ. Pro. Code, and not within s. 278 (17 C. 711, *F.*) Where the Munsif inquired into the claim under the latter section and allowed it, and the District Court dismissed the appeal on the ground that no appeal lay from such an order, the High Court, in second appeal, dismissed the appeal as such, but exercised its revisional powers and sent the case down to the first Court to be inquired into in the manner shown in s. 244. BEG RAJ MARWARI v. SRIMUTTY KUNDALI DEBYA, **8 C.W.N. 383.** [*D.*, 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908; 8 C.L.J. 20.]

(991)—*S. 47, O. XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code,* 1882)—*Personal decree against* shebait—*Execution against* debutter *property—Suit to declare property* debutter *if maintainable.*—A suit instituted by the *shebait* of an idol to have it declared that property sought to be sold in execution of a personal decree against the plaintiff is the endowed property of the idol is maintainable. AMAR CHAND KUNDU v. NANI GOPAL MUKERJEE, **12 C.W.N. 308.** (6 C.W.N. 663, *F.*)

(992)—*S. 47, O. XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code,* 1882)—*Decree, personal, against* shebait—*Claim to attached property on behalf of idol, if may be tried in execution proceedings.*—When immoveable property is attached in execution of a decree passed against a *shebiat* personally, the latter can object to the attachment on the ground of the property being *debutter* and the claim is triable under s. 244 of the Civ. Pro. Code. JOGENDRA NATH SIRKAR v. GOBINDA CHANDRA DUTTA. **12 C.W.N. 310=35 C. 364=7 C.L.J. 537.** (17 C. 711, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(993)—*S. 47, O. XXI, r. 58 (=Civ. Pro. Code,* 1882, *ss. 244, 278)—Sale of property specified in mortgage-decree, remedy of party objecting to—Inapplicability of s. 244.*—There is an essential difference between the execution of a simple decree for money and a decree for money by sale of certain property specified in the decree, itself. A decree for money is not based upon any adjudication that any property which might be brought to sale in execution of the decree, was the property of the judgment-debtor, or property which would be liable for his debts. The Court executing such a decree has therefore, power to inquire into and decide objections taken to the execution of it against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act, the property specified in the decree must be sold by the executing Court which should leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser. SANWAL DAS v. BISMILLAH BEGUM, **19 A. 480=A.W.N. 1897, 115.** (14 C. 631, 12 A. 313, *R.*) [*F.*, 32 C. 265, 1 N.L.R 142; *R.*, 21 A. 277, 21 A. 356, 6 Bom. L.R. 1043, 30 M. 26=16 M.L.J. 545, 1 C.P.L.R. 72, 32 M. 429=19 M. L.J. 401=2 Ind. Cas. 18; *D.*, 26 A. 152, 9 C. L.J. 358.]

(994)—*S. 47, O. XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code,* 1882)—*Objector's representative being representative of judgment-debtor also—Separate suit maintainable.*—Merely because the person who comes in as the representative of an objector to the proceedings in execution of a decree happens also to be the legal representative of the deceased judgment-debtor under the decree, it does not follow that his rights to make such objections claimed by him, not through the judgment-debtor, but through a third person, must be dealt with, and can only be dealt with, between him and the decree-holder, in the execution-proceedings under the decree. The legal representative of the judgment-debtor, brought in after decree, cannot be compelled to have his title, possibly to a large property, determined by the summary method adopted in execution-proceedings. The mere fact that the objector's representative occupies also the status of the judgment-debtor's legal representative cannot place him in a worse position than other people, and deprive him of the proper remedy by suit. BAHORI LAL v. GAURI SAHAI. **8 A. 626=A.W.N. 1886=228.** (11 B.L.R. 149, 6 C. 777, 7 A. 547, 7 A. 733, 2 A. 752, 7 A, 36, *R.*,) [*F.*, 23 M. 195; *R.*, 15 C. 437, 16 C. 1, 12 A. 313=10 A.W.N. 137, 12 A. 73, 23 B. 237; *D.*, 16 C. 603.]

(995)—*S. 47, O. XXI, r. 58 (=Civ. Pro. Code,* 1882, *ss. 244, 278)—Assignment of decree—Subsequent attachment of decree so assigned—Frame of petition objecting to attachment.*—After the assignment of a decree for value, the decree was attached in execution of a decree obtained

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against the assignor. The assignee applied for release of the property under s. 278 of the Code. *Held* that, as the assignee was neither a party nor a representative of a party, the claim by him to the attachment was rightly framed under s. 278. He could not invoke s. 244 of the Code in support of his claim. VENKATASUBBA NAIDU v. W.D. SMITH, 10 **M.L.J. 116.**

(996)—*S. 47, O. XXI, r. 58 (Civ. Pro. Code, 1882, ss. 244, 278)—Personal decree against member of tarwad — Attachment of tarwad property—Claim by judgment-debtor that property not liable to attachment—Appealability of order in claim case.*—Where a member of a Malabar tarwad against whom a personal decree had been passed applied for the release of property attached in execution of the decree on the ground that the property formed the common tarwad property, the claim fell under s. 278 and not under s. 244 of the Code, and no appeal lay from the order passed on the petition. ABDUR RAHIMAN KUTTI HAJI v. KUNHAMMED KOYA, **10 M.L.J. 85.** [*D.*, 30 M. 215=17 M.L.J, 377=2 M.L.T. 31].

(997)—*S. 47, O. XXI, r. 58 (=ss. 244 and 278, Civ. Pro. Code, 1882)—Execution of decree against karnavan of Malabar tarwad—Resistance by members of the tarwad.*—When a decree has been given against the karnavan, as representing the members of the whole tarwad, all the members of the tarwad must be taken to be parties to the suit, for the purpose of execution proceedings, and, if parties, they must proceed under s. 244, and not under s. 278. The fact that they claim the property which has been attached, adversely to the other members of the tarward, does not make them any less constructive parties to the decree. MARIVITILL MOOLAMPAROL MATHU AMAH v. PATHRAMKUNNATH CHERUKOT, **2 M.L.T. 31 =30 M. 215=17 M.L.J. 377.** (24 M. 658, *F.*, 28 M. 195, 10 M.L.J. 85 ; *Expl.* and *D.*, 14, M.L.J. 137, *R.*) [*R.*, 8 C.L.J. 20.]

(998)—*S. 47, O. XXI, r. 58 (= Civ. Pro. Code, 1882, ss. 244, 278)—Attachment of trust-property under personal decree against trustee—Order on claim presented by trustee—Appeal.*—When a person against whom there is a personal decree claims property which has been attached under such decree, on the ground that he holds it as trustee for persons not parties to the suit, such claim falls under s. 278 and not under s. 244 of the Civ. Pro. Code, and no appeal lies against any order passed on such claim by the Court executing the decree. The suit not having been brought, nor the decree passed, against such *person* in his *persona* as trustee, he is, as such trustee (in which capacity he makes the claim to the attached property) not a party to the suit. If the decree had been passed against the judgment-debtor, as trustee, or he had been sued as such, the case would be different. RAMANATHAN CHETTIAR v. LEVVAI MARAKAYAR, **28 M. 195 F.B. = 10 M.L.J. 64.**

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15 C. 437 *R.*) [*F.*, 10 M.L.J. 85, [*R.*, 31 M. 125=18 M.L.J. 21=3 M.L.T. 325; *D.*, 30 M. 215=17 M.L.J. 377=2 M.L.T. 31, 8 C.L.J. 20 ; *D.*, 26 M. 501.]

(999)—*S. 47. O. XXI, r. 58 (—ss. 244, and 278 Civ. Pro. Code, 1882)—Vendee of a purchaser in a rent sale of judgment debtor's property, if a representative.*—A got an assignment of mortgage decree, which he got recognized, and applied to execute the decree. B, a vendee from a purchaser at a rent sale of the judgment debtor's property, who previously put in a claim petition under s. 278, Civ. Pro. Code, which was rejected, applied under s. 244, Civ. Pro. Code. *Held* that B was neither a party to the suit nor the representative of a party, and so had no *locus standi* to apply under s. 244, Civ. Pro. Code. KANDASWAMI GURUKKAL v. C. G. KRISHNA ROW, **6 M.L.T. 290.**

(1000)—*S. 47, O. XXI, r. 58 (—ss. 244, 278, Civ Pro. Code, 1882) — Execution — Legal representative of defendant claiming charge on property attached and to be sold in execution of decree—Claim to be investigated under s. 244.*—A claim preferred by the legal representative of a defendant, in a suit asserting a charge on land, sold in execution of the decree in that suit, to the extent to which he relieved it of liability under a mortgage, should be regularly investigated under s. 244, Civ. Pro. Code, and not summarily disposed of under the claim sections of the Code. T. SUBRAMANYA AIYAR v. MANIKA MUDELY, **2 Ind. Cas. 432.**

(1001)—*S. 47, O. XXI, r. 58—Claim—Previous purchaser in execution of mortgage decree, if competent to object to sale in execution of money decree.*—A property was sold in execution of a mortgage decree and purchased by A. M was about to have the same property sold in execution of his money decree against the same judgment-debtors. A then made an application asking that the Court would exempt the property from sale. The Court granted the application. *Held*, that, as no provision has been made in the Civ. Pro. Code for such an application, the order of the Court below was made without jurisdiction. *Held*, further, that the matter could not be regarded as a claim, inasmuch as the purchase by which the applicant claimed to have acquired his title to the property was made long after the attachment of the property by the second decree holder, *Held*, also, that the matter did not fall within the purview of s. 47 of the Civ. Pro. Code, as the applicant could not be said to be the representative of the judgment-debtor for the purposes of that section. MAHADEO LAL v. DINKAR PRASAD, 9 **Ind. Cas. 164=15 C. W.N. 542.**

(1002)—*S. 47, O. XXI, r. 58 (=Civ. Pro. Code, 1882, ss. 244, 278)—Party exonerated from decree—Objection to attachment in execution.*—Where a person who, though originally a party to the suit, has been expressly exempted from its operation and any liability under the

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decree, raises objections to an attachment of property in execution of such decree, he is in the position of a stranger and not a party to the suit, and the question arising in the matter of such objection between such objector and holder of the decree, is not a question within s. 244, cl. (c) of the Civ. Pro. Code. He has, therefore, no right of appeal from an order disallowing his objection which, having to be regarded as made under s. 278 of the Code, his only remedy is a suit under s. 283. MUKARRAB HUSAIN v. HURMATUN-NISSA, **18 A. 52=A.W.N. 1895, 153.** (11 A. 74, *R.*) [*Diss.*, 15 C.P.L.R. 109; *Appr.*, 23 A. 346, 30 C. 134=6 C.W.N. 10; *R.*, 21 M. 45, 2 O. C. 51, 14 M.L. J. 396, 30 C. 134, 138.]

(1002-*a*)—*S. 47, O. XXI, r. 58 (=ss. 244, 278, Civ. Pro. Code, 1882)—Judgment-debtor in possession as trustee—Personal decree against judgment-debtor—"Parties to suit."*—If *A*, in execution of a decree for money against *B* personally, attaches and proceeds to sell properties of which *B* alleges that he is in possession, not in his own right, but as *shebait* of a deity to whom the properties have been dedicated, an order passed on a claim preferred by *B* falls within s. 278 of the Code, as he claims in his capacity of *shebait* of a deity who is no party to the suit. Under s. 244 of the Code, the question must arise between parties to the suit in which the decree was passed. KARTICK CHANDRA GHOSE v. ASHUTOSH DHARA, **14 C.L.J. 425, F.B.** (7 M. 255, *Diss.*; 17 C. 711 *Expl.*)

(1003)—*S. 47, O. XXI, rr. 58 to 63 (=Civ. Pro. Code, 1882, ss. 244, 278 to 283)—Objection to attachment by judgment-debtor on behalf of others—Procedure—Test.*—Where the judgment-debtor claims the property which is the subject of the attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which representative capacity he has been sued, the question is properly one between the parties to the suit under s. 244. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, the order made must be regarded as an order under s. 280, and the only mode in which that order can be contested is in a regular suit as provided by s. 283. The test, as to whether the order made upon the objection falls within s. 244 or not, depends on whether or not all the necessary parties are before the Court. ROOP LALL DOSS v. BEKANI MEAH, **15 C. 437.** [*Appl.*, 12 A. 73=10 A.W.N. 13, *D.*, 16 C. 603; *R.*, 12 A. 313, F.B., 19 C. 328, 1 O.C. Sup. Vol. II, 23 B. 237, 23 M. 195, F.B. 6 C.W.N. 63.]

(1004)—*S. 47, O. XXI, rr. 58, 59, 60, 61, 62 63 (=ss. 244, 278—283, Civ. Pro. Code of 1882)—Decree—Execution—Property attached, claim to—Contests between parties to the suit or their representatives—Questions arising in the same.—Held* by the Full Bench:—An objection

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taken by one who has become the representative of the original judgment-debtor, in the course of the execution of the decree, to the effect that the property attached in satisfaction thereof is his own private property and not held by him as such representative, is a matter cognizable only under s. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party, against whom an adverse order may have been passed under ss. 280 and 281, as provided by s. 283. *Per Prinsep, O'Kinealy* and *Ghose, JJ.*—Ss. 278—283 of the Code of Civil Procedure do not cover the case of any contest between the parties to the suit, or their representatives on the record of the suit, in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to a third party. The effect of a decision, between such parties, is that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under s. 244, subject to the result of such appeal as is given to them by law. *Per Prinsep* and *O'Kinealy, JJ.*:—S. 244 of the Code of Civil Procedure should be liberally construed in order to prevent litigation. PUNCHANUN BUNDOPADHYA v. RABIA BIBI, **17 C. 711, F.B.** [*F.*, 6 C.P.L.R. 4, 19 B. 328, 23 B. 237, 28 A. 51=A.W.N. 1905, 180, 12 C.W.N. 310=35 C. 364=7 C.L.J. 537; *Appr.*, 17 A. 245; *Cited*, 1 O.C. Sup. 60; *R.*, 17 M. 399, 24 C. 62, F.B., 27 C. 34, 23 M. 195, F.B., 16 C.P.L.R. 19, 6 C.W.N. 63, 6 C.W.N. 663, 8 C.W.N. 353, 11 C.W.N. 593=5 C.L.J. 491=2 M.L. T. 207=34 C. 642, 8 O.C. 405; *Diss.*, 29 C. 696; *D.*, 12 C.P.L.R. 73, 6 Bom. L.R. 1043.]

(1005)—*S. 47, O. XXI, rr. 58, 59, 60, 61, 62, 63 (=ss. 244, 278 to 283, Civ. Pro. Code, 1882)—Property attached in execution claimed as trust property—Procedure for investigating claim—Appeal*—Wakf, *whether decree for sale of, valid.*—Where a judgment-debtor or his representative opposed an execution on the ground that he held the property in trust for some third person or body of persons or a religious charity or institution, *held*, that s. 244 did not apply to the case, that the claim must be investigated, under ss. 278 to 283, Civ. Pro. Code, and that the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit. (22 B. 237, 23 M. 195, *F.*; 30 M. 26, *R.*) A decree for the sale of 'wakf' property may in certain circumstances be perfectly valid. BUDRUDDIN SAHIB v. ABDUL RAHIM, **18 M.L.J. 21=3 M.L.T. 325=31 M. 125.** (26 M. 31, 28 M. 84, *held inapplicable.*)

(1006)—*S. 47, O. XXI, rr. 58, 60 (=ss. 224, 278, 280, Civ. Pro. Code, 1882)—Parties to suit—Appeal from orders disallowing claim preferred by defendants, exempted from operation of decree, to attached property.*—When defendants are exempted from the operation of a

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decree, they should not be considered as parties to the suit within the meaning of s. 244, cl. (c), Civ. Pro. Code. Their objection to the attachment of any property claiming to be their own would fall under ss. 278 and 280, Civ. Pro. Code, and not under s. 244. Their remedy, if any adverse order is passed against them, would be by separate suit under s. 283 and not by appeal under s. 244. RAM PERSHAD v. JAGANNATH RAM, **30 C. 134=6 C.W.N. 10.** (10 W.R. 191, 11 B.L.R. 149, 12 C. 458, 8 M. 473, 23 M. 361, 17 B. 49, 11 A, 74, 18 A. 452, *R.*) [*Dist.*, 17 C.P.L.R. 178.]

(1007)—*S. 47, O. XXI, rr. 58, 60, 63 (=ss. 244, 278, 280 and 283, Civ Pro. Code, 1882)—Property attached—Legal representative—Plea that property attached is trust property—Appeal.*—An objection raised by the legal representative of a deceased judgment-debtor to the effect that the property attached is not the deceased's but that it is trust-property which he holds as trustee, is not an objection falling under s. 244 of the Code, but under s. 278 of the same, and an order passed thereon is not appealable as a decree under s. 244, Civ. Pro. Code. ALI SAJJAD v. BHAJAN SINGH, **3 A.L.J. 370=A.W.N 1906, 157.** (12 A. 313, *F.*) [*R.*, 28 A. 644=3 A.L.J. 565=A.W.N. 1906, 153.]

(1008)—*S. 47, O. XXI, rr. 58, 60, 63 (=Civ. Pro. Code, 1882, ss. 244, 278, 280, 283)—Decree against mortgagor for mortgage-money and for sale of mortgaged property as against him and a third party—Attachment of other property in third party's possession—Third party's claim—Suit by decree-holder to establish mortgagor's right thereto.*—Plaintiff sued B on a hypothecation bond, and M was included as a defendant as she claimed the hypothecated property. A decree was obtained against B personally and for the sale of the property. The sale of the mortgaged property not having covered the whole of the debt, the plaintiff attached certain other property of M as belonging to B. M objected and her objection was allowed. Plaintiff then sued for a declaration that the property, alleged by M to be her own, was liable to attachment and sale under his decree in the previous action. *Held* that this action was rightly brought under s. 283 and was not barred under s. 244, because the decree in the previous suit affected M only, so far as it negatived her alleged interest in the hypotheca, the claim against her having been not in her personal or representative capacity, but only for a declaration that she was not entitled to the hypotheca, and also because so far as the decree was sought to be enforced against the other property, M was a stranger to the action and her objection was to be looked at as having been decided under ss. 278 and 280 of the Code. JANGI NATH v. PHUNDO, **11 A. 74=A.W.N. 1888, 275.** (9 A. 605, 9 B. 458, *D.*; 12 C. 458, *R.*) [*Diss.*, 15 C.P.L.R. 106; *F.*, 18 A. 52; *Appr.*, 23 A. 346; *R.*, 6 C.W.N. 10=30 C. 134.]

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(1009)—*S. 47, O. XXI, rr. 58, 63 (=ss. 244, 278, 283, Civ. Pro. Code, 1882)—Appeal—Claim*—Debutter *property—Right of suit—Estoppel.*—In execution of a decree obtained by the defendant against the plaintiff's father, the plaintiff as legal representative of his father preferred a claim to a property attached on the ground that it was not the personal property of his father but that it was *debutter* property; the claim being disallowed, he preferred an appeal which was dismissed upon the defendant's objection that it was an order, not under s. 244 of the Code but upon an application under s. 278. *Held*, that in a regular suit by the plaintiff for declaration that the property is *debutter*, defendant is estopped from raising the question that it was barred by s. 244 of the Code. HARA DHAN KALIA v. PURNA CHUNDRA MONDAL, **11 C.W.N. 145.**

(1010)—*S. 47, O. XXI, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 244, 278, 283)—Execution of decree—Objection to execution by party who had been a defendant but had been excluded from the proceedings in appeal.*—One M brought a suit for arrears of rent against K and his wife, and obtained a decree against both. In appeal the female defendant got the decree set aside so far as it affected her property. The decree-holder, however, sought to execute his decree against the property of the wife alleging it to be the property of the husband. The wife objected under s. 278 of the Civ. Pro. Code, but her objection was disallowed. She appealed and her appeal was admitted on the ground that she was a party to the suit who raised a question in the sense of s. 244 of the Code: *Held*, that this procedure was erroneous, the objector's remedy being by way of suit under s. 283 of the Civ. Pro. Code. MASIH-ULLAH v. KIFAYATI, **A.W.N. 1893, 67.** [*Appr.*, 23 A. 346.]

(1011)—*S. 47, O. XXI, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 244, 278, 283)—Execution of decree—Party to suit proceeding under ss. 278 and 283—Refusal of Court to consider plaint under s. 283 as application under s. 244.*—Where a party, defendant to a suit, instead of applying under s. 244 of the Code of Civil Procedure for the exemption of certain property which he wished to save from execution filed an objection under s. 278, and subsequently on his objection being disallowed, brought a suit under s. 283, which he fought up to a second appeal, the Court held that this was not a case in which the plaint in the suit might be treated as an application under s. 244. PURAN CHANDRA v. BAWAN DAS, **A.W.N. 1900, 196.** (22 A. 121, *D.*)

(1012)—*S. 47, O. XXI, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 244, 278, 283)—Execution of decree—Execution against representative of deceased judgment debtor—Objections—Appeal—Appeal heard without jurisdiction—Revision.*—In execution of a decree against the plaintiffs

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as representatives of the deceased judgment-debtor, certain property was attached as belonging to the judgment-debtor. The plaintiffs' objection to the effect that the property belonged to them having been disallowed and their appeal against the order rejecting their claim dismissed, they brought a fresh suit for damages for wrongful attachment in the Court of a Munsiff having Small Cause Court powers. The suit was also dismissed. The District Judge, being of opinion that, since no suit lay, he was competent to hear any appeal against the order of dismissal, entertained an appeal made to him by the plaintiffs and affirmed the order of dismissal. On revision, it was contended that the District Judge was not competent to hear the appeal and that the suit was improperly dismissed. *Held*, that under the provisions of s. 244 of the Civ. Pro. Code, the plaintiffs being representatives of the judgment-debtor and not third parties, were precluded from bringing a separate suit to establish their title to the property attached by the decree-holder. *Held*, also, that the order of the District Judge being right on the merits, no interference in revision was necessary, although he had no jurisdiction to entertain the appeal. MIHAN SINGH v. SRI RAM, **73 P.L.R. 1904.** (36 P.R. 1902, F.B., S.C. 22 P.L.R. 1902, F.B., *F.*)

(1012-*a*)—*S. 47, O. XXI. rr. 58 63 (=Civ. Pro. Code*, 1882, *ss. 244, 278, 283)—Property attached in execution of decree—Claim by representative of judgment-debtor that he holds as trustee for another—Decision of questions arising between him and decree-holder—Separate suit.*—Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of s. 244 of the Civ. Pro. Code, 1882. But where he asserts that he holds the property in trust for, or on behalf of, or as manager of, some third person or body of persons or a religious charity or institution, the claim must be investigated under the provisions of ss. 278-283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit—*Per Ranade, J.*—Ss. 278-283 of the Civ. Pro. Code, 1882, have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative on the record (whether originally sued as such or added before or after the decree) and the decree-holder, as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of s. 244—*Per Parsons, J.* MURIGEYA v. HAYAT SAHEB, **23 B. 237.** [*F.*, 31 M. 125=18 M.L.J. 21=3 M.L.T. 325; *R.*, 23 B. 195, 6 C.W.N. 63.]

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(1013)—*S. 47, O. XXI, rr. 58, 63, s. 102 =ss. 244, 278, 283, 586, Civ. Pro. Code*, 1882)—*Judgment-debtor, objection by—Decree-holder—Small Cause suit—Second appeal—Revision—Separate suit.*—A decree was passed by the Court of Small Causes, Lucknow, in favour of the respondent against the appellant on account of a sum of money, which her husband owed to the respondent. It was transferred for execution to the Court of Munsiff of (South) Lucknow. In execution of his decree the respondent attached certain houses alleging that they belonged to the appellant's husband. The appellant thereupon lodged objection to the effect that the property attached was her exclusive party. The objection was allowed by the Munsiff, but was, on appeal, disallowed by the Subordinate Judge, who directed that the execution should proceed. *Held*, that the objection made by the judgment-debtor was governed by s. 244, Civ. Pro. Code, and could not be entertained under s. 278, Civ. Pro. Code, and consequently an appeal could lie to the lower appellate Court against the order of the Court of the first instance allowing the objection. (1 O.C. Sup. Vol. 60, 17 C. 711, F.B., 17 A. 245, 19 B. 328, 12 A. 579, 25 C. 872, 18 A. 48, *R.*) *Held*, further, that the suit being of a nature of a Small Cause suit no second appeal lay under s. 586, Civ. Pro. Code. MUSSAMMAT UMUT-UL-ATTHAR BEGAM v. BALDEO DAS, **8 O.C. 405.**

(1014 and 1015)—*S. 47, O XXI, r. 60*—Applicability of section to case where judgment-debtor tries to set aside effect of decree—Mortgage-decree directs sale of property—Objection to sale that property belonged, not to judgment-debtor, but stranger—Such question to be tried in regular suit, not execution-proceedings—*See* HINDU LAW—WILL, 8 C.L.J. 20.

(1016)—*S. 47, O. XXI, rr. 60, 61, 63 (=Civ. Pro. Code*, 1882, *ss. 244, 280, 281, 283)—*Claim to attached property by representative of deceased judgment-debtor — Subject of determination only in execution and not by separate suit.*—An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under s. 244 and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under ss. 280 and 281 as provided by s. 283 of the Code. VITHOBA LAXAMAN v. SHEORAM, **6 C.P.L.R. 4.** (17 C. 711, 12 A. 313, *F.*)

(1017)—*S. 47, O. XXI, rr. 60, 63 (=ss. 244, 280, 283, Civ. Pro. Code*, 1882)—*Execution of decree — Objection to attachment of property allowed with costs—Suit to establish right—Application for refund of costs in miscellaneous department—Appeal.* — An objection to the attachment of property in execution of a

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decree having been allowed with costs, the decree-holder filed a suit to contest such order, but without claiming any relief in respect of the costs he was ordered to pay to the objector. Having succeeded in the suit, he applied to the Court which had allowed the objection, in the miscellaneous department, for refund of such costs. *Held*, that the application being with reference to a portion of an order made under s. 280 of the Civ. Pro. Code, the Court was *functus officio* in the matter, and its order refusing such refund was not appealable, not being one passed under s. 244 of the Civ. Pro. Code, and if regarded as one passed under s. 280, that an appeal was prohibited by s. 283 of the Code. RAGUNATH DAS v. BADRI PRASAD, **6 A. 21 = A.W.N. 1883, 177.** [*D.*, 5 M.L.J. 252.]

(1018)—*S. 47, O. XXI, r. 64 (=Civ. Pro. Code*, 1882 *ss. 244, 282,)—Decree—Execution—Order under* s. 244, *Civ. Pro. Code, for transfer of execution—Confirmation of order in appeal—Application by decree-holder to Court of first instance for execution.*—Where an order by a Court made under s. 244 of the Civ. Pro. Code, 1882, transferring a decree for execution to the Collector (the property attached by the decree-holder being ancestral estate), was confirmed in appeal, and the case came again before the Court of first instance for execution, *held*, it was not competent to the latter Court to alter the order which it had previously made into an order made under s. 282. Such an order is *ultra vires* and illegal. BUNYAD ALI v. JAGANNATH, **A.W.N. 1886, 270.**

(1019)—*S. 47, O. XXI, r. 63 (=Civ. Pro. Code*, 1882 *ss. 244, 283,)—Property attached in execution of decree—Property purchased while under attachment—Decree set aside—Separate suit maintainable — Representative.* — Where property is purchased during the continuance of an attachment, but the decree in pursuance of which that attachment was made is subsequently set aside, *held* that everything done in pursuance of that decree comes to an end and the purchaser cannot be said to be a purchaser pending a subsisting attachment so as to be the representative of the original judgment-debtor within the meaning of s. 244 of Act XIV of 1882. GHAFOOR UDDIN v. HAMID HUSAIN, **7 A.L.J. 26 = 4 Ind. Cas. 406 = 32 A. 129.**

(1020)—*S. 47, O. XXI, rr. 66, 70 (=ss. 244, 287, Civ. Pro. Code*, 1882)—*Order disallowing judgment-debtor's objection re-value of property stated in sale-proclamation, appeal from.*—An appeal lies from an order disallowing the judgment-debtor's objection that the value of the property specified in the sale-proclamation under s. 287, Civ. Pro. Code, 1882, was grossly inadequate. GANGA PROSAD v. RAJ COOMAR SINGH, **30 C. 617.** [*Diss.*, 27 M. 259, F.B. = 14 M.L.J. 57.]

(1021)—*S. 47, O. XXI, rr. 65, 70 (=ss. 244, 287, cl. (c), Civ. Pro. Code*, 1882)—*Application for amendment of sale-proclamation—Appeal*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—An application by the judgment-debtor against a proceeding under s. 287, cl. (*e*), Civ. Pro. Code, 1882, to have the sale-proclamation amended by inserting in it the proper value of the property advertised for sale, falls under s. 244, and is as such open to appeal. (30 C. 617, 8 C.W.N. 257, 12 C.W.N. 542, *F.*) Where an application is made by a debtor objecting to the value of the property as stated in the sale-proclamation, it is certainly the duty of the Court executing the decree to make an enquiry and to satisfy itself that the amount stated in the sale-proclamation is substantially correct. LACHMAN PERSHAD SINGH v. GANGA PERSHAD SINGH, **6 Ind. Cas. 180.**

(1022)—S. 47, O. XXI, rr. 66, 70—*See* PROCLAMATION OF SALE, A.W.N. 1886, 167.

(1023)—*S. 47, O. XXI, rr. 66, 70, 90, and 92 (=ss. 244 (c), 287, 311, 312, Civ. Pro. Code*, 1882)—*Execution of decree—Absence of notice to the judgment-debtor—Proclamation of sale—Sale at an under-value—Application to set aside sale—Dismissal—Appeal against order of dismissal.*—An application seeking to have the sale set aside on the ground that no notice had been issued to the applicant in the matter and that in consequence the property was sold at an under-value, does not fall within the purview of s. 311 of the Civ. Pro. Code, 1882; and an order dismissing the same is not covered by s. 312 of the Code. The order falls under s. 244 (*c*) of the Code, and is appealable as a decree. The non-issue of notice to a party concerned is not a material irregularity in publishing or conducting the sale under s. 311 of the Civ. Pro. Code, 1882. It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale. The words "publishing or conducting" in s. 311 of the Code refer respectively to the proclamation of sale under s. 287 and to the action of the officer by whom the sale was held. The circumstance that the decree has already been executed does not make s. 244 (*c*) of the Code inapplicable, where the question involved is none the less a "question relating to the satisfaction of the decree." PARASHRAM v. BALMUKUND, **20 Bom. L. R. 752 = 52 B. 572.**

(1024)—*S. 47, O. XXI, r. 69 (=ss. 244 and 291, Civ. Pro. Code*, 1882)—*Mortgage-decree—Sale—Stay—Right of auction-purchaser before confirmation of sale to deposit decretal amount and costs—Representative of judgment-debtor—Inchoate title—Right to redeem—Transfer of Property Act (IV of* 1882) *s. 91.*—A first mortgagee obtained a decree on his mortgage in the presence of the second mortgagee. When he proceeded to sell the mortgaged properties, an auction-purchaser of the properties, at a sale held in execution of a decree obtained on the second mortgage—which sale, however, had not yet been confirmed by Court—deposited the decretal amount under s. 291, Civ. Pro. Code, and prayed that the sale might be stopped

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Held—that the auction-purchaser was a representative of the judgment-debtor, second mortgagee, within the meaning of s. 244, Civ. Pro. Code, and he was entitled to make the deposit. RADHA KISHUN MARWARI v. HEM CHANDRA BOSE, **11 C.W.N. 495=5 C.L J. 45, Note.** (24 C 62, *F.*; 4 C.W.N. 317=27 C. 966, *R.*) [R., 9 C.L.J. 485; *D.*, 11 C.W.N. 239, Note.]

(1025)—*S. 47, O. XXI, r. 69 (=ss. 244, 291, Civ. Pro. Code, 1882)—Order for stay of sale of mortgaged properties in execution of mortgage-decree*— an order for stay of sale of mortgaged properties, in execution of a mortgage-decree, notwithstanding that the order is in terms one under s. 291, Civ. Pro. Code, 1882, is an order virtually for stay of execution within the meaning of s. 244 of the Code, and is appealable. SHYAM KISHEN v. SUNDAR KOER, **31 C. 373.**

(1026)—*S. 47, O. XXI, r. 69 (=ss 244 and 291, Civ. Pro. Code, 1882)—Rival decree-holders —Order distributing surplus proceeds of a* putni *sale amongst—Appeal—Representative of judgment-debtor—Attaching creditor* —Where, the surplus sale-proceeds of a *putni* sale having been attached by two judgment-creditors of the *putnidar* on different dates, the District Judge made an order for the rateable distribution of the sale-proceeds amongst them, and one of them appealed against that order, the judgment-debtor himself remaining indifferent: *Held* that no appeal lay, an attaching creditor of the judgmnet-debtor not being his representative, within the meaning of s. 244, Civ. Pro. Code. (29 M. 319, 16 M. 20, 15 C. 371, 16 A. 483, *D.*; 24 C. 62. A.W.N. 1906, 62, *R.*) S. 244, Civ. Pro. Code, does not apply, when the question concerns two rival decree-holders. RAM CHUNDER v. MUSSTT. HAMIRIAN, **11 C.W N. 433=6 C L.J. 437.**

(1027)—S. 47, O. XXI, rr. 69, 90—Execution sale brought about by fraud—Waiver of right to object to sale—*See* WAIVER, 11 C.W. N. 848=6 C.L.J. 62.

(1028)—*S. 47, O. XXI, r. 71, s. 104, O. XLIII, r. 1 (=ss. 244, 293, 588, Civ. Pro Code, 1882)—Execution of decree—Default of purchaser at sale in execution—Deficiency of price arising on re-sale—Order against defaulter—Civ. Pro. Code, ss. 244, 293, 588—No appeal from order.*—No appeal lies from an order under s. 293 of the Civ. Pro. Code directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale by reason of his default. TAPESRI LAL v. DEOKI NANDAN RAI, **A.W.N. 1890, 89.** [*Appr.*, 12 A. 397; *F.*, 13 A. 569.]

(1029)—S. 47, O. XXI, rr. 71, 84, O. XLIII, r. 1, s. 104—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 18 M. 439=5 M.L.J. 206.

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(1030)—*S. 47, O. XXI, r. 72 (=ss 244, 294 Civ. Pro. Code, 1882)—Cancellation of execution sale on application by judgment-debtor—Separate suit for possession, whether maintainable by judgment-debtor.*—In execution of the decree in a suit to which both the present plaintiff and first defendant were parties, the latter had obtained possession of the land. The sale having been cancelled by order of the executing Court, the question of transfer of possession from defendant to plaintiff would be one, arising between the parties to the suit, relating to the execution and satisfaction of the decree, and therefore one which must be disposed of, under s. 244, and not by separate suit. VIRARAGHAVA v. VENKATA, **16 M. 287=3 M.L.J. 25.** [*F.*, 23 A 478; *R.*, 21 C. 789, 13 M.L.J. 354; *D.*, 18 M. 13; *D.*, 5 P.R. 1907=40 P.W. R. 1907=23 P.L.R. 1908; *D.*, 19 M. 29.]

(1031)—S. 47. O. XXI. r. 72—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 23 A. 478=A.W.N. 1901, 175.

(1032)—*S. 47, O. XXI, r. 72, and s. 104, O. XLIII, r. 1 (=ss. 244, 294, 588, Act XIV of 1882, Civ. Pro. Code—Order of District Judge under s. 294—No second appeal.*—An order made by a District Judge, on appeal, setting aside a sale under s. 294, is not open to second appeal, even though a separate suit in such a case is barred by s. 244. S. 588, cl. 16, is restrictive in its character and gives one appeal only to the parties aggrieved or dissatisfied with any order confirming, setting aside, or refusing to set aside a sale of immoveable property. To suggest that because s. 244 precludes a right of suit, it enlarges the right of appeal, is untenable. S. 244 is restricted by s. 588. BHAGBUT LALL v. NARKU ROY, **21 C. 789.**

(1033)—S. 47, O. XXI, rr. 72, 90—*See* LIMITATION ACT, 1908, art. 166, 9 B. 468.

(1034)—*S. 47, O. XXI, rr. 72, 95, 96=(s. 245 294, 318 and 319, Civ. Pro. Code, 1882)—Decree-holder purchasing at auction-sale—Without leave to bid—Confirmation of sale—Suit to recover property purchased—Fraud, defence of, not set up in the written statement, effect of.*—The first plaintiff, a mortgage decree-holder, without permission to bid at sale, purchased the suit property, in the name of the 2nd plaintiff, for a sum considerably less than the principal money due on the mortgage. At the time of the confirmation of the sale, neither the judgment-debtor nor the Court had notice of any fact which would have caused the latter to refuse confirmation, and their ignorance was due to deceit practised by the decree-holder-purchaser. In a suit by the plaintiff for recovery of the property purchased. *Held, per Abdur Rahim, J.*—The sale not having been set aside under s. 294, Civ. Pro. Code, the plaintiff is entitled to succeed. *Per Miller, J.*—That, the purchase being effected in contravention of s. 294, Civ. Pro. Code, the sale is voidable in the discretion of the Court, on the application of any person interested in it, and the fact that the sale had

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been confirmed do not affect the case. (24 C. 355, *R.*) S. 244, Civ. Pro. Code bars a suit brought for the determination of certain questions, but does not bar the trial of an issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. *Per Abdur Rahim, J.*—It is a well-established rule of law that a party relying upon fraud, either as the basis of his action or as a defence to a suit, must plead it in distinct terms, so that the party, whose act is impeached as fraudulent may have full notice of the charge he has to meet. The restriction imposed upon a decree-holder buying the property of the judgment-debtor, in execution of his decree, is the creation of a statute, and the Court cannot attach to the disregard of a rule like these consequences other than those contemplated by the Legislature. (23 M. 227, 5 B. 575, 11 B. 588, 14 M. 498, 22 B. 628, 11 C. 731, *R.*) A Court should not be hasty in inferring fraud, but should, on the other hand, construe strictly and narrowly all charges of fraud. (23 M. 227, 10 C. 757, 5 C.W.N. 265, *R.*) Questions bearing on the exercise of the discretion vested in the executing Court under s. 294, Civ. Pro. Code, cannot be properly determined in a suit for recovery of the property purchased. *Per Sankaran Nair, J.*—If a defendant would, in a suit brought or application made by him, be entitled to a relief which would be a complete answer to the plaintiff's claim, then, as a defendant, he is entitled to put forward his claim, unless he is estopped or otherwise barred. Where a decree-holder purchases property in contravention of s. 294, Civ. Pro. Code, and the judgment-debtor seeks to set aside the sale, it is unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree-holder to satisfy the Court that the sale should be confirmed. THATHU NAICK v. KONDU REDDI, **5 M.L.T. 248=32 M. 242=1 Ind. Cas. 221.** [*R.*, 14 C.W.N. 560.]

(1035)—*S. 47 O. XXI, r. 83—Civ. Pro. Code*, 1882, *244, 305—Sale with consent of the Court under s. 305—Purchaser of property, representative of judgment-debtor.*—A purchaser from a voluntary seller under a private arrangement made in pursuance of the consent and authority given by an executing Court under s. 305 of the Civ. Pro. Code, is a representative of the judgment-debtor within the meaning of s. 244, cl. (c) of the Code. GOBARDHAN RAI v. BISHAN PRASAD, **23 A. 116=A.W.N. 1900, 218.** [*R.*, 26 A. 447=A.W.N. 1904, 61.]

(1036)—S. 47, O. XXI, r. 83—*See* TRANSFER OF PROPERTY ACT, 1882, s. 89, 3 O.C. 42.

(1037)—*S. 47 O. XXI, rr. 83, 90 (=ss. 244, 305, 311, Civ. Pro. Code*, 1882)—*Admission by judgment-debtor that sale-proclamation had been issued—Time not granted to him—Subsequent application by him for setting aside sale—Estoppel.*—In an application by the judgment-debtor, under s. 305, Civ. Pro. Code, 1882, he stated that a sale-proclamation had been issued, and he offered to have the sale held, without the service of a fresh sale-proclamation, if time was given to enable him to raise money to pay the judgment-debt. The application was refused and the sale took place. He then made an application for setting aside the sale on the ground of irregularity: *Held*, that there was no relinquishment of his right to question the validity of the sale, because the terms on which he offered to do so were accepted neither by the Court nor by the decree-holder, and that the application was, therefore, maintainable. ENAMUDDIN JAMADAR v. ABDUL JAFFAR DUFTRI, **5 Ind. Cas. 489.** (2 C.L.J. 584, 25 W.R. 34, *D.*; 6 C.L.J. 62, 9 C. L.J. 251, 2 Ind. Cas. 338, 36 C. 422, *R.*)

(1038)—*S. 47 and O. XXI, r. 89 (=ss. 244 (c), 310-A, Civ. Pro. Code*, 1882)—*When appeal lies.*—An appeal lies against an order passed under s. 310-A of the Code of Civil Procedure only when it also comes under s. 244 (c) of the Code. MAGANLAL v. MULJI, **3 Bom. L.R. 255=25 B. 631.**

(1039)—*S. 47, O. XXI, r. 89 (=ss. 244 and 310-A, Civ Pro. Code*, 1882)—*Application under s. 310-A, by transferee from judgment-debtor—Appeal from order rejecting application.*—The question of setting aside a sale under s. 310-A relates to the execution of a decree. (21 M. 416 26 C. 449, 19 C. 683, *R.*) The auction-purchaser is the representative of the decree-holder for the purposes of s. 244. (28 M. 87, 19 C. 683, 24 C. 62, 25 M. 529, *R.*) A transferee of the judgment-debtor's interest after the Court-sale is a representative of the judgment-debtor. Where, therefore, an order was passed by the District Munsiff rejecting an application under s. 310-A, on the ground that it was not made by the judgment-debtor, but by a transferee who had acquired the interest of the judgment-debtor after the date of the Court-sale, an appeal lies to the District Judge under s. 244, as the question was one relating to the execution of the decree, and as it arose between the representatives of the parties. MANIKKA ODAYAN v. RAJAGOPALA PILLAI, **17 M.L.J. 291=2 M. L.T. 347=30 M. 507.** [*Diss.*, 30 A. 379=5 A.L.J. 557=A.W.N. 1908, 157; *Not F.*, 12 C.C. 45. *Doubted*, 31 M. 177=3 M.L.T. 306; *R.*, 8 Ind. Cas. 429.]

(1040)—*S. 47 and O. XXI, r. 89 (=ss. 244 (c), 310-A, Civ Pro. Code*, 1882)—*Appeal lies to District Court, from an order passed under s. 310-A.*—A District Court has jurisdiction to hear appeal from an order passed by a Court of first instance under s. 310-A, Civ. Pro. Code, refusing to set aside the sale, where that order falls within the terms of s. 244 (c) of the Code of Civil Procedure; but where it does not so fall no appeal would lie. MURLIDHAR v. ANANDRAO, **3 Bom. L.R. 100=25 B. 418.**

(1041)—*S. 47, O. XXI, r. 89 (ss. 244, 310-A, Civ. Pro. Code*, 1882)—*Sale in execution of*

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decree—Application to set aside the sale on the ground of the decree-holder's fraud—Appeal.—An application by the judgment-debtor to set aside sale of his property, in execution of a decree passed against him, on the ground that the sale was brought about by the fraud of the residents (who included the decree-holder) of the village where the lands were situate, falls within the purview of s. 244, Civ. Pro. Code, 1882, (30 C. 142, *Concurred in.*) An appeal lies from an order passed under s. 310-A, Civ. Pro. Code 1882, when it also falls within s. 244 of the Code. HARIHAR KANT BHATTA v. RAMA PANDU SETTI, **11 Bom. L.R. 1113=4 Ind. Cas. 253=33 B. 698.** (9 Bom. L.R. 15=31 B. 207, *F.*)

(1042)—*S. 47, O. XXI, r. 89 (=ss. 244 and 310-A, Civ. Pro. Code, 1882)—Decree-holder—Judgment-debtor — Auction purchaser— Representative—Appeal.*—Where the auction-purchaser is a third person, and not the decree-holder, and whereupon an application being made by the judgment-debtor under s. 310-A, Civ. Pro. Code, to set aside the sale, it is not contested by the decree-holder, so that no question arises between the decree-holder and the judgment-debtor, the order made by the Court does not fall within s. 244, Civ. Pro. Code, and is, consequently, not appealable. AMIR RAI v. BASDEO SINGH, **5 C.L.J. 204.** (26 C. 449, 1 C.W.N. 703, 21 M. 416, *D.*)

(1043)—*S. 47, O. XXI, r. 89, s. 104 and O. XLIII, r. 1 (=ss. 244 (c), 310-A, and 588, Civ. Pro. Code, 1882, Ss. 310 A. 244 (c)—Execution of a decree—Appeal.*—The judgment-debtor applied under s. 310-A of the Civ. Pro. Code to the Sub-Judge's Court to set aside a sale made in execution of a decree against him, and an order was made accordingly. The auction purchaser appealed to the District Court against that order, but his appeal was dismissed on the ground that no appeal lay against that order as s. 310-A was not included in the sections enumerated in s. 588 of the Code: *Held*, that this case did fall within the terms of s. 244 (c) of the Civ. Pro. Code and an appeal therefore lay against that order to the District Court. PANDURANG v. KRISHNABAI, **1 Bom. L.R. 74.**

(1044)—*S. 47, O. XXI, r. 89, s. 115 (=ss. 244, cl. (c) 310-A, 622, Civ. Pro. Code, 1882)—Sale in execution of decree, application to have set aside—Execution of decree, questions relating to—Order dismissing application to have sale set aside in execution of decree, revision of appeal.*—The property of the judgment-debtors having been sold in execution of a decree, they made an application purporting to be made under s. 310-A, Civ. Pro. Code, to have the sale set aside. The Court dismissed the application on the ground that the decree was one for the sale of the property passed under the Transfer of Property Act, and the provisions of **s. 310-A of the Code of Civil Procedure were not applicable** to a sale made in pursuance of such a decree. The judgment-debtors applied to the Judicial Commissioner's Court under s. 622, Civ. Pro. Code, for revision of that order. *Held* that the question whether the judgment-debtors had a right to apply under s. 310-A, Civ. Pro. Code, to have the sale set aside and the other questions arising in the case were question relating to the execution of the decree, that they arose between the judgment-debtors and the decree-holder and that, therefore, there was an appeal in the case; and an application under s. 622, Civ. Pro. Code, was not entertainable. LALTA v. DEPUTY COMMISSIONER, SITAPUR AND MANAGER, COURT OF WARDS, KATESAR ESTATE, **5 O C. 377.**

(1045)—S. 47, O. XXI, rr. 89, 90—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 28 C. 73

(1046)—*S. 47, O. XXI. r. 90 (=ss. 244, 311, Civ. Pro. Code, 1882)—Execution-sale—Sale not set aside—Auction-purchaser's right to recover possession by suit.*—Where an *ex parte* decree was passed against certain defendants and a sale held in execution, and the application of the judgment-debtors under ss. 244 and 311, Act XIV of 1882, was rejected, *held*, that it was not open to them to resist the auction-purchaser's claim for possession of the property sold. MATA DIN v. GAYA DIN, **6 A.L.J. 799=6 M.L.T. 99=8 Ind. Cas. 24=31 A. 599.**

(1047)—*S. 47, O. XXI, r. 90 (=ss. 244 and 311, Civ. Pro. Code, 1882)—Sale, setting aside—Second appeal—Order, passing of, event happening after—Duty of appellate Court—Ex parte decree sale—Application to set aside ex parte decree, pending—Court, discretion of.*—When the judgment-debtor does not seek to set aside the sale on the ground of any material irregularity in the publication or conduct of the sale as contemplated by s. 311 of the Civ. Pro. Code, but on grounds which, if valid, can be advanced only under s. 244 of the Code, for instance, the ground that the decree, in execution of which the decree-holder purchased the property, has been subsequently set aside, a second appeal lies. (27 C. 810, 31 C. 499, *R.*) It is not only competent to a Court of appeal, but it may be its duty to take notice of events which have happened since the order challenged in appeal was made. (6 C.L.J. 92, 6 C.L.J. 74, *F.*) When a sale has been set aside on the ground that the decree, in execution of which the sale took place, has been nullified by an *ex parte* decree in a regular suit, and an appeal has been preferred against the order setting aside the sale, if, during the pendency of the appeal, the *ex parte* decree is set aside and the original decree restored, the appeal ought to be allowed and the sale restored. RAMYAD SAHU v. BINDESHWARI KUMAR UPADHAY, **6 C.L.J. 102.** [*F.*, 6 C.L.J. 622.]

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(1048)—*S. 47, O. XXI, r. 90 (= Civ. Pro. Code, 1882, ss. 244, 311)—Review of decree does not nullify original decree—Sale in execution of original decree—Misdescription of property—Remedy of parties.*—Where a decree for sale is passed and an application for review of judgment is put in by one of the defendants and is directed, not against the whole decree but only against that part of it which affected him, and the judgment on review treats the original decree as existing and final in all other respects than that in which it directs a modification, and the decree-holder applies for execution of the original decree and the portion of the original decree sought to be executed is not affected by the review, it cannot be said that the decree-holder is executing a decree not in existence, as the two decrees though written on separate papers must be treated as one. The original decree should not be considered as a mere nullity, and any misdescription of the terms of the original decree in the application for execution should be set right in execution, and any objection to the sale founded on such misdescription is also a matter for disposal in execution under s. 244 Civ. Pro. Code. A separate suit to set aside the sale in execution of the decree on the ground of certain irregularities is barred by s. 244, Civ. Pro. Code. MANAKKAL BHATTATHIRIPAD v. MANAKKAL DAMODARAN, **8 M.L.J. 115.**

(1049)—*S. 47, O. XXI, r. 90 (= ss. 244, 311, Civ. Pro. Code, 1882)—Purchase benami—Proceedings for setting aside sale.—Beneficial owner, not a necessary party.*—Beneficial owners are not necessary parties to the proceedings for setting an auction-sale aside. It is competent to the Court to set aside the sale finally and conclusively as against the beneficiary, although the *benamidar* only is a party to the proceeding, and notwithstanding that the applicant to set aside the sale is aware of the *benami* purchase. BARODA KANTA BOSE v. CHUNDER KANTA GHOSE, **29 C. 682 = 6 C.W.N. 706.**

(1050)—*S. 47, O. XXI, r. 90 (= ss. 244, cl. (c) and 311, Civ. Pro. Code, 1882)—Sale in execution set aside—Sale confirmed on appeal—Purchase-money returned to purchaser in the interval—Suit by decree-holder to compel purchaser to return purchase-money — Suit not maintainable.*—A sale in execution of a decree was set aside, under s. 311 of the Civ. Pro. Code, on the application of the judgment-debtor and the purchase-money, which had been paid in by the purchaser, was returned to him. On appeal, however, by the decree-holder, the order setting aside the sale was quashed and the sale was confirmed. The decree-holder now sued to compel the purchaser to re-pay, with interest, the money representing the price of the property which had been returned to him. The purchaser had not obtained possession, nor applied for a certificate of sale. *Held*, the suit was not maintainable. The subject-matter of the suit was clearly a matter coming within s. 244 (c) of the Code, and it ought to have been dealt with in execution. It was a matter relating to execution and discharge of the decree, and no independent suit could be maintained, (26 A. 447, F.B., *F.*) The course which the plaintiff-decree-holder ought to have adopted, was to have applied to the execution Court to call upon the purchaser to re-deposit in Court the purchase-money of the property, which had been returned to him. RAHIM-UD-DIN v. RAM LAL, **27 A. 155 = A.W.N. 1904, 203.**

(1051)—*S. 47, O. XXI, r. 90 (= ss. 244, 311, Civ. Pro. Code, 1882)—Suit for refund of purchase money, where execution-sale was set aside, maintainability of s. 244—Plaint treated as an execution-application.*—The plaintiff had brought a *mehal*, in execution of a rent-decree, and had paid the purchase-money into Court in the ordinary course. Subsequently, the sale was set aside on the ground of irregularity under s. 311, Civ. Pro. Code. The plaintiff then applied for a refund of the purchase-money paid by him, but his application was refused. Hence the present suit. The defendants contended that the suit was not maintainable, having regard to the provisions of s. 244, Civ. Pro. Code. *Held* the suit is maintainable. The case does not fall within s. 244. It is not a question between the parties to the suit or their representatives and relating to the execution of the decree. But even if it were, the suit may be taken as one instituted in a Court which had jurisdiction to execute the decree, and the plaint may be regarded as an application to the Court for determining the question, whether the purchaser was entitled to a refund of the money from the decree-holder to whom the money had been paid. JOTINDRA MOHAN TAGORE v. MAHOMED BASIR CHOWDHRY, **32 C. 332.** [*F.*, 5 P.R. 1907 = 40 P.W.R. 1907 = 23 P.L.R. 1905; *R.*, 10 C.W.N. 274.]

(1052)—*S. 47, O. XXI, r. 90 (= ss. 244, 311, Act XIV of 1882, Civ Pro. Code)—Suit for rent by landlord against some of several tenants—Execution sale—Landlord becoming purchaser—Application under s 311 to have it set aside by tenants, parties to suit, unsuccessful—Subsequent suit by all tenants to set aside sale on ground of fraud.*—One of two brothers, who were the recorded tenants of certain holdings in a landlord's *sherista*, died leaving his three sons, his heirs. On his death, no application was made for mutation of names in respect of the holding. Disputes having arisen with reference to the rents of the holdings, the landlord instituted a suit against the surviving brother, joined the eldest son of the deceased as a party defendant therein and obtained an *ex parte* decree. In execution of the decree, he brought the holdings to sale and purchased them himself. After the sale had taken place the two judgment-debtors made an application under s. 311, Civ. Pro. Code, to have the sale in execution set aside, but failed to obtain an order. Whereupon, the surviving brother and the three sons of the deceased instituted a

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

suit, as being all interested in the land sold, to set aside the sale on the ground of fraud : *Held* that, as between the landlord and the tenants, who were parties to the prior rent-suit, the questions as to the propriety of the execution of the rent-decree by sale of the property, and as to the suppression of the sale-proclamation, were questions, which could and ought to have been decided under s. 244, and that as regards the tenants (parties to the rent-suit), the suit would not lie: *Held* also that, it was competent for the other two sons of the deceased, who were not parties to the prior rent-suit, to sue at least to have it declared that the sale in question did not affect their rights, and that, although as heirs of a deceased registered tenant, who had not got themselves registered in the landlord's *sherista*, they might not be able to question the decree obtained for arrears of rent, yet that fact did not preclude them from contesting a sale fraudulently obtained under colour of that decree, if it be true that the decree did not warrant any sale at all in execution of it. JAGAN NATH GORAI v. WATSON AND CO., **19 C. 341**. [*R.*, 1 Bom.L. R. 743 ; *D.*, 21 C. 605]

(1053)—*S. 47, O. XXI, r. 90* (=ss. *244, 311, Civ. Pro. Code,* 1882)—*Representative of judgment-debtor— Rent decree—Sale — Occupancy holding—Transferee of holding if may apply to set aside sale when holding not transferable.*—When an occupancy holding is sold in execution of a decree, for arrears of rent obtained against the raiyat, a person who claims to have purchased the holding from the latter cannot apply as the representative of the judgment-debtor to have the sale set aside under ss. 244 or 311 of the Code, if the holding be not transferable by custom or usage. PROSUNNO KUMAR MIDDAR v. BAMA CHURN MONDAL, **13 C.W. N. 652=3 Ind. Cas. 461.** (11 C.W.N. 312, *F.*)

(1054)—*S. 47, O. XXI, r. 90* (=ss. *244 and 311, Civ. Pro. Code,* 1882)—*Purchaser at previous mortgage sale before institution of present suit, whether representative of judgment debtor— His* locus standi *for applying for setting aside sale—Unregistered transferee of tenant—Recognition by landlord.*—When the landlord of an occupancy holding obtains a decree against the registered tenant, an unregistered transferee of the tenant, into whose hands the holding has passed in whole or in part, is bound by the decree, and is, therefore, a representative of the judgment-debtor within the meaning of s. 244, Civ. Pro. Code, and is entitled to apply for setting aside a sale held under the decree. The appellant purchased an occupancy holding at a rent sale on February, 20, 1906. The respondent applied, on November 13, to have it set aside, and alleged that he purchased it at a mortgage sale on November 19, 1903. He alleged that the landlord had recognised him after the purchase by the appellant. *Held*, that it was not open to the landlord at that stage to recognise the purchase of the respondent, so as to prejudice the position of the appellant, and that, if the holding was not transferable, the application by the respondent should be dismissed, and, if it was transferable, the sale should be set aside, as it was found that it was vitiated by fraud. BHUPENDRA NATH CHATTERJI v. UPENDRA NATH GANGOPADHYA. **3 Ind. Cas. 39**. (9 C.W.N. 124, 11 C.W.N. 312, *F.*)

(1055)—*S. 47, O. XXI, r. 90* (=ss. *244 and 311, Civ. Pro. Code,* 1882)—*Decree against registered tenant—Sale of entire holding -Application for setting aside sale by transferee of a portion of a holding from judgment-debtor—"Person whose immoveable property is sold."*—When, in execution of a decree obtained by the landlord against a registered tenant, the entire holding is sold, the unregistered transferee of a portion of the holding from the tenant, previous to the decree, may apply for cancellation of the sale on the ground of fraud, under s. 244 since such transferee is bound by the decree and the sale, and since he is a representative of the judgment-debtor, within the meaning of s. 244 seeing that the decree in the case is a rent-decree and the applicant an unrecorded tenant. (24 C. 62, F.B., *Appl.*; 6 C, W.N. 127, *Not F.*; 21 W.R. 94=12 B.L.R. 484, 4 C. 346, 9 C. 855, 10 C. 496, 23 C. 254 1 C.W.N. 114, 8 C.W.N. 55, 8 C.W.N. 232, *R.*) He may, also, apply, under s. 311, as a person whose immoveable property has been sold. AZGAR ALI v. ASABODDIN KAZI, **9 C. W.N. 134.**

(1056)—*S. 47, O. XXI, r. 90* (=ss. *244, 311, Civ. Pro. Code,* 1882)—*Application after confirmation—Fraud--S. 18. Limitation Act,* 1877). --An application may be made, under s. 244 (Civ. Pro. Code, 1882), even after confirmation of sale, for setting it aside, on the ground of fraud. (25 B. 337, *Explained.*) Ordinarily, the provisions of S. 311 (Civ. Pro. Code, 1882), can be availed of only when the sale has not been confirmed and within the period of 30 days from the date of sale ; but if the right of the applicant to apply under the section was concealed from him by fraud, he would, by operation of s. 18, Limitation Act, 1877, and notwithstanding the confirmation of the sale, have 30 days within which to make his application from the date on which the fraud first became known to him. GOLAM AHAD CHOWDHRY v. JUDHISTER CHUNDER SHAHA, **30 C. 142=7 C.W.N. 305**. [*R.*, 33 B. 698=11 Bom. L.R. 1113=4 Ind. Cas. 253.]

(1057)—*S. 47, O. XXI, r. 90* (=*Civ. Pro. Code,* 1882, *ss. 244, 311*)—*Fraud—Application to set aside sale.*—Where the judgment-debtor applies to have an execution-sale set aside on the ground of fraud on the part of the decree-holder or auction-purchasor, the application comes under s. 244, Civ. Por. Code, although the question is one between the judgment-debtor and the auction-purchaser who is not

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the decree-holder and a second appeal lies in such a case. NEMAI CHAND KANJI v. DENO NATH KANJI, **2 C.W.N. 691.** (19 C. 683, *R.*) [*F.*, 4 C.W.N. 538 26 C. 324=3 C.W.N. 294, 27 C. 197, 6 C.W.N. 279, 6 C.W.N. 288, 31 C. 385 ; *D.*, 28 C. 4=5 C.W.N. 124.]

(1058)—*S. 47, O. XXI, r. 90 (= s. 44 and 311, Civ Pro. Code*, 1882)—*Execution of decree—Property sold as non-ancestral after inquiry by Court and notice to judgment debtors—Plea that property was in fact ancestral barred.*—Where, after an inquiry as to the nature of the property, of which the judgment-debtor had notice, a Court in execution of a decree caused certain immoveable property, to be sold by auction as non-ancestral, the judgment-debtors standing by and neglecting to supply the Court with any information as to the nature of the property sold, it was *held* that it was not competent to the judgment-debtors, subsequently, to seek to have the sale set aside upon the ground that the property was ancesttral and ought to have been dealt with in the manner provided by law in respect of such property. BEHARI SINGH v, MUKAT SINGH, **A.W.N 1906, 3=3 A.L.J. 140=28 A. 273.** (18 A. 141, *F.*; 15 I.A. 171, *R.*; 4 A. 382, *Not F.*)

(1059)—*S. 47, O. XXI, r. 90 (=ss. 244, 311, Civ. Pro. Code. 1882—Ancestral property—Auction-sale—Allegation of fraud.—Held*, that an application to have a sale set aside on the ground of fraud can be made under s. 244 of the Code even after the confirmation of the sale. WAHID-UN-NISSA v. GIRDHARI, **2 A.L.J. 469=A.W.N. 1905, 162=27 A. 702** (26 C. 326, 26 C. 727, 19 C. 683, *R.*)

(1060)—*S. 47, O. XXI. r. 90 (=ss. 244, 311, Civ. Pro. Code*, 1882)—*Execution sale—Separate suit to set aside sale in execution of decree, maintainability of—Fraud—S. 244, Civ. Pro. Code*, 1882, *questions arising under—Application under s 311, Civ. Pro, Code.—Held by the Full Bench (Ghose, J. dissenting)* :—When circumstances affecting the validity of an execution-sale have been brought about by the fraud of one of the parties to the suit and give rise to a question between those parties, such as, apart from fraud, would be within s. 244, Civ. Pro. Code, a suit will not lie to impeach the validity of the sale on the ground of such fraud. (*Approving* 11 C. 376, 6 B. 148, 5 M. 217, 9 B. 468 and *dissenting in part from* 14 C. 679). In such a case the judgment-debtor is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application, if any, under s. 311 as he may be entitled to make. Per *Ghose, J. (contra)*—An objection to the validity of the sale raised by the judgment-debtor, *after the sale had been confirmed*, under s. 312, Civ. Pro. Code, cannot be dealt with by the Court under s. 244 as relating to the execution of the decree ; for after the sale has been confirmed, everything in regard to the sale is at an end, and indeed the Court becomes *functus officio*. Therefore, in such a case, a judgment-debtor is not prevented from bringing a separate suit to set aside the sale on the ground of fraud; he may at any rate sue to have it declared that the sale passed no title to the purchaser, or that the purchaser is a trustee for him. There is no special provision in the Code for setting aside a sale for fraud, where it has once been confirmed. MOHENDRO NARAIN CHALURAJ v. GOPAL MONDUL, **17 C. 769.** [*F.*, 18 C. 139, 19 C. 341; *Rel. on*, 3 C.W.N. 6; *R.*, 3 C.W.N. 311; *Not F.*, 12 C.P.L.R. 82, 26 C. 324, 23 A. 478, 6 C.W.N. 283 ; *D.*, 21 C. 437, 21 C. 605.]

(1060-a)—*S. 47 and O. XXI. r. 90—Fraud—Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal, whether lies.*—An application to set aside an execution-sale was made on the ground of fraud the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held. *Held*, that the matter did not come within the scops of O. XXI, r. 90 of the Code, inasmuch as the fraud alleged was not fraud in the conduct of publication of the sale, but it came within the scope of s. 47 of the Code, and that, therefore, a second appeal lay : *Held*, also, that, so far as the execution Court was concerned, the payment could not be regarded as having been made, and the allegation of fraud consequently fell to the ground, and that the sale could not be set aside. ALOKESHI DASI v. BIRAJ MOHINI DASI, **10 Ind. Cas. 625.**

(1061)—S. 47, O. XXI, r. 90—Order setting aside under. sale in execution of a non-appealable rent-decree under the Bengal Tenancy Act, appealability of—*See* BENGAL ACT. VIII OF 1885, *s.* 153. 9 C.W.N. 721=1 C.L.J. 476, F.B.=32 C. 957.

(1062) — *S. 47, O. XXI, r. 90, s. 104, O. XLIII, r. 1 (=ss. 244, 311 and 588, Civ. Pro. Code*, 1882)—*Sale in execution—Collusion—Material irregularity—Second appeal.*—A sale was held in execution of a decree. An application was put in for setting aside the sale under ss. 244 and 311, on the allegation that there was a material irregularity, and that the sale was due to a collusion between the opposite parties and the amin : *Held*, that the application was both under ss. 244 and 311, and a second appeal did lie to the High Court. LACHMAN MISRA v. RAM JAS SAHU, **2 Ind. Cas. 983.** (30 C. 143, 3 C.W.N. 6, A.W.N. 1889, 184. A.W.N. 1906. 3, *R.*)

(1063)—*S. 47, O. XXI, r. 90, s. 104, O. XLIII, r. 1 (=ss. 244, 311 and 588, Civ. Pro. Code*, 1882)—*Application for setting aside sale on ground of fraud—Purchase by third party.*—An application to set aside a sale on the ground of fraud of the decree-holder and auction-purchaser comes under s. 244 and not

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under s. 311, Civ. Pro. Code, notwithstanding that the purchase was made by a third person, and a second appeal lies to the High Court. BHUBON MOHUN PAL v. NUNDA LAL DEY, **26 C. 324=3 C.W.N. 399.** (19 C. 683, *Expl. and F.*; 25 C. 175, 2 C.W.N. 691, *Appr.*; 20 A. 412, *D.*) [*F.*, 31 C. 385; *Appl.*, 26 C. 539; *R.*, 27 C. 197, 11 Bom. L.R. 699, 28 C. 4=5 C.W.N. 124, 23 A. 478=A.W.N. 1901, 175, 24 A. 239=22 A.W.N. 49, 26 A. 447=A.W.N. 1904, 61=1 A.L.J. 65.]

(1064)—*S. 47, O. 21, r. 90, s. 115 (=ss. 244, 311, 622, Civ. Pro. Code, 1882)—Application by prior purchaser to set aside a subsequent sale of same property—Sale set aside by Munsiff—Applicability of Munsiff's order—Order of lower Court wrong on question of law—Power of High Court to interfere in revision—Bengal Tenancy Act, s. 153.*—The present petitioner purchased a holding under a money-decree. Two years later, the same holding was sold in execution of a rent-decree and purchased for Rs. 25 by the decree-holder thereof. Thereupon an order was made by the Munsiff, upon an application by the petitioner under the conjoint effect of ss. 311 and 244 of the Code, setting aside the second sale. The purchaser under that sale appealed to the Additional District Judge, who, without going into the merits, reversed the order of the Munsiff. The petitioner, thereupon, moved the High Court on the ground that no appeal lay to the Additional District Judge and that the Judge was wrong in stating that the petitioner had no *locus standi*. *Held*, the effect of the order of the Munsiff was practically to hold that the second purchaser had no title to the land, and the order certainly decided a question relating to title to the land or to some interest in the land as between parties having conflicting claims thereto. Here the parties had conflicting claims thereto. An appeal, therefore, did lie to the Additional District Judge, under s. 153 of the Tenancy Act, and, consequently, he was not acting without jurisdiction, when he made his order. (28 C. 116, *D.*) As to the second point:—What the Additional District Judge meant by stating that the petitioner had no *locus standi* was that the petitioner was not a representative of any of the parties within the meaning of s. 244. If the Judge was wrong on that point, he was wrong upon a question of law, and not of jurisdiction, and the case, in consequence, did not fall within s. 622. The same observations applied as to whether or not the petitioner was a person whose immoveable property had been sold within the meaning of s. 311 of the Code. Rule discharged. GANGA CHARAN BHUTTACHARYA v. SASHI BHUSAN ROY, **1 C.L.J. 255 =32 C. 572.** [*F.*, 32 C. 957, F.B.=9 C.W.N. 721=1 C.L.J. 476.]

(1065)—*S. 47, O. 21, rr. 90 and 92 (=ss. 244, 311, 312, Civ. Pro. Code, 1882).*—An application seeking to have the sale set aside on the ground that no notice had been issued to the applicant in the matter and that in consequence the property was sold at an undervalue, does not fall within the purview of s. 311 of the Civ. Pro. Code, 1882; and an order dismissing the same is not covered by s. 312 of the Code. The order falls under s. 244 (*c*) of the Code, and is appealable as a decree. The circumstance that a decree has already been executed does not make s. 244 (*c*) of the Code inapplicable, where the question involved is none the less a "question relating to the satisfaction of the decree." PARSHARAM v. BALMUKUND, **10 Bom. L.R. 752=32 B. 572.**

(1066)—S. 47, O. XXI, rr. 90, 92, s. 104, O. XLIII, r. 1—*See* LIMITATION ACT, 1908, s. 18 and arts. 166, 181, 3 C.W.N. 333.

(1067)—S. 47, O. XXI, rr. 90, 92, s. 104, O. XLIII, r. 1—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 28 C. 4=5 C.W.N. 124.

(1068)—*S. 47, O. 21, r. 91 (=ss. 244, 313, Civ. Pro. Code, 1882)—Saleable interest—Auction-purchaser—Sale, set aside on what ground.*—An execution—sale can be summarily set aside on the application of the auction-purchaser under s. 313, Civ. Pro. Code, only when the judgment-debtor has no saleable interest therein. No order can be made under that section when the judgment-debtor has an interest, however small, in the property sold. In the absence of fraud or misrepresentation, an execution—sale cannot be set aside under s. 244 merely on the ground that the auction-purchaser thought that A and B were the judgment-debtors and he purchased the interest of both, whereas in fact A was the judgment-debtor and his interest alone passed at the sale. MAKHANCHORE SARKAR v. NISHIND GONAI, **10 C.L.J. 492=3 Ind. Cas. 438** (28 C. 8, *Appl.*)

(1069)—S *47*, O. XXI, *r. 92*—Non-service of notice under s. 10. Public Demands Recovery Act, effect of—Suit to set aside sale on ground of non-service—*See* BEN. ACT I OF 1895, s. 10, 11 C.W.N. 745=34 C. 787.

(1070)—*S. 47*, O. XXI, r *92*—The order of a Collector setting aside an execution-sale as void *ab initio*, in a proceeding under the Tenancy Act, must be considered as one passed under s. 244, and not under s. 312, Civ. Pro. Code, and as such, an appeal will lie to the District Judge—*See* U.P. ACT II OF 1901, 2 A.L.J. 130 =A.W.N. 1905, 55.

(1071)—*S. 47, O. 21, r. 92, s. 144* (1), s. *104, O. 42, r. 1 (=ss. 244, 312, 583, 588, Civ. Pro. Code*, 1882)—*Restitution of mesne-profits to judgment-debtor—Auction-purchaser.*—The respondent in execution of his decree for sale purchased the property mortgaged. Appellants applied, under s. 311 of the Code, for setting aside the sale. The application was rejected by the first Court and the sale confirmed. The sale having been confirmed, the respondent

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took possession of the property purchased through Court. On appeal to the Judicial Commissioner's Court, the sale was set aside. The appellants then paid the decretal amount and applied to the Court to get back possession of the property. After having got back possession, they applied to the same Court, under s. 583, for a determination of the mesne profits and for the award of such amount as may be found due. The first Court dismissed the application, holding that the order setting aside the sale was not a decree and therefore no restitution could be claimed. *Held*, that the question whether the sale was a valid one or otherwise was a question between the parties to the suit in which the decreee was passed relating to the execution of the decree and as such was covered by s. 244 (*c*): *Held*, further, that the order setting aside the sale passed by the Judicial Commissioner's Court was an order under s. 244 and consequently could be treated as a decree and the application under s. 583 of the Code was maintainable. THAKUR KAMAKHYA SINGH v. MUNSHI PRAG NARAIN, **8 O. C. 254.**

(1072)—*S. 47. O. 21. r. 95 (=ss. 244, 318, Civ. Pro. Code,* 1882)—*Right to sue for possession—Auction-purchaser.*— An auction-purchaser of the property in execution of his decree or his legal representative cannot maintain a suit for possession, s. 244 of the Civ. Pro. Code, being a bar to the suit. SHEO NARAIN v. NUR MUHAMMAD. **5 A.L J. 20=A W N. 1908, 12=30 A. 72.** (27 C. 34, 26 M. 740, 3 A.L.J. 234=26 A.W.N 87, *F.*; 4 A.L J. 434=29 A. 463, *reversed*) [*Overruled*, 31 A. 82, F.B =6 A. L.J. 71=5 M.L T. 185=1 Ind. Cas. 416].

(1073)—*S. 47. O 21, r. 95 (=ss 244 and 318, Civ. Pro. Code,* 1882)—*Judgment-debtor, objector--Appeal.*—When an application is made by the assignee of the decree-holder-purchaser for an order under s. 318 of the Civ. Pro. Code, the mere fact that the judgment-debtors put in an objection, does not make it an application under s. 244 of the Code, so as to entitle the judgment-debtor to appeal against the order passed by the Court of first instance or by the Court of first appeal. MAHOMED MOSRAF v. HABIL MIA, **6 C L J 749.** (1 C.W.N. 658, *R.*) [*R.*, 31 A. 82, F.B =1 Ind. Cas. 416=5 M.L.T. 185=6 A.L.J. 71.]

(1074)—*S. 47, O, 21, r. 95 (=Civ. Pro. Code* 1882, *ss 244, 318)=Agreement between decree-holder who is auction purchaser and judgment-debtor not to take possession of property.*—In execution of a hypothecation decree, the decree-holder became the auction-purchaser of the hypotheca. He entered into an agreement with the defendants not to take possession of the property as he had been paid Rs. 1,100. In spite of this, the auction-purchaser applied under s. 318, Civ. Pro. Code, for removal of obstruction and to be put in possession. *Held* that the question as to the genuineness of the agreement could be gone into by the executing Court under s. 244, Civ. Pro. Code, and that, consideration having been received by the decree-holder, he had no right to get an order under s. 318 in defiance of his own agreement. BALUSWAMY v. LAKSHMANAN, **8 M.L.J. 193.** (13 M. 504, *F.*)

(1075)—*S. 47, O. 21, r. 95 (=ss. 244, 318, Civ. Pro. Code,* 1882)—*Purchaser at auction—Representative of judgment-debtor—Suit for possession of property purchased, not maintainable.*—The plaintiffs purchased the property in dispute in execution of a decree. Seven years later they applied for delivery of possession. The application was dismissed as time-barred. They then brought the present suit for possession: *held*, that the purchaser under a sale in execution of a decree is a representative of the judgment-debtor and is precluded by the provisions of s. 244 of the Code, from instituting a suit for possession of the property purchased by him under the sale. KALIAN SINGH v. THAKUR DAS. **3 A.L.J. 234=A.W.N. 1906, 87.** [*Overruled*, 31 A. 82. F.B.=6 A.L.J. 71=5 M. L T. 185=1 Ind. Cas. 416; *F.*, 30 A. 72=5 A. L.J 20=A W.N. 1908, 12, 5 A L.J. 285=A. W.N. 1908, 122.]

(1076)—*S. 47, O. 21, r. 95 (=ss. 244 and 318, Civ. Pro. Code,* 1882)—*Dispute between judgment-debtors—Application for possession—Objection that property purchased with the money of one of them not entertainable in execution—Appeal—Execution Court.*—A dispute between the judgment debtors does not relate to the execution, discharge or satisfaction of the decree, and cannot be gone into by a Court executing the decree. Where, therefore, certain property was sold in execution of a decree and the sale was confirmed but the purchaser applied under s. 318, Civ. Pro. Code, that possession be made over to one of the two judgment-debtors, to which the other judgment-debtor objected, on the ground that the property was purchased with her money, which she had given to the other judgment debtor, who had misappropriated it, but she did not apply to set aside the sale, *held* that the dispute did not relate to the execution of the decree, but should be settled in a separate suit brought for the purpose, and no appeal lay to the High Court from the order refusing to determine the dispute between the judgment-debtors. KASTURA KUNWAR v. GYA PRASAD, **4 A.L J 47=A.W.N. 1907, 29=29 A. 207.**

(1077)—*S. 47, O. 21, r. 95, s. 104, O. 43, r. 1 (=ss. 244, 311, 588, Civ Pro Code,* 1882)—*Appeal.*—An order passed under s. 318, Civ. Pro. Code, 1882, is not appealable. No appeal is given by s. 588. The order cannot be said to be one under s. 244. BHIMAL DASS v. MUSST. GANESHA KOER. **1 C W.N. 658.** (18 A. 36, *Appr.*; 13 M. 504, *Disappr.*) [*F.*, 26 C. 529=3 C.W.N. 374; *Appr.*, 7 C.L.J. 436; *R.*, 6 C.L.J. 749, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185.]

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(1078)—*S. 47, O. 21, rr.* 95, 96 (=*ss. 244, 318 and 319, Civ Pro Code*, 1882)—*Sale in execution of a decree upon mortgage—Purchase by the decree-holder—Grant of sale-certificate—Whether separate suit for possession maintainable—Limitation Act* (XV *of* 1877), *sch.* 2, *art*, 138.—Where a mortgagee, in execution of his own decree, purchases the mortgaged property at an auction-sale which is confirmed, and he obtains the sale-certificate, there is no bar to his subsequently maintaining a suit to recover possession thereof if the judgment-debtor does not deliver up the property. S. 244 (*c*) does not apply to such a case. (3 AL J. 234. 1906 A W.N. 87, *Overruled.*) Per *Stanley, C.J., dissentiente* (*Knox, J., concurring* with him) : The rule, which forbids a mortgagee-decree-holder to purchase, has no force if permission to bid be given to him by the Court and when the grant of permission to bid has been given, such mortgagee is no longer under disability to purchase, but *qua* the right to purchase, is on the same footing as strangers to the suit who may be bidders at the sale. The recognition of a dual personality in a decree-holder-purchaser would be to introduce a strange and novel legal fiction. An executor who is sued as such only cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound, he must be sued in his personal as well as in his representative capacity. An executor not merely claims title from a deceased person but he represents the deceased person. If he institutes a suit in respect of the estate of the deceased, he does so not presumably for his own benefit, but for the benefit of the estate of the deceased. If he be sued as an executor only, he is sued as representing the deceased. On the contrary in the case of a decree-holder, he sues on his own behalf and for his own benefit. If he gets leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. By becoming a purchaser he does not cease to be a party to the suit and as such be bound by any order which may be passed therein. The intention of the Legislature in passing the enactment in question was to prevent any question which could be disposed of in execution becoming the cause of fresh litigation. (5 M. 217, 13 M. 504, *R.*) The word "representative" in s. 244 of the Code includes a party who by assignment or gift succeeds to the rights of the decree-holder after decree. Art. 138, Limitation Act, 1877, might be applicable to the case of a purchaser who was a stranger to the suit in which a decree for sale was passed and, not being a party to the suit, was not entitled to take proceedings under s. 244. When a Court has passed a decree for sale in a mortgage-suit, the proceedings are not at an end when the sale to the decree-holder who has obtained leave to bid has been confirmed and a certificate of sale granted. Delivery of possession is necessary and until such possession is given, the decree cannot be said to have been executed or satisfied Per *Banerji, J.* (*Aikman and Griffin, JJ., concurring*). In order that cl. (c) of s. 244 may apply, two conditions are essential ; first, that the question arises between the parties to the suit, in which the decree was passed or their representatives, and second, that it is a question relating to the execution, discharge or satisfaction of the decree. As regards the first condition it is manifest that the party must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his rspresentative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of s. 244. (7 A. 681, 25 B. 631, *F.*) The decree-holder as such is not entitled to possession as the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree-holder has purchased the property is a pure accident. Although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities and it is in the latter capacity only that he can obtain possession. All auction-purchasers, whether they are decree-holders or not, and whether they purchased under a mortgage-decree or under a simple-money-decree, are in the same position as regards recovery of possession of the property purchased by them, and it is only in their capacity as auction-purchasers that they can obtain possession. The question therefore which arises under s. 318 or 319, Civ. Pro. Code, is not a question between the parties to the suit or their representative and cannot be determined under s. 244. (16 C. 682, P.C., *R.*) A question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to the delivery of possession is not a question relating to the execution, discharge or satisfaction of the decree. Under the meaning of s. 244, cl. (*c*), upon the judgment-debtor's property being sold and the amount due under the decree being realised, the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction-purchaser obtains possession of the property sold, is wholly immaterial for purposes of the decree and does not in anyway affect it. The validity of the sale or the completion of it does not depend on the decree-holder's obtaining possession. So far as the purchaser is concerned, he does not obtain possession by virtue of the decree, and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the Legislature intended that a purchaser at an auction-sale may obtain possession by means of suit is

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manifest from art. 138, Limitaiton Act. A decree-holder auction-purchaser, like any other auction-purchaser, is entitled to claim possession, not only by an application under s. 318 or s. 319, but also by suit; he has alternative remedies, one of the remedies being a summary application for possession, and s. 244 is not a bar to such a suit and does not apply to such an application. No appeal lies from an order under s. 318, Civ. Pro. Code (A.W.N. 1886) 45 13 A.W.N. 122, 1 Agra 5 Mis. App. 1 C.W.N. 658, 6 C.L.J. 746, *F.*) An application under s. 318 is not an application for execution, and so also an application for delivery of possession is not an application to take a step-in-aid of execution. The opinion of *Knox, J.*, in the under-mentioned cases. (26 A. 365, 10 A. 477. *Doubted.*) Per *Aikman, J.*—The observation of the Privy Council in I.L.R. 19 C. 683 must be read with reference to the facts of the case, which was before their Lordships, and could never have been intended to have the effect of taking away a right of suit which has never been doubted. MUSSAMMAT BHAGWATI v. BANWARI LAL, **6 A.L.J. 71 F.B.=5 M.L.T. 185=31 A. 82=1 Ind. Cas. 416.** [*R.*, 2 Ind. Cas. 454.]

(1079)—*S. 47, O. 21, r. 96 (=Civ. Pro. Code, 1882, ss. 244, 319)—Delivery of symbolical possession erroneously made—Fresh cause of action—Suit for possession—Delivery of wrong property.*—A delivery of symbolical possession, even erroneously, operates to give the person put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser. (24 C. 715, 22 B. 667, *R.*) A suit for actual possession of the mortgaged property by a purchaser at auction-sale who had already obtained symbolical possession, under s. 319 of certain property which was alleged not to be the mortgaged property, would not be barred by s. 244 of the Civ. Pro. Code, although the plaintiff's proper course would have been to apply to the execution Court to decide, whether the land of which he wanted possession was the mortgaged property sold to him, instead of obtaining possession under s. 319 of the Code. GOVIND BIDIRAJI BHUKTA v. AKELLA VENKATA SASTRULU, **17 M.L.J. 598.**

(1080)—*S. 47, O. 21, rr. 97, 99, 103 (=ss. 244 and 335, Civ. Pro, Code, 1882)—Mortgagee from judgment-debtor after attachment—Representative.*—A mortgagee under a mortgage from the judgment-debtor after attachment is a representative of the judgment-debtor within the meaning of s. 244 of the Code. S. 335 of the Code has no application to such a case. NARAYANASAWMI NAICK v. SESHAPPIER, **17 M.L.J. 321.** (20 M. 378, 28 M. 119, 28 C. 492, 31 C. 737, *R.*) [*F.*, 18 M.L.J. 28, Note=4 M. L.T. 85.]

(1081)—*S. 47, O. 21, rr. 99, 100, 101, 103 (=Civ. Pro. Code, 1882, ss. 244, 331, 333)—Decree on compromise—Objection by person not party to compromise.*—Where a party to a suit, but not to the compromise on which it was decreed, being dispossessed in execution of the decree, objects that the decree is not binding on him, such objection must be investigated and determined under s. 244, Civ. Pro. Code, and the order rejecting such objection is appealable. SANKARAVADIVAMMAL v. KUMARASAMYA, **8 M. 478** [*Diss.*, 6 C.W.N. 10=30 C. 134, 23 A. 346; *Appr.*, 23 M. 361, F.B.; *R.*, 17 B. 49, 2 O.C. 51.]

(1082)—*S. 47, O. 21, rr. 100, 101, 103, 97, 99 (=Civ. Pro. Code, 1882, ss. 244, 332 335)—"Judgment-debtor."*—If against one, defendant there is no liability under the decree, any question arising out of the execution against the other defendants is not, as between the first named defendant and the decree-holder, a question relating to the execution of the decree within the meaning of s. 244 Civ. Pro. Code, ss. 332 and 335 of the Code should be read with s. 244. VASUDEVA UPADYAYA v. VISVARAJA THIRTHASAMI, **19 M. 331.**

(1083)—*S. 47, O. 22, r. 10 (=ss. 244, 372, Civ. Pro. Code, 1882)—Suit instituted—Person claiming title afterwards, no representative.*—A person claiming title from the judgment-debtor, after the suit is instituted and not brought on the record under old s. 372 is no representative under old s. 244, but is identified with the judgment-debtor. BHAINI RAM v. GOKAL MAL, **151 P.R. 1890.** (16 C. 355, *Diss.*)

(1084)—*S. 47, O, 22, r.* 10 s. 115 (=*Civ. Pro. Code*, 1882) *ss. 244, 372, 622)—Scope of and parties to—Revision—Question between two judgment-debtors.*—An application cognisable under s. 244 of the Civ. Pro. Code, must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holders of the one part, and the judgment-debtors or their representatives of the other. [*R.* 30 A. 379=5 A.L.J. 557=A.W.N. 1908, 157, 31 A. 82, F.B.=6 A.L.J. 71=5 M. L.T. 185.] An application by a judgment-debtor that another person to whom he has transferred the property in suit, *pendente lite*, may be brought on the record and within the operation of the execution-proceedings, is not one under s. 244 but under s. 372 of the Civ. Pro Code; and an order, allowing such application and disallowing the objections of the party brought on the record, being appealable under s. 588 (21), cannot be made the subject of revision under s. 622. RAYNOR v. MUSSOORI BANK, **7 A. 681=A.W.N. 1885, 204.** [*R.*, 10 A. 97.]

(1085)—*S. 47, O. 26, rr. 13, 14, s. 104, O. 43 r. 1 (=ss. 244, 396 and 588, Civ, Pro. Code, 1882)—Appeal from an order made on an application for appointment of a Commissioner.*—An application, under s. 396 of the Code for the appointment of a Commission, is not a matter

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which comes within the scope of s. 244. No appeal lies from the order made on the application, since it is not an order, from which a right of appeal is given by s. 588 of the Code. MALLAYYA v. SUBBARAYUDU, **17 M. L.J. 144.** (28 M. 127, *D.*)

(1086)—*S. 47, O. 26, r. 15 (=Civ. Pro. Code, 1882, ss. 244, 397)—Commissioner's fees—Nature of order to be passed—Right of Commissioner to proceed in execution.*—Where a Commissioner is appointed, the Court should provide for payment of the fees to the Commissioner into Court before the commission is proceeded with, or it is open to the Commissioner to sue to recover the money. An order for payment of fees to the Commissioner is not an order which can be executed at the instance of the Commissioner as if he were party to a decree. Where an appeal was preferred from an order granting execution of an order directing the payment of fees due to a Commissioner, it was not open to the Commissioner, who set the Court in motion, to say that his application was not made under s. 244 of the Code and that no appeal lay from the order granting execution. VENKATANARASIMHULU v. NARASIMHAMURTI, **10 M.L.J. 241.**

(1037)—S. 47, O. XXXII, r. 4 (1)—Effect of s. 53, Guardians and Wards Act—Meaning of "parties" in s. 244, Civ. Pro. Code—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 13 C.W.N. 1182, P.C. = 10 C.L.J. 318 = 6 A.L.J. 822 = 11 Bom. L.R. 1225 = 6 M.L.T. 279 = 19 M.L.J. 631.

(1088)—*S. 47, O. 33, r. 11, O. 32, rr. 1, 4 (2) (=Civ. Pro. Code, 1882, ss. 244, 412, 440)—Lands of minors next friend attached for Court fees due to Government—Order dismissing application by Collector for sale proclamation, whether appealable.*—An application by the Collector for issue of a sale proclamation in respect of certain properties which had been attached, and for sale thereof and payment of the Court-fees ordered to be paid to Government by the decree in the suit brought by certain minors by their next friend (the counter-petitioner's father) having been dismissed, *held* on appeal preferred by the Collector from the order of dismissal, that such order was not appealable, because the appellant, the Collector, was not a party to the suit in which was passed the decree directing the counter-petitioner's father to pay the Court-fees, and also because, in proceedings for the enforcement of an order under s. 412, Civ. Pro. Code, against a next friend, the next friend cannot be regarded as a party to the suit. *Held* also that s. 440 did not apply to the case, as that section relates only to costs, and Court-fees, though as between the plaintiff and the defendant they are costs, are not costs as between the plaintiff and the Government, but revenue. COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL, **23 M. 73 = 9 M.L.J. 265.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1089)—*S. 47, O. 41, r. 5, s. 141 (=ss. 244 545 and 647, Civ. Pro. Code, 1882)—Execution of decree—Appeal against order of execution—Decree upon private arbitration award—Application for stay of execution—"Sufficient cause."*—Where in an appeal against an order granting execution of a decree passed upon a private arbitration award, an application under s. 545 of the Civ. Pro. Code, was made for an order to stay the execution until the decision of the pending appeal. *Held* that s. 545 must be read along with s. 647 of the Code and that the order of the lower Court granting execution of the decree was such an order as falls within the purview of s. 244 of the Code and as such was a decree, and that, in an appeal from such order, the provisions of s. 545 would be applicable and that therefore the application can be validly entertained. *Held*, also, that in regard to immoveable property, the chance of the person in possession allowing the property to fall into arrears of Government revenue and bring about a sale for such arrears, is not such an injury as is contemplated by s. 545 of the Code as to justify an order for stay of execution of decree. HARIRAJ SINGH v. KIRAT SINGH, **A.W.N. 1888, 245.**

(1090)—S. 47, O. XLV, r. 13—*See* APPEAL—ORDERS, 11 M.L.J. 238.

(1091)—*S. 47, O. 47, rr. 7, 9 (=ss. 244, 629, Civ. Pro. Code, 1882)—Execution-proceedings — Review—Appeal.*— An order, passed on review of a previous order in an execution proceeding, is open to appeal as it is an order under s. 244, Civ. Pro. Code, 1882, relating to the execution of a decree. ADHAR MANDAL v. KESHAB CHANDRA MANA, **5 Ind. Cas. 483.**

——S. 48 [=1882), s. 230 (3), (4) = 1877, s. 230 (3), (4) = 1859, s. 207.]

See EXECUTION OF DECREE.

(1092)—*S. 48—Decree for sale upon mortgage passed before 1908—No curtailment of right to execute—Application of section—Retrospective effect—Statutes.*—The right to enforce the execution of a decree is a substantive right. That right cannot be lost without an express provision of law to that effect. A decree for sale of mortgaged property was passed while Act XIV of 1882 was in force. Twelve years expired, but the decree was not satisfied. In the meantime, Act V of 1908 was passed, s. 48 of which was made applicable to all decrees. *Held* that the decree passed before the passing of that Act could be executed more than twelve years after the date it was passed. No statute shall be so construed as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Statutes are to be construed as operating only on cases or facts which come into existence after they are passed. KOUNSILLA v. ISHRI SINGH, **7 A.L.J. 420 = 6 Ind. Cas. 188 = 32 A. 499.** [*R.*, 37 C. 796 = 6 Ind. Cas. 537 = 15 C.W.N. 337 = 12 C.L.J. 328, 7 A.L.J. 1070.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1093)—*S. 48 (=old s. 230)—Scope of.*—This section does not apply to applications or petitions asking the Court to give effect to previous petitions still pending. In this case, it was also ruled that, since execution-proceedings had been pending from 1884, the fact that steps-in-aid of execution had not been taken every three years did not bar execution. BUDHE KHAN v. BIR BAL, **40 P.R. 1898.** [*R.*, 76 P.R. 1904=132 P.L.R. 1904.]

(1094)—*S 48 (=old s. 230)—S.9, Limitation Act*, 1877—*Whether it clashes with art.* 179, *Limitation Act*, 1877.—S. 230 does not contain the law of limitation regarding the execution of decrees (for which, see art. 179 of Limitation Act, 1877), but fixes a time, after the lapse of which an application for execution though not barred by the law of limitation, shall not be granted. The Civ. Pro. Code does not restore a right of which the law of limitation prevents the exercise. S. 9, Limitation Act, 1877, applies only to suits, not applications. BEHARI LAL v. BANESS, **109 P.R. 1899.** [*F.*, 9 P.R. 1891; *R.*, 76 P.R. 1904=132 P.L.R. 1904; *Appl.*, L.B.R. 1893—1900, 588.]

(1095)—*S. 48 (=old s. 230)—"Granted," "at a certain date," Meanings of—Assignment of decrees in part.*—An application for a rateable distribution of money, in the hands of the Nazir, among the decree-holders may be said to be "granted" within the meaning of s. 230. A decree, directing the money due under it to be paid annually in two instalments at a specified rate "each harvest" cannot be said to be "payable at a certan date" within the meaning of s. 230 (*b*). An executing Court commits a grave irregularity in allowing several assignees of parts of a single and indivisible decree to execute that decree as to their shares independently of each other. SHER ALI v. DEOKI NANDAN, **19 P.R. 1889.** [*R.*, 76 P.R. 1904=132 P.L.R. 1904.]

(1096)—*S. 48 (=old s. 230)—"Granted," "law in force," Meanings of.*—An application by the decree-holder for the arrest of a judgment-debtor, though he was afterwards released will be held to be "*granted*" within the meaning of this section. The "law in force" means not only the Limitation Act, but includes also the Civ. Pro. Code. MISRI v. TULSI RAM, **54 P.R. 1887.** [*R.*, 76 P.R. 1904=132 P.L.R. **1904.**]

(1097)—*S 48 (=old s. 230)—"Certain date."*—Where a decree for Rs. 8,000 directs that Rs. 400 should be paid annually for interest and that, in case of default, the entire sum of Rs. 8,000 be recovered with interest, the decree could not be held to have directed payment "at a certain date" within the meaning of s. 230. NIHAL CHAND v. SAFDAR HUSSAIN, **99 P.R. 1890.**

(1098)—*S. 48 (=old s. 230)—Delivery of Property—"Certain date."*—S. 230 is not confined to a delivery of the property to decree-holder as his own, but extends to the delivery of property as mortgaged property. Where a date could be ascertained by reference to a contingent event, *e.g.*, there lease from attachment, a *certain date* may be said to have been fixed within the meaning of this section. MUHAMMAD AKBAR KHAN v. DWARAKA DAS, **159 P.R. 1889.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1099)—*S. 48 (=s. 230, cl. 3, Civ. Pro. Code, 1877) Execution of decree.*—The concluding clause of s. 230 of the Civ. Pro Code, 1877, refers to the question of limitation, and not that of due diligence. Therefore, an application for execution under s. 230 could not be disallowed, on the ground that a previous application, under the same section, made in the previous year, had not been prosecuted with due diligence. SOHAN LALL v. KARIM BAKSH, **2 A. 281.**

(1100)—*S. 48 (=Civ Pro. Code, 1882, s. 230, para 3)—Application to execute a decree, meaning of—Limitation.*—The term "application to execute a decree" in the paragraph means any application for that purpose. And it should not be restricted to the last application immediately preceding an application made after 12 years from the date of the decree sought to be enforced, on which the sum decreed became payable. TILESHAR RAI v. PARBATI. **15 A. 198=A.W.N. 1893, 98.** (8 A. 301, *D.*; 8 A. 536 *R.*) [*Appr.*, 18 A.482=16 A.W.N.142; 14 C.W.N. 114; *R.*, 28 C. 122=5 C.W.N. 80; *D.*, 24 A. 282=22 A.W.N. 63.]

(1101)—*S. 48 — Execution proceedings — Limitation.*—Upon a correct interpretation of cl. 2 of s. 48 of the Code, the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which it is held that the judgment-debtor has by fraud prevented the execution of the decree. MOSHIN ALI v. MASOOM ALI, **8 A.L.J. 1020,** (7 C. 556, *Not F.*)

(1102)—*S. 48 (=old s. 230)—Law of Limitation, how affected by.*—This section prescribes a period after the lapse of which an application for the execution of a decree though *not barred* by limitation, shall not be granted. GHOLAM JILANI v. GANGA RAM, **9 P R. 1891.** (27 P.R. 1888, 109 P.R. 1889, *F.*) [*R.*, 76 P.R. 1904=132 P.L.R. 1904.]

(1103)—*S. 48—Decree—Execution—Application to execute decree—Attachment of property—Transmission of decree by Baroda Court to British Court—Application to execute decree by attaching other property in British India—Limitation.*—The plaintiff obtained a decree in the Amerli Court (H H. the Gaekwar's territory) against the defendants for Rs. 6,727 on the 17th July, 1893. An application to execute that decree was made in 1894. A second application for the purpose was made on the 10th July, 1905, wherein the prayer was for attachment of whatever moveable property of

the defendants that might be found at whatever place within the jurisdiction of the Amerli Court. The Court made the order of attachment. Subsequently, on the plaintiff's application, the decree was transmitted for execution to the High Court of Bombay on the 25th July, 1909. The plaintiff applied to the High Court, on the 15th October, 1909, to execute the decree by attaching the moveable property of defendant No. 2 in Bombay. The defendant No. 2 objected that the application was barred by the provisions of s. 48 of the Civ. Pro. Code, 1908. *Held* that the plaintiff's application to the High Court was a substantive application with regard to the property in Bombay which was not the subject of any previous application; and that, having been made more than twelve years after the date of the decree, it was barred by the provisions of s. 48 of the Civ. Pro. Code, 1908. JEEVANDAS DHANJI AND RANCHODDAS CHATURBHAI, **12 Bom. L R. 844=8 Ind. Cas. 168.**

(1104)—*S. 48 (=old s. 230—Limitation Act, s. 7—Minor decree-holder—Execution after twelve years.*—S. 7, Limitation Act does not exempt a minor-decree-holder from the operation of s. 230 which is enacted absolutely for the benefit of the judgment-debtor that he might not be harassed for ever and for ever by execution proceedings. JHANDA v. MOHAN LAL. **128 P. R. 1894** (16 B. 536, *Not F.*) [*R.*, 76 P.R. 1904=132 P.L.R. 1904.]

(1105)—*S 48 (=old s. 230)—Application without succession certificate—Legality of.*—An application for execution is none the less an application in "accordance with law though the applicant had no certificate under s. 4, Act VII of 1889 at the time of presenting the application. S. 4, Act VII of 1889 simply saying that a Court shall not proceed till the production of such certificate and not preventing its receipt. The absence of a certificate is no bar to the reception of an application, but will only bar the Court from proceeding with it till the production of such certificate. KUNDAN LAL v. MUSSAMMAT MAKHNI, **27 P. R. 1894.**

(1106)—*S 48 (=old s. 230)—Payment by instalments.*—Decrees for annual or monthly payments are covered by s. 230, Civ Pro. Code, 1882. NAWABZADA MUHAMMAD KAMAR-UD DIN KHAN v. PIARI LAL. **13 P.R. 1892, F B.** [*R*, 22 P.R. 1905=57 P.L.R. 1905, 12 P.R. 1902=15 P L.R. 1902, 2 P. R. 1899, *Rev*]

(1107)—*S. 48 = old s. 230—Execution of decree—Arrangement between parties—Repudiation.*—A judgment-debtor cannot be allowed to turn back and repudiate his own arrangement regarding the satisfaction of the decree, though it may propose proceedings contrary to the ordinary *cursus curiae*. NAWAB ZADA MUHAMMAD AKBAR KHAN v. DYA NATH, **200 P.R. 1889.** 15 B.L.R. 383, 21 W.R. 310, L.R. 5 P.C., 16, *R.*) [*R.* 89 P.R. 1894.]

(1107-*a*)—*S. 48—Execution of decree—'Fraud' construed in a broad sense—Evasion of warrant amounts to fraud—Whether fraud of one judgment debtor keeps the decree alive after twelve years only against himself or against all.*—The expression "fraud" in s. 48 of the Code of 1908 should be construed in a broad sense, and a deliberate evasion of the process of the Court with intention to defeat the execution of the decree would amount to "fraud." If the Judgment-debtor, by fraud or force, at sometime prevented the execution, it is not necessary for the decree-holder to show that the judgment-debtor, guilty of fraud, had means to pay the decree amount or that the decree-holder exercised continuous diligence and would have realised the fruits of his decree but for such fraud or force. (6 M. 365, *D.*; 8 M L.J. 203, *Cons.* 22 M. 320, *Appr.*; 8 A.L.J. 1029, *R.*) *Quare*:—Whether the Court has a discretion to allow or refuse execution after twelve years, even where fraud has been proved. (11 C.W.N. 441, *Doubted*). *Per Sundara Aiyar, J.*:—Where there are more judgment-debtors than one, the fraud of any particular judgment debtor would give the decree-holder further time for execution only as against him under s 48 (2) *Per Phillips, J.*:—S. 48 is not intended to enlarge the time for execution only against the judgment-debtor who is guilty of fraud, but allows execution against all the judgment-debtors, even though only one of them has been guilty of fraud or force. ABDUL KHADIR v. AJIYUR AHAMMAD SHAIWA RAVUTHAR, **1911. 2 M.W N. 434.**

(1107-*b*)—*S. 48—Execution of decree, due deligence exercised by decree holder in—Judgment-debtor, fraud and stratagem of—Limitation, extension of.*—*Held that*, if the decree-holder exercises due diligence in proceeding with the execution of decree, he cannot be deprived of the benefit of s. 48 of the Civ. Pro. Code. *Held* further, that it is not necessary to show that the fraud or stratagem of the judgment-debtor extended continuously for the whole of the period of 12 years following the date of the decree. It is sufficient to show that the judgment-debtor, on various occasions within the aforesaid period, dishonestly prevented the execution of the decree against him by frivolous devices. Such devices clearly constitute fraud within the meaning of s. 48 of the Civ. Pro. Code. JOGINDRA NATH PATHAK v. MIRSA MOHAMMAD HUSAIN, **14 O.C. 238.** (11 C.W.N. 440, *F.*)

(1107-*c*)—*S. 48—Limitation—Fraud—Execution of decree.*—Where a judgment-debtor evaded arrest, and, when subsequently arrested, spent two years in pretending to prosecute insolveney proceedings without intending to press them, and thus caused 12 years to elapse from the date or the decree, *held*, that he was guilty of fraud, and the application for execution was not barred by s. 48 of the Code.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Held also, that, where unsuccessful applications had been made for the arrest of the judgment-debtor, and the last application was made for the attachment of his property, it was not a continuation of the previous applications. MEWA LAL v. AHMAD ALI, **9 A.L.J. 17**. (6 A. L.J. 401, *R.*)

(1107-*d*) — S. 48 — *See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 2 A. 275.

(1108)—S. 48—*See* NOS. 109, 150, 560, 573, *supra*, AND NOS. 1510, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 5957, *infra*.

(1108-*a*)—*Ss. 48, 115—The time runs from appellate decree—S.* 115—*Whether dismissal on the ground of limitation constitutes a ground for interference in revision.*—Where an execution petition was filed by the decree-holder more than 12 years from the date of the original decree, but within 12 years of the date of the appellate decree confirming the same, and the District Munsif dismissed the petition as barred by limitation under s. 48 of Act V of 1908, *held*:—1. That the petition was within time, as limitation runs from the date of the appellate decree. 2. That the District Munsiff having held that his jurisdiction was ousted by limitation, he failed to exercise a jurisdiction vested in him by law within the meaning of s. 115, Civ. Pro. Code. NARASAYA HEDGE v. VITLA PRABHU, **2 M.W.N. 1911, 239.**

(1109)—*S. 48, O. 21, rr. 10, 21 (=s. 230 Civ. Pro. Code*, 1882)—*Limitation provided by.*—It must not be understood from the above that the limitation of 12 years provided by s. 230 of the Civ. Pro. Code, can be extended by any disability of the person entitled to execution which arises subsequently to the date of the decree. LOLIT MOHUN MISSER v. JANOKY NATH ROY, **20 C. 714.** [*F.*, 23 C. 374, 22 A. 199; *R.*, 3 C.W.N. 24, 1 N.L.R. 180; *Diss.*, 25 M. 431, F.B.=12 M.L.J. 166; *D.*, 29 B. 68 =6 Bom. L.R. 639.]

(1110)—*S. 48, O. 21, rr. 10, 21 (=Civ. Pro. Code, Act X of* 1877, *s. 230)*—"*Granted,*" *meaning of*—*Execution application in time after prior informal application.*—The expression "granted" in s. 230 is equivalent to the expression "admitted" as used in s. 245 of the Civ. Pro. Code. [*R.*, 16 C. 744.] On an application for execution under s. 230 not being "granted," a subsequent regular and formal application under the section may be allowed if made within time. DEW ALI v. SAROSHIBALA DABEE, **8 C. 297=10 C.L.R. 111.** [*R.*, 16 C. 744.]

(1111)—*S. 48, O. 21, rr. 10, 21 (=s. 230, Civ. Pro. Code*, 1882)—*Execution of decree—Application for execution not disposed of—Application after twelve years from decree—Revivor of application.*—An application for execution of a decree passed in July 1871 was last put in May, 1883, but it was struck off the file without any order either granting or refusing it. On 17th September, 1883, another application was put in by the decree-holder wherein time was granted by the Court to the judgment-debtor for payment. Upon his failure, the Court ordered attachment. The judgment-debtor appealed on the ground that the application of September 1883 was beyond the period of 12 years and hence barred: *Held*, that the application of May 1883 not having received any judicial treatment was revived by the application of September 1883 which, owing to time being granted to the judgment-debtor for payment, remained still pending in January 1885 when attachment was ordered, and that therefore execution was not barred. MUHAMMAD ISMAIL v. SUKH RAM, **A.W.N. 1888, 395.**

(1112)—*S. 48, O. 21, rr. 10 and 21 (=Civ. Pro. Code*, 1882, *s. 230)*—*Execution of decree evaded for 12 years—Conduct of judgment-debtor amounting to fraud.*—To give full effect to the penultimate paragraph of s. 230, Civ. Pro. Code, the word "fraud" must be interpreted in a wider sense than that in which it is ordinarily used. Consequently, where, by many devices for keeping out of the way when warrants were issued or for preventing the execution of processes of attachment, the judgment-debtor has dishonestly evaded payment, for more than twelve years, of the money due under the decree, such conduct on the part of the judgment-debtor eluding the creditor until the expiry of the 12 years' period, should be held to be "fraud" within the meaning of s. 230. BHAGU JETHA v. MALAK BAWASAHEB, **9 B. 318.** [*Appr.*, 22 M. 320=8 M.L.J. 79.]

(1113)—S. 48, O. XXI, rr. 10, 21—Appeal by some of the defendants against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree — *See* LIMITATION ACT, 1908, art. 182, 32 P.R. 1907=3 P.L.R. 1908

(1114)—S. 48, O. XXI, rr. 10, 21, 11 (2), 13, 17—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 17 C. 631, F.B.

(1115)—*S. 48, O. 21, r. 11—Execution application, effect of striking off—Attachment, subsisting, removal of—Fresh application or one ancillary to the previous application—Twelve years' rule in execution proceedings to*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

be strictly observed.—An order directing an application for execution to be struck off the file does not in itself necessarily involve the removal of the subsisting attachment, but the passing of such orders as have the effect of striking off the application for execution, and at the same time, allowing the attachment to remain in force, ought to be discouraged. The question whether an application for execution is only ancillary to the previous application or is a fresh application is to be decided according to the circumstances of every case. The twelve years' rule laid down in s. 48, Civ. Pro. Code, is a salutary one and its evasion should not be permitted. Execution proceedings should not be allowed to be dragged on beyond twelve years merely because it suits the convenience of the decree holders. If a decree-holder desires to come to terms with his judgment-debtor in such a manner as to allow a longer period than twelve years for the satisfaction of the decree, he may enter into a fresh contract. MAHADEO PRASAD v. HYDER MEHDI, **8 Ind. Cas. 727**. (18 A. 482, 18 A. 49, 8 C.C. 152, *R.*)

(1115-*a*)—*S. 49, O. 21, r. 18—Equities of judgment-debtor against decree-holder—Practice—Procedure.*—M obtained a decree against K in November 1909, and sold it to C. C notified this transfer to K in February 1910. Subsequently, on the 15th March 1910, K obtained a decree against C which he sold to X. On 29th March, 1910, C got M's decree against K transferred to his name, and as this decree was for a larger amount, obtained the Court's order on 10th May to set off K's decree against M's decree under O. XXI, r. 18 of the Civ. Pro. Code. X then applied for the revision of this order, on the ground that he was a *bona fide* purchaser. *Held*, that, after 29th March, C had a decree against K and K had a decree against C. These decrees could undoubtedly have been set off, and though X at the time of his purchase from K might not have known of C's decree against K, s. 49 applied and, therefore, the order was rightly made. GIRDHARLAL RANCHODDAS v. MULLA MAHOMED, **Ind. Cas. 205**.

——S. 49 (=1882, s. 233=1877, s. 233.)

See EXECUTION OF DECREE.

(1116)—S. 49—Mortgagee holding a simple money-decree against mortgagor—Decree not in respect of the mortgage—Assignment of decree—Execution by assignee—Sale of equity of redemption—Equities in favour of mortgagor—S. 99 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, s. 99, A.W.N. 1905, 42=2 A.L.J. 121=27 A. 450.

(1116-*a*)—S. 49—*See* NO. 904, *supra* and NO. 3562, *infra*.

(1117)—*S. 49, O. 21, r. 18 (=Civ. Pro. Code, 1882, ss. 233, 246)—Cross-decrees between same parties in different suits—Transfer of decree for smaller amount—Notice of assignment—Validity of transfer as against cross-decree-holder—Right of transferee to execute—Equities.*—On the same day and by the same Court cross-decrees were passed between the same parties in different suits. A few days prior to the passing of the decrees, the decree-holder for the smaller amount assigned his decreee to another. Notice of the transfer was not given to the cross-decree-holder till long after the date or the decrees. The transferee then applied for recognition of the transfer and execution of the decree transferred to him. *Held* that the transfer operated against the cross-decree-holder only subsequent to the date of notice to him. That being so, on the date of the cross-decrees, the decree for smaller amount became incapable of execution under the equitable principle enunciated in s. 246 of the Code. At the date of the completion of the transfer by notice as against the cross-decree-holder, the decree transferred was subject to such equity, and therefore under s. 233, the right of the petitioner, as assignee of the decree brought to be executed, was subject to such equity. S. 246 is not inapplicable to a case where the cross-decrees are passed by the very Court whose duty it is to execute them and neither has been transferred for execution to another Court. SINNU PANDARAM v. SANTHOJI ROW, **26 M. 428=12 M.L.J. 398**. (13 I. A. 106, *Expl.*) [*D.*, 32 M. 336=5 M.L.T. 144.]

(1118)—*S. 49 O. 21, r. 18 (=Civ. Pro. Code, 1882, ss. 233, 246)—Assignment of decree—Satisfaction of decree by set-off of another decree before assignee was brought on record—Validity of satisfaction as against assignee.*—The appellant was the assignee of a decree for money. Subsequent to the assignment, an appeal was preferred against the decree. The appellant, however, suffered the original decree-holder's name to remain on the record and proceedings to be taken accordingly. In the appeal the decree of the first Court was confirmed. Before the assignee was brought on record, the respondent who held a decree for a much larger sum against the original decree-holder, applied that the amount due to him under his decree might be set off against the amount due by him under the other decree. An order was made to that effect. On the disposal of the appeal, the appellant applied for execution of his decree. It was contended on his behalf that he was not an assignee of the decree within the meaning of ss. 233 and 246 of the Code, inasmuch as the assignment took place before the appeal was instituted and the sections applied only to the case of an assignment of an existing decree. It was said that the appeal decree, which was sought to be executed, did not exist on the date of the assignment. *Held* that, as the appellant was clearly a transferee of the decree in existence when the transfer took place, he did not cease to be transferee by reason of the fact that an appeal was presented. As he suffered the original decree-holder's

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

name to remain on the record and proceedings to be taken accordingly, he was bound by the order passed in consequence. *Held* also that the appellant was an assignee of the decree within the meaning of s 246 of the Code. RAMAKRISHNA AIYAR v. NARAYANA AIYAR, **7 M L.J. 227.**

(1119)—*S. 49, O. 21, rr. 29, 18 (=Civ. Pro. Code*, 1882 *ss. 233, 243, 246)—Set off against assigned decree partially executed*—Where a person obtained a decree against two others and assigned it to another after partial satisfaction of the same and where these two judgment-debtors had, prior to the assignment, sued the above decree-holder and his assignee and ultimately obtained a decree against both of them, *held* that this latter decree could be set off against the unexecuted portion of the former decree which had been assigned. KRISTO RAMANI DASSEE v. KEDAR NATH CHAKRAVARTI, **16 C. 619.**

——S. 50 (=1882, s. 234=1877, s. 234=1859, s. 210.)

See EXECUTION OF DECREE.

(1120)—*S. 50 (=Civ. Pro. Code*, 1882, *s. 234*, —"*Legal representative.*"—The words "legal representatives" in s. 234, Civ. Pro. Code, cannot be taken to include any person who does not in law represent the estate of the deceased. The wording of that section points to the intention that a stranger in possession of property, who was not a party to the decree, ought not to be proceeded against in execution or otherwise than by a regular suit. CHATHAKELAN v. GOVINDA KARUMIAR, **17 M. 186=4 M.L.J. 59.** [*R.*, 21 B. 424, 21 B. 539, 30 C. 1044, 8 C.W.N. 843, 19 M L.J 671.]

(1121)—*S. 50 (=s. 234, Civ. Pro. Code*, 1882 *=s. 210, Civ Pro. Code*, 1859)—*Decree against dead person—Execution against legal representatives.*—A decree passed against a person who was dead at the time the suit was instituted cannot be executed against his legal representatives. GIRENDRONATH TAGORE v. HURONATH ROY, **10 W.R. 455.**

(1122)—*S. 50 (=s. 234, Civ. Pro. Code*, 1882) *Hindu Law - Decree against father—Execution proceedings—Sons brought on record as legal representatives—Property sold in execution—Execution proceedings binding on sons.*—Where in the course of proceedings in execution of a simple money decree obtained against a Hindu father, who died after the passing of the decree, the sons were brought on record as his legal representatives under s. 234, Civ. Pro. Code, 1882, and the suit property was sold; *held*, that the execution proceedings were binding on the sons. BHAGAVATULU SURYANARAYANA v. YELASWARPU VENKATA SUBBARAYADU, **9 M.L.T. 481=9 Ind. Cas. 648.** (7 M. 255, *F.*; 32 M. 429, *Expl.*)

(1123)—*S. 50 (=s. 234, Civ. Pro. Code*, 1882) —*Hindu Law—Joint family—Decree obtained against uncle executed against nephews—Succession by survivorship—Nephews not the legal representatives—Application bad—Limitation Act (XV of 1877, art 179)—Application against persons not the legal representatives.*—In an application for execution of a simple money decree against the nephews of a deceased judgment-debtor, it was held that the decree could not be executed, inasmuch as the property sought to be attached was the joint family property to which the nephews succeeded by right of survivorship. A second application was then made against the nephews and the widow of the deceased, for attachment and sale of property alleged to be the self-acquired property of the judgment-debtor. *Held* that the nephews were not the legal representatives of the deceased for the purposes of execution of the decree, and that the execution proceedings taken against them were consequently bad. (27 M. 106, *R.*) *Held* further that the nephews not being the legal representatives of the judgment-debtor, the execution proceedings taken against them were bad and could not keep the decree alive as against the widow who was the legal representative of the deceased judgment-debtor. JANENDRA NATH BASU v. RANI NEHALO BIBI, **7 A.L.J. 512=32 A. 404=6 Ind. Cas. 38.** (3 A. 517, A.W.N. 1892, 241, 12 B. 427, *D.*)

(1124)—*S. 50 (=s. 234, Civ. Pro. Code*, 1882) —*Execution of decree containing injunction against original judgment-debtor's son*—A decree containing an injunction can be enforced against the son of the original judgment-debtor, after his death, under s 234 of the Civ. Pro. Code. SAKARLAL v. PARVATIBAI, **4 Bom. L.R. 14=26 B. 283.** [*R.*, 33 C. 306=10 C.W.N. 297=3 C.L J. 112.]

(1125)—*S. 50 (=s. 234, Civ. Pro. Code*, 1882)—*Execution of decree against legal representatives of legal representative.*—A judgment-debtor against whom there was a money decree died before execution, and his legal representative into whose hands certain of the assets of the deceased judgment-debtor had come, was brought on the record. The legal representative also died before the money was recovered from him. *Held*, that the decree could be executed under s. 234, Civ. Pro. Code, against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which may have fallen into his hands. JAFRI BEGAM v. SAIRA BIBI, **22 A 367=A.W.N. 1900, 113.**

(1126)—*S. 50 (=Civ. Pro. Code*, 1882, s. 234) —*Minor representatives brought on record.*—Where property was sold as the property of the mother and liable for her debts as such, and her minor legal representatives had been brought on the record, the mere absence of a formal order appointing a guardian *ad litem* for them was held not to vitiate the proceedings so as to render the sale invalid. KUNHAMMUD v. KUTTY, **12 M. 90.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1127)—*S. 50—Execution of decree—Attachment of ancestral property of a jat deceased judgment-debtor.*—*Held*, that, although a Jat following the ordinary agricultural customs of the Punjab has power to alienate, during his life-time, his ancestral land and house property for necessity, where he dies without exercising his power and the property passes into the hands of his heirs, it ceases to be a part of the assets of his estate for the due disposal of which the heirs are bound to account under s. 234 of the old Act XIV of 1882=s. 50 of the new Act V of 1908, Civ. Pro. Code. HANS RAJ v. SOCHET SINGH, **79 P.W.R. 1911.**

(1128)—*S. 50—Execution of decree—Attachment of the ancestral property of a deceased Jat in the hands of his heirs—Assets—Held*, that ancestral landed and house property when it has actually come into the hands of the heir, and the original debtor has not charged it in his life-time, is not assets of the deceased debtor's estate which the heir is bound duly to apply and to account for under s. 234 of the old (=s. 50 of the new) Code. KARTAR SINGH v. MUNSHI RAM, **80 P.W.R. 1911.** (79 P.W. R. 1911, *F.*)

(1129)—*S. 50 (=s. 234, Civ. Pro. Code, 1882)—Execution of decree—Representative of judgment-debtor.*—On the death of one D, a female, L and others took possession of her property and effects, alleging themselves to be her heirs. N sued L and others for possession of the properties of D in their possession, on the basis of his title as the rightful heir of D and succeeded in obtaining a decree. But, before he could execute the decree, N died and L and others succeeded N as his heirs to the property. Before the death of N, he had borrowed a sum of money from the present plaintiffs for the expenses of the litigation carried on by him (N) against L. Plaintiffs sued L and others, as the heirs of N, and obtained a decree for the amount lent to N. In execution, plaintiffs proceeded against the land of N in the hands of L and others. The latter objected that they were not in possession of the property as the representatives of N and that it was not liable. *Held*, that though N died before executing his decree for the property as against L and others, L and others having been the heirs of N, there was a merger of their titles and they held the land as the representatives of N, and so it was liable for the debt of N. BHAGWAN SINGH v. LEKHU, **48 P.L. R. 1905.**

(1130)—*S. 50 (=s. 234, Civ. Pro. Code, 1882)—Order in execution after notice against heir-at-law and residuary legatee, nature of—Residuary legatee not regarded as executor de son tort when—Act V of 1881 (Probate and Administration).*—It cannot be rightly said that, because no probate of a Will or letters of administration had been granted to any person, nobody represented the deceased, at the time of a suit for recovery of a debt from the latter's estate. (4 C. 342, *R.*) A legal representative, when put on the record, becomes a party to the suit. The true legal representative is bound by an order passed in execution proceedings obtained after notice against the heir-at-law and the residuary legatee under the Will of the deceased judgment-debtor. (14 M 451. *Appr.*) A residuary legatee in possession of the deceased debtor's estate is not an executor *de son tort*, so that his acts would not be binding on the legal representative CHUNI LAL BOSE v. OSMOND BEEBY, **30 C. 1044.** (17 M. 186, *R.*) [*R.*, 8 C.W.N. 842, 2 C.L.J. 484, 19 M.L.J. 671.]

(1131)—*S. 50 (=s. 234, Civ. Pro. Code, 1882) —Executing Court's power to make an order under—Validity of such order—Waiver of objection*—The only Court, which can make an order under s. 234 of the Code, bringing the legal representatives of a deceased decree-holder on record, is the Court which passed the decree, and not the Court to which the decree is transferred for execution. (28 M 466, *F.*) But the order of the latter Court in such a case, if it was perfectly competent to deal with the jurisdiction of the kind arising in execution of decrees passed by itself, cannot be considered as void, so as to be incapable of being validated by consent of waiver. THAMBOO PILLAI v. SRIRAMULU NAIDU, **17 M.L.J. 300.** (27 M. 118, 28 M. 437, *R.*)

(1132)—S. 50—Death of judgment-debtor pending execution—His legal representative can be brought on record without fresh application—*See* BOM. ACT VI OF 1888, s. 29 (*e*), 11 Bom.L.R. 1358=34 B. 142=4 Ind. Cas. 839.

(1133)—S. 50—*See* APPEAL—DECREE AND EXECUTION OF DECREE, W.R. 1864, Mis. 50.

(1134)—S. 50—*See* HINDU LAW—DEBTS, 7 M. 339.

(1135)—S. 50—Impartible estate—Liability of son for father's debts—Execution against sons—*See* HINDU LAW—IMPARTIBLE ESTATES, 2 Ind Cas. 18.

(1136)—S. 50—*See* HINDU LAW—INHERITANCE, 31 C. 224.

(1137)—S. 50—Undivided Hindu family—Money-decree against father—Execution against ancestral estate in the hands of sons as representatives under—*See* HINDU LAW—JOINT FAMILY, 5 M. 232, F.B.

(1138)—S. 50—*See* HINDU LAW—WIDOW, 6 C. 479=8 C.L.R. 1.

(1139)—S. 50—*See* JUDGMENT—FORM AND CONTENTS, 19 B. 807.

(1140)—S 50—*See* MALABAR LAW—JOINT FAMILY, 5 M. 223.

(1141)—S. 50—*See* REPRESENTATIVE OF DECEASED PERSON, 21 B. 539.

(1141-*a*)—S. 50—*See* NOS. 905, 906, 907, *supra*, and NOS. 1174, 1300, 3001, 3563, 3563-*a*, 3813, 4313, *infra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1851 and VIII of 1859)—*continued.*

(1142)—*Ss. 50, 47 (=ss. 234 and 244, Civ. Pro. Code, 1882) "Legal representative," meaning of—Decree against Mitakshara father—Execution on his death against ancestral property in son's hand—Hindu Law—Mitakshara—Father's debt—Son's pious duty to pay—Per Curiam (Harrington and Geidt. JJ.; dissenting.)*—When, on the death of a member of a joint Mitakshara family, against whom a decree for money has been passed, his son is brought on the record as his legal representative the question of the liability of the ancestral property, which the son acquires by survivorship, for the debt covered by the decree, may be determined in the execution proceedings, and a separate suit is not necessary. Meaning of the expression "legal representative" discussed. AMAR CHANDRA KUNDU v. SEBAK CHAND CHOWDHRY, **11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207=30 C. 642, F.B.** [*Rel.*, 9 C.L.J. 5=13 C.W.N. 138; *F.*, 5 Ind. Cas. 146; *R.*, 147 P.R. 1907.]

(1143)—*Ss. 50 and 47 (=ss. 234 and 244, Civ. Pro. Code, 1882)—Death of judgment-debtor after transfer of decree to another Court for execution—Application for execution against representative, to which Court to be made.*—The point referred to the Full Bench for decision, in this case, was, whether, when, after the transfer of a decree to another Court for execution, the judgment-debtor dies, the application for execution, under s. 234 of the Code, against the legal representative of the deceased judgment-debtor, ought to be made to the Court to which the decree has been transferred or to the Court which passed the decree. *Held* (by the Full Bench), that the application ought to be made to the Court which passed the decree. *Per Arnold White, C. J.*—'An order under s. 234 is not made in the exercise of powers in executing a decree,' but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred. The first paragraph of s. 234 is neither useless nor superfluous. That section contemplates the making of an order in general terms—'let the decree be executed against A B, the personal representative of the deceased judgment-debtor.' The provisions of s. 234 can be given effect to without doing violence to the language of the other sections in the Chapter relating to execution. The canon of construction is that statute ought to be so construed that, if it can be prevented, no clause, section, or word, shall be 'superfluous, void or insignificant.' The reason for the application under s. 234 of the Code to be made to the Court that passed the decree, is the same as that for an application being made to that Court under s. 232 of the Code, when the decree is assigned, after transfer thereof, to a different Court for execution. (5 B.L.R. 497, 18 B. 224, 17 A. 431, 22 C. 558, 27 C. 489, *R.*) The last para. of s. 244 only applies where a question arises as to who is a reprsentative of a party for the purposes of that section. It ought not to be construed as cutting down the powers given to the Court which passes a decree by the express words of s. 234. *Per Davies, J.*—There is a direct conflict between the provision in the first paragraph of s. 234 and that in cl. (c) of s. 244, read with the last paragraph in the same section which was enacted later. SWAMINATHA AIYAR v. VAITHIANATHA SASTRIAL, **15 M.L.J 116, F.B.=28 M. 466.** [*R.*, 17 M.L.J. 300.]

(1144) *Ss. 50, 47 (=Civ. Pro. Code, 1882, ss. 234, 244)* — *"Representative"* — *"Legal representative"—Decree—Appeal.*—A certain judgment-debtor having died, application was made by the decree-holders to execute the decree against his widow, not as his "legal representative" but as his "wife and heir." Notice was issued on this application to the widow to show cause why execution should not be had against her, but nothing further appears to have been done at that time to bring the widow on to the record as legal representative of the deceased judgment-debtor. Subsequently, another application was made by the decree-holders alleging that the widow had misappropriated certain moveable property of the deceased judgment-debtor, and notice having been served on her, she appeared and *inter alia*, disputed the Court's jurisdiction over her under s. 244 of the Civ. Pro. Code. Orders were passed on this last mentioned application, but it does not appear that any issue was then raised as to the widow being either the legal representative of her deceased husband in the sense of s. 234 of the Civ. Pro. Code, or his representative in the sense of s. 244. *Held* in appeal from the order of the Court on the widow's objection to the second of the above-mentioned applications, that, on the facts as stated above, the widow had never been brought on the record as the representative of the deceased judgment-debtor and, therefore, no appeal could lie from that order by virtue of s. 244 of the Civ. Pro. Code. VILAYATI BEGAM v. INTIZAR BEGAM, **A.W.N. 1893, 106.** [*R.*, 16 A. 183.]

(1145)—*Ss. 50, 47 (=ss. 234, 244, Civ. Pro. Code, 1882)—Judgment-debtor's death—Suit for administration by judgment-creditor against executor — Mal-administration.*—Certain persons, who had obtained a decree against a person, since deceased, failed to realise the decretal amount by executing the decree against the executrix of the judgment-debtor. They then instituted a suit against the executrix, charging her with mal-administration and asking for administration of the judgment-debtor's estate. *Held*, that the suit involved a much wider question than one merely relating to the execution of the decree, and was not barred by s. 244 of the Civ. Pro. Code. SARATMANI DEBI v. BATTA KRISHNA BANERJEE, **12 C.W.N. 614=35 C. 1100.** (24 C. 473, *R.*; 11, B. 727, *F.*)

(1146)—Ss. 50, 47—*See* **HINDU LAW—JOINT FAMILY, 20 B. 385.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1147)—*Ss. 50, 47, 52, and O. 21, r. 58 (=ss. 234, 244, 252 and 278, Civ. Pro. Code, 1882)—Decree for sale of land—Objection by representative of deceased judgment debtor—Attachment—Claim under s. 278—Suit to set aside sale.*—A suit by the legal representative of a deceased judgment debtor, to set aside sales in execution, on the ground that the property sold did not belong to the judgment debtor, is barred by s. 44, Civ. Pro. Code, where this question between the parties was investigated under s. 244 by the Court of first instance, but the appellate Court held that the proper course was for the decree-holder to attach the property and for the legal representative to them prefer his claim under s. 278, and the legal representative was unsuccessful in both the investigations. KURIYALI v. MAYAN, **7 M. 255.** [*F.*, 19 B. 328, 23 B. 237; *Appl.*, 16 C. 1. 16 C. 603; *Expl.*, A.W.N. 1904, 61; *R.*, 10 M 117, 9 A. 605, 15 C. 437, 19 C. 683, P.C., 17 M. 399, 22 B. 463, 12 C.P.L.R. 73, 23 M. 195, 25 B. 631, 26 A. 447=A.W.N. 1904, 61 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908, 32 M., 429=19 M.L.J. 401; *D.*, 8 A. 626, 11 M. 413, 22 M. 13, 30 M. 26=16 M.L.J. 545.]

(1148)—*Ss. 50, 47, O. 21, rr. 58, 60, 63 (=Civ. Pro. Code, 1882, ss. 234, 244, 278, 280, 283).*—A claim may be preferred by a judgment-debtor, as well as by a stranger, under s. 278, Civ. Pro. Code, provided that the claim be of the nature specified in the following sections; but where the objection that the property attached is not liable to attachment is made, not on one of the grounds specified in s. 281 or in s. 282, but on a ground which raises a question determinable under some other special section, *e.g.*, under s. 234 and s. 244, in execution, then the order made should not be passed under s. 280; and the fact that an order was made purporting to have been made under that section, cannot give the unsuccessful party a right to file a separate suit whether under the provisions of s. 283 or otherwise. RAVUNNI MENON v. KUNJU NAYAR, **10 M. 117.** [*Appr.*, 23 M. 195, F.B.; *R.*, 12 A. 73, 17 M. 399, 23 B. 237.]

(1149)—Ss. 50, 99, O. XXI, rr. 22 and 23—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 22 C. 588.

(1150)—Ss. 50, 145—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 20 W.R. 422.

(1151)—S. 50, O. XXI, r. 11 (2)—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 21 W.R. 420.

(1152)—S. 50, O. XXI, rr, 11 (2), 22, 53—*See* LIMITATION ACT, 1908, art, 182—STEP-IN-AID OF EXECUTION. 24 C. 778=1 C.W.N. 676.

(1153)—S. 50, O, XXI, r. 22—Plea of limitation regarding a previous application for execution—*See* EXECUTION OF DECREE. MISCELLANEOUS, 13 O. C. 90=6 Ind. Cas. 746.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1154)—S. 50, O. XXI, r. 22—*See* LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 19 A. 337=A.W.N. 1897, 75.

(1155)—S. 50, O. XXI, rr. 22, 24 (1)—*See* EXECUTION OF DECREE—EXECUTION BY OR AGAINST REPRESENTATIVES, 21 B. 314.

(1156)—*S. 50, O. 21 (=Civ. Pro. Code, 1871, ss. 234, 248, 711) -- Legal representatives of deceased judgment-debtor—Title of purchaser at sale in execution without notice to representative—Right of redemption of mortgagor's representatives—Limitation.*—This was a suit by the heirs and representatives of the original mortgagor; deceased, to redeem the mortgage from the defendant and the son of the original mortgagee. The questions that had to be decided in second appeal were (1) whether the sale certificate of the equity of redemption granted by the Court to defendant's father legally, conveyed the equity of redemption in the mortgaged premises to him so as to extinguish it, and (2) whether assuming that not to be the case, defendant's father acquired a title by estoppel or acquiescence on the part of the plaintiffs, representatives of the original mortgagor, or by limitation, to the equity of redemption, so as to prevent them now from redeeming. *Held*, that the only mode in which a holder of a decree for money can execute his decree after the death of the judgment-debtor is by application to execute it against the legal representative of the deceased as provided in s. 234 of the Civ. Pro. Code. Not only must there be such an application against the legal representative, but there must be also a notice issued to him. In the absence of such a notice, whether, under the circumstances, the sale in execution was only irregular, or was a absoltely null as regards the legal representatives who were no parties to the execution proceedings, such representatives can sue to recover the property sold so long as their right to do so has not become barred by the law of limitation, *i.e.*, by twelve years' adverse possession on the part of the purchaser. Taking it that notice under s. 248 to the legal representatives was absolutely necessary, but that the proceedings and sale, if not challenged according to law, conveyed title to the purchaser, and also that the legal representatives had the right to object, by regular suit, the present suit to redeem, brought within twelve years of the Court-sale, did in effect challenge the sale, and therefore the plaintiffs were entitled to redeem (*Per Candy and Jardine, JJ.*) *Per Ranade, J.*—In respect of the plaintiffs, in this case, the true legal representatives of the deceased judgment-debtor, the sale proceedings were invalid and null and void, and the auction-purchaser acquired no rights, as against them under his certificate of sale. As against such representatives, he could only claim title by adverse possession not falling short of twelve years. The present suit admittedly brought within such period was

Civ Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

consequently maintainable. ERAVA v. SIDRAMAPPA. **21 B. 424, F.B.** [*F.*, 14 C.W.N, 560=11 C L.J. 489=5 Ind. Cas. 390; *Cons*, 22. 22 B. 271; *R*, U.B.R. 1897—1901, 464, 24 B. 135=1 Bom. L.R. 627, 25 B. 337, 8 C.W.N. 843.]

(1157)—S. 50, O. XXI, r. 78—*See* PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS, 22 M. 119=8 M.L.J. 288.

(1158)—*S. 50, O. 21, r. 90 (=Civ. Pro. Code*, 1882, *ss 234, 311)—Execution of decree—Death of judgment-debtor after attachment but before sale—Legal representative not brought in as party—Effect on validity of sale—Attachment in execution, whether affected by death of judgment-debtor afterwards—Notice of sale.*—*Held* by the Full Bench (*Mahmood, J., assenting*) that the sale of property attached during the life-time of the judgment debtor, held after his death without bringing in his legal representatives as parties to the sale proceedings, is neither irregular nor void, in spite of such omission. 6 M. 180, *Diss.*) *Held by Mahmood, J.*, that such sale was irregular *but not invalid* in the absence of proof of substantial injury within the meaning of s. 311, Civ. Pro. Code, (15 C. 488, *Diss.*; 14 C. 240, *F.*) [*F.*, 17 A. 162; *R*, 19 B. 276, 21 B. 424, 19 M 219, 23 C. 686, 20 A W N. 29, 11 C.W.N. 163=5 C. L.J, 80; *D*, 19 A. 337.] The section applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life-time, and which was not, at the time of his death, under attachment at the suit of the decree-holder; and it does not apply to cases where the judgment-debtor dies after attachment but before sale [*Diss.* 22 M. 119] An attachment would not abate on the death of the judgment-debtor, nor would his death render it necessary for the judgment-creditor to take any steps to keep in force the attachment made during the judgment-debtor's life-time. Property under attachment must be considered as in the custody of the law; and the Civ. Pro. Code, does not at all provide that any notice should be given to the judgment-debtor personally or his legal representative of the sale of the attached property. If the sale damnifies the legal representative, he can have his remedy by application under s. 311, Civ. Pro. Code. SHEO PRASAD v. HIRA LAL, **12 A. 440=A.W.N. 1890, 103, F B.** [*Dis*, 22 M. 119.]

(1159)—S. 50, O. 22, r. 4—*See* PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS, 15 M. 399.

(1160)—*S. 50, O 22, r. 10 (=ss. 234, 372, Civ Pro. Code*, 1882)—*Simple money decree—Transfer* pendente lite—*Transferee could not be brought on record as legal representative in execution.*—Where a person having certain transactions at the Rice Mill of Arbuthnot & Co. at Tiruvalur, obtained a simple money-decree thereof against them, and pending the suit Arbuthnot & Co., transfered the Tiruvalur mill with all assets and liabilities to Arbuthnot's Industrials of which they were to be the managing agents, and in execution proceedings, it was sought to execute the decree against Arbuthnot's Industrials, substituting them on the record as the legal representatives of the first Company, *held* that this could not be done as s. 234 or s. 372, Civ. Pro. Code, had no application. THE ARBUTHNOT'S INDUSTRIALS, LTD. v. A. M. MUTHU CHETTIAR AND A. M. O. MUTHU CHETTIAR v. PARTICK MACFAYDEN, **4 M.L.T. 190.** (30 C. 961, *F*; 23 C. 374, 16 C. 40, *D.*)

(1161)—*S. 50, O. 22, r. 10 (=ss. 234, 372, Civ. Pro. Code*, 1882)—*Debts of limited company—Transfer of properties to third party—Execution—Transferee* pendente lite.—The transferee *pendente lite* could not be brought on record as a legal representative in execution. Where one company, being the judgment-debtor, assigns its liabilities to another company, the transaction is no assignment, creation, or devolution of interest, within the meaning of s. 372, Civ. Pro. Code, 1882. The interest referred to in the section is interest in the property constituting the subject matter in the suit. Purchasers from the assignee for company cannot be proceeded against in execution of a decree against it. S 234, Civ. Pro. Code, 1882, does not apply to such a case. HARISH CHANDRA TEWARY v CHANDPORE CO., LTD. **30 C. 961.** [*F*, 31 M. 461=4 M.L.T. 190.]

(1161-*a*)—*S 50, O. 22, r. 10, if applies to execution proceedings*—Lis pendens, *if applies to mesne profits—Mesne profits, proceedings for ascertainment of, if continuation of suit—Suit, if can continue for one purpose though finally decided for other purposes.*—A decree for possession of an immoveable property directed that mesne profits be ascertained in the execution department. During the pendency of the suit in which the decree had been passed, the property had been sold. On an application in the execution department by the decree holder for delivery of possession and ascertainment of mesne profits against the purchaser *pendente lite*: *Held*—That the suit continued after the decree had been passed. Proceedings for the ascertainment of mesne profits are in continuation of the original suit. So the mesne profits must be held to be determinable in the suit itself and not by way of execution. (17 I.A. 150, 13 A, 53, 25 A. 385, 19 C. 132, *R.*) That the whole suit continued and not for one purpose, *viz.*, the ascertainment of mesne profits, only. The purchaser *pendente lite* were liable to pay mesne profits for the period during which they were in wrongful possession, and their liability could be ascertained in these proceeding and not by a fresh suit. *Semble*—O. XXII, r. 10 of the new Code, seems to have been made

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

applicable to execution proceedings by O. XXII, r. 12 by the principle of exclusion. MIDNAPUR ZAMINDARY CO., LTD. v. KUMAR NARESH NARAIN ROY, **16 C.W.N, 109.** (30 C. 961, *R.*)

——S. 51 (New).

(1161-*b*)——S. 51—*See* NO. 907-*a*, *supra*

——S. 52 (=1882, s. 252=1877, s. 252=1859, s. 203.)

See EXECUTION OF DECREE.

(1162)—*S. 52 (=s. 252, Civ. Pro. Code,* 1882)—"*Legal representative*" *including widow and heiress.*—The person who has the right to represent the estate of a deceased person is, in the Civ. Pro. Code, called its representative, or legal representative. On the death of a Hindu insolvent, his widow may become his legal representative within the meaning of s. 252, Civ. Pro. Code, and the existence of the vesting, order vesting his estate in the Official Assignee, in no way affects her position as such representative. CHANDMUL v. RANEE SOONDERY DOSSEE, **22 C. 259.** (4 C. 897, 8 B. 309, 7 A. 752, *R.*) [*R.*, 30 A. 486=5 A.L.J. 553=A.W.N. 1908, 203.]

(1163)—*S. 52 (=Civ. Pro Code,* 1882, *s. 252,—Legal representative—Heir shown to have received assets.*—A suit laid against a person who, as heir, is shown to have received assets from a deceased debtor is not one against a legal representative merely, and a personal decree can be passed against him. NATHURAM SIVIJI SETT v. KUTTI HAJI, **20 M. 446.**

(1164)—*S. 52(=s. 252, Civ Pro. Code,* 1882) —*Execution of decree against legal representatives—Property of deceased exempt from attachment—Whether representative personally liable.* —In this case the counsel, for the decree-holder petitioner, contended that, under s. 252 of the Code, the decree might be executed against the property of the representatives of his debtor other than that inherited from the latter, for the reason that the latter property was not liable to be sold in execution of decree because of the Land Alienation Act. *Held*, the petitioner could not acquire any personal right against the representatives for the mere reason that the Land Alienation Act deprived him of the right of selling the property of his deceased debtor come into the hands of the representatives. RAM GOPAL v. HARJAS, **123 P.R. 1906 =62 P.L.R. 1907.**

(1164-*a*)—*S. 52 (=Civ. Pro. Code,* 1859, *s. 205)—Representatives of promisor bound by promises—Decree against representative as representing the estate of the deceased when personal —Representative liable to pay only to the extent of the assets—Enquiry—Erroneous decree.*—By s. 37 of Act IX of 1872 "promises bind the representatives of the promisors, in case of death of such promisors before performance unless a contrary intention appears from the contract. By s. 203 of Act VIII of 1859 if a decree be against a party as the representative of a deceased person and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property, or if no such property be found and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, the decree may be executed against defendant to the extent of the property not duly applied by him in the same manner as if the decree had been against defendant personally. *Held*, that the legal representative of the deceased, whether the latter were a Hindu or not, was only liable to perform the promise or pay the deceased to the extent of the property of the deceased received by him. *Held* also, that the existence of assets and the receipt or possession thereof by the representatives must be enquired into before decree, unless a *prima facie* case of receipt or right to receive, not denied by the defendant, appeared; and that such appeared on proof that the defendant was entitled to existing assets without proof that they had come into his actual possession. *Held* also, that a decree, against representative, which did not specify, that it should be payable out of the assets of the deceased, was an erroneous decree. MADHO DASS v. RADHA MALL, **65 P.R. 1874.**

(1165)—*S. 52 (=Civ. Pro Code,* 1882, *s. 252)—Unsecured creditors—Liability of legal representative to distribute assets of deceased rateably among all creditors.*—The effect of s. 252 was only that the legal representative could be proceeded against personally to the extent to which he had failed to apply the assets duly. It did not follow from this that if payment was not made by the heir rateably, he had failed to apply the assets duly. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon the other creditors, and would be a due application of the assets within the meaning of the section. VEERASOKKARAJU v. PAPIAH, **26 M. 792=13 M.L.J. 258.** [*F.*, 30 B. 270=6 Bom. L.R. 1135; *R.*, 52 P.L.R. 1908=45 P.W.R. 1908.]

(1166)—*S. 52 (=old s. 252)—Payment by "legal representative"*—Bona fide *creditors*—"Duly applied," *meaning of.*—Where the legal representative of a deceased person paid away all the property of the deceased person to *bona fide* creditors in satisfaction of their claims, in full he has "*duly applied*" the property under s. 252, even though there may be other creditors of whose unsatisfied claims he might have had notice when he paid the former. SETH KASTUR CHAND v. MANGAL SEN, **68 P.R. 1895.** [*D.*, 6 P.R. 1901=P.L.R. 1900, 513.]

(1167)—*S. 52 (=s 252, Civ Pro. Code,* 1882) —*Decree obtained against wrong legal representative, whether executable against the estate in the hands of the true one—Execution of decree* —Where the plaintiff sued the widow on a pronote executed by her husband and obtained a

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decree against the assets in her hands, but subsequently a will by the deceased was established bequeathing estate to his daughter's son. *Held*, that, when a person is sued as the legal representative of a deceased person for the recovery of debt due by him, and the decree is given for money to be paid out of the assets of the deceased in the hands of the legal representative, the decree is none the less a decree against the legal representative. Under s. 252 of the Code of 1882, the decree can be executed against the legal representative, who was the defendant in the suit or his or her representatives. *Held*, also, that, as the daughter's son is not a representative of the widow, the decree obtained against her cannot be executed against him. KALLIAPPAN SERVAIKARAN v. VARADARAJULU. **6 M.L.T. 199=33 M. 75=19 M.L.J. 651=3 Ind. Cas. 737.** (11 M. 408. *F.*; 9 M. 80, *D*; 28 B. 215, 13 M.I.A. 270, 15 B.L.R. 318, 9 B. 169, 12 B. 247, 1881, P.R. 337, *R.*) [*F.*, 33 M. 465=7 M.L.T. 157=5 Ind. Cas. 917.]

(1168)—S. 52—*See* ATTACHMENT—MODE OF ATTACHMENT, 1 Hyde 158=1 Ind. Jur. O.S. 125.

(1169)—S. 52—*See* CIV. PRO. CODE, 1908, s. 47, 20 W.R. 162.

(1170) S. 52—*See* DECREE — DECREE, FORM OF, 8 B. 309.

(1171)—S. 52—*See* DECREE—MISCELLANEOUS, 4 C. 142, F.B.=2 C.L.R. 223.

(1172)—S. 52—*See* REPRESENTATIVE OF DECEASED PERSON, 6 B.L.R. App. 100=14 W.R. 431.

(1173)=S. 52—*See* SALE—SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES, 24 W.R. 383.

(1173-*a*)—S. 52—*See* NOS. 908, 909, 910, *supra* AND NOS. 1147, 3219, *infra*.

(1174)—*Ss. 52, 50 (=Act VIII of 1859, ss. 203 210)—Execution, application for—Heirs of judgment-debtor.*—When an application is made and granted under s. 210, Act VIII of 1859, and property is attached which is claimed by the heir as his self-acquired property, the Court should proceed under s. 203, without requiring any fresh application to be made under that section. RAM CHAND CHUCKERBUTTY v. MADHUB NARAIN ROY. **1 C.L.R. 339.**

(1175)—S. 52, O. XXI, rr. 58, 59, 60, 61, 63, 64—*See* DAMAGES—MEASURE AND ASSESSMENT, 1 B.L.R. S.N. 23 C.

(1175-*a*)—*S. 52, O. 21, rr. 58, 59, 60, 61, 63 64 (=Civ. Pro. Code, 1589, ss. 203, 246)—Execution—Representatives of deceased judgment-debtor—Procedure.*—Where a decree is passed against certain parties as representatives of a deceased party, it can only be executed against the property of the latter, unless the defendants fail to satisfy the Court that they duly applied all such his property as came into their possession, in which case the decree may be executed against property belonging to the defendants to the extent of the deceased's property not properly applied by them. (S. 203, Act VIII of 1859). The provisions of Act VIII of 1859, relative to execution against a living judgment-debtor are not applicable after he is dead. By his death his property passes from him; and if it is still liable for the debt, the transferee should be put on the record in place of the deceased or regularly sued. There is no ground for applying s. 246 to him, as if he were holding *benamee* for the dead man. SHURFUN BEBEE v. THE COLLECTOR OF SARUN, **12 B.L.R. 66 Note=10 W.R. 192.** [*R.*, 12 B.L.R. 65=20 W.R. 280.]

(1176)—S. 52, O. XXI, rr. 58, 59, 60, 61, 63 and 64 (=ss. 203 and 246, Civ. Pro. Code, 1859)—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 20 W.R. 280=12 B.L.R. 65.

——**S. 53 (New).**

See EXECUTION OF DECREE.

(1177)—*S. 53—Decree against legal representative—Ancestral property, whether liable to be attached.*—Where a decree under s. 90 of the Transfer of Property Act, against the legal representative of a deceased person, directs that the amount thereof be realised from such property only as belonged to the deceased personally, the decree-holder cannot take advantage of s. 53 of the Code of Civil Procedure, 1908, and attach ancestral property which passed by right of survivorship to the son of the deceased. KAIAN DAS v. BHAWANI SHANKAR, **9 Ind. Cas. 631.**

(1177-*a*)—*S. 53—Order under old Code—New Code different rule—Appellate Court—Not to reverse.*—Appellate Court cannot reverse an order of the lower Court passed under an old Code, on the ground that, since that, a different rule has been enacted by the new Code. S. 53, Civ. Pro. Code, provides the course to be followed in such cases. SALEM TOWN BANK BY SECRETARY G. GURUMOORTHI NAIDU v. VARADAPPA CHETTI, **1911, 2 M.W.N. 336.** (3 M. 42, *R.*)

——**S. 54 (=1882, s. 265=1877, s. 265=1859, s. 225,)**

See EXECUTION OF DECREE.

(1178)—*S. 54 (=s 265, Civ. Pro. Code, 1882)—Civ. Pro. Code—Meaning of—Portion of revenue paying estate.*—The meaning of the section is that where a revenue paying estate has to be partitioned into several revenue paying estates, that partition must be carried out by the Collector so that there may be a proper security for the revenue. DEBI SINGH v. SHEO LALL SINGH, **16 C. 203.** (15 C. 198, *Appr.*) [*F.*, 24 C. 725, F.B.; *D.*, 23 C. 679; *R.*, 2 C.L.J. 351.]

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(1179)—*S. 54 (=s. 265, Civ. Pro. Code, 1877)—Inapplicable to ryotwari land.*—S. 265 of the Civ. Pro. Code of 1877, does not apply to property held on ryctwari tenure, but to permanently settled estates. MUTTU v. KUDALALAGA, **6 M. 97.** [*Affirmed*, 7 M. 384 ; *D.*, 16 B. 528.]

(1180)—*S. 54 (=s. 265, Civ. Pro. Code, 1882)—Jurisdiction of Civil Courts—Powers of Collector.*—S. 265 of the Code contemplates the existence of the jurisdiction of the Civil Courts to try suits for partition of estate, or for the separate possession of the share of an undivided estate paying revenue to Government, but at the same time it leaves it to the Collector only to give due effect to any order passed by a decree of a Civil Court. ZAHRUN v. GOWRI SUNKUR, **15 C. 198.** [*Appr.*, 16 C. 203 ; *R.*, 24 C. 725, F.B.]

(1181)—*S. 54 (=old s. 265)—Decree for partition—Collector referred to—Power of Civil Courts thereafter.*—Where a partition-decree under s. 265 is referred to the Collector, the Civil Courts have nothing to do with the orders passed by the Revenue officer. Any appeal or revision should be made to the superior Revenue authorities concerned. SANT SINGH v. WAZIR SINGH, **73 P.R. 1889.**

(1182)—*S. 54 (=s. 265, Civ. Pro. Code, 1882)—Act III of 1901 (United Provinces Land Revenue), s. 107—Partition—Execution of a Civil Court decree for partition of revenue-paying property.*—A decree of a Civil Court for partition is subject to the provisions of s. 107 of the United Provinces Land Revenue Act and cannot be fully executed until the decree-holder's name is recorded in the revenue papers. TULSI DAS v. SHEO NARAIN, **A.W.N. 1906, 53=3 A.L J. 336=28 A. 375.**

(1183)—*S. 54 (=Civ. Pro. Code, 1882, s. 265)—Partition-decree—Execution by Collector—Not subject to revision by Civil Court.*—The language of s. 265, Civ. Pro. Code, 1882, is clear. It says that "the partition shall be made by the Collector" and according to a certain law. The power thus given to the Collector is not in any way made subject to the superintendence of the Civil Court or to revision by a Civil Court. No doubt, the Collector cannot refuse to carry out the decree or order of the Court, but when he has made a partition under the section, the Court has no power to examine his work or to direct him to make a fresh partition. SHRINIVAS HANMANT v. GURUNATH SHRINIVAS, **15 B. 527.** (P J. 1881, 31, *D.*; 14 B. 450, 12 B. 371, *R.*) [*Expl.*, 5 Bom. L.R. 648 ; *R.*, 28 B. 238.]

(1184)—*S. 54 (=s. 265, Civ. Pro. Code, 1882)—Decree—Execution—Collector—Partition—Collector contravening the orders—Court's jurisdiction.*—Where a Collector in partitioning an estate, under a decree sent to him under s. 265 of the Civ. Pro. Code, contravenes the decretal command of the Court or otherwise acts *ultra vires*, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution. PURSHOTTAM v. BALCRISHNA, **5 Bom. L R. 949=28 B. 238.**

(1185)—*S. 54 (=s. 265, Civ. Pro. Code, 1882)—Partition-decree—Estate paying revenue to Government—Jurisdiction of Civil Court to direct Collector to effect partition—Oudh Land Revenue Act, s. 69.*—Plaintiff obtained a decree for partition of certain family property. The question for decision, in execution, was, whether the Civil Court can ask the Collector to partition the immoveable property consisting of shares in a number of villages paying revenue to Government. *Held*, that though s. 265 provides that partition of such property shall be made by the Collector, there is no provision in the Code authorising the Civil Court to order the Collector to effect the partition or for giving him directions as to how it is to be carried out, and that, consequently, the order of the lower Court rejecting the application to order the Collector to effect the partition was right. It was pointed out that the decree-holder might apply to the Collector under s. 69 of the Oudh Revenue Act. BHAWANI DIN SINGH v. KEWAL SINGH, **8 O.C. 59.**

(1186)—*S. 54 (=s. 265, Civ. Pro. Code, 1882)—Collector—Partition—Opening a partition—Application to the executing Court—Fresh Suit.*—When a Collector has once made a partition acting, under s. 265 of the Civ. Pro. Code, there is nothing to prevent him from revising the partition for mistake or other cause before he has passed final orders and returned the proceedings to the Civil Court. If any party feels a grievance at the partition made by the Collector, his remedy is to approach the executing Court : it is not open to him to question the Collector's action by a separate suit. KRISHNAJI v. DAMODAR, **5 Bom. L.R. 648.**

(1187)—*S. 54 (=Civ. Pro. Code, 1882, s. 265)—Execution of decree for possession of share of* bighadam *village.*—It is only when a decree has been made for the partition, or for the separate possession, of a share in an undivided estate paying revenue to Government, that the partition of the estate or the separation of the share shall be made by the Collector (s. 265 of the Civ. Pro. Code, 1882. This was a suit for the redemption of a mortgage of a village, the suit having been brought as if the tenure of the village was pure zemindari. The Court having *held* that the tenure of the village was '*dharbachh bighadam*' and having given a decree for possession of 50 *bighas*, 10 *biswas* of the lands in question, which was found to be the amount of the shares in the village of the plaintiff, should not have refused in the execution department to ascertain what particular lands the decree-holder was entitled to under the decree, and to give possession. Nor was it

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necessary in this case to transfer the decree for execution to the Collector. GOBIND SINGH v. KALLU, **A.W.N. 1884, 118.**

(1188)—S. 54—*See* COLLECTOR, 12 B. 371, 11 B. 662.

(1189)—S. 54—*See* JURISDICTION OF CIVIL COURTS, 24 C. 725, F.B.=1 C.W.N. 374, 16 B. 528.

(1190)—S. 54—*See* PARTITION,—RIGHT TO PARTITION, 8 B. 539, 10 C. 435.

(1191)—S. 54—*See* PARTITION—SUITS FOR PARTITION, JURISDICTION OF CIVIL COURT IN 23 C. 679.

(1191-*a*)—S. 54—*See* NOS. 82, 983, *supra*, AND NO. 3353, *infra*.

——S. 55 (=1882, s. 336=1877, s. 336).

See ARREST.

See EXECUTION OF DECREE.

(1192)—*S. 55 (=s. 336, Civ. Pro. Code, 1882—Judgment-debtor arrested in execution of money decree and brought before Court—Duty of Court to inform him of his remedies—Procedure in insolvency and in execution—Punjab Government Notification No.* 360.—Whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court, the Court is bound to inform him, under the provisions of s. 336, Civ. Pro. Code, as notified in Notification, No. 3860 of the Chief Court's Rules and orders, before any enquiry is made by it, that he may apply under Ch. XX to be declared an insolvent. Procedure in insolvency is different from procedure in execution. RAM LAL v. MACKENZIE, **16 P.R. 1909=50 P.L.R. 1909=15 P.W.R. 1909=1 Ind. Cas. 402.**

(1193)—*S. 55 (=old s. 336)—Arrest of judgment-debtor—Subsequent application to be declared insolvent.*—A judgment-debtor, on expressing his intention to file a petition and schedule and on complying with the conditions of this section, is entitled to be discharged. Where, however, the debtor did not apply under this section on being first brought before the Court, but made such application after proceedings under s. 337-A had determined and it did not appear that he had furnished the requisite security, *held* that the Court was not bound to release the petitioner. DAULAT RAM v. RUP LAL, **59 P.R. 1898.**

(1194)—*S. 55 (=s. 336, Civ. Pro. Code, 1882)—Liability of surety under the section—Termination of execution proceedings—Effect upon surety.*—The power reserved to the Court under s. 336 to realise the security in execution of the decree cannot be exercised when the execution proceeding, having been dismissed, is no longer in existence. The dismissal of the application would result in the discharge of the debtor if in custody, and in the release of any property attached under the decree; and the property of the surety cannot be more stringently bound than that of the debtor himself, unless it be expressly so provided in the bond. [*D.*, 19 B. 694.] The obligation of the surety to produce the debtor when called upon is not discharged by the voluntary appearance of the latter, not in obedience to such call or for the purpose of satisfying the decree, but for the purpose of trying to get rid of that decree, and followed as it was by the debtor's disappearance on the failure of this attempt. LALJI SAHOY v. ODOYA SUNDERI MITRA, **14. C. 787.**

(1195)—*S. 55 (=s. 336, Civ. Pro. Code, 1882)—Arrest of judgment-debtor—Bound by surety—Insolvency petition by judgment debtor—Dismissal of petition—Liability of surety—Limitation.*—Defendant No. 2 was arrested in execution of a decree for money obtained by the plaintiff against him. Defendant No. 1 stood surety for him by executing the bond in suit, by which he covenanted that, if defendant No. 2 did not apply to be declared an insolvent within one month or if the said application was rejected, he would produce defendant No. 2 when required by the Court, or pay Rs. 500. Defendant No. 2 applied for insolvency within the time specified but his application was dismissed. The plaintiff made a fresh application for execution and the defendant No. 1 failed to produce defendant No. 2. Then the bond having been assigned to him, he sued to enforce the bond. *Held*, that the bond was not opposed to public policy or without consideration, and was enforceable. (16 A. 37, 31 C. 242, 19 B. 694, 5 C. 437, *Rel. on*). The defendant No. 1 was directed to produce the defendant No. 2 on September 27th, 1904. The time was subsequently extended to September 30th, on which date he failed to produce the judgment-debtor, and became liable on the bond: *held*, that, as the suit was brought within three years from that date, it was not barred by limitation. MIR MUSAR ALI KHONDKAR v. GURU CHARAN SEN, **7 Ind. Cas. 917=12 C.L.J. 419.**

(1196)—*S. 55 (=Civ. Pro. Code, 1882, s. 336)—Security for judgment-debtor filing petition in insolvency—Non-appearance of judgment-debtor after filing petition—Liability of surety.*—Petitioner stood surety for a judgment-debtor, binding himself to produce the judgment-debtor when called upon to do so, pending his filing a petition in insolvency. On the dismissal for default of such petition filed by the judgment-debtor, the creditor applied for execution by arrest of the surety. *Held* that the insolvency petition was filed in due time and that it was on a subsequent occasion that the judgment-debtor failed to appear when called upon. Consequently, the surety could not be held liable. IMBICHUNNI NAYAR v. LALJI RAM DOSS SAIT, **24 M. 560.** [*F.*, 26 M. 366, 13 M. L.J. 484; *R.*, 50 P.R. 1905=30 P.L.R. 1905.]

(1197)—*S. 55=(old s. 336)—Insolvency application by judgment-debtor—Effect on surety.*—A surety for the judgment-debtor under this section is discharged from his obligation when the judgment-debtor applies to be declared an

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insolvent. The right of surety to be discharged is in no way affected by the fact that the Court returned the application of the judgment-debtor for some defect therein. THAKAR SINGH v. RAM DAS, **100 P.R. 1894**. (15 C. 171, 13 A. 100, 15 A. 183, 16 A. 37, R.)

(1198)—*S. 55 (=s. 336, Civ. Pro. Code, 1882) Decree—Execution—Surety guaranteeing payment of judgment debt—Execution against surety, when proper—Remedy by suit—Estoppel.*—In the course of the execution of a money-decree, the judgment-debtor was arrested and brought before the Court. Thereupon the respondents who were not parties to the proceeding put in a surety bond covenanting to pay the decretal amount in the event of the judgment-debtor not paying it within a month, and stipulating that, if they failed to pay "the decree-holder would be at liberty to realise the amount by auction-sale of their moveable and immeveable properties and by arresting them." The judgment-debtor not having paid the money within a month as stipulated, the decree-holder sought to execute the decree against the sureties, who came in and applied for two months' time to pay in the decretal amount and time was allowed. No payment was, however, made and the decree-holder applied for execution and had one of the sureties' property sold. The sale was subsequently set aside. On a fresh application for execution against the sureties, they objected that no execution could be levied against them and the decree-holder ought to institute a separate suit. *Held*—That although the proper course for the decree-holder in such a case would be to institute a separate suit against the sureties, still, having regard to the agreement that was come to and the conduct of the parties in the previous proceedings it ought to be taken that the sureties had waived their right to insist upon a separate suit being brought against them. KAZIMUDDI PATARI v. FAUZDAR KHAN, **10 C.W.N. 830=4 C.L.J. 311** (8 C.W.N. 672, 2 I.A. 219, *Relied on.*)

(1199)—*S. 55 (=s. 336, Civ. Pro. Code, 1882)—Insolvency—Security for filing application by judgment-debtor to be declared insolvent.*—The petitioner gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court, on condition that, if an application, which was to be made by Aziz within a time specified, to be declared insolvent, was rejected on any ground whatever, the amount deposited would be paid to the decree holder. The judgment-debtor duly presented his application for a declaration of insolvency, but, before any order could be passed on it, he died. *Held* that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited to the surety. ASHIQ ALI v. MOTI LAL, **A.W.N. 1907, 120=4 A.L.J. 437=29 A. 466.** (24 M. 637, *R.*)

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(1200)—*S. 55 (=Civ. Pro. Code, 1882, s. 336)—Surety to enable judgment-debtor to apply in insolvency—Insolvency application by judgment-debtor within time—Surety not called on to produce judgment-debtor—Liability of surety for latter's non-appearance.*—A person stood as security to enable a judgment-debtor to apply in insolvency. The judgment-debtor filed an insolvency petition within the time fixed, but subsequently withdrew from it. The decree-holder applied for the issue of a warrant of arrest against the surety and the Court ordered accordingly. *Held*, that the decree could not be executed against the surety inasmuch as the judgment-debtor had applied within the time fixed to be declared an insolvent. The fact that he subsequently withdrew his application did not affect the question. Further, the surety's bond provided that the surety was to produce the debtor when ordered to do so within one month. In the absence of an order calling upon the surety to produce the debtor, the surety was not liable for non-appearance of the debtor on the day that he was directed by the Court to appear. KRISHNAIYAR v. KRISHNASWAMY AIYAR, **26 M. 366**. [*F.*, 13 M.L.J. 484.]

(1201)—S. 55 — Application for execution against surety, when judgment-debtor's application for insolvency is pending—*See* LIMITATION ACT, 1908, art. 182, A.W.N. 1906, 54=3 A.L.J. 13=28 A. 387.

(1202)—S. 55—Pardanashin lady, arrest of—Entry into Zenana—*See* PARDANASHIN WOMAN, 7 C. 19=9 C.L.R. 25.

(1203)—S. 55—*See* SURETY—LIABILITY OF SURETY, 19 B. 210, 16 A. 37=A.W.N. 1893, 203.

(1203-*a*)—S. 55—*See* NOS. 566, 909, 911, *supra* AND NOS. 2309, 2310, 2311, *infra*.

(1204)—S. 55 (3) and (4)—Competency of executing Court to imprison judgment-debtor after applying for insolvency—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 16 (2), 83 P.W.R. 1910=7 Ind. Cas. 351=81 P.L.R. 1910.

(1205) *Ss. 55, 57, 58, O. 21 rr. 38, 40, 39, 25, and ss. 2, 47, 104, O. 43, r. 1 (=Civ. Pro. Code, 1882), Ch. 19 1) ss. 2, 244 (c), 588, cl. 29 (—Order for imprisonment of judgment-debtor by executing Court.—Held*, that an appeal lay against an order of a Court executing a decree under Ch. XIX (1) of the Civ. Pro. Code, 1882, for the imprisonment of the judgment-debtor as against a decree, and not as against the order as such; for the order decided a question pertaining to the execution of a decree within the meaning of s. 244, Civ. Pro. Code, 1882. SEVA SINGH v. DHAUNKAL, **69 P.R. 1895**.

(1206)—*Ss. 55 and 115 (=ss. 336, 622, Civ. Pro. Code*, 1882)—*Order refusing to discharge surety not appealable.*—*Held*, that an order refusing to discharge a surety from liability

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under a bond executed in the terms of s. 336 of the Civ. Pro. Code, is not appealable, but may be revised under s. 622. NOOR MUHAMMAD v. JAGMANDAR DAS, **58 P.L.R. 1902.** (15 A. 183 and P.R. 100 of 1894, *F.*)

(1207)—Ss. 55, 115—*See* APPEAL—ORDERS, 15 A. 183=A.W.N. 1893, 68.

(1208)—*Ss. 55, 145 (=ss. 336, 258, Civ. Pro. Code, 1882)—Summary enforcement of security bond.*—It would appear that a security bond, under s. 349, Civ. Pro. Code, cannot be enforced summarily. However that may be, there is certainly no provision in the section for enforcing it under s. 253, and the security given under s. 336 is practically on the same footing as security under s. 349, once the judgment-debtor has filed his insolvency application. S. 336 does not say that s. 253 applies where there has been failure to appear. It says "But if he (*i.e.*, the judgment-debtor) fails so to apply, the Court may either direct the security to be realised or commit him to jail in execution of the decree. In the case of a surety, such security may be realised in manner provided by s. 253." Now, this can only mean that, if a judgment-debtor fails to apply to be made an insolvent in fulfilment of his undertaking there are two alternative penalties that may be inflicted upon him—he may either be sent to jail or the security he has given may be realized. Such security might be money or other valuable thing placed in deposit by the judgment-debtor himself. But, if the security is personal security given by a surety, it may be realised as laid down in s. 253. That is the penalty for not making the required application may be realised in that way. There is no mention of any penalty for mere fuilure to appear when called upon. For a breach of the conditions of the bond in that respect there would be the usual remedy for breach of a security bond under the Code, whatever that may be. The provision at the end of the section concerning s. 253 does not apply to the realization of the security on failure to comply with the first condition, but only on breach of the second condition. MA SHWE MI v. JAWAL PERSAD, **U.B.R. 1892—1896, 269** (19 B. 210, 15 C. 171, 13 A. 100, 15 A. 183, 16 A. 37, *R.*)

(1209)—*Ss. 55 (3) and (4), 151—Sind Insolvency Rules, r. 11—Application for declaration of insolvency dismissed—Fresh application barred without leave of Court under r. 11—Abuse of process.*—When the application of a judgment-debtor to be declared an insolvent has been once dismissed, and he is re-arrested in execution of decree against him, he is not entitled to a release under s. 55 (3) and (4) of the Civ. Pro. Code, on expressing his willingness to apply again to be declared an insolvent, so long as the bar of the previous dismissal is not removed by obtaining leave of the Court under Rule 11 of the rules under the Insolvency Act. To allow a fresh application, without Rule 11 being complied with, would result in abuse of the process of the Court contrary to the provisions of s. 151 of the Civ. Pro. Code. ABDUL JABAR v. SHEIKH KARIM, **9 Ind. Cas. 121.**

(1210)—*S. 55, O. 21, r. 40 (=ss. 336 and 337-A—Civ. Pro. Code, 1882)—Surety—Judgment-debtor failing to apply for insolvency—Non-appearance — Discharge of surety.*—On 10th July, 1908, judgment-debtor applied under s. 336, Civ. Pro. Code. The surety agreed that if, the judgment-debtor, did not either apply within one month to be declared an insolvent or appear in Court on the due date, he would be liable to the decree-holder. Before the due date fixed for judgment-debtor's appearance in Court, he applied under s. 337-A, instead of applying for insolvency. The Court heard the application when the judgment-debtor was present in Court, and postponed its further consideration to a date subsequent to the date originally fixed for the judgment-debtor's appearance; but on this date the judgment-debtor remained absent. The executing Court at first discharged the surety, but on review it made him liable. *Held*, that the surety was absolved from his liability, as from the proceedings of the Court, it appeared that the original date fixed for the judgment-debtor's appearance was no longer to be regarded as the date fixed for his appearance, and no proceedings took place on that date, and consequently, the executing Court had no power to review its order releasing the surety from the obligation undertaken by him. BHAGWAN DASS v. BHAGAT RAM, **61 P.W.R. 1910.**

——**S. 57 (=1882, s. 338=1877, s. 338.)**

See ARREST.

See EXECUTION OF DECREE.

(1211)—S. 57 (c)—*See* PLAINT—RETURN OF PLAINT, 2 A. 357.

(1211-*a*)—S. 57—*See* NO. 1205, *supra.*

——**S. 58 (=1882, s. 342=1877, s. 342=1859, s. 278.)**

See ARREST.

See EXECUTION OF DECREE.

(1212)—*S. 55 (=Civ. Pro. Code, 1882, s. 341)—Assignee of decree, extent of right of, to proceed in execution.*—The transferee of a decree is not entitled to get execution ordered by the Court, as of right, like the original decree-holder himself; but, as s. 232 of the Civ. Pro. Code, provides, if the transfer be by assignment in writing, the transferee may equally apply for execution, as under that section, which also provides the course to be taken by the Court under such circumstances. TAVERMAL HIRACHAND v. UMAJI HAYABATI, **9 B. 179.** [*F.*, 15 B. 307; *R.*, 31 B. 462=9 Bom. L.R. 728, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.]

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(1213)—*S. 58 (=Civ. Pro. Code, 1882, s. 342)—Period of imprisonment, Court's power to fix.*—The Court has no authority to fix any term of imprisonment under s. 342, Civ. Pro. Code, when committing a debtor to jail. SUJAN BIBI v. SAGAR MANDAL, **5 C.W.N. 145.** (13 M. 141, *R.*)

(1214)—*S. 58 (=Civ. Pro. Code, 1882, s. 341)—Non-payment of subsistence money—Arrested person discharged from Court-house—Effect—Discharge from jail.*—Where a judgment-debtor is arrested and brought to the Court and is ordered to be committed to jail, but is subsequently discharged by the Court on the judgment-creditor omitting to pay the subsistence allowance to be sent together with the warrant of committal such discharge of the defendant from confinement in the Court-house must be regarded as a discharge from jail within the meaning of s. 341 of the Civ. Pro. Code. JUNAPA SHANBHOG v. MANESHVAR KACHI, **9 B. 181.**

(1215)—*S. 58 (=s. 341, Civ. Pro. Code, 1882)—Re-arrest of judgment-debtor.*—A judgment-debtor arrested and released immediately without being imprisoned may be re-arrested. V.S. T. SOMASUNDARAM PILLAI v. MAUNG BA, **U.B.R. 1897—1901, Vol. II, 281.** (23 C. 128, *F.*)

(1216)—*S. 58 (=Civ. Pro. Code, 1882, s. 341)—Release from arrest for non-payment of subsistence allowance—Right to re-arrest.*—The fact that a judgment-debtor arrested in execution of a decree was released owing to non-payment of subsistence money by the decree-holder, is no bar to his being arrested again in execution of the same decree. HABIB-UL-RAHMAN v. RAMSAHAI, **26 A. 317.** (8 M. 21, *F.*)

(1217)—*S. 58 (=s. 341, Civ. Pro. Code, 1882)—Insolvency Act (11 & 12, Vic. c. 42), s. 13—Judgment-debtor*— Interim *protection order—Re-arrest under the same decree.*—A judgment-debtor, who has been arrested and imprisoned in execution of a decree and has obtained an *interim* protection order under s. 13 of the Insolvency Act, is liable to be re-taken, in execution of the same decree, under the provisions of the Civ. Pro. Code. SHAMJI v. POONJA, **4 Bom. L.R. 483=26 B. 632.**

(1218)—S. 58—*See* ARREST, 8 M. 21, 23 C. 128, 20 C. 874.

(1219)—S. 58 (=s. 341 of Civ. Pro. Code, 1877)—*See* CONTEMPT OF COURT, 4 C. 655.

(1220)—S. 58—*See* IMPRISONMENT, 13 M. 141.

(1221)—S. 58—*See* SUBSISTENCE MONEY, Bourke, O.C. 28.

(1221-*a*)—S. 58—*See* NO. 1205, *supra* AND NO. 3710, *infra*.

(1222)—S. 58, O. XXXVIII, r. 4—*See* ARREST, 7 B. 431.

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——S. 59 (=1882, s. 553.)

See ARREST.

See EXECUTION OF DECREE.

(1223)—*S. 59, O. 21. r. 37—Application for execution of decree by arrest of judgment-debtor—Discretion of Court to issue notice to show cause against the application—Illness, whether ground for refusing application.*—*Held*, that a Court is not bound in every case to issue a warrant for arrest, and that, if it has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance. DIP CHAND v. SHEIKH NAUSHAD ALI KHAN, **14 O.C. 36=8 Ind. Cas. 746.**

——S. 60 (=1882, s. 266=1879, s. 266=1859, s. 205).

See ATTACHMENT.

See EXECUTION OF DECREE.

(1224)—*S. 60 (=s. 266 of 1882, Civ. Pro. Code)—Application.*—S. 266 only authorises the attachment of property over which the judgment-debtor has a disposing power which can be exercised for his own benefit. And therefore such *corpus* or any part of it (as is mentioned in this case) does not come under s. 266 of the Code. BISHEN CHAND BASAWAT v. NADIR HOSSEIN, **15 C. 329=15 I.A. 1, P.C.**

(1225)—*S. 60 (=Civ. Pro. Code, 1877, s. 266)—Exemption from attachment—Houses occupied by agriculturists, what does not amounted to.*—The provisions of s. 266 (*c*), Civ. Pro. Code, 1877, refers to materials of houses and other buildings belonging to and occupied by agriculturists in their capacity as such and for the purposes of that occupation. Where the defendant, at a time when he possessed proprietary rights in a certain village, built himself a large and valuable dwelling house in it, and his proprietary rights in such village being sold in execution of a decree for money, he became an ex-proprietary tenant of the land held by him at the time of such sale as *sir*, *held* that the house was not exempt from attachment under the provisions of s. 276 (*c*), Civ. Pro. Code, 1877. BISHEN CHAND v. FUTTEH BAHADUR, **A.W.N. 1882, 13.**

(1226)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Occupancy tenant--Mortgage of dwelling house—Decree for sale of such house unlawful.*—Under the Agra Tenancy Act, an occupancy holding of a tenant is not transferable and cannot be sold by auction in execution of a decree. The dwelling house of an agriculturist may be deemed to be an appurtenant to his holding. S. 266 of the Civ. Pro. Code, 1882, prohibits the sale of dwelling houses occupied by agriculturists. A Court therefore cannot make a decree for sale of such dwelling house. An occupancy tenant made a mortgage of his

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occupancy holding and his dwelling house. The Court decreed sale of the dwelling house in a suit for sale upon foot of the mortgage. *Held*, the house was not saleable. RAMDIAL v. NARPAT SINGH, **8 A.L.J. 190=33 A. 136.**

(1227)—*S. 60, Civ. Pro. Code*, 1882, *s. 266)—Shrotriem villages not enfranchised—Melvaram produce cannot be attached.*—Under s. 266, Civ. Pro. Code, it is only the saleable property of the judgment-debtor that is liable to be attached. So, future melvaram rents of shrotriem village that have not been enfranchised cannot be attached in execution of any decree. RAJABADAR NAIDU v. CHANDRAPPA NAIDU, **4 M.L.J. 18.** [*R.*, 12 O.C. 323.]

(1228)—*S. 60 (=s. 266, cl. (c), Civ. Pro. Code*, 1882)—"*Occupied by,*" *meaning of*—Khurli, *not lived in or used, if can be attached.*—Where a *khurli* of the judgment-debtor, which he neither lived in nor used, was attached. *Held*, that it could be attached. In s. 266, cl. (c), "belonging to" and "occupied by" are not synonymous. The latter is not a mere repetition, but means "lived in by" or "used for agricultural purposes by." ATTAR SINGH v. BHAGWAN DAS, **65 P.R. 1909=104 P.W.R. 1909=2 Ind. Cas. 983.**

(1229)—*S. 60 (=s. 266, Civ. Pro. Code*, 1882)—*Attachment and sale, exemption from—Agriculturist—Town residence of an agriculturist.*—S. 266, cl. (c) of the Civ. Pro. Code, 1882, refers to a house occupied by an agriculturist as an agriculturist. It does not extend to the town residence of an agriculturist. MANECK LAL v. MANILAL, **7 Bom. L R. 685.**

(1230)—*S. 60 (=Civ. Pro. Code*, 1882, *s. 266 (c)—Agriculturist, meaning and applicability of*—The terms 'agricultrist' in proviso (c) to the section does not refer to tenants only, but also includes any person who is proprietor of his holding. GANPAT RAM v. LAKSHMAN RAO, **13 C.P.L.R. 30.** (12 B. 363, *D.*; 7 B. 530, *R.*)

(1231)—*S. 60 (=old s. 266)—Scope*—"*Agriculturist,*" *meaning of*—"The effect of this section is to confer an extraordinary privilege on certain classes of debtors and to trench on the ordinary rights of a creditor to realise his money from his debtor's property and, as such, this section should be construed very strictly. The word "agriculturist" in this section means not a mere owner of land, but a husbandman carrying on and making his living by tillage. BAWA GURBAKHSH SINGH v. GHULAM QADIR, **47 P.R. 1897.**

(1232)—*S. 60 (=s. 266 of Code of* 1882)—*S.* 266, *Civ. Pro. Code*, 1882—*House mortgaged by agriculturist—Attachment—Validity.*—This section is no bar to the attachment of a house mortgaged by a defendant agriculturist in execution of the mortgage-decree. NARAIN DAS v. SHER KHAN, **1 P.R. 1889.**

(1233)—*S. 60 (=old s. 266)—Jagir income pleged—Jaghir charged with decree-debt—No objection to attachment.*—Where a defendant pledges his jagir income as a security for the debt and a decree is obtained charging the jagir with payment of the decree debt, this section will not be a bar to the attachment of the same where the decree is the final adjudication on the liability of the property in question. MUSST. MEHR NISHAN v. NAWABZADA MUHAMMAD KAZIM ALI KHAN, **35 P.R. 1900.** [*R.*, 96 P.R. 1906, 95 P.R. 1906, 6 P.R. 1903.]

(1234)—*S. 60 (=old s. 266)—Jagir revenue—Attachment—How to be realised—Collector—S.* 143, *Punjab Land Revenue Act*, 1887.—The mode prescribed in s. 143 of the Punjab Land Revenue Act, 1887, is the only manner in which assigned land revenue could be attached. It can only be realised through the Collector, as the revenue thus attached is not a debt saleable under s. 266. NAWAB ABDULLAH KHAN v. KUDDAN MAL, **4 P.R. 1894, Rev.**

(1235)—*S. 60 (=old s. 266)—Pensions Act* (23 *of* 1871), *s.* 11—*Jagir—Land revenue, in lieu of—Attachability of.*—Jagir is a political pension within the meaning of s. 11 of the Pensions Act, 1871, and money due on account of it cannot be attached in execution of a decree. The fact that the manner of payment was converted from one of cash to an assignment of land in lieu thereof would not alter the nature of the grant. SHANKAR DAS v. BASANT SINGH, **133 P.R. 1890.** *See also*, **133 P.R. 1888, note.** (57 P.R. 1884, *F.*)

(1236)—*S. 60 (=old s. 266)—Pensions Act* (23 *of* 1871)—*Jagir income may be attached.*—Money paid by the *lambardars* of a village to a judgment-debtor, due to him as jagir income may be attached in execution of a decree. MUSSAMMAT LACHMI v. BHAGWAN SINGH **133 P.R. 1888.**

(1237)—*S. 60 (=old s. 266)—Pensions Act, s.* 11—*Several kinds of jagir—Court to inquire into nature of.*—Before a Jagir income could be attached, the Court should enquire into the nature of the jagir, as some jagir incomes are liable to attachment, while others are not. BASANT SINGH v. ASA RAM, **47 P.R. 1893.** (57 & 58 P.R. 1884, 137 P.R. 1890, *R.*)

(1238)—*S. 60 (=Civ. Pro. Code*, 1882, *s. 266)—Pensions Act* (23 *of* 1871), *s.* 11—*Execution of decree—Attachment of jagir.*—*Held*, that the jagirs called as Pattidari Jagirs of the status of 1809 in the Amballa District, not being political pensions, are not exempt from attachment in execution of money-decree against the jagirdars. JOWALA SINGH v. DWARKA DAS, **92 P.L.R. 1904.** (137 P.R. 1890, 47 P.R. 1893. 57 P.R. 1884, 133 P.R. 1888, 35 P.R. 1900. P.L.R. 1900, 357, *R.*)

(1239)—*S. 60 (Civ. Pro. Code*, 1877, *s. 266)—Loan on security of pension—Liability of pension—Pensions Act*, 23 *of* 1871.—A person who pledges a political pension as an available asset in security for a debt cannot avail himself

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of the protection of s. 266, Civ. Pro. Code, 1877. But the decree cannot be executed by attachment and sale of the pensionary right, title and interest of the judgment-debtor, but under the procedure provided in other sections of part F of Ch. XIX of the Civ. Pro. Code. DAMODAR DAS v. KHWAJA MIR MUHAMMAD. **A.W.N. 1881, 147.**

(1240)—*S. 60 (=Civ. Pro. Code, 1882, s. 266)—Execution of decree—Attachment—Act 23 of 1871 (Pensions, s. 11)—Sum of money payable by special arrangement to judgment-debtor out of increased revenue from family estate.*—The estate known as the Gursarai estate, in the district of Jhansi, was formerly held upon an "*ubari*" tenure, that is to say, the revenue assessed upon it was much below the usual amount. In 1895, the Government raised the assessment considerably and directed that, out of the increased revenue "as an act of grace," the members of the family, other than its head, should have certain shares assigned to them. *Held* that these shares, whether they were to be regarded as assigned Government revenue, or as profits due to a person entitled thereto from the estate, were not a "pension" within the meaning of Act XXIII of 1871, and were not exempt from attachment in execution of a decree. BAL KRISHNA BHAU v. GOVIND RAO, **A.W.N. 1902, 161.** (4 B. 432, *R.*) [*R.*, A.W.N. 1904, 144, 26 A. 617.]

(1241)—*S. 60 (=old s. 266) — Officer of British Regiment—Attachment of moiety of his salary, whether legal.*—The moiety of the salary of an officer of a British regiment serving under the orders of the Government of India will be liable to attachment in execution under s. 266 (*h*) (*iii*), Civ. Pro. Code, 1882, as such officer is a public servant within the meaning of s. 2, Civ. Pro. Code, 1882. KERRING v. RAIKES, **59 P.R. 1897.** (24 C. 166, *Not Appr.*)

(1242)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Execution of decree—Attachment of future salary of private servant.*—Where a decree-holder applied on the 18th November, 1907, for a attachment of the judgment-debtor a salary for November and the succeeding months the judgment-debtor being a lawyer's clerk, *held*, that the unearned salary of a private servant in whole or in part was not liable to attachment in advance. (21 M. 393. *R & F.* 23 A. 164, *D.*) *Semble.*—Where a servent cannot sue his master for salary before it is earned, such salary is not "property" nor even a "debt" payable in future. DEBI PRASAD v. LEWIS, **6 A.L.J. 227=31 A. 304=1 Ind. Cas. 186.**

(1243)—*S. 60 (=s. 206 (f), Civ. Pro. Code, 1882—Right of personal service—*"Brit Mahabrahmani."—*A brit mahabrahmani* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district. is a right of personal service within the meaning of s. 266 (*f*) of the Civ. Pro. Code, and, as such, it is not liable to attachment or sale in execution of decree. DURGA PRASAD v. GENDA, **A.W.N. 1889. 169** 16 W.R. 171 and 10 Bom. 395, *R.*) [*R.*, 20 A. 234.]

(1244)—*S. 60 (=Civ. Pro. Code. 1877, s. 266)—Decree passed on mortgage of* vritti *right—Sale of right in execution.*—Where, in a decree passed on a mortgage of a person's *vritti* right, the Court has expressly declared that the *vritti* right was to be sold in execution of the decree, objections to such a sale could not be raised in execution proceedings, on the grounds, either of the right not being from its nature a fit subject for sale or of its being exempt from attachment under the provisions of s. 266 of the Civ. Pro. Code. SADASHIV LALIT v. JAYANTIBAI, **8 B. 185.** [*Diss.*, 23 B. 131; *D.*, 28 M. 84=14 M.L.J. 468.]

(1245)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Resulting trust—Expectancy.*—Resulting trust is not a mere expectancy or contingency under s. 266 (*k*) of the Civ. Pro. Code, 1882. ANTOO v. ARDESHIR BYRAMJI, **1 Bom. L.R. 303.**

(1246)—*S. 60 (=old s. 266)—Transfer of Property Act, 1882, s. 6—Transfer of right of succession to accural—Legality.*—Attachment in execution of a decree cannot, under s. 266 (*k*), Civ. Pro. Code, 1882, be made of a transfer of, or an agreement to transfer, rights of succession in expectancy; but it is not unenforceable as being contrary to public policy. NIZAM-UD-DIN v. MUSSAMMAT JANNAT BIBI, **38 P.R. 1894.**

(1247)—*S. 60=(s. 266 (k), Civ. Pro. Code)—Execution of decree—Attachment—Contingent right—Right of pre-emptor under a conditional decree for pre-emption.*—*Held*, that the interest in the pre-empted property of a successful pre-emptor, who has not yet paid the pre-emptive price fixed by his decree, is an interest, the attachment of which is prohibited by s. 266 (*k*) of the Code of Civil Procedure. GORAKH SINGH v. SIDH GOPAL, **A.W.N. 1906, 69=3 A.L.J. 183=28 A. 383.**

(1248)—*S. 60 (=Civ. Pro. Code, 1882, s. 266)—Attachment of life-interest of Hindu widow—Future maintenance*—Res judicata.—In execution of a decree against a Hindu widow, the decree-holder attached a village which had been transferred to her by her husband for her life-time, with every right therein except the power of alienation. But the attachment was refused by the Court on the objection of a reversioner. Then, the decree-holder applied for execution of his decree by sale of the widow's right to receive the rents and profits of the village. The widow contended that the right was not saleable and that the application was barred by *res judicata*. *Held* that the order made between the reversioner on the one side and the judgment-debtor and the decree-holder on the other, was no bar to the present

application, that the right to receive the rents and profits of the village was attachable and saleable. Such right is not a right of future maintenance within the meaning of s. 266, Civ. Pro. Code, for, though one of the objects of the transfer of the estate was to afford maintenance to the judgment-debtor, the rents were not specifically assigned as maintenance. Nor, was this an attachment of any contingent or possible right or interest within the meaning of the section. JAIRAJ KUARI v. DEBI, **A.W.N. 1883, 9.** [*R.*, 12 C.L.J. 146.]

(1249)—*S. 60 (=s. 266, cl. (b), Civ. Pro. Code, 1882)—Land granted for maintenance without any right of alienation—Maintenance right not liable to be sold in execution of decree—Estoppel by judgment.*—The respondent, as guardian of her minor grandsons, borrowed money from the appellant, who brought a suit impleading her in it and got a personal decree against her. In execution of the decree, her maintenance right in certain immoveable property, notwithstanding her objections, was attached and put up for sale. But when, however, the question of confirmation of the sale came up for decision, the then District Munsiff set aside the sale accepting the objections of the respondent, that her maintenance right was not such as could be sold. On appeal, it was contended, on behalf of the appellant, that the respondent's interest in the property was attachable and that she was estopped, by the order of the District Munsiff, from raising any question as to the saleability of her interest, since she did not appeal against the order. *Held*, the instrument, by which the maintenance of the respondent was provided for, allowed her the enjoyment of the income only of the lands, without the right to make any alienation by way of sale or otherwise. Accordingly, her interest in the land, thereby created was, with reference to s. 266, cl. (*b*), incapable of being sold in execution of the decree. (10 B. 344, *F.*) [*R.*, 12 C.L.J. 146]. *Held*, also, that there is no estoppel in this case. No doubt, "estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or as the ground-work upon which it must have been based. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle, that, where a conclusion is indisputable and could have been drawn from certain premises, the premises are equally indisputable with the conclusion. Such conclusion must be inevitable, or it cannot be drawn." What is relied on as an estoppel must be certain to every intent. Under the circumstances of the case, the word 'attach' used by the District Munsiff is ambiguous and not free from doubt, because there were two objects sought to be attached, *viz.*, her right to maintenance and her right under certain instrument of lease. MUNISAMI NAIDU v. AMMANI AMMAL, **15 M.L.J. 7.** (14 M.L.J. 379, *R.*) [*R.*, 17 M.L.J, 311.]

(1250)—*S. 60 (=Civ. Pro. Code, 1882, s. 266) Execution of decree—Right of maintenance and residence—Saleable interest.*—In execution of a decree for costs the plaintiff decree-holder sought attachment and sale of a house in which the defendant judgment-debtor resided. The judgment-debtor objected to the attachment on the ground that the house was *wakf* and he had no proprietary interest in it, but merely a right of maintenance and residence, which was exempted from attachment and sale under s. 266 (1), Civ. Pro. Code. As a matter of fact, it had been decided in the suit, to which the decree related, that the plaintiff was entitled, as Mahant, to the property claimed, which included the house in dispute, and the defendant was entitled as a dependant of the shrine, to which the property belonged, to a right of maintenance and residence only. The Divisional Judge disallowed the objection on the ground that the defendant-judgment-debtor was estopped from saying that the house could not be attached as it was *wakf*, that the plaintiff being Mahant and entitled to the reversion of the house could attach and sell it to recover the costs, and the sale would be for necessity. *Held*, that s. 266, Civ. Pro. Code, requires a preliminary condition to attachment that the property sought to be attached should be saleable, or that, over it or its profits the judgment-debtor should have a disposing power, which he may exercise for his own benefit; and that the defendant's interest in the house, which was merely a right of residence and maintenance, was not capable of attachment, as the defendant had no disposing power over it. *Held*, also, that the defendant had a sufficient interest in the institution to entitle him to object as against the Mahant, that the house as *wakf* property could not be sold, though the decree was against himself; and he was not estopped from raising the objection. *Held*, further, that since the defendant had no saleable interest in the house, the question of necessity did not arise. NANAK CHAND v. KISHEN CHAND, **P.L.R. 1900, 209.**

(1251)—*S. 60 (=old s. 266)—Right of residence—Saleability of.*—Where the defendant has only the right of residence in a house which belonged to a shrine, the interest he has in the house not being saleable, the house cannot be attached in execution of a decree against him. Under this section, it is necessary to show that the property sought to be attached is saleable, or that the judgment-debtor is entitled to dispose of the property or its profits. NANAK CHAND v. KISHEN CHAND, **8 P.R. 1900.**

(1252)—*S.60 (=s. 266, Civ. Pro. Code, 1882)—Right to future maintenance, if an annuity is—Annuity, if attachable.*—An annuity given by will is not a right to future maintenance within the meaning of s. 266 of the Code and can be attached in execution of a decree. GOPAL LAL SEAL v. F. J. MARSDEN, **10 C.W.N. 1102.** (10 C.W.N. 1102, *Foot-note, F.*)

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(1253)—*S. 60 (=s. 266 (1), Civ. Pro. Code, 1882)—Annual hereditary allowance—Liability to be attached.*—A hereditary right to an allowance payable annually from the *melwaram* of a certain estate is attachable in execution of a decree.|(9 M.L.J. 113, *F.*). The defendant, who has in his affidavit admitted that he has a hereditary right to the allowance, cannot plead, in second appeal, that the allowance is only a voluntary grant. VAIDYANATHA SASTRIAR v. EGGIA VENKATARAMA DIKSHATHAR, **17 M.L.J. 373=30 M. 279=2 M.L.T. 338.**

(1253-*a*)—*S. 60 (=Civ. Pro. Code, 1882, s. 266)*—Vritti, *sale of, in execution of decree, if valid—Private alienation—Succession—Custom.*—A compulsory alienation of a *vritti*, by way of sale in execution of a decree, is invalid as being not only opposed to Hindu law and public policy, but also against the provisions of s. 266, Civ. Pro Code, 1882, as being a right of personal service. But in the case of private alienations, the prohibition is not of general application, such alienations to strangers only being generally discouraged. No general custom can be pleaded in such matters. The rules of succession depend upon the nature of each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the texts of law which admittedly prohibits both partition and alienation. RAJARAM v. GANESH, **28 B. 181.** [*Appl.*, 26 M. 31; *Cons.*, 34 C. 828 =11 C.W.N. 782; *R.*, 36 C. 975=13 C.W.N. 1084=3 Ind. Cas. 76.]

(1254)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Execution of decree—Attachment—Right to attach profits not yet due.—Held*, that a mere right to receive profits, the profits in question not having yet accrued due, is not susceptible of attachment in execution of a decree. SHER SINGH v. SRI RAM, **A.W.N. 1908, 101=5 A.L.J. 251=4 M.L.T. 10=30 A. 246** (27 C. 38; 28 C. 483, 14 M I.A. 40, *R.*)

(1255)—*S. 60 (=Civ. Pro. Code, 1882, s. 266—Attachment of price in hands of purchasers in auction—Competency of auctioneer—Judgment-debtor to object to attachment.*—In this case, money in the hands of certain purchasers in auction, payable to the auctioneer, was attached by a judgment-creditor of the latter. The auctioneer objected to the attachment on the ground that the above money was the proceeds of the sale of properties which did not belong to him, and it was held that the judgment-debtor, the auctioneer, had no disposing power over the money and, under the first paragraph of s. 266 of the Civ. Pro. Code, it is only money over which the judgment-debtor has a disposing power, which he may exercise for his own benefit, which is liable to attachment. Further, there was nothing to prevent the judgment-debtor contending that he was merely the trustee or bailee of the property, and that, therefore, it was not liable to attachment under the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

provisions of the said s. 266. T. H. SMITH v. THE ALLAHABAD BANK, LIMITED, **23 A. 135 =A.W.N. 1901, 20.**

(1256)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Attachment and sale of country liquor—Collector's permission—Abkari Act (Bom. Act V of 1878), s. 16.*—Country liquor is not exempt from attachment and sale in execution of a money-decree passed by a Civil Court. It is saleable property and is covered by the first part of s. 266 of the Civ. Pro. Code, 1882. The Collector's permission is necessary to the sale of country liquor (s. 16 of the Bombay Abkari Act), but it is not necessary to attachment so far as the attachment can be made without removal. PURSHOTTAM NARAYAN v. BALVANT BABAJI, **10 Bom. L.R. 13=32 B. 157.**

(1257)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Execution of decree—Sale of land—Sanction of superior authority—Act XVIII of 1876 (Oudh Laws), s. 20—Act IV of 1882 (Transfer of Property), ss. 88 and 89—Restriction attached to sale of land—Oudh, practice as regards sale of land in execution of decree in.*—Under the provisions of s. 20, Oudh Laws Act (XVIII of 1876), in Oudh a decree or order passed under ss. 88 and 89 of the Transfer of Property Act (IV of 1882) would be subject to the restriction attched to s. 266 of the Code of Civil Procedure; and the sanction of the superior authority would be necessary for the sale of land in all cases of mortgage. A sale in pursuance of an order under s. 89 of Act IV of 1882 is a sale in execution of decree. SYED FIDA HUSSAIN v. KAILASA, **3 O C 1.** [*R.*, 8 O.C. 409.]

(1258)—*S. 60 (=Civ. Pro. Code, 1877, s. 266) — Saleable property — Lease under Government.*—With reference to Government notification dated 11th October, 1827, a lease of certain land was granted to A. Under the terms of the lease, A held the land at the pleasure of the Government. *Held* that A had a saleable interest in the land in question liable to attachment and sale in execution. MULCHAND v. GARDNER, **A.W.N. 1882, 100.**

(1258)—*S. 60 (=Civ. Pro. Code, 1882, s. 266)—Rights of use and occupancy in State land not liable to attachment and sale in execution of decree—Upper Burma Land and Revenue Regulation.*—The Civil Courts must hold that an occupier of State land has no transferable right of use or occupancy therein. The occupier's right is not saleable property within the meaning of s. 266 of the Code of Civil Procedure. MAUNG PO MIN v. MAUNG PO, **U.B.R. 1897—1901, Vol. II, 258.** (26 C. 727, *F.*; U.B.R. 1897—1901, Vol. II, 207, 209, *R.*) [*R.*; U.B.R. 1908, 3rd Qr., Land and Revenue Regulation 1.]

(1260)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Attachment and sale of deposits under Provident Funds Act, s. 4.*—When a person

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retires from his service, the Provident Funds standing to his credit become re-payable on his demand or at his option : they are no longer " compulsory deposits " within the meaning of s. 4 of the Provident Funds Act, 1897. From that time forward, the sum becomes a debt due to him by the Provident Fund, and can be attached under s. 266 of the Civ. Pro. Code, 1882. MILLER v. B.B. AND C.I. RY., **5 Bom. L.R. 454.**

(1261)—*S. 60 (=s. 226, Civ. Pro. Code, 1882) —Decree — Execution — Attachment—Sale—Possession of the property—Objections under the section.*—In execution of a decree, the house of the judgment-debtor (defendant) was attached and sold. The sale was confirmed by the Court. The plaintiff, being obstructed in seeking its possessoin, filed a suit to recover possession of the house. The defendant then contended that as he was an agriculturist and as the house was occupied by him, the materials of it could not be sold having regard to s. 266 (*c*) of the Civ. Pro. Code : *Held*, (1) that in the absence of proof the exemption from liability to attachment or sale of the house did not exist for the purpose of execution proceedings ; therefore the executing Court had complete jurisdiction to make the order it did : and that, therefore, it was not open to the defendant to contend that there was no jurisdiction to order the sale of the house by reason of s. 266 (*c*) of the Code ; (2) that as "strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do," the plaintiff, who was a stranger to the previous proceedings, was justified in believing that the Court had authority to attach and sell the property. In Courts of law only those facts can be taken to exist which are proved. PANDURANG v. KRISHNAJI, **5 Bom. L.R. 799=28 B. 125.**

(1262)—*S. 60 (=s. 266, Civ. Pro, Code, 1882)—Arrears of rent—Suit by auction-purchaser.*—Arrears of rent due under a sub-lease, which, under the contract, were made payable to the lessor's Zemindar, constitute a debt, due to the lessor, which is liable to attachment and sale, under s. 266 of the Code of Civil Procedure. LACHMI NARAIN v. KALYAN DAS, **5 A.L.J. 265=A.W.N. 1908, 129.**

(1263)—*S. 60 (=s. 266, Civ. Pro. Code, 1882)—Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.*—Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance : he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under s. 266 of the Code of Civil Procedure. PHUL CHAND v. CHAND MAL, **A.W.N. 1908, 103=5 A.L.J. 491=30 A. 252.**

(1264)—*S. 60 (=s. 266 (n), Civ. Pro. Code, 1882) — Attachment — Agriculturist-judgment-debtor—Attachment of fodder—Punjab Land Revenue Act—Reference to Collector.*—As regards fodder for cattle belonging to an agriculturist judgment-debtor, s. 266, cl. (*n*) of the Code taken with s. 70, Land Revenue Act, makes it clear that the Civil Court can attach only so much as will leave, in the opinion of the Collector of the District, to whom a reference must be made, a sufficiency for the owner's cattle calculated according to the rules of his department. GUR BAKSH v. KHAIRATI, **82 P.R. 1907.** (93 P.R. 1901, *Overruled.*)

(1264-*a*)—*S. 60 (=Civ. Pro. Code, 1882, s. 266 (k),) expectancy to succeed by survivorship not attachable under—Possible succession to widow's estates* (spes successionis).—This was a suit for a declaration that a certain house was liable to be sold in execution of a decree against his judgment-debtor. Defendant was the mother of the judgment-debtor. The will of her husband upon which he relied did not expressly give her any power of disposing of the house and the question remained whether judgment-debtor, one of her sons, had any attachable interest in it at the time when the plaintiff attached it (the widow being alive). *Held* that until the defendant, the widow, died, it could not be known who would inherit the house. The judgment-debtor, as one of her husband's sons had only a '*spes successionis*,' "an expectancy of succession by survivorship" and such a hope or expectancy could not be attached under s. 266 (*k*) of the Civ. Pro. Code. ANANDIBAI v. RAJARAM, **22 B. 984.** [*R.*, 1 Bom. L.R. 303.]

(1265)—S. 60—*See* ACT XXIII OF 1871, ss. 8, 11, 26 A. 617=1 A.L.J. 338.

(1266)—S. 60—Political pension—Attachment—*See* ACT XXIII OF 1871, s. 11, 6 A.L.J. 519=5 M.L.T. 388=31 A. 382=2 Ind. Cas. 100.

(1267)—S. 60—Allowance of ward granted by Court of Wards, attachment of, in execution of decree against him—*See* U. P. ACT III OF 1899, s. 22, 7 O.C. 174.

(1268)—S. 60—Wife's share in *let-tet-paw* property— Alienability — Attachability — *See* BUDDHIST LAW—DIVORCE, 8 Ind. Cas. 992.

(1269)—S. 60—Lease Prohibiting alienation by sale or gift—Lessee having saleable interest —*See* LEASE—CONSTRUCTION OF LEASE, 20 C. 273.

(1270)—S. 60—Right to maintenance when attachable—*See* MAINTENANCE, 12 C.L.J. 146 =7 Ind. Cas. 80.

(1271)—S. 60—*See* RESULTING TRUST, 1 Bom. L.R. 303.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1272)—S. 60—*See* ST. 11 & 12, VIC. C. 21, ss. 7, 30, 26 M. 214.

(1273)—S. 60—Attachment and sale of Toda giras allowance—*See* TODA GIRAS, 10 Bom. L.R. 1201=33 B. 258.

(1273-*a*)—S. 60—*See* NOS. 83, 194, 912, 913, *supra* AND NO. 3771, *infra*.

(1274)—*S. 60 (1) (c)—Agriculturist's house—Sale, in execution of decree on mortgage, whether legal.—Held per Richards, C.J., and Tudball, J. (Banerji, J., contra)*, that the house of an agriculturist (which is not an appurtenance of his holding which he is forbidden by law to transfer,) is liable to sale in execution of a decree obtained on foot of a mortgage made by him, there being nothing in s. 60, cl. 1 (c) of the Code of Civil Procedure to render such sale illegal. *Per Richards, C.J.*—The Code of Civil Procedure is an Act which deals entirely with matters of procedure; and *prima facie* it is very improbable that the legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should restricted, the legislature, by express provisions in the Tenancy Act, has so enacted. S. 60 and the proviso to it deal with simple money decrees and not with mortgage decrees. *Per Banerji, J.*—The legislature clearly intended that no Court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the description mentioned in cl.(c) of the proviso to s. 60, Code of Civil Procedure, and it makes no difference in the powers of the Court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is, where an attachment must precede a sale, it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. BHOLA NATH v. KISHORI, **8 A.L.J. 1045, F.B.**

(1274-*a*)—*S. 60, cl. (n) — Attachment in execution of a decree—Crops standing on land given for maintenance—Such crops, whether liable to attachment—Distinction between them and a right to future maintenance, pointed out.*—Where a certain land is given to a Hindu widow by the will of her deceased husband, to be enjoyed by her during life in lieu of maintenance, what she acquires under the grant is not a right to maintenance but to the usufruct of the property; so that the produce of the land, as it accrued, becomes at once her property. Therefore the crop growing on the land, being her property, must be available to answer her debt and is liable to attachment in execution of a decree obtained against her. (15 M.L.J. 7, 10 B. 342, *D.*) What is interdicted by the legislature in cl. (*n*) of s. 60 of the Civ. Pro. Code, is attachment of a mere right to a future maintenance, and not of a debtor's property or any interest in property, though such property or interest in property, might have been granted to him or her for maintenance. *Quære*:—Whether cl. (*n*) of s. 60, Civ. Pro. Code, would apply whether the right to mainenance is derived under the general Hindu or Mahomedan Law, or under an instrument in the nature of deed or will? GOVINDA PILLAI v. GANAPATHY PILLAI, **(1911) 2 M.W.N. 563=10 M.L.T. 493.**

(1275)—Ss. 60, 64—*See* U.P. ACT XVIII OF 1876, s. 20, 8 O.C. 409 (B.)

(1276)—*Ss. 66, 73 (=Civ. Pro. Code, 1877, s. 266 (c) and Expl. (a) and s. 295(—Proceeds of sale of building materials in execution of rent-decree, rateable distribution not grantable in respect of.*—Inasmuch as under s. 266, cl. (c) of the Civ. Pro. Code, 1877, the materials of the house and buildings of a judgment-debtor could not be attached or sold by an ordinary creditor, though they may be sold by the landlord for rent (see Expl. (*a*) to the section); the intention of the Legislature would be frustrated, if the proceeds of sale of such materials realised at the suit of the landlord, be allowed to be rateably distributed under s. 295 of the Code, and it would be giving to the ordinary creditor a benefit which the Legislature clearly meant to confer upon the landlord but to withhold from the ordinary creditor. MANIKLAL VENILAL v. LAKHA AND MANSING, **4 B. 429.** [*R.*, 8 A.W.N. 154, 23 A. 106.]

(1277)—*S. 60, O. 21, r. 2, Civ. Pro. Code (Act XIV of 1882), s. 258—Certifying payment without any execution application pending—Step in-aid of execution—Limitation Act (IX of 1908), sch. II, art. 182, cl 5, explanational—Army Act, 1881, 44 and 45 Vic, Ch. 58, s. 136—Army Annual Act, 1895, s. 4.*—A decree was passed against K, L and V, in 1900. No application for execution was made till 1910, but one of the judgment-debtors other than L, paid sums of money from time to time which were certified by the decree-holder under s. 258 of the Code. *Held*, that the present application which was against L was not barred by time as the decree-holder had certified payments and thus had applied in accordance with law to the proper Court to take some step-in-aid of execution. (12 A. 399, *F.*) *Held*, also, that the pay of an officer of His Majesty's regular forces is not liable to attachment in execution of a decree. (24 C. 102, 25 **M. 402**, *R.*) Where a decree provided that the plaintiff was entitled to premiums, on a policy of life insurance, which was security for the debt, *held* that the Court did not give a decree for the realization of such future and unascertained sums as against any of the defendants. LECKY v. BANK OF UPPER INDIA, LIMITED, **8 A.L.J. 487.**

(1278)—*S. 60, O. 21, r. 46 (=ss. 266, 268, Civ. Pro. Code, 1882)—Monthly allowance, not compassionate, payable on the first of the following month Attachment thereof, validity of—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

'*Debt.*'—A decree-holder applied for attachment of the allowance due to the judgment-debtor for the half of a month. An order, purporting to be made under s. 268 of the Code, was accordingly issued by the Court. The judgment-debtor, thereupon, objected, *inter alia*, on the ground that the attachment was premature inasmuch as the allowance for the month did not fall due till the 1st of the next month. It was also objected that the allowance was not an attachable 'debt,' within the meaning of s. 266 of the Code. *Held*, that, under the circumstances of the case, the allowance was, in no sense, a compassionate one, but was an acknowledged debt, accruing due and actually existing, with a right to payment on and after the first of the following month. The allowance was in consequence attachable; and the prohibitory order, which was only for the attachment of half the judgment-debtor's allowance for a month, was against an existing debt, which had then accrued due, though payable on the first of the following month. The attachment was, therefore, validly made. MAHARANI DAMBAR KOERI v. RAI SHAM KISSEN DAS, **9 C.W.N. 703.** (27 C. 38, 14 M. I.A. 40, *R.*) [*R.*, 7 C.L.J. 658=12 C.W.N. 145.]

(1279)—S. 60, O. 21, r. 46—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 3 A. 12.

(1280)—*S. 60 (1) (i) and O. 21, r. 48 (3)—Execution of decree—Attachment—Pay of Military Assistant Surgeon—Exemption from attachment under Army Act*, 1881 (44 & 45 Vic. c. 58), *s. 144—Refusal by Officer Commanding to comply with order of attachment—Procedure to be adopted by Civil Court.—Held*, that the pay of an Assistant Surgeon in the Military employ is absolutely protected from attachment in execution of a decree (s. 144 (3). proviso 1. Army Act, 1881, 44 & 45 Vic. c. 58) because such an officer is not a 'public officer' within the meaning of s. 60 (*i*), Civ. Pro. Code, 1908. Where an Officer commanding refuses to comply with an order of attachment of the pay of an officer, which is liable to such attachment. *Held*, that the Civil Court ought to act under the provisions of O. XXI, r. 48 (3), Civ. Pro. Code, 1908, that is to say, the Court should proceed to recover from Government, for the benefit of the decree-holder. the sums which should have been stopped out of the judgment debtor's pay, and remitted to the Court by the officer authorised to disburse the judgment debtor's pay leaving the Government to settle up as it pleases with its officer, the judgment-debtor. OAKES & CO. LTD. OF MADRAS v. MR. J. P. DISCARCIE, **10 P.R. 1910=23 P.W.R. 1910=6 Ind. Cas. 802=65 P.L.R. 1910.**

(1281)—S. 60, O. XXI, rr. 51, 52—Construction of legislative enactments—How far Reg. IV of 1831 and Act XXIII of 1838 repealed by—*See* STATUTES, CONSTRUCTION OF, 4 M. H.C. 277.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1282)—*S. 60, O. 21, r. 53 (=ss. 266 (b) and 273, Civ. Pro. Code*, 1882)—*Attachment of right to future maintenance—Decree for maintenance whether money-decree — Proper procedure in execution—Practice.*—The decree for maintenance, is a right to future maintenance, and cannot therefore be attached under s. 266 (*b*), nor can it be attached under s. 273 as a money-decree. The proper procedure to be followed would be that laid down in *Monessur Das* v. *Beer Pratab Sahu*. NANAMMAL v. THE COLLECTOR OF TRICHINOPOLY, **20 M.L.J. 97=5 Ind. Cas. 879.** (15 W.R. 188, *R.*)

(1283)—S. 60, O. XXI, r. 53—*See* ATTACHMENT.—SUBJECTS OF ATTACHMENT, 2 A. 290, 16 B. 522.

(1284)—*S. 60, O. 21, r. 54, Civ. Pro. Code*, 1882, *(=ss. 266 and 274)—Property under mortgage with possession—Liability to be attached—Right to redeem—Attachment of.*—Though property under a mortgage with possession could not be attached, the right to redeem the property is liable to attachment. MOOTIA CHETTI v. MAUNG GYI, **U.B.R. 1897—1901, Vol. II, 261.** (21 B. 226, *F.*)

(1285)—S. 60, O. XXI, r. 83, O. XL, rr. 1, 2, 3—*See* ATTACHMENT—SUBJECT OF ATTACHMENT, 6 B.L.R. 646=15 W. R. 188.

(1286)—*S. 60, O. 21, rr. 90, 92, s. 104, O. 43, r. 1 (=Civ. Pro. Code*, 1882, *ss. 266, (1) 311, 312, 588)—Execution of money-decree obtained against Hindu widow—Sale of property assigned for maintenance—Order allowing objection to sale—Appeal—Letters Patent, s. 10.*—After a sale of certain villages in execution of a money-decree against a Hindu widow, she objected to such sale alleging that the villages had been given to her in lieu of maintenance under an agreement made in compromise of litigation between her and the owners of the villages, and were, by reason of the proviso to s. 266 of the Civ. Pro. Code, cl. (1), not liable to attachment or sale in execution of the decree against her. The High Court, on appeal, reversed the order of the first Court and allowed her objections, on the ground that the rights and interests which have been made over to a Hindu widow, by the family to which she belonged, in lieu of maintenance, cannot be attached and sold by auction in satisfaction of a decree against her, by reason of the proviso, cl. (1) to s. 266 of the Code. On an appeal under the Letters Patent, s. 10, it was held that the application by the widow to the first Court was to be treated as one made under s. 311 of the Code, and that Court's order was therefore an order passed under s. 312, and consequently that, by reason of the prohibition contained in s. 588, no appeal lay from the order of the single Judge of the High Court on appeal to him from the first Court's order. BANSIDHAR v. GULAB KUAR, **16 A. 443=A.W.N. 1894, 155.** [*R.*, 14 C.P. L.R. 114.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——S. 62 (=1882, s. 271=1877, s. 271).

See ATTACHMENT.

(1287)—*See* EXECUTION OF DECREE — MODE OF EXECUTION, 3 B. 89.

——S. 63 (=1882, s. 285=1877, s. 285),

See ATTACHMENT.

See EXECUTION OF DECREE.

(1288)—*S. 63 (=s. 285, Civ, Pro. Code, 1877 —Applicability.*—It is doubtful whether s. 285 applies to immoveable property at all: and even assuming that it does apply, there is nothing in it which would destroy the validity of a sale already made, provided the proceeds of such sale were paid into the Court under whose decree the property was first attached. OBHOY CHURN COONDOO v. GOLAM ALI, **7 C. 410=9 C.L.R. 361.** [*R.*, 7 M. 47; *Appl.*, 12 C. 333.]

(1289)—*S. 63 (=Civ. Pro. Code, 1882, s. 285), —*The provisions of this section apply to immoveable property. The words 'in the custody' of any Court in the section imply actual custody and relate back to s. 272. MUTTU KARUPPAN v. MUTTU RAMALINGA, **7 M. 47.** [*Appr.*, 18 A. 348; *R.*, 12 C. 333, 19 C. 651, 18 B. 458, 22 B. 88; *D.*, 22 M. 295=9 M.L.J. 1.]

(1290)—*S. 63 (=s. 285, Act 14 of 1882, Civ. Pro. Code.)—Attachment—Sale in execution by second Munsiff of property already under an attachment by first Munsiff—Validity of sale by second Munsiff.*—Where the same property was attached by the Courts of the first and second Munsiffs (the Court of the first Munsiff not being a Court of higher grade than that of the second Munsiff within the meaning of s. 285, Civ. Pro. Code,) and it was contended that the sale by the second Munsiff, was absolutely void, inasmuch as the property had been attached by the first Munsiff. *held* that the sale by the second Munsiff, under whose decree the second attachment was made, was valid. DWARKA NATH DASS v. BANKU-BEHARI BOSE, **19 C. 651.** (12 C. 334. *F.*; 4 A. 359, 5 A. 615, *Diss.*; 7 M. 47, *R.*) [*Cons.*, 13 C.P.L.R. 145; *R.*, 18 B. 458, 22 B. 88, 25 C. 46, 34 C 836=6 C.L J. 130.]

(1291)—*S. 63 (=Civ. Pro. Code, 1882, s. 285) —Attachment by Courts of different grades—Sale by Courts of lower grade.*—Where Courts of different grades have attached the same property in execution of decrees, a sale by the Court of lower jurisdiction is invalid; although the sale has been effected in ignorance of the proceedings taken and pending in the Court of superior jurisdiction. CHERANJI LAL v. JAWAHIR MAL, **26 A. 538.** (4 A. 359, 18 A. 348, *R.*) [*R.*, 6 C.L J. 130=34 C. 836.]

(1292)—*S. 63 (=Civ. Pro. Code, 1882, s. 285) — "Grade," meaning of—Small Cause Court inferior in grade to First-Class Subordinate Judge's Court—Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of Subordinate Judge—Validity of sale by Small Cause Court.*—G obtained a decree in the Court of Small Causes at Surat against his debtor M, and in execution attached a certain debt due to M and a proclamation of sale was duly issued. But before the actual sale by that Court, the same debt was attached in execution of a decree passed by the Court of the First-Class Subordinate Judge of Surat against the said M at the instance of K. The proceedings, however, under the Small Cause Court decree were continued and the debt was sold in execution and was purchased by the applicant. *Held* that the sale by the Small Cause Court was not rendered invalid by the subsequent proceedings in the First-Class Subordinate Judge's Court. The term "grade" in s. 285, Civ. Pro. Code, has the same meaning as it has in s. 5 of Act VIII of 1859,—that is to say, that it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and, therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court is of inferior grade to the Court of the First-Class Subordinate Judge. TURMUKLAL HARKISAN RAI v. KALIYANDAS KHUSAL, **19 B. 127.** [*F.*, 22 B. 88; *R.*, 18 A. 348, 13 C. P.L.R. 145.]

(1292-*a*)—*S. 63 (=Civ. Pro. Code, 1882, s. 285)—Execution of decree—Attachment-land, sale of property by Courts of different grades—Purchasers at sales, respective rights of.*—When property is attached by more Courts than one, each of them has jurisdiction to sell it, and s. 285 of the Civ. Pro. Code, merely declares by which of such Courts that jurisdiction should be exercised. Its provisions are directory as to which of the Courts shall exercise what would otherwise be concurrent jurisdiction and do not in anyway annul the jurisdiction of the Court of lower grade when it comes into competition with the jurisdiction of a superior Court. The sale by the Court of lower grade being in such a case merely irregular, the purchaser at the sale will take an indefeasible or defeasible title according as he knows or does not know of the irregularity. If he buys *bona fide* and without notice his title will be perfect and he will not be affected by the irregularity of the proceedings resulting in the sale. The defendant in this case did not set up the plea that he was a *bona fide* purchaser without notice. The Court which sold had full knowledge of the proceedings in the Subordinate Judge's Court and there was no reason to suppose that the defendant had not similar knowledge. His purchase could, therefore, confer no good title on him, it being liable to be defeated by the purchase made by the plaintiff. ABDUL KARIM v. THAKORDAS, **22 B. 88.** [*F.*, 13 C.P.L.R. 145; *Appr.*, 22 M. 295=9 M.L.J. 1; *R.*, 34 C. 836, 6 C.L J. 130.]

(1293)—*S. 63 (=s. 285, Civ. Pro. Code, 1882) —Attachment of property by two Courts of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

different grades—Validity of sale by Court of lower grade—Execution of decree.—Property attached by two Courts—one of a superior, and another of an inferior grade—cannot be sold by the Court of the lower grade. Such a sale will be invalid, whether the latter Court sold the property in ignorance of the attachment of the Court of the superior grade or with a knowledge thereof; and the purchaser thereunder has no *locus standi* to bring a suit for a declaration that a subsequent sale held under the attachment of the Court of the superior grade is not valid and binding as against him. HAR PRASAD v. JAGAN LAL, **27 A. 56=A.W.N. 1904, 161.** (A.W.N. 1904, 95, *F.*) [*Diss.*, 34 C. 836=6 C. L.J. 130; *F.*, 31 A. 527=6 A.L.J. 703.]

(1294)—*S. 63 (=s. 285, Civ. Pro. Code, 1882)—Attachment—Superior Court—Inferior Court—Sale in execution of decrees.*—S. 285 is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. In this case, the earlier decisions were adhered to, and the contention that the sale, by a Munsiff, of property under attachment by a Subordinate Judge was absolutely void, was overruled. RAM NARAIN SINGH v. MINA KOERY, **25 C. 46.** (12 C. 333, 19 C. 651, 18 B. 458, *R.*) [*R.*, 22 M. 295=9 M.L.J. 1, 13 C.P.L.R. 145, 34 C. 836=6 C.L.J. 130.]

(1295)—*S. 63 (=Civ. Pro. Code, 1882, s. 285)—Court of Munsiff in N.W.P., a Court of higher grade than a Small Cause Court.*—For the purposes of s. 285, Civ. Pro. Code, the Court of a Munsif in the North-West Provinces must be regarded as a Court of higher grade than a Court of Small Causes. BALLU RAM v. RAGHUBAR DIAL, **16 A. 11, F.B.=A.W.N. 1893, 211.**

(1296)—*S. 63 (=Civ. Pro. Code, 1882, s. 285)—Attachment by two Courts of different grades*—There is nothing in s. 285 of the Civ. Pro. Code to say that it shall not apply if, after attachment by two Courts, the property happens to be sold by the inferior Court, or if, before attachment by the Court of higher grade, proclamation of sale in execution of the decree of the Court of lower grade has been issued. Under the section, where the same property is attached in execution of the decrees of Courts of different grades, the Court of higher grade has alone the jurisdiction to sell or receive or realise the property, and it is that Court which must determine any claim and any objection to the attachment of either Court. BALKISHEN v. NARAIN DAS, **18 A. 348=A.W.N. 1896, 93.** (4 A. 359, 5 A. 615, 7 M. 47, *R.*) [*F.*, 26 A. 538=A.W.N. 1904, 95; *R.*, 13 C.P.L.R. 145, 34 C. 836=6 C.L.J. 130.]

(1297)—*S. 63 (=Civ. Pro. Code, 1882, s. 285)—Sale by two Courts—Title—Notice—Parties.*—Where property, attached in execution by a superior and an inferior Court, was sold by the latter without notice of the proceedings in the superior Court, *held* that the sale was valid. S. 285 of the Civ. Pro. Code renders a proceeding in contravention of it void, only if there were notice of the proceedings in the superior Court. The question of notice can arise only as between parties to the proceedings in the two Courts, and the sale cannot be impeached by strangers. KUNHAYAN v. ITHU KUTTI, **22 M. 295=9 M. L.J. 1.** [*F.*, 13 C.P.L.R. 145; *R.*, 34 C. 836=6 C.L.J. 130.]

(1298)—*S. 63 (=Civ. Pro. Code, 1882, s. 285)—Execution of decree—Property attached by Revenue as well as Civil Court.*—The principle that, in matters as to which the Rent Act is silent, the Revenue Courts are to be governed by the Civ. Pro. Code, must be applied subject to the broad line of demarcation between the functions of the Civil and Revenue Courts which the Legislature has drawn, and without making one class of Court encroach upon the province of the other. The provisions of the Code and those of the Rent Act relating to execution of decrees are widely different. Although the provisions of s. 285, Civ. Pro. Code, would govern the procedure of Revenue Courts, if property is attached in execution of decrees of more Revenue Courts than one, yet the section would be inapplicable as between a Revenue Court on the one hand, and a Civil Court on the other, *i.e.*, where property has been attached in execution of a Civil Court-decree and also of a Revenue Court-decree. Where, therefore, the same property had been attached by a Revenue Court and by a Civil Court, but was first sold by the Revenue Court, it was held that the purchaser therein took a good title as against the purchaser in execution-sale held by the Civil Court subsequently. RAGHUBAR DAYAL v. BANKELAL, **22 A. 182=A.W.N. 1900, 37.** (16 A. 496, 21 A. 405, 5 A. 406, *R.*)

(1299)—S. 63—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 5 A. 615=3 A.W.N. 167.

(1299-*a*)—S. 63—*See* NOS. 914, 915, *supra* AND NOS. 1511, 1512, 3728, 4044, *infra*.

(1300)—*Ss. 63, 50, O 22, r. 4 (=Civ. Pro. Code, 1882, ss. 285, 234, 368)—Execution of decree—Attachment and sale by Courts of different grades—Death of judgment-debtor prior to sale in execution.*—Where the same property, attached in execution of decrees obtained on the first and second mortgage of it, by two Courts of a lower and a higher grade respectively, is, after its sale by the latter Court, ordered by the Court of lower grade to be sold in execution of *its* decree, such sale is not invalid with reference to s. 285 of the Civ. Pro. Code, as, at the time it was ordered, the property was not under attachment in execution of the decree of the Court of higher grade as that decree had been executed by the sale of the property. (4 A. 359, *D.*) A sale in execution of a decree is not rendered invalid by the death of the judgment-debtor after attachmen

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

and before sale, and by the omission to make his legal representative a party to the execution-proceedings. STOWELL v. AJUDHIA NATH, **6 A. 255=A.W N. 1884, 67.** [*Appr.*, 12 A. 440, F.B.; *R.*, 19 B. 276, 10 C.L J. 396 ; *D.*, 15 M. 399.]

(1301)—*Ss. 63, 73, (=Civ. Pro. Code, Act 14 of 1892, ss. 285 and 295)—Transfer of decree.*—S. 295, Civ. Pro. Code, does not require the transfer of a decree as a condition precedent to an application under s. 285. HAR BHAGWAT DAS MARWARI v. ANANDA RAM MARWARI, **2 C.W.N. 126.** [*D.*, 4 C.W.N. 542]

(1302)—*Ss. 63, 73—Rateable distribution—Holder of decree of Township Court—Attachment and sale of properties by — Holder of decree of Sub-Divisional Court—Attachment of same properties by Sub-Divisional Court—Application by the latter for rateable distribution—Right to obtain such distribution—Wrongful payment of the whole assets to another—Suit to recover same under s. 73 (2), Civ. Pro. Code, 1908—Scope of s. 73.*—A, in execution of a decree obtained by him in the Township Court against X, attached, on 30th March, 1909, certain properties belonging to X and had them sold on 5th May, 1909. The sale-proceeds were received in full by the Township Court on 5th May, 1909 and paid (part) to A and (the balance) to X on the 5th June, 1909, and 26th July, 1909, respectively. Meanwhile S obtained a decree in the Sub-Divisional Court against X and had the same properties attached on 2nd May, 1909, by an order of attachment passed by the Sub-Divisional Court. On 4th May, 1909, S applied to the Township Court for the sale of the said properties in pursuance of the attachment made at his instance by the Sub-Divisional Court and for leave to bid at such sale. The leave was granted. On 19th May, 1909, S again applied to the Sub-Divisional Court, stating that the property had been already sold by the Township Court in execution of A's decree, and praying for rateable distribution. The application was forwarded to the Township Court on 12th June, 1909, which Court refused to give rateable distribution on the ground that it was too late under s. 73 (2), Civ. Pro. Code, 1908. *Held*, that S was entitled to get a refund of the share of the sale-proceeds, which he would have received on a proper rateable distribution, from the person to whom it was wrongfully paid. (23 A. 106, 29 C. 773, 12 C. 333, 2 C.W.N. 126, 1 L.B.R 121, *R.*) Under s. 63, Civ. Pro. Code, 1908, it was the Sub-Divisional Court, and not the Township Court, upon which the duty of rateable distribution fell. Scope of s. 73, Civ. Pro. Code, 1908, *discussed*. SOMASUNDARAM CHETTY v. ALAGAPPA CHETTY, **U.B.R. 1910 3rd Qr., 53.**

(1303)—*Ss. 63, 73 (=ss. 285, 295, Civ. Pro. Code, 1882)—Execution-sale Transfer of execution-proceedings to superior Court—Principle of rateable distribution amongst attaching creditors.*—The practice of the Calcutta High Court seems to be in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of execution-proceedings to the superior Court (from the Small Cause to the High Court.) CLARK v. ALEXANDER, **21 C. 200.** (7 C. 553, 12 C. 333=6 M. 357, 16 B, 683, Note, *F.*) [*R.*, L.B.R. 1893—1900, 161 ; *D.*, 4 C.W.N. 542, 1 L.B.R. 121.]

(1304)—*Ss. 63, 73 (=ss, 285, 295, Civ. Pro. Code, 1882)—Rateable distribution—Simultaneous execution of decree—"Shall determine claim and objection to attachment" meaning of—Scope of s. 285, Civ. Pro. Code.* 1882.—R got a decree for money against I in Sub-Judge's Court at Faridpur, and, on the 21st November, 1908, purchased the attached property of the judgment-debtor, and the amount realized by the sale was set off against the decree. In the meanwhile, G had got a decree for money against I in the Munsiff's Court at Goalundo, and applied for execution against the same property. On the 19th September, 1908, he applied to the Sub-Judge at Faridpur for an order on the Munsiff at Goalundo not to sell the property, and also for rateable distribution of the assets which might be realized by sale in the Faridpur Court. The first prayer was rejected, and it was ordered that the second prayer might be considered when assets were realized. G then applied to the Goalundo Court for transmission of his execution case to the Faridpur Court, which application was refused. He then applied to the Faridpur Court for rateable distribution. That application was granted, and R was directed to refund the sum which was set off against his decree. *Held*, that, as G had made no application, prior to the realization of the assets, for execution of his decree, to the Faridpur Court, he was not entitled to a rateable distribution under s. 295, Civ. Pro. Code, 1882, and that his application to the Faridpur Court for an order on the Goalundo Court not to sell the properties cannot be deemed to be an application for execution of his decree. (21 C. 200, 2 C.W.N. 126, *R.*) A decree cannot be executed simultaneously against the same property in more than one Court. S. 285, Civ. Pro. Code, 1882, is governed by the immediately preceding sections with which it must be read, and the words "shall determine any claim thereto and any objection to the attachment thereof" mean any claim or objection of the sort, which can be summarily enquired into and decided in execution-proceedings. Therefore, an application for rateable distribution cannot be deemed to be an application for determination of any claim, to attached property, or of any objection to the attachment thereof, within the meaning of s. 285. Civ. Pro. Code. If, in contravention of s. 285, an inferior Court, in ignorance of the proceedinds pending before the superior Court, proceeds with execution, and brings a property

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to sale, the superior Court can adopt the proceedings as if they were taken by itself, and is competent to determine any claim for rateable distribution of the assets realized by the sale. RAMAJASH AGARWALA v. GURU CHARAN SEN, **3 Ind. Cas. 105 = 13 C.W.N. 396 = 11 C.L.J. 69.** (12 C. 333, 29 C. 773 = 1 C.L.J. 97, *F.*)

(1305)—Ss. 63, 73 —*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 18 B. 458.

(1306)—Ss. 63, 73—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 12 C. 333.

(1307)—*Ss. 63, 73, O. 38, r. 5, O. 38, r. 12 (=ss. 285, 295, 483, 490, Civ. Pro. Code, 1882) —Decree in Munsiff's and Subordinate Judge's Courts against the same judgment-debtor—Sale by Munsiff's Courts of property attached in both Courts—Order of Subordinate Judge to the Munsiff to send up the record in the execution case—Rateable distribution by Munsiff among decree-holders in his Court—Duty of Munsiff —Attachment before judgment—Effect of attachment when decree is subsequently passed*—In execution of a certain decree in a Munsifi's Court, certain property belonging to the judgment-debtor was attached and sold. But, before the sale, another oreditor, who had the same property attached before judgment, obtained a decree in the Court of a Subordinate Judge and applied to the Subordinate Judge for execution of the same, a few days after the sale above referred to. The Subordinate Judge sent down an order to the Munsiff, calling for the record of the execution-case, pending before him, for the purpose of rateable distribution of the proceeds of the sale, between the decree-holder in his Court and the other decree-holders in the Munsiff's Court. The Munsiff, instead of complying with the order of the Subordinate Judge, made a rateable distribution of the sale-proceeds among the decree-holders in the Court and afterwards sent the records to the Subordinate Judge. The latter Officer determined the matter of distribution of sale-proceeds between the decree-holders in both the Courts, and ordered that the decree-holders in the Munsiff's Court, who had obtained more money than they were entitled to get, should refund the amounts obtained by them in excess of their legitimate dues. One of the decree-holders in the Munsiff's Court moved the High Court for setting aside the orders of the Subordinate Judge above referred to. *Held*, though the sale took place before the decree in the Subordinate Judge's Court, still the amount was realized only after the application was made by the decree-holder in the Subordinate Judge's Courts for execution of his decree. Hence the decree-holder in the Subordinate Judg's Court is one of the persons referred to in s. 295. Although the attachment took place before judgment, still a decree having been subsequently obtained, the attachment that had already been put upon the property, became operative, and the decree-holder in the Subordinate Judge's Court stood in the same position in respect to the property attached as the decree-holder in the Munsiff's Court. That being so, in view of the provisions of s. 285, the Subordinate Judge's Court was the only Court, which could determine any claim to the assets realised by the sale in the Munsiff's Court. (4 A. 359, *R.*) Consequently, after the Subordinate Judge had called for the record of the execution-case from the file of the Munsiff, for the purpose of distribution of sale-proceeds, the Munsiff had no power to distribute the money among the decree-holders in his own Court. He ought to have at once sent up the record to the Court of the Subordinate Judge, for the purpose of distribution being made by that officer in accordance with s. 225 *Quere* :—Whether the Subordinate Judge had the authority to make the order that some of the decree-holders in the Munsiff's Court should refund the sums drawn by them in excess of what was legitimately due to them? BHAGWAN CHANDRA KRITIRATNA v. CHANDRA MALA GUPTA, **1 C.L.J. 97 = 29 C. 778 = 6 C.W.N. 67.** [*F.*, 3 Ind. Cas. 105 = 14 C.W.N. 396 = 11 C.L.J. 69.]

(1308)—S. 63, O. XXXVIII, r. 12—Sale by Munsiff under Small Cause Court decree—Attachment by Subordinate Judge pending—Sale, a nullity—*See* ATTACHMENT—MISCELLANEOUS, 6 A.L.J. 703 = 3 Ind. Cas. 31 = 31 A. 527.

——S. 64 (=1882, s. 276 = 1877, s. 276 = 1859, s. 240.)

See ATTACHMENT.

See EXECUTION OF DECREE.

(1309)—*S. 64 (=s. 276, Civ. Pro. Code, 1887) —Removal of prior mortgage—Attachment before renewal and after mortgage—Effect of.*—The provisions of s. 276, Civ. Pro. Code, are not intended to avoid dispositions of the property attached by the judgment-debtor which are merely in the nature of a renewal of an incumbrance already existing on the property prior to the attachment, and which do not enhance the burden to which it was previously liable. MAHADEVAPPA v. SRINIVASA RAU, **4 M. 417.** [*R.*, 10 C.L.J. 33 = 13 C.W.N. 797.]

(1310)—*S. 64 (=Civ. Pro. Code, 1882, s. 276)—Alienation of attached property, when valid*—The words "enforceable under the attachment" in s. 276 Civ. Pro. Code, must be read as meaning legally enforceable under the attachment, the object of the section being to prevent any alienation which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached. (17 A. 447, A.W.N. 1897, 37, 14 M.I.A. 543, *R.*) Therefore, a private alienation of attached property made under such circumstances that it in no way interferes with the rights secured by his decree

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to the attaching decree-holder, is not barred under s. 276, Civ. Pro. Code. ABDUL RASHID v. GAPPO LAL, **20 A. 421=A W.N. 1898. 98.**

(1311)—*S. 64 (=Act VIII of 1859 s. 240—S. 276, Civ. Pro. Code, 1877.)—Private alienation of property under attachment—Effect.*—Under s. 276 of the Civ. Pro. Code, a private alienation of property under attachment is void only "as against all claims enforceable under the attachment." In execution of a decree, certain property was attached in 1867. Pending this attachment the judgment-debtor sold one portion to the appellant and another portion to the respondent in 1867. Subsequently, the application for execution was struck off. In 1878, the decree-holder again filed a fresh application and again attached the property sold to the appellant. The property so attached was put up for auction-sale and was purchased by the respondent. Now the respondent sought to set aside the sale-deed of 1867 and recover possession from the appellant. *Held* that the purchase made by the appellants could not be assailed as invalid or "void" on the strength of the rule of s. 276 of the Code. The alienation impugned in this suit was made under the old and long extinct attachment of 1867 and under that attachment no claim was enforced. GOBIND SINGH v. ZALIM SINGH, **A.W.N. 1883, 183=6 A. 33.** [*Appr.*, 7 A. 702 =5 A.W.N. 179; *D*, 15 A. 112.]

(1312)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Private alienation—Attachment—Mortgage—Sale under the powers of a mortgage-deed.*—A sale under the powers of a mortgage-deed cannot be held to be a private alienation within the meaning of s. 276 of the Civ. Pro. Code, as an alienation of the attachment in pursuance of a power conferred before the attachment does not come within the section. THE DELHI AND LONDON BANK v. S. J. TELLARY & CO., **3 Bom. L.R. 892.**

(1313)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Attachment—Private alienation, what is—Its effect—Alienation in performance of a direction by the Court, whether private alienation—Sale in pursuance of a contract anterior to attachment—Its validity—Collusive decree—Proceedings in execution—Alienation pending attachment, how far affected.*—Under s. 276, a private alienation of property attached during the continuance of the attachment is void against all claims enforceable under the attachment. An alienation, though strictly an act of parties, is deemed to be not a private alienation, if it is in performance of a direction of the Court. (4 A. 219, *R.*) But, where there is no such direction, the mere fact of there being a prior agreement which obliges a party to carry it out by the execution of a conveyance cannot render the alienation other than private. (8 I. A. 65, *R.*) A sale in pursuance of a contract anterior to the attachment of property (under s. 276) is not void against claims under the attachment which are not enforceable against a

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prior contract to sell. Where a decree was collusive, and the decree itself was brought about with a view to defraud A who has contracted to purchase the property of B, then A's purchase of the property must be uneffected by proceedings under a collusive decree obtained against B. BAPINEEDU v. VENKAYYA, **8 M L.T. 197.**

(1314)—*S. 64 (=Civ. Pro. Code, 1882, s. 276)—Alienation of property while under attachment.*—Where property was attached under s. 276 of the Code of Civil Procedure and subsequently purchased at an auction-sale by the respondent, and while the attachment still subsisted, the plaintiff, who had a mortgage on the same property executed prior to the attachment, took a second mortgage of the property, part of the consideration of the second mortgage being on account of the prior mortgage. *Held* that s. 276 of the Code of Civil Procedure did not render the second mortgage taken by the plaintiff absolutely void, but void only so far as it tended to defeat the object with which the attachment was made. MADHO KEWAT v. ABDUL SUBHAN KHAN, **A.W.N. 1900, 155.**

(1315)—*S. 64 (=Civ. Pro Code, 1883, s. 276)—Keeping alive mortgage—Fresh mortgage pending attachment—Prior mortgage paid by subsequent mortgagee—Effect—Intention of parties.*—Where the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his own benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept alive. Where a mortgagor, for paying off a previous mortgage-decree, executes a mortgage free from incumbrances, in favor of a third party and if, after paying off the mortgage-decree with the fresh loan, he makes over the old mortgage-deed to the new mortgagee, the old mortgage is kept alive for the benefit of the new mortgagee. An attachment of the property compromised under the mortgage though prior to the fresh mortgage, does not affect the interest of the new mortgagee. An attachment of property over which there is a mortgage subsisting affects only the equity of redemption. S. 276 of the Code does not make the new mortgage void as against the attaching creditor. DINOBUNDU SHAW CHOUDHRY v. JOGMOYA DASI, **12 M.L.J. 73, P C. =29 C. 154=4 Bom. L.R. 238=29 I.A. 9=6 C.W.N. 209.** [*F.*, 5 C.W.N. 690, 29 M. 37, 1 C.L.J. 531, 2 C.L.J. 202, 2 C.L.J 288; *R*, 33 C. 1133=4 C.L.J. 12=10 C.W.N. 1010, 36 C. 1903=5 C.L.J. 611 7 C.L.J. 1.]

(1316)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Validity of alienation by judgment-debtor before order of attachment is served upon him.*—The property of the judgment-debtor

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was attached; but, before the order of attachment had been intimated to the judgment-debtor, the judgment-debtor alienated the same to the plaintiff. *Held*, the alienation was not void as against the auction-purchaser, inasmuch as all the conditions prescribed by S. 276, Civ. Pro. Code, were not complied with. TOTOMAL, SON OF TILOKCHAND v. RAISING, SON OF MANGHERMAL, **1 Sind L.R. 176.**

(1317)—*S. 64 (=Civ Pro. Code, s. 276)—Mortgage pending alleged previous attachment in execution—Subsequent application for attachment, effect of, in raising prior attachment.*—The mortgage sought to be enforced in this suit, was held by the lower Courts to be void under the provisions of s. 276 of the Civ. Pro. Code, by reason of an alleged subsisting attachment at the time of the mortgage. The prior proceedings in execution had been struck off before the mortgage was made and another application for attachment in execution of the same decree had subsequently been made. *Held* that the prior attachment was not, under the circumstances, subsisting, and that the mortgage was, therefore, a valid one, because where a party prosecuting a decree is compelled to take out another and a distinct execution, his title should be presumed to date from the second attachment. KISHEN LAL v CHARAT SINGH, **23 A. 114=A.W N. 1900, 214.** (12 B. L.R. 411, 16 A. 133, *R.*)

(1318)—*S. 64 (=Civ, Pro. Code, 1882, s. 276—Discharge of, debt due to attaching crditor, effect of, on the attachment—Absence of subsisting attachment—Claim for rateable distribution affected.*—Where an attachment has ceased to be operative on account of the judgment-debt due to the attaching creditor having been discharged, it would follow on principle that with reference to the other judgment-creditors also, who, had the attachment resulted in the realisation of assets, would have been entitled to a reteable distribution, the attachment would become inoperative. Where the efficacy of the attachment itself has, by a payment out of Court, become exhausted, there can be no sale by the Court and no right to apply for each a sale. KUNHI MOOSSA v. MAKKI, **28 M. 478=10 M. L.J. 98.** [*F.*, 28 M. 380=15 M.L.J. 202.]

(1319)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Decree—Attachment—Prior mortgages—Subsequent mortgage to pay off prior mortgages—Merger.*—When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. DINOBUNDU v. JOGMAYA, **4 Bom. L.R. 288.**

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(1320)—*S. 64 (=s. 276, Civ. Pro. Code. 1882)—Will by Mahomedan—Consent by heirs.*—A consent given by the heirs of a Mahomedan testator whereby the latter disposes of by his will more than one-third of his property to a stranger, even if the consent is given after the property is attached in execution of a decree against the heirs, does not amount to an alienation within the meaning of s. 276 of the Civ. Pro. Code, 1882. DAULATRAM v. ARDUL KAYUM, **4 Bom. L.R. 132=26 B. 497.**

(1321)—*S. 64 (=Civ. Pro. Code, 1882, s. 276)—Attachment does not affect rights against property already acquired.*—The attachment of property cannot override the rights already acquired against the property at the time of the attachment. S. 276, Civ. Pro. Code, does not profess to override the general principle that a creditor can assert no higher rights over the debtor's property than the debtor himself possessed. SAVITHRI AMMAL v. RAMASAMI, **8 M.L.J. 266.**

(1322)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Attachment of son's interest—Alienation by father—Hindu Law.*—Where the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him prohibited by an order of the Court under s. 276 of the Civ. Pro. Code, 1882, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. SUBRAYA v. NAGAPPA, **10 Bom. L.R. 1206=33 B. 264.**

(1323)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Attachment—Order dismissing application for execution—Effect upon maintenance of attachment.* Where property is once attached in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. IMTIAZ ALI v. BISHAMBAR DAS, **8 A.L.J. 619.** (19 A. 482, *F.*; 12 B.L.R. 411, *D.*)

(1324)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Mortgage of attached property to a third party—Consideration.*—The fact that a mortgage made by a judgment-debtor to a person other than his judgment-creditor may be void as against the judgment-creditor under the provisions of s. 276 of the Code of Civil Procedure, will not prevent such mortgage from being a good consideration for an advance by the mortgagee. LACHMAN SINGH v. KHETPAL, **A.W.N. 1895, 117.**

(1325)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Attachment of property—Previous oral agreement to sell—Effect of—S. 54 of Transfer of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Property Act—Subsequent alienation by registered document—Validity of.—Where it orally agreed to sell a piece of land (worth Rs. 100) to B, but executed a registered deed to convey the land *after* the same was attached in execution of a decree obtained against him, *held*, (1) that, there being no registered document before the attachment, there was no valid sale of the property (worth Rs. 100) and the mere contract for sale does not create any interest or charge on such property under s. 54, Tr. P. Act,, (2) that the subsequent alienation under the registered deed was void as against the claim enforceable under the attachment, under s. 276, Civ. Pro. Code. SIT PI v. MA SAN, **L.B.R. 6=2 Ind. Cas. 350.**

(1326)—*S. 64 (=s. 276, Civ. Pro. Code, 1882)—Plaintiff deriving his title both from judgment-debtorand judgment-creditor—Attachment of judgment-debtor's property—Subsequent transfer of same property to plaintiff by judgment-creditor—Release by the plaintiff of the latter right—Estoppel.*—Plaintiff derived his title to certain property both from the judgment-debtor and from the judgment-creditor. But he released his rights derived from the judgment-creditor, reserving the rights derived from the former. It was held that the transfer by the judgment-creditor impliedly warranted that he had a good title to the property, and that the plaintiff, having accepted a title on the footing that the title under the execution-proceedings was good, was consequently estopped from disputing such title. It was also held that, under the provisions of s. 276, Civ. Pro. Code, the plaintiff acquired no rights under the transfer from the judgment-debtor, which could prevail against the attachment, and that his reservation of those rights gave him no title as against the parties who claimed by sale from the judgment-creditor. MARVADI APPALA NARASIAH v. SRI RAJALL VYRICHERJA VEERABHADRA RAJU BAHADUR GARU, **3 M.L.T. 295.**

(1327)—*S. 64 (=s. 276, Civ. Pro. Code. 1882)—Attachment—Transfer of property before attachment.*—The alienation of property by a judgment-debtor after an application for its attachment is granted, but before it is attached, is not invalid. JOWAHIR LAL v. JALAL DIN, **137 P.L.R. 1905.** (11 A. 58, 7 A. 702, *F.*)

(1328)—*S 64 (=Civ. Pro Code, 1877, s. 276).*—An order of the Revenue Court, directing the attachment of a decree of the Civil Court in execution of its own decree was held to be *ultra vires* and could not, therefore, have the effect of invalidating a private sale of such Civil Court decree made after the order of attachment was passed. S 276, Civ. Pro. Code. 1877, did not apply to such a case. BALDEO DAS v. MEHRBAN ALI, **A.W.N. 1881, 117.**

(1329)—S.—64—*See* MAD, ACT VIII of 1865, s. 38, 8 M. 573.

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(1330)—S. 64—*See* ALIENATION—ALIENATION DURING ATTACHMENT, A.W.N. 1881, 75, A.W.N. 1886, 176, 18 A. 123=A.W.N. 1896, 13.

(1331)—S. 64—*See* AWARD, 4 A. 219, F.B.

(1332)—S. 64—Easement enjoyed by dominant tenement expressly released after the latter attached under a decree—Alienation of portion of that property within meaning of section—Transaction void—*See* EASEMENT, 12 C.W.N. 969=35 C. 889.

(1333)—S. 64—*See* INSOLVENCY—MISCELLANEOUS, 8 M. 554.

(1334)—S. 64—*See* LIMITATION ACT, 1908, art. 12, A.W.N. 1890, 224.

(1335)—S. 64—See MAHOMEDAN LAW—WILL, 4 Bom. L.R. 132=26 B. 497.

(1335-*a*)—S. 64—*See* NOS. 916, 982, 1275, *supra*, AND NOS 3219, 3470, 3729, 3743, 3744, 3745, 3746, 3778, 3779, 3784, *infra.*

(1336)—*Ss. 64, 73 (=ss. 276, 295, Civ. Pro. Code, 1882)—Private sale by judgment-debtor of property attached in execution of decree against him—Subsequent order for attachment obtained by other creditors against same judgment-debtor—Payment into Court by purchaser of judgment-debt due to first attaching creditor, whether realization of assets—"Assets realized in execution"—"In execution," meaning of.*—Certain property of a judgment-debtor was attached in execution of a decree. Subsequent to the attachment, two other creditors of the same judgment-debtor obtained orders for rateable distribution. In the meantime, the present plaintiff, the mortgagee of the attached property, purchased it from the judgment-debtor. In pursuance of the terms of the sale to him, the present plaintiff paid the amount due to the decree-holder, who attached the property, into Court, and satisfaction of the decree was entered up but without prejudice to the rights of the other creditors to question the sale to the plaintiff. Subsequent to the payment of the money into Court, the other creditors, above-said also obtained orders for attachment of the same property. The present plaintiff preferred a claim, and, on its being rejected, brought the present suit to establish his right by purchase to the property. The question for determination was, whether the sale to the plaintiff was void as against the defendant under s. 276 of the Code. *Held*, there was good consideration for the sale and the transaction was *bona fide*. The rights of the defendant-decree-holders depended upon s. 295 of the Code, and, if they had no rights under that section, they could have no "claims enforceable under the attachment" within the meaning of s. 276. In the circumstances of the case, there was no realization of assets by 'sale or otherwise in execution of a decree.' The sale to the plaintiff was not made under any

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process of Court. It was made under a private arrangement betwen the judgment-debtor and the plaintiff. The realization of assets in this instance was not a realization in execution. The words "wherever assets are realized by sale or otherwise in execution of a decree" do not mean "where assets are realized for the purposes of satisfying a decree." The payment of the judgment-debt into Court could not make the money so paid "assets realized in execution." The words "in execution" mean by execution, *i.e.*, by some process of Court. S. 295 shold be construed strictly as against judgment-creditor, who claim reteable distribution. The effect of such a claim, if allowed, necessarily diminishes *pro tanto* the amount available for the judgment-creditors, through whose diligence the assets have been realized. The fact that the satisfaction, entered up, was without prejudice to the rights of the defendants did not affect the legal rights of the parties. The test to apply in these cases is whether the assets were realized by sale or otherwise by a process in execution provided for by the Code. In the present case, the realization of the assets resulted not from the attachment of the property but from the sale of the property by the judgment-debtor to the plaintiff. Consequently there was no realization of assets in execution within the meaning of s. 295. Hence the plaintiff was entitled to a decree. VIBHUDA PRIYA THIRTHA SWAMI v. YUSUF SAHIB, **15 M.L.J. 202=28 M. 380.** (6 B. 511, *D.*; 16 B. 91, 28 B. 264, *F.*; 13 C. 225, 21 C. 809, 10 M. 57, 25 A. 431, *R.*) [*F.*, 81 P.R. 1909=149 P.W.R. 1908.]

(1337)—*Ss. 64, 73 (=ss. 276, 295, Civ. Pro. Code of* 1882)—*Claim under s. 295—Attachment—Assignment.*—A claim under s. 295 cannot be enforced as an attachment, against which an assignment is rendered void by s. 276 of the Code. DURGA CHURN RAI CHOWDHRY v. MONMOHINI DASSI, **18 C. 771.** (7 A. 702, *F.*) [*F.*, 25 A. 431=23 A.W.N. 93; *D.*, 16 B. 91.]

(1337-*a*)—*Ss. 64, 73 (=Civ. Pro. Code*, 1882, *ss. 276, 295)—Decree—Execution—Attachment—Claim for rateable distribution—First attachment ceasing to exist on compromise of the claim—Private sale does not affect the claimant under* s. 299—*Practice*—On the 6th July, 1900, D obtained a decree against B and in execution of it attached property belonging to B. On the 30th July the parties entered into a private compromise with the result that B sold the property to M and paid off D. This private satisfaction of the decree was certified to the Court and D's *darkhast* was disposed of by the Court on the 1st December, 1902. In the meanwhile, on the 11th August, 1900, H, another decree-holder against B, presented an application to execute his decree, praying that either he should be held entitled to rateable distribution under s. 295 of the Code of 1882, or that the property already attached in execution of D's decree ought to be attached in execution of his own. The Court granted the prayers. The property was sold at a Court-sale and purchased by the defendant on the 17th February, 1905. M's representative (the plaintiff) sued to recover the possession of the property relying on the sale-deed to M: *Held*, (1) that, when D's attachment proved abortive by the compromise for the purposes of H's decree, it survived for the purposes of H's decree by force of his application for either rateable distribution or a second attachment. (2) That, therefore, the private sale to M was void under s. 276 of the Code of 1882. BIBI MIYAKHAN v. GULABCHAND RAMCHAND, **13 Bom. L.R. 1189.**

(1337-*b*)—*Ss. 64, 73, 68, 70, 71, sch. III, r. 11 (=ss. 276, 295, 320, 325 A, Civ. Pro Code* 1882)—*Decree—Execution—Attachment—Order for sale—Execution-proceedings transferred to Collector—Disposal of* darkhast by Mamlatdar—Mamlatdar *agent of Collector—Certifying adjustment of a decree—Another decree—Attachment under the second decree—Execution of second decree transferred to Collector—Claim of decree-holder under the first decree satisfied—Collector asked to dispose of the* darkshasts—*Private alienation by judgment-debtor—Validity of—Claims enforceable under the attachment—Claim for rateable distribution of other decrees.*—*The English Bills of Sale Act of* 1878, s. 8.—Plaintiff, having obtained a money-decree against one B, got certain property belonging to B attached in execution of the decree. The execution was thereafter transferred to the Collector under s. 320 of the Civ. Pro. Code of 1882. While the execution-proceedings were pending before the Collector, the plaintiff obtained another money-decree in another suit against B and in execution of it the same property was again attached. The proceedings under the latter decree were also transferred by the Civil Court to the Collector, as the latter was seized of the property of B in execution of the first decree. While the Collector was in management of B's property and taking steps for the execution of the first decree, the plaintiff informed the Mamlatdar who was carrying on the execution work on behalf of the Collector, that, as B had satisfied the decree, the necessity for sale had disappeared and that the *darkhast* could be disposed of. This was done on the 21st May, 1904, when the *Mamlatdar* made the following endorsement on the plaintiff's application; "as the *darkhast* has been disposed of, the papers are sent that they may go to the Court." On the 8th June, the Collector formally forwarded the papers to the Court, where they were received on the 16th June, 1904. In the meantime, that is, on the 31st May, 1904, B executed a deed of sale of the property to the defendant in consideration of the latter's satisfying the plaintiff's first decree and other debts of B. The plaintiff obtained a third decree against B in execution of which

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the property was sold through the Civil Court in March 1905 and was purchased by the plaintiff himself at the Court-sale. He then sued for a declaration that the property in the hands of the defendant was liable to be attached and sold in execution of his second degree which remained unsatisfied. It was contended (1) that the deed relied on by the defendant was invalid having regard to the provisions of s. 325-A of the Code, the sale having been made before the 16th of June, 1904, until which date the Collector was, in the eye of law, capable of exercising any of the powers conferred on him by the Court; (2) that the Collector was not warranted in acting upon the plaintiff's admission that the decree had been satisfied, because the satisfaction was one made out of Court and, not having been certified to the Court, it could not be recognised as the payment of the decree under s. 258; (3) that the sale in question was illegal and void under s. 276 by reason of the circumstance that the Civil Court had not received papers from the Collector until the 16th of June, 1904 and that the property had been attached by the Civil Court in execution of the second decree and the execution under that decree transferred to the Collector. *Held*, (1) that the sale in question was not void under s. 325-A, for ss. 322 to 325 presupposed a decree which had to be satisfied and which was, therefore, capable of execution. That could not be said of a decree, which its holder, by his declaration to the Collector or his agent the *Mamlatdar*, acknowledged to have been satisfied. (2) That the action of the Collector on the 8th June, 1904, in forwarding the papers to the Civil Court related back to the date on which the *Mamlatdar*, as the Collector's agent, had, on the plaintiff's application, passed his order disposing of the *darkhast i e.*, 21st May, 1904. (3) That the intimation to the Collector, who was in charge of the execution, amounted to a due certifying of the adjustment of the decree which satisfied the conditions of s. 258. (16 A. 228, *F.*) (4) That s. 276 did not apply, since, though the attachment had existed at the date of the sale and was never formally raised, the *darkhast* claim having been satisfied was no longer enforceable under it. *Held*, further, that the second attachment itself was illegal under the provisions of the last portion of the first paragraph of s. 325-A, and it could not affect the private sale to the defendant by B; and that the sale was not illegal and void under s. 276, there being no claim enforceable under such an attachment. *Held*, also that the sale could not be invalidated, even under the combined effect of ss. 276 and 295 read together. The moment the attachment of the plaintiff came to an end by reason of the satisfaction, of his first decree sent to the Collector for execution, all claims enforceable under attachment ceased to be enforceable under it. A claim under another decree cognizable only under s. 295 ceased to be operative for the purposes of ss. 276 and 295, the same being dependant upon the continuance of the said attachment. (16 B. 91, *D.*; 8 C. 279, 6 A. 33, 23 M. 478, *R.*) When a decree-holder intimates to the Collector that his decree has been satisfied and that the necessity for its execution, by the Collector has ceased to exist, the Collector's powers under ss. 322 to 325 of the Civ. Pro. Code of 1882 also cease, because the very foundation of them, consisting in the fact of a decree which is alive and capable of execution, has disappeared. The provisions of s. 276 of the Code make the private alienation void, not absolutely but only "as against all claims enforceable under the attachment," referred to in it. Where the execution-proceedings, in the course and for the purpose of which the attachment was made, have come to an end on account of satisfaction of the decree by the judgment-debtor, and in consequence the decree is no longer alive, the attachment also ceases, and there is no longer any claim "enforceable" under the attachment to make the private alienation effected by the judgment-debtor during the attachment, void. The person for whose protection s. 276 was primarily intended had had his claim in that event satisfied otherwise than by attachment. As to any claim under another decree cognizable under s. 295, that would be dependent on the continuation of the said attachment. Where that attachment itself was swept away, (as by the disposal of the *darkhast* by the Collector) all other claims cognizable under it ceased to be operative for the purposes of ss. 276 and 295. The only bar in the way of the private alienation was removed as if it never existed in law; and the question as to private alienation during attachment became reduced to one between the judgment-debtor and his alienee. KHUSHALCHAND v. NANDRAM, **13 Bom. L. R. 977.**

(1338)—*Ss. 64, 73, O 39, r. 1 (=ss. 276, 295, 492, Civ. Pro. Code*, 1882)—*Contract Act, s. 23—Alienation made during pendency of temporary injunction—Application for rateable distribution—Effect.*—The effect of a temporary injunction granted under s. 492 (*b*) is not to make a subsequent alienation of the property illegal and void within the meaning of s. 23 of the Contract Act. (9 A. 497, *F.*). The words "shall be void as against all claims enforceable under the attachment" in s. 276, Civ. Pro. Code, cannot include the claim of a person who has not caused the property of the judgment-debtor to be attached, but has simply asked for a rateable share of the assets which might be realized by the sale of the property of the judgment-debtor. Such a claim cannot be regarded as a claim enforceable under the attachment, and will not prevent the judgment-debtor from selling. MANOHAR DAS v. RAM AUTAR PANDE, **25 A. 431=A.W.N. 1903, 93.** (7 A. 702, *F.*; 15 C. 771, 16 B. 91, *D.*) [*R.*, 28 M. 380=15 M.L.J. 202, 148 P.W.R. 1908=81 P.R. 1908, 7 M.L.J. 143=5 Ind. Cas. 92.]

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(1339)—Ss. 64, 115; O. 22, r. 10—*See* ACT I OF 1894, s. 54, 7 Ind. Cas. 481=12 C.L.J. 545.

(1340)—*S. 64, O. 21, rr. 53, 54, 55, 56, 58, 59, 60, 61, 62, 63 (Civ. Pro. Code, 1877, ss. 273-283)—Attachment—Claim to, or objection to attachment of attached property—Subsequent suit.*—The sub-mortgagee of an usufructuary mortgage sued his mortgagor, the original usufructuary mortgagee, and obtained a decree against him. And in execution of his decree, he attached the mortgage-amount due to the usufructuary mortgagee from the mortgagor. The mortgagor objected to the attachment on the ground that the mortgage-amount had been paid long before the attachment, and the attachment was, consequently, removed. The mortgagor sued the mortgagee and the sub-mortgagee for possession, and in that suit the sub-mortgagee contended that the mortgage-amount had not been paid. *Held* that, if the order in the execution-proceedings allowing the plaintiff's objection had been made after due investigation, in the sense of ss. 278, 279, 280, the fact that the sub-mortgagee had not contested that order in a civil suit would preclude him from raising the defence in the present suit. But, as a matter of fact in the present case, the order had not been so made and was therefore not binding. GANESH SINGH v. SURAT SINGH, **A.W.N. 1881, 126.**

(1341)—*S. 64, O. 21, r. 55 (=Civ. Pro. Code, 1859, ss. 240, 245)—"Private alienation," meaning of.*—S. 240, Civ. Pro. Code, declares that any private alienation of the property attached, whether by sale, gift, or otherwise during the continuance of the attachment, shall be null and void. The words "any private alienation" in the section were not intended to apply to an alienation effected with the acceptance of the decree-holder to satisfy the decree and duly sanctioned by the approval of the Court which issued the process of attachment. This is clearly shown by s. 245 of the Code providing for the withdrawal of an attachment upon satisfaction of the decree otherwise than by payment of the amount decreed and all costs and charges into Court. Under this provision, an alienation of the property under attachment, accepted by the decree-holder in satisfaction of the decree, may, after execution, be sanctioned by the Court, and an order thereupon be made for the withdrawal of the attachment. An alienation so sanctioned cannot therefore be considered as one to which s. 240 was meant to be applicable. ANNAVUNDAVAN v. IYASAWMY PILLAI, **6 M.H.C. 65.** [*R.*, 7 C. 107, P.C.]

(1342)—*S. 64, O. 21, r. 58 (=ss. 276, 278, Civ. Pro. Code, 1882)—Private alienation of property under attachment—Sale voidable, not void—Partition of property purchased—Dismissal of suit by attaching creditor as co sharer, for declaration of his title to property purchased—Subsequent application for sale of property in execution of decree*—Res judicata—*Purchaser, judgment-debtor's representative.*—In execution of a money decree, the respondent attached certain immoveable property. While the attachment was subsisting, the judgment-debtor sold a certain part of the property to the appellant. In a suit for partition of the property brought under the Land Revenue Act, the respondent, as a co-sharer, contended in vain that the judgment-debtor had no title to the property sold and that he had acquired title to it by adverse possession. Subsequently, the respondent, as a co-sharer, brought a suit which was dismissed in the Civil Court for a declaration of this title to that property. Consequently, he applied for sale of the property in execution of his decree, to which objection was raised by the appellant on the ground that, in consequence of the previous litigation, the matter had become *res judicata*. The appeal was preferred, the objection having been overruled. The respondent took preliminary objection to the effect that no appeal lay, the appellant not being judgment-debtor or his representative. *Held*, that the appellant, having purchased the property pending the attachment, was the representative of the judgment-debtor within the meaning of s. 244, Civ. Pro. Code, and that an appeal would lie, inasmuch as the order of the Court below amounted to a decree within the definition of the Code. (19 A. 332, *R.*) *Held*, also, that a sale of property under attachment was not void, but was only voidable under s. 276, against the attaching creditor, and that the sale could only be avoided by the attaching creditor if he wished to proceed against the property of his co-sharer. That, in the suit brought by the respondent, not as attaching creditor, but as co-sharer, he need not have raised the plea that the sale to the appellant was not a valid sale, because the property sold had been attached before the sale. KAMAL NAIN v. SAT NARAIN, **2 A.L.J. 265.**

(1343)—*S. 64, O. 21, rr. 60, 63 (=ss. 276, 280, 283, Civ. Pro. Code, 1882)—Attachment—Release—Subsequent suit by attaching creditor—Decree establishing right of attachment—Attached property mortgaged between release and subsequent decree.*—The order for release made under s. 280, is not final but only provisional. It is liable to be set aside by regular suit under s. 283. Although an order under s. 280 operate to prevent the attaching creditor from proceeding to sell the attached property, it does not operate so as at once to remove the attachment and leave the judgment-debtors free to deal with the property as they like. If they do deal with it, they and those with whom they deal do so subject to the result of the suit as to the attachment being maintained. When, on the release of an attachment, a decree is obtained by the attaching-creditor establishing his right of attachment, the effect of such a decree is to set aside the order of release and to restore the original state of things which had existed prio

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to the order of release. So, the rights of the purchaser at the sale under the attaching-oreditor's decree will not be affected by a mort. gage of the property attached between release and subsequent decree. BONOMALI RAI v. PROSUNNO NARAIN CHOWDHRY, **23 C. 829.** [*Relied on*, 33 C. 1158=10 C.W.N. 978; *F.*, 6 A.L.J. 434=31 A. 367.]

(1344)—*S. 64, O. 21, r. 83 (=Civ. Pro. Code, ss. 276, 305)—Object of section.*—The object of s. 305, Civ. Pro. Code, is to prevent the sale of property attached in execution of decree, if the whole decree can be satisfied within a reasonable time by private alienation, and at the same time to protect the lien the decree-holder has obtained under s. 276. Therefore, a mortgage of attached property for a sum less than the decree amount, though it may be *bona fide* and binding as between the mortgagor (judgment-debtor) and the mortgagee, cannot be valid against the decree-holder, nor can it affect the lien acquired by him under s. 276. GURUSAMI v. VENKATSAMI, **14 M. 277=1 M.L.J. 220.**

(1345)—*S. 64, O. 21, r. 83 (=ss. 276, 305, Civ. Pro. Code, 1882)—Sale of property pending an attachment—All claims enforceable under the attachment—Sanction of the Court to the sale.*—*Prima facie* a sale-deed executed by one person in favour of another operates to convey to that other the interest of the executant in the property the deed purports to pass. But to prevent frauds on decree-holders it is provided by s. 276 of the Civ. Pro. Code, that "when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid, any private alienation of the property atttached, whether by sale, gift, mortgage or otherwise . . . during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." S. 305 of the Civ. Pro. Code, is an enabling section, and qualifies the prohibition contained in s. 276; on compliance with the conditions of that section, a private alienation, notwithstanding s. 276, becomes absolute even against all claims enforceable under the attachment. SHIVLINGAPPA v. CHANBASAPPA, **8 Bom. L.R. 16=1 M.L.T. 46=30 B. 337.**

(1346)—*S. 64, O. 39, r. 1, (Civ. Pro. Code 1882, ss. 276, 492)—Temporary injunction—Alienation by defendant subsequent to grant of temporary injunction—Suit by decree-holder on private sale deed against transferee of attached property.*—*Held* that s. 276 does not render an alienation of attached property absolutely void, but only voidable as "against all claims enforceable under the attachment," and, therefore, does not entitle a decree-holder who having purchased the property from the judgment-debtors by a private sale-deed, has dropped the execution-proceedings to bring a suit for possession against a third party to whom the judgment-debtors have, in defiance o an injunction under s. 492, alienated a portion of the property. BALDEO PERSHAD v. PARICHAT, **A.W.N. 1900, 148.** (9 A. 497, *R.*)

——S. 63 (New Cf. 316=1859 s. 259.)

See EXECUTION OF DECREE.

See SALE—SALE IN EXECUTION OF DECREE.

(1346-*a*)—S. 65—*See* NOS. 149, 912, 917, *supra*, AND NOS. 4164, 4256, 4380, 4381, 4399, *infra.*

(1347)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—"Subsisting decree," meaning of,*—The words "subsisting decree" mean a decree unreversed and in full force, and not a decree, the execution of which is not barred by limitation. SARODA CHURN CHUCKERBUTTY v. MAHOMED ISUF MEAH, **11 C. 376.**

(1348)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro. Code, 1882)—Confirmation of sale—Title, becomes complete on the date of confirmation, but relates back to the date of sale.*—In an auction sale, the legal title of the purchaser to the property is not complete until the sale is confirmed. But if the sale is subsequently confirmed, the confirmation relates back, and the purchaser becomes the owner of the property from the date of the original purchase. SIRAJ-UD-DIN v. MUSAMMAT MUMTAZ-UN-NISA, **2 Ind. Cas. 81.** (17 B. 375, 19 A. 188, 2 C.W.N. 589, *F.*; 24 A. 475, 24 A.W.N. 54, *R.*)

(1349)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro. Code, 1882)—When title vests in auction-purchaser—Confirmation of sale—Sale-certificate.*—In an auction-purchaser the title vests on the date of the confirmation of sale, no matter when the sale-certificate may issue. There is no period fixed during which the auction-purchaser has to make an application to obtain a sale certificate. SALIG RAM v. NARAIN DAS, **5 Ind. Cas. 263.** (19 A. 188, 27 B. 334, *R.*)

(1350)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro. Code, 1882)—Auction-purchaser—Title commences from the date of sale certificate—Right to realize rents and profits falling due before confirmation of sale.*—Under s. 316 of the Code of 1882, title to the property sold vests in the auction-purchaser from the date of the certificate of sale and not before. Therefore an auction-purchaser is not entitled, under the old law, to recover rent of premises purchased by him falling due before the confirmation. SHIAM LAL v. NATHE LAL, **7 Ind. Cas. 65.** (24 A. 475, A.W.N. 1902, 145, 15 C. 546, *F.*)

(1351)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Certificate of sale—Proclamation of sale—Property sold.*—A certificate of sale, granted under s. 316 of the Civ. Pro. Code, is not conclusive as to the property sold. So far as regards the parties to the suit and those claiming through or under them, the certificate is determinative as to the date

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from which the property sold actually vests in the purchaser. The property sold is what is described in the proclamation of sale. BALWANT v. HIRACHAND, **3 Bom. L.R. 217=27 B. 334.**

(1352)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro Code, 1882)—Attachment of decree, after sale but before confirmation—Right of attaching creditor to have sale confirmed.*—When a person, who had obtained a decree, purchased immoveable property at an auction sale held in execution of the same, but before the sale was confirmed and satisfaction of the decree entered in the record, the decree was attached by a judgment-creditor of the decree-holder, *held* that the effect of the attachment was to place the attaching creditor in the position of the decree-holder so as to entitle him to have the sale confirmed under s. 316 of the Code, and to take out a certificate of sale. COHARIA RUDRANI KOER v. RAM PERTAP MULL, **11 C.W.N. 158.** [*R.*, 7 C.L.J. 1.]

(1353)—*S. 65, O. 21, r. 94 (=s. 316 Civ. Pro. Code, 1882)—Registration Act, s. 50—Registration of certificate of sale--Prior unregistered optionally registrable mortgage—Rights of purchaser.*—A purchaser of land, at a Court sale, in execution of a decree for money, does not acquire priority by registering his certificate of sale, as against a mortgagee, whose mortgage is optionally registrable and unregistered, but prior in date to the institution of the suit. *Semble:*—A certificate of sale issued by a Court under s. 316, Civ. Pro. Code, if duly registered, takes effect under s. 50 of the Registration Act, 1877, against all unregistered incumbrances. RAMARAJA v. ARUNACHALA, **7 M. 248.** (6 B. 193, *Appr. & F.*) [*F.*, 9 M. 495; *R.*, 16 M. 148.]

(1354)—*S. 65, O. 21, r. 94 (= Civ. Pro. Code, 1882, s. 316)—Execution of decree—Sale in execution—Right, title and interest of judgment-debtor.*—What passes at an execution-auction sale is the interest of the judgment-debtor and no more. If, in the present case, the property had been transferred by the mortgagor to the mortgagee absolutely before the attachment, then, nothing remained in the mortgagor, and nothing passed at the sale. If there had been no absolute tranefer, but, if there was a valid mortgage subsisting before the attachment, then, the title of the mortgagor only, that is, the right to redeem the property from the mortgage, passed to the auction-purchaser, and the mortgagee is entitled, not to possession of the property, but to a declaration that the transfer to the auction-purchaser was subject to the mortgage. MAUNG GYI v. NGA HLE AND NGA SHWE DWE, **L.B.R. 1872—1892, 415.**

(1355)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro, Code, 1882)—Decree reversed, before sale confirmed—Effect of.*—Where property is sold in execution of a decree, but before the sale-certificate is issued, the decree, under which the sale took place, is reversed, the title to the property does not vest in the purchaser. A Court, therefore, should hold its hand and refuse to grant a certificate, if, before it is issued, the decree is set aside. A person, whose property has been sold, is, in such case, entitled to his property, and not the purchase-money. RAM SUKH v. RAM SAHAI, **4 A.L.J. 486=A.W.N. 1907, 198=29 A. 591.**

(1356)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Limitation Act (XV of 1877.) sch. II, art. 178—Sale certificate.*—The law of limitation is not applicable to applications for the grant of a sale-certificate under s. 316 of the Code. PETITION OF KISHEN SINGH, **A.W.N. 1883, 262.** (4 M. 172, 6 B. 586 *F.*) [*R.*, 9 A. 364, 30 A. 390=5 A.L.J. 516=A.W.N. 1908, 162].

(1357)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Rent Cecovery Act (VIII of 1865) s. 10—Liability of purchaser of right, title and interest of former tenant, when commences—Confirmation of sale.*—Where a person purchased at a Court-sale the interest of a former tenant in certain land in a zamindari, the title in the land in the occupancy of the former tenant vests in the purchaser under s. 316, Civ. Pro. Code, on the date of confirmation of the sale; and where, by the terms of the muchalkas which have been executed by the previous tenant, rent is payable in four equal instalments in a year, the purchaser is liable only for those instalments in the year of purchase which fall due subsequently to the confirmation of sale. The date on which the purchaser recovers actual possession from the former tenant, subsequent to the confirmation of sale, is immaterial in regard to his liability to pay rent accruing due subsequent to such confirmation. SIR RAMASAMI MUDALIAR v. ANNADORAI AYYAR, **23 M. 454.** [*R.*, 27 M. 241, F.B.=14 M.L.J. 67.]

(1358)—*S. 65, O. 21, r. 94 (=s. 316, Civ. Pro. Code, 1882)—Sale in execution—Sale absolute—Death of purchaser—Grant of certificate to his representative.*—When a sale in execution has become absolute, the Court can, under s. 316 of the Code of Civil Procedure, grant the certificate prescribed therein to the representative of a deceased purchaser. *In re* VINAYAK, **1 Bom. L.R. 645=24 B. 120.**

(1359)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Auction-purchaser—Granting of sale certificate—Rights.*—The title of an auction-purchaser to whom a certificate of sale has been granted under s. 316, Civ. Pro. Code, relates back to the date of the sale, and he can therefore maintain an action for damages for an injury to the property committed before the confirmation of the sale. ADHUR CHUNDER BANERJEE v. AGHORE NATH AROO, **2 C.W.N. 589.** (17 B. 375, 12 C. 597, *R.*) [*R.*, 7 C.L.J. 1, 11 C.W.N. 495, 10 C.C. 273; *D.*) 26 C. 176; 22 A. 168, 8 C.C. 203; 11 C.W.N. 240, Note.]

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(1360)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Purchase at execution-sale—Right of purchaser before confirmation—Equitable interest.*—On the 27th February, 1886, the property in dispute was sold at an execution-sale and knocked down to the plaintiff. On the 10th March, 1886, the property was sold again, also in execution of a decree, and knocked down to the defendant. The latter sale was confirmed on 3rd July, 1886, and the former; subsequently, on 21st July, 1886. Certificates of sale were issued both to the plaintiff and to the defendant on 22nd September, 1886, and on 14th February, 1887, the defendant was put in possession. *Held* that the plaintiff was entitled to recover. *Per Telang, J.*—The words of s. 316, Civ. Pro. Code, 1882, "the title to the property shall not vest before the certificate" are not necessarily inconsistent with the subsistence of an equitable interest short of the full perfected title in the purchaser even before the certificate issues. And the facts that the transaction which takes place at the time of the auction is called a sale, that a cancellation of it is called the setting aside of a sale, that a subsequent auction after the failure of the first is called a re-sale—all these things show that in the contemplation of the Legislature the transaction even before confirmation and issue of a certificate is a sale—though a sale liable to be set aside. It is something more, therefore, in its legal aspect, than a mere contract for sale. *Per Jardine, J.*—The reference to the parties and persons claiming under them in the addition made to s. 316 in Act XII of 1879, re-enacted in the Code of 1882, would be surplusage if the Legislature had intended the addition to apply to third parties. The new words in s. 316, Civ. Pro. Code, as to the date when "the title to the property sold shall vest" seem to be technical and to point to the complete title arising on the sale becoming absolute, such as might be requisite to enable the purchaser to bring a suit in ejectment, but distinguishable from the *inchoate* title which suffices for a suit of an equitable nature. DAGDU v. PANCHAMSING GANGARAM, **17 B. 373.** (6 B. 139, *R.*) [*F.*, 2 C.W.N. 589; *Appr.*, 19 A. 188; *R.*, 36 P.L.R. 1303=9 P.R. 1903, 11 P.R. 1906 =4 P.L.R. 1906, 11 C.W.N. 495, 7 C.L.J. 1, 2 Ind. Cas. 81, 33 A. 45=7 A.L.J. 893=7 Ind. Cas. 409.]

(1361)—*S. 65, O. 21, r. 94 (=Civ. Pro. Code, 1882, s. 316)—Auction-purchaser, rights of, in the absence of sale certificate granted.*—Where the plaintiff's equity of redemption had been sold and the sale confirmed, the mere fact of the auction-purchaser not having obtained a sale-certificate could not by itself be taken to entitle the plaintiff to treat the sale as a nullity so as to be able to maintain a suit for redemption of his mortgage. CHIDDO v. PIARI LAL, **19 A. 188=A.W.N. 1897, 15.** (17 B. 375, A.W.N. 1894, 54, *Appr.*) [*F.*, 2 Ind. Cas. 81; *R.*, 11 C. W.N. 495, 7 C.L.J. 1.]

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(1362)—S. 65, O. XXI. r. 94—*See* MESNE PROFITS—GENERAL, 24 A. 475=A.W.N. 1902, 145.

(1363)—S. 65, O. XXI, r. 94—Title of auction-purchaser—Sale by judgment-debtor after auction-sale but before confirmation—Effect—*See* MORTGAGE—GENERAL, 8 Ind. Cas. 657.

(1364)—S. 65, O. XXI. r. 94—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 15 C. 546.

(1365)—S. 65, O. XXI, r. 94—Auction-purchaser, right of, to pre-empt before confirmation of sale—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 8 O.C. 202.

(1366)—S. 65, O. XXI, r. 94—Scope and effect—Change of law in s. 65 of the Code of 1908—*See* PRE-EMPTION—MISCELLANEOUS, 7 A.L.J. 893=7 Ind. Cas. 409.

(1367)—S.65, O. XXI, r. 94—See REGISTRATION ACT, 1908, s. 17, 5 A. 568, F.B.=3 A. W.N. 159.

(1368)—*S. 65, O. 21, r. 94 and s. 66 (=Civ. Pro. Code, 1882, ss. 316, 317)—Suit by real purchaser against* benami *purchaser.*—Provision is made in s. 317, Civ. Pro. Code, for those cases in which, with the knowledge, sanction, and consent of the real purchaser, a person who has acted as his *benamidar* at an auction-sale obtains from the Court which had effected the sale a certificate under s. 316, Civ. Pro. Code, stating him to be the certified purchaser. The provisions of the first paragraph of s. 317, Civ. Pro Code, where never intended to prohibit a suit in which the plaintiff comes into Court and establishes by proof that behind his back and without his consent, though he was the real purchaser, the defendant had obtained a certificate of sale in his own name. LAKHPAT RAI v. MURLIDHAR, **A.W. N. 1887, 220.**

(1369)—*S. 65, O. 21, r. 94, O. 41, r. 24 (=ss. 316, 565, Civ. Pro. Code, 1882)—Suit by purchaser—No certificate of sale—Effect.*—In a suit by the action-purchaser to eject, not a third party, but the very person who was a party to the original suit which led to the execution-sale, or persons having interests identical with such party, the mere non-production of the sale-certificate cannot defeat the suit. The purchaser's title gets completed as against the parties to the suit by the order confirming the sale. BUDHU v. HIRA, **27 P.R. 1892.** (12 B. 589, *F.*; [*R.*, 45 P.R. 1902=42 P.L.R. 1902; *Cited*, 9 P.R. 1903=36 P.L.R. 1903, 45 P.R. 1902= 42 P.L.R. 1902.]

——**S. 66 (=1882, s. 317=1877, s. 317=1859, s. 260.)**

See EXECUTION OF DECREE.

See SALE—SALE IN EXECUTION OF DECREE.

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(1370)—*S. 66 (=s. 317, Civ. Pro. Code, 1882) —Auction-purchaser—Mortgagee of the auction-purchaser—Mortgagee can claim protection of s. 317—Plea of* bona fide *purchaser for value without notice—Transfer of Property Act (IV of 1882), s. 41—Reasonable care—Constructive notice.*—H, a party to the decree in execution of which the property in dispute was sold at a Court-auction, purchased it *benami* in the name of A, and advanced him Rs. 9,600, from which Rs. 9,300 were paid as the price of the property. The remainder Rs. 300 and Rs. 1,400 more which A obtained from H were spent in repairs to the house. The house underwent extensive repairs, to meet the costs of which A mortgaged it to M, who claimed to be a *bona fide* purchaser for value without notice of H's title. All through the time H remained in possession of the house. Subsequently she used both A and M for a declaration that she was entitled to the property free of all incumbrances. During the pendency of the suit A, and later on his legal representative, his widow, died ; and no one was brought on the record to represent him. *Held* that the suit was not maintainable in view of the provisions of s. 317 of the Civ. Pro. Code of 1882, for M, the mortgagee, claiming under the Court-sale purchaser A, enjoyed the same immunity from suit as his mortgagor A. (8 Bom. L.R. 873, *R.*) That M's plea of *bona fide* purchaser for value without notice was also a good defence to the suit. The doctrine of constructive notice applies in two cases: first, where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an enquiry after the charge on incumbrance of which he actually knew ; and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged and designedly abstained from enquiring for the very purpose of avoiding notice. The expression "reasonable care, &c." in s. 41 of the Transfer of Property Act, 1882, means that, although a purchaser of property is under no legal obligation to investigate his vendor's title, yet, in dealing with real property as in other matters of business, regard is had to the usual course of business ; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. The occupation of property which has not come to the knowledge of the party charged is not a constructive notice of any interest in the property. MANJI KARIMBHAI v. HOORBAI, **12 Bom. L.R. 1044=8 Ind. Cas. 752.**

(1371)—*S. 66—Sale-certificate— Right of party other than holder of sale-certificate.*—Following the decision of the Privy Council in the 10th Moore's Indian Appeals, p. 522, that notwithstanding the provision in Act VIII of 1859, s. 260, it is open to a party other than the holder of the sale-certificate to show that at the sale itself the purchase was made on his behalf, the High Court set aside judgments of the lower Courts founded on the law as it stood prior to that decision. SYUD WASSEL RUHMAN v. SHEIKH GOLAM RUSOOL, 22 W.R. 270.

(1372)—*S. 66 (=s. 317, Civ. Pro. Code, 1882)—Assignee from certified purchaser—Suit against assignee.*—This section does not bar a suit against such assignee. PIRAMANAYAGAM PILLAI v. ALWAR NAICKER, **18 M.L.J. 305, (21 M. 7, *F.*)**

(1373)—*S. 66 (=s. 317, Civ. Pro. Code, 1882) —Object of—Plea that purchase was made on behalf of family—Whether section applies.*—The object of s. 317, Civ. Pro. Code, 1882, is to check *benami* purchases. That section has no application to a case where the purchase was made in the name of one of the members of a Hindu family and it is alleged that he made the purchase on behalf of the family. HARI SINGH v. SHER SINGH, **6 A.L.J. 174=31 A. 282=2 Ind. Cas. 220.**

(1374)—*S. 66 (=Civ Pro. Code, 1882, s. 317)—No bar of suit against person in possession.*—The section does not enhance a suit brought by a certified purchaser against a party in possession, HARICHAND DULICHAND v. KISHENDAS, **9 C.P.L.R. 55.**

(1375)—*S. 66 (=s. 317, Civ. Pro. Code, 1882) —Title of auction purchaser — Objection as to* benami *character of purchase—Substainability of.*—The effect of the section is to make the title of the auction-purchaser complete against any one who claims on the ground that the purchase was *benami* on behalf of another ; it is immaterial that the suit is maintained by the certified purchaser and not against him. BALAJI v. DAJIBA, **2 C.P.L.R. 137.**

(1376)—*S. 66 (=Act VIII of 1859, s. 260)—Certified purchaser.*—In a suit by the certified purchaser at an execution sale, to establish his right to, and for possession of, the property purchased by him, the defendant is not precluded, by s. 260 of Act VIII of 1859, from contesting the suit on the ground that *he* was the actual purchaser of the property. S. 260 declares that "any suit brought against the certified purchaser—shall be dismissed." The section should be construed literally and applied strictly. JAN MUHMMAD v. ILAHI BAKSH, **1 A. 290.** [*R.*, 3 O.C. 229.]

(1377)—*S. 66 (=Civ. Pro. Code, 1882) s. 317) —Execution of decree—Certified purchaser buying* benami.—In execution of a decree against the judgment-debtor, a certain house was sold and was purchased by the plaintiff who obtained the certificate of sale, but failed to obtain the actual possession of the house. He brought a suit for possession of the house against the judgment-debtor who urged that the house

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was purchased by her at the auction in the name of the plaintiff. *Held*, that s. 317 of the Civ. Pro. Code, should be construed literally and applied strictly, and should not be applied so as to assist the certified purchaser to enforce his claim against the property in possession by relieving him from the necessity of showing the justice of his claim or excluding inquiry as to its fraudulent character. RAZA HUSAIN v. DIDAR FATIMA, **8 O.C. 229.** [*R.*, 8 O.C. 306.]

(1378)—**S. 66** (=s. *317, Civ. Pro. Code*, 1882) —*Sale of property in execution of decree—Purchase by the judgment-debtor's son—Second sale of the same property by the decree-holder—Purchase by stranger—Suit by the second purchaser for possession.*—In execution of a decree obtained by a cousin of the defendant respondent against the respondent's father, one third share of the judgment-debtor in some house-property was sold and purchased by the respondent. Some time after, the decree-holder attached and put up again for sale the same interest in the same property, which had been attached and sold under the former decree. The plaintiff appellant purchased the property and brought a suit for possession against the decree-holder and judgment-debtor and two other persons, who were alleged to be co-parceners in the house property. The respondent was not originally added as a party to the suit, but under s. 32 of the Code, he was subsequently added to the array of defendants. *Held*, under the circumstances, that s. 317 of the Code was applicable to the suit and it must be dismissed. The suit against the respondent could be maintained only on the ground that the purchase was made on behalf of another person. KHUDA BAKHSH v. AZIZ ALAM, **27 A. 194=A.W.N. 1904, 273=1 A.L.J. 646.**

(1379)—**S. 66** (=s. *317, Civ. Pro. Code*, 1882) *Purchase by decree-holder without leave—Defendant a* benamidar—*Suit for recovery of money, maintainability of—Suit for money had and received.*—The plaintiffs put up certain property of their judgment-debtor to sale. They applied for leave to bid, but the Court refused the application. They then, according to the finding of the Court, purchased the property in the name of the defendant who promised to convey it to them. Upon the defendant's refusal to convey, they brought this suit for specific performance of the contract of sale, or in the alternative for recovery of the money advanced. The first relief was subsequently withdrawn. *Held* that the money could not be recovered as money lent, as in fact no money was lent. *Held* further that even if the suit could be treated as a suit for money received by the defendant for the plaintiffs, the plaintiffs could not succeed except by showing that the defendant made the purchase on their behalf. Such a suit being prohibited by s. 317, Civ. Pro. Code 1882, was not maintainable, RAGUNANDAN LAL v. MATRU MAL, **7 A.L.J. 623=6 Ind. Cas. 404.**

(1380)—*S. 66* (=s. *317, Civ. Pro. Code*, 1882) —*Joint decree—Purchase at sale in execution by one decree-holder—Suit for declaration that property purchased was joint.*—In execution of a joint decree on a mortgage, one of the decree-holders obtained leave to bid at the auction-sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage-debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. *Held* that s. 317 did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. ACHHIBAR DUBE v. TAPASI DUBE, **A.W.N. 1907, 166=29 A. 557.** (12 B.L.R. 317, *R.*)

(1381)—*S. 66* (=s. *317, Civ. Pro. Code*, 1882) —*Suit by certified purchaser—Person in possession may set up the plea that the plaintiff was a* benamee *Purchaser.*—Where a certified purchaser at a Court-sale, held in execution of a decree, brings a suit for rents and profits of the property purchased, as against a person in possession thereof, the latter may set up the plea that the plaintiff purchased at the Court-sale *benamee* for himself. S. 317 does not preclude such a defence. GHAZI-UD-DIN v. BISHEN DIAL, **A.W.N. 1905, 39=2 A.L.J. 111 =27 A. 443.** (23 A. 175, *Disc.*)

(1382)—*S. 66* (=*Act VIII of 1859, s. 260*)— *Execution of decree—Certified purchaser.*—Where a judgment-creditor sued for a declaration that the certified purchaser of property in execution of his decree was merely a trustee for the judgment-debtor, that the purchase in his name was made with the intention of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor; *held* that s. 260, Act VIII of 1859 was in no way a bar to the suit. PURAN MAL v. ALIKHAN, 1 A. 235. (N.W.P. 1874, 265. *F.*) [*App.*, 21 C. 519, 18 A. 461; *R.*, A.W.N. 1896, 151, 21 A. 29=A.W.N. 1898, 187, 26 A. 82.]

(1383)—*S. 66* (=s. *317, Civ. Pro. Code*, 1882) —*Trusts Act (II of 1882), ss. 82, 88—Purchased by alleged agent of decree-holder at execution sale*—The decree-holder was refused permission to bid. His agent, of whose duty making purchases was not a part, purchased the property in his own name and got his name entered in the sale-certificate. The decree-holder supplied the purchase-money, ratified the purchase and agreed to take a conveyance of the property after confirmation of the sale. On the defendant refusing to convey, the decree-holder sued for a decree that he was the real purchaser and for possession. *Held* that the proviso to s. 317 did not exclude the operation of the first part of

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the section, and, therefore, the suit was not maintainable. *Held* also that ss. 82, 88 of the Trusts Act did not apply, because it cannot be said that there is any fiduciary duty on an agent towards his principal to assist him in evading the provisions of the law. GANGA BAKSH v. RUDAR SINGH, **22 A. 434=A.W.N. 1900, 152.** (17 M. 282, 18 M. 436, 12 M. 234, *R.*)

(1384)—*S. 66 (s. 317, Civ. Pro. Code, 1882) —Suit for specific performance and possession against certified purchaser — Amendment of plaint—damages.*—Plaintiff, a minor, sued by his next friend for specific performance of an agreement by defendant, who had promised to purchase certain lands in a Court-auction for the minor and to deliver the same to him, and also for possession of those lands. *Held*, that the suit for specific performance and possession was barred by s. 317, Civ. Pro. Code. *Held*, also, that, as the plaintiff was a minor, the plaint should be allowed to be amended by the insertion of a prayer for damages. PONNUSAMI v. VITHILINGAM PILLAI, **8 Ind. Cas. 268.**

(1385)—*S. 66 (=s. 317, Civ. Pro. Code, 1882) —Auction-sale—Purchase by one of joint decree-holders on behalf of all—certificate in the name of the purchaser alone*—Benami *purchase —Non-applicability of s. 317.*—The plaintiff and the defendant were both joint decree-holders. The plaintiff being minor execution was taken out by the defendant, and the property purchased in his name alone. The plaintiff, alleging that the purchase had been made on behalf of both of them, claimed a moiety of his share from the defendant: *Held*, that the suit was not barred by s. 317, Civ. Pro. Code, 1882, as the purchase could not be deemed to be a *benami* one, and the object of the section was to put an end to such purchases only. NAIPAL SONAR v. SHEO NARAIN SONAR, **6 Ind. Cas. 374=7 A.L.J. 1091.** (29 A. 557 A.W.N. 1907, 166, *F.*

(1385-*a*) *S.—66 (=Civ. Pro. Code, 1859, s.260 —Joint Hindu family—Purchase at Court-auction by one of the members.*—The policy of s. 260 of Act VIII of 1859 is to check *benami* purchases at execution-sales, *i.e.*, transactions in which A secretly purchases on his own account in the name of B. The provisions of that section cannot be taken to affect the rights of members of an undivided family who, by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat, as part of their common property, an acquisition howsoever made by a member of the family in his sole name, if made by the use of the family funds. BODH SINGH DOODHOORIA v. GUNESH CHUNDER SEN, **12 B.L.R. 317, P.C.=19 W.R. 356=3 Sar. 253.** [*F.*, 21 A. 29, 9 M.L.J. 298; *R.*, 20 W.R. 65=12 B.L.R. 336, 6 M. 135, 11 C.L.R. 514, 22 B. 672. A.W.N. 1907, 166=29 A. 557.]

(1386)—S. 66, applicability of proceedings to enforce a certificate issued under the public

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Demands Recovery Act, I of 1895, B.C.—*See* BENGAL ACT I OF 1895, ss. 10, 12, 15, 16, 21, 31, 1 C.L.J. 550.

(1387)—S. 66—Where a case comes under the second paragraph of the section the claim cannot be barred by the first paragraph—*See* BENGAL ACT, I OF 1895, ss. 10, 12, 15, 16, 21, 31, 1 C.L.J. 550.

(1388)—S. 66—*See* BENAMI TRANSACTIONS —CERTIFIED PUCHASERS, 11 M. 234, 9 C.L.R. 295, 5 A. 478, F.B.=A.W.N. 1883, 125 14 W.R. 179, 23 A. 175=A.W.N. 1901, 44, 21 M. 7=7 M.L.J. 290, 23 A. 34=A.W.N. 1900, 190, 6 N.W.P. 265, 6 N.W.P. 197, 9 W.R.360, 4 B.L.R. App. 32, 8 Bom. L.R. 873=31 B. 61, 5 Bom. L.R. 329, 13 M.L.J. 354, 14 W.R. 111, 1 W.R. 328, 8 W.R. 130, 6 M. 135, 21 A.196=A.W.N. 1899, 30, 14 C. 583, 16 M. 290=2 M.L.J. 173, Marsh 423=2 Hay 512.

(1389)—S. 66—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 23 C, 805.

(1390)—S. 66—*See* ESTOPPEL—ESTOPPEL BY CONDUCT. 23 W.R. 358.

(1391)—S. 66—*See* EVIDENCE—PAROL EVIDENCE, 11 M. 213.

(1392)—S. 66—*See* HINDU LAW—PARTITION, 6 W.R. 160.

(1393)—S. 66—Suit by mortgagee for declaration that the auction-purchaser of the mortgaged property was the *benamidar* of the mortgagor — Maintainability — *See* MORTGAGE—GENERAL, 3 Ind. Cas. 298=8 A.L.J. 184.

(1394)—S. 66—*See* RES JUDICATA—PARTIES, 2 A.L.J. 111=A.W.N. 1905, 39=27 A. 443.

(1395)—S. 66—*See* SALE—SALE BY AUCTION, 1 B.H.C. 20.

(1395-*a*)—S. 66—*See* No, 918, *supra*, AND NOS. 1368, 3471. 3933, 4140, 4164, 4413, 4414, 5471, *infra*.

— S. 67 (=1882, s. 327=1877, s. 327.

See EXECUTION OF DECREE.

See SALE-SALE IN EXECUTION OF DECREE.

(1396)—*S. 67 (=s. 327, Civ. Pro. Code, 1882) —Sale in execution—Sanction of Commissioner.*—The Special rule, which was in force under the second clause of s. 327 of the Code of 1882, having become inoperative, as that section was not re-enacted in the Code of 1908, the sanction of the Commissioner of the Division is no longer required as a condition precedent to the sale in execution of decree of land applied to agricultural or pastoral purposes. GIRDHARI RAM v. MEHR KHAN, **4 P.R. 1910, Rev.=7 Ind. Cas. 495=117 P.L.R. 1910.**

(1397)—*S. 67 (=old s. 327)—Local Government—Competency to make rules—Sale without*

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sanction void.—It is competent for the Local Government to make with the sanction of the Governor-General in Council rules relating to sales of land in execution of a decree in modification of former rules on the subject. A sale not in conformity with such rules is void and may be set aside. TARA CHAND v. ALI BAKSH, **95 P.R. 1888.** [*R*., **1 P.R. 1904=41 P.L.R. 1904.**]

(1397-*a*)—**S. 67**—*See* **NO. 1412**, *infra.*

——S. 68 (=1882, s. 320 (1)=1877. s. 320.)

See COLLECTOR.

See EXECUTION OF DECREE.

(1398)—*S. 68 (=Civ. Pro. Code, 1897, s. 320)—Local Government Rules under s. 320 of the Civ. Pro. Code, 1877—Notification No. 671 (Judicial Civil Department), dated 30th August, 1880—Meaning of the word "with effect from the 1st October, 1880."*—The rules and procedure prescribed by the Notification are not applicable to execution-proceedings in which sales of immoveable property had been ordered prior to the 1st October, 1880, and such proceeding could not be transferred to the Collector. HAFIZ-UN-NISSA v. MAHADEO PRASAD, **4 A. 116, F.B.=A.W.N. 1881, 146.**

(1399)—*S. 68 (=Civ. Pro. Code, 1877, s. 320)—Notification No. 671 of 1880, Judicial Civil Department, dated the 30th August, 1880—With effect from 1st October, 1880.*—In the case of an order of sale passed on the 11th September 1880, the Rules prescribed by the Local Government would not apply. GUR CHARN v. GOBIND PRASAD, **A.W.N. 1882, 12.**

(1399-*a*)—S. 68—*See* NOS. 919, 920, 1337-*b*, *supra* and NOS. 3814, 4243, 4244, 4314, 4315, 4316, 4345, 4378, 4373, 4375, *infra.*

(1400)—*Ss. 68, 70, 71 (=Civ. Pro Code, 1882, s. 320)—Execution—Transfer of decree to Collector—Power of Court.*—One of the two holders of a decree died. The survivor applied to the Subordinate Judge for execution of the decree on his own behalf and as heir to the deceased. Certain property of the judgment-debtor was attached and ordered to be sold. Then the Subordinate Judge transferred the execution to the Collector under s. 320 of the Code. Subsequently, on the application of the widows of the deceased decree-holder, that they were the heirs of their husband, the Subordinate Judge passed an order for the production of a certificate and postponed the sale. The decree-holder applied to the High Court for revision. *Held* that the Subordinate Judge had no jurisdiction to entertain the application of the ladies or to make the order which he did, inasmuch as the execution of the decree had been transferred to the Collector under s. 320 of the Code. KESHO SARAN v. JANKI, **A.W.N. 1883, 164**

(1401)—*Ss. 68, 70, 71 (=Civ. Pro. Code, 1882, s. 320)—Transfer of decree to Collector for execution—Acknowledgment in Collector's Court of part payment of decretal amount, validity of*—When a Civil Court transfers a decree, under s. 320, Civ. Pro. Code, for execution by the Collector, so long as the decree remains in his hands, he alone can execute it, all proceedings in the Civil Court relating to the execution of the decree having come to an end for the time being. Under such circumstances, the decree-holder and the judgment-debtor would be perfectly justified in certifying the part satisfaction of the decree to the Collector, and the acknowledgment so made is a valid acknowledgment for all purposes under the first clause of s. 258. MUHAMMED SAID KHAN v. PAYAG SAHU, **16 A. 228=A.W.N. 1894. 55.** [*R.*, 22 B. 722, 26 A. 36=23 A.W.N. 179.]

(1402)—*Ss. 68, 70, 71 (=s. 320, Civ. Pro. Code, 1882)—Transmission of decree for execution by Collector—Power of Local Government to provide for appeals from orders of Collector—Rule 17, cl. (19) of 12th November, 1883, if ultra vires—N.W.P. Land Revenue Act (XIX of 1873), s. 243, application of, to orders of Collector.*—The Local Government under s. 320, Civ. Pro. Code (prior to its amendment by Act VII of 1888), empowering it to prescribe rules for regulating the procedure of the Collector and his subordinates in executing decrees transmitted under the section, may also make rules for providing for an appeal from the orders made by such Collector or his subordinates. Cl. XIX of Rule 17 of 12th Nov. 1883 (N.W.P. and Oudh Gazette of 17th November, 1883), providing for an appeal to the Commissioner of the Division against an order of a Collector confirming a sale, was *held* to be, therefore, not *ultra vires* of the Local Government. (5 A. 314, *R.*) The section does not apply to such orders passed by the Collector. TAKADDUS FATTIMA v. BALDEO DAS, **12 A. 564=A.W.N. 1890, 185.**

(1403)—*Ss. 68, 70, 71 (=s 320, Civ. Pro. Code, 1882)—Execution of decree—Property to be sold ancestral in part only—Transfer to Collector—Local Government, Notification No. 671 of August 31, 1880.*—*Held* that where the Civil Court is satisfied that the land, which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. AHMAD GHAUS KHAN v. RAI BAHADUR SAHU LALTA PERSHAD, **A.W.N. 1906, 143=3 A.L.J. 422=28 A. 631.**

(1404)—*Ss. 68, 70, 71 (=s. 320, Civ. Pro. Code, 1882)—Suit to confirm a sale—Powers of Assistant Collector to set aside his order—Irregularity in sale.*—It is the duty of a Judge to set aside an order, which he would not have passed had he been informed of the true state of affairs. Where an Assistant Collector was asked by a person, who alleged himself to be a decree-holder, to postpone a sale and did postpone it and a few hours later, on being informed that the applicant was not entitled to make the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

application, set aside his former order and held the sale, *held*, that he was justified in setting aside his former order and the sale was not illegal merely for that reason. WAZIR ALI v. JANKI PRASAD, **3 A.L.J. 458=A.W.N. 1906, 183=28 A. 671.**

(1405)—*Ss. 68, 70, 71 (=s. 320, Civ. Pro. Code, 1882)—Appeal to the High Court—Execution of decree—Transfer to the Collector under—Land Revenue Code (Bombay Act, V of 1879), s. 203.*—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him under s. 320, Civ. Pro. Code. Under s. 320, Civ. Pro. Code, and s. 203 of the Land Revenue Code, the Revenue Commissioner or the Government are vested with the appellate power in respect of such orders. MANCHERJI v. THAKURDAS, **7 Bom. L.R. 682.**

(1406)—*Ss. 68, 70, 71 (=Civ. Pro. Code, 1882, s. 320)—Execution of decree—Transfer to Collector—Appeal from orders of Collector to High Court.*—Orders passed by a Collector in the exercise of the powers conferred on him under s. 320 and the following sections of the Code relating to the execution of a decree of a Civil Court after transfer of the decree to him under s. 320, are not appealable to the High Court. MADHO PRASAD v. HANSA KUAR, **A.W.N. 1883, 65. F.B.=3 A.W.N. 59=5 A. 314, F.B.**

(1407)—*Ss. 68, 70, 71 (=s. 320, Civ. Pro. Code, 1882)—Execution-proceedings transferred to Collector—An order made by Collector in such proceedings - Revision or appeal against—To whom lies—Relation between Collector and Civil Courts in such cases pointed out.*—*Held* that, against an order made by the Collector in execution-proceedings transferred to him by the Civil Court under the rules framed under s. 320, Civ. Pro. Code, 1882 (=ss. 68, 71, Civ. Pro. Code, 1908), a revision or appeal lies only to the Chief Commissioner to whom the Collector is subordinal. (11 C.P.L.R. 33, *F.*) So far as the Central Provinces are concerned, the proper principles regulating the relations between the Collector and the Civil Court from which execution of a decree has been transferred to him whether under s. 320 of Act XIV of 1882 or ss. 68-71 of Act V of 1908, would seem to be:—that the Civil Court is precluded from interfering in any matter declared to be within the Collector's jurisdiction but that it is not divested of its ordinary jurisdiction in regard to other matters, merely because the decree has been transferred to the Collector; and, that a civil suit will lie with respect to every order of the Collector, upon which, if it had been made by the Civil Court (acting within its jurisdiction) an action could have been maintained; but not otherwise. HARDEO v. MT. NARBADI, **5 N L.R.=121=8 Ind. Cas. 572.** (3 A. 554, 18 A. 437, 20 A. 379, 26 A. 101, 18 C. 481, *R.*)

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(1408)—Ss. 68, 70, 71—*See* COLLECTOR, 5 A. 314, F.B.=A.W.N. 1883, 59.

(409)—Ss. 68, 70, 71—*See* COLLECTOR, 16 A. 1=A.W.N. 1893, 181.

(1410)—Ss. 68, 70, 71—Framing of rules by Local Government (Bombay) under—Amendment by s. 30, Act VII of 1888—Rules not retrospective in their operation—Decree referred to Collector for execution—Sale—Confirmation and setting aside of—Collector's powers in respect of—*See* RULES—RULES MADE UNDER ACTS. 15 B. 322.

(1411)—*Ss. 68, 70, 71, 47 (=Civ. Pro. Code, 1882, ss. 320, 244)—Sale of property of judgment-debtor even after satisfaction of decree—Remedy available.*—After a decree had been transferred to the Collector for sale of immoveable property, and during the pendency of proceedings before him, the judgment-debtor sold the property privately and the purchaser, having satisfied the decree, put in a satisfaction petition in the Civil Court, but the Collector sold the property subsequently. *Held* that the remedy of the private purchaser was to apply to set aside the sale under s. 244 of the Civ. Pro. Code, and not to institute a separate suit, and that the application was to be made to the Civil Court and not to the Collector. SADHO CHAUDHRI v. ABHENANDAN PRASAD, **26 A. 101=A.W.N. 1903, 208.** (24 A. 239, *R.*) [*R.*, 5 N.L.R. 121.]

(1412)—*Ss. 68, 70, 71, 67 (=ss. 320, 327, Civ. Pro. Code, 1882)—Execution of decree—Powers of Collector.*—A Collector who has obtained control of an estate under ss. 320 to 327 of the Civ. Pro. Code, cannot set aside the acts of the owner of the estate because he thinks such acts were unwise. The estate having been transferred to the Collector for doing the best he can with it, there is no reason why he should be in a different position to the owner himself with reference to the acts of the owner before the estate passed out of his control. THE COLLECTOR OF GHAZIPUR v. CHITBAHAL BHAGAT, **A.W.N. 1885, 305.**

(1413)—*Ss. 68, 70, 71, O. 23, r. 1—Execution of decree—Transfer of decree to Collector for execution—Nature of powers exercisable by Collector under s. 320 of the Civ. Pro. Code in case of transferred decree—Civ. Pro. Code, ss. 320, 373.*—The functions which devolve upon a Collector, to whom a decree has been transferred for execution under s. 320 of the Code of Civil Procedure, are functions of a purely ministerial and not of a judicial character. Hence, where a Collector, to whom a decree had been transferred for execution under the provisions of s. 320 of the Civ. Pro. Code, passed an order for postponement of sale in the following terms "It is ordered that the sale be postponed, and, by means of a copy of this order, the papers, which have arrived from the Court should be returned and the record of

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the case should be deposited in the office;" and such order was followed by an order of the Court which passed the decree striking off the execution proceedings. *Held* that these orders did not operate as a bar to further execution proceedings within the meaning of s. 373 of the Civ. Pro. Code. REAIT-UN-NISSA v. HAJI MUHAMMAD ISMAIL KHAN, **A.W.N. 1891, 189.**

(1414)—*Ss. 68, 70, 71, sch. III, r. 7, (= ss. 320, 323, Civ. Pro. Code,* 1882)—*Execution of decree—Appeal* — Where a decree was transferred for execution to the Collector under s. 320, Civ. Pro. Code, and, acting under s. 323, Civ. Pro. Code, the Collector made arrangements for liquidation of the decree by a lease of immoveable property, and the decree-holder was not satisfied with this arrangement and appealed to the Commissioner who considered he had no jurisdiction to interfere and he then applied to the Court which transferred the decree to the Collector, and that Court refused to interfere with the orders; *held* that the High Court could not entertain an appeal so as to interfere with the Collector's order, which was the object of the appeal. Orders passed by a Collector under the powers conferred on him by s. 320, Civ. Pro. Code, are not appealable to the High Court. (5 A. 314, *R.*) The last paragraph of s. 323 shows that the supervising and controlling authority in respect of matters coming under that section is the chief controlling Revenue authority. KISHNA RAM v. SARJU PRASAD, **A.W.N. 1886, 168.**

(1415)—*Ss. 68, 70, 71 and sch. III, r. 9 (= ss. 320, 324-A, Civ. Pro. Code,* 1882)—*Maintenance of the judgment debtor's family, a matter for determination by the Court.*—When an estate is in the hands of the Talukdari Settlement Officer by reason of the provisions contained in s. 320 of the Code of Civil Procedure, it must be borne in mind by the accounting officer that the provisions of s. 324-A must be closely followed. The provisions for the maintenance of the judgment-debtor's family is a matter for determination by the Court and not by the executing officer. PURSHOTTAMADAS v. HIRAJI, **6 Bom. L.R. 822.**

(1416)—*Ss. 68, 70, 71, and sch. III, r. 9 (= ss. 320, 324-A, Civ Pro. Code,* 1882)—*Execution proceedings transferred to a Collector—Court's power under s. 324-A—Collector's duties.*—A Collector acting under s. 320 of Civ. Pro. Code, has power to include on the debit side only such charges as can be incurred under the provisions of the chapter; and the Court is perfectly justified under s. 324 A in regarding as at its disposal, the balance which is left after such charges have been deducted; and if there be any charges which have been not so incurred, but which have been inserted in the accounts, such charges, being improper, cannot affect or restrict the disposing power of the Court over the balance. The power of the

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Court as to the application of the balance is complete although the fund itself remains in the hands of Collector as trustee. The amount of maintenance to be determined for the judgment debtor is a matter for the Court to consider and decide and one which it cannot allow the Talukdari Settlement officer acting as a Collector to decide. The Collector, like an agent, though bound under s. 324-A to render accounts, cannot be compelled to give up the account books into Court; nor does the section require him to pay the balance into Court. RUPALI v. KALYANSING, RUPALI v. GAMBHIRSINGJI, **6 Bom. L.R. 825.**

(1417)—Ss. 68, 70 and 71, sch. III, r. 10—*See* JURISDICTION OF CIVIL COURTS, 11 B. 478.

(1418)—*Ss. 68, 70, 71, sch. III, r. 11 (= ss. 320 and 325, A. Civ. Pro. Code,* 1882) *Ancestral property—Execution of decree—Property taken under management of the Collector—Disabilities of proprietor pending term of management.*—In pursuance of the powers conferred upon him by rules framed by Government under s. 320 of the Code of Civil Procedure the Collector sanctioned a lease of certain zamindari property of the judgment debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor, but with the permission of the Collector. *Held*, that the disabilities imposed by the first paragraph of s. 325-A of the Code affected the judgment-debtor during the pendency of such lease; and *semble*, that such disabilities continued, so long as any of the debts, for the satisfaction of which the judgmet-debtor's property was taken under management by the Collector, remained unpaid. GANGA PRASAD v. GANGA BAKSH SINGH, **A.W.N. 1907, 112 = 29 A. 415.**

(1419)—S. 68, sch III, rr. 1, 2. 3, 7, 8, 9, 10—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 7 B. 332.

(1420)—S. 68, sch. III, r. 3—*See* EXECUTION OF DECREE—EXECUTION BY COLLECTOR, 20 A. 428 = A.W.N. 1898, 96.

——**S. 70 [=1882 s. 320 (2) (3).]**

(1421)—S. 70, *See* JURISDICTION OF CIVIL COURTS, 20 A. 379, F.B. = A.W.N. 1898, 81.

(1421-*a*)—S. 70—*See* NOS. 194, 919, 920, 1337 (*b*) 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, *supra* AND NOS. 3471, 3814, 4243, 4244, 4315, 4316, 4345, 4373, 4374, 4375, *infra*.

——**S. 76 [=1882 s. 320 (5).]**

(1421-*b*)—S. 71—*See* NOS. 194, 919, 920, 1337-*b*, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, *supra* AND NOS, 3814, 4243, 4244, 4315, 4316, 4345, 4373, 4374, 4375, *infra*.

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——S. 72 (=1882, s. 326=1877, s. 326=1859 s. 244.)

See COLLECTOR.

See EXECUTION OF DECREE.

(1422)—*S. 72 (=s. 326 Civ. Pro. Code, 1882)—Proposal by Collector for stay of sale under, disapproval by Civil Court of, procedure on.*—The scheme for satisfaction of a decree proposed by the Collector, under s. 326 of the Code, must provide for such satisfaction within a reasonable period, by the proposed temporary alienation or management of the land concerned; and when the Collector does not submit a scheme providing for satisfaction in the manner indicated above, the Civil Court ought to pass orders for the sale of the property itself. JAI BHAGWAN v. GUALI BAKSH. **63 P.R 1906 =121 P.L.R. 1906.** *(9 C. 290. R.)*

(1423)—*S. 72 (=s. 326 of Code of 1882)—Collector's order—Appeal.*—Though any party may appeal from the order of a Court authorizing or refusing to authorize the Collector to make an arrangement under s. 326 of the old Code, there is no appeal to any superior Civil Court from such order made by a Collector acting under s. 326 of the Code. *Held*, also that the Code did not require the Collector to submit a detailed scheme when he made a representation under that section to prevent a sale and that the Court could give the Collector an authority in general terms. DARYA SINGH v. MAHTAB, **25 P R. 1894.** (114 P.R. 1886, *R.*)

(1424)=*S. 72 (=s. 244 of Civ. Pro. Code, 1859)—Arrangement by Collector.*—The arrangement proposed by the Collector was not necessarily to be accepted under the terms of s. 244 of the Civ. Pro. Code, MUTTRA PRASHAD v. RAM PRASHAD, **6 N.W.P. 39.** [*F.*, 6 N.W.P. 293; *Cited*, 14 P.R. 1904, Cr. =111 P.L.R. 1904.]

(1425)—*S. 72 (1) (=s. 326 of 1882) (=s. 244, Act VIII of 1859)—Temporary alienation—payment by instalments.*—Under s. 244 of Act VIII of 1859, only a temporary alienation of land can be made and an arrangement by which possession is left the judgment-debtor subject to a payment by yearly instalments, cannot be made. KASHEE LAL v. MUSSUMAT AMEER JAN, **2 N.W P. 347.**

(1426)—*S. 72 (=Civ. Pro. Code, 1882, s. 326)—Limitation against execution—Property under management of Collector.*—Where the immoveable property of the judgment-debtor is placed under the management of the Collector under s. 326, Civ. Pro. Code, limitation against execution does not run so long as the property is under such management. GIRDHAR DAS v. HAR SHANKAR PRASHAD, **20 A. 383=A.W.N. 1898, (82).**

(1427)—*S. 72—Agricultural land—Order of Collector refusing to intervene after attachment of land—No appeal.*—Where a Civil Court by its order, after attachment of agricultural land, sent the record to the Collector, it amounts to an enquiry whether he wished to intervene, and where the Collector, by an order of his refused to intervene, no appeal lies against the Collector's order. RAJA RAM v. DURGA DUT, **3 P.R. 1910, Rev.=8 Ind, Cas. 331.**

(1427-*a*)—S. 72—*See* No. 293, *supra* AND No. 5946 *infra*.

——S. 73 (=1882, s. 295=1877, s. 293=1859, s. 270.)

See EXECUTION OF DECREE.

See RATEABLE DISTRIBUTION.

(1428)—*S. 73 (=Civ Pro. Code, 1882, s. 295)—Rateable distribution of sale proceeds, condition of—Execution proceedings—Ascertainment of shares of joint-debtors—Rateable distribution of sale-proceeds.*—S. 295 of the Civ. Pro. Code, requires that the assets under distribution should be held for execution of decrees against the *same judgment-debtor*, to enable the holder of a decree other than that actually executed to participate in them. (Rule No. 774 of 1884 (unrepealed) *(followed)*. *Overruled*, 7 C.W.N. 414=30 C. 583, F.B.; *F.*, 16 B. 683; *R.*, 20 C. 673, 3 C.W.N. 368, 8 O C. 86.] A Court has no power in execution proceedings to ascertain the respective shares of joint judgment-debtors; so that a judgment-creditor holding a decree against one only of two joint-judgment-debtors cannot share rateably in the sale proceeds in execution of the joint decree. *D.*, **10 A. 35=** 7 A.W.N. 262.] The Court did not intend, in 9 C. 920, to decide that a person, who has obtained a decree for money against a single judgment-debtor, is entitled to come in and share rateably with a person, who has obtained a decree against the same judgment-debtor and other persons. DEBOKI NUNDEN SEN v. HART. **12 C. 294.** [*R.*, 22 M. 241.]

(1429)—*S. 73 (=Civ. Pro. Code, 1859, ss. 270, 271=Civ. Pro. Code, 1882, s. 295)—Rateable distribution among decree-holders.*—The purport of ss. 270 and 271 is not to alter or limit the rights of parties arising out of contract, but simply to determine questions between rival decree-holders, standing before the Court on the same footing and in respect of whom there is no rule for otherwise determining the mode, in which the proceeds of property sold in execution shall be distributed. HASOON ARBA BEGUM v. JAWADOONNISSA SATOODA KHANDAN, **4 C. 29.**

(1430)—*S. 73 (=Civ. Pro. Code, 1882, s. 295), Cause of action under—When it arises—"Decree for money"—What is—Purchase by mortgagee under his own decree—Further execution of decree, when permissible.*—The cause of action under the last paragraph but one of s. 295 of the Civ. Pro Code does not arise, until the money has been actually paid over to the

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person alleged not to be entitled to receive the same; and a suit for recovery of a share of sale-proceeds under the section, before actual payment to a person to whom they have been ordered to be paid, is premature and liable to dismissal. [*F.*, 7 M.L.J. 277; *D.*, 3 C.L.J. 385.] Every decree under which money is payable, though it might grant other relief, is so far a "decree for money" under s. 295 as to entitle the holder of such a decree to claim rateable distribution along with other holders of decrees for money only. Civ. Pro. Code, s. 295, does not prevent a mortgagee with a decree upon his mortgage from proceeding against properties of the mortgagor other than that mortgaged; so that a mortgage-decree-holder, entitled to proceed also against the mortgagor personally, need not exhaust his mortgage security before proceeding to claim the benefit under s. 295. [*Approved*, 20 M. 107=7 M L. J. 66, 28 M. 473=15 M.L J. 126, F.B.; *D.*, 25 C. 580; *R.*, 10 A. 35=7A.W.N. 262.] A mortgagee purchasing any portion of the mortgaged property in execution of his own mortgage-decree must, before proceeding further against the mortgagor or claiming the benefit under s. 295, prove the fact of a balance remaining still due to him and of the realisation of a fair amount for the property sold to himself; the Court must, upon such an application to further execute the decree or to share rateably under s. 295, carefully enquire into the matter, the mere fact that the property was purchased at auction not being sufficient by itself to prove the value of the property sold, where the mortgagee is himself the purchaser. HART v. TARA PRASANNA MUKHERJI, **11 C. 718.** [*D.*, 16 C. 132, 18 M. 153, 24 M. 96; *R.*, 19 C. 4, 18 A. 31, 22 A. 284, F.B., 24 M. 85.]

(1431)—*S. 73 (=s. 295, Civ Pro. Code), application of.*—S. 295 applies only where the decree-holders have all applied to the same Court for execution of their decrees. GOPEE NATH ACHARJE v. ACHACHA BIBEE. **7 C. 553=9 C. L.R. 393.** [*Appr.*, 6 M. 357; *F.*, 21 C. 230.)

(1432)—*S. 73 (=s. 295, Civ. Pro. Code)—Rateable distribution of assets.*—S. 295 provides only for the case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. [*D.*, 16 B. 91; *R.*, 3 L.B.R. 275, 9 C.L.J. 210.] The words "by sale or otherwise" in s. 295 mean by sale or by other process of execution provided for in the Civ. Pro. Code. [*Appr.*, 21 C. 809, 26 C. 772, 28 M. 380=15 M L.J. 202; *R.*, 28 B. 264.] The section does not compel a judgment-creditor, whose debt is satisfied by the judgment-debtor or by a person standing in the shoes of the judgment-debtor, to share with other persons the money received by him in satisfaction of his judgment. SUW BUX BAGLA v. SHIB CHUNDER SEN, **13 C. 225.** [*R.*, 6 P.R. 1903.]

(1433)—*S. 73 (s.=295, Civ. Pro. Code, 1882.)—Decree-holders, rateable distribution between.*

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—M obtained a decree against B. Subsequently B died and M presented a *darkhast* for execution of the decree after bringing on the record B's son, K as his legal representative. B's property was then attached. G, the petitioner, thereupon applied to the Court which had passed the above decree, for rateable distribution under s. 295 of the Civ. Pro. Code as he held a decree obtained against "B, deceased, by his son, K and against the deceased's estate:" *Held*, that s. 295, Civ. Pro. Code, required that the decrees in respect of which rateable distribution had to be made must be decrees against the same judgment-debtor, and hence no rateable distribution could be allowed as the decree obtained by G was against B's legal representative, whereas the one obtained by M was against B himself and the two decrees could not therefore be said to have been against the same judgment-debtor. *Per Chandavarkar, J.*—S. 295 of the Civ. Pro. Code does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section. GOVIND v. MOHONIRAJ, **3 Bom. L.R. 407=26 B. 494.**

(1434)—*S. 73 (=Civ. Pro. Code, 1882, s. 295) Scheme of-Order for distribution of sale-proceeds—Order in a suit—Suit for refund of money distributed under s. 295, Civ. Pro. Code—Limitation Act, 1887, art. 15.*—The scheme of s. 295, Civ. Pro. Code, is rather to enable the Judge as a matter of administration to distribute the price according to what seem, at the time, to be the rights of the parties, and does not import a conclusive adjudication on these rights, which may be re-adjusted subsequently by a suit. [*F.*, U.B.R. 1904, 4th Qr., Limitation, sch. II, 13.] An order under s. 295, Civ. Pro. Code, for distribution of sale-proceeds is a step in an execution proceeding in the suit in which the decree was made and is thus an order in a suit. A suit for refund of money paid to the defendant under an order of Court made under s. 295, Civ. Pro. Code, on the ground that the plaintiff was entitled to it in preference to the defendant, is not a suit to set aside the order of distribution and does not come within art. 13 of the Limitation Act. (15 B. 438, *Approved*). The application of art. 13 to such suits is precluded by the fact that the order for distribution is an order in the suit. SANKAR SARUP v. LAL PHUL CHAND, **5 C.W.N. 649, P.C.=3 Bom. L.R. 713 =28 I.A. 203=23 A. 313.** [*F.*, U.B.R. 1904, 4th Qr., Limitation, sch. II, 13.]

(1435)—*S. 73 (=Civ. Pro. Code, 1877, s. 295)—"More persons than one," meaning of—Rateable distribution of assets.*—The words in s. 295, "more persons than one" must be taken to mean more decree-holders than one of the *same* Court, and do not include outsiders or decree-holders of other Courts. This construction is warranted by the words of the section "have prior to the realization applied to the Court by which such assets are held, for execution of decrees for

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money against the same judgment-debtor." These words clearly indicate that those decree-holders only could share in the rateable distribution who have actually applied for execution of their decrees to the Court holding the assets. In the present case the salary of a Karkun who was employed in the Sub-Judge's Court at A was attached in execution of a decree of the Sub-Judge's Court at B, by an order issued by the latter Court to stop and remit, every month, a moiety of the Karkun's salary to itself (the Court at B) until satisfaction of the decree. While this decree was in execution another person obtained a decree against the Karkun in the Court at A, and applied to that Court for rateable distribution of the moiety between himself and the decree-holder of the Court at B. *Held* that the application was not sustainable, because the decree of the Court at B was being executed by itself; and not by the Court at A to which the order of attachment was sent not as to a Court executing the decree of another Court, but only as to the head of a department, or, to adopt the language of s. 268, Civ. Pro. Code, as to "the officer whose duty it was to disburse the salary." KRISHNASHANKAR v. CHANDRASAANKAR, **5 B 198.** (4 B. 472. *R.*) [*F.*, 6 M. 357, 18 B. 456; *R.*, L.B.R. 1893—1900, 161. 9 C L.J. 210]

(1436)—*S. 73 (=Civ. Pro Code*, 1882, *s 295)—Sale in execution of d cree—Application for rateable distribution—"Prior to realization" and "same judgment-debtor" meaning of.*—In execution of a decree against a father and son, four items of properties were sold. Another person who had obtained a decree against the father alone applied for rateable distribution of the amount realized by the sale. The application was made after payment into Court of the sale-proceeds in respect of two of the four items sold and before payment of the sale-proceeds of the remaining two items. The properties sold were the joint family properties of the father and son. *Held*, that the word "assets" in s. 295, Civ. Pro. Code, means the proceeds of the sale of the property which is sold in execution of a decree. In the present case, the assets could be said to be realized when the *whole* of the proceeds were paid into Court. At the time the application was made under s. 295, the assets had not been realized for the purpose of the section. Only a portion of the assets had been realized. Consequently the petitioner was entitled to participate in the sale-proceeds of all the items sold. *Held*, also, that as the property from which the assets were realized by the sale was the ancestral property of the family of which the father and son were undivided members the judgment-debtors were the same for the purposes of s. 295 of the Code. RAMANATHAN CHETTIAR v. SUBRAMANIA SASTRIAL, **26 M. 179.** (4 M. 384, *R.*) [*F.*, 29 B 529 = 7 Bom. L.R. 567; *R.*, 8 O. C. 86, 10 O.C. 129.]

(1437)—*S. 73 (=Civ. Pro.Code*, 1882, *s. 295, proviso (h)—Same judgment-debtor—Sale of attached land free of mortgage—Act IV of* 1882, *s. 99*—Where a person obtained a decree against a father and son, and another person got a decree against the son alone (the father having died before the suit), it was *held* that the decrees were against "the same judgment-debtor" within the meaning of s. 295 of the Civ. Pro. Code, and that the second decree-holder was entitled to rateable distribution of amounts realised in execution of the first decree. [*R.*, 26 M. 179 = 12 M.L.J. 276, 8 O.C. 86.] Where, in execution of A's decree, certain properties were attached, and before the sale, A who had another mortgage over the same properties applied to have the properties sold free of the mortgage, giving him the same rights against the sale-proceeds as he had over the properties by virtue of the mortgage, and the Court ordered accordingly, *held* that such an order was illegal and in contravation of s. 99 of the Transfer of Property Act, and that, consequently, it would not affect the right of another creditor to rateable distribution of the proceeds of the sale in execution. GRANT v. SUBRAMANIAM, **22 M. 241 = 9 M.L.J. 179.**

(1438)—*S. 73 (=s. 295 Civ. Pro. Code*, 1882) *—Rateable distribution—Meaning of "against the same judgment-debtor"—New ground taken in appeal.*—The words "against the same judgment-debtor," in s. 295, Civ. Pro. Code, do not include the judgment-debtor of the judgment-creditor against whose property rateable distribution is claimed. Where a decree-holder claimed rateable distribution in the lower Court, he will not be allowed before the appellate Court to shift his ground and contend that he was a prior attaching creditor and so entitled to the whole sale-proceeds. ELLUSAH v. RUPPU RANGAYYAN, **18 M.L.J. 562 = 7 M.L.T. 126.**

(1439)—*S. 73 (=s 295, Civ. Pro. Code*, 1882) *—Rateable distribution—'Against the same judgment-debtor'.*—The applicant and the respondent held decrees against the estate of one N. H. The judgment-debtors were not the same in both cases. The applicant brought the property of N. H. to sale, in execution of his decree, and the proceeds were kept in Court deposit. The respondent applied for rateable distribution. The applicant objected that, since the decree was not 'against the same judgment-debtor' the respondent was not entitled to a share. *Held*, that, the object of s. 295 being to provide rateable distribution of moneys to two or more persons equally situated, the expression 'against the same judgment-debtor' must be interpreted as referring more to the property than to the person; the test is, not whether the decree has been passed 'against the same judgment-debtor' but whether the rateable distribution has been applied for 'against the same judgment-debtor.' ABADI BEGAM v. SHA ARA BEGAM, **8 O.C. 86.** (9 C. 920, 12 C. 294, 3 C. W. N. 368, 10 A. 35, 16, B. 683, 22 M. 241, 23 A. 106, *R.*) [*R.*, 10 O. C. 129].

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(1440—41)—*S. 73 (=s. 295 of Civ. Pro. Code, 1882)—Construction of--Distribution of assets among decree-holders.*—The words "decree-holders" or "persons holding decrees for money against the same judgment-debtor" in s. 295 of the Civ. Pro. Code, mean *bona fide* decree-holders against the judgment-debtor; and a Court is bound to see, on occasions when assets are to be distributed, whether the claimants are *bona fide* decree-holders within the meaning of the section. *In re* SUNDAR DASS, **11 C. 42.** [*F.*, 13 B. 154; *Doubted*, 1 C.W.N. 633.]

(1442)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Decree—Execution—Assets realized in execution of a decree.*—Where a certain property attached before judgment is in the possession of a third person who claims it as a pledgee and who undertakes to bring the property or its market value into Court when ordered, and it is subsequently found that he has no right as a pledgee over the property and in consequence the market-value is paid into Court the money so paid answers the description of "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Civ. Pro. Code, 1882. CHUNILAL v. RAMPRATAP, **6 Bom. L.R. 376.**

(1442)—*S. 73 (=Civ. Pro. Code, Act X of 1877, s. 295)—Assets "realised," meaning of.*—S. 295 of the Civ. Pro. Code, must be read and construed as if the words "from the property of the judgment-debtor" were inserted after the word realised. So, money paid by a judgment-debtor, under arrest, in full satisfaction of the decree against him, cannot be regarded assets realized by sale or otherwise, under s. 295, so as to entitle other creditors, who have in the meantime applied for the execution of their decrees against the same debtor, to claim a share in the money under that section. PURSHOTAMDAS TRIBHOVANDAS v. MAHANANT SURAJBHARTHI HARIBHARTHI, **6 B. 588.** [*Appr.* 8 A. 67=6 A.W.N. 1, 21 C. 809; *R.*, 13 C. 225, 26 C. 772; *R.*, 6 P.R. 1903, 28 M. 380=15 M.L.J. 202; *D.*, 16 B. 91, 28 B. 264=6 Bom. L.R. 11.]

(1444)—*S. 73 (=Civ. Pro. Code. 1859. s.270)—Decree holder first attaching property—First applicant in execution—Priority.*—S. 270. Civ. Pro. Code, gives priority to the decree-holder who first causes the property of the judgment-debtor to be attached, and not to the decree-holder who first applies for attachment. KAILASANADA MUDELY v. NARAYANA MUDELY. **5 M.H.C. 113.**

(1445)—*S. 73 (=s. 295, Civ. Pro. Code. 1882.)—"Whenever assets are realised," meaning of—Deposit of 25 per cent. of purchase money at execution-sale.*—The words "whenever assets are relalized" in s. 295, Civ. Pro. Code, really mean "whenever assets are so realised as to be available for distribution among the decree-holders." According to s. 295, the twenty-five per cent. of the purchase-money, deposited at the time of an execution-sale, is not assets and is not immediately available for payment to the decree-holder, because it is merely a deposit. The effect of s. 308 is to show that until, at any rate, the whole purchase-money is paid in, in neither the decree-holder, nor any other attaching creditor has any interest whatever the twenty-five per cent. Should the purchaser not pay the balance within the time allowed, this one-fourth does not go back to the person who paid it, but is, after the deduction of the expenses of the sale, forfeited to Government. HAFEZ MAHOMED ALI KHAN v. DAMODAR PRAMANICK, **18 C. 242.** (6 B. 16, 12 C. 252, *D.*) [*R.*, 26 M. 179=12 M.L.J. 276.]

(1446)—*S. 73 (=s. 295, provisos (a and b), Civ. Pro. Code, 1882)—Execution, sale of property "subject to mortgage" and "free from mortgage"—Procedure.*—Where a decree-holder desires that the mortgaged property be sold free of the mortgage and that the mortgagee should have the first claim on the sale-proceeds, the consent of the mortgagee is required under s. 295, proviso (*b*), and the Court should issue notice to the mortgagee to ascertain whether he assents. If the property is to be sold free of the mortgage and the mortgage is to be extinguished out of the sale-proceeds, there is no reason why the purchaser should know anything about the mortgage, and the sale-proclamation, therefore, ought not to contain any reference to the existence of the mortgage. If, on the other hand, the sale should be "subject to the mortgage," care should be taken that the proclamation is properly worded and that the bailiff explains to bidders that he is only selling the judgment-debtors's right to redeem, and that the mortgagee still retains his right to realise his money by sale of the property. SHWE SAIK v. M.A.R. SOMSUNDRAM CHETTY, **3 L.B R. 268.**

(1447)—*S. 73 (=s. 295, Civ Pro. Code, 1882)—Realized — Interpretation — Realization of assets—Rateable distribution.*—The term "realized" as used in s. 295 of the Civ. Pro. Code, *prima facie* means converted into cash or into a form whereby it becomes available for immediate distribution; and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution. MANILAL v. NANABHAI, **6 Bom. L R 11=28 B. 264.**

(1448)—*S 73 (=s 295, Civ. Pro. Code, 1882)—All judgment creditors placed on the same footing—Assets realised by "sale or otherwise," meaning of—"Equitable execution"—Appointment of Receiver—Application made after realisation by Receiver.*—The object of the Legislature in introducing s. 295 into the Code is manifestly to place all judgment-creditors on the same footing, in the administration by the Court, of their debtor's estate, provided that they have taken the precaution of invoking the aid of the Court by applying for execution of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

their decree in any of the modes prescribed by the Code. The words " by sale or otherwise " should not be so limited as to exclude any process of execution under the provisions of the Code. Rents of property under attachment which have been realised by a Receiver, appointed by one decree-holder are assets realised, " by sale or otherwise " in execution of a decree within the meaning of s. 295 of the Code. (6 B. 588 8 A. 67, 13 C. 225, *D.*; 21 C. 809, *Appr.*) Assets realised by the appointment of a Receiver after decree, are assets realised by a process of execution provided for by the Code. [*R.*, 28 B. 264.] The appointment of a Receiver at the instance of a judgment-creditor is "equitable execution." [*R.*, 10 C.C. 268.] Where rents are realised by a Receiver, no judgment-creditor obtaining attachment subsequent to such realisation is entitled to share therein. Only those applying for execution prior to such realisation are entitled. FRINK v. MAHARAJ BAHADOOR SINGH, **26 C. 772=4 C.W.N. 27.** [*R.*, 9 C.L J. 210.]

(1449)—*S. 73 (=Civ. Pro. Code, 1877, s. 295)—Attachment in execution of decree of Small Cause Court—Subsequent attachment under decrees of Subordinate Court—Assets realised under previous attachment not distributable rateably.*—Where, after attachment of certain moveable property in execution of a decree obtained in a Small Cause Court, but before realisation of assets by sale, on certain other creditors having obtained decrees against the same debtor in the Court of the Subordinate Judge of the same locality, and having applied for execution of their decrees, prohibitory orders were received by the Small Cause Court for the attachment of the said property, and the holders of the latter decrees of the Subordinate Court claimed a rateable share, under s. 295 of the Civ. Pro. Code, in the assets realised in execution of the decree of the Small Cause Court, *held* that they were not entitled to any share in such assets until after the satisfaction of the above decree of the Small Cause Court. JETHA MADHAVJI v. NAJERALLI ABHRAMJI, **4 B. 472.** [*F.*, 18 B. 456; *Appr.*, 6 M. 357; *R.*, 5 B. 198; L.B. R. 1893—1900, 161.]

(1450)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Decrees by Subordinate Judge in small cause and original jurisdictions, rateable distribution if grantable on execution of.*— A Subordinate Judge invested with small cause powers acquires the jurisdiction of two distinct Courts, but, however, he himself does not thereby become Judge of two different Courts but remains the Judge of the Subordinate Court. So, when sitting in the exercise of his power as a Judge of the Small Cause Court, and when sitting as an ordinary Subordinate Judge, he forms the same Court, within the meaning and for the purposes of s. 295 of the Civ. Pro. Code, MALHARI v. NARSO KRISHNA, **9 B. 174.** [*F.*, 12 B. 31; *R.*, 31 B. 314=9 Bom. L.R. 327.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882) X of 1877, XXIII of 1861 and VIII of 1859),—*continued.*

(1451)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Rateable distribution—Realisation.*—A debt due by a third party to the judgment-debtor, when paid into Court under a prohibitory order of the Court, is *realised* within the meaning of s. 295, Civ. Pro. Code, so that it becomes liable to rateable distribution among those who applied for execution before the payment into Court. But one who applies after payment is not entitled to rateable distribution. SRINIVASA AYYANGAR v. SEETHARAMAYYAR, **19 M. 72=5 M.L.J. 151.** [*R.*, 28 B. 264, 31 M. 501=4 M.L.T. 348; *Dist.*, 22 M. 68, F.B.]

(1452)—*S. 73, (=Civ. Pro. Code, 1877, s. 295)—Sale in execution of Small Cause Court decree—Rateable distribution for sale-proceeds—Holder of decree passed by such Judge as Subordinate Judge.*—A Small Cause Court Judge in his more limited jurisdiction on the one hand, and in his larger jurisdiction of Subordinate Judge on the other, fills two distinctly different judicial characters. Therefore, the holder of a decree, passed by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who has applied to such Judge, acting in that capacity, for the execution of his decree, is not thereby entitled to claim rateable distribution, under s. 295 of the Civ. Pro. Code, out of assets subsequently realised in execution of a decree passed by such Judge in his capacity of Judge of a Small Cause Court. HIMALAYA BANK v. HURST, **3 A. 710.**

(1453)—*S. 73 (= s. 295 Civ. Pro. Code, 1882)—Rateable distribution, how effected, Execution-proceedings—Sale—What constitutes "realisation" within the meaning of s. 295.*—Rateable distribution can be effected only of the proceeds of a sale in execution under the process of the Court or of assets realised in one of the other modes expressly provided by the Code. [*Appr.*, 28 M. 380=15 M.L.J. 202; *R*, 26 C. 772, 28 B. 269, 6 P.R. 1903; *Cited.*, 12 C.P.L. R. 101.] To constitute a 'realisation' within the meaning of s. 295, Civ. Pro. Code, it must be either a realisation by a sale in execution under the process of the Court, or it must be a realisation in one of the other modes expressly prescribed by the sections of the Code. PRASONNOMOYI DASI v. SREENATH ROY, **21 C. 809.** (6 C. 588, 13 C. 225, *Appr.*,) [*Appr.* 28 M. 380=15 M.L.J. 202; *R.*, 26 C. 772, 28 B. 269 6 P.R. 1903; *Cited*, 12 C.P.L.R. 101.]

(1454)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Scope.*—S. 295 of Civ. Pro. Code, does not give a mortgagee, as such, who has obtained a decree on his mortgage, the right to obtain, by an order in execution by proceedings or by his miscellaneous application, payment out of the sale-proceeds of the property under mortgage of the amount of the mortgage-debt. NARANA CHETTY v. SIT KAUKA, **U.B.R. 1897—1901, Vol. II, 276.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861, and VIII of 1859)—*continued.*

(1455)—*S. 73 (= Civ. Pro. Code, 1859, s. 270)—Applicability.*—S. 270 of Act VIII of 1859 does not apply where property has not been sold in execution of a decree. BISHEN CHUNDER SURMA CHOWDHRY v. MAN MOHINI DABEE, **8 W.R. 501.**

(1456)—*S. 73 (= Civ. Pro. Code, 1859, s. 270)—Decree-holder first attaching property—Priority not forfeited by delaying to obtain order for sale.*—A decree-holder who first attaches the judgment-debtor, does not forfeit its prior right to payment under ss. 270, Civ. Pro. Code, by delaying to obtain an order for the sale of the property upon his attachment. A decree-holder who sues out a second attachment and sells the property, takes the risk of there being no surplus proceeds after payment of the debt of the creditor first attaching. PETER PILLAI v. KRISTNA AYYAN, **6 M.H.C. 348.**

(1457)—*S. 73 (= Civ. Pro. Code, 1882, s. 295)—Execution of decree—Attachment in execution of different decrees-Payment into Court of money due under one decree—Rateable distribution—Assets realised by sale or otherwise.*—Where the same property is attached in execution of different decrees against the same judgment-debtor, and he pays into Court the amount due on account of one of the decree-holders, the latter is entitled to the whole of the amount, and the other decree-holders cannot claim rateable distribution of it, for it cannot be said to be assets realised by sale or otherwise in execution of a decree, not having been realised from the property of the judgment-debtor. GOPAL DAI v. CHUNNI LAL, **8 A. 67 = A.W.N—1886.** (6 B. 588, *Appr.*) [*Appr.*, 28 M. 380 = 15 M.L.J. 202; *R.*, 28 B. 264, 6 P.R. 1903; *D.*, 16 B. 91, 26 C. 772.]

(1458)—*S. 73 (= Civ. Pro. Code, Act X of 1877, s. 295)—Rateable distribution, assets, available for.*—As soon as the purchase-money for the properties sold in execution is paid into Court, such money becomes assets realized for the purposes of s. 295 of the Civ. Pro. Code. So long as the assets are in the hands of and held by the Court, every creditor who has prior to such realization, applied for execution of his money-decree, is entitled to a rateable division, and the mere fact that it might be possible that; under certain circumstances, the sale might be set aside by the Court, and the purchase-money returned to the purchaser, could not affect its character, while within the control of the Court as assets realised in execution of a decree. VISHVANATH MAHESHVAR v. VIRCHAND PANACHAND. **6 B. 16.** [*R.*, 12 C. 252, 12 B. 400, 6 B. 91. 28 B. 264; *D.*, 18 C. 242.]

(1459)—*S. 73 (= s. 295, Civ. Pro. Code, 1882)—Execution of decree—Suit for recovery of assets wrongly distributed—Pltaintiff's decree against common judgment-debtor and another—Defendant's decree against common judgment-debtor alone.*—Suit under s. 295, Civ. Pro. Code. One S was the common judgment-debtor of plaintiffs and defendants. Plaintiffs obtained a mortgage-decree against S and R. The mortgaged property having proved insufficient to satisfy the decree, the plaintiff obtained a decree under s. 90 of the Transfer of Property Act, personally against S and the representative of R, who was then dead. Defendants' decree was a simple decree againt S alone. Defendants realised a certain sum in execution by attaching and selling S's interest alone in a property belonging to him. Plaintiffs claimed a rateable distribution of the money so realized by defendants to satisfy their decree as far as it could. Defendants contended that the rateable distribution could not be allowed, since their decree was against S alone and the sale was of S's interest alone, whereas the decree of the plaintiffs, was one against S and another. *Held*, that, under the provisions of s. 295, the plaintiffs were entitled to a rateable distribution of the money realized by the sale of the common judgment-debtor. GATTI LAL v. BIR BAHADUR SAHAI, **27 A. 158 = A.W.N. 1904, 200 = 1 A.L.J. 562.** (30 C. 583, F.B., *F.*) [*F.*, 29 B. 528 = 7 Bom. L.R. 567.]

(1460)—*S. 73 (= Civ. Pro. Code, 1882, s. 295.—Rateable distribution—Attachment by inferior Court—Subsequent attachment by superior Court—Transfer of decree to superior Court—Decree—Same judgment-debtors—Separate and joint judgment-debtors—Marshalling equality.*—When it is found that property attached by a lower Court is already, or thereafter becomes, subject to an attachment issued from a superior Court, the decree-holder in the lower Court must apply to that Court to transfer his application to the higher Court if he desires to secure the appropriation of the attached property and its proceeds to the satisfaction of his decree. (6 M. 357, *F.*) [*No. F.*, 21 C. 200; *R.*, 19 B. 539.] The test of the application of s. 295 of the Code is not whether the decrees have been passed against the same judgment-debtor, but whether the applicants for a rateable share have applied for execution against the same judgment-debtor. A decree-holder holds a joint and several decree against A, B and C. Another decree-holder who holds a decree against A alone cannot claim to participate in the proceeds of property realised in execution of the decree against A, B and C, if the property so realized was the joint property of A, B and C. But if the property realized was the property of A alone, the decree-holder holding a decree against A alone is entitled to participate therein. (9 C. 920, 12 C. 294. *R.*, [*R.* 22 M. 241, 3 C.W.N. 368, 26 M. 179 = 12 M.L.J. 276, 8 O.C. 86, 14 C.W.N. 396 = 3 Ind. Cas. 105 = 11 C.L.J 69.] Execution proceedings are essentially proceedings in which equitable principles of fairness and equality should prevail. A decree-holder who has but one fund to go against is entitled to ask on the general equitable principle of marshalling, that another decree-holder who has two funds to go against, should go first

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

against the fund which he alone can attach, and only share rateably in the fund common to both, as creditor for the amount of the debt which will then be unsatisfied NIMBAJI TULSIRAM v. VADIA VENKATI, 16 B. 683.

(1461)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Execution of decree—Assets realised by sale or otherwise—Payment into Court by Collector as receiver of rents and profits under decree.*—A decree declared that the plaintiffs were entitled to have a former decree satisfied out of the rents and profits of certain property ; and the Collector of the district was appointed receiver, and, having received, the rents and profits as such, paid them into Court. Prior to the Collector's receipt of the rents and profits, an application was made by the holder of another decree for execution against the same judgment-debtor. *Held* that the case did not fall within the proviso to s. 295 of the Civ. Pro. Code, as that proviso related solely to cases of sale, and here there was no sale ; that the first paragraph of the section was applicable, there being nothing in that paragraph to limit the decree therein mentioned to any particular kind of decree ; and that the rents and profits were rateably divisible under the section. BHOLA NATH v. GANESHI LAL, A.W.N. 1890, 194.

(1462)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Incumbrances.*—When immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority SHAHI RAM v. SHIB LAL., 7A. 878=A.W.N. 1885,63. [*R.*) 8 O.C. 86.]

(1463)—*S. 73 (=s. 295, Civ. Pro. Code 1882)—Execution-sale—Rateable distribution among decree-holders.* Where property has been attached under a decree, and another creditor, who holds a decree jointly against such debtor and another, has, along with others applied for participation in the sale-proceeds of the attached property, *held*, such creditor also is entitled to a share in the proceeds. SHUMBHOO NATH PODDAR v. LUCKYNATH DEY, 9 C 290. [*F.*, 10 A. 35=7 A.W.N.262. 16 B. 683; *Expl.* 12 C. 294; *R.*, 16 B. 91. L.B.R. 1893—1900, 161. 22 M. 841. 3 C.W.N. 368, 8 O.C. 86.]

(1464)—*S. 73 (=Civ Pro. Code, 1882, s. 295—Mortgage—Letting by mortgagee to mortgagor—Rent in lieu of interest—Charge—Prior incumbrance.*—A mortgagee with possession, who lets the mortgaged property to the mortgagors under the stipulation, that they should pay rent in lieu of interest, and elects to convert the interest into rent, cannot contend that the arrears of rent are a charge on the land as against the encumbrance of a puisne mortgagee. SIVARAMA v. SUBRAMANYA, 9 M 87.

(1465)—*S. 73 (=s 295 Civ. Pro. Code 1882)—Sale of mortgaged property in execution of*

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decree on second mortgage—Suit by first mortgagee for re-sale of property in execution of decree on his mortgage—Where property, the subject of two mortgages, is sold in execution of a decree on the second mortgage, the only remedy open to the first mortgagee who has obtained a decree on his mortgage is to sue for the re-sale of the property in execution of his decree ; for he could not have claimed a rateable distribution under s. 295, Civ. Pro. Code, as the first and second provisos to that section refer only to sales in execution of simple money-decrees, and the third proviso relates to subsequent, and not to prior incumbrances. JAGAT NARAIN RAI v. DOUNDHEY RAI, 5 A.566=A.W.N. 1883, 180. [*D.*, 10 A. 35.]

(1466)—*S. 73 (=s. 225, prov. (c) (3), Civ. Pro. Code, 1882)—Surplus sale-proceeds—Mortgagee under no legal obligation to appropriate surplus sale proceeds towards mortgage debts—S. 44, I.C.A.—Ss. 96 97, Tr. P. Act.*—Under proviso (c), cl. (3), S. 295. Civ. Pro. Code, 1882, a mortgagee is entitled to claim, in satisfaction of the mortgage-debts due to him the surplus sale-proceeds arising from the sale of the mortgaged property in a suit by the prior mortgagee. But, because he has such a right, he is not under any legal obligation either to the mortgagors or their co-mortgagors so to appropriate the surplus sale-proceeds. The principle last cited is necessary, as otherwise it would be prejudicial to the mortgagors, out of the sale-proceeds of whose property, the payment is made, and might give their co-mortgagors an undue advantage. If, under s. 44, I.C.A., the release of one of several joint promisors does not affect the rights of the promisee as against the other promisors, the qualified release, by a part, of the mortgage security in favour of some of the several joint mortgagors, resulting from the mortgagee not choosing to enforce his rights as against any surplus sale-proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right. It is open to a mortgagee to forego his security if he has confidence in his debtor. *Johnson* v. *Bourne*, (1843), 2 Y and C. Ch. 268 (277), *F.*] If there be any hardship to any of the co-mortgagors, it is always open to them, when entering into the mortgage-contract, to insert a stipulation that the security, or its equivalent in money, in case of its being converted by sale *in invitum* should be primarily answerable for the mortgage-debt, and that their personal liability should arise only in the event of the security, or its equivalent proving insufficient. Where the mortgagee receives such surplus sale proceeds by means of or by virtue of the security, he is bound to appropriate the same to the satisfaction of the mortgage-debt. GANGA RAM MARWARI v. JAIBALLA NARAIN SINGH, 30 C. 953.

(1467)—*S. 73 (=s. 295, Civ. Pro. Code*, 1882—Where a person desires to share in the assets

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

realized by a sale in execution, he should apply to the Court, in which those assets are held, for execution of his decree. [*F.*, L.B.R. 1893—1900, 161; *R.*, 22 B. 778.] Where property attached by a Munsiff's Court is already or thereafter becomes subject to an attachment issued from a superior Court, the decree-holder should apply to this District Court to transfer his application to the higher Court, if he desires to secure the application of the attached property and its proceeds to the satisfaction of his decree. MUTTALAGIRI v. MUTTAYYR, **6 M. 357**. (7 C. 553, 4 B. 472, *Appr*). [*Not F.*, 21 C. 200, 16 B. 683.]

(1468)—*S. 73 (=old s. 295,—Rival decree-holders—Rateable distribution—Priority—Property given as security.*—Where the Court has accepted certain property as security for a decree, it cannot be attached and rateably distributed by rival decree-holders; such acceptance creates a first charge on the property for the particular decree which will, therefore, take precedence over all subsequent attachments or charges. KANWAR HIRA SINGH v. MASSON, **60 P.R. 1892.**

(1469)—*S. 73—Rateable distribution, application for—Notice to rival decree-holders, necessity of.*—*Held* that applications for rateable distribution should be dealt with after notice to the rival decreee-holders, whose interest may be seriously affected thereby. IKBAR HUSSAIN SAIYAD v. JAFAR ALI KHAN NAWAB, **13 O.C. 282.**

(1470)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Rateable distribution of assets conditions for—Notice of application to decree-holder realizing assets not necessary.*—In order that a decree-holder may be entitled to a rateable distribution under s. 295 of the Code, the following conditions must exist; two or more decree-holders must be holders of decrees for money against the same judgment debtor; the decree-holder seeking rateable distribution must, prior to the realization, have applied to the Court, by which the assets are held, for execution of his decree; the realisation of the assets must have been made by sale or otherwise in execution of the other decree. *Held*, that the section does not provide that an application for rateable distribution of assets realised in execution of a decree cannot be made in the course of execution-proceedings taken by the applicant himself, but must be made in the course of execution-proceedings made by some other decree-holder: nor is it necessary that to entitle the applicant to a rateable distribution, the decree-holder, at whose instance assets have been realized, must have knowledge of such an application. CHUNNI LAL v. JUGAL KISHORE, **27 A. 132=A.W.N. 1904, 188=1 A L J. 519.**

(1471)—*S. 73(=s. 295, Civ. Pro. Code, 1882)—Rateable distribution order, for—Suit for declaration, decree collusive—Rateable distribution not allowable.*—After an order for rateable distribution of sale-proceeds has been made under

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

s. 295 of the Code, and before the funds have been actually distributed, it is open to one of the decree-holders to maintain a suit for a declaration that the decree of a rival decree-holder is collusive and that he is not entitled to share in the sale-proceeds by way of rateable distribution. TRAILAKYA NATH ADHYA v. PULLIN BEHARI BARAL, **3 C.L.J. 385.** (11 C. 718, *D.*)

(1472)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Execution of decree—Rateable distribution—Proportionate distribution of sale-proceeds.*—N and S obtained decrees against three judment-debtors—A, M and B. J obtained a decree against A alone. Property belonging to the judgment-debtors, A, M and B was attached and sold in execution of decrees obtained by N and S.: *Held*, that J was entitled under the provisions of s. 295 of the Code of Civil Procedure to a proportional distribution of the assets realized, so far as they represented the share of A in that property. CHHOTALAL v. NABIBHAI, **7 Bom. L.R. 567=29 B. 528.**

(1473)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Rateable distribution—Same judgment-debtor—Suit for refund of money wrongfully distributed—Amount, ascertainment of.*—Where the plaintiff obtained a decree against P and S and the first defendant obtained another decree against P and R, the father of S, and the other defendants obtained decrees against P, R and S, and a certain amount was realised by the sale of the properties of P, the common judgment-debtor, *held*, that the plaintiff was entitled to rateable distribution of the sale-proceeds and to ask for a refund of the monies paid to the defendants, under s. 295, Civ. Pro. Code, out of the assets so realised. (9 C. 920, 16 B. 683, *R*; 12 C. 294 *D.*) No question of the ascertainment of the shares of the judgment-debtor, or of the application of the principle of marshalling, could arise in the case. [*R.*, 8 O.C. 86; *Cited*, 30 C. 583, **F.B.**] In a question of rateable distribution, the amount ought not to be estimated with reference to the original amount of the several decrees but only with reference to the unsatisfied portions of these decrees. SARAT CHANDRA KUNDU v. DOYAL CHAND SEAL, **3 C.W.N. 368.**

(1474)—*S. 73 (=s. 295, Civ. Pro. Code, 1882—Lien.*—A decree-holder who attaches and sells moveable property of his judgment-debtor, on which a third party has a lien, is liable to that third party for the loss that he sustains by having his lien destroyed or impaired. NARAYANEN CHETTY v. A. K. A. M. ANNAMALEE CHETTY, **U.B R. 1902—1903, Vol. II, Civ. Pro. 9.**

(1475)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Act V of 1908, ss. 38, 63, 73, O. 21, rr. 6, 7, 8—Rateable distribution — Realization of assets by Higher Court—Application—For execution to Court of lower grade—Transfer to High Court—Whether necessary to entitle applicant to rateable distribution.*—Petitioner attached property of the judgment-debtor in execution

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of his decree in the Munsiff's Court. The same property was attached by another creditor of the same judgment-debtor in execution of a decree of the District Court. The property was sold by the District Court and the purchaser made the deposit on 17th September, 1909, and paid the balance of the purchase-money on 29th September, 1909. Petitioner applied to the District Munsiff's Court for execution on 29th September, 1909, but the order of transfer was not received in the District Court till the following day. *Held*, that the assets of the judgment-debtor should be taken to have been realized by the District Court only on the 29th September, 1909, within the meaning of s. 295, Civ. Pro. Code, 1882. (26 M. 179, *F.*) That an application for execution to the District Court, before the receipt of assets, was an essential pre-requisite of a general claim for rateable distribution. (6 M. 357, *F.*) That the right to share in the proceeds realized by sale of attached property was independent of a transfer of decree to the higher Court, and that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitled the decree-holder to apply to the Court, to which the decree is sent, for execution. ARIMUTHU CHETTY v. VYAPURI PANDARAM, 8 **Ind. Cas. 882=9 M.L.T. 121=21 M.L.J. 505.** (6 M. 357, 16 B. 633, *Diss.*; 21 C, 200, *Appr.*)

(1476)—*S. 73—Rateable distribution—Proceeds of execution-sale—Receiver—Leave of Court — Prohibitory order—Leave of Court subsequent to application—Validation.*—It is necessary for the applicant for rateable distribution of the sale-proceeds to obtain leave from the Court by which the Receiver was appointed before he can be permitted to prosecute his application against him under s. 73 of the Code of Civil Procedure, 1908. A prohibitory order under s. 272 of the Code of Civil Procedure, 1882, is not equivalent to a grant of leave to the decree-holder to execute his decree against the properties in the hands of the Receiver. The Courts are generally reluctant to allow execution to proceed against properties in the hands of a Receiver until leave has expressly been granted for that purpose. If the proceedings have been commenced without leave previously obtained, they can be validated by the subsequent grant of leave during their pendency. (32 C. 270, *Diss.*; 15 C.W.N. 54, *F.*) The petitioner for rateable distribution of the proceeds of the execution-sale was allowed an opportunity to obtain the requisite leave of the Court which appointed the Receiver, at a late stage of the case. SARAT CHANDRA BANERJEE v. APURBA KRISHNA ROY, **14 C.L.J. 55.**

(1477)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Order for refund by person who had received payment—Assets not actually paid to person not entitled to receive same—Suit by former that latter not entitled to rateable distribution—Maintainability.*—Plaintiff, a decree-holder,

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took the assets realized by sale of the judgment-debtor's property in discharge of his decree-debt. On an application by another decree-holder of the same judgment-debtor for rateable distribution of the money received by the plaintiff, the Court ordered the plaintiff to deposit the amount received by him for the purpose of rateable distribution. Thereupon, plaintiff instituted a suit for declaration that the other decree-holder was not entitled to a rateable distribution, as his application for execution had been dismissed by the Court before the realization of the assets by him (plaintiff). *Held* that on the ground that the assets had not come to the defendant's hands a refund was not possible. Having regard to the language of s. 265 of the Code, the suit was not maintainable. PARSURAMA PATTAR v. VEERARAGHAVA PATTAR, **7 M.L.J. 277.**

(1478)—*S. 73 (=Civ. Pro. Code, 1882, s. 295)—Rateable distribution on execution—Decree, personal against one of the several judgment-debtors and for sale of the property of the rest—Money-decree.*— Defendants had obtained money-decrees against one B and two others, and plaintiffs subsequently obtained a decree against the above three persons and one S in addition. On defendants obtaining an order for attachment and sale of B's property in execution of their decree, plaintiff's also proceeded to attach the said B's property in execution of their decree, and applied for an order to enable them to share rateably in the proceeds of the defendant's execution. The decree of the plaintiffs against B and the three others was held not to have lost its character as a money-decree, merely because a sale of the property of the other three judgment-debtors had been directed thereby. Their decree so far as regards B was therefore a decree for money within the meaning of s. 295 of the Civ. Pro. Code, so as to entitle them to rateable distribution. Nor would the fact that there were four judgment-debtors in the plaintiffs' decree, and only three judgment-debtors in the defendants' decrees deprive the plaintiffs of their right to share rateably. THE DELHI AND LONDON BANK v. THE UNCOVENANTED SERVICE BANK, BAREILLY, **10 A. 33=A.W.N. 1887, 262.** (9 C. 920, 12 C. 298, 5 A. 566, 11 C. 718, *D.*) [*R.*, 8 O.C. 86.]

(1479)—*S. 73 (=s. 295, Civ. Pro Code, 1882)—Property mortgaged in unspecified moieties—Execution-sale by one mortgagee after attachment by the other.*—Where there were two mortgages of the same property, each covering a moiety without further specification, and both the mortgagees attached it in execution of their decrees, the purchaser at a sale in execution of one of the decrees took one of the moities only, subject to the other unsatisfied mortgagee's lien, notwithstanding the omission by the executing Court to give specific direction as provided in cl. (*b*) of s. 295 of the Civ. Pro. Code, 1882, and notwithstanding the whole

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

interests of the mortgagor was intended to be sold. JANOKY BULLUBH SEN v. JOHIRUDDIN MAHOMED ABU ALI SOHER CHOWDHURY, **10 C. 867.** [*R.*, 16 B. 91, 8 O.C. 86.]

(1480)—*S. 73 (=Civ. Pro. Code, Act XIV of 1882, s. 295) — Mortgage-decree—Decree for money.*—Two persons, who held prior and subsequent mortgages from the same persons, some items of property being common to both mortgages, obtained decrees for sale against the mortgaged properties, and for the balance against the mortgagors; but the subsequent mortgagee gave up his claim against the hypotheca and attached and brought to sale other properties of the mortgagor. The sale in execution of the other mortgage-decree was adjourned meanwhile, and that mortgagee applied for rateable distribution of the proceeds of the other execution-sale, which was refused; and he brought a suit for the same. It was held that he was entitled to rateable distribution, since every decree directing the payment of money is a "money-decree" within the meaning of s. 295 of the Civ. Pro. Code. Though it was true that the plaintiff was entitled to proceed against other properties, only when the proceeds of sale of the hypotheca were found insufficient for the decree, the other mortgagee was also in the same position, and the properties ought not to have been sold in execution of his decree before the hypotheca had been sold. KOMMACHI KATHER v. PAKKER, **20 M. 107=7 M.L.J. 66.** [*Diss.*, 27 C. 285; *F.*, 28 M. 224; *Appr.*, 28 M. 473=15 M.L.J. 126; *R.*, 3 A.L.J. 585=A.W.N. 1906. 237=1 M.L.T. 247.]

(1481)—*S. 73 (=Civ. Pro. Code, 1882, s. 295) —Execution of decree—Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in former Court transferred to High Court—Property realized in execution—Liability to rateable distribution.*—Where the High Court ordered the consolidation of the execution-proceedings in a Presidency Small Cause Court's decree, and directed them to be taken along with the proceedings in execution of its own decree, *held* that the High Court must be held to have adopted all the proceedings in execution in the Small Cause Court, and should deal with them as if they had taken place in the High Court itself. And consequently an application for execution made in the Small Cause Court is to be treated as one under s. 295 of the Civ. Pro. Code, 1882, and as enuring to the benefit of that decree-holder in the same manner as if he had himself transferred his decree to the High Court, and thereafter applied for execution there. And, therefore, he was entitled to share the proceeds of the sale in execution rateably with the holder of the decree of the High Court. JAYNARAYAN MEGHRAJ v. ISMAIL KARAMALI, **20 B. 377.**

(1482)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Rateable distribution—Judgment-debtor,*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

same.—Where A obtained a decree against X, Y and Z, and B obtained a decree against X and Y only, *held* that the case fell under s. 295, Civ. Pro. Code, and B was entitled to a proportionate distribution of the monies realised by sale of the property of X, Y and Z, so far as those monies represented the share of his own judgment-debtors, X and Y in that property, GONESH DOS BAGRIA v. SHIVA LAKSHMAN BHAKAT. **30 C. 583, F.B.=7 C.W.N. 414.** (12 C. 294. *Overruled.*) (*F.*, 27 A. 158=1904, A.W.N. 200=1 A.L.J. 562, 29 B. 528=7 Bom. L.R. 567; *Relied on*, 10 O.C. 129; *R.*, 8 O.C 86; *Not Appl.*, 36 C. 130.]

(1483)—S. *73(=Civ. Pro. Code*, 1882, *s. 295, — Execution sale — Parties claiming interest should be given an opportunity of being heard and establishing their claims to participate in distribution.*—An order passed under s. 295, Civ. Pro. Code, is not subject to appeal, and the Court does not ordinarily exercise its powers of revision when other remedy is expressly provided by law. Before passing an order under s. 295, Civ. Pro. Code, the Court should give the parties claiming to be interested an opportunity of being heard, and of establishing their claims to participate in the distribution. MA MYA v. TO LU, **U.B.R. 1897—1901, Vol. II, 274.**

(1484)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Decree—Execution—Rateable distribution—Order—Appeal from order.*—No appeal lies from an order passed under s. 295. MAGANLAL MULJI v. BOGILAL NARANJI, **12 Bom. L.R. 368.**

(1485)—*S. 73 (=s. 295, Civ. Pro. Code, 1882)—Order under, whether Chief Court would interfere with, under s. 70 (1) (a) of the Punjab Courts Act*, 1884.—In this case, the petitioners asked for the revision of an order under s. 295 of the Code, and the question had to be decided whether the Chief Court could interfere on the revision side, another remedy being open to the petitioners under the penultimate clause of the above section. *Held*, it is not the practice of the Chief Court to interfere on the revision side, in exercise of its extraordinary jurisdiction, under the Punjab Courts Act with an order under s. 295 of the Code, save in exceptional circumstances clearly warranting such interferences. FAZAL DIN v. NARAIN SINGH, **128 P.R. 1906=119 P.L.R. 1908.** (65 P.R. 1905, 82 P.R. 1905, 21 P.R. 1902, 76 P.R, 1902, *R.*)

(1486)—*S. 73 Civ. Pro. Code*, 1882, *s. 295) —Execution of decree—Dismissal of application on date fixed for passing of order—Distribution of assets—Procedure—Revision.*—An application for execution should not be dismissed for default of prosecution when the decree-holder does not appear on the date fixed in the case, if only order is to be passed on that date. The Court executing a decree had on a date fixed only to pass order under s. 295 of the Civ. Pro. Code for distribution of assets realized by sale of property of the judgment-debtor. It dismissed an application for execution of decree

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filed by one of the judgment creditors for default of appearance and ordered assets to be distributed among the remaining judgment-creditors. Upon revision, *held*, that the order of the lower Court was wrong, that it should have ordered distribution of the assets *pro rata* among all the judgment-creditors, whose applications for execution were pending before the Court including the decree-holder whose application was dismissed. BISAKHI RAM v. DIAL SINGH **32 P.L.R. 1904.** (82 P.R. 1901, *F*).

(1487)—*S. 73* (=s. *295, Civ. Pro. Code*, 1882—*Limitation.*—The period of limitation applicable to a claim under s. 295, Civ. Pro. Code, 1882, is three years. HAJI IBHAM v. AMOLAK, **1 Bom. L.R. 795.**

(1488)—*S. 73* (=s. *295, Civ. Pro. Code*, 1882)—*Distribution—Order in a suit—Limitation Act* (*XV of* 1877), *art. 13.*—The scheme of s. 295, Civ. Pro. Code, is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the right of the parties, without this distribution importing a conclusive adjudication on rights, which may be subsequently re-adjusted by a suit. An order for distribution under s. 295, Civ. Pro. Code, is an order in a suit, and is, consequently, excluded from the operation of art, 13, sch. II, Limitation Act, 1877. SHANKAR v. LALA PHULCHAND, **3 Bom. L.R. 713.**

(1489)—*S. 73* (=*old s. 295*)—*Suit for Refund of sale-proceeds paid under order for distribution under old Civ. Pro. Code, s. 295—Suit by puisne mortgagee—Marshalling—Limitation Act*, 1877, *art. 13.*—Art. 13, Limitation Act, 1877, will not apply to a suit, which was not one to set aside an order under old s. 295, but was one to recover money on the allegation of a superior title in the plaintiff. The defendant was the mortgagee of two houses and the plaintiff of one of them. *Held* that the defendant could realise the money due to him on his mortgage first from the house not mortgaged to the plaintiff and that he could approach the house mortgaged to the plaintiff also only to make good any deficiency that may be found due after the sale of the first house. SOHAN LAL v. BALDEO SAHAI, **68 P.R. 1895.** (15 B. 438, A.W.N. 1894, 78, *F*; 13 C. 159. *Not F.*)

(1489-*a*)—*S. 73* (=*Civ. Pro. Code*, 1859, s. *270*)—*Mortgage-bond—Purchase-moneys.*—If the application of the purchaser of a decree for attachment of purchase-moneys is rejected, he may institute a regular suit to establish his title under Act VIII of 1859, s. 270; otherwise he forfeits his lien both on the land and on the purchase-moneys. But he does not forfeit his right to execute the decree otherwise. SYUD NADIR HOSSEIN v. PEAROO THOVILDARINEE, **14 B.L.R. 428, note.** [*R.*, 22 W.R. 98.]

(1489-*b*)—*S. 73* (=s. *295, Civ. Pro. Code*, 1882) — *Mortgage — Mortgaged property sold under* s. 295 (*b*)—*Right of mortgagee-plaintiff to interest on sale-proceeds.*—Where part of mortgaged property is sold under s. 295 (*b*), Civ. Pro. Code, 1882, the plaintiff is entitled to recover interest on the sale-proceeds, and there is no duty imposed on him under the section to draw the amount out of Court and apply it in part satisfaction of the mortgage-debt. KOTIPALAPUDI v. MAGANTI SEETHAYA, **10 Ind. Cas. 852.**

(1489-*c*)—*S. 73* (=*Civ. Pro. Code*, 1859, s. *270*)—*Rival decree holders—Right of action—Appeal.*—An action will lie in the Civil Court by a decree holder against the holder of another decree in order to obtain a refund of money which has been paid to the latter under an order passed in the execution department in contravention of the provisions of s. 270 of the Civ. Pro. Code, 1859. It is for the Court to decide whether, having regard to all the equities between the parties, the plaintiff is entitled to recover or not. No appeal lies from an order directing the distribution of sale-proceeds under s. 270, Act VIII of 1859. GOGARAM v. KARTICK CHUNDER SINGH, **B.L.R. Sup. Vol. 1022=9 W.R. 514.** [*Appr.*, 3 N.W.P. 104; *R.*, 16 W.R. 11, 17 W.R. 227, 12 C. 317, 11 C. 718, 13 C. 159; *Cons.*, 23 W.R. 373.]

(1490)—S. 73, order under, whether open to revision by the Chief Court—Punjab Courts Act, 1884, s. 70 (1) (*a*)—*See* PUNJAB ACT XVIII OF 1884, s. 70 (1) (*a*) and (*b*). 65 P.R. 1905=130 P.L.R. 1905.

(1491)—S. 73—*See* ATTACHMENT—PRIORITY OF ATTACHMENT, 2 N.W.P. 368.

(1492)—S. 73—*See* CERTIFICATE OF ADMINISTRATION—PROCEDURE, 19 W.R. 183.

(1493)—S. 73—*See* INSOLVENCY — MISCELLANEOUS, 27 C. 351=4 C.W.N. 610.

(1494)—S. 73—*See* LIMITATION — MISCELLANEOUS, 1 Bom. L.R. 795.

(1495)—S. 73—*See* LIMITATION ACT, 1908, art. 13, 17 W.R. 227, 23 A. 313=5 C.W.N. 649=3 Bom. L.R. 713=28 I.A. 203, P.C.

(1496)—S. 73—*See* LIMITATION ACT, 1908, arts. 13, 63, 15 B. 438.

(1497)—S. 73—*See* MAHOMEDAN LAW—DOWER, 26 A. 28—A.W.N. 1903, 184.

(1498)—S. 73—*See* MORTGAGE—FORM OF MORTGAGES, 19 W.R. 255=14 B.L.R. 425, Note.

(1499)—S. 73—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 22 W.R. 98, 6 C. C. 76.

(1500)—S. 73—*See* PARTIES TO SUIT—GENERAL, 23 W.R. 434.

(1501)—S. 73—Decree against two principal debtors and surety—Decree against principal debtors alone for larger sum—Partial satisfaction of decree against the principal debtors alone by rateable distribution—Extent of surety's liability—*See* PRINCIPAL AND SURETY—GENERAL, 2 M.L.T. 30=30 M. 167.

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(1502)—S. 73—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 12 A. 546=10 A. W.N. 77, W.R. F.B., 180

(1503)—S. 73—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHT TO, 16 B. 91, 13 B. 154, 13 B. 171, 16 W.R. 11.

(1504)—S. 73—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 W.R. 415.

(5105)—S. 73—*See* SMALL CAUSES COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 7 A. 378=A.W.N. 1885, 63, 9 M. 250.

(1505-*a*)—S. 73—*See* NOS. 332, 567, 568, 920, 921, 922, 922-*a*, 982, 1276, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1336, 1337, 1337-*a*, 1337-*b*, 1338, *supra*, AND NOS. 2181, 2668-*a*, 3220, 3419, 3424, 3429, 3436, 3437, 3564, 3627, 3730, 3731, 3779, 3780, 3789, 3971, 4045, 4064, 4130, 4131, 4132, 4133, *infra*.

(1506)—*Ss. 73, 38, 39, 41, O. 21, rr. 4 and 5 (=ss 295, 223 (d), Civ. Pro Code, 1882)—Transfer of execution proceedings from one Court to another—Rateable distribution—Civ Pro. Code, 1882, ss. 295, 223 (d).*—K obtained a decree against G in the Court of Small Causes at Poona and in execution attached his property. L obtained another against the same debtor, G in the High Court of Bombay and got the decree transferred for execution to the Court of the Subordinate Judge of Poona and attached the property which had been previously attached at the instance of K. On the motion of L. the execution proceedings of the Small Cause Court were transferred to the Sub-Court by the District Judge, and L thereupon claimed to share rateably in the proceeds of the execution-sale. Objection was taken that L was not entitled to rateable distribution under s. 295 of the Civ. Pro. Code, because the attachment had been made under the decrees of two different Courts, and that the order of the District Judge transferring the execution-proceedings was contrary to the spirit and purpose of s. 25 of the Civ. Pro. Code. *Held* that the last para of s. 25 had not the effect of converting the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit which had been transferred, being conducted by the Sub Court as a Small Cause suit; and that, therefore, s. 295 would apply and rateable distribution could be granted. *Quœre*:—Where the attached property is within the jurisdiction of a Subordinate Judge's Court, whether the Subordinate Judge has power to transfer a decree for execution to a Court of Small Causes, under s. 223 (*d*) of the Civ. Pro. Code, 1882, KRISHNA VELJI MARWADI v. BHAN MANSARAM, **18 B. 61=P.J. 1893, 258.**

(1507)—*Ss. 73, 38, 39, 41, O. 21, rr. 4 and 5 (=Civ. Pro. Code, 1882, ss. 295, 223)—Execution of decree—Transfer of decree—Rateable distribution of assets realized in execution.*—In execution of a decree which he had

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obtained against X and Y in the High Court on the Original Side. A attached and brought to sale the property belonging to X alone by an order made by the Court at B. In the Court at S, T obtained another decree against X and attached the same property. He then made an application to Court at B under s. 295 of the Civ. Pro. Code, and claimed rateable distribution of the assets realised by sale of the attached property. His application having been rejected, he applied to the High Court under s. 622, Civ. Pro. Code. *Held* that T was not entitled to rateable distribution of the assets. The Court at B had no jurisdiction to entertain an application with respect to a decree passed by the Court at S, because the decree had not been transferred by the latter Court to the former, as acquired by s. 223 of the Civ. Pro. Code, DATTATRAYA v. RAHIMTULLA NUR MAHOMADKHOJA, **18 B. 456.** [*R.*, 11 C.L J. 69=14 C.WN. 396=3 Ind. Cas. 105, 47 P.W.R. 1910 =6 Ind. Cas. 650.]

(1508)—Ss. 73, 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 14 A. 210= A.W.N. 1892, 56.

(1509)—*Ss. 73, 47, 104, O. 43, r. 1, s. 115 (= ss. 295, 244, 588 and 622, Civ. Pro. Code, 1882)—Rateable distribution, order directing—Appealability—Revision.*—The petitioners had obtained a decree against certain judgment-debtors and had attached some properties of the latter. The respondents who held a decree against persons not exactly identical with the judgment-debtors of the petitioners, applied for reteable distribution under s. 295, and the Munsiff refused to grant the application. On appeal, the District Judge granted the respondents prayer for reteable distribution. *Held*, by the High Court, that an order passed under s. 295, Civ. Pro. Code, is not ordinarily appealable under s 588 (19 C. 683=19 I A. 166, *Not appl.*) that such order cannot possibly come within the scope of s. 244, Civ. Pro. Code (26 M. 176, *Relied on*; 28 B. 458, *D.*) and that therefore no appeal lay to the District Judge. *Held*, also, that the order of the District Judge passed in appeal was without jurisdiction and could be set aside by the High Court, in revision, under s. 622, Civ. Pro. Code. JAGADISH CHANDRA SHAHA v. KRIPA NATH SHAHA, **36 C. 180= 1 Ind. Cas. 783.**

(1510)—*Ss. 73, 48, O. 21, rr. 10, 21 (=Civ Pro. Code, 1882, ss. 295, 230)—Execution of decree—Rateable share of sale-proceeds—Application to be made to Court holding assets prior to their realization—Application to be made to Court which passed decree or to Court to which decree sent for execution*—S. 295 requires that the persons seeking a rateable share shall, prior to the realisation of the assets, have applied: the the Court which holds the assets for execution of their decrees, Under s. 230 of the Code, an application for execution of a decree can only be made to the Court which has passed the decree or to a Court, to which the decree has

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been sent for execution under ss. 223 and 224 SIT SAING v. MAUNG PO KAING, **L.B.R. 1900—1902, Vol. I. 121.**

(1511)—*Ss. 73, 63—Rateable distribution among decree-holders—Transfer of decrees to the Court where realisation takes place—Application for execution to the Court realizing money, necessity of.*—The object of s. 73, Civ. Pro. Code, is twofold, *firstly*, to prevent unnecessary multiplicity of execution-proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property; and *secondly*, to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them. *Held* further, that s. 295 of Act XIV of 1882 (corresponding to s. 73 of the present Code), did not require the transfer of a decree to the Court where the process of realization takes place as a condition, and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. MOHAN LAL (LALA) v. HUMAYUN JAH (PRINCE MIRZA), **13 O.C. 291=8 Ind. Cas. 372.**

(1512)—*Ss. 73, 63, O. 21, rr. 58, 62 (=ss. 295, 285, 278, 282, Civ. Pro. Code, 1882).—Attachment by inferior Court of property already attached by superior Court—Rights of earlier attaching creditor refused by superior Court—Lien of prior attaching creditor in inferior Court on property subsequently attached by superior Court.*—A judgment-creditor, who has got attached the property of his judgment-debtor by the Court where he is executing his decree, and whose application, under s. 295, Civ. Pro. Code, to another Court which had previously attached the same property in execution of a decree, being executed in that Court by another judgment-creditor, for a rateable division of the assets realized by that Court has been refused because it was inadmissible under s. 295, has not a right because of anything provided in s. 285 of Civ. Pro. Code, to have the execution-proceedings in that Court re-opened and to compel restoration of any portion of the assets thus realized and paid by the Court which realized the assets to that other decree holder. (21 C. 200, 4 M. 383, 6 M. 357, 4 B. 472, 5 B. 198, 9 C. 920, *Dist.*) But an attachment of property under a decree does not cease to constitute a charge upon the attached property, merely because s. 295, Civ. Pro. Code, deprives the first attaching creditor of the priority enjoyed under ss. 270 and 271 of Act VIII of 1859. If a judgment-creditor executing his decree in an inferior Court gets the property of his judgment-debtor attached before another creditor executing his decree against the same debtor in a superior Court gets the same property attached, then, there is no room for holding that, upon application being made to the superior Court which has realized the assets by the earlier attaching creditor even after realization and even without transfer of his execution proceedings to the superior Court, such an application may well be treated as a claim to a share of the assets based upon the earlier attachment and made under ss. 278 and 282 of Civ. Pro. Code, and such superior Court acting on the ground that the line obtained by a prior attaching creditor is not entirely extinguished by the principle of rateable distribution introduced by s. 295 of the Code may well give recognition to such a claim by setting free a rateable share of the realized assets, to be made available, upon the proper steps for that purpose being taken, for the satisfaction of the decree of the creditor who has made the earlier attachment in his execution proceedings in another Court. The decision in 21 C. 200 is strongly in favour of that contention. But the authorities show that, if the applicant to the superior Court has not placed the earlier attachment, he can only claim a rateable distribution of assets on the terms and conditions laid down in s. 295, that is, by applying for the execution of his decree to the Court, which has realized the assets before such realization has taken place. CHOCKALINGUM CHETTY v. MOOTHAIA CHETTY, **L.B.R. 1893—1900, 161.**

(1513)—*Ss. 73, 115 (=ss. 295, 622, Civ. Pro. Code, 1877)—Civ. Pro. Code, s. 295—Powers of High Court to interfere in an order under s. 295—S. 622, Civ. Pro. Code—Rateable distribution who were entitled to.*—Although under s. 295, Civ. Pro. Code, the defeated party has his remedy by suit, yet he is not confined to that remedy if circumstances exist which warrant him in applying to the High Court, to interfere under s. 622, Civ. Pro. Code. [*R.*, 28 B. 264, 32 M. 334=19 M.L.J. 307.] It is to be understood that persons, for whom the benefit of s. 295, Civ. Pro. Code, is intended, are those who have applied before the assets came into the hands of the Court and whose applications are still on the file and undisposed of. TIRUCHITTAMBALA CHETTY v. SESHAYYANGAR, **4 M. 383.** [*App.*, 15 M. 372; *Ex.*, 26 M. 179=12 M.L.J. 276; *R.*, 12 B. 100, L.B.R. 1893—1900, 161, 65 P.R. 1905=130 P.L.R. 1905, 3 L.B.R. 275]

(1514)—*Ss. 73, 115 (=Civ. Pro. Code, 1882, ss. 295, 622)—Application by rival decree-holder for rateable distribution—Revision by High Court.*—The High Court has no power to revise under s. 622, Civ. Pro. Code, an order of a District Munsif allowing an application for rateable distribution out of the sale-proceeds made by a rival decree-holder under s. 295, Civ. Pro. Code. Where the District Munsiff has jurisdiction, the mere fact of his decision being erroneous does not justify a revision by the High Court under s. 622, Civ. Pro. Code. MAMMAD v. RAMA CHUND, **4 M.L.J. 87.** (11 I.A. 237, *F.*; 19 I.A. 154, *D.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1515)—*Ss. 73, 115 (=ss. 295 and 622 Civ. Pro. Code*, 1882)—*Rateable distribution—Power of Court to refuse—Revision—Interference by High Court, where other remedy exists.*—Where a Judge refused an application for rateable distribution of a petitioner who was entitled therefor, on the ground that there was other property of the judgment-debtor, which, though not yet realised by execution, may be made available for the satisfaction of the petitioner's debt. *Held*, that s. 295 does not give such a discretion, nor does it permit the Judge in his discretion to refuse to a party, who to his knowledge is entitled to relief under the section, the relief to which he is entitled. *Held*, this is an order which can be revised under s. 622, Civ. Pro. Code, the lower Court having declined to exercise a jurisdiction vested in it. Where a party has a remedy elsewhere than in the High Court, the High Court should not, except in special cases, interfere under s. 622, Civ. Pro. Code. But in a case where there is no doubt as to the rights of parties and no other remedy except by a suit to which there can be no defence, the High Court will be justified in exercising its powers of revision under s. 622, Civ. Pro. Code. SRI KRISHNA DOSS v. H. CHANDOOKCHAND, **5 M.L.T. 125=19 M.L.J. 307=32 M. 334.** (4 M. 383, 15 M. 372, *F.*; 11 M. 356, *Cons.*)

(1516)—*Ss. 73, 115 (=ss. 295 and 622, Civ. Pro. Code*, 1882)—*Rateable distribution—Realisation—Assets if to be attached—Revision. High Court's power of interference in.*—Under s. 295, Civ. Pro. Code, 1882, the decree-holder applying for rateable distribution must apply for execution of his decree to the Court by which the assets are held, and he must do so prior to their realisation. The section does not require that such decree-holder must also apply for attachment of the assets. The decree-holders who attach the surplus sale-proceeds subsequent to the realisation of the assets, are not entitled to have any share in the assets. (26 C. 772=4 C.W.N. 27; *F.*] Under s. 622, Civ. Pro. Code, 1882, High Court can interfere with an order passed under s. 295 of the same Code. INDRA CHAND BOTHRA v. GHANESHYAM MISSER, **9 C.L.J. 210.** [13 C. 225, 15 M. 372, *R.*]

(1517)—*Ss. 73, 115—Rateable distribution—Proceeds of execution sale—'Assets'—Purchase-money—Receiver, application for execution against—Leave of Court subsequent to application—Validation—Revision—Misapprehension of true effect of statutory provision—Refusal to exercise jurisdiction.*—The condition essential to attract the operation of s. 73 of the Code of Civil Procedure, 1908, is, that the application to the Court for execution of the decrees should be made before the receipt of the assets which have to be rateably distributed. Till the whole of the purchase-money has been deposited, it is open to the decree-holders to apply for execution. Where leave was obtained to proceed against the Receiver after the application for execution had been presented and before the Court was called upon to make a rateable distribution of the assests. *Held*, that the subsequent grant of leave validated the application. [32 C. 270, *Diss.*; 15 C.W.N. 54, *F.*] The High Court can interfere in the exercise of its revisional jurisdiction, where the Court below refused to exercise the jurisdiction vested in it, by reason of an erroneous interpretation of the provisions of s. 73 of the Code. MAHARAJA OF BURDWAN v. APURBA KRISHNA ROY, **14 C.L.J. 50.**

(1518)—*Ss. 73, 115 (=Civ. Pro. Code*, 1882, *ss. 295, 622*;—*Rateable distribution—Vesting order in insolvency.*—A judgment-debtor whose proprety has been attached in execution, filed his petition in insolvency at Madras and a vesting order was made. Thereafter, another judgment-creditor of the debtor applied for attachment and sale of the other properties, and put in another application for rateable distribution of the sale-proceeds under the previous attachment. As the vesting order divests the judgment-debtor of the property, the decree-holder's application for attachment and sale cannot be granted, but his application for rateable distribution must be granted. If the other decree-holder has realised the entire sale-proceeds, he must be compelled to refund the share of the second decree-holder. [*R.*, 65 P.R 1905=130 P.L.R. 1905, 9 C.L.J. 210, 3 L.B.R. 275, 32 M. 334=19 M.L.J. 307; *Dist.*, 26 M. 673.] If the Court declines to entertain the application for rateable distribution in the above case on the ground that it is precluded from so doing by the insolvency proceedings, it fails to exercise a jurisdiction vested in it by law and the High Court can interfere under s. 622, Civ. Pro. Code. VIRARAGHAVA v. PARASURAMA, **15 M. 372.** [*R.*, 3 L.B.R. 275 (*F.*, 5 M.L.T. 125.]

(1519)—*Ss. 73, 115 (=ss. 295, 622, Civ. Pro. Code*, 1882)—*One decree against the sons of a deceased debtor, and another against the deceased—Whether judgment-debtor same under s. 295.*—Where the petitioner obtained a decree against the sons of M to be satisfied out of the assets of the family in their hands, and the respondent obtained a decree against M himself, *held* that the judgment-debtors under both the decrees were not the same within s. 295) Civ. Pro. Code, 1882. (25 B. 494, *Appl.*, The fact that the two decrees are to be realized out of the family property is not decisive of the question against whom the decrees are made. When a decree is obtained against the legal representatives of a deceased man, the legal representatives are the judgment-debtors, and not the estate of the deceased. SRINIVASIENGAR v. KANTHIMATHI AMMAL, **7 M.L.T. 157=5 Ind. Cas. 917=33 M. 465.** (19 M.L.J. 651, *F.*)

(1520)—*Ss. 73, 115 (=ss. 295 and 622, Civ. Pro. Code*, 1882)—*Revision, where Court fails to exercise jurisdicion—Rateable distribution,*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

"*application for*—" *Same judgment-debtors, meaning of*—*Right of decree holders to rateable distribution in case where decrees against estates of different persons but where same persons are judgment debtors.*—*Held*, that, in order to claim a rateable distribution under s. 295 of the Code, it is not necessary that the two decrees should have been passed precisely against the same judgment-debtors, but that the test is whether the applicant for a rateable share and the person in execution of whose decree assets have been realised have both applied for execution against the same judgment-debtor. IKBAL JAHAN BEGAM v. MUNNEY MIRZA, **10 O.C. 129.** (8 O.C. 86, 30 C. 583, 26 M. 179, *R.*) [*R.*, 13 O.C. 341]

(1521)—Ss. *73, 115*--*See* SUPERINTENDENCE OF HIGH COURT, 1 C.W.N. 633.

(1522)—*S. 73 and O. 21, r. 11 (2)* (=*old ss. 295 and 235*)—*No application under*—*Petition for rateable distribution.*—A decree-holder, who has not made an application under old s. 235, Civ. Pro. Code, for execution of the decree, cannot claim by a mere petition under old s. 295, for a rateable distribution of the assets in Court. HARDAL v. BIHARI LAL, **93 P.R. 1889.**

(1523)--S. *73, O. 21, r. 54, 46*—*See* BURDEN OF PROOF—CLAIMS TO PRPERTY ATOTACHED, 17 W.R. 23.

(1524)—*S. 73, O. 21, r. 72* (=ss 295., 294, *Civ. Pro. Code*, 1882)—*Persons interested in the sale*—*Decree*—*Execution*- A person who applies for execution of his decree but does not obtain satisfaction thereof, is a person who, under the provisions of s. 295, Civ. Pro. Code, is entitled to a rateable distribution of the proceeds of the sale taking place subsequently. He is, therefore, a person interested in the sale within the meaning of s. 294, Civ. Pro. Code. JASA v. SAKARLAL, **2 Bom. L.R. 489.**

(1525)—*S. 73, O. 21, r. 89* (=ss. 295, 310-*A*, *Civ. Pro Code*, 1882)—*S. 174, Act VIII of* 1885 (*Bengal Tenancy*)—*Execution of decree*—*Sale*—*Deposit for setting aside sale*—*Rateable distribution.*—S. 295, Civ. Pro. Code, 1882, refers only to cases where assets are realised by sale or otherwise in execution of decree. The money deposited for setting aside a sale, under s. 310-A, Civ. Pro. Code, 1882, or s. 174 of the Bengal Tenancy Act, is not assets. S. 295, Civ. Pro. Code, 1882, has no application to such a deposit. BIHARI LAL PAUL v. GOPAL LAL SEAL, **1 C.W.N. 696.** [*F.*, 30 C. 262=7 C.W.N. 341.]

(1526)—*S. 73, O. 21, r. 89* (=*ss. 295, 310 A, Civ. Pro. Code*, 1882)—*Execution-sale*—*Deposit by judgment-debtor*—*Jurisdiction of Court having attached money in deposit to adjudicate on claims of attaching creditor "for payment to the decree-holder," meaning of.*—S. 295 (Civ. Pro. Code, 1882) (=s. 73, new Code) does not apply to a deposit by a judgment-debtor under s. 310-A (O. XXI, r. 89, new Code), this being merely in the nature of a voluntary payment, (1 C.W.N. 195, 695, *F.*) The Court that had the attached money in deposit had jurisdiction to adjudicate upon the conflicting claims of the attaching creditors. The words "for payment to the decree-holder" in s. 310-A, Civ. Pro. Code (O. XXI, r. 89) mean that he is the person solely entitled to the money which has been paid into Court. ROSHUM LALL v. RAM LALL MULLICK, **30 C. 262=7 C.W.N. 341.**

(1527)—S. *73*, O. XXI, r. 89—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 1 C.W.N. 195.

(1528)—*S. 73, O. 21, r. 90* (=*Civ. Pro. Code*, 1882, *ss. 295, 311*)—"*Decree-holder*"—*Material irregularity* —When one of two decree-holders against the same debtor has attached certain land, and the other has become entitled to rateable distribution under s. 295 of the Code of Civil Procedure, the latter may apply, under s. 311, Civ. Pro. Code, to have the sale in execution set aside on the ground of material irregularity. A material error, in describing the encumbrances on the property sold, may be a material irregularity in publishing and conducting the sale. LAKSHMI v. KUTTUNI **10 M. 57.** [*Diss.*, 4 C.W.N. 542; *F.*, 3 M.L.T. 249; *Appr.*, 15 A. 318; *R.*, 16 B. 91, 20 C. 673, 21 M. 51, 23 M. 478, 24 M. 311, 29 C. 518; 28 M. 380=16 M.L.J. 202.]

(1529)—*S. 73, O. 21, r. 99* (=*ss 295 (c) and 311, Civ. Pro Code*, 1882)—*Sale in execution of mortgage-decree*—*Sale continued after realisation of mortgage amount*—*Rights of prior decree-holders in surplus sale-proceeds*—*Illegality.* Where property subject to a mortgage is sold in execution of the mortgage-decree, and there are other decree-holders, who have, prior to the sale, applied to the Court to execute their decrees and had even attached the mortgaged property, it cannot be contended that the sale ought to have been stopped as soon as the amount of the mortgage-decree was realised and that the sale of the rest of the property was illegal. The sale by the Court must be held to have been in execution of those decrees, in accordance with the other decree-holder's application as well as in execution of the mortgage-decree. S. 295 (c) contemplates such a case. VENKATARAMA SASTRIAR v. MANGALATHAMMAL, **17 M.L.J. 80.**

(1530)—S. *73, O. 21, r. 90*—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL 15 A. 318 = A.W.N. 1893, 119.

(1531)—S. *73, O. 21, r. 90*—*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 20 C. 673.

(1532)—*S. 73, O. 21, rr. 90, 92* (=*ss. 295, 311, 312, Civ. Pro. Code, 1882*)—"*Decree-holder*," *meaning of*—*Person who cannot apply*—*Appeal from order passed under s. 312, Civ. Pro. Code*, 1882—The words "the decree-holder"

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in s. 311, Civ. Pro. Code, may be properly so construed as to include any decree-holder for the enforcement or satisfaction, of whose decree the sale has been held, and would therefore include all decree-holders who, prior to sale, have applied to the Court under s. 295 for execution of their decrees. (10 M. 57, 20 C. 673, *F.*; 15 C. 488, *D.*; 29 C. 1, 11 Bom. H.C. 15, 1 C.L.R. 250, *R.*) A person who has attached the debtor's property in a Court different from that which sold the property is not one "interested in the property sold." (4 C.W.N. 542, *R.*) An order passed under s. 312, refusing to set aside a sale on the ground that the applicant had no *locus standi* to apply under s. 311 is appealable. BEJOY SINGH DUDHURIA v. HUKUM CHAND, **29 C. 548.**

(1533)—*S. 73, O. 21, r. 93* (=ss. 295, 315, *Civ. Pro. Code* 1882)—*Rateable distribution—Suit for recovery of amount—Consideration, failure of—Limitation.*—S. 315, Civ. Pro. Code, is wide enough to entitle a person to recover money rateably distributed. A suit for recovery of purchase-money on a failure of consideration is within time, if brought within three years from the date on which the consideration failed. RAMAKRISHNA IYER v. A.L.R.M.N PALANIAPPA CHETTIAR, **7 M.L.T. 232.**

(1534)—S. 73, O. 21, r. 93—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASE ON SETTING ASIDE SALE, 13 A. 383=11 A.W.N. 138.

(1535)—*S. 73, O. 38, rr. 10, 11—Four suits against same defendant—Attachment of moveables before judgment in each suit—Distribution of sale-proceeds amongst decree-holders in three suits—Remedy of decree-holders in remaining suit.*—Some buffaloes were attached before judgment by the plaintiffs in four different suits against the same defendants, each of which ended in a decree. The decree-holders in three of the suits applied for rateable distribution of the proceeds of a sale of the buffaloes which had taken place during the pendency of the suits. Before the moneys were taken out, the decree-holders in the remaining suit applied for execution and a re-distribution of the sale-proceeds. The application having been rejected, *held*, in revision, that s. 73 of the Civ. Pro. Code did not apply to the case, and the lower Court was not justified in ordering a distribution of the sale-proceeds amongst the decree-holders in three of the suits in disregard of the order of attachment in the other suit, and the application of the decree-holders in that suit, made whilst the money was still in Court, should not have been rejected. BUTLOO KHAN v. GOMANI SINGH, **13 C.W.N. 1177,=3 Ind. Cas. 836.**

(1536)—S. 73, O. XLI, r. 10—*See* PAUPER—APPEALS, 17 W.R. 68.

——S. 76 (=1882, s. 386 (2)=1877, s. 386 (2) =1859, s. 175.)

See COMMISSION.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

See COMMISSIONER.

(1536-*a*)—S. 76—*See* NOS. 4835, 4836, *infra.*

(1537)—S. 76, O. XXVI, rr. 1, 2, 3, 4—*See* COMMISSION, 1 Hyde 68, 5 B.L.R. 252.

——S. 78 (=1882, s. 391=1877, s. 391.)

See COMMISSION.

See COMMISSIONER.

(1538)—*S. 78, O. 5, r. 14—Summons—Service of—Person summoned.*—It cannot be held that a person summoned could not be found, when it appears that he was not at his home when the process server went there to effect service on him, and a relative of his endorsed on the back of the summons that he had gone to a certain place. HARDYAL v. PIR SANT DAS, **136 P.L.R. 1911.**

——S. 79 (=1882, s. 416=1877 s. 416.)

(1538-*a*)—S. 97—*See* NO. 1574. *infra.*

(1539)—*S. 79, C. 27, r. 1, s. 80* (=ss. 416, 424, *Civ. Pro. Code*, 1882)—*Suit against Government—Notice.*—*Per Batty, J.*—S. 416 of the Civ. Pro. Code does not enlarge or in anyway affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council, which must always depend on the provisions of 21 and 22 Vic. c. 106. It only provides a means of affecting the revenues of India in cases where these revenues could have been affected when in the hands of the East India Company. No power is given by that section to Government to bind or otherwise affect the revenues. It gives no cause of action but only declares the mode of procedure when a cause of action has arisen. *Per Chandavarkar, J.*—The notice under s. 424 of Civ. Pro. Code should state the relief which the plaintiff claims; it should be absolute in terms and not conditional. JEHANGIR v. SECRETARY OF STATE, **6 Bom. L.R. 131.**

——S. 80 (=1882, s. 424=1877, s. 424.)

(1540)—*S. 80* (=*s. 424, Civ. Pro. Code*, 1882, —*Suit against Government—Notice.*—The object of notice, required by s. 424 of the Civ. Pro. Code, is to inform Government or the public officers concerned generally of the nature of the suit, which is intended to be filed against them. The notice must not be too strictly or too narrowly construed. It must not be construed as if it were pleadings and it need not set out all the details and facts of the case, which the plaintiff intends to prove. It must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. JEHANGIR v. SECRETARY OF STATE, **5 Bom. L.R. 30=27 B. 189.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1541)—*S. 80 (=Civ. Pro. Code, 1882, s. 424) —Suit to recover water—Rate wrongly levied for two faslis—Notice given by two out of three owners of land in respect of one fasli only—Sufficiency of notice—Cause of action.*—Certain *Mittadars* sued for a declaration that the Government had no right to levy water rate from them for recovery of the amount collected from them, and for a perpetual injunction restraining the Government from imposing water-rate thereafter. The suit related to collections made in faslis 1302 and 1303. Notice of suit had been given in respect of fasli 1302 by only two out of three plaintiffs. Defendant contented that the notice given was not valid in law. *Held* that the object of the notice required by s. 424, Civ. Pro. Code is to give the defendant an opportunity of settling the claim if so advised without litigation. That object was fully attained by two out of the three plaintiffs giving the notice. *Held* also that the expression "cause of action," in s. 424 should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground of complaint. The notice given was that the defendant had no right to collect anything on account of fasli jasti and that the collection which had been made on that account for fasli 1302 was illegal. The fact that a further sum for a subsequent fasli was collected after notice of the suit had been given did not constitute a fresh cause of action requiring a further notice under s. 424 THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. PERUMAL PILLAI, **24 M. 279=11 M.L.J. 117.** [*F.*, 8 C.W.N. 913; *R.*, 27 B. 189, 14 M.L.J. 350; *D.*, 25 A. 187.]

(1542)—*S. 80 (=s. 424, Civ. Pro. Code, 1882) —Suit against Secretary of State not maintainable unless notice prescribed by s. 424, Civ. Pro. Code, is given.*—S. 424 is a section dealing with procedure. Whether or not the words "in respect of" an act purporting to be done by him in his official capacity, in s. 424, apply only to a public officer and not to the Secretary of State, no suit will lie against the Secretary of State, unless notice prescribed by s. 424, Civ. Pro. Code, has been given. Want of notice under s. 424 not only vitiates the action against the Secretary of State but as regards other persons also. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJ LUCKI DEBI, **25 C. 239.** (23 C. 563, P.C., *R.*) [*F.*, 4 C.C. 133; *R.*, 30 C. 36, 10 C.C. 49, 34 C. 257=5 C.L.J. 148.]

(1543)—*S. 80 (=old s. 424, Civ. Pro Code, 1882)—Delivery by post—Officer to whom to be delivered.*—This section does not prohibit the use of the post in delivering or leaving the notice of the suit. TANI v. SECRETARY OF STATE IN COUNCIL, **17 P.R. 1891.**

(1544)—*S. 80 (=old s 424, Civ. Pro. Code, 1882)—Sufficiency of notice—Objection as to—Waiver.*—Objection as to sufficiency of notice ought not to be allowed after the defendant had pleaded on the merits. SECRETARY OF STATE FOR INDIA v. MAHTAB SINGH, **185 P.R. 1890.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1545)—*S. 80 (=Civ. Pro. Code, 1882, s. 424 —Public officer) suit against—Notice—Cause of action stated in notice.*—In a suit for damages brought by plaintiff against two Deputy Magistrates for having in bad faith and maliciously caused him to be illegally kept in confinement, after serving on the defendants a notice under s. 424 of the Civ. Pro. Code, 1882, which set out that the two defendants, acting in concert with the intention of oppressing him wilfully, improperly and illegally kept him in *hajat* from the evening of the 26th December, to the afternoon of the 27th December, 1878, thereby causing him injury, the defendants pleaded that the cause of action stated in the plaint was different from that alleged in the notice. *Held* that the notice sufficiently stated the cause of action within the terms of s. 424, Civ. Pro. Code, that is to say, that it sufficiently informed the defendants that it was the intention of the plaintiff to proceed against them for having caused him to be illegally confined, and that in considering whether the notice under s. 424, Civ. Pro. Code, is sufficient, we should not properly read it with the strictness with which a plaint should be read, PARBUTTI CHURN MOZUMDAR v. NOBIN CHUNDER SEN, **13 C.L.R. 195.** [*F.*, 27 B. 189.]

(1546)—*S. 80 (=s. 424, Civ. Pro. Code 1882)—Scope — Public officer—Act done in official capacity—Suit against public officer for damages for wrongful arrest and trespass—Arrest made in official capacity—Want of required notice—Permission to amend plaint not asked—Joinder of causes of action—Amendment of plaint not asked for in lower Court—Amendment not allowed on appeal.*—S. 424, Civ. Pro. Code, does apply to the case of a Public Officer charged with a tortious act done by him in his official capacity. Such officer is entitled to the required notice before institution of suit against him. The section does not seem to warrant the drawing of any distinction between acts of this kind done inadvertantly, or otherwise. (7 C. 499, *D.*) [*F.*, 1 L.B.R. 152; *Relied on*, 29 A. 567=A.W.N. 1907, 170, 23 A W.N. 241, 9 O.C. 275; *D.*, 26 A. 220.] In a suit against a Public Officer for recovery of damages for wrongful arrest and trespass, it having been found, that the former act was done by him in his official capacity and it having been doubted whether the latter act was so or not, *held*, such a suit is liable to dismissal of notice required by s. 424, Civ. Pro. Code, is not served on him. [*F.*, 1 L.B.R. 152; *Relied on*, 29 A. 567=A.W.N. 1907, 170; *R.*, 23 A. W.N. 241, 9 O.C. 275.] Since in the above suit, both acts were mixed up in the plaint and damages claimed for both, permission to amend the plaint so as to restrict the suit to one for damages for trespass only, if asked for, for the first time, on appeal to the High Court will not be granted. JOGENDRA NATH ROY, BAHADUR v. PRICE, **24 C. 584.** [*R.*, 9 C.C. 275; *Diss.*, 103 P.L.R. 1909.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1547)—*S. 80 (=s. 424, Civ. Pro. Code, 1882,) —Suit against Secretary of State—Suit for injunction —Notice —Inam — Resumption.*—The plaintiff was the grantee of an Inam of two villages. The Collector being of opinion that the condition on which the Inam was continued had been terminated, directed the Mamlatdar to take over from the plaintiff the charge of the records of the villages. The plaintiff, thereupon, without giving notice required by s. 424 of the Civ. Pro. Code, 1882, filed a suit against the Secretary of State for India in Council to obtain a declaration that he and his immediate successors were entitled to hold the villages as full and absolute owners, and to obtain a permanent injunction restraining the defendant or his officers from taking possession of or resuming the two villages or from demanding their records as long as the plaintiff or his immediate successors be living. *Held*, that notice under s. 424 of the Civ. Pro. Code, of 1882, was necessary as a condition precedent to the suit. The word "act" in s. 424 relates only to the public officer and not to the Secretary of State for India in Council. The words "no suit shall be instituted against the Secretary of State in Council" are wide enough to include suits of every kind whether for injunction or otherwise. *Per Heaton, J.*—Where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice, if it is owing to immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice. THE SECRETARY OF STATE v. GAJANAN KRISHNA MAVLANKAR, **13 Bom. L.R. 273.**

(1548)—*S. 80 (=s. 424, Civ. Pro Code, 1882) —Notice—Suit by legal representative without fresh notice.—Suit instituted without notice—Effect—Cause of action — Construction.*—A notice of suit given under s. 424 of the Civ. Pro. Code, does not enure for the benefit of the legal representative of the party so as to enable him to bring a suit on the subject of the notice without a fresh notice. Where a suit has been instituted without a valid notice as required by s. 424 of the Civ. Pro. Code, the Court has to reject the plaint under s. 54 (*c*), and the plaintiff is not entitled to be given an opportunity of serving a fresh notice. [*F.*, 10 O.C. 49; *R.*, 28 A. 600=A.W.N 1906, 107=3 A.L.J. 341, 5 C.L.J. 270=34 C. 305, 5 Ind. Cas. 81; *D.*, 34 C. 257=5 C.L J. 147.] The words "cause of action" in s. 424 of the Civ. Pro. Code, should not be too strictly construed. BACHCHU SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **23 A. 187.** [*R.*, 8 C.W.N. 913, 34 C. 305=5 C.L.J. 270.]

(1549)—*S. 80 (=Civ. Pro. Code, 1882, s. 424) —Whether notice necessary to sue Administrator-General—"Cause of action"—Object of section —Notice given to public officer before suit—Omission to state same in plaint—Amendment.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—If any suit is instituted against the Administrator-General in respect of any act purporting to be done by him in his official capacity, he is entitled to notice under s. 424. The phrase "cause of action" in s. 424 of the Civ. Pro. Code, should not be construed narrowly, the object of the section being merely to inform the defendant of the ground of complaint. It is only when notice is not given that the suit is liable to be dismissed. The suit, however, may be proceeded with, if notice has been given in the manner prescribed and subsequently the plaint is amended in order to state the fact. BHOLARAM CHOWDHURY v. ADMINISTRATOR-GENERAL, **8 C.W.N. 913.**

(1550)—*S. 80 (=s. 424, Civ. Pro. Code, 1882) Notice — Suit against Government — Act of Government officers—Bhagdari Act (Bom. Act V of 1862), s. 3—Collector's declaration under the Act.*—The Collector of Kaira, acting under s. 3 of the Bhagdari Act, 1862, declared that certain mortgages in favour of plaintiff were illegal and inoperative. The plaintiff filed a suit to have it declared that the order was null and void. The notice, required by s 424 of the Code of 1882, was not given. *Held*, that the notice was compulsory, for the declaration was a distinct act of the Collector, done in the exercise of a statutory power, and therefore in his official capacity The true test of an action for the purposes of s. 424 (which is the same as s. 80 of the new Code of 1908) is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part, and secondly, whether that act purported to have been done by him in his official capacity. Both those elements must combine to render necessary the giving of notice under s. 424 as a condition precedent to suit. CHHAGAN LAL v. COLLECTOR OF KAIRA, **12 Bom. L.R. 825.**

(1551)—S. *80 (=Civ. Pro. Code, 1882 s. 424,) —Suit against Government — Notice.*—The Municipal Committee of Umbala, in the Punjab, the holders of the decree obtained in an Umbala Court, brought to sale, in execution of that decree, a house situate at Shaharanpur, in the North-Western Provinces, and purchased it on behalf of Government. The present suit was brought at Shaharanpur against the Secretary of State for India in Council to have the sale set aside and for possession of the house, the plaintiff having given the notice mentioned in s. 424 of the Civ, Pro. Code, 1882, to the Secretary to the Government of the Punjab. *Held*, that, as the suit was instituted in the district of Shaharanpur, the notice refered to in s. 424, Civ. Pro. Code, should have been delivered to, or left at the office of a Secretary to the Government of the North-Western Provinces, or the Collector of the District of Shaharanpur; and as it was not done, the suit should be dismissed. KHWAJA HUSAIN AHMAD v. THE SECRETARY OF STATE FOR INDIA, **A.W.N. 1884, 58.**

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1552)—*S. 80 (=Civ. Pro. Code, 1882, s. 424) —Suit against public officer—Notice.*—A notice is a necessary preliminary to the institution of a suit against an excise superintendent for damages for wrongful arrest, assault and malicious prosecution, purporting to have been made and instituted by him in his official capacity. QUAILEY v AH BAN SHOKE, **L.B.R. 1900—1902 Vol. I, 152.** (7 C. 499, 24 C. 584, *F.*)

(1553)—*S. 80 (=s. 424, Civ. Pro. Code, 1882) —Suit against Government — Notice.*— The notice of suits prescribed by s. 424 of the Civ. Pro. Code, is necessary even when the remedy sought in the action is only an injunction. HARI v. SECRETARY OF STATE, **5 Bom. L.R. 431.**

(1554)—*S. 80 (=s. 424 Civ. Pro. Code, 1882) —Suit for damages against a public officer—Dismissal in toto of claim for damages for separate acts—Amendment—Notice of suit.*—In a suit for damages against the defendants, who were police officers, the plaintiff alleged as follows :—That the defendants induced one S to make a false report against the plaintiff at the Kotwali, where the defendants were stationed, that the defendants then charged the plaintiff with the commission of an offience under s. 454 of the Indian Penal Code, arrested him, and sent him up to the Magistrate for trial, that the plaintiff was acquitted by the Magistrate, and that the defendants then caused S to lodge a false complaint in Court against the plaintiff for an offence, under s. 380 of the Indian Penal Code, and the plaintiff was again acquitted. The plaintiff stated that a cause of action accrued to him when the defendants sent him up for trial and when the complaint was made by S to the Court. He claimed one lump sum as damages for both. The question for consideration was whether, under s. 424 of the Code, notice of suit should have been given to the defendants. *Held*, that if the defendants induced S to make a report or file a complaint they did not act in their official capacity, and, therefore, so far as the report and complaint were concerned, no notice of suit was necessary ; but that the other alleged acts of the defendants purported to be done by them in their official capacity, within the meaning of s. 424 of the Code, even if they were acting in pursuance of an illegal conspiracy, and therefore, the defendants were entitled to notice, under that section, in respect of them. *Held*, further, that having regard to the frame of the suit, no amendment could be allowed but the suit should be dismissed *in toto*. BRIJ MOHAN LAL v. ALI HUSAIN, **9 O C. 276** (7 C. 499) 26 A. 220, 24 C. 584, *R.*, [*R. and D.*, 10 O.C. 49.]

(1555) *S. 80—(=s. 424 Civ. Pro. Code, 1882) —Suit against public officer—Notice—Suit to recover articles seized by police during a search.* —The plaintiff sued to recover from the defendant three account books, which he alleged that the defendant, a Sub-Inspector of Police had seized during a search, apparently in pursuance of the provisions of s. 165 of the Code of Criminal Procedure, of the plaintiff's house. *Held* that the defendant, if he seized the books, which was denied, did so in his capacity as a police officer, and that the suit was not maintainable in the absence of the notice prescribed by s. 424 of the Code of Civil Procedure. BAKHTAWAR MAL v. ABDUL LATIF, **A.W.N. 1907. 170=29 A. 567.** (26 A. 220, *D.* ; 24 C. 584, *R.*)

(1556)—*S. 80 (=Civ. Pro. Code, 1882, s. 424) —Suit against officer of Government—Suit ex-contractu—Notice.*—Where the suit against an officer of Government, in his official capacity, was one *ex contractu*, held that no notice under s. 424 of the Civ. Pro. Code, 1882, was necessary. RAJMAL MANIKCHAND v. HANMANT ANYABA, **20 B 697.** (7 C. 499, 19 B. 407, *R.*) [*Exp.*, 12 Bom. L.R. 615=34 B. 583 ; *R.*, 4 O. C. 133.]

(1557)—*S. 80 (=s. 424, Civ. Pro. Code, 1882) —Government officer—Assault and use of insulting language—Notice, if necessary—Damages.*—Where a public officer employs insulting language to and assaults his subordinate, he is not entitled to such notice of any action of his, as is required by s. 424. If a public officer exceeds his rights and uses defamatory language which is actionable, or assaults or beats a subordinate, he is responsible in damages as any ordinary person would be liable. MUMTAZ HUSSAIN v. A.E. LEWIS, **7 A.L.J. 301=5 Ind. Cas. 467.**

(1558)—*S. 80 (=s. 424, Civ. Pro. Code, 1882) —Suit for injunction against public officer—Notice, whether necessary.*—A suit against a public officer for an injunction to restrain the commission of an act, not done but threatened to be done, is not a suit in respect of an act purporting to have been done by him, and so, this section (s. 80, Civ. Pro. Code, 1908) does not render notice necessary, so for as a suit seeks relief by injunction. FANDUMAL v. MAHOMED SHARIF, **3 Sind L. R. 175.** (36 C. 28, *F.*)

(1559)—*S. 80 (=old s. 424, Civ. Pro. Code 1882)—Suit against Court of Wards—Notice whether necessary.*—A suit on a bond executed by the father of a minor defendant, who at the time of the suit was a ward of Court, is not within the purview of this section. BASANT SINGH v. INDARSINGH, **24 P.R. 1889.**

(1560)—*S. 80 (=Civ. Pro. Code, 1882, s. 424) —Suit against police officer for damages—Wrongful confinement—Malicious act—Notice, if necessary.*—Where it is found, in a suit against a police officer for damages for wrongful confinement, that the act was not done in good faith or in pursuance of official duty, but maliciously and without cause, the defendant cannot plead absence of notice under s. 424 of the Civ. Pro. Code, as a defence. MUHAMMAD SADDIQ AHMAD v. PANNA LAL, **26 A. 220=A W.N. 1903, 251.** (7 C. 499, 24 C. 584, *R.*) [*R.*, 32 C. 1130=1 C.L.J. 542, 9 O.C. 275 : *D.*, 29 A. 567=A.W.N. 1907, 170.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1561)—*S. 80 (=Civ. Pro. Code, 1887, s. 424)—Notice to Collector.*—Under the provisions of s. 424, Civ. Pro. Code, 1877, as amended by Act XII of 1877, notice is not necessary to the Collector, before adding him as defendant, if the act in question is not purported to be done by him in his official capacity. MADHO DAS v. THE COLLECTOR OF JAUNPUR, **A.W.N. 1881, 175.**

(1562)—*S. 80 (=s. 424, Civ. Pro. Code, 1882)—Construction — Amendment of plaint, notice after.*—S. 424, Civ. Pro. Code, relates to the institution of suits against the Secretary of State. There is nothing in the law to show that in case of any amendment of the plaint necessitated by the alleged discovery of facts, previously unknown to the plaintiff, the Secretary of State should have a further notice of two months under s. 424. (25 C. 239, *D*) Where, in an action already instituted against the Secretary of State, a Sub-Collector is also afterwards joined as defendant, who, however, is not sued for any act done by him independently of Government, and no separate relief is asked for against him, no notice of action, under s. 424, Civ. Pro. Code, is required in his case. EZRA v. THE SECRETARY OF STATE, **30 C. 36=7 C.W.N. 249.** [*Affirmed*, 32 C. 605, P.C., 9 C.W.N. 454=1 C.L.J. 227=2 A.L.J. 771=7 Bom. L.R. 422, 32 C. 257=5 C.L.J. 148.]

(1563)—*S. 80 (=s. 424, Civ. Pro. Code, 1882.)—Plaint not specifying grounds on which right to sue jointly was based—Notice of action—Sufficiency of notice.*—Case where, on the facts, it was held that there was no material alteration regarding the statement of the cause of action between the notice of action given and the suit instituted in accordance with the notice given, that the notice was a sufficient notice and that the suit was not liable to be dismissed owing to such variance. It was further held that, in a suit on three leases, one of the plaintiffs only was the lessee for the first year and the other two only are named in other lease-deeds would not prove that they were not jointly interested. S. 92, Evidence Act, would not prevent them from proving they were interested in the first lease or that the first plaintiff in the other two leases. TANI MAHESHA v. SECRETARY OF STATE FOR INDIA, **67 P.R. 1894.**

(1564)—S. 80—*See* BEN. ACT IX OF 1880, ss. 5, 6, 72, 81, 5 C.L.J. 148=34 C. 257.

(1565)—S. 80 — Notice of suit—Object of notice—Who can object to validity of notice—*See*—BEN. ACT I OF 1895, s. 19, cl. 2, 1 C.L.J. 542=32 C. 1130.

(1566)—S. 80—*See* U.P. ACT XV OF 1873, ss. 28, 40, A.W.N. 1896, 22.

(1567)—S. 80—*See* ATTACHMENT BEFORE JUDGMENT, 1 Ind. Jur. N.S. 265.

(1568)—S. 80—*See* COLLECTOR, 13 B. 343. 11 M. 317.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1569)—S. 80—Suit against official not as such trespass—Suit for injunction—Notice if necessary—*See* COURT OF WARDS, 12 C.W.N. 1065=36 C. 28=1 Ind. Cas. 514.

(1570)—S. 80—*See* MESNE PROFITS—MISCELLANEOUS, 28 C. 540=6 C.W.N. 175.

(1571)—S. 80—*See* OFFICIAL TRUSTEE, 7 C. 499.

(1572)—S. 80 — Notice to public officer — Objection as to want of notice under s. 424 to be taken only by Secretary of State—*See* PRE-EMPTION—GENERAL, 10 O.C. 49.

(1573)—S. 80—Specific Relief Act, I of 1877, s. 42—Suit for decree declaratory of title without prayer for consequential relief—Relief by way of injunction not sought—Effect—Notice under—*See* PUBLIC OFFICER, 14 B. 375.

(1573-*a*)—S. 80—*See* NOS 84, 85, 151, 1539, *supra* AND NO. 2476, *infra*.

(1574)—*Ss. 80, 79, O. 27, rr. 1, 6 (=ss. 424, 416, 421, Civ. Pro. Code, 1882)—Suit against Government—Secretary of State to be sued as defendant in suit against State Railway—"Railway administration," meaning of—Railways Act, 1890, s. (3) cl. (6)—Notice to Secretary of State—Amendment of plaint.*—In a suit for compensation against two State Railways, the persons sued as defendants were the Traffic Superintendents of those Railways. On behalf of the State Railways, it was contended that the proper person to be sued was the Secretary of State for India in Council and that it was necessary to give him notice under s. 424 of the Code of Civil Procedure. *Held*, that the suit was one against the Government and should have been brought against the Secretary of State as provided in s. 416, Civ. Pro. Code. *Held*, further, that the suit would not lie as against the Secretary of State, nor could the plaintiff be permitted to amend his suit by substituting the Secretary of State for the Traffic Superintendents, until the notice required by s. 421, Civ. Pro. Code, was given. Traffic Superintendents E.B., E.I., and O. and R. RAILWAYS v. HAFIZ ABDUL RAHMAN, **4 O.C. 133.**

(1575)—S. 80, O. 1, rr. 8 (2) 10 (2)—Whether a fresh defendant can be substituted for a sole existing defendant against whom no cause of action is found to exist—Whether notice under s. 424 is necessary in case of adding a public officer as co-defendant in a case against Secretary of State—*See* ACT XVIII OF 1850, 59 P.W.R. 1908.

——S. 81 (=1882, ss. 425, 428=1877, ss. 425, 428=1859, s. 72).

(1576)—S. 81—*See* RIGHT OF SUIT—TORTS, 18 W.R. 27.

——S. 83 (=1882, s. 430=1877, s. 430).

(1577)—*S. 83, O. 29, r. 1 (=ss. 430, 435, Civ. Pro. Code, 1882)—Ss. 6, 41, 224, Act VI of 1882 (Indian Companies)—Right of foreign*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

corporation to sue without being registered—Verification of plaint.—A foreign corporation can sue in its corporate character, without being registered under the Indian Companies Act or an Act of Parliament. S. 435, Civ. Pro. Code, applies to suits by or against unregistered corporation. So a plaint can be verified, on behalf of the corporation by one of its principal officers under s. 435, Civ. Pro. Code. A corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States. SINGER MANUFACTURING Co. v. BAIJNATH, **30 C.** 103. (12 C. 41, 16 A. 420, *D.*)

(1578)—*S. 84 (=s. 431, cl. (b), Civ Pro. Code* 1882)—*"Private right," meaning of.*—The "private rights" spoken of in the section do not mean individual rights, as opposed to those of the body politic or State; but those private rights of the State, which must be enforced in a Court of justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights, which may be enforced by a foreign State against private individuals, as distinguished from rights, which one State in its political capacity may have as against another State in its political capacity. The rule laid down in s. 431 of the Code is only an enactment of that which prevails in England. (See *Emperor of Austria* v. *Day* and *United States of America* v. *Wagner*). HAJON MANICK v. BUR SINGH, **11 C. 17**. [*R.*, 24 B. 149].

(1579)—*S. 85 (=s. 432, Civ. Pro. Code*, 1882) —*Applicability of section to Revenue Court—Signature of plaint by unauthorized person, but subsequently authorized.*—The provision of s. 432, Civ. Pro. Code, is applicable to a suit brought in a Revenue Court. Where on the date on which a suit was filed, the person who signed the plaint had not been appointed by the Government as the agent of the Ruling Chief on whose behalf the suit was brought, but was so appointed before the period of limitation in respect of such suit had expired, *held* that the plaint was a valid plaint. MAHARAJ OF REWAH v. SWAMI SARAN, **25 A. 635=A.W.N. 1903, 189.** (22 A. 55, *R*; A.W.N. 1899, 55, *D.*)

(1580)—*S.(85 (=s. 432, Civ.Pro. Code*, 1882). —*Suit in British India by independent Prince —Agent for instituting suit.*—S. 432 does not prevent the institution, by an independent Prince, of a suit in a Court in British India, in his own name, and through a recognised agent other than one appointed under that section. BEER CHUNDER MANIKYA v. ISHAN CHUNDER BURDHUN, **10 C. 836**. [*F.*, 19 A. 510; *R.*, 165 P.R. 1889, 41 P.R. 1902.]

(1581)—*S. 85 (=Civ. Pro. Code*, 1882, *s. 432)—Ruling Chief, suit by.*—S. 432, Civ. Pro. Code, does not require a Ruling Chief to sue in the Civil Courts only through the person specifically appointed by order of the British Government mentioned in the section. S. 432 is an enabling section and does not impose a special disability on plaintiffs in the position of a Ruling Chief. SIPAHI SINGH v. THE CHIEF OF INDORE, **A.W.N. 1886, 133.**

(1581-*a*)—S. 85=*See* NOS. 2705. 2716, 2719, 2720, 2721, 2721-*a*, 2755, 2766, *infra*.

(1582)—Ss. 85, 86—*See* JURISDICTION OF CIVIL COURTS, 8 B. 415.

(1583)—*S. 85, O 3, r. 2 (=Civ. Pro. Code, 1882, ss. 432, 37)—Independent Prince, right of, to act through recognized agents other than under s. 432.*—The object of s. 432 of the Civ. Pro Code, was to add, in the case of Ruling Chiefs and Sovereign Princes, another class of recognised agents to those specified in s. 37 of the Code. The Legislature has not, by s. 432, intended to restrict the rights of Ruling Chiefs and Princes in respect of the appointment of recognised agents which they had under s. 37. So, the provisions of s. 432 have not the effect of preventing the institution of a suit by an independent prince in his own name and through a recognised agent other than one appointed under that section. THE MAHARAJA OF BHARATPUR v. KACHERU, **19 A. 510=A.W. N. 1897**, 138 (10 C. 136, *F.*) [*R.*, 41 P.R. 1902=54 P.L.R. 1902.]

(1584)—S. 85, O. III, rr. 2, 3, O. XXVII, r. 2 —*See* WARRANT OF ATTORNEY, Bourke O.C. 244.

(1585)—S. 85, O. III, rr. 2, 3, O. XXVII, r. 2, O. 1, r. 12—*See* EXECUTION OF DECREE —APPLICATION FOR EXECUTION AND POWERS OF COURT, 2 B.H.C. 103.

(1586)—*S. 86 (=Civ. Pro. Code*, 1882, *s 433) —Consent of Governor-General in Council required under to be obtained before institution of suit—Consent procured pending suit, insufficiency of — Suits against Sovereign Princes and Ruling-Chiefs—Waiver.* The preliminary issue in this case, whether Court had jurisdiction to try it, involved questions of considerable importance upon the construction of s. 433 of the Civ. Pro. Code, regarding suits against Sovereign Princes and Ruling Chiefs. One of the questions to be decided was whether a consent given after the commencement of such a suit—a consent not to its being instituted, but to its being proceeded with, was a sufficient consent. In other words, whether a consent with regard to *proceeding* against the defendant with a suit previously instituted without such consent was a consent which, having regard to the terms of s. 433 of the Code, would make a suit maintainable against a Ruling Chief. It was held that the language of the section was inconsistent with any other view than that the consent of the Governor-General in Council must be obtained before the institution of the suit. The word 'sued' includes every part of a suit, every step in it including the filing of the plaint. Further, a Sovereign Prince or Ruling Chief may be sued with the consent of the Governor-General in Council "but not without such

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consent." Consequently, the filing of the plaint and every other step in the suit before obtaining the consent is suing "without such consent," and, therefore, a violation of the section. It would be inconsistent with the intention of the Legislature to hold that the Court has power to adjourn a suit to enable the plaintiff to obtain the necessary consent. A Ruling Chief who was not precluded himself from raising the objection of want of such consent is entitled to apply for the dismissal of the suit on the ground that is barred by the section. Also even where the consent obtained has not been a sufficient consent, the objection to the jurisdiction of the Court on such ground may be liable to be waived by the defendant where he has taken any step in the proceedings before applying to dismiss the action. CHANDULAL v. AWAD *bin* UMAR SULTAN. **21 B. 351.** [*Appr.*, 40 P.R. 1903=69 P.L.R. 1903; *R.*, 2 L.B.R. 117, 21 P.R. 1909=32 P.L.R. 1909, 27 P.W.R. 1909=1 Ind. Cas. 604; *D.*, 21 B. 784.]

(1587)—*S. 86 (=s. 433, Civ. Pro. Code, 1882) —Suit against a Ruling Chief—Permission to sue granted in absence of necessary conditions precedent—Jurisdiction.*—A suit for the recovery of arrears of salary was brought in the Court of the Subordinate Judge of Agra against the Maharajah of Jaipur. The plaintiff obtained the consent of the Governor-General in Council to the institution of the suit, granted ostensibly in accordance with the provisions of s. 433; but, in fact, none of the conditions enumerated in cl. (2) of the section existed. *Held* that the suit was not maintainable. MAHARAJA OF JAIPUR v. LADJI SAHAI, **A.W.N. 1907, 65=4 A.L.J. 358=29 A. 379.**

(1588)—*S. 86 (=Civ. Pro. Code, 1882, s. 433)—Suit against Ruling Chief without consent of Governor-General—Objection as to jurisdiction of Court—Waiver by defendant—Oral transfer of liability to pay money under written contract—Evidence Act (I of 1872), s. 92.*—Under s. 433 of the Civ. Pro. Code, a suit against a Ruling Chief, filed without the consent of the Governor-General in Council, cannot be tried by a Civil Court. But this exemption of the defendant does not create a defect of jurisdiction properly so-called but only a privilege in his favour, and this may be waived by the defendant. Where the defendant took objection as to the Court's jurisdiction for the first time on further appeal before the Chief Court, held, that the defendant by not taking objection at the proper time had waived his privilege, and was not competent to raise the question at that stage of the case. Liability to pay money under a written contract may be transferred to another person by word of mouth with the consent of the creditor and the person taking upon himself the liability for the original debtor, the old contract being entirely rescinded or put an end to, S. 92, Evidence Act, has no application to such a case. H.H. THE MAHARAJA OF FARIDKOT v. MESSRS. BALL HOBSON & CO., **69 P.L.R. 1803=40 P.R. 1903.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1589)—*S. 86 (=s. 433, Civ. Pro. Code, 1882) —Sovereign Prince, suit against — Previous consent of the Governor-General or Local Government.*—The Maharaja of Hill Tipperah is a Sovereign Prince and an action against him for a declaration that the land in dispute is the *lakheraj* land of the plaintiff and not the *mal* land of the defendant is not maintainable, the consent of the Governor-General in Council or the Local Government not having been previously obtained under s. 433. The status of a Sovereign Prince is absolute; he cannot divest himself of his status, and, as such, the Courts have no jurisdiction over him, except as provided by s. 433; the only way in which a Sovereign Prince can waive his right is by appearing and submitting to the jurisdiction of a Court. MAHARAJA RADHA KISHORE MANIKKYA BAHADUR v. GOBINDA CHANDRA CHAKRAVARTI, **2 C.L.J. 163.** [*F.*; 21 P.R. 1909; *R.*, 32 P.L.R. 1909=27 P.W.R. 1909.]

(1590)—*S. 86 (=Civ. Pro. Code, 1882, s. 433) —The Raja of Tipperah, a Sovereign Prince.*—The Raja of Tipperah is a Sovereign Prince within the meaning of Ch. XXVIII of the Civ. Pro. Code, so as not to be sued personally in British Indian Courts, except under the conditions in s. 433 of the Code. BEER CHUNDER MANIKKYA v. RAJ COOMAR NOBO DEEP CHUNDER DEB BURMONO, **9 C. 535=12 C.L.R. 466.** [*R.*, 2 C.L.J. 163.]

(1591)—S. 86=Scope of—Ruling Chief sued along with other defendants—Want of consent of Governor-General under—Effect—*See* JURISDICTION OF CIVIL COURT, 21 P.R. 1909=32 P.L.R. 1909=27 P.W.R. 1909=1 Ind. Cas. 604.

(1592)—S. 86—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 12 C.L.R. 473.

(1592-*a*)—S. 86—*See* No. 1582, *supra*.

(1593)—S. 86, O. XXII, rr. 3 (2), 10—*See* ABATEMENT OF APPEAL, 51 P.R. 1886.

——S. 87 (=1882, s. 434.)

(1594)—S. 87—Notification by Deputy Commissioner of Cooch Behar regarding certified copies of judicial records—Compliance with Evidence Act—*See* EVIDENCE ACT, 1872, s. 86, 14 C. 546.

——S. 88 (=1882, s. 470=1877, s. 70.)

See INTERPLEADER-SUIT.

(1595)—*S. 88 (=Civ. Pro. Code, Act XIV of 1882, s. 470)—Interpleader-suit by Collector against claimants for compensation under Land Acquisition Act—Maintainability—Provincial Small Cause Court Act, arts. 11, 14—Claim for compensation under Land Acquisition Act.*—Where a District Court declines to decide

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

a reference made by the Collector about the title of claimants to compensation under the Land Acquisition Act, the Collector is not precluded from bringing an interpleader-suit in a Civil Court against the claimants. A suit of the above nature falls within art. 14 of the second schedule to the Provincial Small Cause Courts Act and also within art. 11 since the claim to compeneation involves, not incidentally but necessarily, the determination of a title to land. As such it is not cognisable by a Small Cause Court. TIRUPATI RAJU v. VISSAM RAJU, **20 M. 155.**

(1596)—*S. 88 (=s. 470, Civ. Pro. Code*, 1882) *—Interpleader-suit—Deposit into Court—Payment by Court to wrong person—Liability.*—Where the plaintiff in an interpleader-suit, under s. 470 of the Code, 1882, paid money due by him into Court for payment to the person to whom the Court should decide that it was payable, *held* that was a valid discharge for him, and, it the Court paid it to the wrong person, he was not responsible. SADASHEO BALKRISHNA v. KRISHNA RAO DEORUS, **2 C.P.L.R. 9.**

(1596-*a*)—S. 88—*See* NO. 3757, *infra.*

(1597)—*S. 88, O. 35, rr. 1,2, 4, 5 (=ss .470 to 474, Civ. Pro. Code*, 1882)—*Interpleader—Two* kabuliats *given by tenant to two parties—Suit by tenant to get rid of one—Not maintainable.*—The plaintiff passed two *kabuliats* in favour of two parties in respect of certain land and found himself in the predicament of being sued on both. He brought a suit praying that "the Court may declare which defendant has what right in which of the disputed lands, and in what right the plaintiff holds which of the said land, under whom:" *Held*, that the prayer of the suit seeks a declaration as to the title to land, and the plaintiff cannot describe himself as a mere stake-holder of the property; that the case does not come within the positive provisions of Ch. XXXIII of the Civ. Pro. Code, 1882, and that, s. 474 of the Code being in its terms clearly against the plaintiff the suit is not maintainable. MR. K. S. BONERJEE v. RAJ CHANDRA DUTT, **5 Ind. Cas. 577 =11 C.L.J. 577=14 C.W.N. 784=37 C. 552.**

(1598)—S. 88, O. XXXV, r. 4.—*See* INTERPLEADER-SUIT, 18 B. 231.

——**S. 89 (=1882, s. 606=1877, s. 506=1859, ss. 312, 313.)**

See APPEAL—ARBITRATION.

See ARBITRATION.

See AWARD.

(1598-*a*)—S. 89—*See* NO. 553-*b*, *supra*, AND NOS. 4725, 1974, *infra.*

(1599)—*Ss. 89, 100, 104—Appeal from* ex-parte *decree against defendants resident beyond British India—Extent of* onus *of proof on such defendants.*—There is nothing in s. 100 of the Civ. Pro. Code, to limit its application to defendants resident in British India, and there is nothing in s. 104, enacted in the interest of the defendant and not of the plaintiff, to exempt the latter, where the former resides out of British India, from proving the due service of the summons before the hearing can proceed *ex parte*. The latter section does not dispense with the requirements of the former, but has been enacted to enable a Court, in the case of defendants residing out of British India, to impose conditions upon the plaintiff before allowing him to proceed with the suit, even where due service of summons has been proved. So, in the case of a defendant residing out of British India, it would not be sufficient if it is merely shown that the summons was issued by post in the manner required by s. 89. There must also be such evidence before the Court as would justify the inference that the defendant had actually received the cover containing the summons. FAKHR-UD DIN v. GHAFUR-UD DIN, **23 A. 99=A.W.N. 1901, 1.**

(1600)—*S. 89, sch. 2, r. 1 (=Civ. Pro. Code, Act of VIII* 1859, *s. 313)—Reference to arbitration—Necessity for written authority.*—S. 313 of the Code did not apply when the reference was agreed to by all the parties present in open Court at and during the course of the final hearing. In such a case, no written authority was necessary. JEYASANKIRA-DEVI v. NAGANNADA DEVI, **1 M.H.C. 106.** [*F.*, 2 N.W. P. 419.]

(1600-*a*)—*S. 89, sch. 2, r. 1 (=Civ. Pro. Code*, 1859, *ss. 312, 313)—Act XXIII of* 1861, *s.37—Reference to arbitration—Appellate Court, powers of.*—An Appellate Court has no power under the Civ. Pro. Code, to refer a case to arbitration even on consent of the parties. JUGESSUR DEY v. KRITARTHO MOYEE DOSSEE, **12 B.L.R. 266, F B.=21 W.R 210.** [*Diss.*, 3 M. 78, 22 W.R, 207, 7 N.W.P. 243; *D.*, 18 C. 507.]

(1600 *b*)—S. 89, sch. II, r. 1—*See* ARBITRATION—REFERENCE TO ARBITRATION. 1 B. L.R. S.N., 11 C.=10 W.R. 171.

(1600-*c*)—*S. 89, sch. 2, r. 89 (=Civ. Pro. Code*, 1859, *ss. 312 and 318—Act XXIII of* 1861, *s. 37—Reference to arbitration—Powers of appellate Court—Delay.*—An appellate Court is competent to refer cases to arbitration. Where a party contests the validity of an arbitration-award, on the ground that it was not completed within the time fixed by the Court, he must show that the delay arose from corruption or misconduct on the part of the arbitrators or that the award was made after the issue of an order of Court superseding the arbitration and recalling the suit. RUSSOL BIBEE v. SHEIKH JAN ALI CHOWDHRY, **12 B.L.R. 267. Note=17 W.R. 31.**

(1601)—*S. 89, sch. 2—Rule 16 (2)—Arbitration—Whole case entrusted to arbitrators—Costs—Power to award—Appeal when Court allows costs against the award made by the arbitrator.*—When the whole is entrusted

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

to the arbitrators, they are competent to award the costs of the litigation, and the Court cannot order costs to be paid contrary to the award. If it does so, the order of the Court can be set right on appeal. CHUNI v. DHAN DIVI, **97 P.L.R. 1909=111 P.W.R. 1909.**

——S. 90 (=1882, s. 527=1877, s. 527=1859, s. 328.)

(1602)—S. 90, O. XXXVI, rr. 1, 2, 3, 4 & 5—*See* DEPOSIT OF TITLE-DEEDS, 6 B.L.R. 701.

——S. 91 (New.)

See NUISANCE.

See PUBLIC NUISANCE.

(1603)—S. 91—Powers of Advocate-General—*See* Bom. Act III OF 1888, ss. 349-A. 349-B, 12 Bom. L.R. 274=5 Ind. Cas. 213.

——S. 92 (=1882, s. 539=1877, s. 539.)

See ACT XX OF 1863.

See HINDU LAW—RELIGIOUS ENDOWMENTS.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO.

(1604)—S. 92 (=s.539, *Civ Pro. Code*, 1887) —*Religious trust.*—Trusts for religious purposes were excluded from the purview of this section. KARUPPA v. ARUMUGA, **5 M. 383.**

(1605)—S. 92—*Suit against* mahant *of a* gaddi.—The appellant instituted this suit against the respondent, who was admitted to have been for years *Mahant* of the *Gaddi* alleging various breaches of trust and asking for removal of the respondent from his trusteeship and for a declaration that the property entered in the schedule to the plaint was trust property. *Held*, that the case came within s. 92 of Act V of 1908 and therefore under sub-s. (1) of the section, the suit could not be entertained unless instituted in conformity with the provisions of the sub-section. SHEO RATAN DOSS v. AUDHESH NARAIN, **13 O.C. 177=7 Ind. Cas. 566.**

(1606)—S. 92—*Suit against trespasser for possession of trust-property, maintainability of.* —*Held*, that a suit for possession cannot be maintained under s. 92 of Act V of 1908 against a trespasser in possession of trust-property. IMAMI v. MOHAMMAD YUSUF, **14 O.C. 65.** (2 C.L.J. 431, 33 C. 789, 24 B. 170, 20 A. 46, 28 A. 113, *R.*)

—(1607)—S. 92—*Suit governing public charity —Trust alleged by plaintiff need not be admitted by defendant—Certificate of the Collector—Certificate in the name of one plaintiff alone.*—S. 539 of the Code of 1882 (corresponding with s. 92 of the present Code) does not require that the trust alleged by the plaintiffs must be admitted by the defendants. It will embrace a suit where the trust alleged by the plaintiffs is denied by the defendants. (25 A. 631, *Expl.*)

Civ. Pro. Code (Acts V of 1908,) XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Several persons applied for sanction to bring a suit under s. 539 of the Code of 1882. The sanction given was addressed to the first applicant by name and "the other applicants." Four out of the applicants, then instituted the suit. It was objected that the sanction, having been given to only one person named, was not sufficient under the section; and that the suit was on that account not maintainable. *Held*, that the sanction was good, and the suit could not be defeated merely because the officer granting the sanction elected to name only one of the applicants and to refer to the others merely as "the other applicants." JAFARKHAN JATBARKHAN PATHAN v. DAUDSHAN MAHOMEDSHAH FAKIR, **13 Bom. L.R. 49=1 Ind. Cas. 358.**

(1608)—S. 92—Wakf—*Alienation of such property—Suit to set aside such alienation and declaration that property* is wakf—*Right to sue.* —*Held*, that a suit by two Mahomedans for a declaration that a certain property is *wakf* and to set aside the alienation of such property by the persons in charge thereon is not a suit contemplated by s. 539 of the Code of 1882, and is maintainable without permission obtained under s. 30 of the Code. DASONDHAY v. MUHAMMAD ABU NASAR, **8 A.L.J. 710.** (21 A. 187, 25 A. 631, 24 B. 170, *F.*)

(1609)—S. 92—*Suit relating to public religious charity—Consent of Advocate-General—Addition of new parties—Addition of new reliefs—Fresh consent necessary.*—In a suit brought by two relators, with the previous consent of the Advocate-General under the provisions of s. 92 of the Code, the plaint was amended by adding a new party defendant and praying for certain reliefs against him without the consent of the Advocate-General: *Held*, that the suit as against the newly added party defendant was not maintainable, the previous consent of the Advocate-General not having been obtained to institute the suit as against him. ABDUL REHMAN BAPOO SAHEB v. CASSUM EBRAHIM, **13 Bom. L.R. 583.** (16 B. 626, *F.*)

(1610)—S. 92 (=s. 539, *Civ. Pro. Code*, 1877) — *Public trust* — "Bama Sariff-indulla" —*Mahomedan.*—A bequest of money by a Mahomedan testator "*bama sariff-indulla*," *i.e.*, to be expended on first purposes at the discretion of the executor is too vague and indefinite to be pronounced a bequest creating "a trust for public charitable purposes" within the meaning of s. 539. The above fund might be legitimately expended on second purposes such as pilgrimage to Mecca, alms-giving, fasting, prayer, purification and erection of *musjids*, within the discretion of the executor. DEPUTY COMMISSIONER OF DELHI v. MUSSAMMAT MUHAMADIN JAN, **50 P.R. 1882.**

(1611)—S. 92 (=*Civ. Pro. Code, Act X of* 1877, *s. 539*)—*Right of worshipper to complain*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of braech of trust of temple funds.—A worshipper of an idol is entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple. RADHABAI v. CHINNAJI *bin* RAMJI SALI, **3 B. 27** [*F.*, 5 M. 383; *R.*, 3 A. 636, 8 B. 432; *R.*, 15 B. 612, 3 C P L R. 11, 15 B. 625, 20 C. 397, 24 B. 170=1 Bom.L.R. 649, 1 S.L.R. 155.]

(1611-*a*)—*S. 92—Suit by two worshippers—Application by others to be made parties—When lies.*—A suit by two worshippers of a temple on behalf of the whole body of worshippers is a representative suit. The fact that the Advocate-General's sanction has been obtained does not change the character of the suit. An application by certain other worshippers to be made parties may be made at any stage of the suit, even before a scheme for the management of the temple is before the Court, if it be shown that the plaintiffs are not prosecuting the suit to the advantage of the persons they profess to represent. L. VARADAYYA CHETTY v. CHINNASWAMY CHETTY, **10 M.L T. 514.**

(1611-*b*)—*S. 92—Trust for public purposes of religious or charitable nature—Evidence—Pleadings.*—*Per Karamat Husain, J. (Piggott, J., differing).*—"The mere fact that the income of the property has been spent for a long period in the so-called feeding of an idol and in the maintaining and taking care of *faqirs* and pilgrims is not sufficient to constitute a trust for public purposes of a charitable or religious nature. It is essential that evidence should be forthcoming that a trust was created for such purposes." Where there is no evidence that a trust was created for public and charitable purposes, a Court has no jurisdiction to try a suit brought, with the permission of the Legal Remembrancer, for removal of the manager and preparation of a scheme for management of the property. *Per Piggott, J.*—The words "any express or constructive trust" in s. 92, Civ. Pro. Code, should be construed liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under the said section, wherever there is fair ground for affirming the existence of a trust." GOPAL DAS v. SHIVA DAS, **8 A.L.J. 1120.** (25 A. 296, *R.*)

(1611-*c*)—*S. 92—Scheme settled by Court—Power to vary—English and Indian Courts—Suit to establish private right—Precluded by existence of scheme—Remedy of person aggrieved by scheme—Civ. Pro. Code, 1882, s. 539—Suit for declaration of right to office of* Dharmakarta *—No prayer for possession of lands—Tenants willing to pay rent if right to office established—Suit not barred by s. 42, Specific Relief Act.*—Where, in a suit for a mere declaration of the plaintiff's right to the office of *Dharmakarta* of a temple, it is found that, if the plaintiff gets possession of the office of *Dharmakarta* the tenants will pay rent to him, and where no prayer is made for the recovery of possession of lands in the hands of tenants, *Held*, that s. 42 of the Specific Relief Act will be no bar to the suit. (15 M. 15, 15 M. 255, 28 M. 238, 33 M. 452, *D.*; 28 B. 567, 4 M. 146, 8 M. 516, 32 C. 129, 11 M. 116, *R.*) Where a scheme has once been settled by Courts under s. 539, Civ. Pro. Code, 1892 (=s. 92, Civ. Pro. Code, 1908), it would preclude suits between parties to establish a private right, which, if established, would interfere with a charitable scheme settled by Court. A scheme once settled by Court cannot be altered except by the Court and then only on substantial grounds. A person cannot sue under s. 539, Civ. Pro. Code, merely to establish his right as hereditary trustee. The High Courts and the District Courts in this country to which this jurisdiction is confined by s. 92, Civ. Pro. Code, 1908, possess the same practically unlimited jurisdiction as the Court of Chancery possesses in matters relating to the public charities, religious or otherwise (28 M. 319, 15 B. 612, 21 B. 556, 20 M. 138, *R.*) Where, the rights of a person, whose prayer to be included as party to a scheme suit under s. 539, Civ. Pro. Code, 1882, was refused, are prejudiced, his only remedy would seem to be to induce the Collector by taking action under s. 92, Civ. Pro. Code, 1908. VEMAVARAPU RAMADOSS v. KAREDLA HANUMANTHA ROW, **10 M.L.T. 356=21 M.L.J. 952.**

(1611-*d*)—*S. 92—Government if may empower Judge to try a particular suit pending before another Court.*—A suit for the administration of a public charity under s. 92, Civ. Pro. Code, was properly instituted before the District Judge. Subsequently the Government by a notification empowered a Subordinate Judge to try that suit and the District Judge thereupon transferred the suit to the said Subordinate Judge. *Held*—That, as the notification was directed to a particular Judge and purported to deal with a particular litigation which was at that date already pending before another Court, it was not such a notification as was contemplated by s. 92, Civ. Pro. Code. *Held*, further, —That the Subordinate Judge had therefore no jurisdiction to try the suit, and the District Judge had no power to transfer the suit to him. ABDUL KARIM ABU AHMED KHAN GHAZNAVI v. ABDUS SOBHAN CHOUDHRY, **16 C.W. N. 44.**

(1612)—S. 92—Religious or charitable trusts —"Interest"—Further or other relief"—Construction of *ejusdem generis*—See TRUSTS, 11 Bom. L.R 85=5 M.L.T. 301=33 B. 509=12 Ind. Cas. 701.

(1612-*a*)—S. 92—*See* NO. 294, *supra*, AND NOS. 2433 C. 2455, 2456, 2457, 2458, 2459, 3420, 5062, 5140, 5817, *infra*.

(1613)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Scope.*—S. 539, Civ. Pro. Code, presupposes the existence of an express or constructive trust. MUJTABA HUSAIN v. JAMAL-UL-DIN, **1 A.L.J. 26.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1614) *Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Suit for removal of old trustee—Prayer for accounts from old trustee and refund of moneys—Court Fees Act (VII of 1870), sch. II, art. 17, cl. 6.*—S. 539 of the Civ. Pro. Code, provides for cases of an alleged breach of trust for public, charitable or religious purposes, and enables two or more persons having an interest in the trust to institute a suit to obtain a decree "appointing new trustees under the trust." These words are wide enough to include a claim for the removal of an old trustee who has committed a breach of trust, and for the appointment of new trustees and the vesting of the trust properties in them. For the purposes of the Court Fees Act, the said reliefs not being capable of money-valuation, the plaintiffs would have to pay a Court-fee of ten rupees under cl. 6 of art. 17 of sch II of the Act, and the mere fact that in the plaint a prayer has been added for the taking of an account from the old trustee, cannot render the plaintiffs liable to pay *ad valorem* fees in respect of that portion of the plaint. GIRDHARI LAL v. RAM LAL, **21 A. 200=A.W.N. 1899, 32.** (19 A. 60, *R.*; 20 A. 46, *Appr.*; 17 M. 462, *D.*) [*R.*, 3 O.C. 299, 5 O.C. 110, 2 C.L.J. 431, 2 C.L.J. 460.]

(1615)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Public trusts—Sanction of the Advocate-General—S. 539, if mandatory or permissive—Its scope—Religious Endowments Act (XX of 1863, s. 14—Demurrer.*—To bring a case within the purview of s. 539, the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive public trust, upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trustee be so *de jure* or *de son tort* and for the particular relief mentioned. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. As against strangers, such as aliences from the trustee and mere trespassers holding adversely to the trust, the section does not apply. Meaning of the phrases "direction of the Court is necessary for the administration" and "such further or other relief" in s. 539 explained. S. 539 is not mandatory but enabling and permissive; cumulative and not restrictive in its effect and does not affect any right of suit which may exist independently of it. If, therefore, a suit is one which would have been maintainable prior to the enactment of the corresponding section in the Code of 1877, it may now be instituted independently of the provisions of s. 539, even though it be upon such a cause of action and for such relief as is mentioned in it. Scope and history of the section discussed and explained. RAI BUDREE DAS MUKIM BAHADUR v. CHUNI LAL JOHURRY, **10 C.W.N. 581=33 C. 789.** [*Expl.*, 32 M. 131=4 M.L.T. 345; *R.*, 1 S.L.R. 155, 29 A. 27=3 A.L.J. 773=A.W.N. 1906, 260, 33 C. 905=10 C.W.N. 867, 1 L.B.R. 183, 7 M.L.T. 45.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1616)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Suits relating to public charities—Suit must conform to sanction given.*—S. 539 of the Code lays down strict rules with a view to protecting trustees of public charities from vexatious and irresponsible suits; and the plaintiff in such a suit must conform to the terms of the sanction given. Where the Collector sanctioned a suit to remove a trustee and to appoint a new trustee, a suit under that sanction, asking that the public be given power to make the appointment, could not be entertained, as the Collector contemplated appointment only by the Court. (21 B. 257, *R.*) The powers mentioned in the last paragraph of the section include also the powers of the Collector to authorise suits by private persons, and not merely power to sue. GANGA RAM v. RALLA SINGH, **110 P.R. 1907.** (24 C. 418, *R.*)

(1617)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Applicability of—Suit brought by the whole body of persons authorised to administer trust.—Held* that s. 539 does not apply to a case, where the suit is instituted by the whole body of persons, who are legally authorised to administer the trust, to which it relates. RAM DAS v. BADRI NARAIN, **A.W.N. 1906, 260=3 A.L.J. 773=29 A. 27.** (10 C.W.N. 581, *F.*)

(1618)—*Ss. 92, 93 (=old s. 539, Civ. Pro. Code, 1882)—Applicability of—Right to remove mahant.*—This section does not apply to a case where a person claiming as the lawful *mahant* of a shrine sues to recover possession of the shrine and its lands against a person elected as a *mahant* by the worshippers of the shrine. This will apply only in cases of alleged breach of trust regarding religious or charitable endowments. BAVA SUKHRAM DAS v. BARHAM PURI, **122 P.R. 1890.** [*R.*, 78 P.R. 1907, 53 P.R. 1904-7 P.R. 1908. Note. *F.*, 7 P.R. 1908.]

(1619)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Muhammadan Law—Sajjadhanashin—Removal of.*—The provisions of s. 539, Civ. Pro. Code, 1882, do not authorise a Court to remove a *Sajjadahnashin* from his office even in case of breach of trust. The possession and custody of property is inseparable from the office of *Sajjadahnashin*. It is impossible to appoint a new trustee and vest the *wakf* property in him. In a suit filed under s. 539 of Act XIV of 1882, for the removal of a *Sajjadahnashin*, when the Court finds that he cannot be removed from his office, the Court has also no power to order the *Sajjadahnashin* to furnish accounts and to issue an injunction restraining him from alienating the property. ISHTIAQ AHMAD v. SAIYAD MASSAOD AHMAD, **6 A.L.J. 632=8 Ind. Cas. 508.**

(1620)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539).*—This section does not apply to a suit to

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*continued.*

enforce a vested right to see, that certain religious and charitable endowments are managed by a person entitled to manage them, as being the member of a particular religious association or brotherhood. GIYANA SAMBANDA PANDARA SANNADHI v. KANDASAMI TAMBIRAN, **10 M. 375.** [*F.*, 16 M. 31, 33 C. 789=10 C.W. N. 581.]

(1621)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Suit praying for appointment of plaintiffs as trustees—Prayer for reliefs by way of declaration and injunction—Court-fee payable for the several reliefs—Court Fees Act (VII of 1870. s. 7, sub-s. 4, cl. (d), sch. II, art. 17. cl. (VI).*—The provisions of s. 539 of the Civ. Pro. Code, would be seriously interfered with, and defeated, if every suit under that section, in which an appointment of trustees is prayed for, or the removal of a trustee is sought, has to be treated as a suit for possession of the property concerned. Instances may often arise in which the trust property is of considerable value. If Court-fees had to be paid with reference to that value whenever it was found necessary to bring a suit to remove a trustee who had committed a breach of his trust, such Court-fees might be prohibitive and might prevent the institution of the suit. So, where such a suit embraced first, a claim for a declaratory decree to the effect that the property in suit was endowed property, a Court-fee of Rs. 10 was held to be payable as for such claim; and, for the second prayer in the suit for the appointment of the plaintiffs as trustees, as it was impossible to estimate such prayer at a money-value, a Court-fee of Rs. 10 had to be paid in respect thereof, as under cl. 6, art. 17 of the second schedule to the Court Fees Act. For the further prayer contained in the same plaint for an injunction against interference with the discharge of the duties of the plaintiffs as superintendents, Court-fee was payable under s. 7, sub s. 4 cl. (*d*) of the Act according to the amount at which the relief sought was valued in the plaint. THAKURI v. BRAMHA NARAIN, **19 A. 60=A.W N. 1896 187.** (8 M. 516, 15 B.L.R. 167, 10 C. 599, *R. & D.*) [*F.* 21 A. 200.]

(1622)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Public charitable and religious trust—Removal of trustee—Removal, grounds of—Manager of temple, position of—Jurisdiction, if trust disputed—Pleadings.*—It is not essential, to the maintainability of a suit under s. 539, that the existence of the public charitable or religious trust alleged by the plaintiffs should be admitted by the defendant. (2 C.L.J. 431, *F.*) In a suit under s. 539, the Court has jurisdiction to make a decree for the removal of the trustee. (17 M. 462, *Diss.*; 24 C. 418, *F.*) The cases upon Sir Samuel Romilly's Act, 1882, are not always applicable in case of construction of s. 539, Civ. Pro. Code. Persons, who are officiating priests of a temple, carry on the worship in the absence of the high priest and receive maintenance from the income of the shrine, as also persons who act as *pandas* or guides and priests of the pilgrims, have an interest in the trust within the meaning of s. 539, Civ. Pro. Code, and are competent to maintain an action under that section. Effect of the amendment made by Act VII of 1888 discussed. (23 B. 659, 24 C. 418, *F.*) S. 539, Civ. Pro. Code, is applicable when it is sought to remove the trustee from a religious office, if, as the holder of such office, he is called upon to exercise business functions, either as trustee or as manager of temple funds and properties and thus, necessarily, possesses civil rights and consequent liabilities. (12 B. 247, M.H.C. 301, *F.*; 19 M. 62, *D.*) In the case of public temples, the ideal owner of the properties dedicated is the *Thakur*, and the *Shebait* or the high priest is merely the natural custodian of the properties, having no beneficial interest therein, and thus occupying the fiduciary position of a mere manager, subject strictly to the liabilities of a trustee. (27 M. 435, *D.*) Although no proof can be admitted of any matter, during the trial of a suit, which is not noticed in the pleadings, yet, where a trustee is sought to be removed under s. 539, Civ. Pro. Code, by reason of his fraudulent conduct and improper behaviour, in illustration of which certain specific facts are alleged in the plaint, the plaintiffs are not precluded from producing evidence of other instances of misconduct and misbehaviour. Under s. 539, the Court will not dismiss a trustee although he may have transgressed the strict line of his duty, provided there has been no wilful default but merely a misunderstanding; the Court will, however, remove him if he has misconducted himself by dealing with the trust-property for his own personal benefit or set up an adverse title thereto. SHILAJANANDA DUT JHA v. UMESHANUNDA DUT JHA, **2 C.L J. 460.** (15 B. 612, *F.*; 21 B. 556, 22 B. 493, *D.*)

(1623)—*Ss. 92 and 93 (=old s. 239*—Dharmasala—*Right of worshippers to contest alienation.*—Though the worshippers at a *Dharmasala* are persons interested in the preservation of property attached to the same, this section will not apply to such a suit. SEWA SINGH v. BUDH SINGH, **66 P.R. 1892.** [*R.*, 9 P.R. 1904, 78 P.R. 1907.]

(1624)—*Ss. 92 and 93 (=Civ. Pro. Code, 1882, s. 539)—Suit by* pujari *of temple to recover possession of lands belonging to temple from trespasser—Applicability of section to.*—S. 539 of the Code did not apply to a suit by the *pujari* of a temple to recover possession of a village which had been managed by the defendant on behalf of the temple and to require of him an account inasmuch as the position of the plaintiff was that of a Sarbarakar and consequently had an independent right of suit against the defendant, a trespasser. THAKUR BEHARI LALJI v. RAMCHARAN DAS, **8 C.P.L.R. 49.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1625)—*Ss. 92, 93 (Civ. Pro. Code, 1882, s. 539).*—Persons elected as church wardens or *kaikars*, in the place of others whose election has been superseded, and in whom the possession of the property of the church and the church itself is vested, cannot, when they sue the superseded wardens for possession of the properties, injunction, and a declaration that the church was held in trust for worship according to their faith, be treated as beneficiaries suing trustees, and s. 539, Code of Civil Procedure has no application to such a suit. AUGUSTINE v. MEDLYCOTT, **15 M. 241.** [*R.*, 21 B. 257, 3 O.C, 302, 33 C. 789=10 C.W.N. 581.]

(1626)—*Ss. 92 and 93 (=ss. 539, Civ. Pro. Code, 1882)—Property of shrine—Alienation—Suit to set aside by person interested—Sanction.*—A suit to set aside an alienation of property belonging to a shrine does not fall under s. 539, Civ. Pro. Code, 1882, and so no sanction is necessary to enable a person interested in the maintenance of the shrine to bring the said suit. ABID ALI v. GHULAM TALAL, **94 P.R. 1885.** (27 P.R. 1885, *R.*)

(1627)—*Ss. 92 and 93 (=s. 539 Civ. Pro. Code, 1882)—Suit for a share of offerings—One relating to public or charitable trust.*—A suit to recover, under an ancestral right, a share of offerings wholly appropriated by the defendants to their own use cannot be held to be based on a breach of trust created for public, charitable or religious purposes within the meaning of s. 539, Civ. Pro. Code, 1882. DANE SHAH v. JHANDE SHAH, **76 P.R. 1886.**

(1628)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Suit by minor whether maintainable—"person," meaning of.*—The term "person," in s. 539 should not be restricted to persons, *sui juris*, and a suit under that section can be maintained by an infant, who is interested in a public religious and charitable trust, if he is properly represented by a next friend. SRI SRI LAKSHMI JANARDAN v. ERADATULLAK MALLIK, **6 Ind .Cas. 119.**

(1629)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Public charity — Jurisdiction—Stranger, eviction of—Interest in trust, what constitutes — Sir Samuel Romilly's Act (St. 52, Geo. III, C. 181), scope of—Reg. II of 1819, jurisdiction of Revenue authorities under—Resumption proceedings, scope of*—Kanungoe—*Inam.*—It is not necessary, in order to make s. 539, Civ. Pro. Code, applicable, that the existence of the trust for public charitable or religious purposes, alleged by the plaintiff should be admitted by the defendant. If the trust is disputed, the question must be decided by the Court upon evidence, the evidence, however, must be strong and clear that the lands have been inalienably and, in perpetuity, dedicated by the founder for a public charitable or religious purpose. (25 A. 631, *Expl.* 2 C. 341, *F.*) When the Jurisdiction of a Court to take cognisance of a suit instituted before it is disputed, the Court must adjudicate upon the question; mere denial of jurisdiction does not oust it. In a suit under s. 539, Civ. Pro. Code, a decree for ejectment cannot be made in favour of the plaintiff against a stranger to the trust, who sets up a title hostile thereto. (20 A. 46, 24 B. 170, *F.*, 24 C. 418; *Diss.*) A suit, the sole object of which is to eject a trespasser or to recover possession of trust-property from the hands of a person, who has acquired it on the basis of an improper alienation by a trustee, does not fall within the scope of s. 539 of the Civ. Pro. Code. *Per Mookerjee, J.*:—The language, scope and object of Sir Samuel Romilly's Act are materially different from those of s. 539, Civ. Pro. Code, and decisions upon the former Act cannot be safely relied upon in interpreting the latter. (24 C. 418, 21 A. 200, 21 B. 48, 14 M. 186. *F.*; 17 M. 462, *Diss.*) Persons claiming a title purely adverse to a trust are not proper parties to a suit for the execution of the trust. As the possession of an interest in the trust is an essential condition precedent to the maintenance of a suit under s. 539, Civ. Pro. Code, the plaint ought to contain a specific statement of the grounds upon which such interest is claimed. A plaintiff, merely as the heir of the trustee against whom misconduct is alleged, has not such an interest in the trust as would entitle him to maintain an action under s. 539, Civ. Pro. Code. The interest referred to in the section must be an existing one, and not a mere contingency like the possibility of a succession. (20 C. 810, *F.*) If the trust to be administered is one for the feeding of wayfarers and the poor, it does not necessarily follow that every member of the public has an interest in the trust. Reg. II of 1819 conferred, upon Revenue authorities, jurisdiction to determine whether lands ought to be exempted from assessment of Revenue on the ground that they constitute a valid rent-free grant; the question whether they had been absolutely dedicated for a public charitable purpose, is wholly foreign to such an enquiry. (2 Hay 490, 21 W.R. 365, *Appl.*) The history of the office of *kanungoe* examined. BUDH SINGH DUDHURIA v. NIRADABRAN ROY, **2 C. L J. 431.** [*F.*, 2 C.L.J. 460; 4 L.B.R. 183, 36 C. 713=9 C.L.J. 563=13 C.W.N. 654; 33 C. 789; *R.*, 3 C.L.J. 160.]

(1630)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Scope of suit—Jurisdiction of District Judge—Recovery of truste-property improperly alienated—Court-fees.*—There is no good reason for holding that, under the section, the Court cannot determine of what the trust-properties consisted or find that particular alienation of them could not be maintainted, provided all proper parties are represented before it. *Semble*, if transferees or mortgagees, who have been impleaded in a suit instituted under s. 539, do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

by the Court to manage the trust-property to institute a suit for recovery of possession. *Semble* (*per Stanley, C. J.*)—A suit for the dismissal of a trustee and for recovery of trust-property from the hands of a third party, to whom the same had been improperly alienated fell within the scope of s. 539. (24 C. 418, *Appr.*) A suit instituted under s. 530, is not a suit in which plaintiffs claim, or can claim for themselves, possession of the trust-property. They merely ask the Court to vest the trust-property in the trustees duly appointed to manage the trust and to take it out of the hands of trustees, who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power, under the section, to vest the trust-property in the new trustees, and it seems to be reasonably clear that the Court may direct a trustee, who is being removed, to make over the trust-property to the new trustees. The plaintiffs in such a suit carry on the suit for the benefit of all persons interested in the trust and continue to act as plaintiffs until the decree has been fully executed. As regards the Court-fees, in many cases, the costs of such a suit as this fall on the trust-estate, and that, as the decree in such suit works no change in the beneficial ownership of the property, it would be a hardship to impose on the trust-estate the payment of the ordinary Court-fee payable in respect of a hostile suit for recovery of land on title. *Per Burkitt, J.*—By s. 539, the Legislature do not create a new class of civil rights nor constitute a Court empowered to hear suits relating to infringements of those rights. Were it not for s. 539, the class of suits, which the section makes triable by the District Judge only, would be cognizable by the ordinary Subordinate Court empowered to hear original suits. A suit to recover possession of immoveable property on title (even though it be alleged that the property in suit forms part of a *waqf* property and had been improperly alienated by the *mutwalli*) is not a suit of the nature specified in s. 539, and, therefore, it is not within the power of the District Judge, when hearing a suit under s. 539, to pass a decree for recovery of possession of such property. But the plaintiff in such a suit can obtain a direction from the District Judge to the *mutwalli* instructing the latter to get in the trust-property as ascertained by the Judge. GHAZAFFAR HUSSAIN KHAN v. YAWAR HUSSAIN, **2 A.L.J. 591=A.W.N. 1905, 201=28 A. 112.**

(1631)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)—*Vindication of management—Trust—Suit.*—A suit instituted for the vindication of the right of management which is vested in and actually being exercised by the plaintiffs and those they represent at the date of obstruction, does not fall within s. 539 of the Civ. Pro. Code, merely because those who cause the obstruction happen to have been nominated as trustees. NAVROJI v. KHARSEDJI, **5 Bom. L. R. 745=28 B. 20.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1632)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)—*Constructive trustee—Trustee de son tort—Removal of a trustee—Limitation.*—A person, who without being appointed a trustee by the founder of an endowment, takes charge of the endowment and manages it as the endowment property, makes himself a constructive trustee, or in other words, a trustee, *de son tort*. A suit to remove such a trustee, under s. 539 of the Code of Civil Procedure, is never time-barred, for with every fresh breach of the constructive trust, or whenever the direction of the Court is deemed necessary, a fresh cause of action arises. JUGAL KISHORE v. LAKSHMANDAS, **1 Bom. L. R. 118=23 B, 659.**

(1633)—*Ss. 92 and 93 (=s 539, Civ. Pro. Code*, 1882)—*Head of Mutt—Suit for declaration that he is not the lawful trustee and for his removal*—Devastanam *attached to* Mutt—*Scheme for management—Maintainability of suit by two lay disciples or worshippers—Head of* Mutt, *whether a trustee.*—Plaintiffs, two lay disciples of a *Mutt*, sued the defendant for a declaration that he was not the lawfully appointed head, for his removal, and for administration of the *Devastanam*. The defendant pleaded that he could not be removed under s. 539, as the section is inapplicable to such a suit by two lay disciples, and that consequently he could not be deprived of the *Devastanam* properties, and that the position of the Head of a *Mutt* was analogous to that of a Corporation Sole. *Held*, that the suit under s. 539 was maintainable, and it was not necessary to have a legal successor appointed first, and for him to have sued for possession. (26 M. 450, 15 C. 329 =15 I. A. 1, *F.*; 16 M. 31, *Not F.*; 22 M. 117, *D.*) *Held* also, that, even supposing that the defendant cannot be removed from headship of the *Mutt* under s. 539, and that the headship of the *Mutt* carries with it trusteeship of *Devastanam*, there is no reason why the properties held by the defendant in trust should not be protected, if it be proved that the defendant has been guilty of waste and mismanagement, or why, if a proper case is made out, the Court should not make the necessary provisions for a proper administration of the trust. A Court of equity always exercised jurisdiction to make whatever arrangements may be required for carrying out the object of the trust. The question whether, under the general Hindu Law, the position of the Head of a *Mutt* is that of trustee of its endowments, or is it rather that of a life-tenant of the income of such endowments, was referred to a F.B. KALISHWARA GURUKAL v. NATARAJA THAMBIRAN, **6 M.L.T. 193=8 Ind. Cas. 255.** (27 M. 435, 10 M. 375, 2 M. 175, *R.*)

(1634)—*Ss. 92, 93 (=Civ. Pro. Code*, 1882, *s. 539)—Suit for appointment of new trustees as defendants were not lawful trustees—No relief prayed for delivery of possession—Maintainability—Specific Relief Act (I of* 1877) *s. 42—Consequential relief.*—Plaintiffs instituted a suit for the appointment of new trustees

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

to a certain public temple, on the ground that the defendants who were in management of the temple were not lawful trustees and that the trusteeships were therefore vacant. The plaint contained no prayer for delivery of possession of trustees to be appointed. *Held* that the suit was comprised in the words of s. 539, Civ. Pro. Code, *viz.*, "or whenever the direction of the Court is deemed necessary for the administration of such trust." The suit was not bad under s. 42 of the Specific Relief Act for the omission of a prayer for recovery of possession of the temple and its property from the defendants. If new trustees were appointed by the Court under cl. (*a*) of s. 539 of the Code, they would be entitled to demand possession from the defendants whose title to administer the trust is negatived by the decree, and if the defendants choose not to comply with the demand, the new trustees would be entitled to bring a suit under the ordinary law to eject them from the temple and its endowments. (15 I. A. 10, *R.*; 16 M. 31, *D.*) [*F.*, 6 M.L.T. 193; *D.*, 33 C. 789 = 10 C.W.N. 581; *R.*, 19 M.L.J. 772.] Where in a suit under s. 539, Civ. Pro. Code, the plaintiffs ask for the relief specified in cl. (*a*) thereof, s. 49 of the Specific Relief Act is no bar to the maintainability of the suit, on the ground that there is no prayer for consequential relief. NETI RAMA JOGIAH v. VENKATACHARLU, **26 M. 450.**

(1635)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Public religious endowment, facts necessary to constitute—Dedication of temple for use of particular sect.*—A Hindu provided for the creation and maintenance of a religious endowment in favour of the sect known as Bhagwatas appointing managers and directing the manner in which the profits of the endowed property were to be spent. *Held* that this must be taken to be a public religious endowment within the mening of s. 539 of the Code of Civil Procedure. KANHAYALAL v. SALIG RAM, **A.W.N. 1894. 159.**

(1636)—*Ss. 92 and 93 (=Civ. Pro. Code, 1882, s 539)—Trust-property, Suit against dismissed* Mahant *by his successor for possession of.*—The plaintiff sued as the *Mahant* or trustee of an enowments in whom the property of the endowment was vested, for the recovery of that property from the late *Mahant* who, according to the plaint, was in possession of the property as a trespasser, and another defendant who was in possession of a portion of the said property that had been alienated to him by the late *Mahant*. *Held*, that the suit was not barred by the provisions of s. 539, Civ. Pro. Code, and was maintainable against the late *Mahant* as well as against the other defendant. The fact that the suit involved the determination of the questions whether the late *Mahant* had been removed from the *mahantship*, whether such removal was validly effected, whether the plaintiff was appointed *Mahant* in succession

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to him, and whether such appointment was valid, was immaterial. DAMODAR DAS v. NARSING DAS, **3 O.C 299.**

(1637)—*Ss. 92, 93 (=Civ. Pro. Code, XIV of 1882, s. 539)—Suit jointly brought by trustee and worshipper in temple, maintainability of, in the District Court—Religious Endowments Act (XX of 1863), ss. 14 and 15.*—Plaintiffs sought for the removal of the defendants from their offices as trustees of a temple, for the appointment of the plaintiffs or other persons in their stead, and for the settlement of a scheme of management. The suit was instituted in a District Court, leave having been obtained under the Religious Endowments Act, as well as under s. 539 of the Code of Civil Procedure. One of the plaintiffs was a mere worshipper in the temple a suit by whom for the removal of a trustee lay only in the District Court and though the other plaintiff, as a general trustee, was at liberty to sue in the ordinary Courts, he was not precluded from suing under the Religious Endowments Act and instituting the suit in the District Court along with the other plaintiff. Nor were the plaintiffs precluded from claiming in such suit reliefs by way of appointing a fresh trustee, vesting the property in him, and settling a scheme of management. There was nothing to prevent them from asking the court for such reliefs at once, instead of being required to institute a separate suit for the purpose. NARAYANA AYYAR v. KUMARASAMI MUDALIAR, **23 M. 537 = 10 M.L.J. 106.**

(1638)—*Ss. 92, 93 (=s 539, Civ. Pro. Code, 1882)—Whether directory or mandatory—Sanction of Advocate-General—Pre-existing right of suit whether taken away by s. 539—Question relating to jurisdiction, whether can be waived.*—Statutes imposing restrictions upon the subject's right of suit must be construed strictly. Hence a pre-existing right of suit cannot be held to be taken away by the words of s. 539, Civ. Pro. Code, those words being merely permissive or directory, and not mandatory. Under Hindu Law, a member of the Hindu community, interested in a public "*tikana*" or place of worship, can maintain a suit in respect of such "*tikana*." And no certificate of the Advocate-General is necessary under s. 539 Civ. Pro. Code. Questions relating to jurisdiction (as, the questions that the certificate of the Advocate-General is necessary under s. 539, Civ. Pro. Code, for the institution of the suit) may be raised in second appeal, though waiver in the lower Courts. There cannot be a waiver of jurisdiction. MUSSAMAT RADHIBAI WIFE OF KISHENDAS v. MR. KUNDAMAL SDDIWAN ASUMAL, **1 Sind L.R. 155.**

(1639)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Suit by managers of mosque for trespass in respect of property of mosque.*—Any Muhammadan, who is interested in property belonging to a mosque, is competent to bring a suit in respect of a trespass committed with regard to such property. Such a suit does not need any

Civ Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

permission for its institution under the provisions of s. 539 of the Code of Civil Procedure. MUHAMMAD UMR v. MAULA BAKHSH, **A.W.N. 1892, 9.**

(1640)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Breach of trust—Suit brought with the consent of the Advocate-General—Amendment of plaint by mentioning particulars of the breach of trust—No consent necessary.*—A suit instituted under the provisions of s. 539 of the Civ. Pro. Code complained generally about a breach of trust. The suit was brought with the consent of the Advocate-General. The plaint was subsequently amended by mentioning the particulars constituting the breach of trust: no consent of the Advocate-General was obtained to the amendment: *Held*, that consent was not necessary, because if the Advocate-General was satisfied generally that there was a breach of trust, and gave his consent, it was competent to the plaintiffs to specify such instances of the breach of trust as they thought they could prove. DHANJIBHOY v. MEHERALLY, **9 Bom. L.R. 961.**

(1641)—*Ss. 92 and 93 (=old s. 539)—Temple property, alteration of—Power of worshippers to restrain.*—*Pujaris* of a temple can sue for injunction to restrain the alteration of temple property without the consent of the Advocate-General under this section. SAPURAN SINGH v. GULAB SINGH, **29 P.R. 1897.**

(1642)—*Ss. 92 93 (=Civ. Pro. Code, 1882, s. 539)—Suit instituted on sanction—Reliefs to be limited to matters covered by sanction.*—This was a suit brought in the District Court by the Collector on sanction obtained from Government under s. 539 of the Civ. Pro. Code, which instructed him "to move the District Court to appoint trustees newly for the administration of the trust-funds and to settle a scheme for their management." It was contended for the defendants that, as the sanction by Government was of a limited character, and did not include the relief in the plaint in respect of the removal of old trustees and of rendering of account and refund of monies, the suit was not maintainable in its enlarged form as including such reliefs, and the High Court upheld the contention. The lower Court was in error in inquiring into matters not covered by the order of sanction, thereby enlarging the scope of the suit so as to enable it to grant reliefs not included in the sanction. The plaint, so far as it prayed for the appointment of new trustees and the settlement of a scheme for administering the trusts, was strictly within the limits of the sanction. In so far, however, as the enquiry was extended to the investigation of breaches of trust and to the passing of an order requiring the old trustees to refund certain sums, the action of the lower Court was not warranted by the terms of the sanction and, as such, was *ultra vires*. SAYAD HUSSEINMIYAN v. COLLECTOR OF KAIRA, **21 B. 267.** [*R.*, 110 P.R, 1907, 9 S.L.R. 155.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*continued.*

(1643) *Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Suit for declaration that certain property is waqf.*—A suit instituted simply and solely for the purpose of having a declaration of the Court that certain property is *waqf*, is not a suit coming within the provisions of s. 539, Civ. Pro. Code. GAMAL-UDDIN v. MUJTABA HUSAN, **25 A. 631=A.W.N. 1903, 120.** [*F.*, 33 C. 759=10 C.W.N. 581; *Expl.*, 2 C.L.J. 431; *D.*, 2 C.L.J. 460.]

(1644)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Suit by some of the subscribers of a religious and charitable society for removal of office-bearers appointed under rules of society and not by subscribers, and for accounts—Suit brought without sanction or consent of Advocate-General.*—In a suit brought, without the sanction or consent of the Advocate General, by some of the subscribers of a religious and charitable society, on behalf of themselves and all other persons interested in the subject-matter of the suit, for the removal of certain office-bearers from their respective offices, for accounts and for payment into Court of the money which may be found due from them to the society, it having been found that the officers were appointed under the rules of the society and not by the subscribers, that the subscribers were not entitled, as of right, to make any claims upon the funds of the society, and that they were not the beneficiaries of the trust *held*, per *White, C.J.*, that they had no right to maintain the suit, even if they had obtained the sanction under s. 539, Civ. Pro. Code. (8 B. 432, *Not F.*) *Held* Per *Abdur Rahim, J.*, that the present suit having been brought without the sanction or the consent of the Advocate-General being first obtained under s. 539, Civ. Pro. Code, was not maintainable. H. A. D'CRUZ v. J.L. D'SILVA, **4 M.L.T. 345=32 M. 131=1 Ind. Cas. 999.** (14 M. 186, 33 C. 789, *Expl.*)

(1645)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Consent of Advocate-General—Suits relating to charity—Suit instituted by one person with consent of Advocate-General—Amendment of plaint—Substitution of another plaintiff with consent of Advocate-General.*—A suit under s. 539 of the Civ. Pro. Code, was in the first instance brought by one person with the consent of the Advocate-General. This was objected to, and it led to an amendment of the plaint by the addition of the second plaintiff, with the certificate of the Advocate-General which ran: "I give my consent to the amendment of the plaint of this suit as proposed." *Held*, that the suit as brought is defective in a material particular; for s. 539 of the Civ. Pro. Code, nowhere speaks of the consent of the Advocate-General to an amendment of the plaint, and it would be unduly forcing the words of the Code to hold that by virtue of the second consent given by the Advocate-General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

consent in writing of the Advocate-General. DARVES v. JAINUDIN, **8 Bom. L.R. 751=30 B. 603.**

(1646)—*Ss. 92, 93 (=s 539, Civ. Pro. Code,* 1882)—Dharmasala—*Suit for removal of present* mahant *and appointment of another—Sanction of the Advocate-General, whether necessary.*—S. 539 of the Code is applicable to a suit for the removal of the incumbent *mahant* of a *dharmasala* and the appointment of the plaintiff in that place, on an allegation of breach of trust, and the suit is not maintainable without obtaining the previous consent of the Advocate-General. DALIP SINGH v. ISHVAR SINGH, **78 P.R. 1907.** (29 M. 283, P.C., 9 C.W.N. 151, 20 C. 397, 24 C. 418, 21 B. 49, 122 P.R. 1890 "and" 66 P. R. 1892, *R.*)

(1647)—*Ss. 92, 93 (=s. 539. Civ Pro. Code.* 1882)—*Suit relating to public charity—Suit for declaration that certain property is* waqf.—The plaintiffs brought their suit on the allegations that they were Mahomedans interested in the due carrying out of the provisions of a certain deed of endowment made by a deceased ancestor of theirs; that one of the defendants was the *mutawalli* of the property, made *waqf* under the said deed, and that he had mortgaged the *waqf* property to the other defendant who was seeking to bring it to sale by enforcement of his mortgage. The plaintiffs prayed for a declaration that the property in suit was *waqf* and, in consequence, not liable to be brought to sale under the decree obtained by the defendant-mortgagee. *Held*, that the suit came within the provisions of s. 539 of the Code of Civil Procedure and that no permission, as required by that section, having been obtained for its institution, the suit must fail. HASHIMAT BIBI v. MUHAMMED ASKARI, **A.W.N. 1895, 2.**

(1648)—*Ss. 92, 93 (=Civ. Pro. Code,* 1882, *s. 539)—Trust—Public charity—Breach of trust—Suit—Consent of Advocate-General—Maintainability of suit.*—Two out of the five trustees of a public charitable trust alleged breach of trust on the part of one of the remaining three trustees and brought a suit against all of them to obtain a decree—(1) ordering the first defendant to account for the money in respect of which they alleged he had committed a breach of trust, (2) removing the first defendant from the office of trustee and appointing some fit person in his stead, and (3) granting such further or other relief as the nature of the case may require The plaintiffs failed to obtain the consent of the Advocate-General for the institution of the suit. *Held* that s. 539 of the Code applied to the suit which was, therefore, not maintainable at all without such consent in writing. TRICUMDASS MULJI v. KHIMJI VULLABHDASS, **16 B. 626.** [*Diss.*, 33 C. 789=10 C.W.N. 581, 1 S.L.R. 155; *F.*, 21 B. 257; *App.*, 2 C.L.J. 460; *R.*, 21 B. 48, 20 A. 46=17 A.W.N. 210.]

(1649)—*Ss. 92, 93 (=Civ. Pro. Code,* 1882, *s. 539)*—Waqf—*Suit by members of general public against persons in possession of property alleged to be* waqf.—Where a plaintiff alleges misappropriation or non-administration of trust-funds and trust-property by persons upon and in charge of that property and asks the interference of a Court, it is necessary for him to obtain preliminary sanction under s. 539 of the Code of Civil Procedure. AKBAR KHAN v. MUHAMMAD NUR KHAN. **A.W.N. 1893, 71.**

(1650)—*Ss. 92, 93 (=s. 539. Civ. Pro. Code.* 1882)—*Religious institution—Suit for removal of* Mahant *of* Dharmsala—*Sanction of Collector, necessary.*—One out of several *lambardars* of a viliage with two other residents of the village sued the *Mahant* of a *Dharmsala* for his removal and the cancellation of alienations of endowed property alleged to have been effected by him. No sanction was obtained under s. 539 of the Civ. Pro. Code. *Held*, that, sanction being necessary, the suit was not maintainable. SAHAB SINGH v. PHUMAN, **198 P.L.R. 1910=8 Ind. Cas. 528.** (78 P.R. 1907=193 P.L.R 1908 "and" 7 P.R. 1908=176 P.L.R. 1908 *F.*; 94 P.R. 1885 29 P.R. 1897 (*Cited*; 33 B. 509, 33 C. 789 *R.*)

(1651)—*Ss 92, 93 (=Civ. Pro. Code.* 1882, *s. 539)—Sanction to plaintiff and "another"—Validity—No valid consent before suit—Subsequent consent, effect of—Permission to withdraw, sufficient cause.*—The "consent in writing" of the Advocate-General or other officer required by s. 539 of the Civ. Pro. Code, must be a specific permission given to two specific named persons. A permission given to one applicant by name "and another" is not a sufficient compliance with the terms of the section. The consent above referred to is a condition precedent to the institution of the suit to which the consent relates. If no such consent has been obtained, no valid consent obtained after suit will avail the plaintiffs. (10 M. 185, *D.*) [*D.*, 34 C. 305=5 C.L.J. 270.] Though a defect in the sanction required by s. 539 of the Civ. Pro. Code, is a formal defect, yet, no permission to withdraw the suit could be given where the plaintiffs delayed the suit for eight years after the sanction without any reason. GOPAL DEI v. KANNO DEI. **26 A. 162=A.W.N. 1903, 227.**

(1652)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code,* 1882)—*Suit between to private individuals claiming to be* Mutuwalis—Wakf *property—Necessity for Advocate-General's sanction.*—To necessitate the sanction of the Advocate-General, under this section, there must be, in existence, a dispute of a public nature regarding a trust contemplated by this section. A mere private dispute between two private individuals, each claiming, as against the other, to exercise rights as *mutuwallis* over *wakf* properties, is not one necessitating the sanction of the Advocate-General, for maintenance of a suit. MUSST MONIJAN BIBEE v. KHADEM HOSSEIN, **9 C.W.N. 151=32 C. 273.** (24 C. 418, *F.*) [*F.*, 33 C. 789=10 C.W.N. 581.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1653)—*Ss. 92, 93—Suits regarding public charity—Consent of the Collector—Consent signed by Assistant Collector who was in charge owing to Collector's illness—Consent invalid.*— In a suit filed under the provisions of s. 92 Civ. Pro. Code, 1908, the plaintiffs applied for the consent of the Collector who was authorized by the Local Government in that behalf. The Collector having been ill, the consent was signed by the Assistant Collector who was performing his duties: *Held*, that consent was not valid. SOMCHAND BHIKHABHAI v. CHHAGANLA KHUBCHAND, **13 Bom L.R. 207.**

(1654)—*Ss. 92 and 93 (=Civ. Pro. Code, 1882, s. 539)—Suit for appointment of Committee by Civil Court.*—Where the plaintiffs prayed for permission, under s. 539 of the Code of Civil Procedure, to sue to have a committee appointed by a Civil Court for the management of a certain religious trust and to obtain any other relief they might be entitled to under the section, and the Collector had merely "accorded permission," *Held*, that the suit must be limited to matters sanctioned and that the plaintiffs were not competent to sue for the removal of the defendant from the office of *mahant*, the Court having no authority to enlarge the scope of the suit and to grant any other reliefs other than those included in the terms of the permission. PREM SINGH v. LABH SINGH, **89 P.R. 1911.**

(1655)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Discovery by Advocate-General—Advocate-General—Discovery upon oath—Practice*—The Advocate-General cannot be called upon to make discovery upon oath, in a suit filed by him at the instance of relators under the provisions of s. 539 of the Civ. Pro Code, 1882. ADVOCATE GENERAL v. ADAMJI, **8 Bom. L.R. 565=30 B. 474.**

(1656)—*Ss. 92, 93, (=Civ. Pro. Code, 1882, s. 539)—Lands dedicated to charity, suit to set aside illegal sale of, not governed by s. 539. Civ. Pro. Code--Advocate-General not necessary party*—Where the plaintiff, alleging that the lands in question had been dedicated by his grandfather for charitable purposes, that they were vested in his family, and that they had been illegally sold to the defendant, sued to have such sale set aside and to be put in possession of the lands, the suit, being one merely to recover trust-property, from outsiders, was held not to fall within s. 539 of the Civ. Pro. Code, and the plaintiff was not bound to make the Advocate-General a party to it. LUKSHMANDAS PARASHRAM v. GANPATRAV KRISHNA. **8 B. 365.** [*F.*, 21 A. 187=19 A.W.N. 18, 33 C. 789=10 C.W.N. 581; *R.*, 18 A. 227=16 A.W.N. 37, 24 B. 170=1 Bom. L.R. 649, 2 C.L.J. 431, *D.*, 24 C. 418.]

(1657)—*Ss. 92, 93 (=s. 533, Civ. Pro. Code, 1882)—Suit for public religious charitable property--Suit in ejectment—Ejectment of a third person--Practice—Party to suit.*— Though a suit to eject a trespasser from trust-property is outside the scope of and reliefs claimable under s. 539 of the Civ. Pro. Code, 1882, yet a suit, wherein a breach of trust is complained of and the alienee denies that the property is a public trust for religious purposes can be tried under s. 539, and the alienee can be joined as a party to it. Such an alienee is a necessary party where it is alleged that he has taken the property from the trustee with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to and for the trust. COLLECTOR OF POONA v. CHANCHALBAI, **13 Bom. L.R. 690.**

(1658)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Right to appeal--Suit relating to charity--Suit brought by the Advocate-General at the instance of relators—Dismissal of suit—Right of appeal—Relators cannot appeal in their own right.*—Where a suit filed, under s. 539 of the Civ. Pro. Code, by the Advocate-General at the instance of relators, is dismissed and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account, against the dismissal. JAN MAHOMED v. SYED NURUDIN, **9 Bom. L.R. 996.**

(1659)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Scheme of management—Religious endowment—Hindu temple—Trustee—Trustees not acting according to the scheme—Application for their removal—Scheme not contemplating their removal—Scheme could be enforced by their imprisonment or attachment of their property or by both.*—The scheme for the management of a temple provided that the defendants and their heirs were during their good conduct to be retained as the trustees and managers of the temple, and as such to maintain a proper system of worship, not to allow persons of low caste to reside on the temple lands, to keep the compound, etc., clean and the temple-building in repair, to keep regular accounts from the date of the decree, i.e., 30th September, 1896, etc. The plaintiffs applied on the 27th June, 1898, for the execution of the decree embodying the scheme, averring that defendants were not maintaining a proper system of worship, were allowing persons of low caste to reside on the temple lands, were not keeping the compounds clean or the buildings in repair, were not keeping proper accounts and so forth. The plaintiffs, therefore, prayed that defendants be removed from their office, or that the terms of the decree might be enforced by imprisonment of the defendants and attachment of their property. The District Judge dismissed the application on the ground that even if the applicants proved their allegations, he did not consider that the defendants could be removed in execution-proceedings and that the plaintiff's remedy lay in a regular suit. *Held*, that as the scheme was framed, there was no provision for removing the defendants, for proved misconduct;

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

that the proper course in order to remove the trustees was not to bring a fresh suit under s. 539 of the Code of Civil Procedure, 1882, but was to have the scheme amended so as to include in it a provision for their removal, if necessary; that s. 260, Civ. Pro. Code, 1882, applied to the case, because it was clear that the decree had been made against defendants for the performance of a particular act, and if they had an opportunity of preforming that act and have wilfully failed to do so, the decree might be enforced by their imprisonment or by the attachment of their property or by both. DAMODARBHAT v. BHOGILAL, **1 Bom. L.R. 509=24 B. 45.**

(1660)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)— *Scheme, framing of—Decree, form of.*—In a suit instituted by the plaintiffs for the administration of a religious trust, the High Court ordered an account to be taken of the property, and of the receipts and disbursements of the temple, and directed the lower appellate Court to draw up a scheme for the future management of the temple and its funds. *Held*, that the decree was right and that the first thing to be done was to take an account of the trust-property. CHOTALAL v. MANOHAR. **2 Bom. L.R. 316=24 B. 50.**

(1661)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)—*Religious endowment—Scheme for management.*—In settling a scheme of management under s. 539 of the Civ. Pro. Code, due consideration should be given to the established practice of the institution and to the position of the persons connected with it. BALDEVPURI v. GOPALDAS, **8 Bom. L.R. 756.**

(1662)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)—*Scheme for management of temple—Trusteeship vested in head of* Mutt *after* 1843 *—Jurisdiction of District Court and High Court to vary scheme and appoint additional or new trustees—Doctrine of* Cypres.—This was a suit for the settlement of a scheme for the management of the temple of Tirupati, an ancient Hindu temple, the management whereof was originally in the native Rulers and, after the advent of the British, passed into the hands of the East India Company, which conducted its affairs through the Board of Revenue. After the year 1841, the British Government withdrew from all interference with its management, and the management was handed over to the head of a *Mutt*, the *sunnud* granted to him providing that he and his successors were to continue as managers of the temple. A series of managers having mismanaged the affairs of the temple and misapplied and misappropriated its funds, the present suit was instituted for the settlement of a scheme. The history of the temple showed that the successive *Mahants*, or heads of the *Mutt* were utterly incompetent to manage its affairs, and that the arrangements made in 1843 for the administration of the institution failed to answer the expectations

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

then entertained. The District Judge, in the Court of first instance, by his decree, appointed a committee of five members to exercise minute and complete control over the *Mahant*. The contentions for the defendant, *Mahant*, were: that the Courts had no jurisdiction to appoint new or additional trustees or to establish a controlling authority. The contentions were based on the meaning of the words 'under the trust' in s. 539 of the Code, it being urged that the Courts, if they had jurisdiction to interfere, ought to conform to the original constitution of the trust or to the rules now in force in respect to it. *Held*, that District Courts and High Courts in this country, exercising jurisdiction under s. 539 of the Code, have powers similar to those of Courts of Chancery in England, *i.e.*, powers of appointing additional trustees, even though such appointment might involve a departure from the arrangement contemplated in the constitution of the trust,—and that there was no reason for supposing that the Indian Legislature meant to control the powers of the Courts in respect to the appointment of new or additional trustees. *Held*, further, that, as, in this case, the *Mahant* did not derive his power of management under the original constitution laid down centuries ago, but under the British Government in 1843, the contention that the original constitution ought to be conformed to, does not hold good in this case. The arrangement under which the *Mahant* came to be in office was one made by the Board of Revenue when it withdrew from the management of the temple. Such an arrangement was analogous to a scheme settled by a lawful authority, and, as such, it was liable to be varied by that or other authority legally competent to alter or modify it. There was, therefore, nothing to prevent a scheme being framed by the Court providing, *inter alia*, for the appointment of an additional trustee or the creation of a controlling body. The High Court, following the *cypres* principle, settled a scheme for the management of the temple and for the expenditure of its surplus income, the scheme providing, among other things, for the appointment of an additional trustee and the constitution of a controlling body and reserving a power to the trustees to apply to the District Court with reference to the carrying out of the directions of the scheme. PRAYAG DOSS JI VARU v. SRIRANGACHARLU VARU, **15 M.L J. 133=29 M. 319.** (15 B. 612, 21 B. 556, 24 B. 45, *R.*) [*Modified*, 30 M. 138=17 M.L.J. 236=9 B.L.R. 588=11 C.W. N. 442=34 I.A. 78, P.C.]

(1663)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code*, 1882)—*Religious trust--Scheme of management.*—The Privy Council framed a scheme of management of a temple in a way to meet the exigencies of the case without impairing the authority of the *Mahant* as the duly constituted manager of the institution. PRAYAGA v. TIRUMALA **9 Bom L.R. 588=11 C.W.N. 442=2 M.L.T. 119=17 M.L.J. 236=30 M. 138.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1664)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Sole jurisdiction of District Court under, in suit against trustees of public charity for removal and compensation for default.*—A preliminary question of jurisdiction was raised in this case by the appellant's Counsel who contended that, as the relief sought for and granted involved the removal of the trustees and required them not only to account for the moneys disbursed by them, but also to make good the losses sustained by the charities in consequence of their default, the suit was not maintainable in the District Court as these reliefs were not covered by the provisions of s. 539 of the Civ. Pro. Code. This contention in regard to want of jurisdiction was overruled by the High Court which held that the prayers for the removal of the trustees and for requiring them to give an account, fall within the scope of s. 539 as distinctly as the appointment of new trustees and the settling of a scheme for the management of the charities. SAYAD HUSSEINMIAN v. COLLECTOR OF KAIRA, **21 B. 48.** [*F.*, 2 C.L.J. 431; *R.*, 22 B. 496, 20 A. 46=A.W.N. 1897, 210, 3 O.C. 303, 5 O.C. 110, 2 C.L.J. 460, 33 C. 789=10 C.W.N. 581, 78 P. R. 1907=132 P.W.R. 1907=193 P.L.R. 1908.]

(1665)—*Ss. 92 and 93 (=Civ. Pro. Code, 1882 s. 539)—Plaint, returning of, for presentation to another Court—Trustees, suit for removal of——Trust—Jurisdiction.*—The plaintiffs instituted a suit for the removal of the defendants from the office of trustees or, what according to the allegations in the plaint was, a trust for public charitable purposes created by a deed executed by a Mahomedan lady, on the ground, that the defendant had committed breaches of the trust. The suit was instituted in the District Judge's Court with reference to the provisions of s. 539, Civ. Pro. Code. The District Judge came to the conclusion that a trust for public charitable purposes, when created by a Mahomedan, is a *wakf*, that the deed amounted to a *wakf-bil-wasiat* or testamentary *wakf*, and that under Shia Law, the *wakf* was null and void, because the *wakfi* died before delivery of the property. He held that the plaint had been wrongly presented to him and returned it to be presented to the proper Court. *Held*, that the District Judge should have entertained the suit. The suit as brought clearly related to a trust for public charitable or religious purposes and one which should have been instituted in the District Judge's Court, and, if the deed did not create the alleged trust, that circumstance was not a ground for returning the plaint to be presented to another Court. SAIYAD HASAN JAFAR v. SHAH ARA BEGAM, **5 O.C. 110.**

(1666)—*Ss. 92 and 93 (=s. 539, Civ. Pro. Code, 1882)—Reliefs sought—Public charitable trust—Breach—Suit—Jurisdiction — Court in which suit should be brought.*—Under s. 539 of the Civ. Pro. Code, one of the two conditions must exist in order to bring a suit within its purview. Either there must be any alleged breach of any express or constructive trust and created for public, charitable or religious purposes, or there must be some direction of the Court deemed necessary for the administration of any such trust. If in any suit one of these two conditions exist, it must be filed in the Court (mentioned in the section) either by the Advocate-General or by two or more persons interested in the trust, with the sanction of the Advocate-General previously obtained. It is not necessary to such a suit that a relief should be claimed of the description of the clauses (*a*) (*b*) (*c*) (*d*) and (*e*) in that section. These reliefs are not exhaustive and any other relief may be claimed in such a suit. AMRITRAM HARINARAYAN v. RAMJI VALLABH, **10 Bom. L.R. 87.**

(1667)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Suits under—Suit against the* mahant *akhara.*—Suits under s. 539, Code of Civil Procedure, must be brought in the District Court after leave to institute them has been obtained from the Collector. A suit instituted in the Court of the Subordinate Judge, for the removal of trustees, and for cancelling certain alienations made by them, was held to have been not properly instituted in that Court, as, under s. 539, it should have been filed in the District Court. Where a suit was based upon the existence of a trust and upon a breach of that trust, and the relief sought was the appointment of a new trustee and an order vesting property improperly alienated in the new trustee, *held*, that the suit was one contemplated by s. 539. So, s. 539 applies to a suit against the *mahant* of an *akhara* for setting aside alienation made by him and for removing him and appointing a new *mahant* in his place. SAJEDUR RAJA v. BAIDYANATH DEB, **20 C. 397.** [*F.*, 24 C. 418, 78 P.R. 1907=(32 P.W.R. 1907 Suppl.); *Appr.*, 2 C.L.J. 460; *R.*, 21 B. 48, 20 A. 46=17 A.W.N. 210, L.B.R. 1893—1900, 645; *Diss*, 3 O.C. 299, 33 C. 789, 10 C.W.N. 581; *Diss, and Disappr.*, 33 C. 905=10 C.W.N. 867.]

(1668)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Appointment of trustees—Burden of proof of a trust.*—If persons sue as trustees, and their status is denied, they must show that they have been legally put in the position they claim. MAUNG HMAN v. MAUNG PO LU **U.B R. 1897—1901, Vol. II, 301.**

(1669)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Removal of* mahant*—Order of Collector under s. 539, granting sanction to file suit for removal—No revision.*—An order of a Collector granting permission under s. 539, Civ. Pro. Code, 1882, to sue for the removal of the mahant of a temple, is not open to revision by the Chief Court. DHIAN DAS v. JEGAT RAM **104, P.R. 1910 Civ.** (24 M. 685, 24 C. 418, *R.*)

(1669-*a*)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code 1882)—Suit under—Removal of existing trustees—Power of Court to order—Hereditary right to trusteeship—Selection from members of family*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*Court cannot direct—Members of family incompetent—Association of respectable stranger—Settling scheme—Proper course.*—The Court cannot remove any of the existing trustees in a suit under s. 539, Civ. Pro. Code, 1822. (17 M. 462, F.B., *R.*) Where the office of trustee descends by hereditary succession, the trustee cannot be appointed from amongst the members of the family by selection. Where some of the members of the family are guilty of breaches of trust, and others of gross carelessness, it was held desirable to associate a respecta ble stranger in the management of the trust and settle a scheme. THANDAPANENI KRISHNAYYA v. PEADILIBOTTO SUBBAYYA, **21 M.L.J. 784.**

(1669-*b*)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Public religious trust—Testator creating trust in future—Trustees named dead at the time when the trust became operative—Administration of trust*—Shivarpana—*Court—Ejectment suit against trespasser—Heir of testator can take steps to effectuate the trust.*—Res judicata.—A suit to eject a trespasser from property, which is the subject of a public religious trust, does not fall within the purview of s. 539 of the Civ. Pro. Code of 1882. (8 B. 365, 15 B. 148, 24 B. 170, *F.*) Whece the trustees named by the testator for the purpose of making and completing the trust at the point of time fixed by him are dead, and the object of the trust as named by him is specific and definite, the Court will take the administration of the trust. Where the testator names certain persons to carry out the trust pointed out by him, and those persons die before the period for the creation and completion of the trust, in the absence of any provision made by the testator to meet such a contigency, the right to do that which those persons would have done devolves, according to Hindu Law, on the heir of the testator. He takes either their place or his. Where a Hindu, who has directed a trust of his property for a religious purpose, dies before giving effect to it, the Hindu Law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser. Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death, then, until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate, but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust, with the sanction of the Court, if necessary. Before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed. A person suing as a trustee for the purpose of the recovery of the property impressed with a trust is not barred by *res judicata* by reason of the judgment in the previous suit brought by him in a different capacity, *i.e.*, as the heir on his own account. GHELABHAI GAVRISHANKAR v. UDERAM ICHHARAM, **13 Bom. L.R. 989.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1669-*c*)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1882)—Trust for public charitable objects—Suit to remove trustee—Grant made in favour of* 'Nanakshahi gaddi' *by a Muhammadan Ruler for charitable purposes*—Wakf—*Evidence for establishing a public trust*—'Nanakshahi gaddi' *analogous to a* mutt—*Position and power of* Mahant *of* 'Nanakshahi gaddi.'—A Muhammadan Emperor granted certain villages to a *Nanakshahi gaddi* for charitable purposes; for nearly a century the property so granted to the *gaddi* was acknowledged to be trust-property, the object of which was to provide for the *Mahant*, for the *fakirs* attached to the *gaddi*, and for the visitors thereto, and to provide for the maintenance of *fakirs* whose duty it was to travel about and preach the faith of the *Guru*; *held* (*Karamat Husain, J. Diss.*) that the property was trust-property for public, charitable and religious purposes, and the *mahant* of the *gaddi* was the trustee thereof. (13 O.C. 79, 5 Ind Cas. 1005, 2 O.C. 340, *R.*) *Per Chamier, J.*—In order that a trust may be a trust for public purposes, it is not necessary that there should be a trust for the benefit of the public at large. It is sufficient to show that there is a trust for the benefit of a section of the public. (23 B. 659, *R.*) It is not necessary in every case to produce definite evidence of the creation or the origin of a trust. *Per Karamat Husain, J.*—(1) (i) The creation of a public or of a private trust, save by making a *wakf* is unknown to Muhammadan law. (ii) A Muhammadan Ruler could not make a *wakf* in respect of property which was not his private property. (iii); The property which is made *wakf* must be in existence at the time of the *wakf*; the future revenue was not property which could be a fit subject of *wakf*. (2) A public trust must be proved by strong and clear evidence; the mere fact that the income of the property has for a long period been spent to support *fakirs* and visitors is not sufficient to establish a public trust. (2 C. 341, *R.*) (3) In the absence of evidence to the contrary, a *Nanakshahi gaddi* is analogous to a *mutt* and not to a temple which is the abode of a deity. The *Mahant* of the *gaddi* is not a mere trustee like the head of a temple. He is not legally bound to spend the income of the *gaddi* on public purposes of a charitable or religious nature, and is not accountable in law. (27 M. 435, *R.*) (4) From the fact that a grant was made to a *Mahant* it does not follow that a public charity was created. The question whether certain property is a public charity is not a pure question of fact. All the legal requisites essential for the constitution of a public charity must be established by strong and clear proof, in order to enable a Court of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

justice to declare whether property is a public charity. (5) An institution which encourages celebacy and parasitism and offers temptations to crime and vice cannot be an institution for puplic purposes of a charitable or religious nature. PURAN ATAL v. DARSHAN DAS, **11 Ind. Cas. 166.**

(1669-*d*)—*Ss. 92, 93 (=s. 539, Civ. Pro. Code, 1877)—Suit to evict* de facto *manager of charity by plaintiffs as* de jure *trustees—Dismissal of suit as barred by time, whether operates as* res judicata *against subsequent suit by Advocate-General.*—This was a suit filed by the plaintiffs with the consent of the Advocate General under s. 539 of the Civ. Pro. Code (*inter alia*), to have trustees appointed for the management of the plaint mentioned property—a temple and its accessories, and to have the property made over to such trustees. The District Judge rejected the claim and dismissed the suit, without recording the evidence, on the ground that it was *res judicata* by reason of the decision in a previous suit by the plaintiffs against the defendant. The High Court, however, *held* that the present suit was not barred by the proceedings in the former suit. That suit was brought on the allegation of the plaintiffs that they had been appointed trustees of the charity by its founder and the defendant was sought to be evicted on the ground that he had been appointed by them as their *gumasta*, that they had dismissed him and that he refused to give up the property to them. The High Court then, without finding whether plaintiffs had or had not been appointed as trustees, dismissed the suit on the ground that their claim to recover possession of the property from the defendant was barred by limitation. In the previous suit, plaintiffs had based their title to sue on their particular appointment by the founder of the charity, and when it was found that they had, by limitation, lost their right to any title derived from such appointment, they ceased to represent the public just as though they had been removed from the office. The plaintiffs in that suit had no general warrant such as the one in their present suit under s. 539, to represent the public as the objects of the charity. LAKSHMAN DAS v. JUGAL KISHORE, **22 B. 216.** [*R.*, 33 C. 789=10 C.W.N. 581, 4 N.L.R. 98; *D.*, 6 C.W.N. 178.]

(1669-*e*)—*Ss. 92, 93 (=Civ. Pro. Code, 1882, s. 539)—Nature of suits falling under—Suit for recovery of allowances for management of* darga *—Pensions Act, XXIII of 1871, s 4—Cash allowance attached to religious endowment—Grant of money.*—A suit has to be brought under s. 539 of the Civ. Pro. Code, only in case of alleged breach of any express or constructive trust founded for public, charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the proper administration of any such trust. Plaintiff in this case did not sue on account of any such breach of trust, nor did he require the direction of the Court in the administering of the trust. He merely complained that, though a co-trustee, he had been excluded from a share in the management of certain *dargas* and in the profits of such management, and it was held that the suit on such allegations would not come within the purview of s. 539 of the Code. [*R.*, 24 B. 170=1 Bom. L.R. 649. 3 O.C. 299. 33 C. 789=10 C.W.N. 581.] *Held* that the above suit, so far as it related to the cash allowances from Government, was not maintainable in the absence of the Collector's certificate issued under s. 4 of the Pensions Act (XXIII of 1871), such cash allowances constituting a grant of money within the meaning of s. 4 of the Act which applies as well to religious endowments as to personal grants. MIYAVALI ULLA v. SYED BAVA SANTI MIYA, **22 B. 496.** [*Diss.*, 31 M. 12=17 M.L.J. 549=3 M.L.T. 104; *R.*, 29 B. 480=7 Bom. L.R. 497.]

(1670)—Ss. 92, 93— *See* DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 16 M. 31.

(1671)—Ss. 92 and 93—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 8 A. 31=A.W.N. 1885, 318.

(1672)—Ss. 92, 93—Whether confers power to High Court to try suits about charities in the mofussil—*See* HIGH COURT, 7 M.L.T. 292=5 Ind. Cas. 729=20 M.L.J. 387.

(1673)—Ss. 92, 93—*See* MAHOMEDAN LAW—WAKF, 5 A. 497=A.W.N. 1883.

(1674)—Ss. 92, 93—*See* PARTIES TO SUITS—GENERAL, 20 A. 46=A.W.N. 1897, 210.

(1675)—Ss. 92, 93—*See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, 18 B. 721, 15 B. 612.

(1676)—Ss. 99 and 93—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 26 M. 450, 1 Bom. C.R. 649=24 B. 170, 7 A.L.J. 797=6 Ind. Cas. 835=32 A. 631.

(1677)—Ss. 92 and 93—*See* YAUMA, 11 M. 283.

(1678)—*Ss. 92, 93 99 (=Civ. Pro. Code, 1882, s. 539 and 578)—Scope and applicability of—S. 14 Act, XX of 1863—Act VIII of 1888—Claim for administration of trust—Claim to eject alinee—Suit for removal of trustee and for recovery of possession of trust-property from third person—Sanction of Advocate-General, or Collector—Duty of Collector—Collector's omission to exercise his judgment under s. 539, Civ. Pro. Code, 1882—Suit not affected—Provisions of s. 539, Civ. Pro. Code,* **1882**—*Romill's Act,* 1812.—S. 539 does not create a new and special jurisdiction. Persons having a right to worship in a temple are within the scope of s. 539, Civ. Pro. Code. Under this section, as originally enacted, the words were "having a direct interest in the trust," and the

Civ. P. Code (Acts V of 1908, 859) XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

word "direct" has been taken out by Act VIII of 1888. The inference is that the Legislature intended to allow persons having the same sort of interest that is sufficient under s. 14, Act XX of 1863, to maintain a suit under s. 539. (12 B. 247, *Appr.*; 8 C. 32, *D.*) [*F.*, 2 C.L.J. 460, 33 C. 789=10 C.W.N. 581; *R.*, 110 P.R. 1907.] Where there is a claim for administration of trust falling within s. 539, a claim to eject an alienee, may be joined with it. [*F.*, 33 C. 789=10 C.W.N. 581.] A suit can be brought under s. 539, Civ. Pro. Code, for the dismissal of a trustee and for recovering trust-property from a third person, to whom the same has been improperly alienated. (15 B. 612, 11 C. 33, 20 C. 397, 810, *F.*; 14 M. 186, *R.*; 8 B. 365, 17 M. 462, 18 A. 227, *D.*) [*F.*, 2 C.L.J. 460, 78 P.R. 1907=132 P.W.R. 1907; *Appr.*, 28 A. 112=2 A.L.J. 591=A.W.N. 1905, 208; *R.*, 20 A. 49; *Diss.*, 3 O.C. 299, 2 C.L.J. 431, 33 C. 789=10 C.W.N. 581.] When the joining of all persons interested in any trust is inconvenient or impracticable, some of them may sue without joining others, on their obtaining the consent of the Advocate-General or of the Collector of the district. This condition is imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. [*R.*, 32 C. 273=9 C.W.N. 151, 78 P.R. 1907=132 P.W.R. 1907.] The Collector in giving his consent to the institution of the suit under s. 529 has to exercise his judgment in the matter, and see not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust. [*R.*, 110 P.R. 1907.] The Collector's omission to exercise his judgment under s. 539, in the matter relating to the interest of the petitioners in the trust, exhibited in the language of the permission, may be regarded as a mere irregularity; such an irregularity comes within the scope of s. 578, Civ. Pro. Code. Provisions of s. 539, Civ. Pro. Code, 1882, are not in all respects identical with the provisions of Romilly's Act, 1812. Differences between the two pointed out. SAJEDUR RAJA CHOWDHURI v. GOUR MOHAN DAS BAISHNAV, **24 C. 418.** [*F.*, 2 C.L.J. 431, 2 C. L.J. 460.]

(1679)—*Ss. 92, 93, O. I, r. 8 (=Civ. Pro. Code, 1882, ss. 539, 30)—Suit by worshipper at Hindu temple relating to trust—Hindu law—Right to sue—Act XX of 1863, applicability of*—A and three others made a gift, of certain land belonging to them, to an idol. Mutation of names was obtained from the Revenue authorities, and A was constituted as agent and manager. Subsequently, however, the donors having resumed the land for their own use, a suit was brought by one of the worshippers in the temple against all the donors that they

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

should be directed to use the land for the purpose of the idol, and that some orders should be given for the future management of the temple and the property belonging to it. *Held* that the Hindu law neither permitted nor prohibited such a suit, that under s. 539, the suit was not maintainable without the certificate mentioned therein; and that under s. 30, the suit could not be maintained by plaintiff alone either on his own behalf or on behalf of himself and other worshippers (7 A. 178, *D.*; 5 A. 602, 8 A. 31, 11 C. 33. 12 B. 247, *R.*) [*F.*, 20 C. 397; *R.*, 13 A.W.N. 71, 91 P.R. 1901=113 P.L.R. 1901, 2 C.L.J. 460, 33 C. 789=10 C.W.N. 581; *D.*, 2 M.L.J. 251.] *Held* also that the Act does not apply to the present case, as the temple and trust, if there was one, came into existence in 1870 and was not in existence at the date of the Act. RAGHUBAR DIAL v. KESHO RAMANUJ-DAS, **11 A. 18=A.W.N. 1888.276.** [*Overruled*, 18 A. 227.]

(1680)—Ss. 92 and 93, O. I, r. 8 (1)—*See* PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 11 C. 33.

(1681)—*Ss. 92 and 93, O. 1, rr. 8 (2), 10 (2), (3), (5), 11 (=ss. 539 and 32, Civ. Pro. Code 1882)—Public charity—Interest—Trustee—Breach of trust—Purchaser—Limitation Act, sch. II, arts. 134, 144*—Shebait, *powers of—Decree under s. 539, Civ. Pro. Code, scope of.*—In a suit under s. 539, Civ. Pro. Code, where one of the plaintiffs was the *shebait* of a public religious and charitable trust, it was competent to the Court to grant to the plaintiffs for the benefit of the *cestui que trust*, a decree for the cancellation of unauthorised and invalid leases of the trust-property executed by the *shebait* and his predecessor and for recovery of possession by the existing *shebait*. Persons, who are *ex-officio* concerned in the performance of the worship of a public idol and are entitled to the maintenance from the temple funds, have an interest in the trust within the meaning of s. 539, Civ. Pro. Code, and are competent to maintain an action under that section. Where X and Y instituted, under s. 539, with the consent of the Advocate-General, a suit for setting aside certain improper alienation of *debutter* property and for other relief making A, the then *shebait*, a party defendant, and subsequently. A was transferred to the category of plaintiffs under s. 32, Civ. Pro. Code, the suit was maintainable at the instance of A without any fresh sanction of the Advocate-General. It was not necessary for A to verify the plaint. When a person has taken trust-property from a trustee with full knowledge that it is property which the alienor was not competent to deal with, neither the trustee nor his successor is estopped from recovering the trust-property for the benefit of the *cestui que trust*. (10 B.L.R. 19, *F.*) Where, however, there was an alleged trust, which the trustees themselves were competent to terminate, and the trustees, after having alienated the property, sought to recover it for their own benefit, they would be barred

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by the doctrine of estoppel, when a person accepts a transfer of trust-property with full knowledge that the alienation is beyond the powers of the transferor and does not believe that he is acquiring an absolute title, he cannot be regarded as a purchaser within the meaning of art. 134, sch. II the Limitation Act. A suit against such a transferee would be governed by art. 144, and if it is brought by the successor of the trustee, who made the alienation, limitation as against him would run from the date when he succeeded to the office. (14 M.I.A. 1, *Appl.*) A *shebait* has no more power to deal with *debutter* property than has the manager of an infant's estate and *prima facie*, and, any permanent alienation made by him is bad in law and a breach of trust; but where necessity is established, a *shebait* can make such disposition or alienation as a prudent manager may for the benefit of the estate. RAM CHURN TEWARY v. PROTAB CHANRA DUTT JHA, **2 C.L J. 448.** [*Doubted*, 33 C. 511=10 C.W.N. 738=3 C.L.J. 306; *R.*, 30 P.R. 1908=35 P.W.R. 1908, 102 P.L.R. 1908=35 P.W.R. 1908=30 P.R. 1908, F.B. *D.*, 2 C.L.J. 546.]

(1662)—*Ss. 92 and 93 O I. r. 8 (1), O. 40, rr. 1, 2, 3, (=ss. 539, 30, 503, Civ. Pro. Code, 1882)—Suit for a scheme of management of a temple and for appointment in the meanwhile of a receiver—Temple property subject of suit.*—This was a suit brought under s. 589 and s. 30, Civ. Pro. Code, for a declaration that a scheme of management of a temple is binding and in the alternative for the settlement by the Court of the scheme and for the appointment in the meanwhile of a receiver. *Held* the property of the temple was a subject of the suit within the meaning of the word in s. 503, Civ. Pro. Code, and that the Court has jurisdiction to appoint a receiver. The whole aim and object of the suit was to regulate the collection and distribution of the property of the temple, and even though there was no application for the removal of the *Dharmakharthas* (in which case there could be no doubt that the Court would have power to appoint a receiver pending the appointment of fresh *Dharmakarthas* to take charge of the property of the temple) the subject of the suit was the same in both the cases, namely, the property of the temple. K.A. VEERARAGHAVA THATHACHARIAR v. R. KRISHNASWAMI THATHACHARIAR, **4 M L.T. 88.**

(1683)—*Ss. 92, 115—Suit with Advocate-General's sanction in respect of public charities—Court-fee—Court Fees Act (VII of 1870), sch. II, art. 17, (vi)—Striking off a prayer for relief—Advocate-General's sanction if necessary—Interlocutory order—Revision by High Court.*—A plaint in a suit under s. 92, Civ. Pro. Code, 1908) relating to public charities), should bear a Court-fee stamp of Rs. 10 only, as required by art. 17, cl. 6 of sch. II of the Court Fees Act. 119 A. 60, 21 A. 200, *Rel on.*) Where the plaintiffs in such a suit, being ordered

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

by the Judge to value the suit and pay *ad volorem* Court-fee on such value, moved the High Court, without waiting for the dismissal of the suit for non-compliance with the order: *Held*—That the order in effect amounted to a denial of jurisdiction, and, though interlocutory, was a fit one for interference in revision by the High Court. A prayer for relief in a plaint in such a suit, not covered by those specified in s. 92, may be struck off on the application of the plaintiff, the sanction of the Advocate-General for striking of such a prayer being unnecessary. RAMRUP DAS v. MOHUNT SHIYARAM DAS, **14 C.W.N. 932=7 Ind. Cas. 92=12 C.L J. 211.** (33 C. 789, *R.*)

(1683-*a*)—*Ss. 92 (2), 151—Sanction of Advocate-General—Obligatory—Suit instituted under Civ. Pro. Code*, 1882—*Preliminary judgment deciding such sanction to be unnecessary—Power of Court to re-open—S. 151, Civ. Pro. Code, 1908 Retrospective operation of s. 92 (2) S. 539, Civ. Pro. Code*, 1882.—A suit for the removal of the existing trustees for the appointment of new trustees &c., in respect of a public trust, was instituted, without obtaining the sanction of the Advocate-General under s. 539, Civ. Pro. Code, 1882. Before the new Code came into force, the Court gave a finding on the preliminary issue that the suit was maintainable without the Advocate-General's sanction. The suit was taken up for disposal after the new Code came into force, and the point that the suit was bad for want of such sanction was raised again. *Held*, that the suit was not maintainable. S. 92 (2), Civ. Pro. Code, 1908, is intended to be retrospective in its effect. S. 6, General Clauses Act, 1897, does not affect its retrospective operation. (13 Bom. L.R. 583, 22 C. 767, *R.*) *Held*, that, at the date of the institution of the suit, the plaintiff had no vested right which can bar s. 92 (2), from operating retrospectively to it, and that the provisions of s. 92 (2), being of a declaratory nature, do apply to the present suit. (16 B. 626, 21 B. 257, *R.*) *Held*, also, that the suit is barred by provisions of s. 92 (2), Civ. Pro. Code, 1908. *Held*, also that the trying Judge has inherent power under s. 151, Civ. Pro. Code, 1908, to re-consider an interlocutory judgment passed by his predecessor, when part of the interlocutory judgment is found to be based on an erroneous assumption or hypothesis. HEMANDAS BAMRAKHIOMAL v. CHELLARAM, **3 S.L.R 184.** (32 B. 432, 2 S.L.R. Civil, 59, *R.*)

(1684)—S. 92, O. I, rr. 3 & 4, O II, rr. 2 & 3—Suit to appoint a trustee and to recover trust-properties—Joinder of parties—Stranger to trust, whether can be joined as party—Widow and heir of trustee—*See* TRUST, 4 L.B.R. 183.

(1685)—S 92, O. I, r. 8 (1)—Plaintiffs suing as members of Muhammadan community, every member of which is entitled to bury his dead anywhere in a *wakf* graveyard—Whether

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each plaintiff should show he has used graveyard —Ss. 30 and 539, Civ. Pro. Code, whether applicable to such case—*See* MAHOMEDAN LAW —WAKF, 78 P.L.R. 1908=52 P.W.R. 1908.

(1685-*a*)—*S. 92, O. 1, r. 10 (2)—Suit under —Alienee from trustee—Whether necessary party,* —In a suit under s. 92, Civ. Pro. Code, 1908, the alienee from a trustee is not a necessary party. (33 C. 799, 24 B. 170, 28 A. 112, 1 S.L.R 155, *R.*) It cannot be said that the alienee's presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the question involved in the suit, within the meaning of O. 1, r. 10 (2) of the Code. OSERI v. BALMUKANDAS, **3 S.L.R. 103.**

(1686)—*S. 92, O. 2, r. 3—Sanction under—Not necessary as regards private rights—Public trust—Necessity of sanction—Founder not exempt—Multifariousness—Suit for recovery of debt and account of trust funds against several defendants—All defendants.*—A suit by a person, who seeks to remedy a particular infringement of his own individual right, is not affected by s. 92, Civ. Pro. Code, 1908. (33 C. 789, 11 Bom. L R. 85, *R.*) Nor is sanction required where the trust is a private trust. (14 M 1, *R.*) In the case of the public trust, s. 92 does not at all exempt the founder from its operation and, therefore, *qua* founder, he does not possess any special right of suit, and he cannot sue without the sanction of the Advocate-General or the Collector. A suit brought against A, as a debtor and trustee, against B and C as trustees, and against D as a debtor for the recovery of debt, for an account of trust-money, etc., is bad for misjoinder of parties and causes of action. No doubt the Court has a discretion in such matters to allow different causes being joined in one suit. Each case must be judged by itself, and while increase of litigation is undesirable, multifariousness and inconvenience also must be avoided. (9 C. 563, *R.*) Where the defendants are not all jointly interested in both the causes of action, this does not come under O. 2, r. 3, Civ. Pro. Code, 1908. GOPALDAS BHIMANDAS v. HASSA SINGH LALSING, **4 S.L R. 152.**

(1687)—S. 92 and sch. II, r. 20—Dispute about succession to trusteeship cannot be referred to arbitration—Application to file award in such cases—Jurisdiction of Court—*See* MAHOMEDAN LAW—WAKF, 6 Ind. Cas. 219=7 A.L.J. 761.

——S. 93 (1882, s. 539, last para=1877, s. 539, last para.)

(1687-*a*)—S. 93—*See* NOS. 294, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669,

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1669-*a*, 1669-*b*, 1669-*c*, 1669-*d*, 1669-*e*, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, *supra*, AND NOS. 2455 2456, 2457, 2458, 2459, 3420, 5062, 5817, *infra*

——S. 95 (=1882, ss. 491, 497=1877, ss. 491, 497=1859, ss. 88, 96.)

(1688)—*S. 95 (=Civ. Pro. Code, 1882 s. 491) —Compensation for attachment before judgment obtained on insufficient grounds—Power of Small Cause Court to grant—Act IX of 1887, sch. II, cl. 35 (k).*—As s. 491, Civ. Pro. Code, had been made applicable to Small Cause Courts, such Courts can award compensation to a defendant for attachment before judgment procured by plaintiff on insufficient grounds, notwithstanding the limited powers of such Courts under cl. 35 (*k*) of the second schedule to the Provincial Small Cause Courts Act. IBRAHI ROWTHEN v. SANGARAM CHETTY, **26 M. 504.**

(1689)—*S. 95 (=old s. 497 and s. 96 of 1859) —Damages and compensation for wrongful injunction.*—Where a party does not wish to ask for compensation, under s. 96, Civ. Pro. Code, 1859, for wrongful injunction, he is allowed by implication to bring a suit for damages. EDWARD WILSON v. KANHYA SAHOO, **11 W. R. 143.**

(1689-*a*)—*S. 95 — Limited and incidental relief—Attachment before judgment—Proof of malice and absence of reasonable cause—Rule of English Law—Analogous to s. 250, Civ. Pro. Code—Malice defined—Special damage defined—Credit impaired—Legal remedy.*—In a suit for damages for attachment before judgment, the plaintiff should prove that the defendant had no reasonable and probable cause for applying and also malice in fact. S. 95 of the new Civ. Pro. Code provides for compensation as a limited and incidental relief; and in cases of wrongful attachment, it gives an alternative remedy. The rule in England is that actual malice must be proved, while this section allows a limited remedy without such proof. S. 95 is analogous to s. 250 of the Crim. Pro. Code. (2 N.W.P. 353, 4 C. 583, 17 I.A. 17, 6 Bom. L.R. 704, 29 M. 208, *R.*, Malice may be defined to mean any improper or indirect motive, *i e*, a motive other than what should properly actuate the party. And no hatred or enmity is required. Recklessness regarding the truth or otherwise of the allegations would also amount to malice. Special damage is a misleading term and can be found out only in the light of the context in each case. It has three meanings—the particular damage resulting from the particular circumstances of the case; the actual and temporal loss caused where the damage done is the wrong and no actual right has been disturbed; and the particular loss of the individual in cases of nuisance, over and above the loss sustained by the public in general. When a blow is struck at the credit of a person, the law should place

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in the hands of the injured person a means of righting himself. MANJAPPA CHETTIAR v. GANAPATHI GOUNDAN, **10 M.L.T. 365=1911, 2 M.W.N. 414.** (32 M. 170, *R.*)

(1690)—S. 95—*See* APPEAL—ORDERS, 8 W. R. 332.

(1691)—S. 95—*See* ATTACHMENT BEFORE JUDGMENT, 1 N.W.P. 91.

(1692)—S. 95—*See* ATTACHMENT — MISCELLANEOUS, W.R. 1864, 224.

(1693)—S. 95 — Interlocutory injunction—Damages for, wrongful obtaining of such injunction—Appeal—*See* COURT FEES, A.W.N. 1893, 220.

(1694)—S. 95—*See* DAMAGES—DAMAGES, SUITS FOR, 1 Agra 104.

(1695)—S. 95—*See* RULES OF HIGH COURTS AND SUPREME COURTS—BOMBAY, 10 Bom. L.R. 1002.

(1695-*a*)—S. 95—Compensation to defendant under s. 491, Civ. Pro. Code, 1882, for illegal arrest—*See* WITHDRAWAL OF SUIT, 15 B. 160.

(1696)—S. 95—*See* NOS. 5104, 5120, 5148, *infra.*

(1696-*a*)—*Ss. 95, 104 (g), 104 (2)—Compensation—Order in appeal against the order refusing to grant compensation—Second appeal.*—Where a Divisional Court differs from a Court of first instance, and grants an order for compensation under s. 95 Civ. Pro. Code, purporting to act under that section, the order must be taken to be an appellate order under s. 104 (*g*), and under the authority of cl. 2 of s. 104, it is not appealable. C.V.C.T. FIRM v. SAYA BYA, **11 Ind. Cas. 917.**

(1697)—*Ss. 95, 104, O. 43, r. 1 (=Civ. Pro. Code, 1882, ss. 491, 588)— Attachment before judgment on insufficient grounds—Award of compensation—Appeal.*—No appeal lies from an order under s. 491, Civ. Pro. Code, awarding compensation for attachment before judgment obtained on sufficient grounds. NARASINGA BHAKSHI v. GOVINDA BHAKSHI, **24 M. 62=10 M.L.J. 355.** [*F.*, 28 A. 81=2 A.L.J. 602=A.W.N. 1905, 197 ; R , 17 M.L.J. 310.]

(1698)—*Ss. 95, 115 (=ss. 491 and 622, Civ. Pro. Code, 1882)—Order under s. 491 to be embodied in the decree—Revisional jurisdiction.*—Having regard to the express language of s. 491 of the Code, an order for compensation, for attachment before judgment on insufficient grounds must be embodied in the decree in the suit, and is not capable of being passed, after the decree in the suit has been given. If such an order is passed after the decree without any fault on the part of the defendant, the proper course for a Court of revision to adopt will be, in order that justice may be secured to the defendant, to set aside the decree as well as the order for compensation, and remit the case back to the lower Court in order that it may embody

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

its order as to compensation in the decree in the case. But where a suit is for more than Rs.500, the High Court, in exercise of its powers of revision under s. 622 of the Code, cannot interfere with the decree, as a second appeal lies against the decree. KOPILO PATRO v. KASINADA PATRO, **17 M.L.J. 310.**

(1699)—*S. 95, O. 37, rr. 2, 3 (=Civ. Pro. Code, 1882, ss. 49, 532, 533)—Summary suit—Arrest of defendant before judgment—Compensation—Leave to defend—Practice—Compensation for arrest under s. 491, Civ. Pro. Code, 1882—Cross-claim—Set off—Practice.*—Where, in a summary suit, a defendant has been arrested before judgment and claim compensation for such arrest under s. 491, Civ. Pro. Code, 1882, leave to defend the suit should be given to him if he makes out *prima facie* a case against the plaintiff that he applied for his arrest on insufficient grounds. The Civ. Pro. Code, 1882, does not provide in general terms for a cross claim being set up by a defendant as a defence to a suit filed against him, and the only case in which a cross-claim can be so relied upon by a defendant is where it arises out of the very transaction sued upon and is in the nature of a set-off. But the special cross-claim under s. 491 of the Code, *viz.*, a claim for compensation for arrest on insufficient grounds, may, under that section, be taken into account in any suit, and any amount awarded as compensation be provided for in the decree, and thus *pro tanto* be a defence to the plaintiff's claims in the suit. ROULET v. FETTERLE, **18 B. 717.**

(1700)—*S. 95, O. 43, r. 1, s. 104 (=ss. 491 and 588, Civ. Pro. Code, 1882)—Attachment before judgment—Compensation for unnecessary attachment—Appeal.*—*Held*, that no appeal will lie from an order, under s. 491 of the Code, granting compensation to a person against whom an attachment has been obtained upon insufficient grounds. LOK NATH v. AMIR SINGH, **A.W.N. 1905, 197=2 A.L.J. 602=28 A. 81.** (24 M. 62, *F.*)

——S. 96 (=1882, s. 540=1877, s. 504).

See APPEAL.

See APPELLATE COURT.

(1701)—*S. 96 (=s. 540, Civ. Pro. Code, 1882) Application—Jurisdiction of Courts—Rights of parties.*—S. 540 does not deal with the jurisdiction of Courts. It deals with the rights of appeal given to parties. And in enactments of this kind, the distinction must always be remembered between sections which confer jurisdiction on Courts, and sections which confer rights on parties. GOLAM RAHMAN v. FATIMA BIBI, **13 C. 232.**

(1702)—*S. 96 (=Civ. Pro. Code, 1882, s. 540)—Mortgage by widow — Reversioners made parties—Their right to appeal.*—In a suit upon a mortgage executed by one of two widows, certain persons who were the next reversioners.

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and who claimed under a settlement executed by the other widow were made parties. The suit was decreed. *Held* that the next, reversioners who were defendants in the suit had a *locus standi* to maintain an appeal and to appeal against the whole decree under s. 540, Civ. Pro. Code. KALLIYANASUNDARAM PILLAI v. SUBBAMOOPANAR, **14 M.L.J. 139.**

(1703)—*S. 96 (=Civ. Pro. Code, 1882, s. 540) General Clauses Act (Madras), Act I of 1891, s. 8—Suit under enactment in force at time of institution but subsequently repealed—Appellate Court—Jurisdiction to hear appeal.*—Plaintiff sued in a District Court to recover the offices of Karnam and shroff and the emoluments attached thereto. The offices sued for formed portions of a permanently settled estate. Subsequent to the institution of the suit, a notification was published under s. 2 of Madras Act II of 1894, the effect of which was that, from the date of the notification, s. 11 of Regulation XXV of 1802 and Regulation XXIX of 1802 ceased to apply to the office of Karnam. The District Judge *held* that notwithstanding the notification, he had jurisdiction, to hear the suit on the ground that it had been instituted before the notification into force. The question was whether an appeal lay to the High Court from the decree of the District Court. *Held* that the High Court had jurisdiction to entertain the appeal. The appeal was from a Court exercising original jurisdiction, and the High Court, if Act II of 1894 had not been passed, would have had appellate jurisdiction by virtue of s. 548, Civ. Pro. Code, in suits brought under the above said Regulations. The appellate jurisdiction of the High Court, in cases where the Court of first instance had jurisdiction to entertain the suit and the parties had a right of appeal when the suit was instituted, is saved by s. 8 of the Madras General Clauses Act, 1891, unless the right of appeal has been taken away in express terms. There is no enactment which, in express terms, takes away the right of appeal in suits brought under Regulations XXV and XXIX of 1802. SADASIVA PILLAI v. KALAPPA MUDALIAR, **24 M. 39.** [*R.*, 32 M. 140=5 M. L.J. 27.]

(1704)—S. 96—Order of Court refusing to make conditional decree for foreclosure absolute—Whether decree appealable—*See* MORTGAGE—FORECLOSURE, 4 N.L.R. 54.

(1705)—S. 96—Suit of small cause nature tried as regular suit by mistake by Judge having small cause powers—Decree—Appeal—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, ss. 16, 33, U.B.R. 1907, Provincial Small Cause Courts Act, 1.

(1705-*a*)—S. 96—*See* NOS. 56, 58, 60, 71, 86, 87, 88, 89, 90, 126, 127, 295, 542, *supra* AND NOS. 2725-*a*, 2905-*h*, 3001-*a*, 3002, 3089, 5889, *infra*.

(1706)—S. 96 (1) (2)—*See* ACT IV OF 1869, s. 55, 84 P.L.R. 1904.

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(1707)—Ss. 96, 35, O. XX, r. 6 (3)—*See* APPEAL—COSTS. 13 A. 290=A.W.N. 1891, 94.

(1708)—*Ss. 96—109, O. 17 (=Civ. Pro. Code 1882, chs. VII, XIII—Applicability to execution proceedings—Act XI of 1892, s. 4—Inherent power of Court.*—By virtue of. s. 4 of Act VI of 1892, the procedure provided in Chs. VII and XIII, Civ. Pro. Code, could not be applied by analogy under s. 647, in proceedings upon applications for the execution of decrees. But the Court has power inherent, if not conferred by statue, to dismiss an application, when the applicant fails through his own laches to put the Court in a position to proceed with the application, as for instance by failing to pay the Court-fees for service of notice under s. 248 Civ. Pro. Code, on the judgment-debtor. Similarly, a Court has inherent power, if such power is not conferred upon it by statute to proceed forthwith to decide an application for the execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application and that act has not been done. DHONKAL SINGH v. PHAKKAR SINGH, **15 A. 84=A.W.N. 1893, 36, F.B.** [*R.*, 18 B. 429. 16 A. 390, 19 B. 276, 3 C.L.J. 276, 9 O.C. 288, 10 C.L.J. 91.]

(1709)—S. 96, O. IX, r. 13, O. XLI, r. 21, s. 100—*See* APPEAL—EX PARTE CASES, 8 A. 354, F.B.

(1710)—S. 96, O. XXI, r. 2—*See* TRANSFER OF PROPERTY ACT, s. 89, 29 C. 651.

(1711)—*S. 96, O. 41, r. 9 (=Civ. Pro. Code, 1882, ss. 540, 558)—Rejection of first appeal—Second appeal.*—Where the lower appellate Court erroneously rejects an appeal on the ground that no appeal lies in the case, such an order is a decree within the meaning of s. 2 of the Civ. Pro. Code, being a final adjudication of the appellant's claim, and a second appeal lies therefrom provided a second appeal is entertainable having regard to the nature of the case. MATHURA MOHAN PAL v. AMIRUDDI SHILALOO, **8 C.W.N. 64.**

(1712)—S. 96, O. XLI, r. 23, s. 115—*See* SPECIAL OR SECOND APPEAL—GENERAL, 6 C.W.N. 614.

——S. 98 (=1882, s. 575=1877, s. 575).

See APPEAL.

See APPELLATE COURT.

(1713)—*S. 98 (=Civ. Pro. Code, 1882, s. 575)—Reference of appeal to other Judges—Composition of Bench hearing referred appeal.*—Where the Judges who hear an appeal differ on a point of law, and decide to refer it to another Bench of Judges, such Bench must include the Judges who first heard the appeal. ROHILKHAND AND KUMAON BANK, LIMITED v. ROW, **6 A 468.** (6 W.R. 269, *R.*) [*Appl.*, 7 A. 523=5 A.W.N. 139; *R.*, 6 Bom. L.R. 131.]

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(1714)—*S. 98 (=s. 578, Civ. Pro. Code,* 1882) —*Letters Patent, cl. 15.*—Where the Judge to whom an appeal is referred under the provisions of s. 575 of the Civ. Pro. Code, agrees with one of the differing Judges as to the result of the appeal, but the agreement does not proceed on the identical lines of reasoning, there is no further appeal to the High Court against such decision under cl. 15 of the Letters Patent, JEHANGIR M. CURSETJI v. SECRETARY OF STATE, **6 Bom. L.R. 230.**

(1715)—*S. 98 (=s. 575, Civ. Pro. Code,* 1882) —*Reference to third Judge*—Per *Chandavarkar, J.*—There is nothing in the language of s. 575 of the Civ. Pro. Code, 1882, to support the view that the third Judge to whom reference is made under the section cannot sit and hear the appeal alone. JEHANGIR v. SECRETARY OF STATE, **6 Bom. L.R. 131.**

(1716)—*S. 98 (=s. 575, Civ. Pro. Code,* 1882) —*Reference—Third Judge.*—(1) Where reference is made under this section to a third Judge, such third Judge should not be one of those who first heard the appeal. (2) With regard to the custody of a minor, the minor should be placed under that custody which will be most beneficial to the minor's interests, MUSSAMMAT SAHIBZADI v. NEWTON, **15 P. R. 1887.**

(1717)—*S. 98 (=Civ. Pro. Code,* 1882, *s. 575)* —*Reference by Division Bench to third Judge—Scope of appeal.*—Where an appeal is referred to a third Judge by a Bench of two Judges under s. 575 of the Civ. Pro. Code, the whole appeal is open for argument before him, and not simply the point or points on which the Judges differed. SESHADRI AYYANGAR v. NATARAJA AYYAR, **21 M. 179.** [*R.*, 6 Bom. L.R. 230, 14 Bur. L.R. 59.]

(1718)—*S. 98 (=s. 575, Civ. Prr Code,* 1882) —*Reference by Bench to another Judge or Judges —Competency of the latter Judge or Judges to deal with the whole appeal.*—When an appeal is referred by a Bench of the Court, to one or more Judges of that Court, under s. 575 of the Civ. Pro. Code, the whole appeal, and not merely the point or points, on which the reference is made, can be dealt with and disposed of by the Judge or Judges to whom the reference was made. MAUNG PO TE v. MAUNG PO THEN, **14 Bur. L.R 59, F.B.**

(1719)—*S. 98 (=s. 575, Civ. Pro. Code,* 1882) —*Applicability—Quære:*—Having regard to the explanation to s. 647, Civ. Pro. Code, it is questionable whether s. 575 of the Code is applicable when an application is made to the High Court under s. 622 of the Code. MANCHARAM v. FAKIRCHAND, **3 Bom. L.R. 58=25 B. 478.**

(1720)—*S. 98 (=Civ. Pro. Code,* 1882, *s. 575)* —*Delivery of dissentient judgments—No reservation—Reference to Full Bench—Legality of reference.*—Where the Judges of the High Court differed and delivered dissentient judgments as judgments and without any reservation, they could not make an order of reference to the Full Bench under s. 575, Civ. Pro. Code, and the order of reference so made was *ultra vires.* LAL SINGH v. GHANSHAM SINGH, **9 A. 625, F.B.= 7 A.W.N. 154.** (6 A. 468, *R.*) [*D.*, 6 Bom. L. R. 131.]

(1721)—*S. 98—Act XXIII of* 1861, *s. 23—Judges sitting in appeal from original Civil Jurisdiction.*—S. 23, Act XXIII of 1861, referred only to the late Sudder Court, and, although this Act formed part of the Code of Civil Procedure, it is clear that s. 23 could not apply to Judges sitting in appeal from the original civil jurisdiction for this reason, that all the Judges of the Court so sitting in appeal are supposed in law to be equal, whereas s. 23 of Act XXIII of 1861 only contemplated an appeal from a Court of inferior jurisdiction to the late Sudder Court and had nothing at all to do with the Court of Appeal from the original civil jurisdiction, as that Court is now constituted. GREENWAY v. HOGG, **Bourke, A.O.C., 139.**

(1722)—*S. 98 (=Civ. Pro. Code,* 1882, *s. 575)* —*Suit, dismissal of, under s. 375, Civ. Pro. Code — Misjoinder of parties — Champerty—Maintenance—Contract to supply funds for carrying on litigation not opposed to public policy—Contract of sale of property not in possession of vendor can operate as present transfer—Failure of consideration, plea of—Argument before Judge or Judges to whom case referred.*—The terms of a contract entered into by A.S., with the plaintiff were, that A.S., sold a half-share in a taluka to the plaintiff for one lakh and fifty thousand rupees; that fifty thousand rupees were to be held in deposit by the plaintiff to be expended in litigation about the said taluka and in giving A.S., a monthly allowance of fifty rupees. The deed of sale executed by A.S. in favour of the plaintiff recited that one lakh of rupees had been paid to A.S. and a separate receipt for that sum was taken from him. The plaintiff and A.S., brought a suit against the defendant for possession of the aforesaid taluka on the 21st February, 1891. In the plaint it was stated that, not having sufficient funds to carry on the suit, A.S., had sold half the share in the estate to the plaintiff who was joined as a co-plaintiff. Three days before the date of first hearing A.S., filed a petition and a compromise stating he was satisfied that under law and custom he had no claim to the estate; that he had been persuaded by the plaintiff to execute a sale-deed in his favour for which he (A.S.) got no lawful consideration; and he prayed that the suit might be dismissed under s. 373 of the Civ. Pro. Code. Some three days after, A.S. registered a petition in the office of a Sub-Registrar under s. 373 of the Civ. Pro. Code, praying that his suit be unconditionally dismissed. Subsequent to this, the defendant filed a written statement in which, among other pleas, it was urged that the plaintiff's

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suit was champertous and unmaintainable, and was also bad for mis-joinder of parties. The Court of first instance dismissed the plaintiff's claim. *Held (per W. Blennerhaussett, J. C.)* that the joinder of the plaintiff in this suit as the purchaser of half of A.S's share did not amount to a misjoinder of parties. (18 A. 131 *Not F.*) ; that the specific English law of maintenance and champerty has not been introduced into India. The defendant, therefore, could not directly plead that the suit was unmaintainable on the ground of champerty ; that the agreement on behalf of the plaintiff to supply A.S. with the necessary funds was a fair agreement and was in no way contrary to public policy and the suit was maintainable; that where an assignee sues on his assignment and proves it, an adverse party cannot take objection that there was no consideration. *Held (per R. Scott, A.J.C.)* that whether the contract between A.S. and the plaintiff was void or voidable or a valid and binding agreement, the plaintiff could not sue for possession of half the taluks in the present suit. *Held* further, that the agreement relied upon by the plaintiff was a gambling in litigation and opposed to public policy and, therefore, void. *Held (per Spankie, A.J.C.)* that there was a contract of sale between the plaintiff and A.S. under which there was a present transfer of a moiety of the taluks to the plaintiff. That a contract of sale of property, which is not in the possession of the vendor, and which is the subject of litigation and as to which the vendor's title may never be established, can operate to give to the purchaser a right to obtain possession of the property, and that, therefore, the contract of sale between A.S., and the plaintiff could operate as a present transfer of a moiety of the taluks to the plaintiff; that the defendant could not defend the suit on the ground that the contract of sale was extortionate, unconscionable and fraudulent, and that there had been a failure of consideration ; that there was nothing in the contract of sale "against good policy and justice, tending to promote litigation or what is in the legal sense immoral," and that the suit was maintainable; that the withdrawal of A.S. from the suit might perhaps be a reason for the amendment of the plaint, but it was not a ground for dismissing the suit. Upon the defendant's attempt to address an argument upon a point with regard to which the Bench had come to a unanimous decision, *held*, that under s. 575, Civ. Pro. Code, only the point of law on which there is a difference of opinion should be heard by the Judge or Judges to whom the appeal may be referred, and not points on which there is no difference of opinion. KAZIM HOSEIN KHAN v. LAL ACHAL RAM, 2 **O.C. 149.** [*Cons.*, 7 O.C. 181.]

(1723)—*S. 98—Court of two or more Judges, —Difference of opinion—Judgment.*—Where, in a Court consisting of two or more Judges, their concurrence is necessary to a judicial determination of a case, their minds must be brought together before they express their opinion. If the Judges differ in opinion on points of law, they must state the points on which they differ. If they do not, there is no determination of the case, which, if referred to other Judges, may be gone into by them. Under an English deed, a mortgagee is entitled to possession before foreclosure immediately upon default, and he would hold possession subject to his own right to foreclosure and to the mortgagor's right to redeem. The decree in the foreclosure suit would not be binding on a party, who purchased *bona fide* the rights of the mortgagor, or a portion of them, before the pendency of any suit against the mortgagor. In a suit to recover possession of land under a mortgage-deed, limitation will count as against the mortgagee from the date of default, and the pendency of a foreclosure suit will not prevent limitation from running. KHELUT CHUNDER GHOSE v. TARACHURN KOONDOO CHOWDHRY, **6 W.R. 269.**

(1724)—S. 98—*See* DIVISION BENCH OF HIGH COURT, 14 M. 186=1 M.L.T. 95.

(1725)—S. 98—*See* LETTERS PATENT, HIGH COURT, 1865, BOMBAY, 6 Bom. L. R. 230.

(1726)—S. 98—*See* LETTERS PATENT HIGH COURT—N.W.P., ss. 10, 27, 26 A. 10= A.W.N. 1903, 162.

(1727)—S. 98—Two Judges hearing an appeal and differing in their opinions—Whether appeal should be dismissed—*See* PRACTICE AND PROCEDURE, 14. Bur. L.R. 257.

(1728)—S. 98—*See* RULES OF HIGH COURT AND SUPREME COURT—N.W. PROVINCES, 6 A. 468.

(1729)—Ss. 98, 114, O. XLVI. r, 1. s. 141—*See* LETTERS PATENT HIGH COURT, N.W.P. s. 27, 11 A. 176=1889, 27.

(1730)—Ss. 98, 141—*See* LETTERS PATENT, HIGH COURT, 1865, BOMBAY, s. 36, 3 B. 204. F.B.

——S. 99 (=1882, s. 578=1877, s. 578=1859, s. 350.

See APPEAL.

See APPELLATE COURT.

(1731)—*S. 99. (=s. 578. Civ. Pro. Code, 1877)* —Explained. SHAMA SOONDARY v. HURRO SOONDARY. **7 C 348=8 C.L.R. 528.**

(1732)—*S. 99 (=s. 578, Civ. Pro. Code,* 1882).—The words of s. 578, "not affecting the jurisdiction of the Court," mean, "not affecting the competency of the Court to try." The error in instituting a suit in a Subordinate Judge's Court, rather than in that of the Munsif's, is not an error which affects the jurisdiction of the former Court. But, if a case cognizable only by a Subordinate Judge had been instituted in

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the Court of a Munsiff, that would have been a case, of want of jurisdiction. MATRA MONDAL v. HARI MOHUN MULLICK, **17 C. 155.** [*R.*, 8 C.W.N. 705=31 C. 849, 8 Bom. L.R. 516; *R. and Ap.*, 5 C.W.N. 509=28 C. 324, 14 M. 183.]

(1733)—*S. 99—Suit upon agreement by Karnavan of Malabar Tarwad against successor—Necessity of joinder of other members—'Misjoinder' in s. 99—Whether includes 'non-joinder.'*—Where a suit is brought, upon an arrangement entered into by a Karnavan, against the succeesor of that Karnavan, the succeesor-Karnavan represents all the other members of the Tarwad, and it is unnecessary to make the other members parties. The word 'misjionder' in s. 99, Civ. Pro. Code, 1908, includes 'non-joinder.' EKKANATH EACHARA UNNIVALIAKAIMAL v MANAKKAT VASUNNI ELAYA KAIMAL, **7 M.L.T. 102=5 Ind. Cas. 774=20 M.L.J. 344=33 M. 486.** (7 M. 428, *D.*; 21 M. 373, *F.*)

(1734)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—'Jurisdiction,' meaning of.*—The word 'jurisdiction' is used in two different senses. It may either mean what is ordinarily understood by the term "jurisdiction" when used with reference to the local, or pecuniary jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit, or it may mean the legal authority of a Court to do certain things. But in s. 578 the term is used in the former sense, MOHESH CHANDRA DASS v. JAMIR-UDDIN MOLLAH, **28 C. 824=5 C.W.N. 809.** (12 C. 510, *Diss.*; 11 C. 6. P.C. 20 C. 8 18 M. 421 19 M. 479 *R.*; 2 B.L.R. 13, *D.*; 13 W.R. 234. 17, C. 155, 14 B. 332, *F.*) [*R.*, S.L.R. 45.]

(1735)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Technical point not affecting merits.*—No decree or order shall be reversed or altered on appeal or revision on account of an irregularity of procedure, unless such irregularity has occasioned, or is likely to occasion, a failure of justice. The appellate Court should not have reversed the decision of the Court of first instance on a technical point not affecting the merits of the case. HAJI DAWUD v. MAHOMED NUR KHAN, **U.B.R. 1892—1896, 282.** (12 B. 68, 15 W.R. 245, *F.*)

(1736)—*S. 99—Misjoinder of parties—Merits of the case.*—Where the misjoinder of parties does not affect the merits of the case, an appellate Court should not dismiss the suit for misjoinder. KHAYALE SINGH v. PITAM SINGH, **8 Ind. Cas. 889.**

(1737)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Refusal to examine defendant on commission.*—When the merits of the case have not been affected by the absence of defendant's evidence, the refusal of the Court of first instance to allow defendant's evidence to be taken on commission is not a reason for reversing his decision, having regard to s. 578, Civ. Pro Code. AKIKUNNISSA BIBI v. RUP LAL DAS, **25 C.807 =2 C.W.N. 566, P.C.** [*D.*, 28 C. 37.]

(1738)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Error or defect not affecting merits of case.*—The error of the lower appellate Court in entertaining an appeal (preferred against an order absolute for sale) from an order, and not from an original decree, as it should have been, is one not affecting the jurisdiction of that Court or the merits of the case. PRAMATHA CHANDRA ROY v. KHETRA MOHAN GHOSE, **29 C. 651.**

(1739)—*S. 99 (=Civ. Pro. Code, 1882, s. 578)—Non-compliance — Irregularity.*—The non-compliance with the provision relating to notice under s. 347, Civ. Pro. Code, must be taken as a mere irregularity, which, in the absence of any proof of prejudice, is cured by s. 578, Civ. Pro. Code. RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB, **5 C.W.N. 91.**

(1740)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Defects in signing etc., of plaint*—Where a plaint on behalf of Government was signed by the Collector and by a pleader who was not the Government Pleader but who generally acted for Government and the verification was signed by the Collector and the Government Pleader. *Held per Rampini J.*—That the plaint was properly presented. *Per Curiam*—That the defects, if any in the signing and verification of the plaint were cured by s. 578. RAKHAL CHANDRA TEWARY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **10 C.W.N. 841=C.L.J 24.**

(1741)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Irregularity—Disposal of a suit on a Sunday.*—*Held*, that the disposing of a civil suit on a Sunday is a mere irregularity, which is covered by the provisions of s. 578 of the Code. SHEO RAM TIWARI v. THAKUR PRASAD, **A.W.N. 1907, 168=29 A. 562.** (9 A. 366, 16 W.R. 230, *R.*)

(1742)—*S. 99 (=Civ Pro. Code 1882 s. 578)—Cause of action—Error or irregularity.*—T mortgaged certain property to A, and B received the consideration therefor from A. Subsequently, T mortgaged the same property to B alone, and the consideration for the mortgage covered the money due on the first mortgage. A agreed to receive the money that he gave on the first mortgage, from B, and allowed the mutation of names. Then A sued B on the mortgage for the recovery of the amount due to him. *Held* that the only claim of the plaintiff was a money-claim against B. His cause of action against B was on the agreement by which the latter took on himself the debt due to the plaintiff, but there was no mortgage made by B of the property to the plaintiff. With reference to s. 578, Civ. Pro. Code, the claim should not be disallowed on the technical ground that the right of action was in the plaint alleged to be

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the deed of mortgage, or any other ground not affecting the merits of the case or jurisdiction of the Court. Therefore, the Court *held* that the plaintiff could maintain his claim in the present suit. DAMMAR SINGH v. LALAK SINGH, **A.W.N. 1883, 129.**

(1743)—*S. 99 (=Civ. Pro. Code, 1859, s. 350)—Suit for* brahmottur *land—Irregularity—Merits.*—A suit was brought under Act XIV of 1859, s. 15, for possession of *brahmottur* land; but defendant contesting the right of the plaintiff, the Munsiff had the suit numbered as a regular suit, taking adequate stamps from the plaintiff. The disputed land was then decreed in favour of plaintiff as *lakhiraj*, and the decree was upheld in appeal. *Held* that the regular procedure for the Munsiff would have been to require the plaintiff to file an entirely fresh plaint upon the proper stamp: but as the irregularity objected to did not affect the decision upon the merits, effect should not, under Act VIII of 1859, s. 350, be given to it in special appeal. DOORGA NATH BHADOORY v. ROOKMINEE KANT BAGCHEE, **24 W.R. 167**

(1744)—*S. 99 (=Civ. Pro. Code, 1877, s. 578)—Remand by appellate Court for amendment of plaint.*—In a suit for damages for loss of produce of certain land, which was dismissed by the original Court, the lower appellate Court remanded the case in order that the plaint might be amended by the addition of a clause praying for possession of the definite lands on which the crops in dispute had been sown and the case be re-tried. The first Court re-tried the suit and again dismissed it. The lower appellate Court gave the respondent a decree in the suit. *Held* that the irregularity committed by the lower appellate Court, in ordering the plaint to be amended, was not such as in anyway to affect the merits of the case or the jurisdiction of the Court; and could not, therefore, under the provisions of s. 578, Civ. Pro. Code, 1877, justify the disturbance of the decree of the lower appellate Court, if otherwise substantially and equitably just. KASHI NATH v. RACHPALI, **A.W.N. 1881, 121.**

(1745)—*S. 99 (=1882, Civ. Pro. Code, s. 578)—Bengal Civil Court Act (VI of 1871), s. 26—Transfer of appeal part-heard.*—A District Judge heard an appeal and adjourned the case in order to take further evidence. Subsequently he transferred the appeal to the file of the Subordinate Judge who took the further evidence and disposed of the appeal. *Held*, that the terms of s. 26 of Act VI of 1871, more especially of the second part thereof, are very wide, and suffice to justify the transfer made in the case by the Judge to the Subordinate Judge. Assuming that there was any irregularity or anomaly in the mode of hearing, it would not amount to an error, defect or irregularity affecting the merits of the case or the jurisdiction of the Court. SADHO RAM v. UMDA BEGAM, **A.W.N. 1883, 220.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1746)—*S. 99 (=Civ. Pro. Code, 1882, s. 578)—Omission to issue commission, saving of.*—The omission to issue a formal commission to take oath under the Indian Oaths Act is a defect or irregularity such as is contemplated by s. 578 of the Code. MADHOGIR GOSSAI v. GOPAL BHASKAR, **7 C.P.L.R. 122.**

(1747)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Material irregularity—Revision.*—An appellate Court which, contrary to s. 578, reversed the decree of the lower Court on the ground of an irregularity not affecting the merits of the case or the Court's jurisdiction, commits a material irregularity. JAIMAL SINGH v. GUNPAT MAL, **65 P.R. 1891.** [*R.*, 26 P.R. 1892.]

(1748)—*S. 99 (=s. 578, Civ. Pro. Code, 1882)—Misjoinder of different causes of action whether cured by—Damage of two persons by same tortious act—Right to sue as joint plaintiffs.*—Damage was caused to two members of a firm by the same wrongful act of the defendant. The two members brought a suit as co-plaintiffs for damages. But the plaint was so framed that each plaintiff was suing, individually, for the injury to his personal reputation and credit. *Held*, that, in such a case, each plaintiff had a different cause of action, and that the joint suit was not maintainable. But the two plaintiffs might, had they so chosen, have instituted an action for the joint damage suffered by the firm. Though it is open to plaintiffs in England to join in one suit distinct causes of action under certain circumstances, there is no such privilege conferred by the Code of Civil Procedure. Under the Code, the plaintiff can do so only in respect of the same cause of action. The powers of the Courts are derived in India entirely from legislative enactments, and their jurisdiction does not commence till a suit has been instituted in the manner allowed by law. Hence, misjoinder of causes of action is not cured by the provisions of s. 578, Civ. Pro. Code. MANGHAM MAL ROCHIRAM v. MICHUMA REWACHAND, **1 Sind. L.R. Civil 181.** (11 C. 524, 26 B. 259, 34 C. 652, *R.*)

(1749)—*S. 99 (=s. 578, Civ. Pro. Code) 1882)—Misjoinder of defendants.*—When several persons have been joined as defendants in a single suit based on a contract, which, however, evidences an individual and separate contract with each defendant, and the defendants have been prejudiced by the misjoinder, the defect is not one which can be cured under s. 578, Civ. Pro. Code. NAMASIVAYA GURUKAL v. KADIR AMMAL, **17 M. 168=4 M.L.J 31.** [*R.*, 27 M. 80, 2 C.L.J. 602, 5 C.L.J. 71.]

(1750)—*S. 99—Misjoinder of causes of action—Sustainability of plea in second appeal—Applicability to suits and appeals instituted before Act V of 1908 came into force.*—A and B obtained two separate money-decrees against C and attached certain properties in execution thereof. When the properties were attached by A, the three plaintiffs and the 4th defendant,

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the children of C, put in a claim-petition on the ground that the properties belonged to their deceased mother. No such claim-petition was put in when B attached these properties. The suit for declaration that the attachments made by A and B are not valid, was dismissed by the Munsiff but was decreed by the Sub-Judge. *Held*, that the objection that the suit was bad for misjoinder of causes of action cannot be heard in second appeal. S. 99 of the new Code provides that "no decree shall be reversed or substantially varied on account of any misjoinder of parties or causes of action." That section is one regulating the procedure of the appellate Court and was therefore applicable to all appeals heard after the new Code came into force. (34 M. 55, *Appr.*, 7 M.L.T. 296, *doubted*; 1910, M. W.N. 640, 719, 33 M 241, *R.*,) The circumstance that the suit or appeal was instituted before Act V of 1908 came into force does not affect the applicability of s. 99 of the new Act. (20 M.L.J. 344, *F.*) That the plea of misjoinder of causes of action had been upheld in the Court of first instance and only failed in the first appellate Court is also immaterial in determining the applicability of s. 99. The declaration granted by the Subordinate Judge that the entire attachment of the suit-properties was invalid was bad in law, as plaintiffs were only three out of the four persons entitled to the property, and the order on the claim-petition against the 4th defendant had become final, no suit having been brought within one year from its date. TEJMAL SOWCAR v. JAGGUPILLA PAPAYAMMA, **1912, 1 M.W.N. 50.**

(1750-*a*)—*S. 99 (=Civ. Pro. Code, 1859, s. 350)—Action for test—Non-joinder—Defect cured by s. 350.*—In an action brought by a Hindu husband for a tort and personal grievance to himself and wife, the Chief Court held that the non-joinder of the wife was cured by s. 350 of Act VIII of 1859. MUSSAMMAT GOOJREE v. RUTTUN CHUND PUREE, **3 P.R. 1869.**

(1750-*b*)—S. 99—*See* ACT XL OF 1858, s. 3, 9 A. 508=A.W.N. 1887, 189.

(1751)—S. 99—*See* BEN. ACT XI OF 1859, s. 9, 30 C. 794=7 C.W.N. 609

(1752)—S. 99—*See* CO-SHARERS—SUIT BY CO-SHARERS, 4 A. 289=A.W.N. 1882, 36.

(1753)—S. 99—*See* DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 8 A. 365=A.W.N. 1886, 129.

(1754)—S. 99—*See* EVIDENCE ACT, 1872, ss. 65 (*b*), 167, A.W.N. 1881, 9.

(1755)—S. 99—Effect—Misjoinder of causes of action not a ground of appeal—*See* HINDU LAW—ADOPTION, 6 A.L.J. 567, P.C.=10 C.L.J. 58=13 C.W.N. 920=5 M.L.T. 423=11 Bom. L.R. 833=36 C. 780=3 Ind. Cas. 382=93 P.R. 1909=68 P.L.R 1910=146 P.W.R. 109=36 I.A. 103=19 M.L.J. 548.

(1756)—S. 99—Misjoinder of causes of action, if ground of appeal — *See* HINDU LAW—WIDOW, 6 Ind. Cas. 248.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*.

(1757)—S.99—Recording evidence in English in ejectment suit—Irregularity—*See* LANDLORD AND TENANT—HOLDING OVER, 34 C. 396=11 C.W.N. 826.

(1758)—S. 99—*See* MISJOINDER OF CAUSES OF ACTION, 189 P.R. 1888, 6 Ind. Cas. 15=8 M.L.T. 6; 2 A.L.J. 91.

(1759)—S.99—*See* MISJOINDER—OF PLAINTIFF'S AND CAUSES OF ACTION, 24 C. 540.

(1760)—S. 99—*See* MORTGAGE—REDEMPTION, 6 O C. 135.

(1761)—S 99—Death of next friend pending appeal by minor—Omission to appoint new next friend mere irregularity within—*See* NEXT FRIEND, 3 A.L.J. 81=A.W.N. 1906, 40=28 A. 328.

(1762)—S.90—*See* PLAINT—VERIFICATION AND SIGNATURE, 103 P.L.R. 1902, 7 N.L.R. 33.

(1763)—S. 99—*See* REMAND, 11 A. 35.

(1764)—S. 99—Ground of second appeal not affecting the jurisdiction of the Court or the merits of the case, but relating to order of lower appellate Court remanding case for amendment of plaint—Whether second appeal lies on such grounds-*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 14 Bur.L.R. 122.

(1765)—S. 99—*See* SPECIFIC RELIEF ACT, 1877, s. 42, A.W.N. 1887, 231.

(1766)—S. 99—*See* STAMP ACT, 1879, s. 34, cl. 3, 5 M. 220.

(1767)—S. 99—*See* STAMP ACT, 1879, s. 39, Proviso 3, 13 B. 449, F.B.

(1768)—S. 99—Effect of over-valuation or under-valuation of suits—*See* SUITS VALUATION ACT, 1887, s. 81, 20 M.L.J. 726=8 M.L.T. 404=8 Ind. Cas. 545.

(1769)—S. 99—*See* TRANSFER OF PROPERTY ACT, 1882, s. 89, 5 Bom. L.R. 389.

(1769-*a*)—S. 99—*See* NOS 372, 398, 401, 523, 582, 923, 1149, 1678, *supra* AND NOS. 2430, 2433-*c*, 2488 *c*, 2509; 2700, 2717, 2751-*e*, 2757 *b*, 2806, 2831, 2906, 3000, 3099, 3189, 3194-*d*, 3465, 4510, 4851, 4909, 4930, 5394, 5529, 5570, 5583, 5653, 5673, 5674, 5679, 5680, 5681, 5682, 5683, 5684, *infra*.

(1770)—Ss. 99, 105—Powers of appellate Courts and High Court—*See* JURISDICTION—QUESTION OF JURISDICTION, 2 Ind. Cas. 677.

(1771)—S. 99 and O. I, rr. 3 and 4 (4)—*See* MISJOINDER OF PLAINTIFFS AND CAUSES OF ACTION, 3 Bom. L.R. 878=26 B. 259.

(1772)—S. 99, O. II, r. 3—*See* MULTIFARIOUSNESS, 4 A. 163.

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(1773)—S. 99, and O. II, rr. 4 & 5—*See* MIS JOINDER OF PARTIES, 10 C. 1061.

(1774)—S. 99, O II, r. 6—*See* APPELLATE COURT—MISCELLANEOUS, 15 A. 380=A.W. N. 1893, 150.

(1775)—*S. 99, O. 3, r. 2, O. 6, rr. 14 and 15 (1)=(ss. 578, 37, 54, Civ. Pro. Code*, 1882)—*Conditions for suing by agent—Absence of principal from jurisdiction—Objections first raised in second appeal—Maintainability.*—In this case the suit was brought and the plaint was signed by a duly authorised agent holding a general power of attorney. The proceedings did not show that the principal was living away from the jurisdiction of the Court at the time of bringing the suit; nor was it shown that he was unable to sign the plaint himself owing to absence or any other good cause. Objections on these grounds were taken for the first time in second appeal. *Held*, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized in that behalf, as required by s. 51 of the Code, will not necessarily make the plaint absolutely void, and that the defect in the signature in the plaint or the absence of signature, where it appears that the suit was in fact filed with the knowledge, and by the authority, of the plaintiff named therein, may be waived by the defendant and, having regard to s. 578 of the Code, is not a ground for interference in second appeal. *Held*, further, that such objections might have been raised in the original proceedings, when the fact of the plaintiff's absence or otherwise would have been inquired into by the lower Court. THA ZAN v. THA DUN **4 L.B.R. 284**. (8 Bur. L.R. 103, 1 L.B.R. 191, 6 B. H.C. 159, 2 L.B.R. 41, 22 A. 55, *R.*; 15 W. R. 245, 12 B. 69, *F.*)

(1776)—*S. 99, O. 22, rr. 3,4—Sole appellant dying pending appeal—No application made to bring representatives on record—*Vakalatnama *filed on behalf of the representatives—Abatement—Irregularity not affecting merits.*—An appellant died after filing his appeal and no application was made to bring his representatives on the record, but a *vakalatnama* was filed by a pleadar on behalf of the representatives and the appeal was heard and the suit decreed in the name of deceased appellant: *Held*, that this was not a mere irregularity which could be cured by s. 99 of Code of 1908, and that the appeal had abated. BADAL KHAN v. MURTAZA. **9 Ind. Cas. 977.**

(1777)—*S. 99, O. 32, rr. 3 (1), 4 (2) (=ss. 578, 443, Civ. Pro. Code*, 1882)—*Minors—Suit—Guardian ad litem—Recording a formal order of appointment—Summons, non-service of—Irregularity—Procedure.*—A defect in following the procedure prescribed by s. 443 of the Civ. Pro. Code, is not necessarily fatal to the proceedings. Where, in a suit against the minors, the minors are represented by their mother though no formal order appointing her to be their guardian is drawn up, and no attempt is made to serve the summons upon the minors personally or upon their mother, a *pardahnashin* lady, before serving it upon the only adult male member and the *karta* of the family, these defects in procedure, if they have not caused any prejudice to the minors, are irregularities which, under s. 578 of the Civ. Pro. Code, would not have furnished grounds for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit; much less could they furnish any ground for reversing the proceedings by a fresh suit. MUST. BIBI WALIHAN v. BANKE BEHARI, **5 Bom. L.R. 822.**

(1778)—S. 99, O. XLI, r. 32—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE. **11 W.R. 257, 5 B.L.R. App. 10.**

(1779)—S. 99, O. XLI, r. 32—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF —SMALL CAUSE COURT, MOFUSSIL, PRACTICE AND PROCEDURE OF, 5 N.W.P. 55.

(1780)—S. 99, O. XLI, r. 32—*See* VALUATION OF SUITS, 1 B.H.C. 163.

(1781) — *S. 99 — Sch. II — Arbitration — Whether second schedule part of the Code—Death of one of the parties to the agreement — Abatement.*— Sch. II of the Code is as much an enactment as any other part of the Code, and where parties apply to refer the matter to arbitration in appellate Court, that Court must, under paragraph 3, sch. II, refer the matters in dispute between the parties to arbitration, and if the Judge omits to do so, his judgment is defective, and s. 99 does not cure the defect. The authority of an arbitrator is not revoked by the death of one of the parties to the original application, and as the right to sue survived, the case should have been referred to arbitration after substitution of the heirs. DATTA v. KHEDU, **8 A.L.J. 678.**

——S. 100 (=1882, s. 584=1877, s. 584=3859, s. 172).

See SPECIAL OR SECOND APPEAL.

(1782)—*S. 100, (=Civ. Pro. Code*, 1882, *s. 584.)*—S. 584 of the Civ. Pro Code, appears to supply a reasonable interpretation of the expressions "illegally" and "with material irregularity" occurring in s. 622 Cls. (*a*) and (*b*) embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. And cl. (c) indicates the meaning of "material irregularity" which means some material irregularity in procedure which may possibly have produced

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error or defect in the decision on the merits. (*Straight* and *Tyrrell, JJ.*) BADAMI KUAR v. DINU RAI, **8 A. 111, F.B.=A.W.N. 1886, 28.** (3 A. 203, *R.*) [*Appr.*, 13 C. 225; *R.*, 9 A. 104, 14 C. 768.]

(1783)—*S. 100 (=Civ. Pro. Code, s. 1882), s. 584)—Act XII of (881 N W.P. Rent Act), s. 189 — Appeal — Procedure.*—S. 584 of the Code of Civil Procedure has no application to an appeal heard by a District Judge under s. 189 of the N.W.P. Rent Act. PIRYA DAS v. MAKUND, **A.W.N. 1900, 213.**

(1784)—*S.100 (=s. 584, Civ. Pro Code, 1882) —Appeal under the Agra Tenancy Act, not a second appeal under s. 584,*—Upon an appeal being preferred to a District Judge under s. 180, sub-s. (2), cl. (*a*) of the Agra Tenancy Act, 1901, it is competent for the Judge to determine the questions of proprietary title raised and determined in the subordinate Courts, such appeal not being second appeal of the description referred to in s. 584 of the Code. HAMID HUSAIN v. BHOLA NATH, **A. W.N. 1906, 186.**

(1785)—*S 100 (=s. 584, Civ. Pro. Code, 1882)—Discretion—Second appeal—Co-sharers —Construction on joint land—Mandatory injunction—Special damage.*—Plaintiffs and defendants were co-sharers. Defendants built upon land which was common land. Plaintiffs, thereupon, brought a suit for a mandatory injunction. The Court of first instance granted the injunction, but the lower appellate Court, finding that no special damage had occurred and the plaintiffs had committed a similar wrong before, refused it. *Held*, that a second appeal would lie, although the granting of a mandatory injunctionwas a matter of discretion inasmuch as, (1) the defendant having built upon common land, the decision appealed against was contrary to law as specified in the memorandum of appeal within the meaning of s. 584 of the Code, and (2) the Court below had exercised not a judicial, but an arbitratory, discretion. *Sembla* :—It is not the law that, where a wrong has been previously committed by the plaintiffs, redress ought not to be given to them if a similar wrong is afterwards committed by the defendant. Where a co-sharer makes constructions upon common land it is not necessary for a co-sharer, who has not acquiesced in such construction, to prove special damage. RAM BAHADUR PAL v. RAM SHANKAR PRASAD PAL, **2 A L J.455=27 A. 688=A.W.N. 1905, 158, 158P.C.** (18 A. 115)18A 361. *Relied on* ; 26 A. 327, A.W.N. 190., 55. A.W.N. 1901, 53, 12 A. 426, 9 A. 661, *R.*)

(1786—*S. 100—Second appeal—Error of law —Erroneous views of evidence—Omission to consider important part of evidence—Deposition, construction of—No question of law.*—An erroneous view of evidence does not, in every case, involve an error of law sufficient to support a second appeal. But a total omission to consider an important part of the evidence is an error of law. (30 C. 207, *R.*) The construction of the deposition of a witness is what the Court thinks proved by it. It is a misapplication of the term to speak of it as a construction, so as to make it a question of law. NARAIN PAL v. ADDOITA MONDAL, **3 Ind. Cas. 173.** (23 W. R. 250, *R.*)

(1787)—*S. 100 (=s, 584, Civ. Pro. Code 1882)—Question raised for the first time in second appeal—Jurisdiction.*—A question as to the competency of an inferior Court can be allowed to be raised before the High Court, even though it was not taken before the inferior Court. The fact that the lower appellate Court has exercised jurisdiction not vested in it by law, may be raised as a good ground of second appeal under s. 584, Civ. Pro. Code, if the same is "specified" in the memorandum of appeal. *Per Banerjee, J.* ACHHA MIAN CHOWDHRY v. DURGA CHURN LAL, **25 C. 146 =2 C.W.N. 137.** [*R.*, 7 C.L.J. 152,]

(1788)—*S. 100 (=Civ. Pro. Code, 1882, s. 584)—Order dismissing appeal—Second appeal—Limitation Act, 1877, s. 4.*—An order dismissing an appeal, under s. 4 of the Limitation Act, is a "decree passed in appeal," so as to admit of a second appeal therefrom under s. 584 of the Civ. Pro. Code. GUNGA DASS DEY v. RAMJOY DEY, **12 C. 30. [*F.*, 27 M. 21 = 13 M.L.J 300.]**

(1789)—*S. 100 (=Civ. Pro. Code, 1882,) s. 584)—Substantial error in procedure—Decision on case not raised by parties.* Where the lower Court disposed of a suit upon a case not raised by the parties and to which the evidence had not been directed, *held* that there was a substantial error or defect of procedure within the meaning of s. 584. SHIVABASVA *bin* AMINGAVDA v. SANGAPPA *bin* AMINGAVDA, **1A.L.J. 637, P.C.=8 C.W.N. 865=29 B. 1=6 Bom. L R. 770.** (14 C. 740= 14 I.A. 101, P.C. 18 C. 23=17 I.A. 128, P.C. *R.*)

(1790)—*S. 100 (=s. 584, Civ. Pro Code, 1882)—Substantial error or defect of procedure —High Court—Second appeal—Question of law —Lower appellate Court itself making out a new case for the parties.*—Where a lower appellate Court disposes of a suit upon a case not raised by the parties and to which the evidence has not been directed, there is a substantial error or defect of procedure within the meaning of s. 584 of the Civ. Pro. Code ; and the High Court can in second appeal reverse the decision so arrived at. It is within the jurisdiction of the High Court in second appeal to dismiss a case if the Judges are satisfied that there is, as an English lawyer would express it, no evidence to go to the jury, because that will not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge. SHIVABASAVA v. SANGAPPA, **6 Bom. L.R. 770=29 B. 1.**

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(1791)—*S. 500 (=s. 184), cl. (a) Civ. Pro. Code, 1882)—Second appeal, competency of High Court in, to examine the evidence as to "usages having the force of law."—Right to trees on ryots' holdings under 'Zemindar'*— Though s. 584 of the Code disallows a second appeal with reference to findings of fact, yet the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court when it has to pronounce upon that question to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.,) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it (4 M. 272, 7 M. 3, 8 M. 464, *R.*; 10 C. 138, 22 B. 430, *Not F.*) and in India it has been laid down ever since the days of Manu that, "custom is transcendent law." A ryot holding lands in a zemindari on a permanent tenure would, as regards land on which money-assessment is paid, be *prima facie* entitled to the trees therein exclusively. In regard to lands, as to which the sharing of crops between the zemindar and ryot prevails the zemindar and the ryot would be jointly interested in the trees standig thereon, but presumptions to the above effect are liable to be rebutted by proof of usage or contract to the contrary. ABBAYYA v PAPPAYYA RAO BAHADUR. **29 M. 24=16 M.L.J. 8.** (26 M. 252 *F.*) [*Appl.*,] 5 M.L.T. 210; *D.* 17 M.L.J. 64=2 M. L.T. 25=30 M. 155; *R.*, 28 A. 698=3 A L J. 467=A.W.N. 1906 187.]

(1792)—*S. 100 (=Civ. Pro. Code, 1882, s. 584)—Second appeal—Nature of tenancy—Question of law.*—The question as to the nature of the tenancy, whether the tenants are merely tenants-at-will or yearly tenants is a question of law which can be dealt with in second appeal. SULATU DASS v. JADU NATH DAS, **8 C.W.N. 774, F.B.**

(1793)—*S. 100 (=Civ. Pro. Code, 1882, s. 584)—Second appeal—Inferences of fact or of law.*—In second appeal, the High Court has the power of considering whether the procedure adopted by the lower appellate Court in dealing with the facts is proper or not; and whether the inferences of fact or law derived by that Court from facts established to its satisfaction are well-founded or not. N.B.—In this case, the High Court in second appeal reversed the judgment of the lower appellate Court and considered the inferences of facts and also certain facts found by the first Court and not displaced by the lower appellate Court which set aside the judgment of the former. PROTAP NARAIN SINGH DEB v. RAGHU RAM HAZRA, **6 C.W.N. 185.**

(1794)—*S. 100 (=Civ. Pro. Code, 1882, s. 584)—Substantial defect in procedure—Material circumstances not considered by first appellate Court.*—Where the lower appellate Court has not apparently considered all the material facts and circumstances of the case, the procedure adopted by it in the trial of the case is not one in accordance with law and is a substantial defect which may lead to an error in the decision of the case on the merits. BHUPUT RAI v. KALI RAI, **6 C.W.N. 357.**

(1795)—*S. 100 (=Civ. Pro. Code, 1882, s. 584 (c)—Second appeal—Substantial error in procedure—Omission to try material issue.*— In a suit for sale on a mortgage, the defendant pleaded that he had purchased the property in suit and had paid off liens prior to that of the plaintiff, but without particularising what those liens were. The Court of first instance did not try the issue raised by this plea, and disposed of the suit on another ground. On appeal, the lower appellate Court merely held that the appellant's evidence in support of the plea above stated was insufficient without corroboration, and that bonds produced by him and alleged to have been paid afforded no corroboration. That Court, however, decided the appeal on the finding that the view taken by the first Court on another point disposed of the case, which, in reality, it did not. On appeal to the High Court, it was held that there was a substantial error in the procedure of the lower appellate Court which had probably produced a defect in the decision of that Court within the meaning of s. 584 of the Code of Civil Procedure. SHEO DIHAL SINGH v. JAI MANGAL SINGH, **A.W.N. 1896, 104.**

(1796)—*S. 100—Second appeal—Point of law—Whether decree fraudulent—Conclusion of law from facts.*—A finding of the lower appellate Court that a certain decree is not fraudulent is not a finding of fact, but is a conclusion of law arrived at from facts found and is, therefore, amenable to reversal in second appeal. DEO NAGAR ROY v. RAM SEWAK MAHTO, **5 Ind. Cas. 398.**

(1797)—*S. 100 (=s. 584, Civ. Pro. Code 1882)—Chief Court, Punjab, appeal to—Questions of fact are open for decision.*—An appeal from an appellate Court to the Chief Court, Punjab, is not limited, as such appeals are, under the Code of Civil Procedure, s. 584. The Chief Court has authority to deal with the evidence and decide questions of fact. BUDHA MAL v. BHAGWAN DAS, **18 C. 302, P.C.**

(1798)—*S. 100 (=s. 584, Civ. Pro. Code, 1882)—Finding of Court of appeal below, not a finding of fact, but an inference drawn from Judge's view—High Court's interference in second appeal.*—The finding of the Court of appeal below,—"as the manufacture of indigo is an agricultural purpose, it may be fairly held that the execution of indigo buildings is also in conformity with the purpose for which an agricultural holding is let,"—not being a finding of fact in the strict sense of the expression, but an inference drawn from the Judge's view that the manufacture of indigo is

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an agricultural purpose, it is open to the High Court to interfere in second appeal. SURENDRA NARAIN SINGH v. HARI MOHAN MISSER, **31 C. 174=9 C.W.N. 87.**

(1799)—*S. 100 (=s. 584, Civ. Pro. Code, 1882)—Omission to decide a material issue, ground of second appeal—Issue as to limitation, importance of.*—Where the first Court dismissed a suit on one of the issues, *viz.*, that of title, observing that it was not necessary to decide the other issues, one of which was an issue as to limitation, and the second Court decreed the suit by reversing the finding of the first Court on the issue of title, but omitted to record a finding on the issue of limitation. *Held*, that the case must be remanded to the lower appellate Court for findings on the remaining issues. KAILASH CHANDRA KUNDU v. KUNJA BEHARI GOSWAMI, **4 C.L.J. 86.**

(1800)—*S. 100 (=Civ. Pro. Code, 1882, s. 584, —Second appeal—Findings of fact by Court below.*—A Court of second appeal is bound to accept the findings of fact arrived at by the lower appellate Court, provided that there is any evidence to support such findings. MEWA BHAGAT v. GOPAL DAS, **A.W.N. 1890, 196.** (7 A. 649, *Diss.*)

(1801)—*S. 100 (=s. 584, Civ. Pro. Code, 1882)—Question of fact—Conclusion arrived at the same in the lower Courts—Second appeal—Powers of appellate Court.*—Where two Courts have come to the same conclusion on a question of fact, which goes to the foundation of the case; namely, what was the rental of the defendant, it is not open to the High Court, on second appeal to interfere,—per *O'Kinealy, J.* RADHA PROSAD SINGH v. BAL KOWAR KOERI, **17 C. 726, F.B.**

(1802)—*S. 100 (=Civ. Pro. Code, 1882, s. 584)—Limitation Act (XV of 1877), s. 5—Exercise of discretion by first appellate Court—Second appeal.*—No second appeal lies where the appeal to the Court below was dismissed as barred by time and the latter had refused to exercise its discretion in favour of the appellant under s. 5 of the Limitation Act after fully considering the facts. HAMID ALI v. GAYADIN, **26 A. 327.** (25 A. 71, *F.*) [*Cited*, **2 A.L.J. 455.**]

(1803)—*S. 100 (=Civ. Pro. Code, 1882, s. 584) —Second appeal—Refusal of lower appellate Court to admit additional evidence, no ground of second appeal.*—It is no ground of second appeal under s. 584 of the Code of Civil Procedure that the lower appellate Court has declined to receive additional evidence tendered to it under s. 568 of the Code. RAM PIARI v. KALLU, **A.W.N. 1900, 195.** (Marsh, 278, 7 W.R. 480, 15 W. R. 429, *F.*)

(1804)—*S. 100 (=s. 584, Civ. Pro. Code, 1882)—Second appeal, ground of—Erroneous conclusion of fact upon evidence.*—The question whether there is evidence before the Court on which it could properly arrive at a given conclusion of fact is a question of law which may be taken in second appeal, but if there is evidence, though the Courts below may have come to an erroneous conclusion on it, there is no second appeal against such finding. MA THA v. THA DO BO, **L.B.R. 1893—1900, 543.** (12 C. 93 and 18 C. 23, *F.*)

(1805)—*S. 100 (=s. 584, Civ, Pro. Code, 1882)—Finding of fact—Second appeal—High Court—Jurisdiction—Evidence—Relevancy—Entry in Collector's books, effect of.*—*Per Chandavarkar and Jacob. JJ.*—The fact that certain lands are entered in the Government records in the name of a particular person is not sufficient by itself to prove that person's ownership in those lands. It can only be evidence of that person's title as owner, when taken with something else. *Per Chandavarkar, J.*—It is a rule of practice that a Court of appeal should not upset the judgment of the first Court on the quetion of fact, depending on the appreciation of the evidence, unless the former Court is quite confident that the judgment is wrong. This is after all a rule of practice, meant for the guidance of appellate Court having jurisdiction to deal with questions of fact and they are the sole Judges of the question whether a judgment appealed against is wrong. The High Court sitting in second appeal has no jurisdiction to interfere with the exercise of their discretion in that respect unless there is any error of the kind pointed out in s. 584 of the Code of Civil Procedure, 1882. *Per Jacob, J.*—Where there is a clear finding of fact, right or wrong, the High Court on second appeal is precluded from interfering with it. *Per Aston, J. dissenting,*—The fact that certain lands are entered in the Government records in the name of a particular person, is material, though not conclusive, evidence of his title of those lands. A finding of fact arrived at in a first appeal after giving insufficient or perverted consideration to matters which justly weighed with the original Court or ought to be well-weighed in appeal bears too close a resemblance to a capricious or arbitray decision to permit of its being accepted as a proper adjudication of fact in dispute and binding in second appeal. PANDURANG v. ANANT, **5 Bom. L.R. 956**

(1806)—*S. 100 (=s. 584, Civ. Pro. Code, 1882)—Second appeal, ground of—Document, construction of.*—A second appeal does not lie because some portion of the evidence is in writing that is, in the form of a document, and the Judge in the Court of appeal below makes a mistake as to the meaning of it. BRAJA MOHAN MANDAL v. THAKUR DASS NATH, **10 C.L.J. 593.** (19 W.R. 222, *F.*)

(1807)—*S. 100—Second appeal—Custom—Evidence legally insufficient—Power of High Court to interfere.*—Where there is legally insufficient evidence to prove a custom, a finding that the custom exists may be questioned

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in second appeal. But when the sufficiency or insufficiency of the evidence is not a matter of law, and depends on the weighing of that evidence, it is not the practice of the High Court to allow a second appeal. MAKUN MURARI DASS v. KISHNA DHONE GHOSE, **9 Ind. Cas. 889.** (29 M. 34, 16 M.L.J. 8, 28 A. 608, 3 A.L.J. 467, A.W.N. 1906, 187, *R.*)

(1808)—*S. 100 (=s. 584, Civ. Pro. Code,* 1882) —*Second appeal—Court acting on illegal evidence—Question of custom.*—Where the lower appellate Court acts upon illegal evidence or upon evidence, which is legally insufficient to establish a custom of pre-emption, or has disregarded any legal evidence, the High Court can treat the question of the existence or non existence of a custom as one of law, but the High Court cannot, in second appeal, consider the weight of the evidence adduced by the parties. HASIM ALI v. ABDUL RAHMON, **3 A.L.J. 467 =A.W.N. 1906, 187=28 A. 698.** (29 M. 24, 3 A.L.J. 338, *R.*) [*Appr.*, 32 A 125=7 A.L. J. 36=4 Ind. Cas. 304; *R.*, 30 A. 311=A.W.N. 1908, 112=5 A.L.J. 456=4 M.L.T. 169.]

(1809)—*S. 100 (=s. 584 Civ. Pro. Code,* 1882) —*Second appeal—Finding of fact—Petition for mutation reciting a gift—Evidence of gift disbelieved.*—In a suit for possession by the daughters of one A, the sons set up an oral gift in their favour by the father. They put in evidence a copy of a petition for mutation of names filed by A in their favour, which said that A had made a gift of that property in favour of his sons and widow, and that their names may be entered accordingly. Witnesses were also produced to prove the gift, but were not believed by the Courts below. *Held*, that the petition for mutation of names did not amount to a gift and the question was not a question of construction of the petition, but a question as to the effect to be given to that petition as evidence of gift, and the finding that there was no gift was a finding of fact, and could not be disturbed in second appeal. PARBATI KUAR v. MAHMOOD FATIMA, **4 A.L J. 121=A.W.N. 1907, 36=29 A. 267.** (22 C. 609, *R.*)

(1810)—*S. 100—Second appeal—Question of fact—Jurisdiction of High Court.*—Where the High Court, in deciding a second appeal, said that, on a careful consideration of the evidence and the circumstances, it thought the appellant must succeed: *Held*, that it went beyond the limits open to the High Court in second appeal. JAGGANNATH MAHAPATRA v. RAM KRISTO MAHAPATRA, **6 Ind. Cas. 760.**

(1810-*a*)—*S. 100—Second appeal—Limitation Act XV of* 1877), *s.* 5—*Discretion of Court —Extension of time for filing appeal.*—Where the lower appellate Court, in the exercise of its discretion after considering the whole case, refused to Act under s. 5 of the Limitation Act, 1877, and dismissed an appeal as time-barred, no second appeal would lie. BIKRAM SINGH NARAIN SINGH, **9 A.L.J. 292.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1810-*b*)—*S. 100, O. 41, r. 27—Practice—Second appeal—Further evidence admitted by appellate Judge—Finding based on evidence improperly admitted not binding on High Court* —The provisions of O. XLI, r. 27 of the Civ. Pro. Code, are not intended to give a party a second opportunity of proving his case. Where a Judge upon appeal took further evidence which, however, was not of the kind expected by him, and used it for the purpose of importing prejudice into the case and punishing the appellant for refusing to come to terms, *held* that the further evidence was improperly admitted, and a finding of fact resting upon such evidence was not binding upon the High Court in second appeal. KHAZAN SINGH v. PANNA LAL, **9 A.L.J. 59.**

(1811)—S. 100—*See* APPEAL—DISMISSAL OF APPEAL, 147 P.R. 1879.

(1812)—S. 100—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 28 C. 190.

(1813)—S. 100—Second appeal against order about costs—Necessity for good ground for appeal—*See* COSTS—SPECIAL CASES, 8 O.C. 251.

(1814)—S. 100—Second appeal—Error of law —*See* EVIDENCE ACT, 1872, s. 36, 11 C.W.N. 230=9 C.L.J. 415.

(1815)—S. 100—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 9 Ind. Cas. 650.

(1816)—S. 100—*See* LIMITATION ACT, 1908, ss. 4, 5, 25 A. 71=A.W.N. 1902, 203.

(1817)—S. 100—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 15, 20 P.R. 1911 =93 P.L.R. 1911=54 P.W.R. 1911=9 Ind. Cas. 579.

(1818)—S. 100—*See* REMAND, 25 W.R. 325, 1 Ind. Jur. N S. 35.

(1819)—S. 100—*See* RIGHT OF SUIT, 5 N. W.P. 72.

(1819-*a*)—S. 100—*See* NOS. 91, 92, 155, 156, 295, 372, 543, 544, 1599, 1709, *supra*, AND NOS. 2779, 2802-*f*, 2802-*i*, 3071, 4382, 4875, 5167, 5330, 5334, 5392, 5462, 5463, 5470, 5616, 5649, 5674, 5675, 5778, *infra*.

(1820)—*Ss. 100, 101 (=ss 584, 585, Civ. Pro. Code,* 1882)—*Second appeal, grounds of.*—In determining upon what grounds the High Court will interfere, in second appeal, with the judgment of the lower appellate Court, the provisions of s. 584, Civ. Pro. Code, should be strictly adhered to. KAMESHWAR PERSHAD v. AMANUTULLA, **26 C. 53=2 C W.N. 649.** (14 C. 740, 17 C. 291, 18 C. 23, 19 C. 249, *R.*) [*Diss.*, 31 C. 155].

(1821)—*Ss. 100, 101 (=s. 584, cl. (a) and 585, Act XIV of* 1882 *(Civ. Pro. Code)—Findings of fact distinguished from inferences or conclusions of law—Second appeal—"Specified law."*—A Court of second appeal, for the purpose of considering the weight of the evidence

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

is not competent, according to ss. 584 and 585, Civ. Pro. Code, to entertain a question as to the soundness of a finding of fact by the Court below. The first Court's decision as to the effect of evidence must stand final as to the facts. But the soundness of conclusion may involve matter of law, and may be questioned by a Court of second appeal. Where a higher appellate Court, on a second appeal, decided that a conclusion, drawn by an appellate Court affirming the judgment of the first Court, that the defendant had accepted as a binding allegation upon him, a mortgage executed by his mother, with whom he was sharer by inheritance on the property charged, was not warranted by the facts found, and reversed that judgment, *held*, that the third Court had not exceeded its powers under ss. 584 and 585 by reversing the decision of the Court below. *F.*, 24 C. 825; *Appl.*, 9 C.W.N. 663; *R.*, 21 B. 91, 21 B. 110, 19 M. 485, 25 C. 896, F.B., 26 C. 53, 3 C.W.N. 255, 5 Bom. L.R. 225, 5 Bom. L.R. 956, 8 C.W.N. 690, 6 C.L.J. 237=34 C. 941=11 C.W.N. 959, **F.B.**; *D.*, 32 C. 719=1 C.L.J. 232.] The term "specified law" in s. 584 (*a*), first introduced in the Civ. Pro. Code of 1877, means "specified in the memorandum or grounds of appeal." RAMGOPAL v. SHAMES-KHATON, **20 C. 93, P.C.=19 I.A. 228.** (18 C. 23, *F.*, [*R.*, 25 B. 202.]

(1822)—*Ss. 100, 101 (=Civ. Pro. Code, ss. 584, 585 of 1882)—Question of fact—Second appeal on facts.*—A Court of second appeal cannot entertain an appeal on any question as to the soundness of findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it may be, if examined, must stand final. RAMRATAN SUKUL v. NANDU, **19 C. 249, P.C.= 19 I.A. 1.** [*R.* 21 C. 504, 19 M. 485, 26 C. 53=2 C.W.N. 649, 4 C.L.J. 198; *D.*, 20 C. 93.]

(1823)—Ss. 100, 102, O. XLIII, r. 1, s. 106—*See* APPEAL—ORDERS, 3 A. 18, F.B.

(1824)—*Ss. 100, 105, 114, O. 47, r. 1, O. 47, rr. 7 and 9 (=ss. 584, 591, 623, 629, Civ. Pro. Code, 1882)—Review of judgment granted for "any other sufficient reason"—Objection against the order in appeal from final decree.*—Ss. 584 and 591 of the Code do not control s. 629, so as to confer a right of appeal in a case, where the appeal is not based on one of the objections mentioned in s. 629. An objection against the order of admission of an application for review of judgment cannot be taken in an appeal against the final decree except on one of the grounds mentioned as grounds of objections in s. 629. Where an application for review of judgment is granted for "any other sufficient reason" under s. 623 of the Code, the sufficiency or otherwise of the reason is not a good ground of appeal against the order. GOPALA AIYAR v. RAMASWAMI SASTRIAL, **17 M.L.J. 603=2 M.L.T. 519=31 M. 49.** (27 A. 695, 24 C. 878, *F.*; 23 M. 314, *D.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1825)—Ss. 100, 115—*See* BENG. ACT I OF 1879, ss. 87, 137, 144, 1 C.W.N. 341.

(1826)—*S. 100, O. 17, r. 1, and O. 41, r. 2—Adjournment—Reasons to be recorded—Ground not taken in memorandum of appeal that evidence was not taken—Leave to be heard in support of such ground—Appeal—Pleadings.*—Where a Court finds the adjournment of a case to be necessary beyond the following day, it is bound to record its reasons. The failure of a Court to examine the witnesses of a party is a valid and substantial ground for interference under s. 100, Civ. Pro. Code. (2 L.B.R. 93, *Expl.*) The failure of the Court of first instance to examine the defence witnesses was not mentioned among the grounds of appeal in the lower appellate Court, but the defendants pleader at the hearing asked permission to raise this point. The Judge refused permission, although he perceived the grave irregularity of the original Court's proceedings. *Held*, that the lower appellate Court committed a serious error in disregarding this plea, because, although it was not mentioned in the grounds of appeal, it was not a matter to which the other side could legitimately object on the ground of surprise, and because it was a matter clearly affecting the decision of the suit on the merits. MA DAW THU v. MA DAW, **8 Ind. Cas. 990.**

(1827)—S. 100, O. 41, r. 10—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 6 N.W.P. 172.

(1828)—*S. 100, O. 41, r. 17 (=ss. 584, 556, Civ. Pro. Code, 1882)—Order dismissing appeal for default—Appeal—Re-submission after remand—Applicability of s. 556.*—Under the present Code, (Civ. Pro Code. 1908), there is no appeal against an order under S. 556 dismissing an appeal for default. An appeal if still being heard at the stage when the proceedings have been re-submitted after a remand, and a day has been fixed for the parties to file objections to the findings of the lower Court, and there is nothing to take the case out of the general rule contained in s. 556, Civ. Pro. Code, 1882, nor does the Code of 1908 make any change in the matter. NGA CHOK v. NGA ON GAING. **U.B. R. 1909. 2 Qr., Civ. Pro. 27.** (6 A. 383, 15 W. R. 235, *R.*)

(1829)—*S. 100, O. 41, r. 27—Admission of additional evidence in appeal—Discretion of Court—Appeal.*—A refusal, in the exercise of discretion, to admit additional evidence under O. XLI, r. 27 of the Civ. Pro. Code, is not an error or defect coming within s. 100 of that Code. Where the lower appellate Court has exercised its discretion and in the exercise of its discretion has refused to admit additional evidence, there is no substantial defect or error in procedure which would afford a ground for second appeal. DURGA PRASAD v. JAINARAIN, **8 A.L.J. 178=9 Ind. Cas. 265.** (23 A. 121, *F.*)

(1829-*a*)—*S. 100, O. 41, r. 31—Appeal—Judgment, contents of—Ground of interference.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—The failure to write a legal judgment as required by O. XLI, r. 31, is a good and sufficient ground for interference under s. 100 of the Code. Where an appellate Court concurs in the findings of an original Court, it is specially important that the judgment of the appellate Court should contain the points for determination and the reasons for the decision as required by law, since the High Court is bound in second appeal to accept concurrent findings of fact. MG PO GAING v. RAMANATHAN CHETTY 11 **Ind. Cas. 915.**

——**S. 101 (=1882 s. 585=1877, s. 586.)**

(1829-*b*)—S. 101—*See* NOS. 1820, 1821, 1822, *supra*, AND NOS. 2802-*f*, 5334, *infra*.

——**S. 102 (=1882, s. 586=1877, s. 586).**

See SPECIAL OR SECOND APPEAL.

(1830)—*S. 102 (=s. 586, Civ. Pro. Code, 1882)—Scope and application.*—S. 586 relates to appeals from appellate decrees, not to appeal from orders. The terms of s. 586 do not refer to the amount in dispute at the time the appeal is preferred, but to the amount or value of the subject-matter of the original suit. SRI BULLORE BHATTACHARJI v. BABURAM CHATTOPADHYA, **11 C. 169.** [*R.*, 17 M.L.J. 376=30 M. 212.]

(1831)—*S. 102 (=s. 586, Civ. Pro. Code, 1882)—Small Cause suit instituted on original side—Second appeal.*—The applicabity of s. 586, Civ. Pro. Code, depends on the nature of the suit and not on the Court in which it is instituted. The section will apply to a case in which the Court which entertained the suit had no jurisdiction to take cognisance of it. MAHADEO v. SUDHU RAM, **26 A. 338** (9 B. 259, *F.*; 1 C. 123, *Diss.*)

(1832)—*S. 102 (=s. 586, Civ Pro. Code, 1882)—Second appeal—Pecuniary limit.*—S. 586 of the Civ. Pro. Code contemplates rather the original character of the suit than the character which it may subsequently assume by operation of findings of the Courts. LAKSHUMANDAS v. ANNA, **6 Bom L.R. 731.**

(1833)—*S. 102 (=Civ. Pro. Code, 1882, s. 586)—Provincial Small Cause Courts Act, s. 23—Second appeal.*—A suit of a nature cognizable by a Court of Small Causes does not cease to be so within the meaning of s. 586, Code of Civil Procedure, by reason of the Court having exercised its discretion under s. 21 of the Provincial Small Cause Courts Act, to direct the plaint to be presented to the Court on its regular side. MUTHUKARUPPAN v. SELLAN, **15 M. 98.** [*F.*, 24 C. 557; *R.*, 21 B. 248, 23 M. 547, F.B.]

(1834)—*S. 102 (=Civ. Pro. Code, 1882, s. 586)—Powers in execution of decree of Small Cause Court—No appeal from.*—S. 586 of the Code applies to proceedings in execution of a decree of a Small Cause Court and consequently no appeal lies from orders passed in such proceedings. DAYARAM MANSARAM KALAR v. SARUPCHAND, **12 C.P.L.R. 12.** (18 A, 481, 11 C. 169, 12 M. 116, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1835)—*S. 102 (=s. 586 Civ. Pro. Code, 1882)—Suit for rent and for a declaration as to the propriety of patta tendered to the tenant—Small Cause suit—Second appal.*—Where, in a suit for rent under Rs. 500, the landlord sued for a declaration as to the propriety of the *patta* tendered to the tenant and for the recovery of the rent, *held*, that, as the plaintiff could have obtained all the relief which he sought in his suit without asking for a declaration, the prayer for a declaration does not prevent the suit being of the nature cognizable in a Small Cause Court within the meaning of s. 586 of the Code and that no second appeal lies in such case. RAMACHANDAIYAR v. MIR MUHAMMED NOORULLA SAHIB, **1 M.L.T. 314, F.B.=16 M.L.J. 477 =30 M. 101.**

(1836)—*S. 102 (=s 586, Civ. Pro. Code, 1882)—Suit to recover Cooks and money cognizable by a Court of Small Causes—Second appeal—Valuation for fiscal purposes and for jurisdiction to be determined by the value put by plaintiff.*—The plaintiff, a widow of a deceased Brahmin priest, entrusted the defendant with certain books, containing the list of her husband's clients, and had authorised him to carry on the business of *purohit* on her behalf and make over the proceeds to her. The suit was brought to recover those books and a sum of Rs. 60, which had been realised by the defendant from the *jujmans* The valuation of the suit was below Rs. 500. *Held*, that the suit was of a nature cognisable by a Court of Small Causes, as it was one for the recovery of moveable property and money, and, consequently, no second appeal would lie. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff upon it in the plaint not only for fiscal purposes but also for purposes of jurisdiction. Where the value is below Rs. 500, s. 586 of the Code forbids the entertainment of a second appeal. HANS RAJ v. RATANI *alias* IWALA DEI, **27 A. 200=A.W.N. 1904, 227.**

(1837)—*S. 102—Second appeal—Nature of suit cognizable by Small Cause Court—Suit for damages for cutting away crop.*—In a suit for damages between two sets of *raiyats*, the plaintiff alleging that the defendant had wrongfully come and cut away the crop on his land, the Courts below found that the defendant had no possession or title in the land and was, therefore, liable to damages. In second appeal by the defendant: *Held* that no second appeal lies in this case. (17 C. 707, *F.*; 25 M. 540, *D.*) *Held*, further, that, although a question of title to land has been tried, it was tried incidentally, and, therefore, the second appeal was incompetent. MANBODH ACHARYA v. ANANTA KARU, **6 Ind. Cas. 415.** (2 C. 470, 1 C.L.R. 33, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1838)—*S. 102 (=s. 586 of Civ. Pro. Code, 882)—Rent—Small Cause.*—A suit for rent (not only house) rent is a suit of a nature cognizable in Courts of Small Causes within the meaning of s. 586, Civ. Pro. Code. MAUNG SIT LE v. MAUNG SHWE THIN, **L.B.R. 1900—1902, Vol. I, 69.** (23 M. 574, *F.*,) [*Overruled*, L.B.R. 1905—1906, 47.]

(1839)—*S.102 (=s. 586, Civ. Pro. Code* 1882) —*Provincial Small Cause Courts Act (IX of* 1887), *sch. I, art. 31—Suit of a Small Cause Court nature—Second appeal—High Court.*—The plaintiff sued to recover from the defendants Rs. 120 as the value of his share in the produce of certain lands alleged to belong jointly to him and the defendants. This right was denied in the written statement. The lower Courts dismissed the suit. On second appeal, a preliminary objection was taken that no second appeal lay, as the suit was of a Small Cause Court nature : *Held*, upholding the objection, that no second appeal lay. The question of title arose incidentally and did not therefore remove the suit from the cognizance of the Court of Small Causes. KESRISANG BANESANG v. NARANSANGH MANABHI, **10 Bom. L.R. 733=32 B. 560.**

(1840)—*S. 102 (=s. 586, Civ. Pro. Code*, 1882) —*Provincial Small Cause Courts Act (IX of* 1887), *s. 23—Small Cause suit—Second appeal —Practice.*—The plaintiff instituted a suit, in a Court having both ordinary and Small Cause Court's jurisdiction, to recover Rs. 75 being the *utpan* of plaintiff's lands wrongfully recovered by defendant. The lower Courts having decreed the suit in plaintiff's favour, defendant presented an appeal to the High Court : *Held*, that the suit being of the nature cognizable in the Court of Small Causes, the second appeal was barred by the provisions of s. 596 of the Code of Civil Procedure. VINAYAK v. KRISHNARAO, **8 Bom. L.R. 239=25 B. 625.**

(1841)—*S. 102(=s 586, Civ. Pro. Code*, 1882) —*Second appeal—Limitation Act (XV of* 1887), *art. 49* —No second appeal lies in suits governed by the Limitation Act, art. 49, as those are suits cognizable by the Court of Small Causes. BATHINI KUMARASAMI NAIDU v. ANKAPPA NAYINI VARU, **5 M.L.T. 201.**

(1842)—*S. 102 (=s. 586 Civ Pro. Code*, 1882) —*Appeal—Suit cognizable by Small Cause Court.*—A suit by a co-sharer to recover his share of the profits of a *khoti takshim* recovered by another co-sharer is a suit cognizable by a Court of Small Causes; and if the claim is below Rs. 500, no second appeal lies as provided by s. 586 of the Civ. Pro. Code, 1882. VASUDEV v. DAMODAR, **6 Bom. L.R. 870.**

(1843)—*S. 102 (=s. 586, Civ. Pro. Code*, 1882)—*Suit for damages for trespass—Value of suit less than Rs. 500—Suit of Small Cause nature—No second appeal.*—Where, in a suit for damages for trespass, the damages claimed were less than Rs. 500, no second appeal lay from the decree in the suit, inasmuch as the suit was not exempted from the cognizance of a Court of Small Causes. TRILOCHANA BAKSHI v. BROJO PATRO, **12 M.L.J. 349.** [*F.*, 26 M. 362=12 M.L.J. 389 ; *Appr.*, 1 Ind. Cas. 592=10 C.L.J. 198.]

(1844)—*S. 102 (=Civ. Pro. Code*, 1882, *s. 586), applicability of, to orders in execution of decrees.*—Where the decree under execution directed the payment of a sum of money less than Rs. 500, and contained no direction for the sale of any immoveable property and was therefore one passed in a suit cognizable by the Court of Small Causes, it was held that no second appeal would lie from orders made in such execution. AITHALA v. SUBBANA, **12 M. 116.** [*Appr.*, 16 A,W.N. 160=18 A. 481. F.B.]

(1845)—*S.* 102 (=s. 586, *Civ. Pro. Code* 1882)—*Small Cause suits.*—A suit for recovery of a rent of less than Rs. 500 and for a declaration that the lands, the rent of which is due are *nunjah* lands is a suit of Small Cause nature and no second appeal lies. RAMA NATHA CHETTIAR v KAMATHA ANTHONI UDAYAN, **16 M.L.J. 432.**

(1846)—*S. 102 (=Civ. Pro. Code*, 1882, *s. 586)—Applicability of, to second appeals from orders in execution.*—Where the suit itself was one of the nature cognizable by a Court of Small Causes, and the value of the subject-matter did not exceed Rs. 500, but a second appeal was sought to be preferred to the High Court from the order of a Subordinate Judge passed in an appeal from the Munsiff's order on an objection filed to an application for execution of the decree in such suit, the second appeal was *held* to be barred by reason of the provisions of s. 586, of the Civ. Pro. Code, which was not inapplicable to orders passed in proceedings in execution of the decree passed in a suit of the description referred to therein, DIN DAYAL v. PATRAKHAN **18 A. 481, F.B.= A.W.N. 1896 160.** (12 A. 579 *Appr.* 11 C. 169=12 M. 116 *R.*) [*F.* 27 C. 484 ; *Appr.* 12 C.P.L.R. 12 ; *Expl. & Appl.* 5 A.L.J. 84, Note ; *R.* 8 O.C. 405.]

(1847)—S. *102—Hut—Immoveable property —Second appeal—Hindu Law—Dayabhaga—Father and son—Son's self-acquired property—Father maintained by son—Father's title to property.*—A hut is immovable property and a suit for a declaration in respect of a hut is not cognizable by the Small Cause Court and therefore, s. 102 of the Civ. Pro. Code does not apply and a second appeal lies in such a suit. Where a Hindu son governed by the *Dayabhaga* school maintains his father without any intention to create any title to any self-acquired property in his father, the latter does not get any present right to such property. ARJUN RAM PAL v. SADANANDA SARMA. **9 Ind. Cal. 1.** (18 I.A. 9, 18 C. 341, *R* ; 10 C.W.N. 765 33 C. 1119, *D.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1848)—S. 102— *Jurisdiction— Provincial Small Cause Court—Standing trees-Immoveable property—Second appeal—Limitation Act (XV of 1877,) sch. II, arts.* 134, 144—Debutter *property purchase of, suit to recover possession.* —Standing trees are not moveable property for the purposes of the Provincial Small Cause Courts Act. (5 A. 564, 14 A. 30, *R.*) Therefore, a suit for the recovery of possession of standing trees is not cognizable by the Small Cause Court and a second appeal lies in such a suit. A suit to recover possession of a *debutter* property sold for value by a *shebait* in excess of his powers must be brought within twelve years from the date of the sale; and the suit is governed either by arts. 134 or 144 of the Limitation Act, 1877. The possession of the defendant, deriving title not from the idol but ignoring its rights must be taken to have become adverse to the idol from the date of the alienation. PURNA CHANDRA CHOWDHURI v. KINKAR MANJHI. **9 Ind. Cas. 133.**

(1849)—S. 102—*See* BEN. ACT VIII OF 1885, ss. 75, 144, 26 C. 842=4 C.W.N. 95.

(1850)—S. 402—Second appeal—Suit to enforce payment of 'begar'—*See* C.P. ACT XVIII OF 1881, s. 4 (3), 6 N.L.R. 117=8 Ind. Cas. 276.

(1851)—S. 102—*See* CESS, 22 C. 680.

(1852)—S. 102—*See* HINDU LAW—MAINTENANCE, A.W.N. 1903. 226.

(1853)—S. 102—Lease—Possession not given as per covenant—Suit for recovery of money—Small Cause suit—Second appeal—*See* LEASE—ZURPESHGI LEASE, 6 Ind. Cas. 704.

(1854)—S. 102—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 7 Ind. Cas. 778.

(1855)—S. 102—*See* PROFITS, SUIT FOR 5, O.C. 130.

(1856)—S. 102—*See* PROVINCIAL SMALL CAUSES COURTS ACT, 1887, ss. 16-23, sch. II, arts. 3, 13, 31, 38, 41, 4 O.C. 89, 1 M.L.J. 166, 6 C.W.N. 687, 14 M.L.J. 480, 30 M. 212=17 M.L.J. 376, 5 O.C. 403, 26 A. 358, A.W.N. 1898, 10, 15 M. 298.

(1857)—S. 102—Failure of consideration—Suit by auction-purchaser for refund of purchase money—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 12 Bom. L.R. 723=7 Ind. Cas. 955.

(1858)—S. 102—*See* SMALL CAUSES COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 9 B. 259, A.W.N. 1898, 113, 22 M. 229.

(1859)—S. 102—Second appeal—Suit to recover money made over by Magistrate acting under s. 517, Crim. Pro. Code—Suit of Small Cause nature—*See* TORT, 9 C.W.N. 495=1 C. L.J. 355.

(1860)—S. 102—Trespass—Suit for damages —Small Cause Court—Jurisdiction— Second appeal—*See* TRESPASS, 10 C.L.J. 198=1 Ind. Cas. 592.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1860-*a*)—S. 102—*See* NOS. 563, 580, 923-*a*, 924, 1013, 1823, *Supra*, AND NOS. 2459-*a*, 2822-*b* 4351, *infra*.

(1861)—*Ss.* 102, 104, *O.* 43. *r.* 1 (=*Civ. Pro. Code*. 1882, *ss.* 586 (28), 588).—The right of appeal conferred by s. 588 of the Code of Civil Procedure is not controlled by s. 586. CHINNATHAMBI GOUNDAN v. CHINNANA GOUNDAN, **19 M. 39.**

(1862)—Ss. 102, 19, 104, O. 43, r. 1—Appeal from order of remand in Small Cause suit—*See* LIMITATION ACT 1908, sch. I, arts. 48, 109, 11 C.W.N. 862.

(1863)—S. 102, O. 41, r. 23—*See* REMAND, 10 C. 523.

——S. 103 (New.)

See SPECIAL OR SECOND APPEAL.

(1863-*a*)—*S. 103—High Court—Second appeal—Power to consider evidence on a point not referred to by lower appellate Court—Practice.* —The High Court, under s. 103, Civ. Pro. Code, can consider the evidence on any point, which was taken in the grounds of appeal, but which was not referred to by the lower appellate Court. CHELLA NAGI REDDI v. JEVIPOTHULA VENKATA REDDY, **5 M.L.T. 288.**

——S. 104 (=1882. s. 588, para. 2=1859, ss. 363, 364, 365.)

See APPEAL—ORDERS.

(1864)—S. 104—*See* NOS. 57, 71-*a*, 72, 73, 74, 75, 87, 92, 93, 94, 95, 96, 97, 98, 99, 100, 121, 153, 192, 466, 925, 926, 927, 928, 929, 984, 1028, 1029, 1032, 1043, 1062, 1063, 1066, 1067, 1071, 1077, 1085, 1205, 1286, 1509, 1599, 1696-*a*, 1697, 1700, 1861, 1862, *supra* and NOS. 1920-1921, 1932, 1939, 2182, 2188, 2246, 2374, 2375, 2412 *a*, 2477, 2477-*a*, 2477-*b*, 2709, 2725-*a*, 2765, 2770, 2774-*c*, 2780, 2792, 2793-*b*, 2856, 2856-*a*, 2861, 2884, 2884-*a*, 2884-*b*, 2910, 2911, 2913, 3002, 3020, 3027, 3041, 3145, 3169, 3898, 4110, 4134, 4242, 4317, 4318, 4335, 4337, 4338, 4591, 4592, 4617, 4635, 4657, 4658, 4659, 4669, 4726, 5036, 5039, 5085, 5105, 5117, 5119, 5141, 5168, 5243, 5250, 5331, 5332, 5333, 5358, 5360, 5401, 5530, 5531, 5532, 5533, 5534, 5535, 5536, 5537, 5538, 5539, 5540, 5541, 5542, 5543, 5544, 5545, 5546, 5547, 5548, 5570, 5584, 5694, 5695, 5696, 5697, 5816, 5819, 5850, 5886, *infra*.

(1864-*a*)—*S. 104, sub-s. 1, cl. (f), second schedule, r. 21—Order directing award to be filed appealable, but not decree following the award.*—Where the District Judge orders that a certain award shall be filed, and gives the plaintiff a decree "in accordance with that award," no appeal lies against the decree *qua* decree under s. 21 of the second schedule. But an appeal lies from the order directing an award to be filed under s. 104 of the Code. In this case, therefore, though the appeal was filed as an appeal from the decree and the stamp is paid on that footing, their Lordships treated it as an appeal against the order directing the

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award to be filed and overruled the preliminary objection. Further, *held*, that, as there is no illegality apparent on the face of the award, and as the alleged irregularities were only the result of the informal character of the proceedings before the arbitrators, to which both parties consented, there is no ground for interference by the High Court. SITA RAMIAH v. PITCHAYYA, **2 M.W.N. 1911, 223.**

(1865)—*S. 104, cl. 2—Order passed in appeal—Appeal against such order—Bar—Application to set aside* ex parte *decree dismissed—Appeal.*—Where an appeal was preferred against an appellate order passed by a District Judge, who set aside the order of the District Munsif, on the ground that an amendment in the Limitation Act cannot take away the right to obtain reliefs which had become already vested prior to the amendment. *Held*, that the appeal was barred under s. 104 (2), Civ. Pro. Code, 1908. VENKATACHELLAYA v. SUBRAMANIA AIYAR, **21 M.L.J. 442=9 Ind. Cas. 55.**

(1866)—*S. 104, sub-s. 2, O. 21, r. 9—Order on application under O. 21, r. 89—Order passed on appeal—No second appeal—Case under ss. 310-A, 244, Civ. Pro Code, 1882—Right of second appeal—Effect of s. 104, sub-sec 2, Civ Pro. Code, 1908.*—No second appeal lies from an order passed in appeal preferred against an order made on an application under O 21, r. 89, Civ. Pro. Code, 1908, s. 104, sub-sec. 2, Civ. Pro. Code, 1908, has taken away the right of second appeal from cases under s. 310-A read with s. 244, Civ. Pro. Code. 1882, in which such appeal was allowed under the Code of 1882. ASIMADDI SHEIKH v. SUNDARI BIBI, **38 C. 389.**

(1867)—*Ss. 104, 105, 154—Interpretation of statutes—Retrospective effect—Appeal—Order refusing to file an award made in 1909—Application in 1908.*—The Code of Civil Procedure, 1882) granted no appeal to a higher tribunal from an order refusing an application to have an award made a rule of Court, but the Code of 1908 does grant such an appeal *vide* s. 104 *(f)*. Where, therefore, an application was made on the 19th September, 1908, to make an award a rule of Court, and the application was rejected on the 18th June, 1909, *held* that the provisions neither of s. 154 nor of s. 104 of the Code applied, and the appeal was not maintainable. A Court will not ascribe retrospective effect to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature. GAJRAJ LAL v. RAMDIN LAL, **7 A.L.J. 1070 =8 Ind. Cas. 8.**

(1868)—*S. 104, O. 9, rr. 3, 4, and O. 43, r. 1—Suit dismissed for non-appearance of both parties—Application for restoration of suit dismissed—Appeal.*—An order passed under O. IX, r. 4, refusing to restore a suit dismissed for default of appearance of *both* parties under O. IX, r. 3, is not appealable. SHADDI LAL v. KARM DIN, **9 Ind. Cas. 238.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1868-*a*)—**S.104, O. XLI, r. 19 and O. XLIII, r. 1—Appeal dismissed for default—Mistake of pleader—Application to have appeal re-opened—Opportunity to be given to applicant to prove sufficient cause for non-appearance—***See* **LIMITATION ACT, 1908, ss. 4, 5, U.B.R. 1907, 3rd Qr., Limitation, 1.**

(1869)—*S. 104, O. 43, r. 1* (=s. 588, *Civ. Pro. Code*, 1882)—*Applicability.*—S. 588 applies only to orders made by Subordinate Courts. The power of the High Courts are not derived from the Civ. Pro Code. An order of a Judge of the High Court exercising its original civil jurisdiction, though made in accordance with the procedure laid down in the Code, can hardly be said to be made "under the Code."—*Per Amir Ali, J.* THOLSEE MONEY DASSEE v. SUDEVI DASSEE, **26 C. 361=3 C.W.N. 347.**

(1870)—*S. 104, O. 43, r. 1* (=s. 588, *Civ. Pro. Code*, 1882)—*Right of appeal, effect on.*—S. 588 of the Civ. Pro. Code does not take away the right of appeal given by cl. 15 of the Letters Patent. SECRETARY OF STATE v. JEHANGIR, **4 Bom. L.R. 342.**

(1871)—*S. 104, O. 43, r. 1* (=*Civ. Pro. Code*, 1882, s. 588)—*Letters Patent, s. 15—Orders passed in appeal under s. 588.*—"*Final*," *meaning of appeal from such order—Judgment of single Judge of High Court.*—The word "final" in the concluding sentence of s. 588 of the Code is not used in the sense that it is not subject to review by the same Court or to revision by the High Court or to appeal to His Majesty in Council under s. 595 of the Code. It is used in the section simply in the sense that there shall be no second appeal to a Court of a higher grade, and in this view, it is not consistent with the provision made by s. 15 of the Letters Patent in appeals from the judgment of one Judge of the High Court to the High Court. Consequently an appeal lies under s. 15 of the Letters Patent from an order passed by a single Judge of the High Court under s. 588 of the Code. MUTHUVAIEN v. PERIASAMI IYEN, **13 M.L.J. 497.**

(1872)—*S. 104, O. 43, r. 1* (=*s. 588, Civ. Pro. Code*, 1882)—*Scope.*—S. 588, Civ. Pro. Code, 1882, by enacting that the orders passed under it shall be final, only bars appeals from those orders, but does not intend to bar any interference with them by revision. *Per Banerjee, J.* MATHURA NATH SARKAR v. UMESH CHANDRA SARKAR, **1 C.W.N. 626.**

(1873)—*S. 104, O 43, r. 1* (=s. 588, *Civ. Pro. Code*, 1882)—*Insolvency proceedings, order by Subordinate Judge in—Appeal.*—An appeal lies against an order of a Subordinate Judge passed on an insolvency petition presented in execution of a Small Cause decree, to the District Court, under s. 588, Civ. Pro. Code, and not to the High Court. SAMI AIYAR v. AYILAM VYTHI PATTER, **4 M.L.T. 455=19 M.L.J. 68=4 Ind. Cas. 617.** (12 M. 472, 15 M. 89, 23 A. 56, 27 B. 604, *Relied on*; 17 M. 377, *Not F.*)

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(1874)—*S. 104, O. 43, r. 1 (= Civ. Pro. Code, 1882), s. 588 (17)—Appeal—Insolvent--Distribution of assets—Priority.*—No appeal lies under s. 588 (17) of the Code from an order relating to the distribution of the assets of a judgment-debtor who had applied to be declared an insolvent. ALLAHDAYI v. KISHEN SHAHI, **A.W.N. 1883, 255.**

(1875)—*S. 104, O. 43, r. 1 (=s. 588 (6)—Appealibility of order returning plaint.*—An appeal from an order of a Court of Appeal returning a plaint for amendment or for being presented to the proper Court does not lie under s. 588 (6) Civ. Pro. Code, 1882, which covers only orders passed by a Court of first instance. NADHU v. NIHALA, **15 P.R. 1898.** (3 A. 456, *F.*) [*Not F.*, 59 P.R. 1899.]

(1876)—*S. 104, O. 43, r. 1 (=s. 588, cl. 28, Civ. Pro. Code*, 1882)—*Remand on questions of fact—High Court cannot interfere.*—Where the appellate Court remands a case on questions of fact, and there is no question of law, the High Court cannot interfere in appeal from the order of remand. JOSEPH ARUMUGAM PILLAI v. MURUGA PILLAI, **6 M.L.T. 198=3 Ind. Cas. 283.** (19 M. 422, 15 A. 413, 20 A. 42, *F.*)

(1877)—*S. 104, O. 43, r. 1 (=Civ. Pro. Code, 1882, s. 588) — Powers of appellate Court in appeal from order of remand.—Letters Patent, s. 15—Right of appeal from order.*—In an appeal under s. 588 of the Civ. Pro. Code, from an order of remand passed by the first appellate Court under s. 562, the High Court cannot only deal with the correctness of the lower Court's decision on the preliminary point, but also pass a final decree in the case if it thinks fit, instead of remanding the appeal for disposal by the lower Court on the merits. S. 588 is applicable to the High Court under s. 632 of the Civ. Pro. Code. An order, therefore, by a single Judge sitting in appeal from an erroneous order of remand, is not appealable, since it is one passed under s. 588 of the Code. SANKARAN v. RAMAN KUTTI, **20 M. 152=6 M.L.J. 232.** [*Diss.*, 26 C. 361; *F.*, 20 M. 407.]

(1878)—*S. 104, O. 43, r 1 (=s. 588, Civ. Pro. Code*, 1882)—*Order passed under s. 225 of Civ. Pro. Code—Appeal.*— Where the Court to which a decree is sent for execution proceeds under s. 225 of the Civ. Pro. Code, 1882, and comes to the conclusion that the original Court had no jurisdiction to pass the decree and declines to become the executing Court, the order so passed does not fall within the purview either of s. 244 or 588 of the Civ. Pro. Code and cannot be appealed against. BHAGWANTAPPA v. VISHWANATH, **6 Bom. L.R. 342 =28 B. 378.**

(1879)—*S. 104, O. 43, r. 1 (=Civ. Pro. Code, 1882, s. 588, cl. 28)—Decision in summary suit under Rent Recovery Act—Remand by District Court on appeal—Validity of remand order.*—An appeal was preferred from the order

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of a Sub-Collector releasing certain property from attachment under the Rent Recovery Act. The District Court reversed the finding of the Sub-Collector and remanded the suit under s. 562, Civ. Pro. Code, for disposal on the merits. *Held* that it was competent to the District Court to make the order under s. 562 of the Code. The judgment or adjudication by the Sub-Collector was a formal expression of an adjudication upon a right claimed within the meaning of the definition of "decree" contained in s. 2 of the Code. It was also a formal expression of opinion upon a right claimed in a Civil Court. VEERASWAMY v. MANAGER, PITTAPUR ESTATE, **26 M. 518.** [*R.*, 120 P.R. 1907.]

(1880)—S. 104, O. XLIII, r. 1—*See* CIV. PRO. CODE, 1908, O. XXII, r. 5, 4 Bom. L.R. 980=27 B. 162.

(1881)—S. 104, O. XLIII, r. 1—*See* LETTERS PATENT—HIGH COURT, 1865—BOMBAY, 11 Bom. L.R. 245=2 Ind. Cas. 150.

(1882)—S. 104, O. XLIII, r. 1—*See* LETTERS PATENT—HIGH COURT, 1865—MADRAS, cl. 15, 20 M. 407=6 M.L.J. 125.

(1883)—S. 104, O. XLIII, r. 1—Order returning memo. of appeal for presentation to proper Court—Appeal—*See* LETTERS PATENT—HIGH COURT, 1865, N.W.P., s. 10, 1 Ind. Cas. 137.

(1884)—S. 104, O. XLIII, r. 1—*See* PARTIES TO SUIT—ADDITION OF PARTIES TO SUIT, A.W.N. 1896, 101.

(1885)—S. 104, O. XLIII, r. 1—*See* PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS, 28 C. 171=5 C.W.N. 307.

(1886)—S. 104, O. XLIII, r. 1—*See* PLAINT—AMENDMENT OF PLAINT, 3 M.L.J. 253.

(1887)—S. 104, O. XLIII, r. 1—*See* PRACTICE AND PROCEDURE, 1 A.L.J. 695.

(1888)—S. 104, O. XLIII, r. 1—*See* RECEIVER, A.W.N. 1903, 67.

(1889)—*S. 104 (2), O 43, r. 1—Second appeal from order—Not maintainable—O. 43, r. 1—Order of appellate Court remanding the case—Whether appeal lies when order made in appeal from order.*—When a lower appellate Court makes an order in an appeal from an order, as allowed by O. 43 of Act V of 1908, no further appeal lies from the order of the appellate Court. S. 104, cl. 2, contemplates only one appeal from an order and not two appeals. When a Munsiff returned a plaint for presentation to the Revenue Court holding that he had no jurisdiction, and an appeal was preferred to the District Judge who transferred it to the Subordinate Judge who remanded the case to the Munsiff, *held* that no second appeal lay to the High Court, inasmuch as the District Judge was competent to hear appeals from the orders of both Civil and Revenue

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Courts and s. 197, Agra Tenancy Act, governed the case, O. 43, r. 1, contemplated an appeal from an order of remand under s. 41, r 23, only in cases in which, if the appellate Court had made a decree, an appeal could have been preferred from such a decree. NAUBAT SINGH v. BALDEO SINGH, **8 A L.J. 312=9 Ind. Cas. 666.**

(1890)—S. 104 (2)—O. 43, r. (1) *(a)*—Order of remand—Jurisdiction—Appeal—Revision—*See* PUN. ACT XVIII OF 1884, s. 70 (1) *(a)* *(b)*, 147 P.L.R. 1911.

(1891)—*S. 104, O 43, r. 1 and s. 47 (= ss. 588, 244, Civ. Pro. Code, 1882)—Purchase in execution by holder of decree—Order disallowing application for amendment of sale-certificate—Appeal.*—An order disallowing an application by a decree-holder, who has purchased in execution of his decree, praying for an amendment of the sale-certificate which had omitted to specify some portion of the property sold to him, could not be appealed against. The order is not one appealable under s. 588 of the Code; nor can it come under s. 244 of the Code. The sale-certificate is issued to the decree-holder not in his capacity as such, but as the purchaser in auction; and the question of amendment of the sale-certificate and of delivery of possession to the auction-purchaser is not a question which arises between the parties to the suit or their representatives and relates to the decree so as to fall within the provisions of s. 244 of the Code. SADDO KUNWAR v. BANSIDHAR, **23 A. 476=A.W.N. 1901, 156.** (26 C. 529, 18 A. 36, *R.*)

(1892)—S. 104, O. XLIII, r. 1, s. 105—*See* LETTERS PATENT, HIGH COURT, N.W.P. s. 10, 11 A. 375=9 A.W.N. 70.

(1893)—*S. 104, O. 43, r. 1, s. 105, O. 9, r. 13 (=ss. 588 591, 108, Civ. Pro. Code, 1882)—Order setting aside ex parte decree, not to be raised as ground of appeal from decree in suit.*—The words "affecting the decision of the case" in s. 591, Civ. Pro. Code, mean affecting the decision of the case on its merits. Therefore, an order setting aside an *ex parte* decree passed under s. 108, does not come within the purview of the section. Such an order is final and cannot be put forward as a ground of appeal from the decree in suit. TRASADDUQ HUSSAIN v. HAYAT-UN NISSA. **25 A. 280=A.W.N. 1903, 39.** (22 C. 981, 24 A. 464, *F.*) [*F.*, 9 C.W.N, 584, A.W.N. 1905, 274=1 M. L.T. 52=3 A.L.J. 30, 8 C.L.J 308, 2 N.L.R. 179.]

(1894)—S. 104, O. XLIII, r. 1, s. 106—*See* PUN. ACT XVIII OF 1884, ss. 23 *(b)* and 43 (1) *(b)*, 89 P.L.R. 1904=83 P.R. 1904.

(1895)—S. 104, O. XLIII, r. 1, s. 106, inapplicability of, to appeals from judicial orders passed by a Collector as a Revenue Court under the Punjab Tenancy Act—*See* PUN. ACT XVI OF 1887, ss. 80 *(b)*, 88, 1 P.R. 1905, Rev.=53 P. L.R. 1906.

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(1896)—S. 104, O. XLIII, r. 1, s. 106—*See* DISTRICT JUDGE, JURISDICTION OF, **17 M. 377=3 M.L.J. 97.**

(1897)—*S. 104, O. 43, r. 1, ss. 106, 105 (= ss. 598, 589, 591, Civ. Pro. Code, 1882)—Limitation Act (XV of 1877), sch. II, arts. 10 and 120—Pre-emption suit—Oral sale—Physical possession.*—An order passed in an appeal presented under s. 588 of the Civ. Pro. Code is final. (24 M. 447, *F.*; 89 P.R. 1891, 18 B. 35, *R.*) S. 591 of the Civ. Pro. Code provides for appeals from decrees attacking the correctness of orders which are not appealable under s. 588 or which have not been appealed under that section. (20 A. 42, *R.*) The words "physical possession" in art. 10 of the second schedule of the Limitation Act mean personal and immediate possession. A suit for possession of joint and undivided share in land by right of pre-emption upon an oral sale is governed by art. 120 of the second schedule of the Limitation Act. KISHEN CHAND v. KEHR SINGH, **140 P.L.R. 1904=14 P.R. 1904.**

(1898)—*S. 104, O. 43, r. 1, s 115 (=ss. 588, 622, Civ. Pro. Code, 1882)—Orders passed on appeal under s. 588—High Court—Revision.*—The High Court has power under s. 622, to interfere with orders passed in appeal under s. 588. VENURI VEKATASUBBIAH v. GAGGAYA, MINOR BY NEXT FRIEND, MAHALAKSHMI AMMAL, **3 Ind. Cas. 724=6 M.L T. 348.**

(1899)—*S. 104, O. 43, r. 1, s. 115 (=Civ. Pro. Code, 1882, ss. 588, 622)—Application to set aside ex parte decree—Second appeal—Revision.*—No appeal lies against an appellate order reversing a refusal to set aside an *ex parte* decree; nor would the High Court interfere in revision in such a case. AUBINASH CHUNDER MOOKERJEE v. MARTIN, **8 C. 832.**

(1900)—*S. 104, O. 43, r. 1, ss. 115, 114, O. 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—Ss. 588, 622—Revision, application for—Appeal from orders against which no appeal lies under Civ. Pro. Code, but appealable under Lower Burma Courts Act—Lower Burma Courts Act, s. 22—Review of order.*—Where an application for revision under s. 622, Civ Pro. Code, was presented to the Court of the Judicial Commissioner against an order against which, under the Civ. Pro. Code, no appeal was allowed to the Court and this Court holding that an appeal lay under s. 622, Lower Burma Courts Act, treated the application as an appeal and dealt with it as such, *held*, that while the proper course to be followed was to have rejected the application for revision and to have directed that an appeal be filed the error, which was of a purely technical kind, did not in itself constitute a sufficient reason within the meaning of s. 623, Civ. Pro. Code, to justify a review of the order. GOVINDASAWMY NAIKEN v. KALLY, **L.B.R. 1893—1900, 540.** (1 C. 197, 24 W.R. 186, *R.*)

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(1901)—S. 104, O. XLIII, r. 1, ss. 115 and 141—*See* APPEAL- GENERAL, 48 P.R. 1901.

(1902)—*S. 104, O. 43, r. 1, O. 1, rr. 8 (2), 10 (2) (3) (5) and 11 (= ss 588, 32, Civ. Pro. Code,* 1882)—*Court's power to strike out name of co-defendant after first hearing—Appeal.*—Under s. 32, a Court is not competent to strike out a co-defendant's name after the first hearing of a suit. An appeal lies under s. 588 (*b*) from the Court's order returning the plaint for amendment in this particular after the first hearing. FATEH ALI v. NIZAM DIN, **71 P R. 1907=37 P.L.R. 1908.** (7 A. 79, F.B., *F.*; 1 P.R. 1900, 14 B. 232, 1 P. R. 1903, *R.*)

(1903)—*S. 104, O. 43, r. 1, O. 9, r. 13 (= ss. 588 (9), 108, Civ. Pro. Code,* 1882)—*Order setting aside an* ex parte *decree, no appeal lies from.*—Where an application made, under s. 108 of the Code, to set aside an *ex parte* decree was accepted and order pased setting the decree aside, no appeal lies from such an order, s. 588 (9) of the Code allowing appeals only in the case of orders rejecting applications under s. 108. BURA RAM v. MITHA RAM, **103 P R. 1905=45 P.L.R. 1906.** (16 C. 426, *R. & F.*)

(1904)—S. 104, O. XLIII, r. 1, O. XXI, r. 2, ss. 47, 2—*See* APPEAL—DECREES—EXECUTION OF DECREES, 14 M. 99.

(1905)—*S. 104, O. 43, r. 1, O. 41, r. 23 (= (ss. 588 (6) and 562)—Suit against surety without impleading judgment-debtor—Amendment of plaint.*—The defendant stood surety for one against whom the plaintiff executed a decree and whose land he attached. When the defendant-surety made default in the observance of the surety-bond, the plaintiff sued him. But the first Court held that the original judgment-debtor also should have been impleaded and that the plaintiff should also have sued for the possession of the land attached by him and returned the plaint for amendment. On appeal the District Judge remanded the case under s. 562 for decision on the merits. *Held* that the proper section for the Judge to proceed under was s. 588 (6), as no decree had been passed by the first Court and that the District Judge should have simply set aside the order of the first Court and directed it to decide the case on the plaint as it stood, though the error in the order of the District Judge was immaterial, considering that the order of the first Court in returning the plaint was wrong. JAHAN KHAN v. CHANDRA SINGH, **59 P.R. 1896.**

(1906)—*S. 104, O. 43, r. 1, O. 47, rr. 7, 9, (=Civ. Pro. Code,* 1882, *ss. 588, 629)—Order granting review, no second appeal lies from*—S. 588 does not allow a second appeal against an order under s. 629 since such an order is not itself a decree. PAPPAYYA v. CHELAMAYYA, **12 M. 125.** (11 C. 296, *F.*)

(1907)—*S. 104, sch. 2, r. 11—Indian Arbitration Act (IX of* 1889), *s. 10—Arbitrators*—**Civ. Pro. Code (Acts V of 1908,** XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Reference to arbitration—Difference in opinion of arbitrators on a question of law—Statement of a special case for the opinion of the Court—Appeal from the Court's order.—The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons; and a consent of Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that, in case of disagreement between the arbitrators, which prevented them from making an award, the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to an umpire. But the arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case, under the Civ. Pro. Code, 1908. sch. II, r. 11, and the Indian Arbitration Act, s. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision: *Held* that no appeal lay, since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion; but there was simply a statement of a question of law for the opinion of the Court. The case was not, therefore, one which fell under r. 11 of the second schedule of the Civ. Pro. Code, 1908; but it fell under s. 10 of the Indian Arbitration Act, in so far as it related to the second agreement. PURSHOTUMDAS RAMGOPAL v. RAMGOPAL HIRALAL, **12 Bom. L.R. 852=8 Ind. Cas. 171.**

(1908)—*S. 104 (f), sch. 2, r. 21 (1) and (2)—Appeal—Order filing an award—Decree based thereon—Provisions of the Code, whether antagonistic—Intention of Legislature*—An appeal lies, under s. 104 (*f*) of the Code of 1908, from an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under cl. 21 (1) of the second schedule to the Code, proceeded to pronounce judgment according to the award. Per *Reid, C.J., and Kensington, J.*—The language of s. 104 (*f*) is very clear and the fact that a later provision of the Code, cl. 21 (2), sch. II, bars an appeal from a decree based on an award does not cancel the earlier provision. The two provisions of the Code are not antagonistic. If the order filing an award is set aside, there is no award on which judgment and decree can be based. The absence of any ground, such as is mentioned or referred to in cl. 14 or cl. 15 of sch. II, is a condition precedent to passing an order filing the award. (33 C. 757=3 C.L.J. 450=10 C.W.N. 609, 27 P.R. 1910, Cr.=69 P.L.R. 1910=22 P.W.R. 1910, Cr.=6 Ind. Cas. 736, 1 P.R. 1908, F.B.=58 P. W.R. 1907, *D.*) Per *Ratigan, J.*—The two provisions of the Code are all for practical purposes in direct conflict. The result of allowing an appeal from order filing an award is tantamount to allowing an appeal from the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXII of 1861 and VIII of 1859)—*continued.*

decree based on the award. The intention of the Legislature expressed in cl. 21 (2), sch. II, is to all intents and purposes nullified by the provision in cl. *(f)* of s. 104. The intention of the Legislature is to allow an appeal from the order filing an award merely when such order dealt with the objection that the matter had not been referred to arbitration or that no award had in fact been passed. RAM DITTI v. AMAR SINGH, **172 P.L.R. 1911.**

——S. 103 (=1882, s. 591=1877, s. 591.)

See APPEAL—ORDERS.

(1909)—*S. 105 (=s. 591, Civ. Pro. Code, 1882)—Appeal against decree—Sole ground directed against interlocutory order in suit—Maintainability of appeal.*—S. 591, Civ. Pro. Code, contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591. (18 A. 19, *R.*) Where, therefore, an appeal was made ostensibly against a decree in the suit, while the sole ground of the appeal was against an interlocutory order passed therein, *held* that the appeal was not maintainable. SHER SINGH v. DIWAN SINGH, **22 A. 366=A. W.N. 1900, 109.** [*Not F.*, 9 O.C. 80; *R.*, 5 A.L.J. 644=A.W.N. 1908, 242=4 M.L.T. 400.]

(1910)—*S. 105 (=s. 591, Civ. Pro. Code, 1882)—Construction of the word "decree," in—Appeal after remand and decision by original Court—Appellate Court's power to review its order of remand.*—The word "decree in s. 591 should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. (14 W.R. 235, 21 W.R. 199, 3 A. 755, 14 A. 348, 32 B. 432, *R.*) It is not open to a Court of Appeal to review its own order of remand, on the filing of an appeal after remand by the appellate Court and the subsequent decision by the original Court. JAMMALAMADAKU SUBBALAKSAMAMMA v. JAMMALA VENKATARAYADU, **3 M.L.T. 75=32 M. 318=2 Ind.Cas. 525.** [*Doubted*, 7 M.L.T. 93.]

(1911)—*S. 105 (=Civ. Pro. Code, 1882, s. 591)—"Error, defect or irregularity."*—These words mean an error, defect or irregularity in procedure of law and not in matters of fact. And even then, *i.e.*, where there is any defect, etc., in procedure or in law, it should be such as to affect the decision of the case. SANKALI v. MURLIDHAR, **12 A. 200.** [*Appl.*, 27 B. 162.]

(1912)—S. 105=(1882, *Civ. Pro. Code*, s. 591)—*Appeal—Remand—Appeal ostensibly from final decree, but practically from order of remand.*—*Held*, that s. 591 of the Code of Civil Procedure does not enable a litigant to avoid limitation by coming up under s. 591, when the only ground of appeal is the order made under s. 562. DHARI UPADHIA v. RAUSHAN CHAUDHRI, **A.W.N. 1899, 136.** (18 A. 19, *F.*) [*D.*, A. 430.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1913)—*S. 105=s. 591, Civ. Pro. Code, 1882—Order for compensation embodied in decree—Appeal.*—There is no appeal against an order for compensation though it is embodied in the decree. S. 591, Civ. Pro. Code, does not apply to such a case. KANDAPPA CHETTY v. CHINNAPPIA, **8 Ind. Cas. 164.** (24 M. 62, *F.*)

(1914)—*S. 105 (=Civ. Pro. Code, 1882, s. 591)—Punjab Courts (XVIII of 1884 as amended), s. 70 (b)—Regulation XVII of 1806—Demand.*—In a plaint in a suit for foreclosure of a mortgage there was no mention of a demand for payment having been made before the application for the issue of notice under Regulation XVII of 1806 on the mortgagor, but it was expressly stated in the application that several demands had been made. The suit was decreed and the decree was confirmed on appeal. The defendant filed an application under s. 70 (*b*) of the Punjab Courts Act in the Chief Court and objected for the first time that there was no proof of the demand of payment previous to the issue of the notice, and it was, therefore, bad in law. It was contended for the plaintiff that the objection was made too late, and that he should at all events be given an opportunity to produce evidence. The Chief Court allowed the objection to be urged and remanded the suit for the evidence of the parties to be taken on the question of demand of payment before the application, or the issue of the notice of foreclosure. It is incumbent on the plaintiff to prove affirmatively by satisfactory evidence that the proceedings for the issue of notice were strictly regular and in accordance with law (11 C. 111, P.C., 16 P.R. 1888, *F.*) The terms of s. 591 of the Civ. Pro. Code do not apply to revisions under s. 70 (*b*) of the Punjab Courts Act. MELLA v. RALLIA RAM, **162 P.L.R. 1903=71 P.R. 1903.**

(1915)—*S. 105 (=s. 591, Civ. Pro. Code, 1882)—Appeal against decree—Erroneous decision in an interlocutory order—Ground of appeal.*—An appeal lies against the final decree of a Court within the meaning of s. 591, Civ. Pro. Code, 1882, though the only ground of appeal is the erroneous decision of Court in regard to an interlocutory order. It is not necessary for a suit or to appeal from every interlocutory order by which he may feel himself aggrieved. Any erroneous interlocutory order may be set aside in the appeal from the final decree. RAJAH DHAMARA KUMARA THIMMANAYANIM BAHADUR VARU v. BUKKAPATNAM VENKATACHARLU, **6 Ind Cas 239=8 M.L.T. 72=20 M. L.J. 805=M.W.N. 1910 226.** (7 C. 148, 14 B. 232, 7 M.I.A. 283, 22 A. 360, 23 M. 260, 18 A. 19, 33 M. 494, 21 M. 344, *R.*)

(1915-*a*)—*S. 105 (1)—Application for decree absolute—Extension of time, question of—One affecting the decision of the case—Ground of appeal.*—Where a mortgagee applies for a decree absolute, but is opposed by an application for extension of time, the question whether time

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

should be granted or not, and, if granted, on what term, is one 'affecting the decision of the case' within the meaning of s. 105 (1), Civ. Pro. Code, 1908, and may be urged as a ground of objection in an appeal from the final decree. PANDAR v. MAHADEO, **7 N.L R. 162**. (22 C. 931, 9 C.W.N. 584, 25 A. 280, 24 A. 454, 2 N.L.R. 179, 2 N.L.R. 137, 3 N.L.R. 55, 3 N.L.R. 146, *R.*]

(1916)—S. 105—*See* APPELLATE COURTS—POWERS OF APPELLATE COURT, 9 A. 447=7 A.W.N. 89.

(1917)—S. 105—*See* ARBITRATION—REFERENCE TO ARBITRATION, U.B.R, 1897—1901, Vol. II, 310.

(1918)—S. 105—*See* HINDU LAW—INHERITANCE, 83 P.R. 1894.

(1919)—S. 105—*See* PARTIES TO SUITS—GENERAL, 7 C. 148.

(1919-*a*)—S. 105—*See* NOS. 1770, 1824, 1867, 1892, 1893, 1897, *supra*, AND NOS. 2183, 2774-*c*, 2831, 2861, 2906, 3004, 3005, 3006, 3049-*a* 3062-*c*, 3898, 4626, 5036, 5124, 5340, 5545, 5546, 5547, 5548, 5549, 5550, 5584, 5696, 5872, *infra*.

(1920)—*Ss. 105, 104, O. 43, r. 1* (=*ss. 59 and 588, Civ. Pro. Code*, 1882)—*Letters Patent, s. 15—Decree for account—Order appealable.*—An order varying the report of a Commissioner, appointed to take partnership accounts, is not one of those orders indicated in s. 588, Civ. Pro. Code. It falls within the concluding provision of s. 591 of the Code, and consequently any error in it, may be set forth as a ground of objection in the memorandum of appeal against a decree based upon it. JAMSETJI v. DADABHOY, **2 Bom. L.R 649=24 B. 302.**

(1921)—*Ss. 105, 104, O. 43, r. 1 and O. 47, rr. 7 and 9* (=*ss. 591, 588 and 629, Civ. Pro. Code*, 1882.)—The provisions of s. 629 are not controlled or superseded by s. 591 of the Civil Procedure Code. This appears from the fact that, in appealable cases, an appeal is certainly allowed from the order, although the order is not one of those specified in s. 588. GYANUND ASRAM v. BEPIN MOHUN SEN, **22 C. 734.** [*F.*, 24 P.L.R. 1902=33 P.R. 1902; *Diss.*, 23 M. 496.]

(1922)—*Ss. 105, 108, 109—Privy Council appeal—Order of remand—Decree or final order.*—An order of remand is not a decree or final order within the meaning of s. 109 of the present Code. Hence, where an application was made for leave to appeal to His Majesty in Council from an order of the High Court reversing the decree of the lower Court on a preliminary point and remanding the cause for trial on the merits, *held* that the order was an interlocutory order, and therefore, an application for leave to appeal to His Majesty in Council did not lie. S. 105 of the Civ. Pro. Code, is not applicable to Privy Council appeals, having regard to the language of s. 108. S. 109 and the following sections deal with such appeals. AHMED HUSAIN v. GOBIND KRISHNA NARAIN **8 A.L.J. 192.**

(1923)—*Ss. 105, 115* (=*Civ. Pro. Code*, 1882, *ss. 591, 622*)—*Interlocutory order capable of being made ground of objection in appeal from final decree—Power of High Court to revise such order.*—Where an interlocutory order could, under s. 591, be made the ground of objection in the appeal from the final decree, the order could not be revised under s. 622, though there was no appeal therefrom. SREEMAN SADAGOPA SRINIVAS SWAMI v. K. RAMANUJA CHARIAR, **5 M.L J. 75.**

(1923-*a*)—*Ss. 105, 115, O. 41, r. 23—Appeal—Remand order—Second appeal when lies—Revision—Interference with remand orders—Punjab Courts Act* (*XVIII of* 1884), *ss. 40, 70*—"*Varied or reversed otherwise as to costs.*"—An order of remand is appealable only in cases in which the decree, which would have been passed by the appellate Court had that Court, instead of remanding the case under O. XLI, r. 23 of the Code decided, the whole suit and passed a decree, is appealable. Where an appellate Court has remanded the case under O. XLI, r. 23, it is impossible to say, if the decree, which might have been passed by the Court had it not remanded the case, would have "varied or reversed otherwise than as to costs" the decree of the Court below. In a case where it is impossible to say whether the order is appealable or not, it must be held that no express provision for appeal has been made and that the order is not appealable. No appeal lies from an order of remand passed by an appellate Court in a land suit of the jurisdictional value of Rs. 707, or a Small Cause suit of the jurisdictional value of Rs. 1,170. The High Court should not interfere with orders of remand on the revisional side. FAIZ AHMAD v. BADAR DIN, **50 P.R. 1911.** (101 P.R. 1910, 8 Ind. Cas. 1157, 41 P.L.R, 1911, *F.*)

(1924)—*S. 105, O. 9, r. 13* (=*ss. 591, 108, Civ. Pro. Code*, 1882)—*Rule discharged by High Court—District Judge—Power to re-open question—Order setting aside ex-parte decree—Appeal, if open to attack in—Petition to High Court—Facts in judgment—Affidavit, if necessary.*—An *ex-parte* decree was set aside under s. 108 of the Code of Civil Procedure by the Munsiff. A rule to set aside this order was discharged by the High Court. Subsequently on appeal from the final decree, the District Judge set it aside on the ground that the order under s. 108 was not proper. *Held*, the District Judge had no jurisdiction to consider the propriety of the order, after the discharge of the rule by the High Court. *Held* further:—It was not open to the plaintiff to challenge the validity of the order in an appeal against the final decree. S. 591 of the Code of Civil Pro-

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

cedure has no application to such a case (22 C. 981, 25 A. 290, *F.*) *Per Mookerjee, J.*—Where the facts in a petition to the High Court appear sufficiently from the judgments of the lower Courts, no affidavit need be filed. MUSSAMUT KARIMAN v. A. H. FORBES, **8 C.L.J. 308.** (32 C. 146, *F.*)

(1925)—*S.* 105, O. IX, r. 13—*See* APPEAL—ORDERS, 22 C. 981.

(1926)—S. 105, O. XLI, r, 23—Validity of order of remand—When to be impeached after the passing of final decree—*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UH-ARZ, 5 Ind. Cas. 667.

(1927)—*S. 105, cl. (2), O. 41, rr. 23, 25—Remand order—Appeal if lies after suit is finally disposed of on appeal.*—Where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of is incompetent. (32 C. 1023=9 C.W.N. 895, 12 C.W.N. 590, 36 C. 762, 30 A. 479, *F.*; 32 M. 83, *D.*) S. 105, cl. (2) of the new Civ. Pro. Code has no bearing on this question but applies to the converse case. JANAKI NATH ROY CHOWDHURY v. PROMOTHO NATH ROY CHOWDHURY, **15 C.W N. 830.**

(1928)—S. 105 (2), O. XLIII, r. 1 (*u*)—Power of Chief Court on appeal against an order of remand—*See* PRE-EMPTIOM—MISCELLANEOUS, 86 P.L.R. 1910=8 Ind. Cas. 246.

(1929)—S. 105, O. XLVII, rr. 7, 9—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 24 C. 319.

—S. 106 (=1882, s. 589=1877, s. 589).

See APPEAL—FORUM OF APPEAL.

See APPEAL—ORDERS.

(1930)—*S. 106 (=Civ. Pro. Code, 1882,) s. 589 (a)—"Subordinate to that Court," meaning of.*—The words "subordinate to that Court" are used with reference to appellate jurisdiction. RAMMELAL v. RAJA GOKULDAS **14 C.P.L.R. 62.** 17 M. 377, *R.*

(1931)—S. 106—*See* CIV. PRO CODE, 1882, s. 344, 5 Bom. L.R. 591=27 B. 604.

(1931-a)—S. 106—*See* NOS. 1823, 1894, 1895, 1896, 1897, *supra* AND NO. 1939, *infra.*

(1932)—*Ss. 106, 104, O. 43, r. 1, O. 6, rr. 17 and 18, O. 7, r. 11 (=ss. 589, 588, 53, 54, Civ. Pro Code, 1882)—Amendment of plaint—Finality of appellate order confirming order of amendment—Revision—S. 70 of Act XVIII of 1884, as amended by Act XXV of 1899.*—Held that an appellate order, confirming an order returning a plaint for amendment, is final under the last para of s. 583, Civ. Pro. Code, and is consequently not open to revision under s. 70 of Act XVIII of 1884, as amended by Act XXV of 1899; but its legality can be questioned in appeal from the final order rejecting the plaint, if one lies in the case to the Chief Court. MALANG v. MOHAMMAD ALIAS, **15 P.W.R. 1908.**

(1933)—Ss. 106, 107 (2), O. VII, r. 10, O. XXII, r. 11, O. XLIII, r. 1—*See* APPEAL ORDERS, 26 C. 275=3 C.W.N. 243.

(1934)—*S. 106 and O. 45, r. 1—Order for presenting to proper Court—Appeal.*—An appellate Court's order returning a plaint for presentation to the proper Court is not a "decree" but an order from which there is an appeal under s. 106 and O. XLIII, r. 1. HIRA LAL v. KARORI MAL, **59 P.R. 1899.**

——S. 107 (New.)

See APPELLATE COURT.

(1934-*a*)—S. 107—*See* NOS 58, 101, 105, 153, 498, 545, 1933, *supra* AND NOS. 2312, 2386, 2398, 2479, 2744, 2766, 2767, 2768, 2774, 2779, 2792, 2795-*j*, 2804-*f*, 4555, 4556, 4562, 4588, 4621, 4622, 4623, 4624, 4625, 4626, 4627, 4643, 4660, 4670, 4671, 4672, 4727, 4728, 4750, 5140, 5260, 5571, 5950, 5851, *infra.*

(1935)—S. 107, O. 1, r. 10, O. XXIII, rr. 1 and 3—Revocation of probate by first Court—Compromise in appellate stage—Legality—Petitioner for revocation if can withdraw entire proceeding pending appeal by objector—*See* PROBATE—GENERAL, 12 C.L.J. 91=6 Ind. Cas. 912.

(1936)—S. 107, O. XXII, r. 11—*See* CIV. PRO. CODE, 1908, O. XXII, r. 1, 4 Bom. L.R. 325=26 B. 597.

(1937)—S. 107 (2), O. XXII, r. 11—*See* ARBITRATION—APPOINTMENT OF ARBITRATORS, 18 C. 507.

(1938)—S. 107 (2), O. XXII, r. 11—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 22 M. 187.

(1939)—*S. 107 (2), O. 22, r. 11, s. 104, O. 43, r. 1, s. 106 (=ss. 582, 588, 589, Civ. Pro. Code, 1882)—Order of appellate Court under s. 57 returning plaint—Whether appeal lies.*—Under ss. 588 (6) and 589 read with s. 582 of the Civ. Pro. Code, an appeal lies to the High Court from an order of an appellate Court returning a plaint for presentation to the proper Court. S. 588 (6) does not apply merely to orders passed by a Court of first instance. WAHID-ULLAH v. KANHAYA LAL, **25 A. 174, F.B.=A.W.N. 1902, 222.** (3 A. 456, *Overruled*; 21 M. 234, 26 C. 275, *R.*)

(1940)—*S. 107 (2), O. 22, r. 11 s. 108, O. 43, r. 2 (=Civ. Pro. Code, 1882, ss. 582, 287, 590)—Order—Appeal*—Interim *injunction—High Court—Jurisdiction*—"*Procedure*" and "*powers*", *distinction between.*—*Per C.J. (Davies J., Diss)*:—When the plaintiff has appealed against the order of the Subordinate Judge dismissing his application for a temporary injunction and his appeal has been admitted

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1863 and VIII of 1859)—*continued.*

and notice of his application for an *interim* injunction pending the hearing of the appeal has been directed to issue to the defendants, the High Court has jurisdiction to make an *interim* order pending the return of the notice. The fact of the appeal not being against a decree does not prevent the appellate Court from exercising jurisdiction in the matter. It would be anomalous to hold that the High Court in a second appeal against a decree possesses powers which it does not possess in an appeal from an original order; and the want of uniformity in the language of the two ss. 587, 590, Civ. Pro. Code, is not good reason for so holding. The power to make such order exists apart from any express provision of the Code, as part of the inherent jurisdiction of the appellate tribunal incidental to the exercise of the appellate jurisdiction. *Per Davies, J., Diss.* :—The term "procedure" in s. 590, Civ. Pro. Code, is not intended to cover all the provisions of Ch. XLI, Civ. Pro. Code, and s. 582 in that chapter, conferring on appellate Courts under that chapter the same powers as Courts of original jurisdiction, is pre-eminently not a point of "procedure" as the term is used in s. 590. MAHADEVA ROW v. SETHURAM SAHIB, **14 M.L J. 471, F.B.**

(1941)—*S. 107 (2), O. 22, r. 11 and C. 23, r. 1 (=ss. 582, 373, Civ. Pro. Code. 1882)—Plaintiff withdrawing from appeal—Partition suit—Practice.*—When in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession afterwards to annul its effect by withdrawing from the suit in the appellate Court. Ss. 373 and 582 of the Civ. Pro. Code, do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by a plaintiff withdrawing of his own free-will and without the permission of the Court. SATYABHAMABAI v. GANESH, **6 Bom.L.R. 353 =29 B. 13.**

(1942)—*S. 107 (2), O. 22, r. 11, O. 23, r. 3 (=ss. 582, 375, Civ. Pro. Code, 1882)—Compromise, decree in terms of—Procedure when one of the parties to a compromise objects to its being recorded by Court—Appeal—Civ. Pro. Code, s. 582).*—The hearing of an appeal before the Judicial Commissioner was fixed for the 20th September, 1894. On the 4th September, 1894, the respondents made an application to the Court, in which they alleged that, on the 25th November, 1893, the parties to the appeal had entered into a compromise, whereby the appellants agreed to withdraw the appeal, that notwithstanding the said agreement the appellant had not withdrawn the appeal, and they prayed that the Court would reject the appeal. Upon the application an order was made that notice should be given to the appellants and that the application should be brought up at the hearing of the appeal. On the date when the appeal was called on, the respondents objected to the hearing of the appeal and asked that it might be dismissed on the grounds stated in the application above referred to. *Held*, that where it is shown that an appeal has been adjusted by a lawful compromise, the Court can, under s. 375, read with s. 582, Code of Civil Procedure record the compromise and pass a decree in accordance therewith. *Held*, further, that where one of the parties objects to the compromise being recorded and a decree being given in its terms, the other party should move the Court to have the compromise recorded and to pass a decree in accordance with its terms, and the matter can be decided on affidavits, or, if necessary, by a special issue on oral evidence, *Held*, therefore, that the respondents should amend their application and ask the Court to act under s 375, Civ. Pro. Code, and have the compromise recorded and to pass a decree in accordance with its terms. LACHMIN v. PARKOTAM SINGH, **5 O.C. 49.**

—S. 108, (1882, ss. 587, 590=1887, ss. 587, 590=1859, s. 366.)

See APPELLATE COURT.

(1943)—*S. 108 (=s. 587, Civ. Pro. Code, 1882)—"As far as may be."*—The words "as far as may be" in s. 587 are not equivalent to as far as possible, but mean as far as inconsistent with the principles on which appeals from appellate decrees are admitted and determined. HINDU v. BRAYAN, **7 M. 52.** [*Not F.*, 12 C. 37, 24 C. 98; *R.*, 9 A. 147, F.B.]

(1944)—*S. 108 (=s. 374, Act VIII of 1859)—Grounds not mentioned in petition of special appeal, Admission of, discretionary.*—Under s. 374 of Act VIII of 1859, Civ. Pro. Code, it is open to the Court to admit any new ground of appeal arising out of the proceedings, though it may have been omitted in the petition of appeal. JAY KISHEN MOOKERJEE v. RAJ KISHEN MOOKERJEE, **5 W.R. 147.**

(1945)—*S. 108 (=Civ. Pro. Code, 1882, s. 590)—Appeal under the Insolvent Act—Procedure—Insolvent Act, s. 73.*—Appeals from orders under the Insolvent Act are not governed by the procedure laid down in the Civ. Pro. Code. S. 73 of the Insolvent Act, which governs such cases, provides that they should be by petition. *In the matter of* R. BROWN, **12 C. 629.** [*R.*, 17 B. 334.]

(1946)—*S. 108, O. 22, rr. 4 and 11—Second appeal—Death of respondent—Change of law of Limitation—Limitation Act, 1877, sch. 2, art. 175-C—Limitation Act, 1908, sch. 2, art. 177—Curtailment of 3 years into 6 months—General Clauses Act (X of 1897), s. 6—Abatement as against some respondents without whom the suit cannot proceed—Effect as against others.*—An application to bring on record the legal representative of a respondent, who died when the old Limitation Act, 1877, was in force must be dealt with under the new Act of 1908. Such an

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

application must be made within six months from the date of the respondent's death under art. 177 of the Act of 1908, and the benefit of a three years period under art. 175-C. of the Act, of 1877 will not avail. S. 6, General Clauses Act, 1897, has no application so as to preserve the older period of limitation, which is not a rule of substantive law. Where an appeal abated as against some of the respondents Co-uralars of a *devasom*) without whom the appeal cannot be prosecuted as against the rest, the appeal should be dismissed as against all. ARAYIL KALIAMMA v. PELAPPAKKARA MANAKAL SANKARAN NAMBUDRIPAD, **7 M.L.T. 115=5 Ind. Cas. 420=20 M.L.J. 347.** (11 A. 408, 11 B.H.C. 117, *F.*; 6 B. 26, *D.*; 29 M. 529, *R.*)

(1947)—S. 108—Talbana not paid within fixed period—Appeal whether can be dismissed for default—*See* APPEAL—PRACTICE AND PROCEDURE, 35 C. 535.

(1947-*a*)—S. 108—*See* NOS. 56, 930, 1922, 1940, *supra*, AND NOS. 2768, 4583, 4618, 4627, 4668, 5163, 5472, 5583, 5593, 5653, 5691, *infra*.

——S. 109 (=1882, s. 595=1877, s. 593).

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(1948)—S. *109* (=s. *595*, *Civ. Pro Code*, 1882)—"*Final decree*"—*Order of remand—Suit to annul incumbrances—Bengal Tenancy Act* (*VIII of* 1885), s. *167—Notice—Dismissal of suit on the ground of non-service of notice—Appellate Court holding service proved and remanding case.*—Where a suit to annul incumbrances by the purchaser of a *putni* at a sale for its own arrears was dismissed by the Subordinate Judge, on the ground that the plaintiff had failed to prove the service of notices under s. 167, Bengal Tenancy Act, but the High Court, on appeal held that the service of notices was proved and remanded the suit for the trial of the other issues in the case. *Held*, that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case, *viz.*, whether the notices were properly served or not. The order was therefore a "final decree" within the meaning of s 595 of the Civ. Pro. Code. ANANDA GOPAL GOSSAIN v. NAFFOR CHANDRA PAL CHOWDHURY **12 C.W.N. 848=38 C. 618=8 C.L.J. 168.** (17 A. 113, 15 B. 155, *R.*)

(1949)—S. *109* (=*Civ. Pro. Code*, 1877, s. *595*)—*Appeal to Privy Council*—"*Final*" *decree*—Where an order of the High Court virtually dismissed the appeal on the ground that no appeal lay from the order of the Subordinate Judge, which erroneously styled an application to have judgment and decree passed upon the basis of an award that had been filed, as being one for review, *held* that no final decree had been passed by the High Court, and an application for permission to appeal to Her Majesty in Council could not be entertained. **TULSI RAM v. GANESH, A.W.N. 1882, 30.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1950)—*S. 109* (=*old* s. *595*, *Civ. Pro. Code*, 1882)—*Order returning plaint for presentation to proper Court—Meaning of "final decree."*—An order passed on an appeal from an order returning a plaint for presentation to the Revenue Court and reversing the latter order is not a "final decree." A "final decree" under this section is one which finally determines some cardinal point in issue in the cause in respect of the rights of the parties and on the merits of the case. GANDA MAL v. THAKAR HARKISHEN SINGH, **12 P.R. 1896.**

(1951)—*S. 106* (=*old* s. 595, *Civ Pro. Code*, 1882)—*Order of remand—No "final decree."*—An order of remand directing a re-trial on the merits, is not a "final decree" within the meaning of this section. YUSAF SHAH v. GHULAM JILANI, **56 P.R 1888.**

(1952)—*S. 109* (=*Civ. Pro. Code*, 1882, s. *595*)—*Decree directing accounts to be taken, leave not grantable to appeal to Privy Council.*—In this case the appeal to the Privy Council for which leave was sought from the High Court was directed against a preliminary decree of the High Court which affirmed the liability of the defendants in the suit to render accounts and gave various directions as to the extent and mode in which the accounts were to be taken in view of the final decree in the suit. The High Court *held* that the decree was not final within the meaning of s. 595 of the Civ. Pro. Code, of 1882, and that there was nothing so special in the case as to bring it under cl. (*c*) of the section, and refused to grant the certificate. (In the appeal to the Privy Council, from the above order refusing certificate, reported in 15 B. 155, the Judicial Committee *held* that the decree in the case was final on the ground that it established the liability of the defendants to account, irrespective of the fact that it was not the last decree in the matter). RAHMUBHOY HUBIBBHOY v. C. A. TURNER, **14 B. 428.** [*R.*, 10 C.L.J. 336.]

(1952-*a*)—S. 109—*See* NOS. 83, 102, 192, 931, 1708, 1922, *supra* AND NOS. 2348, 5551, 5552, 5553, 5554, *infra*.

(1953)—*S. 109, cl. (a)*—'*Order passed on appeal*'—'*Final order*'—*Application to sue in forma pauperis*—'*Order of reversal*'—*Elements of appellate Court—Petition disclosing no cause of action.*—An order passed by the High Court in the exercise of its revisional jurisdiction, reversing that of the Court of first instance allowing the applicant to sue in *forma pauperis*, is an order passed on appeal within the meaning of cl. (*a*) of s. 109 of the Code of Civil Procedure, 1908. Two essential elements are to be considered in deciding whether an order is passed on appeal within the meaning of cl. (*a*) of s. 109 of the Code, namely, (1) whether there exists the relation of superior and inferior Court; and (2) whether there exists the power, on the part of the superior tribunal, to review, affirm, modify or reverse

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the decision of the inferior tribunal. (13 C.L. J. 90, *F.*) An order of the High Court based on the ground that the allegations in an application to sue in *forma pauperis* do not disclose any cause of action, is a final order ' within the meaning of cl. *(a)* of s. 109 of the Code. The term ' final order ' denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit and therefore is an order which could never, while the decision stands, be questioned again in the suit, it is a ' final order ' within the meaning of s. 109 of the Code, notwithstanding that there may be subordinate enquiries to be made. Whether the character of finality can be rightly claimed in respect of an order, should be determined with reference to the precise relation in which it stands to the proceeding before the Court. HARISH CHANDRA ACHARJEE v. NAWAB BAHADUR OF MOORSHIDABAD, **13 C.L.J. 688.** (10 C.L.J. 336, *F.*)

(1954)—*S. 109, cl. (a)—Privy Council Appeal —Order of remand—Decision on cardinal question.*—Where, in a suit for the winding up of a partnership business, the first Court directed an account to be taken, and the High Court on appeal disagreed with that Court in respect of the respective liabilities of the parties, and remanded the suit for a fresh taking of the accounts. *Held* that the decision of the High Court on this cardinal question as to the respective liabilities of the different parties in such a decision as to constitute such a final decision on the points in issue as to amount to a decree in suit. DWARKA NATH SARKAR v. HAJI MAHOMED AKBAR, **7 Ind. Cas. 622.** (18 I.A. 6, 15 B. 155, 22 I.A. 1, 17 A. 112, *F.*)

(1955)—*Ss. 109, 110—Privy Council Appeal —Leave to appeal—Subject-matter not exceeding Rs. 10,000—Certificate granted in connected cases—Same question involved—Fit case for appeal to His Majesty in Council.*—Applications were made in several connected appeals for leave to appeal to His Majesty in Council. Some of them satisfied the requirements of s. 110 of Act V of 1908, and the certificates were granted. One of them, however, did not satisfy the requirements of the section but involved the same question as did the others. *Held*, that, in view of the fact that the same question was involved in all the appeals, the certificate should be granted, even in the appeal which did not satisfy the requirements of s. 110. MAKUND SARUP v. RICHALD ROSS SKINNER, **5 Ind. Cas. 583.**

(1956)—*Ss. 109, 110—(=ss. 595, 596, Civ. Pro. Code. 1882)—Ch. XLV—Appeal to Privy Council, leave to—Appellate decree affirming decree of Court of first instance—Appellate Court, when decision of first Court may be said to have been affirmed by judgment of—" Decree," meaning of, in s. 596.*—The words " when the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decree appealed against affirms the decision of the Court immediately below the Court passing the decree" in s. 596 are very wide, the word "decree" including judgment, and there is nothing in Ch. XLV of the Code, which would justify the Court in interpreting them as meaning merely such an affirmation of the decision of the Court below, as regards issues which it has disposal of, as results in the affirmation of the decree of that Court. The words are so wide that, when the Court below has dismissed or decreed a suit on all of certain issues, its decision cannot be deemed to have been affirmed by the judgment of the appellate Court, unless its decision as regards all those issues has been affirmed, as well as its decree. SANWAL SINGH v. RANI SATRUPA KOER, **4 O.C. 66.**

(1957)—*Ss. 109, 110 (=ss. 595, cl. (c) 596, Civ. Pro. Code. 1882)—Privy Council, application for leave to appeal to—Valuation of suit, questions indirectly in issue as regards—Appeal to Privy Council, Fitness of case for.*—A was a co-sharer of 4 annas and M of 12 annas in a taluka. C was, under a decree of Court, entitled to receive allowance payable to him being charged on the taluka. Upon the death of C, A instituted a suit against (1) C's son, (2) M, and (3) the mortgagee in possession of M's share, alleging that the allowance of Rs. 70 per mensem enured only for the life of C and, after his death, was not chargeable against her one-fourth share, that defendants 2 and 3 were not entitled to debit in rendition of accounts her one-fourth share with a proportionate part of the allowance. The value of the suit for the purposes of jurisdiction was estimated at Rs. 3,000, being the value of a one-fourth share of the allowance. C's son pleaded that the allowance was heritable. The other two defendants supported this plea. A's suit was ultimately dismissed by the Judicial Commissioner. The parties to the appeal were only A and C's son. A applied for leave to appeal to Her Majesty in Council. *Held* that, although A valued her suit as one in which the subject-matter was the right of C's son to receive from her, as owner of a fourth share in the taluka, annually the sum of Rs. 210, and this was the question directly in issue between the parties, yet, the determination of this question necessitated the determination of the question whether the allowance of Rs. 70 per mensem, charged on the taluka, was heritable, or was limited to the life of the original grantee, C, and, therefore, the decree of the Court involved indirectly a question between the parties, the annuitant and one of the co-sharers in the taluka, respecting property above Rs. 10,000 in value, that is to say, the question whether the allowance of Rs. 840 per annum was heritable or ceased on the death of C. *Held*, therefore, that a certificate should be granted, that, as regards value and nature, the case fulfilled the requirements of s. 596, Civ. Pro. Code. *Held*, further, that, considering the

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

circumstances of the case, it was not a fit one for appeal to Her Majesty in Council under s. 595, cl. (c), Civ. Pro. Code. AZIZ UN-NISSA v. TASADDUK HUSAIN, **4 O.C. 234.**

(1958)—Ss. 109, 110—Final decree of Division Bench of High Court—Appeal to Privy Council, certificate as to—Applicability of—*See* LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, ss. 39, 15 9 C.W.N. 566=32 C. 963.

(1959)—*Ss. 109, 110, O. 41, r. 10—Order rejecting appeal for failure to furnish security for costs—Order affirming decision of the Court below, meaning of—Final order passed on appeal, meaning of.*—Where an appeal had been rejected for failure on the part of the applicant to furnish security for costs under O. 41, r. 10, *held*, that the order rejecting the appeal was not one affirming the decision of the Court below within the meaning of the last paragraph of s. 110, Civ. Pro. Code. *Held* further, that the order in question was not a final order passed on appeal, within the meaning of s. 109, Civ. Pro. Code. RADHA KISHEN v. JAMNA PRASAD, **13 O.C. 59=5 Ind. Cas. 940.** (6 W.R. 102, 10 W.R. 1, F.B., 8 C.W.N. 296, 30 C. 679, 32 B. 108, *R.*)

(1960)—*Ss. 109, 110, O. 45, r. 3 (=Civ. Pro. Code, 1882, ss. 595, 596, 600)—Appeal to Privy Council—Substantial point of law—Certificate of High Court—'Otherwise,' meaning of—Assent of respondent cannot give right of appeal.*—Under s. 596, Civ. Pro. Code, there is no right of appeal to the Privy Council simply on the ground that a substantial point of law is involved. The presence of such a question does not give a right of appeal when the value is below the mark: the requirement of it restricts the right when the higher Court affirms the lower, and the dispute either directly or indirectly relates to an amount of Rs. 10,000 [*R.* 23 A. 415 P.C. 24 A. 236=22 A.W.N. 46.] Under ss. 595 and 600, Civ. Pro. Code, there is a right of appeal if the High Court certifies that the case is 'otherwise' a fit one for appeal. The word 'otherwise' refers to special cases, such as, where the point in dispute is not measurable by money, though it may be of great public or private importance. But in all such cases, a special certificate to that effect must be granted by the High Court. The mere assent of the respondent to an appeal does not give the appellant a right of appeal which the Code does not allow, or sustain a certificate which from some oversight or other is obviously erroneous. BANARASI PARSHAD v. KASHI KRISHEN NARAIN, **5 C.W.N. 193=28 I.A. 11=23 A. 227, P.C.**

(1961)—Ss. 109, 112, O. XLV, r. 13—Application to appoint Receiver — High Court's Powers—See Appeal to Privy Council—Practice and Procedure, 10 C.L.J. 326=7 Ind. Cas. 452.

(1962)—*Ss. 109, 115—High Courts Act (24 and 25 Vict., c. 104), s. 15—Letters Patent, s. 39—"Final order passed on appeal" meaning of—Order for discovery—Order deciding competency of Land Acquisition Judge to review certain portions of award—Final order—Privy Council appeal, whether lies.*—An order passed by the High Court, in the exercise of its revisional jurisdiction under s. 115 of the Civ. Pro. Code, or of its power of superintendence under s. 15 of the Charter Act, is "an order made or passed on appeal" within the meaning of s. 100 of the Civ. Pro. Code and s. 30 of the Letters Patent. The term "final order" in s. 109 of the Civ. Pro. Code and s. 39 of the Letters Patent, denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, and, therefore, is an order which can never, while the decision stands, be questioned again in the suit, it is "final," notwithstanding that there may be subordinate inquiries to be made. In a land acquisition case, the High Court, on the application of the parties, ordered, under s. 115 of the Civ. Pro. Code, that the Judge had no jurisdiction to review, at the instance of the Secretary of State, the award of the Collector in so far as it was not challenged by the claimants, and also that he had no jurisdiction to make an order for discovery: *Held*, that the order of the High Court was not a "final order" within the meaning of s. 109 of the Civ. Pro Code, or s. 39 of the Letters Patent; for although it determines only a question of law which affects one part alone of the case, it leaves other matters still to be determined. An application for leave to appeal to the Privy Council against the order was, therefore, refused. SECRETARY OF STATE FOR INDIA v. BRITISH INDIAN STEAM NAVIGATION CO., **9 Ind. Cas. 183=13 C.L.J. 90.** (21 W.R. 263, *Rel.*; 30 C. 679, *D.*)

(1963)—Ss. 109, 115—*See* PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 8 C.W.N. 296.

(1964)—*S. 109, cls. (a) and (c) and O. 41, r. 5—Order refusing stay of execution—'Order passed on appeal'—'Final order'—'Fit case'—Substantial loss, question of—Discretion.*—An order deciding that circumstances have not been established such as would justify an order for stay of execution of a decree under appeal is not a 'final order' (but an interlocutory order), nor an 'order passed on appeal' within the meaning of cl. (*a*) of s. 109 of the Code of Civil Procedure. The term 'final order' in cl. (*a*) of s. 109 of the Code denotes an order which finally decided any matter directly at issue in the case in respect of the rights of the parties. (10 C.L.J. 336, *F.*) An order cannot be deemed to have been passed on appeal, unless it is an order passed by a superior Court, in reversal, modification or affirmance of an order of an inferior Court. To constitute appellate jurisdiction, there must exist the relation of superior and inferior Court and the power on the part of the former to review the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decision of the latter. Cl. (*c*) of s. 109 of the Code is intended to meet special cases, such, for example as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. The discretion vested in the Court by cl. (*c*) of s. 109 of the Code is to be sparingly used. The question, whether or not the applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to the High Court, is not a question of such exceptional importance as would justify a special certificate of fitness under cl. (*c*) of s. 109 of the Code. Cl. (*c*) of s 109 of the Code is not to be interpreted as restricted in its application to cases of 'final orders,' precisely in the same manner as cls. (*a*) and (*b*). SRINIVASA PRASAD SINGH v. KESHO PRASAD SINGH, **13 C.L.J. 681.**

(1965)—*S. 109, O. 41, r. 23 (=ss. 595, 562, Civ. Pro. Code, 1882)—Order under s. 562, Civ. Pro. Code—Appeal to Privy Council.*—An order under s. 562 of the Civ. Pro. Code, is not ordinarily appealable to the Privy Council, though such an appeal will lie where the remand order has, in effect, finally decided the cardinal point in the suit. HABIB-UN-NISSA v. MUNAWAR-UN-NISSA, **25 A. 629=A.W.N. 1903, 159** (17 A. 112 8 B. 548, 10 M.I.A. 340. *R.*) [*F.* A.W.N. 1907. 291=5 A.L.J. 57 ; R., 52 P.R. 1907=34 P.L.R, 1908 ; *D.*, 10 C.L.J. 336]

(1966)—*S. 109, O. 45, r. 3 (=ss. 595, 600, Civ. Pro. Code, 1882)—Privy Council, application for leave to appeal to—Substantial question of law, suit below Rs. 10,000 involving—Appeal to Privy Council, Case "otherwise a fit one for"—Question of general interest or public importance.*—*Held* that, within the meaning of s. 600, Civ. Pro. Code, the fact that a substantial question of law is involved in a case, in which the value is below Rs. 10,000, is not by itself a sufficient ground for granting leave to appeal to His Majesty in Council and that something more is required. It must, in addition, be a question of general interest or of great public or private importance, or the like. BHAGWAN PARSHAD AND ANOTHER v. THAKUR RUDR PARTAR NARAIN SINGH, **5 O.C. 168.**

(1967)—*S. 109, O. 45, r. 3 (=ss. 595, 600, Civ. Pro Code, 1882)—Objection that appeal has not been properly admitted.*—On a preliminary objection being taken that an appeal was not properly admitted, *held*, that the case fell within the principle of 31 C. 57, P.C. and that the certificate of leave to appeal given was sufficient. AMARCHANDRA KUNDU v. SHOSHI BHUSHAN ROY, **31 C. 305=31 I.A. 24=8 C.W.N. 225.**

(1968)—S. 109, O. XLV, r. 3—*See* APPEAL TO PRIVY COUNCIL — MISCELLANEOUS, 3 Bom. L.R. 154.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1969)—*S. 109 (c), O. 45, r. 3—Privy Council Appeal—Case fit for appeal.*—In 1902 a decree received a certain interpretation by the Court. In a subsequent proceeding the High Court decided that the interpretation given in 1902 operated as *res judicata*. Against this order of the High Court, the decree-holder applied for leave to appeal to the Privy Council: *Held* that it was not a fit case for appeal to His Majesty in Council. KUNJ BEHARI LAL v. COLLECTOR OF SHAHJEHANPUR, **8 Ind. Cas. 485.**

(1970)—S. 109, O. XLV, r. 6—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 15 B. 155, P.C.=18 I.A, 6.

——S. 110 (=1882, s. 596=1877, s. 596).

See APPAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(1971)—*S. 110 (=s. 596, Civ.Pro.Code, 1882)—"Amount or value of the subject-matter of the suit," meaning of--Amount or value of the matter in dispute on appeal- Decree involving directly or indirectly some claim or question to or respecting property—Appeal to His Majesty in Council—Privy Council appeal.*—In a suit for partition, the value of the subject-matter of the suit, for the purposes of valuation under s. 596 of the Code of Civil Procedure for appealing to His Majesty in Council, is the value of the whole of the estate which it is sought to partition and not merely that of the particular share, which one of the parties may claim. (3 C.L.J. 197, 7 M. I.A. 261, 6 W.R. Mis. Rul. 4, 17 C. 680, *Appl.*) When, therefore, in a suit for partition, the value of the entire estate is ten thousand rupees or upwards, although that of the appellant's share may be valued less, the decree for partition does involve, directly, or indirectly, some claim or question to or respecting property of the amount or value of ten thousand rupees or upwards within the meaning of the third paragraph of s. 596 of the Code of Civil Procedure. Under such circumstances, where the decree appealed from is in reversal of the decree of the Court below, the case is a fit one for appeal to His Majesty in Council and a certificate should be granted accordingly. BHAGWANT SAHAI v. PASHUPATHI NATH BOSE, **3 C.L.J. 257=10 C.W.N. 564.**

(1972)—*S. 110 (=s. 596, Civ. Pro. Code, 1882)—Value of subject-matter of suit—Suits Valuation Act*, 1887.—The question for decision was whether in granting certificate under s.596, Civ. Pro. Code, the Court should take into consideration the value of the subject-matter of the suit or its value as prescribed by the Suits Valuation Act. *Held*, the Suits Valuation Act was passed with the object of prescribing the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect thereto. In s. 596 of the Civ. Pro. Code, the value means the selling or the market-value of the property in dispute. As

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the market-value of the property in suit was more than Rs. 10,000, certificate was granted. KARM SINGH v. KHEM SINGH, **60 P.R. 1905 =150 P.L R. 1905.**

(1973)—*S. 110 (= Civ. Pro Code, 1882, s. 596)—Appeal to Her Majesty in Council—Amount or value of subject-matter of suit not Rs. 10 000 or upwards.*—Under the first clause of s. 596 of the Code of Civil Procedure, not only must the amount or value of the matter in dispute on appeal to Her Majesty in Council be Rs. 10,000 or upwards, but the amount or value of the subject-matter of the suit must also have been Rs. 10,000 or upwards. MOTI-CHAND v. GANGA PRASAD, **A.W.N. 1901, 19.** (3 W.R.C.R. 14, 3 A. 633, *D.*)

(1974)—*S. 110 (= Civ. Pro. Code, Act XIV of 1882, s. 596)—Application for leave to appeal to Privy Council.*—In order to justify a High Court in giving a certificate under s. 596 of the Civ. Pro. Code, it must be satisfied that the decree itself involves, directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards. KRISHNA MILLS, CO., LD., DELHI v. GOPI NATH, **137 P.L.R. 1904=75 P.R. 1904.** (7 M.I.A. 548, 11 C. 740, 6 C.W.N. 411, 1 M.I.A 363, *R.*)

(1975)—*S. 110—Leave to appeal—Privy Council—Amount, value and nature of appeal—Putting the appellant on terms—Procedure.*—Where only a small amount is at issue in an appeal, the High Court, not having any power to put the appellant on terms will not certify a case to be a fit one for appeal to His Majesty in Council. (4 M.I.A. 353, *R.*) But the application for such leave to the High Court is a proper step to be taken by the appellant. L.O. CLARKE v. BRAJENDRA KISSORE ROY CAOWDHURI, **13 C,W.N. 1127=3 Ind. Cas 786.** (29 I.A. 40, 6 C.W.N. 362, P.C., *R.*).

(1976)—*S. 110 (s. 596, Civ. Pro. Code, 1882)—Leave to appeal to Privy Council against decree of High Court dismissing a suit for damages for libel—Practice of the High Court to ascertain the true value of the matter in dispute within the meaning of.*—A suit for the recovery of Rs. 10,000, as damages for an alleged libel contained in a letter, was dismissed by the High Court on the ground that the letter complained of was privileged. Thereupon, the plaintiff applied to the High Court for leave to appeal to the Privy Council. *Held*, that, when there is a contest as to the true value of matter in dispute, it has been the invariable practice in the High Court—a practice sanctioned by the judicial Committee—to ascertain, by evidence and enquiry, that the true value is, and that under the circumstances of the case it is impossible to say the amount or value of the matter in dispute is Rs. 10,000 or upwards, within the meaning of s. 596, and, consequently, the certificate asked for was refused. RAI AMRITA NATH MITTER BAHADUR v. ABHOY CHARAN GHOSH, **9 C,W.N. 370.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1977)—*S. 110 (=596, Civ. Pro. Code, 1882)—Appeal to His Majesty in Council—"Decree involving indirectly ten thouand rupees or upwards," meaning of.*—When it is laid down in s. 596, Civ. Pro. Code, that the decree must involve, directly or indirectly, some claim or question to, or respecting property, of ten thousand rupees in value or upwards, the reference is to suits in existence and not to suits in *gremio futuri*. Where, therefore the question decided by a decree was a question of title which may possibly affect the title of person who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed and concerning the title to which property there is no litigation pending, *held* that no appeal lay to the Privy Council. HANUMAN PRASAD v. BAGWATI PRASAD, **24 A 236=A.W N. 1902. 46.** (23 A. 415. 23 A 227, 1 M.I A. 363. 7 M.I.A. 548. *R.*) [*R.* 6 B.L.R. 403.]

(1978)—*S. 110 (=s. 596, Civ. Pro. Code, 1882)—Meaning of "affirms the decision"—Certificate of leave to appeal—Defect—Practice as to amendment.*—The word "decision" in s. 596 of the Civ. Pro. Code, means the decision of the suit by the Court and not the statement given by the Judge of the grounds of the decree order. Where, therefore, the appellate Court dismissed an appeal, but for reasons different from those given by the Court below, *held* that the appellate Court *affirmed* the decision of the Court below within the meaning of s. 596 and that the certificate granting leave to appeal should show that the appeal involved a substantial question of law. [*D.*, 31 C. 57; *R.*, 62 P.W.R. 1908.] Where a certificate granting leave to appeal, which should, under s. 596 of the Civ. Pro. Code, state a question of law as involved in the appeal, did not contain such a statement, *held* that an amendment in that respect would not be allowed by the Privy Council, but that the appellant could be given time to produce the requisite certificate from the Court below. TASSADUQ RASUL KHAN v. KASHI RAM, **25 A. 109, P.C =30 I.A. 35= 5 Bom. L.R. 100.**

(1979)—*S. 110 (=Civ. Pro. Code, 1882, s. 596) Appeal to Privy Council—Concurrent findings on facts—Substantial question of law—Procedure.*—On an application for leave to appeal to the Privy Council, the decision of the Chief Court was concurrent with that of the first Court upon a question of fact, and, upon the fact as found, no substantial question of law was involved; *held* that, under the last clause of s. 596, Civ. Pro. Code, the plaintiff could not appeal, and, that therefore, leave to appeal should be refused. LIKAL v. SHARIF-UL-HASSAN KHAN, **48 P.R. 1904.** (18 C. 190, 23 C. 918, P.C., 20 B. 699, *Cited*; 16 C. 287, 16 C. 292, *Dissented from.*)

(1980)—*S. 110 (=old s. 596, Civ. Pro. Code, 1882)—Appeal to Privy Council—Question of law—Order under s. 588 (16).*—**Where the**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Chief Court confirming the decision of the lower Court takes the same view on the facts from which no question of law arises, leave to appeal to the Privy Council will be refused. An appeal to the Privy Council lies in certain cases from an order passed under s. 588 (16). MUSSAMMAT SURASUTI AND OTHERS v. ESHRI PERSHAD. **61 P.R. 1900.**

(1981)—*S. 110 (=s. 596, Civ. Pro. Code, 1882)—Appeal to His Majesty in Council—"Substantial question of law"—What is a question of fact—Leave to appeal refused.*—The main question at issue in a suit for partition of moveable and immoveable property being whether the family was or was not joint in title and interest, the defendants, on being asked what they would call evidence to prove, set down a series of facts which they alleged that they could prove, and which, they contended, indicated that the family was, at the time of suit, joint as to property as well as in other respects. The plaintiff admitted the facts so alleged, and the parties therefore summoned no witnesses on either side. Some documentary evidence, however, was put in, mainly consisting of the will of the late head of the family. *Held* that the finding on these *data* as to what was the status of the family was a finding of fact merely and could involve no "substantial question of law" within the meaning of s. 596 of the Code. PARSOTAM RAO TANTA v. JANKI BAI. **A.W.N. 1908, 7=3 M. L.T. 169.**

(1984)—*S. 110 (=s. 596, Civ. Pro. Code, 1882)—Appeal to Privy Council,—Costs, different judgments about—Affirming the decision of the Court below—Discretionary power of Court to award costs.—Held*, that the last clause of s. 596, Civ. Pro. Code relates to the subject-matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs. THAKUR BALDEO BAKSH SINGH v. THAKUR LALJI SINGH, **10 O.C. 65.** (8 C.W.N. 294, *Diss.*)

(1983)—*S. 110 (=s. 596, Civ. Pro. Code, 1882)—Appeal to Privy Council, certificate for—Concurrent findings on facts—Substantial question of law not involved—Certificate not allowed.* In this case, the District Courts found in favour of the plaintiff on the point of limitation, but against him on the question of adoption. On appeal, the Chief Court held that the plaintiff's claim was barred by limitation and also the plaintiff had not been adopted. Thereupon, the plaintiff applied to the Chief Court for a certificate to appeal to the Privy Council. *Held*, there was a concurrent finding of the Chief Court and the District Court on the facts. The circumstance that, on the defendant's objection, the Chief Court found against the plaintiff on the point of limitation could not make any difference. There was thus no substantial question of law involved in the appeal to the Privy Council within the meaning of s. 596. Application for certificate rejected. RAM NARAIN v. MAHARAJA NARAIN. **59 P.R. 1903=177 P.L.R. 1905.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1983 *a*)—S. 110—*See* NOS. 931, 1955, 1956, 1957, 1958, 1959, 1960, *supra*, AND NOS. 2348, 5554, 5650, *infra.*

(1984)—*S. 110, O. 41, r. 23=ss. 596, 562, Civ. Pro. Code, 1882)—Appeal to His Majesty in Council—Appeal from order of remand not usually admisisible.*—An order under s. 572 of the Code is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. RAM SARAP v. RAM DEI, **A.W.N. 1907, 291=5 A.L.J. 57.** (A.W.N. 1903, 159, *F.*; 2 C.W.N. 201, *R.*)

(1985)—*S 110, O 45, r. 2 (=ss. 596 and 598, Civ. Pro. Code, 1882)—Leave to appeal to His Majesty in Council, application for—"Substantial question of law," meaning of—Questions of general importance or of general interest.—Held* that the words "substantial question of law" in s. 596, Civ. Pro. Code, mean question of general importance; they do not include a question of the construction of a document in which the parties alone are interested. If no such question is shown to exist, leave to appeal to His Majesty in Council cannot be granted. UDAIRAJ SINGH (BABU) AND OTHERS v. RAJA BHAGWAN BARHSH SINGH, **10 O.C. 308.** (11 C.W.N. ccxviii, *F.*)

(1986)—*S. 110, O. 45, r. 3 (=ss. 696, Civ. Pro. Code, 1882)—Certificate of appeal*—Where the amount of value of the suit in appeal to the Privy Council was morethan Rs. 10,000 and the decree of the High Court appealed from, affirmed the decision of the Court immediately below the High Court which passed the decree, and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for appeal to His Majesty in Council, such a certificate is correct in form and satisfies the provisions of the law. WEBB v. MACPHERSON. **31 C 57, P.C.=30 I. A. 238=8 C.W.N. 41=6 Bom. L.R. 838=13 M.L.J. 389.** (25 A. 109, P.C., *D.*) [*R.*, 31 C. 305, P.C.=31 I.A. 24=8 C.W.N. 225, 5 M.L. T. 78.]

(1987)—S. 110, O. XLV, r. 3—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 24 A. 174, P.C.=6 C.W.N. 362=29 I.A. 40.

(1988)—S. 110, O. XLV, r. 3—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 21 C. 522.

(1989)—S. 110, O. XLV, r. 3—*See* PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 6 C.W.N. 362, P.C.=29 I.A. 40=24 A. 174.

(1990)—S. 110, O. XLV, r. 6—*See* LETTERS PATENT, HIGH COURT, N.W.P., 1865, s. 10. A.W.N. 1888, 37.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1991)—*S. 110, O. 45, r. 7 (=Civ. Pro. Code, 1882, ss. 596, 602)—Appeal to His Majesty in Council—Application for admission—Restoration to file an appeal struck off for default—Time-limits, extension of, for security and deposit.*—While the Court has power to restore to the file an application for the admission of an appeal to His Majesty in Council which has been struck off for default and to extend the time-limits specified in s. 602 of the Code for the furnishing of security and the deposit of expenses, those limits are not to be departed from without cogent reason. MA ME GALE v. MA SA YI, **1 L.B.R. 329.** (10 C. 557, *F.*; 2 C.W.N. xlvi, *R.*)

——S. 112 (=1882, s. 616=1877, s. 616).

(1991-*a*)—S. 112—*See* NO. 1961, *supra.*

——S. 113 (=1882, s. 617=1877, s. 617).

See REFERENCE TO HIGH COURT.

(1991-*b*)—S. 113—*See* NOS. 576, 932, *supra* AND NOS. 2247, 3421, 3735, 3935, 5078, 5732, 5733, *infra.*

(1992)—*S. 113, O. 46, r. 1 (=Civ. Pro. Code, 1882, s. 617)—Entertainment of reference by High Court.*—The High Court can only entertain a reference under s. 617 of the Code, when there is a suit or an appeal, before the Court making the reference, in which the decree is final. GANGADHAR MADHAV CHITNAVIS v. CHIMANA, **16 C.P.L.R. 17.** (7 A. 815, *F.*)

(1993)—*S. 113, O. 46, r. 1 (=s. 617, Civ. Pro. Code, 1882)—Decree not final—No reference lies—Court's power to refer.*—A Court is not competent to make a reference to the High Court under s. 617 of Act XIV of 1882, in case in which the decree of the Court would not be final. *In re* DEBI PRASAD v. SHAMA CHARAN, **5 Ind. Cas. 584.**

(1994)—*S. 113, O. 46, r. 1 (=Civ. Pro. Code, 1882, s. 617)—Reference to High Court ="Final" decree or order.*—A reference to the High Court under s. 617 of the Civ. Pro. Code, can only be made when there is a suit or an appeal before the Court making the reference, in which the decree is final. RAMPHUL v. DURGA, **7 A. 815=A.W.N. 1885, 245.** [*F.*, 16 C.P.L.R. 17.]

(1995)—*S. 113, O. 46, r. 1 (=s. 617, Civ. Pro. Code, 1882)—Scope and application of—Suit partly cognizable by Civil Court and partly by Revenue Court—Procedure.*—Where a claim is partly cognizable by a Civil Court and partly by a Revenue Court, the duty of the Court is to amend the plaint by striking out the latter portion of the claim and decide the suit so far as regards the other part of such claim. This case also deals with the making of references to the Chief Court under this section in cases in which a further appeal will lie if certified to by the Divisional Judge or in cases fit for revision. MUSSAMMAT KARMON v. JIWAN MAL, **19 P.R. 1893.** [*R.*, 21 P.R. 1909, 23 P.R. 1904=107 P.L.R. 1904, 81 P.R. 1904.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(1996)—*S. 113, O. 46, r. Civ. Pro. Code, Act, XIV of* 1882, *s. 617)—Reference to High Court—Question of law.*—A reference, under s. 617 of the Code of Civil Procedure, must distinctly set out the legal point or points in the case, as to the decision of which the Judge entertains a reasonable doubt. *In the matter of insolvency of* DIN DIAL AND OTHERS, PROPRIETOR OF THE FIRM OF MOTI RAM, JAMNA DAS OF DELHI, **93 P.L.R. 1902.**

(1997)—*S. 113, O. 46, r. 1(=Civ. Pro. Code, 1877, s. 617)—Reference to High Court in rent-suit.*—The High Court is not competent to entertain a reference by a Distict Judge trying a second appeal in a suit for arrears of rent under Act XVIII of 1873, as s. 617 does not apply to suits under the Rent Act. MADHO PRAKASH SINGH v. BHUNDI LAL, **A.W.N. 1881, 145.**

(1998)—*S. 113, O. 46, r. 1 (=s. 617, Civ. Pro. Code, 1882) —Construction.—Quere.*—Whether s. 617, Civ. Pro. Code, 1882, is to be read as incorporated with s. 69 of the Presidency Small Cause Courts Act? BENODE LALL ROY v. THE RIVER STEAM NAVIGATION CO., **1 C.W.N. 143.**

(1999)—*S. 113, O. 46, r. 1 (=s. 617 Civ. Pro. Code, 1882)—Court Fees Act (I of* 1870), *s. 12 (1)—Reference—Court-fee payable on memorandum of appeal.—Held*, that s. 617 of the Code of Civil Procedure does not contemplate a reference as to the proper Court-fee payable on a memorandum of appeal. PIR BAKSH v. FAIZ MAHOMED, **A.W.N. 1906, 180.**

(1999-*a*)—S. 113, O. XLVI, r. 1—*See* CONTRACT ACT, 1872, s. 178, 23 P.L.R. 1902=34 P.R. 1902.

(2000)—S. 113, O. XLVI, 1, r.—Reference by Divisional Judge to Chief Court, when permissible—Punjab Courts Act (XVIII of 1884), ss. 40 (1) (*b*), 44, 70 (1) (*b*)—*See* CUSTOM—PUNAJAB—ALIENATION, 16 P.L.R. 1905=39 P.R. 1905.

(2000-*a*)—S. 113, O. XLVI, r. 1—*See* NEGOTIABLE INSTRUMENTS ACT, ss. 42, 118, cl. (9), L.B.R. 1893—1900, 537.

(2001) -S. 113, O. XLV, r. 1—*See* REFERENCE TO HIGH COURT, 7 Bom. L.R. 995=30 B. 226, 17 B. 735. 7 C.L.R. 144, 12 B. 78. 7 Ind. Cas. 806, 10 Bom. L.R. 13=32 B. 157.

(2001-*a*)—S. 113, O. XLVI, r. 1—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTIOF OF —GENERAL, 35 P.R. 1880.

——S. 114 (=1882, s. 623=1877, s. 623=1859, s. 376).

See REVIEW.

(2001-*b*)—S. 114—*See* NOS. 196, 296, 923, 1729, 1824, 1900, *supra*, AND NOS. 2184, 2185, 2186, 2187, 2376, 2377, 2839, 2869, 2908-*b*, 2910-*a*, 3002, 3007, 3008, 3009, 3020, 3095, 3170, 3190, 3201, 4975, 5035, 5224, 5298, 5357, 5651, 5748, *infra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1863 and VIII of 1859)—*continued.*

(2002)—*S. 114, 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—Application for review of judgment.*—For the entertainment of an application for review of judgment, there must be shown some mistake or error apparent on the face of the judgment or some other sufficient reason. An error of law may be a ground for review, but the law must be definite and capable of distinct ascertainment. MA CHIT v. MAUNG PYO, **U.P.R. 1892—1896, 287,** (10 W.R. 143, 7 M. 307, *R.*) [*R.*, U.P.R. 1902—1903, III, Civ. Pro. Code, 3.]

(2003)—*S. 114, O.47, r. 1 (=Civ. Pro. Code, 1877, s. 623)—Review of judgment—"Sufficient reason," what does not amount to.*—It is not a "sufficient reason" within the meaning of s. 623, Civ. Pro. Code, for admitting an application for a review of a judgment, that the soundness of the judgment is questionable. The words "other sufficient reason" in that section mean other sufficient reason of the kind mentioned in the earlier part of the section. KRISHNA RAM v. RAI RUKMIN SEWAK, **A.W.N. 1882, 102.**

(2004)—*S. 114 O. 47, r. 1 (=623 Civ. Pro. Code, 1882)—Discovery of favourable decision of superior Court, whether good ground for grant of review.*—The respondents obtained a decree for pre-emption of part of the property sold in the case. The judgment was erroneously passed, in accordance with a case subsequently found to have been overruled by a Full Bench decision passed prior to the wrong judgment but not brought in time to the Court's notice. Under the ruling of the Full Bench, appellants should have obtained decree for the whole of the property in question; so, they applied for a review on that ground. *Held*, the fact that the appellants were deprived by the original decree of what they were entitled to, according to the then existing judicial decisions, constituted a miscarriage of justice, affording ground for a review. SUJAN SINGH v. FATEH MUHAMMAD, **124 P.R. 1906=97 P.L.R. 1907.** (6 A. 292 F; 14 C. 627, D.)

(2005)—*S. 114, O. 47 r. 1 (=Civ. Pro. Code, 1882, s. 623)—Review of judgment.*—Where the discovery of a fresh authority may not entitle a party to a review of judgment, yet, when a judge is satisfied that his judgment has proceeded upon an erroneous view of the law, he may, under s. 622, Civ. Pro. Code, review his judgment and decide according to law. VELLAYA v. JAGANATHA, **7 M. 307.** [*R.*, U.B.R. 1892—1896, Vol. II, 287, 153, 11 C.P.R. 41, U.B.R. 1902, 4th Qr., p. 3.]

(2006)—*S. 114, O. 47, r. 1 (=s, 623, Civ. Pro. Code, 1882)—Ground of review—Fraud—Mistake.*—The ground that fraud was practised upon a party in connection with a petition of compromise, upon which a decree was made, is a good ground of review under s. 623, Civ. Pro. Code. A mistake in the matter of copying out the petition of compromise may not by itself, fall within the scope of s. 623, but, taking it with the other ground stated above, it might be a good ground of review. RASIK CHANDRA CHOWDHURY v. RAJANI RANJAN CHOWDHURY, **10 C.W.N. 286.** [R. 13 C.W.N. 1197.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2007)—*S. 114, O. 47, r. 1 (=Civ. Pro. Code, 1882. s. 623—Letters Patent, s. 10—Judgment passed by two Judges of High Court in appeal under s. 10, Letters Patent—Review.*—S. 623, Civ. Pro. Code, does not apply to a judgment passed by two judges of the High Court in an appeal under s. 10, Letters Patent. HAFIZ MUHAMMAD MOHSIN v. SHEO PRASAD **1 A.L.J. 509.**

(2008)—*S. 114, O. 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—Application for review—Subsequent filing of an appeal—Jurisdiction to grant review, whether barred by—Court's duty.*—Where an application for review is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application (28 M. 210, *Overruled*: 30 M. 535, 13 B. 520, P.C., *D.*; B.L.R. F.B. 362, 18 M. 214, *R.*) in such a case the jurisdiction ought to be exercised with the greatest care and only in a very strong case. CHENNA REDDI v. PEDDA OBI REDDI, **6 M.L.T. 135. F.B.=2 Ind Cas. 802=32 M. 416=19 M.L.J. 388.**

(2009)—*S. 114, O. 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—Review of judgment—Effect of order on review—Appeal from original decree.*—Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted, and an order passed, which purported merely to amend the decree then under appeal. *Held*, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard, KANHAIYA LAL v. BALDEO PRASAD, **A.W.N. 1908, 265=28 A. 240.** (A.W.N. 1890, 144, *F.*)

(2010)—*S. 114, O. 47, r. 1 (Civ. Pro. Code, 1882, s. 623)—Review of judgment, application for, on grounds abandoned in appeal.*—In an appeal, the counsel for the appellant admitted that he was unable to support the appeal, unless it was held that the '*nikah-nama*' in question was a composition-deed and did not require registration. This point was decided against the appellant and the appeal was dismissed. The appellant then made an application, under s. 623, Civ. Pro. Code, for review of the judgment passed in her appeal, on points which were not directed against the ruling of the Court that the '*nikah-nama*' was not a composition-deed. *Held*, as such points were abandoned when the question whether the *nikah-nama* was decided against the appellant, and as it was not shown that there were circumstances which would justify the Court in

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

disregarding such adandonment, the application ought not be granted. MARIAN BEGAM v. SAYED MAHAMMAD, **3 O.C. 279.**

(2011)—*S. 114, O. 47, r. 1 (=s. 623, Civ. Pro Code, 1882)—Review of judgment——First application dismissed—Second application—Exclusion of time—Limitation Act (XV of 1877), s. 5, and art. 173—Limitation—Exclusion of time.*—A second application for review of judgment if presented beyond the prescribed period is barred by limitation: and the time occupied by the previous application for review cannot be excluded in counting the period. VAMAN v. MALHARI, **4 Bom. L. R. 121=26 B. 485.**

(2012)—*S. 114, O. 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—High Court—Decree—Compromise—Alteration of decree—Review—Subsequent event—Limitation Act (XV of 1877) sch. II art 179—Application for leave to appeal—Step-in-aid.*—The High Court has no power to alter its own decrees except under the provision of either s. 206 or s. 623 of the Code of Civil Procedure. The High Court has, therefore, no powers to amend its decree so as to make it fit in with a subsequent compromise between the parties. S. 623 of the Code of Civil Procedure does not authorize the review of a decree which was right when it was made, on the ground of the happening of some subsequent event. An application for leave to appeal to Her Majesty in Council does not operate as step-in-aid of the execution of the decree KOTAGIRI v. VELLANKI, **2 Bom L.R. 771.**

(2013)—*S. 114, O. 47, r. 1 (=Civ. Pro. Code, 1882, s. 623)—Review of order pased in execution case.*—The scope of s. 623 of the Code of Civil Procedure is wide enough to admit of the review of an order dismissing an execution case. ASOKA KUMAR ROY CHAUDURI v. KHETTRAMONI DASI, **2 C.W.N. 606.** (17 A. 106, 18 B 429, 16 A. 390, *R.*)

(2014)—*S. 114, O. 47, r. 1 (=s. 623, Civ. Pro. Code, 1882)—Review—Application for—Admitted under a mistake—Effect of.*—Where the Sub-Judge, thinking that he had committed a mistake in excluding an unstamped acknowledgment from his consideration, admitted an application for review *held*, the fact that he was wrong in thinking so, and had really committed no mistake, does not prevent the admissibility of the review. MANIKAVASAKA DESIKAGNANA SUMBANDA PANDARA SANNADHIAR v. SUNDARAM PILLAI. **5 M.L.T. 284.**

(2015)—*S. 114, O. 47, r. 1 (=Civ. Pro. Code, 1882, s. 623)—Review of judgment—Second appeal—Application for review based on facts arising subsequent to lower appellate Court's judgment.—Held* that facts, coming into existence subsequently to the pronouncing of judgment by a Court of first appeal, could not form grounds for a review of the judgment

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of the Court of second appeal. BANDHAN SINGH v. CHET NARAIN, **A.W.N. 1895, 131.**

(2016)—*S. 114, O. 47, r. 1 (=Civ. Pro. Code, 1882, s 623)—Review—Error of law.*—A review of judgment cannot be admitted for the purpose of re arguing a case on previous materials. Error of law can be a good ground for review only where the law is definite and capable of distinct ascertainment. MA MYIT v. KIN KIN GYI, **U B.R. 1902—03 Vol. II, Civ. Pro. p. 3.** [*R.*, U.B.R. 1909, Civ. Pro. 21.]

(2017)—S. 114. O. XLVII, r. 1—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 16 A. 390=A.W.N. 1894, 131.

(2018)—S. 114, O. XLVII, r. 1—Review of judgment—Grounds for admission — Subsequent ruling of High Court—*See* FULL BENCH RULINGS, 6 A. 292=A.W.N. 1884, 89.

(2019)—S. 114, O. XLVII, r. 1, inapplicability of, proceedings under the Guardian and Wards Act, 1890—*See* GUARDIAN AND WARDS ACT, 1890. ss. 7, 47, 48, 143 P.R. 1906=12 P.W.R. 1907=105 P.L.R. 1907.

(2020)—S. 114, O. XLVII, r. 1—*See* LIMITATION ACT, 1908. s. 5 13 C. 62.

(2021)—S. 114, O. XLVII, r. 1—*See* REVIEW—GENERAL, 7 O.C. 299, A.W.N. 1893, 33, 2 Ind. Cas. 204, 5 O.C. 59.

(2022)—S 114, O. XLVII, r. 1—*See* REVIEW—GROUNDS FOR REVIEW, A.W.N. 1885, 123. 10 M.L.J. 134, 19 W.R. 189, 9 A. 36, 9 A. 61, F.B., 5 A. 14, Bourke O.C. 115.

(2023)—S. 114, O. XLVII, r. 1—*See* REVIEW—REVIEWS AFTER TIME, 11 C. 767.

(2024)—S. 114. O. XLVII, r. 1—*See* REVIEW—REVIEW WHEN LIES, 17 W.R. 70, 20 W.R. 284.

(2024-*a*)—S. 114, O. XLVII, r. 1—*See* REVIEW—MISCELLANEOUS, A.W.N. 1894, 148.

(2025)—S. 114, O. XLVII, r. 1—*See* SMALL CAUSE COURT MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 8 C. 287=10 C.L.R. 275.

(2026)—S. 114, O. XLVII, r. 1—*See* SUBORDINATE JUDGE, JURISDICTION OF, 18 W.R. 292.

(2027)—*S. 114, O. 47, rr. 1 & 2.—(=Civ. Pro. Code, 1882, ss. 623, 624)—Review of judgment—Other sufficient reason—Clerical error—Jurisdiction of succeeding Judge.*—The omission of a Judge to deal with a particular partion of a case in his judgment cannot be considered as a "clerical error." It may perhaps come within the term in s. 623 of the Code, "other sufficient reason." A succeeding Judge has no jurisdiction to entertain an application to review a judgment of his predecess for from the decree passed, on which the defendant could appeal in the High Court. BIDHI CHAND v. ZULFICAR ALI. **A.W.N. 1883, 173.** (4 A. 278, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861, and VIII of 1859)—*continued.*

(2028)—*S. 114, O. 47, rr. 1, 2, (=ss. 623, 624 Civ. Pro. Code, 1882)—Decree rendered ineffectual by subsequent decree—Former decree not to be considered as reversed—Proper remedy of judgment-creditor is under s. 624—New and important matter.*—The proper remedy for a judgment-creditor, a decree in whose favour was rendered wholly ineffectual by virtue of a decree passed in another suit, was by application for review of the original case, under s. 624, Civ. Pro. Code, the latter decree being treated as new and important matter; and not under s. 623 as the decree in the original case cannot be treated as having been reversed by the subsequent decree. SATRAMDAS JERAMDAS v. MISSIR MANGALMAL, **1 S.L.R. 227.** (10 B. 338, *R.*)

(2029)—S 114, O. XLVII, rr. 1, 2—*See* REVIEW—REVIEW BY JUDGE OTHER THAN THE JUDGE IN ORIGINAL CASE, 8 M. 567, 13 B. 330, 4 A. 278=A.W.N. 1882, 26, 3 O C. 316.

(2030)—*S. 114, O. 47, rr. 1, 2 4 (=ss. 623, 624, 626, Civ. Pro. Code, 1882)—Review of judgment, application for—Admission of review—Admission of truth of plaintiff's claim by defendant, evidence of—Appeal against order admitting review, if lies—Court, jurisdiction of, to admit evidence after decree—Evidence or matter, it should be existing at the time of the trial, but was not procurable—"Discovery of new or important matter," meaning of—"Any other sufficient reason," meaning and scope of.*—No appeal lies against an order which is not passed in contravention of the provisions of s. 624 or s. 626 of the Code of Civil Procedure (Act XIV of 1882). (24 C. 878, 12 B. 171. *R. & F.*) S. 623 of the Code of 1882, in dealing with the discovery of new and important matter or evidence, clearly indicates that the matter or evidence must be in existence at the time of the decree. The words " for any other sufficient reason " in s. 623 do not apply and cannot apply to something which came into existence after the decree was made, and the section does not authorise the review of the decree, which was right when it was made, on the ground of the happening of some subsequent event; and a Court commits a material irregularity in admitting a review on such a ground. GOLAM ALI JEMADAR v ABDUL KASIM SARKAR, **11 C.L.J. 27=14 C.W.N. 244=5 Ind. Cas. 182.** (24 M. 1, *R. & F.*)

(2031)—S. 114. O. XLVII, rr. 1, 2, 4—*See* LIMITATION ACT, 1908, ss. 4 & 5, 3 C.L. J. 545=10 C.W.N. 986=33 C. 1323.

(2032)—S. 114, and O XLVII, rr. 1, 2, 4—*See* REVIEW—JURISDICTION TO REVIEW, 13 M. 178, F.B.

(2033)—*S. 114. O. 47, rr. 1, 2, 4, 8 (=Civ. Pro. Code, 1882, ss. 623, 624, 626 and 630)—Review—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Interlocutory order.*—An application for review was granted by a Judge of the Small Cause Court, without his coming to any clear finding under ss. 623 and 626 of the Civ. Pro. Code that the "new and important matter was not within plaintiff's knowledge, or could not be produced by him at the time the decree was passed." Upon revision it was contended that the order being an interlocutory one was not open to revision. *Held*, that the contention was not valid. An order passed by a Small Causes Court setting aside a judgment and admitting a review may be a "case" within the meaning of s. 25 of the Provincial Small Causes Courts Act, and, if manifestly incorrect, may be interfered with on revision. GULZARI MAL v. SOHAN LAL, **38 P.L.R. 1904.** (60 P.R. 1897, *F.*)

(2034)—S. 114, O. XLVII, rr. 1, 3—*See* REVIEW—PRACTICE AND PROCEDURE, **17 A.** 213, F.B.=A.W.N. 1895, 61.

(2035)—*S. 114. O. 47. rr. 1, 4 (=ss. 623 and 626, Civ. Pro. Code, 1882)—Review of judgment—Appeal—Second appeal.*—When an order granting a review of judgment has been set aside on appeal, the order passed in appeal is final and not open to second appeal. JAINAL BIBI v. ABDUL JALIL, **6 C.L.J. 225.**

(2036)—*S. 114. O. 47, rr. 4 & 4 (=ss. 623, 626) Civ. Pro. Code, 1882)—Review of judgment—Order dismissing the rule granted—Appeal—Limiation.*—An application for review commences ordinarily with an *ex-parte* application, under s. 623 of the Civ. Pro. Code. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected; and it is obvious that the hearing of this rule may involve, to some extent, an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to and still rest on the old decree. On the 20th Nov., 1902, an order in execution was passed; and in supplement of it a further order as to costs was made on the 20th December, 1902. On the 3rd August, 1903, the present respondent applied under s. 623 of the Civ. Pro. Code, for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Court rejected the application for review on the 14th December, 1903. The respondent appealed against this order dated the 14th September, 1903, and the lower appellate Court held that there was sufficient cause for granting the review and as

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result proposed a new order in substitution of the one passed on the 20th December, 1902. The appellant appealed to the High Court contending that no appeal lay from the order dated the 14th September, 1903: *Held*, that no appeal lay from the order of the 14th Sep. 1903, and that the proper procedure would be an appeal from the order of 20th December, 1902. VADILAL v. FULCHAND, **7 Bom. L.R. 666=34 B. 56.**

(2037)—*S. 144, O. 47, rr. 1 & 4 (=ss. 628, 626, Civ. Pro. Code* 1882)—*Discovery of new and important matter—Review of judgment-Appellate Court—Due diligence.*—Where a defendant applied for review of the judgment on the ground of the discovery of new and important evidence consisting of an old release-deed executed by one of his ancestor and stated that the deed was discovered when he happened to dust one of the four or five books in a shelf in one of the only two rooms in his house, *held* that the defendant's statement did not prove due diligence and that, as the place from which the document was discovered was not an unnatural place to search for the document and as the document was of very great importance, the application should be dismissed. HARJIMAL DHAMAL v. BHEJANMAL, **2 Sind L.R. 35 F.B.** (31 B. 81, 9 Bom. L.R. 61, *R.*)

(2038)—S. 114, O. XLVIII, rr. 1,—*See* REVIEW—GENERAL. 7 O.C. 345.

(2039)—S. 114, O. XLVII, rr. 1 ,4—*See* REVIEW—JURISDICTION TO REVIEW, 9 B.H.C. 238.

(2040)—*S. 114, O. 47, rr. 1, 7, 9, (=ss. 623, 629, Civ. Pro. Code, 1882)—Application for review of judgment—'Any other sufficient reason'—Appeal against the order granting a review—High Court's power to question the sufficiency or otherwise of the reason—Grounds for appeal.*—The plaintiff's suit was dismissed on the ground of deficiency in the Court-fee duty. On plaintiff's applying for review of judgment, the Court granted the application, having found that the Court-fee, which he had originally paid, was more than sufficient. *Held*, that, where a Court was of opinion that there was other sufficient reason' within the meaning of s. 623 of the Code for granting an application for review of judgment, the High Court need not consider in appeal whether that Court was right or wrong in its opinion on that point, inasmuch as an appeal from an order admitting a review could be brought on one of the three grounds mentioned in s. 629 of the Code, and on those grounds only—*Per Richards, J.*—The fact that the Court-fee, originally paid, was afterwards found to be more than sufficient, constituted a most fitting ground for granting a review of judgment and was clearly 'other sufficient ground' within the meaning of s. 623 of the Code, ALI AKBAR v. KHURSHED ALI, **A.W.N. 1905, 154=2 A.L.J. 465=21 A. 695.**

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(2041)—*S. 114, O. 47, r. 1, O. 41, r. 11 (=ss. 623, 551, Civ. Pro. Code,* 1882)—*Review of judgment pending an appeal—Appeal dismissed under s. 551 of the Civ. Pro. Code—Procedure—Practice.*—Where there has been an appeal there still may be a review of the judgment of the Court against whose decree the appeal was preferred, provided the appeal to the higher Court is withdrawn. Where, however, an appeal is preferred but the same is rejected under s. 551 of the Civ. Pro. Code, the Court of first instance cannot entertain an application for review of its own judgment. RAMAPPA v. BHARMA, **8 Bom. L.R. 842=30 B. 625.**

(2042)—S. 114, O. XLVII, r. 2—*See* U.P. ACT XII OF 1881, s. 185, 19 A. 522=A.W.N. 1897, 139.

(2043)—S. 114, O. XLVII, r. 4—*See* REVIEW—PRACTICE AND PROCEDURE, 1 A. 363.

(2044)—*S. 114, O. 47, rr. 7, 9 (=Civ. Pro. Code,* 1882, *ss. 623, 629)—Second application for review*—The Code of 1882 does not prevent a second application for a review being made after a previous application for review has been made and rejected. GOBINDA RAM MONDUL v. BHOLANATH BHATTA, **15 C. 432.** (5 M. H.C. 323, *Rel. on.*) [*F.*, L.B.R. 1893—1900, 580 *R.*, 26 B. 485, 9 P.R. 1905, Rev.=65 P.L.R. 1906.]

——S. 115 (=1882, s. 622=1877, s. 622).

See PRESIDENCY SMALL CAUSES COURTS ACT, 1882, ss. 6, 38.

See REVISION.

(2045)—*S. 115 (=Civ. Pro. Code,* 1882, *s. 622)—Revisional power of High Court—Original jurisdiction—Right of vakil to appear on the original side.*—An application to invoke the exercise by the High Court of its revisional jurisdiction over the Presidency Small Cause Court under s. 622, Civ. Pro. Code, falls within the original jurisdiction of the High Court, and so must be made in the usual course by an advocate of the Court and not by a vakil, as the latter is not entitled to practice upon the original side of the High Court. *Re* APPLICATION OF A VAKIL OF THE APPELLATE SIDE, **7 C.W.N. 843.**

(2046)—*S. 115 (=Civ Pro. Code,* 1882, *s. 622)—Court acting without jurisdiction—Collins, C.J.*—When a Court assumes, as a matter of law, that which in fact had no existence in law, it cannot give itself jurisdiction over the matter of the suit. *Kernan, J.*—If the Court passes a decree against a party, on the basis of a decision, which is the result of an error of law applied to the facts of the case, the High Court has power to interfere in revision, under s. 622, Code of Civil Procedure. *Per Muthusami Aiyar, J.*—The words "act illegally so

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with material irregularity" in s. 622, Civ. Pro. Code, apply to those cases only, in which there is an error of law or a material irregularity in the procedure, by reason of which the Court concludes that it has or has not jurisdiction. The term 'jurisdiction' is used in contradiction to the "merits" and it denotes a tribunal designated by the Legislature as competent to entertain the case under reference. MANISHA ERADI v. SIYALI KOYA, **11 M. 220, F.B.** [*Dis. apper*;17 M. 410 F.B.; *F.*, 15 M. 372, 16 M.454, 12 C.P.L.R. 112; *R.*, 27 M. 504, 25 A. 509, F. B. =23 A.W.N. 104, 31 C. 385, 2 L.B.R. 333, 4 N.L.R, 184.]

(2047)—*S. 115 (=s. 622, Civ. Pro. Code*, 1882 —*Power of the High Court*,—Case where it was held that the High Court has power to interfere under s 622, Civ. Pro. Code, as the Judge acted with illegality or material irregularity in the exercise of his jurisdiction. PUGARDIN v. MOIDIN, **6 M 414.** [*R.*, 11 M. 220.]

(2048)—*S. 115(=s. 622. Civ. Pro. Code*, 1882) —*Interpretation* —" *Material Irregularity* "— The words "a material irregularity" in s. 622 of the Code include an irregularity of procedure materially affecting the merits of the case. The application of a section of the Code to a case to which it does not apply stands upon the same footing and is a material irregularity. SUW BUX BOGLA v. SHIB CHUNDER SEN, **13 C. 225.** (7 A. 336, *Obs.*) [*Cons.*, 2 L.B.R. 333; *Disc.*,—2 C.W.N. 474; *R.*, *14* C. 768. 1 C. W.N. 617, 130 P.L.R. 1905=65 P.R. 1905, 3 L.B.R. 275, 9 C.L.J. 210.]

(2049)—*S. 115 (=Civ. Pro. Code*, 1877, s. 622)—*Jurisdiction.*—Where a Court has no inherent jurisdiction over the subject-matter of a suit, neither the consent of the parties, nor the failure, of one of them to object to it, can give it a jurisdiction not conferred on it by law. And where the objection is urged under s. 622 of the Civ. Pro. Code, the High Court cannot refuse to take notice of it. DEBI SINGH v. HANUMAN UPADHYA, **3 A. 747.**

(2050)—*S. 115 (=s. 622.)—Revision grounds of—Power to go into the merits of case—Rule of equity.*—The Chief Court is fully empowered in a revision application to go into the merits of the decision which is being revised on a point of jurisdiction. A Court dismissing an appeal on the ground of equity, justice and good conscience must specify the same in its judgment, and by failure to do so acts with material irregularity justifying a revision of its decision by the Chief Court. ROEBUCK v. HENDERSON, **54 P.R. 1896.** [*R.*, 12 P.R. 1907, 121 P.R. 1907 =51 P.W.R. 1907.]

(2051)—*S. 115 (=Civ.Pro. Code*, 1877, *s 622) —High Court's powers of revision under s. 622 of the Civ. Pro. Code*, 1877.—Where the proceedings of both the lower Courts in a case are without jurisdiction, and the case is one in which there is no second appeal, the High Court is competent to entertain an application under s. 622 of the Civ. Pro. Code, and quash such proceedings. Accordingly, where a suit of a small cause nature was instituted in the Court of an Assistant Collector who dismissed it, was taken on appeal to the District Court which decreed it; and the High Court declined to interfere as there was no second appeal; *held* that the High Court could entertain an application for revision and quash the proceedings of both the Lower Courts. (See 3 A. 37). Observations by *Stuart, C. J.* on the powers of revision of the High Court under s. 622 of the Civ. Pro. Code, 1877. SARNAM TEWAI v. SANKINA BIBI, **3 A. 417.** [*R.*, 9 A. 398.]

(2052)—*S.115 (=Civ. Pro. Code*, 1882, s.622,) —*Misjoinder of parties and causes of action —Return of plaint—Power of High Court to revise.*—An order under s. 57 of the Code was passed returning a plaint to be amended. The order was appealed against and it was upheld. Then the plaintiff applied for revision. *Held* that the High Court could interfere and examine the order by way of revision. *Held*, further that the contention that those proceedings did not amount to a "case" within the meaning of s. 622 of the Code was unsustainable. GANDHARP SINGH v. JASWANT SINGH, **A.W.N. 1881, 37.**

(2053)—*S. 115 (=s. 622, Civ. Pro. Code*, 1882) — *Construction — Setting aside interlocutory orders* —S. 622, Civ. Pro. Code, does not prevent the High Court from setting aside an interlocutory order made without jurisdiction. The word "case" in s. 622 is wide enough to include an interlocutory order, and the words "record of any case" include so much of the proceedings in any suit as relate to the interlocutory order. DHAPI v. RAM PERSHAD, **14 C. 768.** (12 C.L.R. 148, 4 A. 31, 5 A. 293, 6 A. 233, *Diss.*) [*F.*, 2 O.C. 67; *R*, 18 B. 35; *D.*, 31 P.R. 1902=8 P.L.R, 1902.]

(2054)—*S. 115 (=s. 622, Civ. Pro. Code*, 1882) —*Illegal exercise of jurisdiction—Interference by High Court—Civ. Pro. Code*, s. 622.—Where a (District) Judge, in dealing with a case, erroneously holds that a particular statute, or section of it, is applicable to the case, and that, by reason of that statute or section, the suit does not at all lie *e.g.*, s. 188 of the Bengal Tenancy Act, the Judge, in the exercise of the jurisdiction vested in him by law, acts illegally and with material irregularity within the meaning of s. 622, so as to entitle the High Court to interfere under the section. But where the Judge (11 C. 6=11 I.A. 237, *D.*) has jurisdiction to decide the question before him one way or the other and he makes a mistake in deciding it, it is not a matter that could be rectified by an application under s. 622. JUGOBUNDHU PATTUCK v. GADU GHOSE ALKUSHI, **16 C. 47.** [*Cons.*, 2 L.B.R, 333; *R.*, 16 B. 708, 1 C.W.N. 617, 1 C.W.N. 626, 25 A. 509=23 A. W.N. 104.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2055)—*S. 115 (=Civ Pro. Code*, 1882, *s.* 622) —*"Jurisdiction"—Meaning of.*—The word "jurisdiction," as used by their Lordships of the Privy Council in 11 C. 6, means the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority. (*Mahmood, J.*) HARPRASAD v. JAFAR ALI, **7 A. 345=A.W.N. 1885, 73.** [*Appr.*, 73 A. 661, F.B.; *R.*, 8 A. 519, 12 A. 510, F.B., 2 L.B.R. 333.]

(2056)—*S. 115 (=s. 622, Civ. Pro. Code*, 1882) —*Revision application and appeal pending before High Court.*—Where an application under this section and an appeal is pending before this High Court and the question of jurisdiction is involved in the case, the Court is competent to deal with the case, if not as an appeal, yet in the exercise of its revisional powers. SUDHIN DOO NARAIN ACHARJEE CHOWDHRY v. GOBINDA NATH SARKAR, **9 C.W.N. 504=1 C.L.J. 239=32 C. 518.**

(2057)—*S. 115 (=Civ. Pro. Code*, 1882 *s. 622*), —*Jurisdiction—Dekkhan Agriculturists' Relief Act (XVII of* 1879), *s. 53—Special Judge, revisional powers of—Failure of justice*—S. 622 of the Civ. Pro. Code, gives to the High Court jurisdiction to interfere only where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity." The Special Judge by s. 53 of Act XVII of 1879, has a revisional power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and, in doing so, he is entirely within his jurisdiction. GURUBASAVA v. CHANMALAPPA, **19 B. 286.**

(2058)—*S. 115 (=Civ. Pro. Code*, 1882 *s. 622*), —*Power of High Court in revision—Order under s. 409 on application to sue as pauper.*—There is nothing in s. 622 to limit the meaning of the words "acted illegally" to the case of a perverse decision; nor does it seem that the Court is empowered to interfere to correct an error, merely because it is gross and palpable or because no other remedy is available. There are many instances in which there can be no doubt as to the power to revise. Where there is a patent illegality or material irregularity of procedure, the application of the section cannot be doubted. For example, if a Court were to reject an application for leave to sue as a pauper explicitly on some ground not specified in s. 407, it could not be doubted that it would be "acting illegally." Or if it decided a case on a question of fact after refusing to hear witnesses on either side, it could not be denied that it had acted with "material irregularity." But where there is no illegality of so crude and obvious a kind and where the proper procedure has been observed, in cases, that is to say, where the application of the section is doubtful owing to the difficulty in distinguishing between an error of law and illegal action, the test

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859),—*continued.*

is whether the lower Court has applied its mind to the law and the facts and come to a decision after due consideration; or, whether it has failed to take into account some proposition of law or some fact in evidence which ought to affect its decision; if the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. ZEYA v. MI ON KRA ZAN, **2 L.B.R. 333.** (11 C. 6, 7 A. 345, 13 C. 225, 8 A. 111, 12 B. 617, 15 C. 47, 18 B. 369, 1 C.W.N. 617, 1 C.W.N. 626, 1 C.W.N. 633, 2 C.W.N. 474, 3 C.W.N. 581, 25 A. 509, 7 A. 336, 7 A. 661, 11 M. 220, 17 M. 410, 20 A. 78, 20 A. 299, 15 C. 446, 15 A. 139, 23 B. 177, L.B.R. 1893—1900, 61, L.B.R. 1893—1900, *Considered.*) [*F.*, 3 L.B.R. 120; *R.*, 4 U.B.R. 1905, 2nd Qr., Civ. Pro. 26, 3 L.B.R. 275.]

(2059)—*S. 115 (=Civ. Pro. Code*, 1882, *s. 622*) —*High Court, power of.*—When a Court, owing to the misconstruction of a rule of practice, exercises a power or jurisdiction which it would not have but for the misconstruction, it is a proper case for interference by the High Court under s. 622, Civ. Pro. Code. SEETHARAMA PATTER v. PARUKUTTI, **4 M.L.J. 280.**

(2060)—*S. 115 (=s. 622, Civ. Pro Code*, 1882)—*Presidency Small Causes Courts Act, s. 69—Difference of opinion among the Judges constituing the Full Bench—Disposal of the case according to the opinion of the majority—Legality—Jurisdiction of the High Court*—The Presidency Courts of Small Causes are Courts subordinate to the High Court and there is nothing in the language of s. 622 of the Code or in any other provision in the Code or the Presidency Small Causes Courts Act which may be said to indicate an intention on the part of the legislature to exclude such Courts from the application of s. 622 of the Code. (11 C. 261, 24 C. 455, 19 M. 96, 20 M. 358, 21 M. 232, 26 M. 163, *R.*) The fact that no formal order was made granting a new trial would not preclude the case from the operation of s. 69, if the Judges purported to deal afresh with the merits of the case. P. RANGIAH NAIDU v. G. RANGIAH, **4 M.L.T. 283.** (20 M. 358, *R.*).

(2061)—*S. 115 (=s. 622, Civ. Pro, Code*, 1882)—*Interference of a District Judge with judgment of Munsiff on question of law—Power of High Court to revise order of District Judge.*—By the proviso to s. 153, Bengal Tenancy Act, a District Judge has no power to interfere with the judgment of a Munsiff on a question of law. Where he so interferes, the High Court has power, under s. 622 of the Code, to revise the erroneous order of the District Judge. HORANANDA BANERJEE v. ANANTA DASI, **9 C.W.N. 492.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2062)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Conditions under which High Court can interfere with order of Court below—Revision—Erroneous decision on question of law.*—Under s. 622, Civ. Pro. Code, the High Court can interfere in revision with the order of the Court below only when the latter has acted illegally or without jurisdiction, and the fact that it may have been wrong on a question of law is not a reason for the High Court to interfere. SUBRAMANIA OTHUVAR v. MUNUSWAMI PILLAI, **3 M L T. 262.**

(2063)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Amending of decree—Civ. Pro. Code, (Act XIV of 1882) s. 206*—The proceedings under s. 206 of the Civ Pro. Code, 1882, terminate in an order (which can be dealt with in revision by the High Court). BAI SHRI VAKTUBA v. AGARSANGJI, **9 Bom. L R. 547=31 B. 447.**

(2064)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Execution proceedings.*—A decree-holder made a complaint under s. 328 of the Civ. Pro. Code, to the Judge who, holding that the matter came under s. 331 of the Code, without registering the claim as a suit and without making any inquiry, rejected the complaint. *Held*, that the order was not appealable: but it was one which could be dealt with by the High Court under the power conferred upon it by s. 622 of the Code. VISHNU v. RAMCHANDRA **9 Bom. L R. 936.**

(2065)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision at the instance of a person not party to the proceedings—Rule of procedure sometimes imperative—Guardian and Wards Act, s. 31 (2).*—Where a mother, who had been appointed guardian of the property of her minor sons, applied for sanction to sell it, which was granted, and an application for revision against the order granting permission for sale was made by an uncle of the minor who was not a party to the proceedings, *held*, that the High Court is not precluded by the absence of an application by a party, from exercising its jurisdiction under s. 622, Civ, Pro. Code Where the order granting permission for sale did not recite the necessity for it, *held*, that it could not be regarded as embodying the particulars required by s. 31 (2) of the Guardian and Wards Act, merely because it was endorsed on the back of an application which specified an alleged necessity. *Held* further, that s. 31, sub-section (2) of the Guardian and Wards Act, though it relates to procedure, is not merely directory. GOPAL v. MUSAMMAT MAHTABA. **12 O.C. 78=2 Ind. Cas. 237.** (4 C.W.N. 695, 28 C. 680, 26 B 716 *R.*)

(2066)—*S. 115 (=s 622, Civ. Pro. Code, 1882)—Subordinate Judge exercising jurisdiction which he had not and declining to exercise jurisdiction which he had.*—Where a Subordinate Judge declines to exercise jurisdiction which he has, and exercises one which does not belong to him, his judgment is liable to be reviewed by the High Court under s. 622 of the Code of Civil Procedure. BRIJ MOHUN THAKUR v. RAI UMA NATH CHOWDHRY. **20 C. 8=19 I.A. 154. P.C.** [*F.*, 25 C. 155; *Cons.*, 28 C. 324=5 C.W.N. 509: *R.*, 4 M.L.J. 87, 17 M. 410, F.B., 1 C.W.N. 617, 626, 633, 2 O C. 67, 29 C. 33, 30 C. 155; *Dis.*, 2 C.W.N. 474]

(2067)—*S. 115 (=s 622 Civ. Pro Code, 1882)—Revision—Omission to consider part of defence owing to an erroneous view of law—Jurisdiction—Held*, that, where a subordinate Court declines to consider a certain part of the defence, owing to an erroneous view of the law, such Court should be deemed to have failed to exercise jurisdiction vested in it by law, and its decision can be revised by the High Court under s. 622. GHISA v B. SHUKDEO SINGH, **10 O.C. 8.** [*R.*, 13 O.C. 109.]

(2068)—*S. 115 (=Civ. Pro. Code, 1882, s 622)—Act XIX of 1841, ss. 3 & 4—Inventory directed to be taken*—The order of a District Court directing, under s. 4 of Act XIX of 1841, the taking of an inventory of the estate of a deceased person, is liable to be interfered with by the High Court under s. 622, Code of Civil Procedure, if such order does not conform to the requirements of s. 3 of the said Act. ABDUL RAHIMAN v. KUTTI AHMED, **10 M. 68.** [*R.*, 2 N.L.R. 72, 34 C. 929=12 C.W.N. 65.]

(2069)—*S. 115, (=Civ. Pro. Code, 1882, s 622)—Order of Civil Court appointing manager of temple—Power of High Court to revise order—Office of manager of* Devasthanam—*Appointment of manager by Civil Court—Necessity for vacancy in office—Conditions precedent for exercise of jurisdiction by Civil Court.*—An order by the Civil Court under the powers conferred by s. 5 of the Religious Endowments Act is a judicial adjudication in the matter before the Court. Consequently, it is competent to the High Court to entertain a revision petition against the order. Before the Civil Court can exercise the jurisdiction conferred by s. 5 of the Religious Endowments Act, certain conditions precedent must exist. The first condition is that there should be a vacancy in the office. The second condition is that there should have been a transfer to the former trustee. The third condition is that a dispute should have arisen respecting the right of succession to the office. The words "any dispute shall arise respecting the right of succession" in s. 5 of the Act are not limited to the existence of an outstanding dispute with regard to the question of the right of succession to the office, but extends also to the case in which a question has arisen with reference to the person who is to succeed to the office. GOPALA AYYAR v. ARUNACHALAM CHETTY, **26 M. 85.**

(2070)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—When second appeal may be treated as application for revision.*—Where a second appeal is preferred from an order from which

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

a second appeal does not lie, the second appeal so preferred cannot be treated as an application for revision under s. 622, unless it is shown that the lower Courts acted with material irregularity in the exercise of their jurisdiction. BALARAM v. MULLA. **5 C P.L.R. 81.**

(2071)—*S. 115 (=s. 622, Civ. Pro. Code, 1982)—Charter Act, s. 15—Analogous appeals in superior and inferior Courts—Duty of inferior Court to await decision of superior Court.*—The High Court has powers either under s. 622, Civ. Pro. Code, or if not, under s. 15 of the Charter Act, to interfere in cases where the lower Courts have not acted correctly in accordance with law. Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasenable steps for that purpose and the suit was disposed of by both the Court of first instance and the appellate Court without reference to that document, the High Court in revision set aside the judgments of both the Courts. When appeals preferred in analogous cases are pending, some in an inferior and others in a superior appellate Court, the inferior Court of appeal would exercise a wise discretion to await the decision of the superior appellate Court. MOHANT GOBIND RAMANUJA DAS v. LAKHUN PARIDA, **11 C.W.N. 112=8 C. L.J. 43.**

(2072)—*S. 115—Order to prosecute for offence not committed—Material irregularity—Interference in revision.*—Where a Court directs the prosecution of a person for an offence, which, clearly on the facts before it, has not been committed, *held* that the Court has acted with material irregularity, and the order may be set aside in revision. BALBHADAR DAS v. KING-EMPEROR, **8 A.L.J. 537.**

(2073)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Decree—Appeal by contesting defendants, dismissed—Setting aside the decree--Competency of Court.*—A suit was brought against defendants 1 and 2 for declaration of title, and against the other defendants for *khas* possession, and it was contested only by defendants 1 and 2 and decreed, and the appeals preferred by defendants 1 and 2 were dismissed by both the Courts of appeal. The other defendants applied to set aside the *ex-parte* decree, and the Munsiff passed orders that the suit be restored, and allowed defendants 1 and 2 to defend the suit *de novo*. *Held* that the Munsiff had no jurisdiction to set aside the decree as against defendants 1 and 2, which was not an *ex-parte* decree, and which was not its decree but that of a superior Court, and that the High Court could interfere under s. 622, Civ. Pro. Code, to set aside the order of the Munsiff. MONOMOHINI CHOWDHURANI v. NARA NARAYAN ROY CHOWDHRI, **4 C.W.N 456.** [*R.*, 24 A. 383, F.B., 15 C.P.L.R. 179, 26 M. 604, 6 C.L.J. 226, 31 M. 454=4 M.L.T. 230 =18 M.L.J. 543.]

(2074)—*S. 115 (=s. 622, Civ. Pro, Code, 1882—Revisional jurisdiction—Court of Judicial Commissioner, Lower Burma—Court of Judge of Moulmein—Court of Small Causes—Lower Burma Courts Act, ss. 9 and 10—Provincial Small Causes Courts Act, 1887, s. 25.*—The Court of the Judicial Commissioner, Lower Burma, has jurisdiction to revise decrees and orders of the Judge of Moulmein sitting as a Court of Small Causes. Extent of revisional powers of High Court under s. 622, Civ. Pro. Code, 1882, and s. 25, Act IX of 1887, considered. MEYAPPA CHETTY v. CHOCKALINGAM CHETTY. **L.B.R. 1893—1900, 61.** (11 C. 6, 15 C. 446, 13 A. 277, 8 C. 170, *R.*)

(2075)—*S. 115—Suit on pro-note—Failure of consideration — Discrepancies between the terms of the pro-notes and their description in the plaint—Dismissal of suit on the ground of discrepancies—Material irregularity—Failure to exercise jurisdiction—Revision.*—Where, in an action on pro-notes, the Court dismissed plaintiff's suit simply on the ground of certain discrepancies between the terms of the pro-notes and the description of them in the plaint. *Held*, that the Court acted with material irregularity and failed to exercise a jurisdiction vested in it by law, and that the High Court was empowered to deal with the matter in revision under s. 115, Civ. Pro. Code, 1908. SRI MIRZA PASUPATI VIZIARAMA JAGAPATHI RAJAMAHARAJU MAYA SULTAN BAHADUR VARU, MAHARAJU OF VIZIANAGARAM THROUGH G. APPIAH MUKTAR v. MUDURI SURYANARAYANA, **9 Ind. Cas. 32=9 M.L.T. 268=21 M.L.J. 461.**

(2076)—*S. 115 (=Civ. Pro. Code 1882, s. 622)—Application for revision by third party.*—Under certain circumstances, the High Court can act under s. 622, Civ. Pro. Code, otherwise than on the application of a party to the proceedings sought to be revised. (7 C.L.R. 91, *Expl. and D.*; 1 C.W.N. 633, *R.*) On a reference made to the District Judge under s. 55 of the Land Registration Act, a decree was passed in favour of A, and he was put in possession in spite of the claim of C that he had been in possession as auction-purchaser under a mortgage-decree. And C did not take any steps to obtain any recognition of his title from the District Judge, but some months afterwards applied to the Court of the Subordinate Judge from whom he had originally obtained possession as auction-purchaser, for an amendment of his sale-certificate and for a fresh writ of possession in pursuance of the amended sale-certificate; and, before any action could be taken upon that writ, A presented an application to the Suubordinate Judge representing his right to and possession of the property, but the Subordinate Judge declined to take any action upon it. Several resistances were made to the delivery of possession to C, and several successive writs of possession were issued to C, and A moved the High Court under s. 622, Civ. Pro. Code, for a revision of the orders of the Subordinate Judge, *held*:—

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

that A had a sufficient interest in the orders complained against to justify him in moving the High Court to exercise its revisional powers; that the proceedings of the Subordinate Judge were bad *ab initio*. GOLAM MAHAMMAD v. SARODA MOHAN MAITRA. **4 C.W.N. 695.** [*Appr.*, 28 C. 680=6 C.W.N. 114.]

(2077)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Liability of broker—Burden of proof—Decree unsupported by any evidence—Jurisdiction.*—In order to make a broker liable on the ground of want of authority, *onus* is upon the plaintiff to affirmatively prove such want of authority. A decree, which is unsupported by any evidence, is made without jurisdiction and is liable to be set aside under s. 622 of the Civ. Pro. Code. *In the matter of s. 622 of the Civ. Pro. Code.* BISSESSUR DASS v. JOHANN SMIDT, **10 C.W.N. 14.** (9 A. 398, *F.*)

(2078)—*S. 115 (=Civ. Pro Code, 1882, s. 622)—Father's debt—Personal decree against minor sons.*—A personal decree against adult sons may be erroneous, but one against minors is materially irregular and so revisable. "Irregularity" in s. 622 refers to procedure. BASHYAM v. JAYARAM. **11 M. 303.** [*F.*, 17 C.P.L.R. 57; *R.*, 17 M. 410, F.B.]

(2079)—*S. 115 (=Civ. Pro. Code, 1882, s 622)—Reg. II of 1827, s. 5—Practice—Valuation by Subordinate Court for determining Court-fee—Power of High Court to revise decision.*—A decision by a subordinate Court on a question of valuation for determining the amount of Court-fee is, although not subject to examination in appeal, subject to revision by the High Court under s. 622, Civ. Pro. Code, 1882, and s. 5 of Reg. II of 1827. VITHAL KRISHNA v. BAL KRISHNA JANARDHAN, **10 B. 610, F.B.** [*R.*, 17 B. 56, 15 B. 82, 23 B. 486.]

(2080)—*S. 115 (=Civ. Pro. Code, s. 622 of 1877)—Powers of the High Court.*—The High Court has power to interfere, under s. 622 of the Code, with an order of confirmation of sale and set aside the order. SUBBAJI RAU v. SRINIVASA RAU, **2 M. 264.** [*R.*, 7 B. 341.]

(2081)—*S. 115 (—s. 622 of Civ. Pro. Code, 1882)—Jurisdiction — Material irregularity—Notice to parties of time and place at which Court is to be held.*—The petitioner was told to attend the Court of the Deputy Collector on a certain date. He attended the Court on that date at the usual place of sitting of the Court, while the Deputy Collector held his Court 16 miles off, of which the petitioner had no notice. He consequently failed to appear and an *ex-parte* decree was passed against him: *Held*, that litigants are entitled to proper notice both of the time and of the place at which the Court is to be held; that in the absence of such notice the Court cannot proceed to decide the case *ex parte*, and that, if it does so, it acts in the exercise of its jurisdiction with material irregularity. BHYRON PERSHAD v. JAGDAMBA BAKHSH, **1 O.C. 166.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2082)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—High Court's revisional jurisdiction.*—The exercise of jurisdiction under s. 622 is discretionary, and the Court does not usually interfere under the section, if the result of any irregularitty in the lower Court has been to promote the justice of the case. G.P. COOKE v. THE EQUITABLE COAL, CO., LTD. **8 C.W.N. 621.**

(2083)—*S. 115 (=Civ. Pro Code, 1882, s. 622)—Scope—High Court's power of revision.*—The section is of very limited operatian; the meaning of the section is that, whenever a Court has jurisdiction to decide a question, whether it is a question of law or fact, its decision on that question is not revisible by the High Court. Unless it is a matter in which there is an appeal, its decision on that matter is final, and that decision cannot be reviewed by the High Court because it is wrong either on the question of law or of fact. KRISHNA MOHINEE DOSSEE v. KEDARNATH CHUCKERBUTTY. **15 C. 446.** (11 C. 6, *F.*) [*F.*, L.B.R. 1893—1900, 548; *Cons.*, 2 L.B.R. 333.]

(2084)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Review.*—S. 622, Civ. Pro. Code, does not apply to a case where the order, of which a review is sought, was made by the High Court. The Court referred to in s. 622 is a Court other than the High Court. *In re* PREMJI TRIKUMDAS. **17 B. 514.** [*R.*, 45 P.L.R. 1901.]

(2085)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Interference of High Court.*—If no case for the interference of the High Court is made out, it is not necessary for that Court to interfere, even in cases where the orders made are irregular. *In the matter of* BASHARAT ALI CHOWDHRI, **24 C. 133.**

(2086)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision.*—Where a Court has jurisdiction over a matter, whether it exercises such jurisdiction rightly or wrongly, the High Court cannot interfere. GODU RAM v. SURAJ MAL, **2 A.L.J. 18=A.W.N. 1905, 10=27 A. 380.**

(2087)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision, when allowed.*—*Held*, that, where there is no irregularity or want of jurisdiction, the order of the lower Court even if erroneous, cannot be disturbed in revision. DWARKA PRASAD SINGH v. JANKI PRASAD SINGH, **11 O.C. 288.** (18 B. 35, 6 C.W.N. 57, *Disappr.*) [*F.*, 12 C.O. 405.]

(2088)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—No interference by High Court where right result has been reached by lower Court—Jurisdiction of lower Court to review wrong order.*—Where a Court passed an order under a wrong section, it has jurisdiction to review the wrong order for sufficient reason; and the High Court will not interfere under s. 622, if the right result has been reached and that which was irregularly done has been set right. BOLLAPRAGADA GARU NARAYAN ROW v. BOLLA PRAGADA JANKI RAMIAH GARU, **31 M. 414=5 M.L.T. 221.** (16 M. 424, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2089 & 90)—*S. 115 (=s. 622, Civ. Pro. Code, 1882) — Revision—Wrong decision by Court having jurisdiction.*—The words, " act illegally or with material irregularity in the exercise of its jurisdiction," in s. 622, Civ. Pro. Code, do not comprehend cases of erroneous decisions of lower Courts in cases which the Courts have jurisdiction to decide. PARASURAMA AIYAR v. SESHIER, **27 M. 504.**

(2091)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Material irregularity—Mistaken view of the law by the lower Court.*—The lower Court's decree should not be reversed by the High Court under s. 622, Civ. Pro. Code, merely because a mistake in law is made. But where the mistake of law is caused by the case not being properly heard, then there will be interference by the High Court on the ground of material irregularity DURAIASMI REDDI v. MUTHIAL REDDI, **31 M 458,** (26 M. 330. *R.*)

(2092)—*S. 115 (=Civ. Pro. Code, 1882, s. 622).*—When an inferior Court has applied its mind to a question of law or procedure, and arrived at an erroneous decision, such decision is not by itself any ground for the exercise by the High Court of the powers given by s. 622, Civ. Pro, Code. The case contemplated by the words " act. . . illegally or with material irregularity " in s 622, Civ. Pro. Code, is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or Procedure. KRISTAMMA NAIDU v. CHAPA NAIDU, **17 M. 410 F.B** (11 C. 6, *F.*) [*Disappr.*, 18 C.W.N. 633 ; *R*, 1 C.W.N. 617, 1 C.W.N. 626, 2 L.B.R. 393.]

(2093)—*S. 115—Judgment of lower Court—Mere technicality, not a ground for setting it aside under s. 622, Civ. Pro. Code.*—On a purely technical ground alone the decision of a lower Court ought not to be declared a nullity under s. 622, Civ. Pro. Code, 1882. ASHARFI LAL v. DEPUTY COMMISSIONER OF BARA BANKI, **22 C. 729, P.C. =22 I.A. 90.**

(2094)—*S. 115 (=Civ. Pro. Code, 1877, s. 622)—Term" case," explained—Proceedings in foreclosure under Reg. XVII of* 1806.—S. 622, Civ. Pro. Code, 1877, has no application to proceedings in foreclosure held by the District Judge under Reg. XVII of 1806, which do not fall within the term " case" mentioned in that section. MENDAKOOER v. BHAGGI SINGH, **A.W.N. 1882, 2.**

(2095)—*S. 115 (=Civ. Pro. Code, 1877, s. 622)—Application to sue as pauper—Rejection—Revision.*—An order refusing permission to sue *in forma pauperis* would not fall within the term " case" in s. 622, and no revision lies to the High Court. PHUL SINGH v. JAGAN NATH, **A.W.N. 1882, 39.**

(2096)=*S. 115 (=Civ. Pro. Code, 1877, r. 622)—Pauper suit—High Court's powers of revision.*—S. 622, Civ. Pro. Code, 1877, had no application to proceedings upon petition to sue or appeal *in form a pauperis.* The High Court cannot, therefore, revise the order of a Subordinate Judge allowing a person to sue as a pauper SITAL SAHU v. BECHU RAM, **A.W.N. 1882, 92.** [*R.*, 7 A. 661, F.B.]

(2097)—*S. 115—Order granting an application to sue* in forma pauperis—*Revision.*—An order of a Subordinate Jugde, granting an application to sue *in forma pauperis*, cannot be revised. MALIK MUHAMMAD AYUB v. MALIK MUHAMMAD MAHMOOD, **7 A.L.J. 741 =6 Ind. Cas. 831.**

(2098)—*S. 115—Leave to sue* in forma pauperis—*Order granting— No revision.*—No application lies under s. 115, Civ. Pro. Code, 1908, for revision of an order allowing a petitioner to sue *in forma pauperis.* SITAI v. TENAI, **7 N.L.R. 49.** (32 A. 623, *F.*)

(2099)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Dismissal of suit as time-barred—Revision. by High Court.*—Where, on the dismissal of a small cause suit as time-barred, an application was made to the High Court under s. 622, Civ. pro. Code, 1882, *held*, that, with reference to the ruling of the Privy Council in 11 C. 6 the grounds raised in this case were not such as could be entertained by the High Court in revision under s. 622 ALI MAZIGH v. SHEO BAKHSH, **A.W.N. 1885, 32.**

(2100)—*S. 115—Wrong decision on limitation—Revision.*—A wrong decision as to limitation or as to the jural relation between the parties does not necessarily involve any material irregularity or illegality in the exercise of jurisdiction, so as to make it a ground of revision under s. 115 of the Code. KARMAM SAMA ROW *alias* VENKATA NARANAPPA v. RODDAM VENCOBA ROW, **6 Ind Cas. 745.**

(2101)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Question of limitation wrongly decided —Not a sufficient ground for interference under* —Erroneous decision of the lower Court on the question of limitation, though it amounts to an error of law and a ground for second appeal, is not a ground for interference in revision under s. 622, Civ. Pro. Code (Act XIV of 1882). DURI v. MOHANLAL, **4 N.L.R. 184.** (11, C. 6, 15 A. 139, 16 A. 39, 20 A. 78, 11 B. 488, 9 M. 118, 11 C. 6, 11 M. 220, 31 C. 799, 15 C 446, 12 C.P.L.R. 112,) *R.*, [*F.*, 6 N.L.R. 49]

(2102)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Award — Error of procedure—Refusal of relief on equitable grounds.*—Where a person authorises his agent to conduct a suit for him and the latter assents to a reference to arbitration, which the former not only ratifies but of the conducting of which by the arbitrators he is fully aware, he cannot, after the award has been made, seek to have it set aside under s. 622, Civ. Pro. Code, either on the ground that the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

case was referred to arbitrators without his knowledge and consent, or that his pleader was not specially authorised in writing as required by s. 506 of the Code. UNNIRAMAN v. CHATAN, **9 M. 451**. [*F.*, 24 C. 469 ; *Expl.*, 8 O.C. 263. 28 C. 303 ; *R.*, 1 Bom. L.R. 261 ; *D.*, 5 C.W.N. 568.]

(2103)—*S. 115 (Civ. Pro. Code*, 1882, *s. 622)—Revision—Admission of insufficiently stamped document in evidence, if ground for.*—Ordinarily, the High Court would not entertain applications for revision under s. 622 of the Civ. Pro. Code, 1882, upon the ground of inadmissibility of documents in the lower Courts by reason of insufficiency of stamp. Such a ground goes neither to the merits of the case, nor to the jurisdiction of the Court, nor does it fall within the category of those irregularities which are contemplated by s. 622 of the Civ. Pro. Code. BHAIRO RAM v. SUNDRI, **A.W.N. 1884, 154.**

(2104)—*S. 115 — Revision—Evidence, misappreciation of—Whether ground for revision—Berar and Central Provinces—Applicability of the Code.*—The mere fact that one item of evidence has been given undue weight or misappreciated is not a sufficient ground for interference in revision under the Code of Civil Procedure. (4 N.L.R. 184, 11 C. 6, P.C., *R.*.) The new Code of Civil Procedure is applicable to Berar and there is no difference between Berar and Central Provinces with regard to the High Courts power of revision under the Code. BABU v. MT. PARWATI, **6 N.L.R. 49=6 Ind. Cas. 429.** (2 N.L.R. 72, *D.*)

(2105)—*S. 115 (=s. 622, Civ. Pro. Code*, 1882)—*Petition for revision—Act XV of* 1882 *(Presidency Small Cause Courts Act,) s. 38—Without making application to Full Bench.*—Except in very special cases, the High Court will not interfere under s. 622, Civ. Pro Code, when the party aggrieved has a remedy elsewhere, *e.g.*, by an application under s. 38 of the Presidency Small Cause Courts Act. SIGNOR COPPA ANGELS v. D'ANGELIS, **4 M.L.T. 325.**

(2106)—*S. 115 =Civ Pro. Code*, 1882, *s. 622)—Scope of the section—"Jurisdiction," meaning of—Order amending decree under s. 206, High Court, whether could entertain application for revision of.*—On an application, to the High Court, made by a judgment-debtor for revising an order amending the decree in respect of an arithmetical error, it was held (*per Oldfield, J.*) that the application for revision could not be entertained, since the order sought to be revised was not open to any objection on the score of want of, or excess of, jurisdiction. Whether or not the lower Court erred, in having entertained the application, because of its bar by limitation or other grounds, are questions which do not affect the jurisdiction of that Court, so as to enable the High Court to interfere under s. 622 of the Code. (11 C. 6, 8 A. 111 *R.*) *Held per Mahmood, J*, that the Legislature, in framing s. 622 of the Civ. Pro. Code, has given the High Court the power and jurisdiction to interfere in the action of the subordinate tribunals in cases where there is no remedy by appeal or otherwise, and where those tribunals have either exceeded, or wrongly declined to exercise, the power and jurisdiction which the law confers upon them, or, under the pretence of exercising such power and jurisdiction, have acted against a positive prohibition of the law. The High Court had therefore power to entertain the present petition for revision for the purpose of satisfying itself whether the jurisdiction, assumed in this case by the lower Court, purporting to act under s. 206 of the Civ. Pro. Code, was rightly assumed ; and if so, whether its action in amending the decree did not exceed the authority and power which that provision of the law conferred upon that Court, and also whether that Court has not acted against some postive prohibition of the law. On the merits, the lower Court had jurisdiction to entertain the application for amendment, and, in making the amendment, its action was not *ultra vires*, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622 of the Code. DHAN SINGH v. BASANT SINGH, **8 A. 519= A.W.N. 1886, 182.** (11 C. 6, 8 A. 111, 7 A. 276, 7 A. 411, 7 A. 336, 7 A. 345, 6 A.W.N. 39, 57 *D.*; 9 W.R. 301, 471, 11 W.R. 142, 20 W.R. 111, *R.*) [*F.*, 8 A.W.N. 148, 10 A. 467 ; *R.*, 9 A. 486, 10 A. 119, 12 A. 115, 11 O.C. 208, 15 A. 359.]

(2107)—*S. 115 (=Civ. Pro. Code*, 1882, *s. 622)—S. 15, Letters Patent—Jurisdiction—High Court.*—When the Small Cause Court has jurisdiction to deal with the matter, the High Court cannot interfere either under s. 622, Civ. Pro. Code, or s. 15 of the Charter. THE CORPORATION OF CALCUTTA v. I.J. COHEN, **6 C.W.N. 480.** (3 C.W.N. 70, 26 C. 74, *F.*)

(2108)—*S. 115 (=Civ. Pro. Code*, 1882, *s. 622)—Sale of immoveable property in execution of decree—Material irregularity—Jurisdiction.*—Some property was put to auction-sale in execution of a decree on the 20th July, 1892, and the sale was closed on the 22nd July, 1892 ; on the 22nd July, the judgment-debtor applied to the Subordinate Judge for postponement of the sale. On the 23rd July, the Subordinate Judge, granting the application, directed the Deputy Commissioner to postpone the sale pending the further orders of the Court, The Deputy Commissioner reported that the sale had been completed on the previous day. The Subordinate Judge subsequently confirmed the sale. The objection of the judgment-debtor, that the sale was illegal and ought not to be confirmed, was, on appeal by the judgment-debtor, considered by the District Judge. *Held*, that the District Judge had jurisdiction to decide the question whether the sale was a valid or invalid one. He applied his mind to the determination of this question ; and, if his

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decision was erroneous, it cannot be said that he acted in the exercise of his jurisdiction illegally or with material irregularity, within ng of s. 622, Civ. Pro. Code. SITA AWAB MIRZA AXER ALI KHAN,

(2109)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision—Error of law not connected with the jurisdiction of the Court.*—In a suit based on a document, which bore a one anna stamp with two parallel lines drawn across it, the Court *held* that it was a promissory note payable otherwise than on demand and that it was, therefore, not duly stamped and was not admissible in evidence. In revision under s. 622 of the Code, it was contended that the Court had acted in the exercise of its jurisdiction with material irregularity, because the decision as to the admissibility of the document was wrong and by reason of that erroneous decision, it had failed to deal with the claim of the plaintiff, in so far as it was based on the document, which was held to be a promissory note. *Held*, that s. 622 of the Code, does not apply to a case like this when the Court has erred, if at all, in deciding a question of law which is not connected with the jurisdiction of the Court. GUR PRASAD v. SATGUR PRASAD, **9 O.C. 107.**

(2110)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Interference by High Court.*—Unless the High Court is satisfied that the Presy. Small Causes Court has acted in the exercise of its jurisdiction illegally, it cannot interfere under s. 622, Civ. Pro. Code, KALI CHARAN SIRDAR v. SARAT CHUNDER CHOWDHRY, **30 C. 397 = 7 C.W.N. 845.** (11 C. 6 *R.*)

(2111)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Order by District Judge on appeal under s. 588, Civ. Pro. Code—Interference by High Court.*—Where a District Judge passed an order on appeal under s. 588, confirming a sale, *held*, that such an order did not come within the purview of s. 622, and that the High Court could not interfere with such order. GOPI KOERI v. GOPI LALL, **21 C. 799.** [*F.*, 12 C. P.L.R. 112; *R.*, 1 C.W.N. 633.]

(2112)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Revision not ordinarily allowed where other remedy available.*—On an application to revise an order passed by a Township Judge, disallowing a claim to land attached in execution of a decree, *held* that it is the intention of the Legislature, as expressed in s. 283, Civ. Pro. Code, that a question of this kind should be left to the Court of first instance and that interference in revision would not be justified. MAUNG THAING v. MAUNG THALE NI, **U.B. R. 1897—1901, Vol. II, 311.** [*F.* U.B.R. 1905, 2nd Qr., Civ. Pro. Code, 26.]

(2113)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Jurisdiction of Court over defendant—Plea not raised in lower Courts—Evidence.*—Where the only ground raised in a revision-petition under s. 622, Civ. Pro. Code, was that

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the defendant, the petitioner, did not reside within the jurisdiction of the Court which disposed of the suit, and it appeared that that objection was not raised in either of the Courts below, *held*, that it was too late to take the objection in the High Court, that the defendant, having appeared in the Courts below and submitted his rights to adjudication, could not set aside the orders passed by the lower Courts, simply on the ground that he was not residing within the jurisdiction of the Court, and that that was a question that could only be decided upon evidence, and for that reason also should have been raised in the Courts below. SHAM SUNDAR v. MENDHAI, **A.W.N. 1886, 158.**

(2114)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Revisional powers of High Court.*—The plaintiffs (Zamindars) sued the defendants (tenants of a garden of fruit trees), for recovering Rs. 104, the value of half the fruit and wood for 3 years as their (plaintiffs') dues. The Court of first instance dismissed the suit. On appeal by the plaintiffs, the lower appellate Court gave them a decree. The defendants applied to the High Court under s. 622, Civ. Pro. Code, 1882, for revision. The grounds urged in the application were (1) that the plaintiffs' claim was based on contract, (2) that the appellate Court had, notwithstanding this, given them a decree on the basis of a custom which was not proved, (3) that the appellate Court had taken into consideration evidence which was not relevant, (4) that the suit was not maintainable as the land was recorded rent-free and had not been assessed to rent, and (5) that the appellate Court had failed to determine certain material issues of mixed fact and law. *Held* that there was no case for revision, with reference to the decision of the Full Bench. BEHARI RAM v. MUHAMMAD ZAKI, **A.W.N. 1885, 32.** (5 A.W.N. 32=7 A. 336, *R.*)

(2115)—*S. 115 (=Civ. Pro Code, 1882, s. 622)—Punjab Courts Act (XVIII of 1884), as amended by Act XXV of 1899, s. 70—Revision of interlocutory order.*—The Chief Court on revision would not interfere with an interlocutory order, where the Court passing it had jurisdiction to do so. POKHAR DAS v. KAKA RAM, **8 P.L.R. 1902=31 P.R. 1902.**

(2116)—*S. 115 (=Civ Pro. Code, 1882, s. 622) Revision—Case—Interlocutory orders.*—An application was made under s. 525, Civ. Pro. Code, to file an award. The defendant admitted the reference to arbitration, but urged that there was no award. Later on, reference to arbitration, meeting of the arbitrators, consultation between, and award by them, were denied by the defendants; it was also pleaded that the signatures of the defendants had been improperly obtained on the *iqrarnama* and the alleged award; and it was contended that the Court had no jurisdiction to proceed with the application. The original Court refused to allow the objection as to jurisdiction

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on the ground that the allegations made subsequently on which the objection was founded were inconsistent with the plea put in at first. On an application for revision against the order disallowing the objection as to jurisdiction of the original Court to proceed with the application, it was contended that the application for revision did not lie, as the case had not been decided, that the decree was subject to appeal, and that the order was an interlocutory one. *Held*, that the contention was right. The word 'case' in s. 622, Civ. Pro. Code, does not necessarily, and in every case mean the whole case, but may mean a particular branch of case for which an independent remedy or different procedure is provided by the Code, and the meaning of the word 'case' cannot be extended further. MEHTAB RAI v. JHAMAN LAL, **22 P.L.R. 1900.** (60 P.R. 1897, *F.*)

(2117)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision—Interlocutory orders—'Case,' meaning of.*—*Held*, that no application for revision will lie against an interlocutory order, which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter. The word 'case' as used in s. 115 of Act V of 1908, must ordinarily mean the whole case. But where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default or to set aside a decree *ex parte*, for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a 'case' within the meaning of the section. Any orders on matters arising incidentally in the course of the hearing of such proceeding, the object of which is to bring on the record or to exclude from it materials upon which its decision is to be based, are not by themselves decisions in a case which can be revised until the case is finally concluded. KEVANCHAL KUNWAR v. KANHAI LAL, **12 O.C. 405.** [*R.*, 13 C.C. 109.]

(2118)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Order refusing to re-admit appeal from order refusing new sale—No revision.*—No revision lies from an order refusing to re-admit an appeal against an order refusing to order a new sale. But there is nothing to prevent the appellate Court from treating the application for revision as an appeal and disposing of it on the merits, if it had been presented within the time allowed for an appeal and if it bore the court-fee required for an appeal. BAXI BAHADER SINGH v. GUNESH PANDIT, **3 C.P L.R. 166.** (10 C. 74, *F.*)

(2119)—*S. 115 (=Civ. Pro. Code, 1882, s. 622)—Suit by* lambardar *to recover additional rates—Appeal—No revision.*—A suit by a *lambardar* for recovery of additional rates, not being cognizable by a Court of Small Causes, a second appeal lies whatever may be the amount

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of the claim, and consequently a revision cannot be allowed. RANI UMED KOWAR v. JAWAHIR LAL KAYATH, **3 C.P.L.R. 177.**

(2120)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Revision—Conditions under which High Court will interfere in revision with discretion exercised by Court below*—The High Court will always refuse to exercise the extraordinary powers conferred on it by s. 622, Civ. Pro. Code, which may be called a revisional section, unless it is satisfied that either great injustice or great inconvenience would follow from its not exercising that power. (14 C. 549, *R.*) Case where the High Court refused to interfere in revision with the decree of a Court below in favour of a plaintiff, who brought a suit under s. 9, Specific Relief Act, for possession of certain lands, forsaken by his tenants during floods with the intention of going back after their subsidence, which were wrongfully taken possession of by the defendants' ryots after the flood receded. BINDUBASHINI CHOWDHURANI v. JANHOBI CHOWDHURANI, **13 C.W.N. 307, Footnote=1 Ind. Cas. 151.** [*R.*, 13 C.W.N. 305=1 Ind. Cas. 152.]

(2121)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Court—Whether District Registrar a Court.*—The word "Court" in s. 622 of the Code should be understood, in its ordinary legal sense, as "place where justice is judicially administered." A District Registrar is not a Court within the meaning of s. 622. MANAVALA GOUNDAN v. KUMARAPPA REDDI, **17 M.L.J. 313=2 M.L.T. 267=30 M. 326.**

(2122)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Crim. Pro. Code, ss. 195 and 439—Revision—Act No. XVIII of 1879 (Legal Practitioners'), s. 14—Jurisdiction.*—A complaint made by letter by a litigant to the subordinate Judge charging a pleader with professional misconduct was "filed" by the subordinate Judge; but on a similar complaint being sent to the District Judge, the District Judge having inquired into its authenticity sent it to the subordinate Judge for inquiry and report. The subordinate Judge thereupon instituted an inquiry under s. 14 of the Legal Practitioners' Act, as a result of which he granted sanction to the pleader to prosecute for perjury one of the witnesses who had appeared before him in the course of the inquiry, and this order was confirmed by the District Judge. *Held*, that the High Court had no jurisdiction to interfere with the order of the subordinate Judge under either s. 195 or s. 439 of the Code of Criminal Procedure; nor could it interfere under s. 622 of the Code of Civil Procedure, inasmuch as the subordinate Judge (though he possibly mistook the meaning of the District Judge's order addressed to him) had jurisdiction to inquire into the truth of the charge made against the pleader. MAZHAR HASSAN v. SAID HASAN, **A.W.N. 1908, 273=5 A.L.J. 749=9 Cr. L.J. 39=31 A. 38=1 Ind. Cas. 609.**

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(2123)—*S. 115 (=Civ. Pro. Code, 1882, s 622)—Appealable case—Court not to interfere in revision.*—Where the case was one which might have been appealed and carried in appeal up to the Court of the Judicial Commissioner, the latter Court could not deal with the case in revision under s. 622 of the Code. SHRAWAN v. RAGHO KUNBI, **6 C.P.L.R. 17.** [*R.*, 7 C. P.L.R. 141, 10 C.P.L.R. 17, 1 N.L.R. 103, 6 N.L.R. 168.]

(2124)—*S. 115 (=Civ. Pro. Code, 1877, s. 622) —Order of appellate Court setting aside award—Appeal—Revision.*—Where, on the application of one of the decree-holders to execute a decree, the judgment-debtor pleaded that the decree was satisfied and the matter was referred to arbitration, and an order was passed, in accordance with the award that the decree had been satisfied, with the direction that it should not affect the other decree-holder, but the award was set aside on appeal on the ground that the case was referred to arbitration without the consent of all the parties, *held* that, as there was an appeal from the lower appellate Court's order, an application under s. 622, Act X of 1877, for revision of the order, was not sustainable. *In re petition of* RAMPHAL, **A.W.N. 1881, 24.**

(2125)—*S.115 (=Civ. Pro. Code, 1877, s. 622) —Scope—Redemption of mortgage under Reg. XVII of 1806.—Held* that s. 622, Civ. Pro. Code, 1877, had no application to proceedings for redemption of mortgage under Reg. XVII of 1806. MOHUN v. BISRAM, **A.W.N. 1882, 32.**

(2126)—*S. 115 (=s. 622, Civ. Pro. Code, 1877, as amended by s. 92 of Act XII of 1879), Construction of.*—A Court cannot, where it has decided a suit over which it had jurisdiction, be said, merely because of its wrong decision of the case, to have exercised its jurisdiction illegally, or with material irregularity, under s. 622 of the Civ. Pro. Code of 1877, as amended by s. 92 of Act XII of 1879. AMIR HASSAN KHAN v. SHEO BAKSH SINGH, **11 C. 6, P.C.= 11 I.A. 237.** [*F.*, 10 C.L.J. 30=13 C.W.N. 835, 10 C.L.J. 33=13 C.W.N. 797, 64 P.R. 1885, 8 A.W.N. 148, 1 C.W.N. 633, 23 B. 177, 1 L.B. R. 142, 61 P.L R. 1902, 2 A.L.J. 370, 2 A.L.J. 711=A.W.N. 1905, 193=28 A. 84; *Expl.*, 1 C. W.N. 617, 3 C.W.N. 581; *commented on.* 206 P. R. 1889; *Cons.*, 2 L.B.R. 333; *Discussed*, 2 C. W.N. 474; *D.*, 11 M. 220, F.B., 15 C. 47, 11 C. 6 =11 I.A. 237, 105 P.R. 1888, 25 A. 509=A.W. N. 1903, 104; *R.*, 7 A. 407=5 A.W.N. 87, 9 B. 432, 7 A. 336, F.B.=5 A.W N. 32, 7 A 345=5 A.W.N. 73, 7 A. 661, F.B., 8 A. 111, F.B.=6 A W.N. 28, 8 A. 519=6 A.W.N. 182, 9 A. 104 F. B., 10 M. 51, 13 C. 225, 11 B. 488, 12 B. 617, 11 M. 303, 14 C. 768, 10 A. 467, 11 A. 267, F.B. 15 C. 446, 16 C. 749=16 I.A. 104, 9 A.W.N. 173, L.B.R. 1872—1892, Vol. I, 509, 16 M. 424, 19 C. 544, F.B., 15 A. 139, 4 M.L.J. 87, 17 M. 410, F.B., 19 B. 790, 16 A. 476, F.B., 17 A 422, L.B.R. 1893—1900, 61, 21 B. 250, 20 A. 78=17 A.W.N. 168, 1 C.W.N. 626, 20 A. 299,

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18 A.W.N. 74, 12 C.P.L.R. 112, 2 C.C. 67, 22 A. 270=20 A.W.N. 59, 20 A.W.N. 214, 5 C.W. N. 509=28 C. 324, 112 P.L.R. 1901=84 P.R. 1901, F.B., 66 P.R. 1904, 30 C. 397, 23 A.W.N. 12, 1 A.L.J. 298, 29 P.R. 1906=97 P.L.R. 1906, U.B.R. 1905, Civ. Pro. 26, 2 N.L.R. 7.]

(2127)—*S. 115 (=s. 622, Civ Pro.Code, 1882) —Merely erroneous construction of provisions of Act—No ground for interference under.*—A merely erroneous construction of the provisions of an Act, *e.g.*, that no person should be added as a defendant to an interpleader suit, unless the plaintiff recognises some right in the party, who seeks to be added, to share in the thing, in respect of which the interpleader suit is brought, would be no ground for relief under s. 622 of the Civ. Pro. Code, as it would not amount to "failing to exercise a jurisdiction vested by law." RABBABA KHANUM v. NOORJEHAN BEGUM, **13 C. 90** [*F.*, 8 P.R. 1897; *R.*, L.B.R. 1872—1892, Vol. I, 509.]

(2128)—*S. 115 (=Civ. Pro. Code, 1877, s. 622)—Sanction for prosecution—Crim. Pro. Code, 1872, ss. 468, 469—High Court's power of revision.*—The provisions of s. 622 of the Civ. Pro. Code, are not applicable to a matter relating to the exercise of the discretionary power of a Civil Court in the granting or withholding of sanction to a criminal prosecution for an offence mentioned in ss. 468, 469 of the Crim. Pro. Code, alleged to have been committed before or against such Court. *In the matter of the petition of* MADHO PRASAD. **3 A. 508.**

(2129)—*S. 115 (=s. 622, Civ. Pro. Code, 1882)—Limited power of interference in revision by High Court—Decision by competent Court, which by law is final and without appeal—Wrong decision—Material irregularity—Failure to exercise jurisdiction.*—S. 622, Civ. Pro. Code, is one of very limited operation and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on these questions. A decision by the judgment of a competent Court, whether right or wrong, which, by law, is final and without appeal, whether the Court has not acted in the exercise of its jurisdiction illegally or with material irregularity, cannot be set aside under s. 622. The fact that the Court may have arrived at a wrong decision is not necessarily a material irregularity or a failure to exercise jurisdiction. MA TAW U v MA NGWE, **L.B. R. 1893—1900, 548.** (15 C. 446, 16 C. 749, *F.*) [*Cons.*, 2 L.B.R. 333.]

(2130)—*S. 115 (=s. 622, Civ. Pro. Code, 1882) —Lower Burma Courts Acts, ss. 22, 24, 26—Second appeal, order refusing leave to file—Appealable order—Application in revision.*—The Lower Burma Courts Act distinctly restricts the right of appeal as compared with the Civ. Pro. Code. Under s. 22, the Judical Commissioner, may apparently refuse to entertain a second appeal

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even where the Courts below differ, and the decree of the Court of first instance is reversed or modified. S. 622, Civ. Pro. Code, must be interpreted strictly, and an appeal does lie from an order refusing leave to appeal. Where, therefore, leave to appeal has been applied for under s. 24, Lower Burma Courts Act, and that leave has been refused and no appeal has been filed against such order, no application for revision of the order refusing the leave will entertained in the Court of the Judicial be Commissioner. MAUNG TUN AUNG v. MAUNG KWIN, **L.B.R. 1893—1900, 592.**

(2131)—*S. 115 (= Civ. Pro. Code, 1882, s. 622)—Orders under Madras Act VIII of 1865, not open to revision by High Court.*—An order under s. 10 of the Madras Rent Recovery Act having been reversed on appeal, the appellant applied to the Revenue Officer for being restored to possession of the land from which he had been ejected under the original order and such application was dismissed by that Officer. It was held that such order of dismissal by the Revenue Officer could not be interfered with by the High Court on revision, since, as decided in 9 M. 332, s. 622 of the Code of Civil Procedure was not applicable to orders passed under Madras Act VIII of 1865. APPANDI v. SRIHARI JOISHI, **16 M. 451.** (9 M. 332, *R.*) [*F.*, 17 M. 298; *R.*, 22 M. 68.]

(2132)—*S. 115 (= Civ. Pro. Code, 1882, s. 622)—Letters Patent, s. 10—Revision—Appeal under s. 10, Letters Patent, from order in revision.*—No appeal lies under s. 10 of the Letters Patent from an order in revision made by a Judge of the High Court under s. 622 of the Code of Civil Procedure. NAND KISHORE v. KHERI SINGH, **A.W.N. 1892, 31.**

(2132-*a*)—*S. 115—Revision—Power of High Court.*—In revision it ought to be seen whether the order passed by the Court below was advisable for the ends of justice between the parties, and not so much whether one party or the other had been prejudiced. SHANKAR LAL v. MAHTAB DEI, **9 A.L.J. 207.**

(2132-*b*)—*S. 115—Erroneous exercise of discretion—No ground of interference in revision.*—When the District Judge, in the exercise of his discretionary jurisdiction under O. 6, r. 17 of the Civ. Pro. Code, refused amendment of the plaint on the ground that it materially altered the character of the suit, and there is no question of material irregularity in the exercise of such jurisdiction, the mere fact that the discretion was erroneously exercised is no ground of interference by the High Court in revision. VADLAMUDI VENKATA SUBBIA v. VADLAMUDI SESHACHALAM, **2 M.W.N. 1911, 257.** (10 M.L.J. 188, *F.*)

(2132-*c*)—*S. 115—Revision—Superintendence, High Court's power of—Charter Act (24 and 25. Vict. C. 104), s. 15—Difference of opinion between two Judges—Letters Patent, s. 36—*

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Holding advertised for sale in execution of decree for rent obtained by co sharer-landlord—Application to deposit money to save sale by purchaser of holding—Summary rejection of application—Remedy of applicant—Bengal Tenancy Act (VIII of 1885), s. 170, cl. 3.—In execution of a decree for rent obtained by a co-sharer-landlord, the holding was advertised for sale, whereupon the petitioners, alleging that they were purchasers prior to suit of portions of the holding, applied under s. 170, cl. (3) of the Bengal Tenancy Act for permission to deposit the decretal amount and costs. The application was summarily rejected by the first Court and its order was affirmed on appeal: *Held*, by *Coxe, J.* (whose opinion prevailed under s. 36 of the Letters Patent) that the error of the Court below was one of law only, and the High Court could not interfere. *Per Teunon, J.*—That, in declining to inquire into the allegations of the petitioners, the lower Courts have greviously erred, and as the petitioners have no other certain remedy, the High Court should interfere. UPENDRA BHUSHAN v. NANDA LAL, **11 Ind. Cas. 125.** (7 Ind. Cas. 477, **12** C.L.J. 609, *Rel. on.*)

(2132-*d*)—*S. 115—High Court—Revisionary jurisdiction—Zanzibar Civil Courts—Zanzibar orders in Council, 1897, cl. 29—Arbitration—Reference to arbitration, absence of—Matters referred outside the suit—Parties to reference no parties to suit—Application for decree in terms of award—Death of plaintiff—Heirs not on record—Irregularity—Illegality.*—The High Court of Bombay has powers of revision over all the Civil Courts of Zanzibar. A suit was referred to the sole arbitrament of the Judge into whose Court it was brought, but there was no written reference. The matters in difference submitted to the arbitration were not all included in the suit; and some of the parties to it were persons who were not in the suit at all. The award was made in 1904. The plaintiff died in 1905. No application was made in time to have a decree in terms of the award; nor was an application ever made to bring plaintiff's heirs on the record. The plaintiff's son applied on the 6th April, 1909 to have a decree passed in terms of the award, which the Court did the next day:—*Held*, (1) that, in acting as he did, the Judge had far exceeded his jurisdiction; (2) that the defendant should, under s. 115 of the Civ. Pro. Code of 1908, be protected against the consequences of a procedure, so entirely unauthorised, from first to last, by any law. MERALI VISRAM v. SHERIFF DEVJI, **13 Bom.L.R. 1017.** (29 I.A. 51, 4 Bom. L.R. 161, *R.*)

(2132-*e*)—*S. 115—Failure to decide question at issue—Leaving it to be determined in execution—Failure to exercise jurisdiction—Interference—High Court's power of.*—Where the lower Court gave a decree for the jewels claimed or their value against the 3rd defendant in the first place, and also directed by its decree that, 'should the plaintiff fail to recover them or

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their value from the 3rd defendant' the plaintiff should be allowed to proceed against defendants Nos. 1 & 2 only if the plaintiff can prove in execution that they took possession of the jewels from the 3rd defendant, *held*, that the lower Court ought not to have relegated the question of possession of jewels by defendants 1 & 2, to be determined in execution, that the lower Court failed to exercise a jurisdiction vested in it by law and that action may be taken by the High Court under s. 115 (*a*). KARUPPA PADAYACHI v. SINGARATHAMMAL, **10 M.L.T. 567.** (27 M. 504, *D.*)

(2132-*f*)—*S. 115—Revision — Material irregularity—Wrongly placing burden of proof—Burden of proof—Plaintiff alleging unconditional taking over of liability.*—The placing of the burden of proof on the wrong party amounts to a material irregularity and justifies intervention in revision under s. 115, Civ. Pro. Code. A owed a debt to B. B alleged that A's brother, C unconditionally took over the liability. C replied: he only agreed to set off the amount against the price of bricks which B might purchase from him: *Held*, that the burden of proving that the liability was taken over unconditionally was on B. MAUNG KAN PE v. MAUNG SAN KYI, **11 Ind. Cas. 774.**

(2133)—S. 115—*See* ACT XIX OF 1841, ss. 3, 5, 8, 24 M. 364=7 M.L.J. 78.

(2134)—S. 115—*See* ACT XX OF 1863, s. 18, 10 M. 98, 24 M. 685=11 M.L.J. 326, 15 M.L.J. 221, 7 M.L.T. 126=5 Ind. Cas. 291=33 M. 412.

(2135)—S. 115—*See* ACT X OF 1870, ss. 3, 24, 25, 29, 34, 17 M. 371.

(2136)—S. 115—*See* ACT X OF 1870, s. 24, L.B.R. 1872—1892, 509.

(2137)—S. 115—Interference with Interlocutory order—*See* ACT IV OF 1893, 7 Ind. Cas. 436=12 C.L.J. 525.

(2138)—S. 115—Compensation-money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under s. 32, Land Acquisition Act—Incompetency of Judge to proceed under s. 32—No appeal from order under s. 32—Power of High Court to interfere in rivison—*See* ACT I OF 1894 (LAND ACQUISITION), ss. 32 and 54, 12 C.W.N. 1039=35 C. 1104.

(2139)—S. 115—*See* BEN. ACT VIII OF 1869, s. 102, 7 C. 330, 9 C.L.R. 86.

(2140)—S. 115—*See* BEN. ACT VIII OF 1885, ss. 15, 16, 104, (2), 105, 106, 107, 108, 153, 186 A, 12 C.W.N. 835, 14 C.W.N. 788=12 C.L.J. 1=6 Ind. Cas. 193, 16 C. 596, 21 C. 776, 23 C. 723, 13 C.W.N. 793=4 Ind. Cas. 20, 9 Ind. Cas. 806.

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(2141)—S. 115—Resident's Court at Aden—Bombay High Court's revisionary powers—*See* BOM. ACT II OF 1864, ss. 8, 15, 12 Bom. L.R. 149=34 B. 267.

(2142)—S. 115—*See* BOM. ACT III OF 1876, s. 15, cl. (*a*), sub-s. 1, 2 and s. 18, 18 B. 449.

(2143)—S. 115—*See* BOM. ACT XVII OF 1879, s. 74, 19 B. 116, F.B.

(2144)—S. 115—Revisionary jurisdiction over Talukdari Settlement Officer—*See* BOM. ACT VI OF 1888, ss. 10, 15, 16, 13 Bom. L.R. 118.

(2145)—S. 115—*See* MAD. ACT VIII OF 1865, ss. 35, 76, 9 M. 332.

(2146)—S. 115—*See* PUN. ACT XVIII OF 1884, ss. 40, 70, 41 P.R. 1898, 86 P.R. 1896, 80 P.L.R. 1901=15 P.R. 1901.

(2147)—S. 115—Applicable to orders appealable under s. 591—Interlocutory order—Compromise—Civ. Pro. Code, s. 375—*See* U.P. ACT XVII OF 1876, ss. 52 and 53, 2 O.C. 67.

(2148)—S. 115—*See* U.P. ACT, XII OF 1881, ss. 183, 199, 12 A. 198=A.W.N. 1890, 59.

(2149)—S. 115—Compensation for illegal ejectment, suit by tenant against landlord and his agent—Revisional powers to set aside order of Subordinate Judge directing Munsiff to try suit—*See* U.P. ACT XXII OF 1886, s. 108, cl. 9 (*c*), 8 O.C. 257.

(2150)—S. 115—Agreement to be bound by Court's decision after local inspection—Award — Appeal —Revision—*See* ARBITRATION — GENERAL, 38 C. 421.

(2151)—S. 115—*See* ATTACHMENT—SUBJECT OF ATTACHMENT, 28 C. 574.

(2152)—S. 115—*See* CIV. PRO. CODE, 1908, O. I, rr 8 (2) 10, (2) (3) (5) & 11, O. XXII, r. 10, 5 O.C. 91.

(2153)—S 115—*See* COURT FEES ACT, 1870, 5 O.C. 319.

(2154)—S. 115—Sanction to prosecute refused by Court of first instance in respect of certain contradictions made by a defendant in two different suits between the same parties—District Judge according sanction—Whether High Court will interfere under s. 622 of Civ. Pro. Code or s. 439, Crim. Pro. Code—*See* CRIM. PRO. CODE, 1898, ss. 195 (6), 435 and 439, 4 N.L.R. 140.

(2155)—S. 115—Proceedings instituted by District Judge under s. 476, Crim. Pro. Code—Whether High Court, on civil side, can stay criminal proceedings—*See* CRIM. PRO. CODE, 1898, s. 476, 35 C. 909.

(2155-*a*)—S. 115—Power to revise interlocutory orders—*See* EVIDENCE ACT, 1872, ss. 124, 162, (1911) 2 M.W.N. 369.

(2156)—S. 115—*See* EXECUTION OF DECREE —APPLICATION FOR EXECUTION AND POWERS OF COURT, 19 B. 544.

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(2157)—S. 115—Garnishee proceedings—*Ex parte* order—Material irregularity—Revision—*See* GARNISHEE PROCEEDINGS, 8 Ind. Cas. 856=21 M.L.J. 525.

(2158)—S. 115—*See* GUARDIAN AND WARDS ACT, 1890, ss. 47, 48, 9 Bom. L.R. 495=31 B. 590.

(2159)—S. 115—*See* HIGH COURT, JURISDICTION OF BOMBAY, 20 B. 480, F.B.

(2160)—S. 115—*See* HINDU LAW REVERSIONERS, 21 C. 539.

(2161)—S. 115—*See* INJUNCTION UNDER CIV. PRO. CODE, 2 C.W.N. 521.

(2162)— S. 115 — *See* INTERLOCUTORY ORDERS, 9 M.L T. 273=21 M.L.J. 484=9 Ind. Cas. 672, 15 C.W.N. 682.

(2162-*a*)—S. 115 — *See* JURISDICTION—QUESTION OF JURISDICTION, 59 P. R. 1878.

(2163)—S.115—*See* JURISDICTION OF CIVIL COURTS, 4 M. 131.

(2164)—S. 115—*See* LETTERS PATENT, HIGH COURT, 1865, MADRAS, cl. 15, 22 M. 68 =8 M.L.J. 231, F.B., 22 M. 109.

(2165)—S. 115—No appeal from an order under—Passed by a single Judge of a High Court disposing of an application for revision—*See* LETTERS PATENT, HIGH COURT, N.W.P. s. 10, A.W.N. 1905, 218=28 A. 133.

(2166)—S. 115—*See* LIMITATION ACT, 1908, s. 3, 5 C. 807=6 C.L.R. 223.

(2167)—S. 115—*See* LIMITATION ACT, 1908, ss. 4, 5, A.W.N. 1888, 126.

(2168)—S. 115—*See* LIMITATION ACT, 1908, s. 12, 12 B. 617.

(2169)—S. 115—*See* LIMITATION ACT, 1908, art. 164, 7 A. 345=A.W.N. 1885, 73.

(2170)—S 115—Order refusing to add parties—Revision—Meaning of "case" in s. 115—. *See* PARTIES TO SUITS—GENERAL, 13 O.C. 109.

(2170-*a*)—S.115—*See* PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 9 A. 486= A.W.N. 1887, 133.

(2171—S. 115—*See* PAUPER APPEALS, 18 B. 454.

(2172)—S. 115—*See* PAUPER SUIT, A.W N. 1882, 69.

2172-*a*)—S. 1 —*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 37, 22 C. 784.

(2172-*b*) —S. 115—Revision-petition to High Court direct from a decision of a Presy. Small Cause Court Judge, whether lies—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 38, 10 Ind. Cas. 551.

(2172-*c*)—S. 115—Provincial Small Cause Courts Act IX of 1877, s. 25, powers of interference in revision given by, wider than those given by s. 622, Civ. Pro. Code—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, A.W.N. 1905, 77=2 A.L.J. 297=27 A. 531.

(2172-*d*)—S. 115—Powers of the High Court in revision—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, ss. 25, 27 A. 192=A.W.N. 1904, 227=1 A.L.J. 697.

(2173)—S. 115— *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 26 C. 74= 3 C.W.R. 70, 16 A. 476=A.W.N, 1894, 183, F.B.

(2173-*a*)—S. 115—*See* REVISION — GENERAL, 9 A. 398=7 A.W.N. 44.

(2173-*b*)—S. 115—Failure to comply with Rule 98 of the Presidency Small Cause Court Rules—Interference in revision—*See* RULES OF PRESIDENCY SMALL CAUSE COURTS ACT; MADRAS, Rule, 98, 10 M.L.T. 163.

(2174)—115— *See* SANCTION TO PROSECUTE, 14 C.W.N. 806=6 Ind. Cas. 473=37 C. 714, 13 C.W.N. 1038=4 Ind. Cas. 6=37 C. 13, 10 Cr.L J. 454.

(2175)—S. 115—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 4 S.L R. 80=8 Ind. Cas 215, 13 C. W.N. 835=10 C.L.J. 30=3 Ind. Cas. 466.

(2176)—S. 115—*See* ST. 24 AND 25, VIC., C. 104, s. 15, 9 A. 104, F.B.=A.W.N. 1886, 309.

(2177)—S. 115—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 16 M. 454.

(2177-*a*)—S. 115—Error of law or of fact—No revision—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 7, cl. 3, 10 M.L.T. 164.

(2178)—S. 115—*See* SUCCESSION CERTIFICATE ACT, 1889, ss. 9, 19, 19 B. 790.

(2179)—S. 115—*See* SUPERINTENDENCE OF HIGH COURT, 18 B. 35, 18 B. 347, 18 B. 61 =P.J. 1893, 258. 21 B. 281, 28 C. 680=6 C. W.N. 114, 16 C. 749=16 I.A. 104, P.C., 1 C. W.N. 626, 1 C.W.N. 617, 13 B. 642.

(2179-*a*)—S. 115—*See* NOS. 88, 101, 103, 103-*a*, 157, 207, 297, 469, 499. 500, 564, 933, 934, 948, 1044, 1064, 1084, 1108-*a* 1206, 1207, 1339, 1509, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1683, 1698, 1712, 1825, 1898, 1899, 1900, 1901, 1923, 1923-*a*, 1962, 1963, *supra* AND NOS. 2349, 2374, 2375, 2378, 2379, 2380, 2381, 2382, 2383. 2412, 2434, 2435, 2478, 2701, 2748, 2788, 2792-*a*, 2858, 2886, 2892, 3010, 3010 *a* 3010-*b*, 3023-*a*, 3049-*a*, 3145, 3199-*d*, 3199-*e*, 3201-*a*, 3217 *g*, 3220, 3225-*f*, 3422, 3627, 3812, 3815, 3900, 3949, 4064, 4065, 4088, 4133, 4245, 4246, 4247, 4398, 4453, 4477, 4478, 4546, 4729, 4730, 4910, 4911, 4914, 4945, 4984, 5019, 5028, 5039, 5124, 5225, 5333, 5341, 5360, 5464, 5555, 5698, 5701, 5710, 5778, 5815, 5822, 5843, 5844, 5868, 5869, 5870, 5922, 5923, *infra*.

(2180)—*Ss. 115 and 47 (=ss. 622 and 244, Civ. Pro. Code, 1882)—Revision, whether High*

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Court will interfere in, when remedy by appeal is open—Order under s. 244, binding effect of.—The order of a Court deciding a question arising between the parties, under s. 244 of the Code, in relation to execution of a decree, is itself a decree within the definition in the Code and is, accordingly, appealable. Consequently, the High Court is not to interfere by way of revision, in such a case, so long as the remedy by way of appeal was open. *Held*, also, a decision given in an execution-case is as binding between the parties and those claiming under them as if it were the final judgment in the suit itself. HLA GYAW v. SIT YON, **3 L.B.R. 131.** (6 A. 269, P.C. *F.*).

(2181)—*Ss. 115, 73 (=ss. 622, 295, Civ. Pro. Code, 1882) — Application for rateable distribution—Error in the exercise of jurisdiction—Revision — High Court, power of.*—By the Court:—Where, in the exercise of a jurisdiction vested in it, a subordinate Court commits an error, it is no ground for revision under s. 622 of the Code. (11 C. 6, *F.*) *Per Banerji, J.*—No application for revision under s. 622 of the Code lies against an order rejecting an application for rateable distribution of assets as, under s. 295 of the Code, the applicant can bring a regular suit. The High Court's powers of revision should not be exercised when another remedy is open to the applicant. (15 A. 405, A.W.N. 1898, 73, *F.*) *Per Richards, J.*—The Court ought not to lay down a definite rule that, in no case, in which there is another remedy open, no matter however inconvenient, will it interfere in revision. If it were shown that the other remedy were so inconvenient. as to pratically amount to no remedy, the Court ought to give relief by way of revision. LACHMI DAYAL v. SRI KISHEN DAS, **2 A L.J. 370.**

(2182)—Ss. 115, 104, O. XLIII, r. 1—*See* SUPERINTENDENCE OF HIGH COURT, 12 C.L.R. 449.

(2183)—Ss. 115, 105 — *See* REVISION — GENERAL, A.W.N. 1899, 210.

(2184)—*Ss. 115, 114, O. 47, r. 1 (=ss. 622, 623, Civ. Pro. Code, 1882)—Ground for review.*—The ground for amending a decree on review must be something which existed at the date of the decree. Where the only ground relied on was an action of the defendant subsequent to the decree it was held that it could not furnish any ground for review. ANNAMALAI CHETTIAR, U.R.M.N M. v. SUBRAMANIA IYER, **4 M.L.T. 86.** (24 M. 1, 13 B. 330, *Not F.*).

(2185)—Ss. 115, 114, O. XLVII, r. 1—*See* REVISION—GENERAL, 45 P.L.R. 1901=54 P.R. 1901.

(2186)—*Ss. 115, 114, O. 47, rr. 1, 4, 7, 9 (=ss. 622, 623, 626 and 629 Civ. Pro. Code, 1882)—Review of judgment—Application for review rejected—Revision—Small Cause Court suit.*—

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An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the Court-fee paid upon the application. *Held* that this order was open to revision. WILLIS v. JAWAD HUSAIN, A.W.N. 1907, 132=4 A.L. J. 439=29 A. 468. (26 A. 572, *D.*)

(2187)—*Ss. 115, 114, O. 47, rr. 1, 7, 9 (=Civ. Pro. Code, 1882. ss. 622, 623, 629)—Grant of review on defective grounds—Appeal entertainable only on grounds under s. 629—Revision from appellate order.*—The plea of limitation set up by the defendants in this case was set aside by the Munsiff in the first Court who held that the period of limitation applicable was twelve and not six years and decreed the suit on the merits. The defendants subsequently applied to the Munsiff for review of judgment on the ground that a certain Full Bench decision, according to which the six years' period of limitation was properly applicable to the suit, had not been brought to the notice of the Court. The Munsiff applying the Full Bench ruling reviewed his decree, and dismissed the suit as barred by limitation. The appeal preferred by the plaintiff from such order granting the review was entertained and allowed by the District Judge who overlooked the fact that he had no power to set aside the order merely because he thought it unreasonable, or on any ground not mentioned in s. 629 of the Civ. Pro. Code. An application for revision of the appellate order of the District Judge was entertained by the High Court which held that the District Judge had acted with material irregularity in having admitted and allowed the appeal from the Munsiff's order granting the review, and allowed the application, setting aside the order of the District Judge and restoring that of the Munsiff with costs. ABDUL SADIQ v. ABDUL AZIZ, **21 A. 152=A.W.N. 1899, 1.**

(2188)—*Ss. 115, 141, 104 O. 43, r. 1 (=ss. 622, 647, 588 Civ. Pro. Code, 1882)—Appeal dismissed for default—Application to restore appeal similarly dismissed—Second application—Appeal—Review—Miscellaneous proceedings.*—In this case, the appeal was dismissed in default. An application to restore the appeal was also dismissed in default. A second application was made for the same purpose. The lower Court rejected it on the ground that it could not lie. *Held*, that there is no special provision in the Civ. Pro. Code for applying to re-admit an application to set aside an *ex parte* decree dismissed in the default. *Held*, also, that no appeal lies under s. 588, Civ. Pro, Code, against the order passed on the second application on the ground that the order passed on the second application cannot be held as settling the question of re-admission of the appeal to hearing, which had been disposed of by the order on the first application. *Held*, further, that the order passed on the first application was appealable and the second application could be treated as a petition for

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review. *Held*, that s. 647, Civ, Pro. Code, had no application to the circumstances of the case and the application should be held to be one in an appeal and not a separate miscellaneous proceeding. Considering the circumstances of the case and the extreme remissness shown by the petitioner in prosecuting the case after his appeal had been once dismissed for default, and the application for review not having been regularly made, the Court declined to interfere on the revision side. GANDA MAL v. MUSSAMMAT SUGHRA BIBI, **7 P.L.R. 1900.**

(2189)—Ss. 115, 141, O. XLI, rr. 27, 28—Revisability of proceedings under s. 195, Crim. Pro. Code, before Judges of Civil Courts—*See* SANCTION TO PROSECUTION. 2 M.L.T. 84=17 M.L.J. 123=30 M, 311=5 Cr. L.J. 288.

(2189-*a*)—Ss. 115, 151—Interlocutory order—Revision—*See* ST. 23 AND 24 VIC., C. 104, s. 15, 10 M.L.T. 451.

(2190)—S. 115, O. IX, r. 9—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 4 M. 217.

(2191)—S. 115, O. IX, r. 13—Powers of revision given to High Court, and by s. 25, Provincial Small Cause Courts Act, relation between—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 5 A.L.J. 295=A.W.N. 1908, 141.

(2192)—S. 115, O. IX, r. 13—*See* REVISION—GENERAL, A.W.N. 1898, 73.

(2193)—*S. 115, O. 21, r. 63 (=ss. 622, 283, Civ. Pro. Code 1882)—Desirability of acting under where other remedies available.*—On an application to the High Court against the order of a Subordinate Judge, where the applicant had a right of suit under s. 283, Civ. Pro. Code, it was held that even in cases where the powers under s. 622, Civ. Pro. Code, might be properly exercised, it was undesirable to apply these special powers when relief could be obtained by the ordinary procedure. SANTDAS DAYALDAS v. MANGATRAM BHOJRAJA, **1 S.L.R. 226.**

(2194)—*S. 115, O. 21, r. 81 (=ss. 622, 310 A, Civ. Pro. Code, 1882)—S. 310 A, Civ. Pro Code, 1882, scope of—Order passed by Judge on the erroneous idea that s. 310-A, is inapplicable—Effect.*—S. 310-A, Civ. Pro. Code, did not impose any new obligation and did not interfere with vested rights and, therefore, it *did* operate retrospectively. [*R*., 1 C.W.N. 617, 23 C. 682, 23 B. 450.] Where a Judge wrongly thinks that s. 310-A is inapplicable to the case, and passes an order, his order may be set aside. JOGODANUND SINGH v. AMRITA LAL SARCAR, **22 C. 767, F.B** [*F.*, 1 C.W.N. 652; 25 C. 155, 6 C.W.N. 57, 29 C. 33; *R.*, 33 C. 487=3 C.L.J. 293. 23 C. 682, 23 B. 450.]

(2195)—S. 115, O. XXI, rr. 89, 90—*See* REVISION—GENERAL, A.W.N. 1898, 78, A.W.N. 1898, 148.

(2196)—*S. 115, O. 21; r. 10 (= Civ. Pro. Code 1882, ss. 622, 311)—Jurisdiction—Sale set aside on account of irregularity only*—Under s. 311 of the Code of Civil Procedure, no sale ought to be set aside unless substantial injury as well as material irregularity is proved, and when a Court sets aside a sale without proof of substantial injury, it exercises a jurisdiction which is not vested in it by law and the High Court may interfere with such an order, under s. 622, Civ. Pro. Code. LAKSHMANA v. NAJIMUDIN, **9 M.145.** [*R.*, 24 M. 311.]

(2197)—*S. 115, O. 21, r. 90 (=ss. 622, 311 Civ. Pro. Code, 1882)—Representatives of decree-holder held by Court below to have been properly brought in—Decree-holder applying for execution before realization—Right of his representatives to rateble distribution—Objection.*—Where a District Judge had on appeal decided that the representatives of a decree-holder had been properly brought in: *held*, that the High Court ought not to interfere in revision with his decision on a point of this kind. (21 A. 291, 24 M. 447, *F.*) Where a decree-holder had applied for execution before the realization, his representatives were held to be entitled to a rateable distribution and consequently to object under s. 311, Civ. Pro. Code. ARUNAGARI MUDALI v. VADIVELU MUDALI, **3 M.L.T. 249.** (10 M. 57, *R.*)

(2198)—*S. 115, O. 21, rr. 90 and 92 (=ss. 622, 311, 312, Civ. Pro. Code, 1882)—Rent—Sale of tenure—Application by purchaser from judgment-debtor to set aside sale under s. 311, Civ. Pro. Code, 1882—Order setting aside sale under s 312, Civ. Pro. Code, 1882, second appeal from.*—The purchaser of a tenure, which is sold prior to attachment, from a judgment-debtor, whose interest in the tenure has been sold in execution of a rent-decree, can apply to have the sale set aside under s. 311, Civ. Pro. Code, 1882. (10 C. 496, *R.*; 15 C. 488, *D.*) A second appeal from an order setting aside a sale in execution of a decree under s. 312, Civ. Pro. Code, will not lie. (18 C. 422, *F.*) Where it is found that an execution-sale is a fraudulent one, the same being carried out without the knowledge of a third party interested in the property sold, there is no ground for interference by the Court under s. 622, Civ. Pro. Code. AUBHOYA DASSI v. PUDMO LOCHUN MONDOL, **22 C. 802.** [F., 28 C. 4=5 C.W.N. 124.]

(2199)—*S. 115, O. 31, r. 1—Jurisdiction, illegal exercise of—Mistake of law—Difference between—Specific Relief Act, s. 9—Suit for possession—Plaintiff* shebait *of idol—Plaintiff's name in heading of plaint—Suit in representative character—Whether maintainable.*—It is not always easy to draw a clear line between the illegal exercise of jurisdiction within the meaning of s. 115 of the Civ. Pro. Code, and a mistake of law. In the heading of a plaint, in a suit under s. 9 of the Specific Relief Act, the plaintiffs' names were given in their personal capacity, but in the body of the plaint the fact was disclosed that the land in suit belonged to an idol and that the plaintiffs held it as

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shebaits, that is, in a representative capacity. No objection on this score was taken before hearing, when the Court held that the suit as framed was not tenable and dismissed it. *Held*, that the Court below acted in the exercise of its jurisdiction with material irregularity, and that, under r. 11, O. XXXI of the Civ. Pro. Code, the Court ought to have given the plaintiffs an option of proceeding with the suit as it was, in their personal capacity, or with the addition of the idol. NABIN CHANDRA SARMA v. SHEIKH AMIR, **9 Ind. Cas. 132.**

(2200)—*S. 115, O. 33, r. 1 (=ss. 622 and 401, Civ. Pro. Code, 1882)—Suit* in forma pauperis—*Application to file suit* in forma pauperis—*Possession of property by the applicant of value less than the amount required in Court-fee—High Court—Revision.*—The plaintiff applied to file a suit *in forma pauperis* on a claim which required the Court-fee of Rs. 1,775 on the plaint. The Subordinate Judge finding that she had property of the value of Rs. 1,600 determined that she was not a pauper. The plaintiff applied to the High Court. *Held*, that the High Court had jurisdiction to interfere, under s. 622 of the Civ. Pro. Code. That the determination by the lower Court was erroneous, for it was obvious that the possession of Rs. 1,600, even if it could properly be taken into account, would not enable the applicant to pay the Rs. 1775, which was the fee prescribed by the law for the plaint. GANGABAI v. SHRIDHAR, **8 Bom. L. R. 642.**

(2201)—*S. 115, O. 33, r. 7—Inspection of disputed property—Inventory, preparation of—Court's power to direct taking of inventory—High Court's power of revision—Interlocutory order.*—Under O. XXXIX, r. 7 of the Civ. Pro. Code, the Court may not only allow inspection of the disputed property, but may also direct the preparation of an inventory of the structures, fixtures, and moveables on the premises which are claimed by the plaintiff. But the Court will take care to impose as little inconvenience as possible on those on whom the order is made. If irreparable injury would be caused to one of the litigants if the matters were not set right, the High Court will interfere with an interlocutory order made by a Subordinate Court in the exercise of its discretion. AMJAD ALI v. ALI HUSAIN JOHAR, **6 Ind. Cas. 574=12 C.L.J. 574.** (4 Ind. Cas. 364, 14 C.W.N. 147, 10 C.L.J. 407, *R.*)

(2202)—*S. 115, O. 41, rr. 5, 6 (2)—Rent decree—Order for sale of holding in execution—Refusal by Court to stay execution upon taking security—High Court's power to entertain original application under r. 5 or to revise the order under r. 6 (2)—Practice.*—Where, an order having been made for the sale of certain holdings in execution of decrees for rent, the Court refuses the judgment-debtor's application under O. XLI, r. 6 (2) of the Civ. Pro. Code, to stay execution pending the hearing of appeals preferred by them against the decrees, the High Court may, on the judgment-debtor's application under O. XLI, r. 5, stay execution, provided it appears to it that the conditions mentioned in cls. (*a*), (*b*) and (*c*) to that rule have been fulfilled. But the High Court may also deal with the order of the lower Court under s. 115 of the Code, and direct the execution to be stayed on the judgment-debtor furnishing sufficient security, in terms of O. XLI, r. 6 (2). RAM NATH SINGH v. KAMLESHWAR PRASAD SINGH, **15 C.W.N. 432=9 Ind. Cas. 323.**

(2203)—*S. 115, O. 41, rr. 7, 9 (=Civ. Pro. Code, 1882, ss. 622, 629)—Order rejecting application for review—Revision.*—The Court which originally heard the case should be the Court to decide whether an application to review its former judgment should or should not be granted, and where the Court decides to reject such an application, its decision should not be open either to appeal or to revision by a higher Court. RAM LAL v. RATAN LAL, **26 A. 572.** (11 I.A. 237, *R.*) [*D.*, 4 A.L.J. 439=A. W.N. 1907, 132=29 A. 468, 31 A. 610=6 A.L. J. 884=4 Ind. Cas. 23.]

(2203-*a*)—*S. 115, O. 41, r. 25—Failure by Appellate Court to frame material issue not raised and tried—Material irregularity—Revision by High Court.*—A suit for damages against a Steamer Company for loss due to short delivery was decreed by the Munsif who did not frame and try the issue whether notice under s. 10 of the Carriers Act had been served on the Company, that issue not having been presented to him by the parties. The Subordinate Judge on appeal reversed that decree and dismissed the suit on the ground that service of notice under the said section had not been made out: *Held*—That the failure of the Subordinate Judge to frame and try the requisite issue under r. 25, O. XLI, Civ. Pro. Code, was in the circumstances a material irregularity which might have led to a failure of justice. RAMJAS AGARWALLA v. INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., **16 C.W.N. 824.**

(2204)—S. 115, O. XLVI, rr. 6, 7—Revision against appellate decree, in suit of the nature of small causes, but tried as an original suit.—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 16, 6 M.L.T. 121, F.B.=33 M. 323=20 M.L.J. 718.

(2205)—*S. 115, O. 46, r. 7 (=Civ. Pro. Code, 1882, ss. 622, 646 B)—Power of Court.*—Where a suit of a Small Cause nature was wrongly tried as an original suit by the District Munsif and was dismissed, and the District Judge on appeal confirmed the judgment of the District Munsif both on the question of jurisdiction and on the merits, and it was contended in revision that the case was wrongly tried as an original suit by the District Munsif and should be sent to the District Judge for trial as a Small Cause

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suit, *held* that neither party took the action which he might have taken under s. 646-B of the Civ. Pro. Code, to have it authoritatively decided before trial which was the Court with jurisdiction to try the suit, that the only effect of the High Court interfering under s. 622, Civ. Pro. Code, would be to require the District Judge as a Small Cause Court to try again the matter which he had already tried as an appellate Court, and that for the High Court to do this would under all circumstances be a perverse and mischievous exercise of the discretion vested in the High Court under s. 622, Civ. Pro. Code. REVUR SUBBA ROW v. PAPI REDDY, **8 M.L J. 149.**

(2206)—*S. 115, O. 47, rr. 7, 9 (=Civ. Pro. Code, 1882, ss. 622, 628)—Order rejecting application for review—Revision.*—It is the intention of the Legislature that a Court which originally heard a case should be the Court to decide whether an application tc review its former judgment should or should not be granted, and, where the Court rejects such an application its decision should not be open either to appeal or to revision by a higher Court. RAM LAL v. RATAN LAL, **1 A.L.J. 298=A.W.N. 1904, 130.**

(2207)—S. 115, O. XLVII, rr. 7, 9—*See* REVISION—GENERAL, A.W.N. 1889, 179.

(2208)—S. 115 and sch. II, rr. 14, 15, 20 and 21—*See* AWARD, 16 C. 482.

(2209)—S. 115, sch. II, r. 20—*See* REVISION—GENERAL, 8 Bom. L.R. 570.

(2210)—S. 115, sch. II, rr. 20, 21—*See* AWARD, 3 M. 68.

——S 117 (=1882, s. 632=1877, s. 632).

(2210-*a*)—S. 117—*See* NOS. 2386, 5779, *infra*.

——S. 119 (=1882, s. 635=1877, s. 635).

(2210-*b*)—S. 119—*See* NO. 104, *supra*.

——S. 120 (=1882, s. 638=1877, s. 638).

(2210-*c*)—S. 120—*See* NO. 158, *supra*.

——S. 122 (=1882, s. 652=1877, s. 652).

(2210-*d*)—S. 122—*See* NOS. 2706-*a*, 5676, *infra*.

(2211)—*Ss. 122, 129, 130 and 131 (=s. 652, Civ. Pro. Code, 1882)—Civil Circulars, Rule 72—Rules having the force of law—Application for execution—Decree, copy of—Limitation Act (XV of 1877), sch. II, art. 179 (4).*—Rules made by the High Court under the powers conferred by the Civ. Pro. Code and published in the local official Gazette, have the force of law: hence, where an application for execution is not accompanied by a copy of the decree of which execution is sought, the application cannot be treated as a step-in-aid of execution within the meaning of cl. 4 of art. (179 of the Limitation Act, 1877). SADASHIVA v. RAMCHANDRA, **3 Bom. L.R. 394.**

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(2212)—Ss. 122, 129, 130, 131—Resolution of High Court as to costs not published in Gazette, whether can be referred to in assessing costs—*See* COSTS—SPECIAL CASES, A.W.N. 1905, 83.

(2213)—Ss. 122, 129, 130, 131—Rules framed under—Nature of — *See* LIMITATION ACT, 1908, art. 182, 3 S.L.R. 171=4 Ind. Cas. 1154.

(2214)—Ss. 122, 129, 130, 131—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 6, 18, cls. (*a*) and (*c*). 33, 18 M. 236, F.B.=5 M.L.J. 114.

(2214-*a*)—Ss. 122, 129, 130, 131—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 42, 45, 46, 48, 7 M.L.T. 385=6 Ind. Cas. 722.

(2215)—Ss, 122, 129, 130, 131—*See* RULES OF HIGH COURT AND SUPREME COURT—BOMBAY, 9 Bom. L.R. 1138=32 B. 14.

(2215-*a*)—*S. 122, O 34, r. 2—New rule made by the Chief Court in exercise of the power vested by s. 122 in place of r. 2 of O. 34—Effect of the new rule limiting mortgagee's substantive right to interest at mortgage rate for six months after decree—Rule* ultra vires.—The Chief Court, under the powers vested in it by s. 122 of the new Code, made a new rule in place of r. 2 of O. 34, whereby it substituted the Court-rate of interest in place of the mortgage-rate as payable by the mortgagor for the six months within which period he may redeem: *Held*, that the new rule, in so far as it limited the right of the mortgagee to recover interest at the mortgage-rate for the whole period allowed for redemption, was *ultra vires*. The rights that accrue to the parties up to the expiration of the period allowed for redemption are substantive rights that are out of the contract. The mortgagee's right to be paid interest at the mortgage-rate for the whole period allowed for redemption is on the same footing as the mortgagor's right to be allowed (after judgment) a definite period of time for redemption or as the mortgagee's right (in default of payment by the mortgagor) to foreclose or to sell the mortgage property. VEERAPPA CHETTY v. MUNIANDY THAVER, **12 Ind. Cas. 18.**

——S. 129 (=1882, s. 652, cl. 3).

(2215-*b*)—S. 129—*See* NOS. 2211, 2212, 2213, 2214, 2214-*a*, 2215, *supra*, and No. 2706-*a* *infra*.

——S. 130 (=1882, s. 652, cl. 2).

(2215-*c*)—S. 130—*See* NOS. 2211, 2212, 2213, 2214, 2214-*a*, 2215, *supra*, and NO. 2706-*a*, *infra*.

——S. 131 (=1882, s. 652, cl. 4).

(2215-*d*)—S. 131—*See* NOS. 2211, 2212, 2213, 2214, 2214-*a*, 2215, *supra*, and NO. 2706-*a*, *infra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——S. 132 (=1882, s. 640=1877, s. 640=1859, s. 21).

(2216)—*S. 132 (=s. 640, Civ. Pro. Code, 1882)—Examination of witnesses by commission—Considerations.*—In considering whether the examination of a witness should be taken by commission, regard must be had to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence *viva voce* in Court or before a Commissioner, or by affidavit, or in any other form. If the witness is not a credible witness, it becomes of the most extreme importance that the jury or the Court which has to decide the question, should have the opportunity of seeing the demeanour of a witness, and observing the way in which various questions which are put to him in cross-examination are answered. MOWJI v. NEMCHAND, **1 Bom. L.R. 384=23 B. 626.**

(2217)—*S. 132 (=Civ. Pro. Code, 1882, s. 640)—Application for issue of commission to examine female witness—Sufficiency of grounds set forth in affidavit in support of.*—On application by the plaintiff for the issue of a commission to examine three female witnesses a summons was issued under s. 640 (of the Civ. Pro. Code of 1882) dealing with the subject of the examption of women from personal appearance in Court. In the affidavit filed by the plaintiff in support of his application, he had stated as the grounds for the issue of the commission, (1) that one of the three women who was a Parsi, having lost her husband ten months ago, was in mourning in accordance with the Parsi usage, (2) that the second was an old lady sickly and infirm and physically unable to attend Court, and (3) that the third woman intended shortly to proceed up-country and would not stay in Bombay until the hearing of the suit. The High Court was of opinion that the circumstances alleged in the above affidavit were not such as to justify the ordering of the women to be examined on commission, and ordered the discharge of the summons obtained by the plaintiff. RUSTOMJI FRAMJI v. BANOOBAI, **14 B. 584.**

(2217-*a*)—*S. 132—Commission—Examination of party to suit or proceeding—Application of section.*—The provisions of s. 132, Civ. Pro. Code, are not restricted to the examination of witnesses. They apply also to parties to suits or proceedings before the Court. RAHMAT-UN-NISSA BEGAM v. AHMED HUSAIN SAIB, **11 Ind. Cas. 668.**

(2218)—S. 132—*See* PARDANASHIN WOMAN, 24 W.R. 375. 1 B.L.R. F.B. 31=10 W.R F.B. 21, 26 C. 650=3 C.W.N. 751, 8 W.R. 282, 26 C. 651, Note=3 C.W.N. 750.

(2218-*a*)—S. 132—*See* NO. 5020, *infra.*

(2219)—*S. 132 and O. 16 and 26—Process, refusal to issue, on wrong and insufficient grounds—Exclusion of evidence—Ground for remand—Summonses, power of Court to refuse to issue—Cross-examination, fixation of limit of time for.*—An application for issue of summons to a witness must, as a rule, be granted by the Court, and the question whether the application is made within a reasonable time is only to be decided when, afterwards, owing to the failure of the witness to attend the Court, an adjournment is prayed for by the party summoning such witness. Process may not be issued if the witnesses are described vaguely. But if witnesses do not appear after being served the party calling them has the right to have them re-summoned. A Court has no power to fix a limit of time within which the cross-examination of a particular witness is to be finished, and where such a limit was fixed and the examination concluded, it was held a good ground for remand. AMIR ALI KHAN v. KULSUM BEGAM, **8 Ind. Cas. 418.**

——S. 133 (=1882, s. 641=1877, s. 64=1859, ss. 22 and 23).

(2220)—S. 133—*See* RENT, SUIT FOR, **22** W.R. 528.

(2220-*a*)—S. 133—*See* NO. 5020, *infra.*

——S. 135 (=1882, s. 642=877, s. 642).

(2221)—*S. 135 (=Civ. Pro. Code, 1877, s. 642)—Protection from arrest, extent of.*—The protection from arrest afforded by s. 642 extends only to arrest under the Civ. Pro. Code. Therefore an accused person attending a Criminal Court could not claim immunity from arrest under the Rent Act. EMPRESS OF INDIA v. HARAKH NATH SINGH, **4 A. 27.**

(2222)—*S. 135 (=Civ. Pro. Code, 1882, s. 572)—Necessity for appellate Court stating reasons for its judgment.*—In an appeal, the appellate Court remanded the suit to the lower Court for a revised finding on a certain issue after taking additional evidence. The lower Court submitted a finding on the issue remitted. The defendant against whom the finding was recorded did not file any memo of objections against it. The appellate Court passed judgment in plaintiff's favour without saying whether it accepted the finding or not. *Held* that, although no memorandum of objections had been filed, it was incumbent on the lower appellate Court to have examined into the correctness of the finding and come to a conclusion whether it accepted the same or not, unless its correctness had been admitted by the party to whom it was adverse. As there was no such admission in the case, there was no expression of any opinion on the matter in question and no judgment as prescribed by the Code. MUSALIYAM KUNHI v. VALIYAKATH PERIYATTAIL, **7 M.L.J. 236.**

(2223)—S. 135—*See* ARREST, 4 M. 317, 13 M. 150, F.B.

(2223-*a*)—S. 135—*See* NO. 935, *supra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2224)—*S. 135 cl. (2) — Returning from Court—Privilege of exemption from arrest—How far applicable—Arrest in execution of a decree—Appeal.*—The respondent obtained an *ex-parte* decree against the appellants at Benares. The appellants made on application to have the decree set aside. They, being residents of Bombay, came from that place to Benares to look after their case. They put up at a Dak bungalow, and attended the Court on the 27th of March, 1909. Their application to set aside the decree was dismissed. They came back to the Dak bungalow and thence proceeded to the Railway Station, They took tickets for Allahabad and were seated in the train when they were arrested in execution of the decree. *Held*, under the circumstances, they could not be said to be returning from a tribunal, within the meaning of s. 135, Civ. Pro. Code, 1908, and consequently they were not entitled to exemption from arrest. (4 M. 317. *not Appr.*; 14 B.L R. 13, *R.*) *Held*, further, that an order directing the arrest and imprisonment of a judgment-debtor in execution of a decree is appealable. ARDESHAR FRAMJI BHUMGARA v. KALYAN DAS, **6 A.L. J. 912=32 A. 3=3 Ind. Cas. 46.**

——S. 136 (=1882, s. 648=1877, s. 648).

(2225)—*S. 136(=s. 648, Civ. Pro. Code, 1882)—Scope of.*—S. 648, Civ. Pro. Code, does not authorise the Court to attach any property, which it is not authorised to attach by any other sections of the Code, though it permits it to transmit its order, where such an order may be made, for execution beyond the local limits of its jurisdiction. KRISHNASAMI v. ENGEL, **8 M. 20.** [*F.*, 3 L.B.R. 255, L.B.R. 1893—1900, 56, U.B R. 1907, 2nd Qr., Civ. Pro. Code, 648=14 Bur. L.R. 138.]

(2226)—*S. 136 (=Civ. Pro. Code, 1882, s. 648 —Attachment before judgment—Property outside jurisdiction—Rulings of Special Court binding.*—S. 648 merely prescribes the procedure to be adopted when property outside the jurisdiction of the Court is to be attached under any provision of the Code. It does not prescribe the circumstances under which attachment before judgment may be ordered of property situated outside the jurisdiction of the Court. (8 M. 20, L.B.R. 1893—1900, 56, *R.*) Rulings of the Special Court are binding on the Courts of Lower Burma, unless or until they are overruled by the Chief Court. N. PANNU THEVEN v. SATHAPPA CHETTY, **1 L.B.R. 310.** (*F.*, 14 Bur. L.R. 138=U.B.R. 1907, Civ. Pro. Code, 13, 3 L.B.R. 255.]

(2227)—S. 136—*See* ATTACHMENT BEFORE JUDGMENT, L.B.R. 1893—1900, 56, 8 M. 205.

(2227-*a*)—S. 136 — *See* NOS. 3220, 3346, 5079, 5080, *infra*.

——S. 139 (=1882, s. 197=1877, s. 197).

(2228)—*S. 139 and O. 9, r. 5—Evidence Act (I of 1872), s. 57, cl. 7—Process, service of, proof of—Affidavit of identifier sworn before pleader—Honorary Magistrate—Signature of Magistrate—Judicial notice.*—O. IX, r. 5, Civ. Pro. Code, is only an enabling provision enacted for a special purpose only. A plaintiff filed, in support of proof of a service of process on the defendant, an affidavit sworn in the Bar Library by the identifier before a pleader who is also an Honorary Magistrate. The Munsiff refused to accept the affidavit, and directed the plaintiff to have an affidavit sworn before the officer of the Court appointed for that purpose. The plaintiff not having complied with this, the suit was dismissed for default: *Held*, that the Munsiff was right in refusing to accept the affidavit; that s. 139 of the Code contemplates that at the time when an Honorary Magistrate administers the oath, he shall be acting in his official capacity as a Magistrate, and that the provisions of s. 57 cl. (7), of the Evidence Act, as to the Court's taking judicial notice of the signature of an Honorary Magistrate, should be interpreted in the same way. RAMJIBAN BHUTTACHARJEE v. AHMED KHAN, **5 Ind. Cas. 537.**

——S. 141 (=1882, s. 647 (1)=1877, s. 647 (1).)

(2229)—*S. 141 (=s. 647, Civ. Pro. Code, 1882)—Applicablity to suits and appeals.*—The section was intended to apply to miscellaneous matters other than suits and appeals. AMIR HASSAN v. AHMAD ALI, **9 A. 36.**

(2230)—*S. 141 (=s. 647, Civ. Pro. Code, 1882)—Application for execution of decree.*—From s. 647, Civ. Pro. Code, it appears that applications for execution of decrees are proceedings in suits. SHYAMA CHARAN MITTER v. DEBENDRA NATH MUKERJEE, **27 C. 484=4 C.W.N. 269.**

(2231)—*S. 141—Suit dismissed for default—Application to set aside dismissal—Dismissal of application for default—Application for restoration of such application—Maintainability.*—Where an application to restore to file a suit dismissed for default is itself dismissed for default, *held* that another application to restore the dismissed application to file can be entertained under s. 141, Civ. Pro. Code, 1908. MANAKJI v. SURAJMAL, **7 N.L.R. 32.** (7 A. 542, 18 B. 59 *R.*)

(2232)—*S. 141 (=Civ. Pro. Code, 1882, s. 647)—Right of appeal.*—It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute or some authority equivalent to statute. S. 647, Civ. Pro. Code, does not confer any right of appeal not expressly given elsewhere by the Code. PARASURAMA AYYAR v. SESHIER, **27 M. 504.** (11 M. 26, 11 M. 319, *R.*)

(2233)—*S. 41 (=Civ. Pro. Code, 1882, s. 647), — Transfer of suit.*—Under the provisions of s. 647 of the Civ. Pro. Code, a claim registered as a suit may, for sufficient cause, be

Civ. Pro. Code (Acts V of 1908 XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

transferred by a superior Court to a subordinate Court for trial. SITHALAKSHMI v. VYTHILINGA, **8 M. 348, F.B.**

(2234)—*S. 141 (=s. 647, Civ. Pro. Code, 1882)—Scope and applicability of—Guardianship—Arbitration.—Per Karamat Husain, J.*— S. 647 of the Code of Civil Procedure deals with procedure and procedure alone; and does not touch the substantive law of arbitration. The consent of parties in a proceeding for the appointment of a guardian does not give the Judge any power to refer the matter to arbitration. MAHADEO PRASAD v. BINDESHARI PRASAD, **5 A.L.J. 101=A.W.N. 1908, 51=3 M.L.T. 203=3C A. 137.** [*R.*, 7 A.L J. 761=6 Ind. Cas. 219.]

(2235)—*S. 141 (=s. 647, Civ. Pro. Code, 1882)—Execution proceedings, striking off of—Review.*—After the execution has been closed and the decree satisfied, no application can be made by a judgment-debtor to re-open a matter, which might have been discussed or argued in the course of the execution-proceedings. Hence a judgment-debtor could, under such circumstances, only apply for a review of the order, which declared the decree to be satisfied and struck off the execution-proceedings. under s. 647 of the Civ. Pro. Code. FAKARUDDN MAHOMED AHSAN v. THE OFFICIAL TRUSTEE OF BENGAL, **10 C 538.** [*F.*, 101 P.L.R. 1901 =63 P.R. 1901; *D.*, 5 C.W.N. 627; *R.*, 13 C. P.L.R. 177, 113 P.L.R. 1904=45 P.L.R. 1904.]

(2236)—*S. 141 (=s. 647, Civ. Pro. Code, 1882)—Act VIII of 1890 (Guardian and Wards Act), Ch. II—Guardian and minor—Application for appointment of guardian—Procedure.*—Where the mother of an unmarried female minor applied for a certificate of guardianship under Act VIII of 1890, it was *held* that it was no valid objection, the parties being Muhammadans, that the mother had married again. *Held*, also, that in hearing an application for certificate of guardianship, the Court ought to record the statements of the witnesses in the manner provided for by the Code of Civil Procedure. It is not sufficient merely to make on the back of the application notes of the statements of persons examined. GHAFURAN v. CHHANGA, **A.W.N. 1906, 64=3 A.L.J. 841.**

(2237)—S. 141—*See* ACT X OF 1870, s. 39, 16 C. 31.

(2238)—S. 141—*See* BEN. ACT VIII OF 1869, ss. 34, 56, 60, 8 C.L.R. 498

(2239)—S. 141—*See* BEN. ACT VIII OF 1885, s. 174, 3 C.W.N. 344.

(2240)—S. 141—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 97, 99, 100, 101, 103, 3 Bom. L.R. 58=25 B. 478.

(2241)—S. 141—Non-compliance with provisions under—in a trial for appointment of guardian—*See* GUARDIAN AND WARDS ACT, 1890, s. 10, A.W.N. 1905, 104.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2242)—S. 141 deals only with procedure—It does not empower the District Judge to refer a dispute about guardianship of minor to arbitration—*See* GUARDIAN AND WARDS ACT, 1890, ss. 11 (1), 13, 17 and 46, 5 A.L.J. 101 =A.W.N. 1908, 51=3 M.L.T. 203=30 A. 137.

(2243)—S. 141—*See* PRACTICE AND PROCEDURE, 21 C. 479.

(2244)—S. 141—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 7 Bom. L.R. 641=30 B. 113.

(2245)—S. 141—*See* SPECIFIC RELIEF ACT, 1877, s. 9. 26 M. 438.

(2245-*a*)—S. 141—*See* NOS. 158, 209, 298, 333, 501, 502, 910, 932, 936, 1089, 1729, 1730, 1901, 2188, 2189. *supra*, AND NOS. 2288, 2485, 2690-*b*, 2764-*i*, 2828-*a*, 2840, 2841-*b*, 2851-*b*, 2883, 2910 *a*, 3003, 3010 *b*, 3010-*c*, 3195, 3936, 4319, 4661, 4731, 4732, 4733, 4734, 4735, 4736, 4737, 4747, 4758, 4759, 4931, 5039, 5282, 5465, *infra*.

(2246)—*Ss. 141, 104, O. 43, r. 1, O. 9, r. 9, O. 2, r. 90 (=ss. 647, 588, 103, 31, Civ. Pro. Code, 1882)—Appeal from an order refusing to set aside the order dismissing an application for setting aside the sale in default.*—S. 647 is so worded as only to render provisions of procedure applicable and cannot be so read with s. 588, cl. 8, (10 B. 433, 27 C. 414, 31 C. 207, 11 M. 319, *R.*), as to confer, by implication, an indirect right of appeal, inasmuch as appellate jurisdiction cannot be created except by express language in an enactment. No appeal, therefore, lies against an order rejecting an application, under s. 103 of the Civ. Pro. Code, for reviving an application, under s. 311, of the Code dismissed for default. MUSAMMAT SOBARAN KUAR v. UDE SAH, **10 O.C. 353.**

(2247)—Ss. 141, 113, O. XLVI, r. 1—*See* REFERENCE TO HIGH COURT, 3 Bom L.R. 368=25 B. 327.

(2248)—*Ss. 141, 151 and O. 39, r. 1—Temporary injunction—Provisions of O. 39, r. 1—Whether rule of procedure or substantive law—Inherent powers of Court, saving of—Applicability of O. 39, r. 1, to arbitration proceedings.*—O. XXXIX, r. 1, in terms, refers to suits only, but s. 141, Civ. Pro. Code, provides that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings of any Court of Justice. O. XXXIX, r. 1, purports to do nothing more than declare what must be proved, before the Court can grant an injunction of a particular kind. It defines the procedure to be followed by a party deserving the help of the Court, and does not confer a jurisdiction or create a right. It applies to proceedings under the Indian Arbitration Act, 1899. Though it may be contended that the Code of Civil Procedure regulates, or even limits, the Court's discretion in granting injunctions, the power to grant them is probably inherent

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in the Court, and is certainly recognised and declared independently of the Code (see s. 52, Specific Relief Act, 1877). S. 151, Civ. Pro. Code, 1908, expressly states that nothing therein shall be deemed to limit or otherwise affect the power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of Court. E. D. SASSON AND CO. v. MANGAL CHAND AND OTHERS, **3 S. L. R. 128=4 Ind. Cas. 609.**

(2249) - *S. 141, O. 2, r. 3, sch. II, r. 17—Civ. Pro. Code (Act XIV of* 1882), *s. 523—Agreement to refer dispute to arbitration—Arbitrators not named in the agreement, effect of—Ambiguity — Power of Court to appoint arbitrator—Three agreements to refer to arbitration relating to one transaction—One application for order of reference sufficient—Different causes of action, joinder of—Contract, terms of, parties cannot resile from—Punjab Courts Act (XVIII of* 1884), *s. 70* (1) (*a*)—*Material irregularity—Express provisions of contract and imperative provisions of law ignored by lower Court—Revision.* — Three agreements in precisely similar terms and relating to what, to all intents and purposes, was one transaction, were executed between plaintiff and defendant within a short period of each other. One of the terms of these agreements was, that "in case of any dispute whatsoever arising under this contract, the same is to be referred to two European merchants residing in Karachi, each party having the right to nominate one arbitrator." When a dispute arose, the plaintiff applied under cl. 17, sch. II of the Code of 1908, that the said agreements be filed in Court and an order of reference made to arbitrators to be appointed in accordance with the provisions of the agreements. The plaintiff in his application duly nominated as his arbitrator a European merchant residing at Karachi, but the defendant, though called upon to do so, failed to nominate his arbitrator. The lower Court held the terms of the agreements to be "ambiguous" and ruling that they should have "contained the name of arbitrators," nominated an Amritsar gentleman to act as arbitrator on behalf of the defendant. It also ruled that each agreement gave rise to a different cause of action and that three causes of action could not be conveniently tried together. *Held*, that, apart from the question of convenience, the plaintiff was justified under O II, r. 3, read with s. 141 of the Code, in asking the Court to take action in one application upon all three agreements; that, unlike the provisions of s.523 of the old Code, cl. 17 of the new Code does not require that arbitrators should necessarily be "named" in the agreement; that the fact that no persons were specially named in the agreements as the persons to be appointed did not render the agreements "ambigious" *Id certum est quod certum reddi potest.* (That is certain which can be reduced to a certainty); that the lower Court had no power, in contravention of the express agreements between the

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parties and the imperative terms of cl. 17, sch. II of the Code, to appoint as an arbitrator a person who was not a European merchant residing in Karachi, and that, in so doing, the Court committed an irregularity which materially prejudiced the plaintiff; that, as it is quite possible for the parties to nominate certain European merchants residing in Karachi as their respective arbitrators, the lower Court must deal with the case in accordance with law, and arbitrators must be appointed in accordance with the provisions of the agreements; and that, as the defendant had wisely or unwisely agreed to appoint as his arbitrator a European merchant residing in Karachi, it was not open to him to plead that he did not know any European merchant there. *Obiter*:—Parties must adhere to contracts made by them with full understanding of all the terms, and must not be allowed to resile from their agreements, simply because they subsequently find it to their interest to do so. CHARLES LOUIS DREYFUS & CO. v. GUARDITTA MAL, **85 P.L.R. 1911=9 Ind. Cas. 655.**

(2250)—*S. 141, O. 9, r. 9 (=ss. 647, 103, Civ. Pro. Code,* 1882)—*Application for revision—Dismissal for default—Power of Court to restore the application.*—Where an application for revision is dismissed for default of the petitioner, such petition can be restored by the Court under s. 103, Civ. Pro. Code, by virtue of the provisions of s. 647 of the Code. JIWANI v. BHAGEL SINGH, **97 P.R. 1907=33 P.L.R. 1908.** (109 P.R. 1882. *Diss.*; 76 P.R. 1903, 75 P.R. 1881, 54 P.R. 1901, F.B, 14 C. 177, 62 P.R. 1894, *R. and D.*)

(2251)—S. 141, O. IX, r. 9—Execution of decree—Previous application dismissed for default—Successive applications for execution—Admissibility—*See* EXECUTION OF DECREE—GENERAL, 13 C.L.J. 532.

(2252)—S. 141, O IX, r. 9—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 18 B. 429.

(2253)—*S. 141, O. 9, r. 9, O. 21, r. 103—Re-hearing—Execution-proceedings.*—An application for re-hearing of execution proceedings is maintainable under O. IX, r. 9, and is not barred under O. XXI, r. 103. S. 141 of the new Code has deliberately changed the provisions of the old Code as in s. 647. SAFDAR ALI v. KISHUN LAL, **12 C L.J. 6=7 Ind. Cas. 241.**

(2254)—S. 141, O. XL, r. 1—Order for the temporary custody of minor's property—Appointment of Receiver of minor's property—Applicability of the Code to proceedings under Act VIII of 1890—*See* GUARDIANS AND WARDS ACT, 1890, s. 12, cl. 2 (*b*), 13 Bom. L. R. 487.

(2255)—*S. 141, O. 46, r. 1—Party to a proceeding, not a suit—No right of appeal—Reference under O. 46, r. 1 by Court—Absence of*

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power—Application under s. 83, Transfer of Property Act—Reference by Court—Not allowed.—S. 141, Civ. Pro. Code, 1908, will not give a party to a proceeding, which is not a suit, a right of appeal. (26 M 438, 27 M. 504, 19 W. R. 122 and 10 B. 433, *R.*) Nor would it authorise a Court to invoke the jurisdiction of another Court, by way of reference to it under O. 46, r. 1, Civ. Pro. Code; any more than it authorises a party to do so by way of appeal. Such right must be expressly conferred by statute. (11 M. 26, P.C., *R.*) A Court cannot, therefore, make a reference under O. 46, r. 1, in an application under s. 83, Transfer of Property Act. K. DAMODARA MENON v. PATINHARA MELSASSERI IKKAMBAMMA'S SON KELLAPPA MENON, **21 M.L.J. 613 = 1911, 2 M.W.N. 13.**

——S. 144 (=1882, s. 588)

(2256)—*S. 144 - Decree—Award of compensation under Land Acquisition Act—Deposit of the amount in Court—Payment to claimant—Reduction in that amount by appeal Court—Payment of interest on the excess amount by Claimant--Inherent powers—Court—Practice.*—The amount awarded to a claimant by the District judge in a proceeding under the Land Acquisition Act, 1894, was deposited by Government into the Court which paid it over to the claimant. On appeal the High Court reduced the amount of compensation. Government then applied to the Court under s. 144 of the Civ. Pro. Code of 1908, to recover interest from the claimant on the amount of difference between the sums awarded by the District Court and the High Court, from the date of its payment to the claimant down to the date of the application. The first Court disallowed the application on the ground that the High Court decree did not provide for the payment of interest and the award of interest was in the discretion of the Court: *Held*, reversing the order, that the claimant had the benefit of the money belonging to Government in excess of that to which the High Court had held him to be entitled; and that benefit was represented not only by the excess amount wrongly taken by the claimant from the District Court, but also by the amount of interest which it carried with it. The award of interest is, generally speaking, a matter of the Court's discretion, except where by law it is made obligatory. It is a rule of law that, where a party has wrongly taken from the Court moneys deposited in Court by his opponent, that Court has inherent power to enforce a refund of the amount with interest. THE COLLECTOR OF AHMEDABAD v. LAVJI MULJI, **13 Bom. L.R. 259.** (14 C. 484, 3 B. 42, *F.*)

(2257)—*S. 144 (1) (=old s. 583, Civ. Pro. Code, 1882)—Execution of decree—Restoration of land—Mesne profits.*—A party seeking restitution under this section should be restored to his former position and in case of dispossession, should be awarded mesne profits for the period of such dispossession. HIMAN v. HUKMAN SINGH, **28 P.R. 1896.**

(2258)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Restitution—Right to apply not confined to parties to appeal—Rights accruing during litigation*—It is not necessary that a person asking for restitution under s. 583, Civ. Pro. Code, should have been a party to the successful appeal, if the appeal is in effect and substance in favour of such a party. Under s. 583, Civ. Pro. Code, the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the litigation. GUNGA PRASAD v. BROJO NATH DAS, **12 C.W.N. 642.**

(2259)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Restitution against a person not a party to appeal.*—Under this section, no restitution can be obtained against a person not a party to the decree passed on appeal. BHAJJU LAL v. RAM BHAROSE, **8 O.C. 115.**

(2260)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Decree—Possession in execution—Dispossession without Court's intervention on reversal--Restoraiton of original decree—Application for restitution—Maintainability.*—Where the plaintiff got a decree for possession and took possession, and where the defendant, on reversal of the decree on appeal, took possession without applying for execution, and in defiance of an order of the High Court staying execution pending a second appeal before it. *Held*, that, on restoration of the original decree by the High Court, the plaintiff was entitled to be put in possession of properties by way of restitution. THEEVANA PILLAI v. KULLA PILLAI *alias* SUBROYA PILLAI AND ANOTHER, **7 M.L.T. 107 = 5 Ind. Cas. 776.**

(2261)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Application for restitution—Appellate decree, whether capable of execution against person not party to appeal—Assignment of original decree—Decree reversed in appeal—Assignee of decree of original Court, no party to appeal—Appellate decree, whether binding*—Lis pendens—*Refund by assignee.*—Under s. 583 of the Civ. Pro. Code, the decree of the appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal; it cannot be executed against a person who was no party to the decree of the appellate Court and who has not derived any interest subsequent to such decree. (19 A. 136; 20 A. 139, *R.* and *F.*) *Obiter*:—When the assignment of the decree was at a time when no proceeding was pending in any Court, but the fact of the assignment was brought to the notice of the defendant by the application made by the assignee for execution of the decree and the judgment-debtor was distinctly referred by the execution Court to the appellate Court, and yet he took no steps to get the assignee added as a party respondent to the appeal, then the

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rule of *lis pendens* does not apply to make the decree of the appellate Court binding on the assignee, so that restitution might be had against him in execution of the decree of that Court. B. L. FRIZONI v. RAJA RAM NARAIN SINGH, **5 C.W N. 426.**

(2262)—*S. 144 (1) (=Civ. Pro. Code, 1882, s. 583)—Restitution of money obtained under a decree subsequently reversed on appeal—Interest on such money not allowable.*—No interest is allowable on money, the restitution of which is claimed under s. 583 of the Code of Civil Procedure. MEWA KUAR v. BANARSI PRASAD, **A.W.N. 1897, 76.**

(2263)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Decree modified in appeal—Possession obtained in execution of lower Court decree—Application for execution and mesne profits—Jurisdiction of executing Court—No appeal made against order refusing mesne profits—Separate suit for mesne profits not maintainable.*—Where a mortgagor was deprived of possession of the property comprised in the mortgage in execution of a decree for foreclosure passed by the Subordinate Judge, but the High Court subsequently modified the decree by lessening the amount payable by the mortgagor, and the mortgagor having paid the latter amount made an application to the Subordinate Judge for restitution of possession and for mesne profits, *held* that the Subordinate Judge had jurisdiction, not only to make restitution by restoring possession but also to award profits, although the decree of the High Court did not specifically provide for mesne profits. (21 C. 989, *R.*) [*R.*, 9 O.C 254, 7 A.L.J. 1=4 Ind. Cas 376.] Where, under the above circumstances, the Subordinate Judge, while ordering restoration of possession, refused to grant mesne profits on the ground that he had no jurisdiction to do so, and the applicant, allowing the decree to become final by not appealing against it, brought a separate suit for mesne profits, *held* that the suit was not maintainable. SRINATH SAHA v. RAM RATAN LAL, **24 A. 361=A.W. N. 1902, 93.**

(2264)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Restitution—Mesne profits—Jurisdiction to restore all such benefits as the party seeking restitution is deprived of.*—It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree it is about to reverse, has been executed or not. Hence, where a mortgagee was deprived of possession of the property comprised in his mortgage in execution of a decree for redemption passed by the Subordinate Judge, but the High Court subsequently modified that decree by raising the amount payable by the mortgagor and the mortgagor failed to pay the increased amount, whereupon the mortgagee made an application to the Subordinate Judge for restitution of possession and for mesne profits, *held* that the Subordinate Judge had jurisdiction, not only to make restitution by restoring possession but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits. PARBHU DAYAL v. ALI AHMAD, **7 A.L.J. 1=4 Ind. Cas. 376=32 A. 79.**

(2265)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Redemption—Mesne profits when in a redemption suit mortgagor of a portion of mortgaged property takes possession of the whole property on payment of smaller sum than that subsequently found due by appellate Court—*Res judicata.—The respondent filed a suit for the redemption of a mortgage of 1st July, 1873, so far as it affected a share in a village which he had purchased, or, in the alternative, for redemption of the whole mortgage. The appellants resisted the suit and the first Court gave the respondent a decree for redemption of the whole village on payment of Rs. 3,652. On the 13th July, 1897, the respondent obtained possession of the village in execution of that decree. The appellate Court allowed redemption of only two-thirds of the village on payment of Rs. 8,996-3-6. On the 28th January, 1902, the respondent deposited the balance payable by him for redemption according to the appellate Court's decree. On the 17th March, 1903, the appellants made an application under ss. 583 and 263 of the Code claiming to be restored to possession of one-third of the village and payment of mesne profits on account of the whole village from the date of their dispossession to the date on which the application might be disposed of. *Held*, that the question whether the respondent, having obtained possession on a decree which allowed redemption on payment of a smaller sum than the appellate Court, found to be due, was liable for the mesne profits for the period between the date of obtaining possession and the date on which he paid up the whole amount due was not a matter in appeal before this Court and therefore not *res judicata*. *Held*, further, that under s. 583 of the Code, the appellants were entitled to mesne profits by way of restitution for the whole of the village from the 13th July, 1897, when the respondent obtained possession under the decree of the first Court to the 28th January, 1902, when the full amount due under the decree of the appellate Court was paid and to mesne profits on the one-third share from the latter date until the appellants recovered possession of it. GAYA DIN SINGH v. THAKUR LAL BAHADUR SINGH, **9 O.C. 254.** (26 B. 661, 24 A. 361. *R.*)

(2266)—*S. 144 (1) (=s. 583, Civ. Pro. Code, 1882)—Execution of decree pending appeal from it—Decree set aside on appeal—Right of appellant to obtain restitution by motion—Appellate Court's decree silent as to restitution.*—During

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the pendency of an appeal against a decree of the Court of first instance, the decree was executed. On appeal, the decree being set aside, the appellant had the right to obtain restitution by motion, although restitution was not provided for by the decree of the appellate Court. Pending an appeal against a decree allowing partition in a suit by a co-sharer, the latter got partition in execution and settled tenants on the land. The decree being set aside in appeal, the defendant co-sharer was, by way of restitution, entitled to be put in joint possession with the plaintiff, (*i.e.*, restored exactly to the position which he occupied before the original Court's partition decree) and to evict the tenants settled on the land by the plaintiff co-sharer. ROHINI SINGH v. HODDING, **21 C. 340.** (18 C. 10, *P.C.*, 19 C. 253, *F.*)

(2267)—*S. 144 (1) (=Civ. Pro. Code*, 1882, *s. 583)—Deprival of land under decree subsequently reversed—Mode of realising mesne profits for period of deprival.*—Where a person was deprived of the possession of immoveable property by a decree of the Court and the decree was reversed on appeal, he could either bring a separate suit for mesne profits for the period he was out of possession or could apply under s. 583 to the Court which passed the decree from which the appeal was preferred. LOKNATH v. BESSESAR NATH, **4 C.P.L.R. 167.** (11 M. 261, 3 C. 720, 14 C. 248. 5 B. 283, 13 B. 486, 7 A. **270, *R.*)**

(2268)—*S. 144 (1) (=s. 583, Civ. Pro. Code*, 1882)—*Execution of appellate decree—Restitution—Mesne profits—Execution Court—Jurisdiction—Auction-sale, validity of—Mortgage—Redemption.*—R executed a usufructuary mortgage in favour of D in 1863. R's interest in the property was subsequently purchased by one Z and his sons. *Z* died in 1873. In 1877 his sons brought a suit for redemption against D. The suit was decreed by the first Court, on condition of the plaintiff's paying a certain amount of mortgage-money. They paid the amount and got possession of the property. On appeal the High Court decreed a larger amount to the mortgagee than what was decreed by the Court of first instance The excess so decreed by the High Court was not paid to the mortgagee within the fixed time. The mortgagee thereupon applied in execution to get back the property, and also prayed for mesne profits for the period during which he had been out of possession owing to the decree of the first Court. The Court awarded the mesne profits. In order to realise these, the equity of redemption was put to sale and was purchased by the mortgagee himself. Subsequently the representative of the mortgagor sold a portion of the property to P. In a suit brought by P to redeem the mortgage of 1863; *held*, that P had no right to redeem. *Held*, further, that a decree of reversal by an appellate Court contains, by necessary implication, a direction to the Court below, to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance. (9 W R. 402, B.L.R Sup. Vol. 985, 23 M. 306, 28 A. 665, A.W.N. 1906, 171; 3 A.L.J. 665, *F.*) In the absence of a specific direction in the decree of the appellate Court, the Court executing the decree is not deprived of its jurisdiction to award mesne profits by way of restitution. The executing Court has jurisdiction to decide whether mesne profits should or should not be awarded, and if any sale takes place for the realization of the mesne profits so determined, it is a valid sale. PANDIT PARBHU DAYAL v. SHEIK ALI AHMAD, **4 Ind. Cas. 376.** (22 C. 434, 22 I.A 68, *D.*)

(2269)—*S. 144 (1) (=s. 583, Civ. Pro. Code*, 1882)—*Application for refund—Jurisdiction.*—A mortgagee, in execution of a money-decree, purchased 2 annas out of 8 annas of certain property mortgaged to him. He subsequently obtained a mortgage-decree, and in execution of it an order was passed for the sale of the 8 annas. On appeal the District Judge directed that only 4 annas of the property should be sold. On second appeal, the High Court held that execution should have been issued after deducting an amount proportionate to the value of the 2-annas share previously purchased by the mortgagee. In the meantime, the 4-annas share had been sold as directed by the District Judge. It was *held* that the application by the judgment debtors for a refund to them of the proportionate value of the 2-annas share fell properly within s. 583, Civ. Pro. Code. Such an application for refund should be made, not before the Court of first instance, but before the District Judge who had *passed the order against which the appeal was preferred.* KHEM NARAIN CHOWDHURY v. MUSSTT. GANESHO KUAR, **5 C.W N. 287.**

(2270)—*S. 144 (1) (=s. 583, Civ Pro. Code*, 1882)—*Execution of decree—Restitution of property sold in execution of a decree revresed in appeal—Procedure.*—In a suit for a declaration that certain property belonged to the defendant-judgment-debtor, the plaintiff-decree-holder obtained a decree and proceeded, on the strength thereof, to sell the property. In appeal, however, this decree was reversed. The rightful owner of the property sold then applied to the Court for restitution of the property. *Held*, that, whether the application could or could not be considered as one falling strictly within the terms of s. 583 of the Code, the applicant was entitled to restitution. SHAIM SUNDAR LAL v. KAISAR ZAMANI BEGAM, **A W.N. 1906, 315=4 A.L.J. 19=29 A. 143.** (6 C.W.N. 710, *R.*)

(2271)—*S. 144, (1) (=Civ. Pro. Code*, 1882, *s. 583)—Decree reversed on appeal, whether executable for restitution against person, not party to appeal.*—On the reversal of the decree of the original Court by the Court of appeal, the appellate decree cannot be executed for obtaining

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restitution, as under s. 583 of the Civ. Pro. Code, against a person who could have been made, but was not made, a party to the appeal in which the decree was passed. The appellate Court, cannot, in the result, be taken to have altered the position of a person who had not figured as a party on the appeal before it. So, where the assignee of a decree for costs made by the High Court had taken out execution against the judgment-debtor but the decree of the High Court was itself reversed by the Judicial Committee on appeal to which the assignee was no party, it was held that the amount realised in execution of the decree of the High Court by the assignee or his representative could not be recovered by proceedings in restitution by way of execution against him of the decree of the Privy Council. BHAGWATI PRASAD v. JAMNA PRASAD, **19 A. 136 = A.W.N. 1897, 6** [*F.*, 5 C.W.N. 426; *R.*, 20 A. 139; *D.*, 28 A. 337 = A.W.N. 1906, 43 = 3 A.L.J. 110.]

(2272)—*S. 144 (1) (=Civ. Pro. Code, 1882, s. 583)—Execution of decree—Reversal on appeal—Power of Court to award restitution—Jurisdiction of executing Court.*—The procedure which s. 583 of the Civ. Pro. Code, 1882, provides for obtaining any benefit (including restitution or otherwise) to which the successful party may be entitled under the appellate decree, is not confined to cases in which restitution is provided for by the decree itself. A brought a suit against B to recover certain timber or damages, and obtained a decree, which was upset on appeal by B. Meanwhile in execution of his decree, A had the timber sold. Thereupon, B made an application to the Court of first instance in execution of the decree of the appellate Court to have the timber restored to him or to recover Rs. 13,325 damages. On objection taken by the plaintiff that the defendant cannot make this claim in execution, but must bring a suit for the purpose, the Court of first instance awarded, overruling the objection, Rs. 5,000 damages to the defendant (the pecuniary limit of its jurisdiction being only Rs. 5,000). On appeal, it was *held* that the matter can be dealt with in execution, and that the jurisdiction of the Original Court in execution continues in all matters, and is not ousted by the circumstances that the value of the question in execution exceeds the limit of suits within the Court's original cognizance. *Held*, further, that such Court (in this particular case) was not limited in its award to the sum of Rs. 5,000. BALVANTRAV OZE v. SADRUDIN, **13 B. 485**. [*R.*, 21 C. 989, 4 M.L.J. 1 = 17 M. 82.]

(2273)—*S. 144 (1) (=Civ. Pro. Code, 1882, s. 583)—Property taken up in execution of decree, restitution of, on reversal of decree—Custody of third party immaterial.*—Where the appellant, the ex-trustee of a temple who had held the actual custody of the temple property was deprived of it under a decree obtained against him by the respondents, the new trustees, but the decree was subsequently reversed, he was *held* entitled to re-gain that custody, since by doing so no injustice would be inflicted on the respondents, and the appellant should therefore be given an opportunity to adduce evidence as to whether any and which of the temple properties where in his actual custody as alleged by him, whether he was deprived of such custody under the decree which was reversed, and whether the respondents or any of them acquired the custody of the same thereunder. The granting of restitution in such a case is not a matter purely within the discretion of the Court. On the reversal of a judgment, the law raises an obligation in the party to the record who received to the benefit of the erroneous judgment to make restitution to the other party for what he had lost; and such obligation it is the duty of the Courts to enforce. The person seeking restoration to the possession of which he has been wrongfully deprived by the agency of the Court, is out of possession only because the Court has wrongly put him out; and whoever is in possession is there, only because the Court has wrongly made room for him to get in. In such cases, therefore, the probable immediate effect on innocent third parties who have come into possession need not be taken into consideration. They would be in no worse position after their being put out by the Court than they would have been if the Court had never acted, and the Court could not, without so putting them out, undo its own wrong. DORAISWAMY AYYAR v. ANNASAMI AYYAR, **23 M. 306 = 10 M.L.J. 307**. (*R.*, 24 M. 341, 33 C. 927 = 3 C.L.J. 67, 13 C.W.N. 710.]

(2274)—*S 144 (1) (=old s. 583)—Questions in execution—Recorder's Court—Reference to High Court.*—Case where in respect of a reference from a Recorder relative to questions arising in execution of a decree in his Court the High Court held that it had no jurisdiction to entertain the reference. ASHBURNER & CO. v. CURRIE AND CO., **13 W.R. 27.**

(2275)—*S. 144 (1) (=Civ. Pro. Code, 1882, s. 583)—Restitution.*—Certain land belonged to a *mutt* and had been mortgaged by S who claimed to be the trustee of the *mutt*. The mortgagee sued the tenant of the land for rent. The validity of the appointment of S to the trusteeship was under litigation at the time of the mortgage, and was eventually decided against him. The rent in question was claimed also by T, who was eventually declared the rightful trustee. T was consequently included as second defendant in the suit by the mortgagee against the tenant who was the first defendant in the suit. The money was deposited in Court by the first defendant with the request that it might be paid to whichever of the claimants might be entitled to it. The Court of first instance dismissed the plaintiff's suit, but on appeal that decision was reversed, and thereupon the money was paid to the

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plaintiff. But, in second appeal preferred by T, the second defendant in the suit, the Court reversed the decree of the lower appellate Court and restored that of the District Munsiff. The first defendant then applied for restitution to him of the money wrongly paid to plaintiff. *Held per Best, J.*, that first defendant was not entitled to the restitution sought as there was no decree whatever in his favour, but there was a decree only in the second defendant's favour and that it was for second defendant to ask the Court to get it back and pay it to himself as the party entitled to the same, it having been paid into Court by first defendant for payment to whichever of the two claimants before it in the same suit might be entitled to the same. *Per Muttuswami Aiyer, J.* The payment was made under the impression that the suit though brought by the plaintiff might be treated as being in the nature of an interpleader proceeding under s. 490, Civ. Pro. Code. The Munsiff was wrong in ordering the money to be paid out to the plaintiff without security before decision of the second appeal, and the party entitled to put him in motion in order to rectify the error and to call for a refund was the second defendant. First defendant, was, therefore, not entitled to ask for a refund. HAJI KASIM v. JURNI DEOG, **4 M.L.J. 1.**

(2276)—*S. 144 (1) (=Civ. Pro. Code, 1882, s.583)—Restitution.*—One S got assigned to him a decree against certain members of a tarwad. In execution of that decree, he attached a decree obtained by the tarwad against strangers for redemption of certain mortgaged lands, and executed that decree for redemption and got possession of the land. Then, the other members of the tarwad sued S and got a decree declaring that the decree which S had got assigned to him was not binding on the tarwad. The tarwad then applied for execution of the decree for redemption making S also a party. The name of S was struck off by the Court as he was not a party to the suit, and the decree was allowed to be executed and S was dispossessed; but, on appeal, that order was set aside on the ground that the execution had become barred by limitation. Then, S applied for recovery of damages during the period of dispossession by way of restitution under s. 583, Civ. Pro. Code. *Held* that the proper remedy of S was a proceeding under s. 332, Civ. Pro. Code, and not by way of restitution, SANKARAN NAMBUDRIPAD v. PANGI ACHEN. **3 M.L.J. 268.**

(2277)—*S. 144 (1) (=Civ. Pro. Code, 1882, s. 583)—Application for restitution of mesne profits after the decree of the first Court has been reversed in appeal—Appeal—Court fee—Circular No 6 of 1893 dated the 25th November.*—A sued B for possession of certain immoveable property. A obtained a decree and in execution thereof got possession of the property. B appealed, and in appeal, the decree of the first Court was set aside. B accordingly

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applied under s. 583 of the Code of Civil Procedure for possession to be restored to him, together with mesne profits for the time during which A was in possession under his decree, and was awarded restitution of possession and mesne profits as prayed. From this order A appealed. *Held* that the Court-fee payable on the memorandum of appeal was an *ad valorem* fee. JAGDIP NARAIN SINGH v. MAHANT KESHOGIR, **A.W.N. 1901, 180.**

(2278)—S. 144 (1)—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 11 M. 261.

(2279)—S. 144 (1)—Inherent power of Court to undo a wrong in execution and to restore what was wrongfully taken in the commission of the wrong—*See* JURISDICTION OF CIVIL COURT, 2 C.L.J. 537=9 C.W.N. 381.

(2280)—S. 144 (1)—*See* LIMITATION ACT, 1908, art. 182, 8 A. 545=A.W.N. 1886, 178.

(2281)—S. 144 (1)—*See* LIMITATION ACT, 1908, art. 182—MISCELLANEOUS, 20 M. 448.

(2282)—S. 144 (1)—*See* MESNE PROFITS—MISCELLANEOUS, 11 O.C. 235.

(2283)—S. 144 (1)—*See* MONEY PAID UNDER DECREE, 17 M. 82.

(2284)—S. 144 (1)—*See* RESTITUTION OF RIGHTS BY MOTION, 20 A. 430=A.W.N. 1898, 100, 20 A 139=A.W.N. 1897, 222, 21 A. 1=A.W.N. 1898, 153.

(2284-*a*)—S. 144—*See* NOS. 76, 121, 937, 938, 939, 940, 941 942, 943, 944, 945, 946, 947, 948, 1071, *supra*, AND NOS. 2312, 2313, 3011, 3225, (*g*) 3347, 4319, 5055, 5244, *infra*.

(2285)—*Ss. 144 (1), 47 (=ss. 583 244, Civ. Pro Code, 1882)—Decree—Sale in execution—Decree-holder's possession as purchaser—Sale set aside—Claim for mesne profits and interest by the representatives-in-title of the judgment-debtor—Decree-holder's claim for interest on the purchase-money.*—The appellant purchased certain property put up to sale by auction, in execution of a decree obtained by him against the predecessor-in-title of the respondents, and obtained possession of the same. The purchase-money was set off against the amount due under the decree, which contained no provision for future interest on the amount decreed. The sale was ultimatey set aside for irregularity. Subsequently, the respondents paid to the appellant the sum found due to him by the decree; and possession of the property was restored to them. Then the respondents applied in execution proceedings for mesne profits and interest. The appellant contended that a separate suit was required, and that he was entitled to interest in respect of his purchase-money. *Held*, that the claim of the respondents to have the questions in dispute determined

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in the execution-proceedings was justified by ss. 583 and 244. Civ. Pro. Code, 1882, and that the claim of the appellant to be allowed interest was absurd. MUNSHI PRAG NARAIN v. THAKUR KAMAKHIA SINGH, **11 Bom. L.R. 1200, P.C.=10 C.L.J. 257=6 M.L.T. 303=3 Ind. Cas. 798=19 M.L.J. 599=13 O.C. 180=31 A. 551=14 C.W.N. 55.**

(2286)—*Ss. 144 (1), 47 (=ss. 583, 244, Civ. Pro. Code, 1882)—Decree reversed on appeal—Transferee of appellate decree—Right of, to claim restitution.*—The appellant contended that, though s. 583 provides that "when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal, desires to obtain satisfaction, he shall apply to the Court which passed the decree against which the appeal was preferred," the term 'party' meant only the actual party to the suit and not his representative by way of assignment of decree. It was urged that the assignee of the decree was not entitled to proceed summarily in execution under s. 583 but could only get the benefit by bringing a suit and obtaining a decree in that suit. *Held*, that since, if there had been no assignment of decree, the holders of it, under the conjoint operation of ss. 583 and 244, could have successfully made the application in question, the present applicant as their assignee and representative is also entitled to adopt the same procedure and ought not to be driven to an independent suit. JAMINI NATH ROY v. DHARMA DAS SIR, **38 C. 857=4 C.L.J. 192.** [*R.*, 35 C. 265.]

(2287)—Ss. 144 (1), 47—Application for execution—Restitution—Court-fees—*See* COURT FEES ACT, 1870, sch. II, art. 11, 11 C.L.J. 541=6 Ind. Cas. 125.

(2288)—Ss. 144 (1), 141—*See* EXECUTION OF DECREE—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER, 16 B. 550.

(2289)—*Ss. 144 (1), 145, O. 41, r. 6 (=ss. 583, 253, 546, Civ. Pro. Code, 1882)—Surety for performance of appellate decree—Enforcibility in execution proceedings.*—S. 583, Code of Civil Procedure, includes the rule embodied in s. 253 of the Code, among the rules applicable to execution of decrees in suits, and extends them all to execution of decrees passed in appeal. Where a surety has given a security bond on behalf of a respondent to an appeal under s. 546, Code of Civil Procedure, for the due performance of the decree of the appellate Court, and the appeal is successful, the appellate decree can, under the provisions of ss. 253 and 583 of the Code of Civil Procedure, be enforced against the surety in execution proceedings. THIRUMALAI v. RAMAYYAR, **13 M. 1.** [*F.*, 14 Bur. L.R. 170=4 L.B.R. 197; *Appr.*, 17 A. 99, 28 M. 117=14 M.L.J. 430; *Cons.*, 15 M. 203; *R.*, 23 C. 212, 25 B. 409; 13 C.P.L.R. 104, 2 Bom.L.R. 203, 31 B. 128, 109 P.R. 1906, 1 P.L.R. 1907, 31 M. 330=3 M.L.T. 317.]

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(2289-*a*)—*Ss. 144, 151—Restitution—Auction-sale reversal of—Decree-holder, auction-purchaser—Inherent power to order restitution.*—A judgment-debtor, on reversal of an execution-sale, is not only entitled to be restored to possession of the properties sold in execution, but to a refund of the profits which have been or might have been collected by the decree-holder-auction-purchaser during the period he was in possession. He is entitled to set off such mesne profits against the decretal amount. The principle upon which restitution is directed is that the Court will not permit an injustice to be done by reason of an erroneous order made by it; when that erroneous order has been reversed, the Court will restore the parties to the position which they would otherwise have occupied. The power of a Court to grant restitution is not confined to cases covered by the provisions of s. 144 of the Code. The power extends also to cases which do not come strictly within the section, because, irrespective of the section, the Court has an inherent power to order restitution. BENI MADHO v. PRAN SINGH, **15 C.L.J. 187.** (14 C. 484, *F.*)

(2290)—*S. 144 and O. 9, r. 13—Principle if applicable to restore a sale under an ex-parte decree set aside—Subsequent contested decree if revives whole decree.*—Where an *ex-parte* decree and sale under it were set aside and after a rehearing a decree was again passed against the judgment-debtors. *Held*, that the principle of s. 144, Civ. Pro. Code, cannot be availed of to set aside the order setting aside the sale. When a decree has once been set aside under s. 108, Civ. Pro. Code, Act XIV of 1882, it cannot by any subsequent proceeding be taken to be revived. If a decree is passed against judgment-debtors on re-hearing, it is a new decree and does not revive the former decree. RAGHUNANDAN SINGH v. JAGDIS SINGH, **14 C.W.N. 282=3 Ind. Cas. 30.**

——S. 145 (=1882, s. 253=1877, s. 253=1859, s. 204.)

(2291)—*S. 145 (=s. 253, Civ. Pro. Code, 1882)—Execution of decree against surety—Transmission of decree to another Court for execution—Notice to surety—Court receiving decree for execution, competency of, to give notice.*—The intention of this section seems to be, that when a person has made himself liable as a surety for the performance of a decree against another, he must have notice in writing that the decree is going to be executed against him; and it is immaterial whether such notice is given by the Court or by the decree-holder. All that the surety is entitled to, is previous intimation in writing. If the language of the proviso to the section is wide enough to make a notice valid even when it is not given by the Court, it is immaterial whether the same is given by the Court, which passed the decree, or by the Court to which the decree is transmitted for execution. It is competent for the

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latter to give the notice and proceed with the execution. The surety cannot insist on a notice by the Court, which passed the decree. LAKSHMI SHANKAR v. REGHUMAL, **29 B. 29 =6 Bom. L.R. 657.** (15 B. 28, *R.*)

(2292)—*S 145 (=s. 253, Civ. Pro. Code*, 1882) —Ex-parte *decree set aside on terms—Execution of decree subsequently passed—Liability of surety—"Before the passing of a decree in an original suit," meaning of.*—The words "before the passing of a decree in an original suit" in s. 253 of the Code, mean before the decree in the original suit which had not been made, but which would be made if the litigation proceeded and for the performance of which the surety would be liable. So, on the setting aside of an *ex parte* decree on the condition of the defendant finding a surety responsible for the amount of the decree to be passed, such a subsequently passed decree could be executed against the surety. SONATUN SHAHA v. DINO NATH SHAHA, **26 C. 222=3 C.W.N. 228.**

(2293)—*S. 145 (=Act VIII of 1859, s. 204)—Act XXIII of 1861, s. 8—Surety bond—Execution.*—A bond taken by the Court as security under s. 8. Act XXIII of 1861, can be enforced under s. 204, Act VIII of 1859. ABDUL KARIM v. ABDUL HUQUE KAZI, **8 B.L.R. 205=15 W. R 21.** [*App*, 6 N.W.P. 261; *R.*, 9 B.L.R. App. 17.]

(2294)—*S. 145 (=s. 253, Civ. Pro. Code*, 1882)—*Decree—Execution proceedings against a surety.*—Where a surety has become liable for the performance of a decree passed prior to his entering into the obligation, he cannot, under s. 253 of the Civ. Pro. Code, be proceeded against in execution of the decree. LAKSHMAN v. GOPAL, **8 Bom. L.R. 367=30 B. 506.**

(2295)—*S. 145 (=Civ. Pro. Code*, 1882, *s. 253)—Nature of Surety.*—A security bond executed during the pendency of a suit by which the person executing it undertook to produce certain documents if the defendant failed to produce them, and to lodge in Court any sum collected by the defendant on those documents, is not one executed with reference to any decree that may be passed in the suit, and the surety cannot be proceeded against under s. 253 of the Civ. Pro. Code. NARAYANAMMA v. RAMAYYA CHETTI, **22 M. 268.**

(2296)—*S. 145 (=Civ. Pro. Code*, 1882, *s. 253) Security given after passing of decree.*—Where a person has hypothecated a certain share of his property as security for the proper satisfaction of a decree for arrears of rent passed against another person, on default of payment of the decree-amount by such latter person, it is not competent to the Revenue Court to sell the property hypothecated by the surety, to whom s. 253 of the Civ. Pro. Code, could have no application as he had become the surety only subsequent to the passing of the decree. BEHARI LAL v. JAGNANDAN SINGH, **19 A. 247=A.W.N. 1817, 21.** [*F.*, 11 O.C. 342, *R.*, 19 C.P.L.R. 104; *D.*, 7 O.C. 210.]

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(2297)—*S. 145 (=s. 253, Civ. Pro. Code*, 1882)—*Surety for performance of decree after it had been passed, liability in execution of—Security.*—S. 253 of the Code does not apply to a person who gave security for the performance of the decree after it had been passed. BHOLA SINGH v. BHABHUTI SINGH, **11 O.C. 342** (7 O.C. 210, 25 B. 409, 19 A. 247, *R.*)

(2298)—*S. 145—Liability of surety after suit once dismissed but subsequently decreed on remand by superior Court.*—A security bond ceases to have effect, at any rate, for the purposes of s. 145 of the Civ. Pro. Code, when the suit is once dismissed, and the liability of the sureties is not revived by the appellate Court's order remanding the suit for trial on the merits. MAUNG PO KHET v. MAUNG SAN YA, **8 Ind. Cas. 980.** (5 L.B.R. 156, 5 Ind. Cas. 985, *F.*)

(2299)—*S. 145 (=Civ. Pro. Code*, 1882, *s. 253)—Application for attachment—Subsequent application for arrest of judgment debtor—Disappearance of care-taker.*—Where an application for attachment and sale of specific property is made and the decree is not satisfied by the sale of such property and the decree-holder wishes to apply for arrest, he must do so in accordance with Civ. Pro. Code, 1882, s. 235. Where moveable property sufficient to satisfy a decree is attached and made over to a care-taker, who is missing with the property, the decree-holder cannot further execute the decree against the person or other property of the debtor, unless it could be shown that the latter was a party to the disappearance of the care-taker. BHANA MAL v. GANPAT, RAI, **21 P.R. 1899.**

(2300)—*S. 145 (=s. 253, Civ. Pro. Code*, 1882)—*Surety for execution of appellate decree—Remedy.*—Where a surety was offered and accepted on behalf of the judgment-debtor as security of the execution for a decree of an appellate Court, and execution was stayed pending an application for review of judgment, the judgment-creditor is not entitled to proceed summarily against the surety under s. 253, Civ. Pro. Code, as it applies only to cases in which the security has been given before the passing of the decree. BALAJI v. RAMASAMI, **7 M. 284.** [*R.*, 12 C. 402, 13 M. 1.]

(2301)—*S. 145 (=s. 253, Civ. Pro. Code*, 1882)—*Security for performance of decree—Execution against surety.*—S. 253, Civ. Pro. Code, 1882, is applicable only to cases in which security is given for the performance of a decree in an original suit. So the liability of a person becoming surety for the performance of an appellate decree cannot be enforced summarily in execution of that decree. JAI DIAL v. SAWAN MAL, **109 P.R. 1886.** [*F.*, 136 P.R. 1892; *D.*, 99 P.R. 1887.]

(2302)—*S. 145 (=old s. 253)—O. 41. r. 5 (=old s. 545.—Surety for appellate decree—Remedy not in execution but by suit.*—**The**

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remedy against a surety for the due performance of an appellate decree is by way of a regular suit and cannot be pursued by means of execution-proceedings. GANPAT RAI v. GOKAL CHAND, **77 P.R. 1815.** [*Overrued*, 109 P.R. 1906, 125 P.R. 1906.]

(2303)—S. 145—*See* APPEAL—DECREE AND EXECUTION OF DECREE, 8 W.R. 24.

(2304)—S. 145—Stay of execution—Security—Future litigation concerning validity of security, whether barred by—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, 15 C.W.N. 475 =13 C.L.J. 365.

(2305)—S. 145—Surety—Personal liability—Execution of decree—*See* PRINCIPAL AND SURETY—GENERAL, 8 Ind. Cas. 985.

(2306)—S. 145—*See* RESTITUTION OF CONJUGAL RIGHTS, 9 B.H.C. 290.

(2307)—S. 145—*See* SURETY—LIABILITY OF SURETY, 3 C.L.R. 505.

(2308)—S. 145—*See* SURETY—MISCELLANEOUS, 6 N.W.P. 261, 3 N.W.P. 88, 9 B.L.R. App. 17, 4 B.L.R. App. 27=13 W.R. 35.

(2308-*a*)—S. 145—*See* NOS. 74, 149, 908, 909, 948(*a*) 949, 1150, 1208, 2289, *supra*, AND NOS. 5083, 5244, *infra*.

(2309)—Ss. *145, 55* (=*ss. 253, 336, Civ. Pro. Code*; 1882)—*Surety, Liability of.*—When a surety gives security under s. 336 for the appearance of, or payment by, a person arrested in execution of a decree for money, he can be proceeded against on default in execution-proceedings. GURAN DITTA v. PALA SINGH, **143 P.R. 1908.** (109 P.R. 1906, F.B., *Appl.*)

(2310)—Ss. *145, 55* (=*Civ. Pro. Code*, 1882, ss. *253, 336*)—*Liability of sureties — Bond to produce judgment-debtor.*—*Held*, that where a security-bond did not make the sureties liable for the performance of the decree or any part thereof, but only for production of the judgment-debtor before the Court, ss. 253 and 336 of the Code of Civil Procedure did not apply. PANNA LAL v. MUKHTAR; **A.W.N. 1900, 156.**

(2311)—Ss. 145, 55—*See* APPEAL—ORDERS, 72 P.R. 1902.

(2312)—*Ss. 145, 107 (2). O. 22, r. 11, s. 144 (1)* (=*Civ. Pro. Code*, 1882 *ss. 253, 582, 583*) —*Security bond for due performance of appellate decree, how enforceable.*—The law having given power to the appellate Court to require a security bond to be given for the performance of its decree it cannot have been the intention of the Legislature that the bond should be given by one party to the other, or that the bond given to the Court should not be enforced by ordinary process, similar to that under s. 253, Civ. Pro. Code, in the case of a security bond given in the suit. Ss. 582 and 583 should be taken to render s. 253 of the Code applicable in the case

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of a security bond given to an appellate Court. JANKI KUAR v. SARUP RANI, **17 A. 99=A.W.N. 1895, 19.** (2 A. 604, *F.*; 13 M. 1, 12 B. 411, *Appr.*; 15 C. 497, 22 C. 25, *Diss.*) [*Diss.* 32 C. 494=9 C.W.N. 372=1 C.L.J. 118; *F.*, 109 P.R. 1906=1 P.L.R. 1907, 4 L.B.R. 197 =14 Bur. L.R. 170; *R.*, 13 C.P.L.R. 106, 25. B. 409, 7 O.C. 210, 31 B. 128=8 Bom.L.R. 932.]

(2313)—Ss. 145, 144 (1)—*See* SURETY—ENFORCEMENT OF SECURITY, 12 B. 411.

(2314)—*S. 145, O. 21. r. 43* (=*Civ. Pro Code*, 1882, *ss. 253 and 269*)—*Security for safe custody of property attached in execution—Realization of security by summary process.*—Where, for the safe custody of live-stock attached in execution of a decree, security is given, such security cannot be realized by summary process in execution. JOSHI POWAR v. JIWRAJ HAZARIMAL, **13 C.P.L.R. 104.** (12 C.P.L.R. 149, *Diss.*)

(2315)—*S. 145, O. 41, r. 5* (=*Civ. Pro. Code*, 1882, *ss. 253 and 545*)—*Security for due performance of appellate decree, suit for enforcement of.*—The appellants having executed a security bond under s. 545 of the Code of Civil Procedure in favour of the respondent, it was *held* that the respondent could enforce the bond by suit and was not bound to proceed in the execution department. SHITAB SINGH v. SHIAM BIHARI, **7 O.C. 210.** [*R. and Disc.*, 11 C. 342].

(2316)—*S. 145, O. 41, rr. 5, 10* (=*ss. 253, 545 and 549, Civ. Pro. Code*, 1882)—*Surety for due performance of appellate decree, liability of, to be proceeded against in execution.*—On appeal by defendant from a decree against him, he applied, under s. 545 of the Code, for stay of execution, when security was given by certain persons as sureties on his behalf. The decree was confirmed in appeal and the plaintiff-decree-holder took out execution against the said sureties of the defendant-judgment-debtor. The application for execution was rejected by the lower Courts on the ground that the plaintiff should proceed against the sureties by way of separate suit, and not on execution. On revision, the question was referred to the Full Bench, whether a surety, who had given security, under s. 545 of the Code, for due performance of such decree or order as may ultimately be binding upon him, could be proceeded against summarily in execution of decree, or whether the proper remedy against him was by way of separate suit. *Held*, that no distinction could be drawn between the case of surety who, before the passing of a decree in an original suit, has become liable as such for the performance of the same, as well as, that of a surety who has given security for the *costs* of an appeal, both of whom might be proceeded against in execution, under ss. 253 and 549 of the Code, respectively, and a surety who has given security, for the performance of

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the appellate Court's decree, under s. 545 of the Code, who could, therefore, be as well proceeded against summarily in execution as the other sureties above referred to. RAGHBAR DAS v. SALIG RAM, **109 P.R. 1906 F.B.=1 P.L.R. 1907.** (77 P.R. 1895, *overruled*; 22 C. 25. *Diss.*) [*F.*, 125 P.R. 1906; *R.*, 143 P.R. 1908.]

(2317)—S. 145, O. XLI, r. 6—Security for restitution of costs paid over to decree-holder—Surety, whether can be proceeded against in execution—*See* SURETY — LIABILITY OF SURETY, 8 A. 639=A.W.N. 1886, 238.

(2318)—S. 145, O. XLI, r. 10—*See* SURETY—LIABILITY OF SURETY, 15 C. 497.

——S. 146 (New).

(2319)—S. 146—*See* COURT FEES ACT, 1870, s. 8, sch. II, art. 17 (iv), 21 M. 269.

(2320)—S. 146 — *See* COURT FEES ACT, 1870, s. 28, A.W.N. 1902, 153.

(2320-*a*)—S. 146 — *See* LIMITATION ACT, 1908, ss. 3, 4, 5, 26 C. 925.

——S. 148 (New).

(2321)—*S. 148—Award made after expiry of time fixed by Court—Application for extending time to file award.*—The Court has not power to enlarge the time for the making of an award, when the time has passed and the award has already been made. (13 A. 300, *F.*) If the time had expired and no award has been made, s. 148, Civ. Pro. Code, no doubt gives the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application. But that section does not enable the Court to extend the time for the doing of a particular act, when in truth and in fact the act has already been done. SHIB KISHNA DAWN & CO. v. SATISH CHUNDEV DUTT, **38 C. 522.**

(2322)—*S. 148—Modification of decree, if can be made by first Court after appeal preferred.*—S. 148 of the new Code does not authorise the first Court to modify the decree or extend the time allowed by it for the execution of a *kabuliyat*, after an appeal has been preferred from that decree. The only Court which can pass such order, after an appeal has been preferred, is the appellate Court. MOHUNT PARMANAND DAS GOSSAIN v KRIPASINDHU ROY, **14 C.W.N. 584=6 Ind Cas. 275=37 C. 548.**

(2323)—S. 148—General Clauses Act, 1897, s. 6—*See* Civ. Pro Code, 1908, O. XX, r. 14, 6 A.L.J. 647=3 Ind. Cas. 497.

(2324)—S. 148—Plaint—Insufficient stamp—Extension of time—Power of Court—*See* **COURT FEES ACT, 1870, s. 28, 6 Ind. Cas. 424=14 C.W.N. 882=12 C.L.J. 62.**

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(2325)—S. 148—Power to extend time for paying pre-emption money—*See* PRE-EMPTION—MISCELLANEOUS, 140 P.W.R. 1910=8 Ind. Cas. 812=22 P.L.R. 11.

(2325-*a*)—S. 148—*See* NO. 4255, *infra.*

(2326)—*Ss. 148, 149—Enlargement of time by Court—Court-fee, power to make up deficiency of—Small Cause Court—Registrar, power of, to enlarge time.*—When a party asks for enlargement of time and invites the Court to make an order under s. 149, or under that section read with s. 148 of the Civ. Pro. Code, an application should be made to the Court, and the record ought clearly to indicate that all the circumstances have been brought to notice of the Court, which, with full knowledge thereof, has, in the exercise of its discretion, made an order entitling the plaintiff to make up the deficiency of Court-fees within the time fixed under s. 149 or within any additional period allowed under s. 148. (6 Ind. Cas. 424, 12 C.L.J. 62, 14 C.W.N. 882, *D.*) Where the Court in its discretion called upon the plaintiff to pay the deficiency of Court-fee within a time fixed by it, but that order was not carried out: *Held* that s. 149 did not assist the plaintiff, and if the deficiency was paid after the period of limitation the suit should be dismissed. (34 C. 20, 4 C.L.J. 431, 11 C.W.N. 38, 1 M.L.T. 355, F.B., 27 C. 376 2 C.L.J. 70, 9 C.W.N. 844, *F.*) S. 149 of the Civ. Pro. Code, 1908, has not brought about any change in the law so as to entitle a plaintiff, who has obtained time under s. 149 and has failed to carry out the order of the Court, to make up the deficiency of Court-fee on a subsequent day without an order for enlargement of time under s. 148. The Registrar of a Small Cause Court is not competent to make an order under s. 148 of the Civ. Pro. Code, 1908, for enlargement of time. BUDHAN SHAH v. SITA NATH SHAH, **7 Ind. Cas. 578.**

(2327)—Ss. 148, 149—Payment of deficient Court-fee—*See* COURT FEES. 13 C.L.J. 78.

(2328)—Ss. 148, 149—Time for payment of Court-fees, if can be extended.—*See* COURT FEES ACT, 1870, s. 11, 13 C.L.J. 432.

(2329)—Ss. 148, 151—Pre-emption or redemption cases—Court's power to extend time fixed in decree—*See* MORTGAGE—GENERAL, 7 Ind. Cas. 36.

(2330)—*Ss. 148, 152, O. 20, r. 3—Enlargement of time by Court—Power of Court to enlarge time subsequent to decree.*—*Held*, that the general provisions of s. 148 of Act V of 1908 relate only to proceedings antecedent to the passing of a final decree; and that, when one such decree has been passed, the power of the Court is limited by the general principle that, once a judgment has been pronounced and the decree signed, such final decree cannot be altered except under the provisions of s. 152 or O. XX, r. 3, or those relating to review

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of judgment, except in cases in which power to grant further extension of time has been expressly reserved to the Court. NARENDRA BAHADUR SINGH v. AJUDHIA PRASAD, **13 O. C. 28=8 Ind. Cas. 443.**

——S. 151 (New).

(2330-*a*)—S. 149—*See* **NOS. 2326, 2327, 2328,** *supra*.

——S. 151 (New).

(2331)—*S. 151—Inherent powers of Court—Exercise of the powers—Court—Discretion.*—G obtained three money decrees against M in the Small Cause Court at Poona; and in execution thereof got attached a sum of money belonging to M and lying in the Court of the First-Class Subordinate Judge at Poona. M's brother P then sued for and obtained a declaration that this money was not liable to be attached. G, in the meanwhile, withdrew the amount from the Court in satisfaction of his decrees. On P's application, the Small Causes Court at Poona, in virtue of the powers reserved by s. 151 of the Civ. Pro. Code, 1908, ordered G to re-pay the money into the First-Class Subordinate Judge's Court at Poona. *Held*, than an order could be made under s. 151, only if it was necessary for the ends of justice or to prevent the abuse of the process of the Court; and that it could not be said to be necessary for either purpose, because P had already a decree which he was entitled to execute in the First-Class Subordinate Judge's Court at Poona. GANESH NARAYAN SATHE v. PURUSHOTTAM GANGADHAR KARVE, **11 Bom. L.R. 1312=34 B. 135=4 Ind. Cas. 515.**

(2332)—*S. 151—Court, inherent power of—Order made by misrepresentation and mistake—Power to cancel.*—Where a Court dismissed a suit for default under misrepresentation and by mistake: *Held* that it had inherent power to cancel that order, as soon as it was apprised of the fact, and to try the suit. SRI ADWAITANAND TIRTHASWAMI v. BASUDEO NAND, **6 Ind. Cas. 208.** (6 C.L.J. 662, 3 M.L.T. 41, *F.*)

(2333)—*S. 151—Review—Court overlooking an important plea—Custom—Alienation by sonless male proprietor—Acquiescence—Attestation of deed of sale by principal plaintiff.*—It was pleaded, *inter alia*, that the plaintiffs' suit for a declaration that a sale made by a sonless proprietor would not affect their reversionary rights, ought to be dismissed on the ground that the sale was made with the consent of the plaintiffs, and one of the two plaintiffs, who was a *lambardar*, took an active part in negotiating the sale and assisted in the registration of the sale-deed. This fact was admitted by the particular plaintiff. In the Chief Court the plea was urged by the defendant, but the Court overlooked it and a decree was passed against the defendant. On an application for review of the decree: *Held*, that there was good ground for review to be granted and that the plea should have been accepted and the suit dismissed. SUNDER SINGH v. NIHALA, **26 P.L.R. 1911=9 Ind. Cas. 545.**

(2334)—S. 151—Amount drawn by Commissioner in excess of his fees—Attachment for recovery of that amount—Power of Court—*See* CIV. PRO. CODE, 1908, ss. 36, 37, O. XIV. r. 7, 6 Ind. Cas. 386.

(2335)—S. 151—Court not to override express provisions of any law—*See* EXECUTION OF DECREE—GENERAL, 9 Ind. Cas. 246.

(2336)—S. 151—Contingency not provided by Legislature—Inherent power of Court—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 Ind. Cas. 846=12 C.L.J. 428.

(2337)—S. 151—Inherent powers of High Court—*See* PROVINCIAL INSOLVENCY ACT, 1907, ss. 2, sub-s. 1, cl. (*g*), 47, 46, 16 (6), 13, 18, 14 C.W.N. 586=11 C.L.J. 435=6 Ind. Cas. 95.

(2337-*a*)—S. 151—*See* NOS. 379; 950; 1209; 1683-*a*; 2189-*a*; 2248; 2289-*a*; 2329; *supra*.

(2338)—Ss. 151, 158—Partition-suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—*See* PARTITION—GENERAL, 7 Ind. Cas. 94=14 C.W.N. 1101=12 C.L.J. 324.

(2338-*a*)—S. 151, O. I, r. 10, O. XLI, r. 23—Rent-suit—Tenant raising title of third party—Necessary parties—Remand by lower appellate Court—Inherent powers—*See* PARTIES TO SUIT—GENERAL, 11 Ind. Cas. 183.

(2339)——*S. 151, O. 21, r. 29 and O. 41, r. 5—Stay of execution—Power of appellate Court.*—In this case, execution of a decree of 1907 was stayed pending decision of a counter case brought by the judgment-debtor, R.B.K. against the decree-holder. That suit was dismissed and an appeal from this order of dismissal was presented to the Chief Court. R.B.K. now prayed that execution of the decree of 1907 might be stayed pending decision of the appeal. *Held*, that though the case is not provided for by O. 21, r. 29 of the new Code (s. 243 of the Code of 1882), s. 151 of the new Code meets the case, and the Chief Court has power to stay execution pending the appeal. It does not follow that an order cannot be passed simply because there is no express section in the Code providing for the passing of such an order. O. 21, r. 29, does not prohibit anything by implication. An appellate Court has, generally speaking, as full powers as the original Court, and, in the absence of any express provision to the contrary, the appellate Court can do, while the appeal is pending, what the original Court should do while the suit was pending before it. SARDARNI BHAGWAN KAUR v. RANI HARNAM KAUR, **82 P.R. 1910=149 P.L.R. 1910.** (33 C. 927, 130 P.R. 1908, *R.*; 41 P.R. 1904, *not F.*)

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(2340)—*S. 151, O. 21, rr. 97, 98, 99—Resistance by outsider to delivery of possession to decree-holder—Inherent power of Court—Order for delivery of possession to decree holder.*—The inherent powers of a Court may be exercised in favour of or against a person, who is not a party to the original suit. (10 C. 109, 10 I.A. 171, *R.*). Therefore, although the Civ. Pro. Code makes no express provision for the case of resistance to delivery of possession to the decree-holder, by a claimant other than the judgment-debtor who is not in possession and who makes no *bona fide* claim to be in possession of the property, yet s. 151 of the Code, which recognises the inherent power of a Court to make such orders as may be necessary for the ends of justice, completely covers the case, and the Court can order possession to be delivered to the decree holder in such a case. RADHIKA MOHUN SHAH v. GYAN CHANDRA SHAH, **6 Ind. Cas. 120=14 C.W.N. 836.**

(2341)—**S. 151,** O. XLI, r. 23—Remand by appellate Court when suit not disposed on preliminary point—Inherent power of Court—*See* PARTIES TO SUIT—GENERAL, 7 Ind. Cas. 75 =12 C.L.J. 368.

——S. 152 (=1882, s. 206 (3).)

(2342)—*S. 152—Accidental slip or omission, meaning of—Amendment of judgments decrees or orders.—Held*, that the test whether a Court can make an alteration under s. 152 of Act V of 1908 is, whether the order, as it stands, represents the intention of the Judge at the time he made it. If it does, then a mistake in it cannot be treated as an accidental slip or omission which may be corrected under the section. ASHIK HUSSAIN v. MADHI HASAN, **13 O.C. 114=6 Ind. Cas. 979.**

(2343)—*S. 152—Decree, amendment of—Arithmetical error—Rectification.*—A plaintiff, who obtains a decree for a specific share, is not entitled to more merely because there is an arithmetical error in the decree. If there is such an error and the plaintiff's interest is prejudiced thereby, the proper course is to get the mistake rectified by an application under s. 152, Civ. Pro. Code. Where, however, the operative part of a decree awards a particular share to the plaintiff, but the detail attached to the decree contains a mistake in calculation, the error in the detail may be disregarded as surplusage, and the plaintiff is entitled to the actual share awarded by the decree. MATA BADAL v. KABLASI, **9 Ind. Cas. 433.**

(2344)—*S. 152—Decree—Clerical error in—Such error found in judgment and plaint—Whether can be amended.—Held* that an error in a decree, being a clerical error, can be amended by the Court that passed it, despite the facts that corresponding amendments of the judgment and plaint are also necessary. GAIBI v. KRISHNAJI, **5 N.L.R. 169=4 Ind. Cas. 231** (20 A. 337, 23 M. 364, *D.*; 8 C.W.N. 206, *Expl.* 22 B. 370, *F.*)

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(2345)—S. 152—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 10 A. 51 =A.W.N. 1887, 284.

(2346)—S. 152—*See* EXECUTION OF DECREE —MISCELLANEOUS, 20 A 304=A.W.N. 1898, 43.

(2347)—S. 152—Powers of amendment—*See* PRACTICE AND PROCEDURE, 37 C. 649=7 Ind. Cas. 876.

(2347-*a*)—S. 152—*See* NOS. 196, 351, 352, 2330, *supra*, AND NOS. 3199 (*f*) to (*k*), 3200, 3201, 3201(*a*) 3201 (*b*) 5299, 5300, *infra*.

(2348)—Ss. 152, 109, 110—*See* APPEAL—LETTERS PATENT, 30 C. 679=30 I.A. 20, P.C.

(2349)—Ss. 152, 115—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 15 A. 121=A.W.M. 1893, 44.

(2350)—*S. 152, O. 20, r. 6 (=old s. 206) Details of compliance with s. 206, Civ. Pro. Code, 1882)—Decree, how to be drawn.*—A decree cannot be said to comply with s. 206, if it is not legal in its terms, incapable of execution, or if no enquiry could be made or evidence taken to explain or make clear the decree in the course of the execution-proceedings. HAIDAR SHAH v. SHUJAWAL, **67 P.R. 1887.** (*R.*, 45 P.R. 1888.)

(2351)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code, 1882)—Power to amend decree—Jurisdiction.*—The proceedings under s. 206 of the Civ. Pro. Code, terminate in an order (which can be dealt with in revision by the High Court). An order passed under s. 206, which makes additions in the decree not warranted by the judgment, is beyond the jurisdiction of the Court passing it. BAI VAKTUBA v. AGARSANJI, **9 Bom. L.R. 547=31 B. 447.** [*R.*, 10 C.L.J. 467.]

(2352)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code, 1882)—Amendment of decree—Decree in conformity with judgment—No amendment can be made.*—The jurisdiction of a Court is to amend a decree, so as to bring it in conformity with the judgment. Therefore, where the decree is already in conformity with the judgment, the Court cannot amend the decree so as to make it conform with the facts, which the plaintiff should have alleged, but had not alleged, in his plaint. KABULA v. SYED MOHAMMAD HASIM ALI, **2 Ind. Cas. 551.**

(2353)—*S. 152, O 20, r. 6 (=s. 206, Civ. Pro. Code, 1882)—Amendment of decree—Substitution of names of representatives for name of deceased appellant after decree passed in appeal.*—Where after decree passed in second appeal by the High Court, an application purporting to be under s. 206 of the Code of Civil Procedure was made for the purpose of having the names of certain allegedlegal

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representatives substituted for the name of the successful appellant, who had died pending the appeal in the High Court, the Court declined to make the amendment asked for. KHUSHI RAM v. NIHAL, **A.W.N. 1895, 237.**

(2324)—*S. 152, O. 20, r. 6 (=Civ. Pro. Code, 1882, s. 206 (=Limitation Act XV of 1877, sch II, art. 179 (3)—Amendment of decree as to costs—Application for execution—Limitation.*—After the passing of a decree, a defendant applied for amendment of the decree in respect of the costs, and the application was granted. Subsequently, he applied for execution of the decree. The question was whether the period of limitation was to be calculated from the date of the original or amended decree. *Held* that the amendment of the decree related to the actual amount of costs, which was not settled in the judgment, but which, under para. 2 of s. 206, Civ. Pro. Code, had to be determined subsequent to judgment for entry in the decree. As an order passed by the Court determining such amount must be treated as a continuation or completion of the judgment, the amendment made was substantially an amendment made on review of judgment, and art. 179 (3) of the Limitation Act applied. VENKATA JOGAYYA v. VENKATASIMHADRI JAGAPATIRAJU, **24 M. 25.** [*R.*, 3 C.L.J. 188, 10 C.L.J. 467.]

(2355)—*S. 152 O. 20, r. 6 (=Civ. Pro. Code, 1882, s. 206)—Application for amendment of decree—Costs incorrectly assessed by ministerial officers of Court in drawing up decree—Rules of Court of the 18th January, 1898, rule 212.*—Where, in drawing up a decree dismissing an appeal as against a certain respondent, the officer of the Court assessed costs against the appellants, on a sum in excess of that upon which the particular respondent was entitled to have his costs assessed, the Court allowed such mistake to be corrected by means of an application under s. 206 of the Code of Civil Procedure. BITHAL DAS v. SHAM KISHEN, **A.W.N. 1901, 94.**

(2356)—*S 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code, 1882.—Execution of decree—Costs—U.P. Act XXII of 1886, Oudh Rent Act, s. 145.*—In execution of a decree, the question for determination was, whether the costs of the suit made payable by the decree could be included in the word "sum" in s 145 of the Oudh Rent Act. *Held* that, in interpreting the words "unless the decree is for a sum exceeding Rs. 500," in s. 145 of the Oudh Rent Act, the costs awarded in the decree to the decree-holder must be included in the calculation of the sum decreed. UDAI PRATAB ADAI DAT v. UDIT PANDE, **1 O.C. 141.**

(2357)—*Ss. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code, 1882)—Application under—Decree, amendment of—Conformity with judgment.*—If the decree be not in conformity with the judgment as to the question of payment of costs, it may be amended under s. 206, Civ. Pro. Code, 1882. SAJEDUR RAJ v. BAIDYA NATH DEB, **1 C.W.N. 65.**

(2358)—*S. 152, O. 20, r. 6 (=Civ. Pro. Code, 1882, s. 206)—Decree—Appeal—Amendment.*—A decree, an appeal against which has been dismissed, cannot be amended by the Court which made it. The application for amendment must be presented to the Court of appeal. No appeal lies against an order amending a decree, but if such order has been made without jurisdiction, the High Court can set it aside on revision. An appeal may lie from the decree as amended. KUMAR RAMESWAR MALIA v. BHABASUNDARI DEBI, **11 C.L.J. 81=5 Ind. Cas. 304.**

(2259)—*S. 152, O. 20. r. 6 (=old s. 206)—Appellate decree—Amending of.*—Where a decree of the lower Court is affirmed by the appellate Court, the only existing decree is that of the appellate Court. An amendment of the decree can be sought for only in the appellate Court and not in the original Court. MUSST. JOWALA DEVI v. KANWAR SINGH, **32 P.R. 1896.** [*R.*, 25 P.R. 1904.]

(2360)—*S. 152, O. 20, r. 6 (=old s. 206)—Appellate decree—Amending of.*—If a decree is appealed against and confirmed, it is to the appellate Court and not to the original Court that an application for amendment should be made, even though the first Court's decree in its incorrect from is upheld and confirmed by the Court of appeal. ABDUL KASIM v. PIARE LAL, **59 P.R. 1900.** [*R.*, 25 P.R. 1904.]

(2361)—*S. 152 O, 20, r. 6 (=old s. 206)—Procedure under, when legal.*—The variance between the decree and the judgment referred to here must be one patent upon the face of the document itself, and must not require the introduction of any extraneous evidence to establish the same. *Semble*:—A confirmation by the appellate Court of the first Court's decree would not prevent the latter Court from amending the original decree. KARM BAKHSH v. HAIDAR BAKHSH, **94 P.R. 1888.**

(2362)—*S. 152, O. 20, r. 6 (Civ. Pro. Code, 1882, s. 206)—Confirmation by appellate Court of decree of first Court—Appellate Court alone competent to amend decree.*—Where a decree of the first Court has been confirmed by the Court of appeal, an application to amend the decree must be made to the appellate Court and not to the Court of the first instance, as the decree of the latter Court has been superseded by the decree of the appellate Court. SETH MORIRAM v. DARYAO KIRAR, **6 C.P.L.R. 142.** (2 A. 267 and 314, *not F.*; 9 M. 354, 2 B.L.R, 363, *F.*)

(2363)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code, 1882)—Partition-suit—Preliminary order for partition—Final decree—Appeal—In appeal both can be questioned—Practice—Pleadings.*—It is open to an appellant, in an appeal against the final decree in a partition-suit, to question the correctness of the

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preliminary order or decree for partition, when no appeal was preferred against such order within the time allowed by law. MULLA ABDUL HAI v. KHATIJA BEGAM, **10 Bom. L. R. 514.**

(2364)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code*, 1882 —*Order amending decree—No appeal—Revision lies—Order based on compromise—Plea of decree not being in conformity with compromise—Not to be taken in revision.*—An order passed under s. 206, Civ. Pro. Code, 1882, amending a decree not in conformity with the judgment, is not appealable but is open to revision. (24 M. 646, *Diss.*; 28 C. 177, *F.*) An objection that the judgment and decree are not in accordance with the compromise on which they were based is an attack on the amended decree on the merits and can be raised only in an appeal and not in revision. (3 C.L.J. 188, *R.*) The word '*haqiyat*' means '*rights in immoveable property.*' Though as a rule the word is used in connection with landed property, there is nothing to prevent its application to house-property also BAWA SINGH v. LACHHMAN SINGH, **24 P.R. 1911, Civ.=56 P.W.R. 1911.**

(2365)—*S. 152, O. 20, r. 6 (=Civ. Pro. Code*, 1882, *s. 206*)—*Order disallowing amendment of decree—Appeal.*—No appeal lies from an order either granting or refusing an application made under s. 206, Civ. Pro. Code, KISHEN PERSHAD v. RADHA MADHO PERSHAD, **1 A.L.J. 701.**

(2366)—*S. 152, O. 20, r. 6 (=Civ. Pro. Code*, 1882, *s. 206*)—*Compromise decree, amendment of.*—Where the parties to a suit entered into a compromise and a decree was ordered to be prepared in terms of it, but owing to some ambiguity in the petition of compromise, a passage, which was not contained in the petition, was inserted in the decree with the knowledge and consent of both the parties, *held* that the decree gave expression to the true intention of the parties and ought not to be amended. *Per Maclean, C. J.*—The judgment in the case was not such a judgment as is contemplated by s. 206, Civ. Pro. Code, as there was no expression of judicial opinion upon the merits of the case. RAMESHWAR PROSAD NARAIN SINGH v. CHANDRESHWAR PROSAD NARAIN SINGH, **7 C.W.N. 880.**

(2367)—*S. 152, O. 20, r. 6 (=old s. 206)*—*Application under—Limitation*—The law of limitation is inapplicable to cases where the Court is asked to do certain things which it is bound to do, *e.g.*, to bring the decree into conformity with the judgment and to correct errors of omissions or to draw up a decree in conformity with its judgment when no decree exists. DEVI DAS v. GURDATTA, **12 P.R. 1897.**

(2368)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code*, 1882)—*Amendment of decree, effect of—Appeal against original decree—Limitation, when begins to run.*—Where the plaintiff obtained a decree in a mortgage suit on the 31st January, 1901, which was made absolute on 28th September following, and the decree was subsequently amended, under s. 206, on the 12th July, 1902, and the plaintiff preferred an appeal to the High Court against the amended decree: *Held*, that an amended decree was a decree between the parties within the meaning of the Code and, as such, was appealable, and the plaintiff was, accordingly, competent to prefer an appeal against the amended decree (9 C.W.N. 605, *F.*; 28 C. 177, *D.*) *Held*, also, that, for the purposes of determining whether the appeal was barred by limitation, time must be taken to have run from the date of the decree as originally drawn up. BROJO LAL RAI CHOWDHURY v. TARA PRASANNA BHATTACHARJI, **3 C.L.J. 183.** (14 M. 150, 6 C. 22, 22 M. 364, *F.*) [*D.*, 11 C.L.J. 81.]

(2369)—*S. 152, O. 20, r. 6 (=Civ. Pro. Code, 1882, s. 206)*—*Dismissal of suit—Finding in judgment not embodied in decree—Review of judgment refused—Amendment of decree ordered—Appeal—Limitation*,—Though a suit for possession was dismissed, the judgment contained a finding that the alienation in favour of a defendant was not supported by consideration. The decree, however, comprised a simple order of dismissal and contained no reference to the above finding. The defendant applied for a review of judgment, praying that the finding might be either expunged or modified in his favour, as it might, if allowed to stand, operate as *res judicata* in any subsequent suit that might be brought. On this being refused, he applied under s. 206, Civ. Pro. Code, that the decree might be brought into conformity with the judgment. The Court added a clause to the decree, to the effect that the issue relating to him had been found against him. The defendant thereupon preferred an appeal against the decree. The District Court held that the appeal was out of time. *Held* that so far as the appellant was concerned there was in fact no finding except with regard to the question of consideration. The decree was in conformity with the judgment and the first Court had no power to vary the decree. That being so, the words added had to be expunged and the decree restored to its original state. *Per Subramania Ayyar, J.* Where a decree which is at variance with the judgment is brought into conformity with it under s. 206 of the Civ. Pro. Code, the date on which the decree is so rectified is immaterial with reference to the calculation of the time for appeal against such decree. But as against the party affected by the alteration, time will run from the date of amendment. PARAMESHRAYA v. SESHAGIRIAPPA. **22 M. 364.** [*F.*, 3 C.L.J. 188.]

(2370)—*S. 152, O. 20, r. 6 (=s. 206, Civ. Pro. Code*, 1882)—*Effect of application to bring decree into accordance with judgment—Limitation—Step in aid of execution.*—**Held**

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that an application under s. 206 of the Code of Civil Procedure to bring a decree into accordance with the judgment does not give a fresh starting point to limitation, and cannot be regarded as an application to the proper Court to take a step-in-aid of execution. AWADH BIHARI PANDE v. MAHADEO SAHI, **A.W.N. 1907, 169=4 A.L.J. 469.** (20 A. 304, 27 A. 575, *F.*; 25 C. 258, *Diss.*)

(2371)—S. *152, O. 20, r. 6 (=s. 206, Civ. Pro. Code,* 1882) — *Altering decrees — High Court.*—The High Court has no power to alter its own decrees except under the provisions of either s. 206 or s. 623 of the Civ. Pro. Code, 1882. The High Court has, therefore, no powers to amend its decree so as to make fit in with a subsequent compromise between the parties. KOTAGIRI v. VELLANKI, **2 Bom. L. R. 771.**

(2372)—S. 152, O. XX, r. 6—*See* DECREE—ALTERATION OF OR AMENDMENT OF DECREE, A.W.N. 1885, 325.

(2373)—S. 152, O. XX, r. 6—*See* EXECUTION OF DECREE—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER, 18 B. 542.

(2374)—*S. 152, O. 20, r. 6, s. 104, O. 43, r. 1, s. 115 (=ss. 206, 588, 622, Civ. Pro. Code,* 1882) — *Order amending decree — Appeal — Review.*—An order under s. 206, amending a decree not in conformity with the judgment, not being a decree, is not appealable; nor is it appealable under s. 588. The proper remedy is by an application under s. 622. NALINAKSHYA GHORAL v. MAFAKSHAR HOSSAIN, **28 C. 177 =5 C.W.N. 192.** (7 A. 875, *F.*; 6 C. 22, *R.*; 25 C. 258, *D*; 8 A. 377, 11 A. 314, *explained*. [*R.*, 3 C.L.J. 188, 31 B. 447=9 Bom. L.R. 547; *D.*, 3 C.L.J. 188.]

(2375)—*S. 152, O. 20, r. 6, s. 104, O. 43, r. 1, s. 115 (=ss. 206, 588, 622, Civ. Pro. Code,* 1882)—*Decree not in conformity with judgment — Decree affirmed on appeal — Subsequently decree amended by original Court--Appealability of amended decree —High Court, jurisdiction of, to revise.*—In a suit for recovery of possession of certain immoveable property with mesne profits, the Court, before which the suit was brought, declared in its judgment that the plaintiff was entitled to obtain possession of the property with mesne profits as claimed; but, in the decree that was drawn up, no mesne profits were allowed, it being confined to an order for recovery of possession of the property. That decree was appealed against and was affirmed by the appellate Court. Subsequently, an application was made, in the Court of first instance, to amend its decree under s. 206 of the Code, so as to bring it into conformity with the judgment that it had pronounced. The Court allowed the amendment, and added an order to its decree in respect of the mesne profits. The decree-holder, subsequently, presented an application for execution of the amended decree and the question was then raised by the judgment debtors, whether that decree was not *ultra vires*. *Held*, no doubt the original Court, erroneously though it may be, entertained the application for amendment of the decree and amended its decree. (11 A. 314, F.B., 18 B. 542, 18 M. 214, F.B., 24 C. 759, *R.*) Such a decree was a decree between the parties within the meaning of the Code and would be binding between them, unless and until it be set aside on appeal. It is true that the order under s. 206, not being specified in s. 588, is not appealable. But the amended decree, being a new decree in the suit, would be appealable. (25 C. 258, 6 C. 22, 20 W.R. 11, *R.*) Even if the amended decree was not appealable, it was open to the judgment-debtor to move the High Court, under s. 622 of the Code, to set aside the order of the original Court, upon the ground that it had no jurisdiction to make it. He availed himself of neither of these remedies, but left the amended decree unquestioned. Consequently, he cannot now challenge the validity of the decree in the execution-proceedings upon the ground that the original Court had no jurisdiction to make the amendment. MENAT ALI v. AMDAR ALI, **9 C.W.N. 605.** [*F.*, 3 C.L.J. 188; *R.*, 10 C.L.J. 467; *D.*, 11 C.L.J. 81.]

(2376)—*S. 152, O. 20, r. 6, s. 114 (=Civ. Pro. Code,* 1882, *ss. 206, 623,) Proceedings under —Distinction.*—Proceedings under s. 206, Civ. Pro. Code, cannot be regarded as of the same nature in any respect as proceedings under s. 623, Civ. Pro. Code. In the former case, the correctness of the judgment is not questioned; it is assumed; but the jurisdiction arises from the fact that the decree as drawn up and signed is not in accordance with the judgment. In the latter case, not only the correctness of the decree, but the correctness of the judgment is questioned, and if the application under s. 623 is allowed, a re-hearing of the suit or appeal to which it refers becomes necessary. In the former case, there is no re-hearing. DAYA KISHAN v. NANHI BEGUM, **20 A. 304=A.W.N. 1898, 43.**

(2377)—*S. 152, O. 20, r. 6, s. 114, O. 47, r. 1 (=ss. 206, 623, Civ. Pro. Code,* 1882)—*Compromise after decree between plaintiff and defendant—Amendment of decree according to compromise—Legality—Limitation Act (XV of* 1877), *sch. II, art.* 179—*Application for execution—Limitation.*—After the passing of a decree by the High Court, the decree-holder and a defendant entered into a compromise and applied to the High Court for amendment of the decree according to the terms of the compromise. The High Court amended the decree accordingly. *Held* that the High Court has no power to alter its own decrees except under the provisions of either s. 206 or s. 623, Civ. Pro. Code. S. 206 enables to Court to amend the decree, if it is found to be at variance with the

judgment, or if any clerical or arithmetical error be found in it. Under s. 623, the ground of amendment must be something which existed at the date of the decree. The section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event. The High Court had power to amend the decree in the terms of the compromise. The decree so amended had no operation either in favour of or against the defendants who were not parties to the application for amendment. What the High Court ought to have done was to make the razinama a rule of Court and stay all further proceedings on the decree against the defendant, who entered into the compromise, except for the purpose of enforcing the compromise. [*F.*, 4 M.L.T. 86 ; *R.*, 14 M.L.J. 359.] Where a decree is amended in pursuance of a compromise entered into between the plaintiff and a defendant, the period of limitation for the execution of the decree against the defendants, not parties to the amendment, commences from the date of the primary and not of the amended decree. KOTAGIRI VENKATA SUBBAMMA RAO v. VELLANKI VENKATARAMA RAO, **24 M. 1, P.C. = 4 C.W.N. 725 = 27 I. A. 197.**

(2378)—*S. 152, O. 20, r. 6, s. 115 (=Civ. Pro. Code, 1882, ss. 206, 622)—Order of amendment, not appealable—Revision.*—There is no provision in the Code justifying an appeal against an order passed under s. 206, Civ. Pro. Code ; but such an order can be revised under the provisions of s. 622, Civ. Pro. Code, under certain circumstances. MUTHAYAN CHETTI v. NARASUVIER, **1 M.L.J. 45.**

(2379)—*S. 152, O. 20, r. 6, s. 115 (=Civ. Pro. Code, 1882, ss. 206, 622)—Order amending decree—High Court's power of revision.*—When an original decree is amended under s. 206, Civ. Pro. Code, the amended decree is *the* decree in the suit from which an appeal lies under s. 540, and in such appeal, the propriety of the amendment can be questioned. An order amending a decree, is, therefore not open to revision. Moreover, proceedings amending a decree do not form a "case" within the meaning of s. 622 of the Civ. Pro. Code, but form part of the proceedings in the suit in which the decree was passed. (*Oldfield, J.*). An order under s. 206, amending a decree, is a separate adjudication, and is not appealable under s. 588. It is not a part of the decree, and cannot be the subject of appeal with the decree. It is, therefore, open to revision. (*Mahmood, J.*). RAGHUNATH DAS v. RAJ KUMAR, **7 A. 276 = A.W.N. 1885, 256** ; on Letters Patent appeal judgment of *Oldfield, J.*, *reversed* and that of *Mahmood, J.*, *affirmed* in 7 A. 876, F.B. = A.W.N. 1885, 226. [*F.*, 15 A. 121 ; *R.*, 7 A. 411, 8 A. 519, 8 A. 492, 10 A. 51, 21 A. 140, 24 M. 646, 11 O.C. 208 ; *D.*, 14 A. 226, F.B.]

(2380)—*S. 152, O. 20, r. 6, s. 115 (=ss. 206, 622, Civ. Pro. Code, 1882)—Execution of decree—Application to bring decree into conformity with the judgment—Revision.*—The plaintiff claimed proprietary possession of a house and courtyard. The Munsif decreed his claim in general terms, but without specific mention of the courtyard, and the District Judge confirmed the Munsif's decree in appeal. The plaintiff applied for execution, but an objection was taken as to his right to execution in respect of the courtyard. The plaintiff then applied to the Munsif and to the District Judge under s. 206 of the Civ. Pro. Code, and in both cases his application was granted. The defendants then applied to the High Court for revision of the order of the District Judge under s. 206 : *Held*, that the order of the District Judge under s. 206 might have been superfluous, as the decree, though badly drawn, was for the plaintiff's claim ; but there was nothing in that order which would afford any ground for revision. MUHAMMAD ABBAS v. MASHUQ ALI, **A.W.N. 1891, 35.**

(2381)—*S. 152, O. 20, r. 6, s. 115 (=Civ. Pro. Code, 1882, ss. 206, 622—Omission in judgment and decree—Order amending decree—Appeal—Revision*—Plaintiff sued his tenant for arrears of rent due under a *cowle* and for possession of the land enjoyed by the tenant in excess of the area specified in the *cowle* or for rent due for such land. Defendant, while denying the encroachment, expressed his willingness to pay rent for the excess area, if any, and admitted his liability for the arrears of rent claimed in the plaint. When measured it was found the defendant had occupied land in excess of that contained in the *cowle*. Thereupon, plaintiff not having pressed his claim for the recovery of the excess land, the Court passed judgment in plaintiff's favour for rent for the excess land. Both the judgment and the decree which was drawn up in accordance with it, omitted to make provision for the payment of the arrears of rent admitted by the defendant to be due and for costs of the suit. Thereupon, plaintiff applied under s. 206, Civ. Pro. Code, for amendment of decree and the amendment was allowed. Defendant applied to the High Court for revision under s. 622, Civ. Pro. Code. *Held* that it was competent to the defendant to appeal under s 540, Civ. Pro. Code, against the amended decree, and that, therefore, an application under s. 622, Civ Pro. Code, complaining of the variance of the decree, was not admissible. VISVANATHAM CHETTI v. RAMANATHAN CHETTI, **24 M. 646.**

(2382)—*S. 152 O 10, r 6 s. 115 (—Civ. Pro. Code, 1882, ss. 106 611)—Order on application for amendment of decree, not open to revision under s. 622.*—With an order passed by a Court amending a decree on application under s. 206, of the Code of Civil Procedure, it is not competent for the High Court to interfere by way of revision under s. 622. The Court having

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surely had jurisdiction to entertain the application under s. 206 and to give a decision thereon, the mere fact of such Court having actedwrongly, *i.e.*, of its decision being wrong, is not sufficient to bring the order within the scope of s. 622. Also, where, without assuming any jurisdiction which it did not possess, a Court erroneously proceeded under one section, while it ought to have acted under another, such an error cannot render the case a proper one for interference on revision. In order to justify interference by way of revision, the error must have led to the assumption of a jurisdiction which did not exist in law, and not merely to an erroneous action in law in respect of a matter within its jurisdiction. NARAYANASAMI v. NATESA, **16 M. 424.** [*R.*, 31 B. 447, 31 M. 414=5 M.L.T. 221; *D.*, 11 O.C. 208.]

(2383)—*S. 152, O. 20. r., s. 115. (—Civ. Pro. Code, 1882, ss. 206 622)—Error of law—Application to bring decree into conformity with judgment—Limitation.*—It is a ministerial function to bring the decree in accordance with the judgment, and there is no period of limitation to govern an application for that purpose. Where a Small Cause Court rejects an application put in under s. 206, because two previous applications had been dismissed for default, and this one was not brought in time, the High Court cannot interfere under s. 622 of the Code of Civil Procedure. The proper remedy is by review. JIVAJI v. PRAGJI, **10 M. 51.** [*F.* 21 C. 259; *R.*, 11 M. 220, F.B. 11 O.C. 208.]

(2384)—S.152, O. XX. rr. 6, 10 Suit for partition—Aribitration—Decree on award--Direction in decree to deliver moveable property—Part of such property lost—Alteration of decree—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 17 B. 657.

(2385)—*S. 152, O. 20. r. 6, O. 21 r. 26 (1) —(ola ss. 206, 239)—Duty of executing Court where decree wrong.*—An executing Court cannot go behind the plain terms of a decree and substitute particulars which it may believe were forgotten to be inserted by the Court which made the decree. If any clerical error is found in the decree, the proper way is to stay proceedings under s. 239 and to allow the decree to be amended under s. 206. CHARAT SINGH v. KHUSHAL, SINGH, **78 P.R. 1889.**

(2386)—*S. 152 O. 20, r. 6, O. 22, r. 11 ss. 107 (2), 117 (=Civ. Pro. Code, 1882, ss. 206. 582, 632)—Amendment of appellate decree by single Judge of High Court—Order whether appealable—N.W.P. Letters Patent, cl. 10.*—When a Judge of a chartered High Court, whether acting under s. 206 of the Civ. Pro. Code (as rendered applicable by dint of s. 582 of the Code in appeals and also by s. 632 of the Code) or under the power inherent in the High Court to amend its decrees, independently of the provisions of the above sections, makes an order for the amendment of a decree, rightly or wrongly, but with jurisdiction, such order

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cannot be made the subject of an appeal under s. 10 of the Letters Patent. (10 I.A. 4, 9 C. 482, *Disc.*). An order by a Court in the Mofussil made under s. 206 is not appealable as an order under s. 588 of the Code. To hold that such an order, when passed by a single Judge of the High Court, can be dealt with by the whole of that Court, would be, to hold, that even though no appeal, as such, lies to the High Court, the mere ceremony of presenting it to a single Judge of that Court, who would undoubtedly reject the same, has the effect of rendering it the subject for consideration by a Bench of that Court, thus allowing the whole policy of the Civ. Pro. Code, as to the finality and non-appealability of decisions, to be defeated. MUHAMMAD NAIM UL-LAH KHAN v. IHSAN-ULLAH KHAN, **14 A. 229, F.B.=A.W.N. 1892 14** [*F.*, 1 Ind. Cas. 137; *R.* 15 A. 359, 15 A. 373, 16 A. 443, 17 A. 438, 20 M. 407, 22 M. 68 =8 M.L.J. 231, F.B., 26 C. 361, 28 A. 133=A. W.N. 1905, 218, 14 A. 201=12 A.W.N. 74.]

(2387)—*S. 152, O. 20, r. 6 O 21 r 26 (1) (=Civ. Pro. Code, 1882, ss. 206 239)—Decree, power to go behind—Power of executing Court.*—An executing Court has no power to go behind the decree which is silent as to instalments, and to treat it as an instalment decree, merely because the judgment intended the decree to be an instalment decree. The proper order in such a case will be, under s. 239, to stay proceedings and to allow the party time to amend his decree to bring it into conformity with the judgment. A Court commits an error of law if it does not adjudicate upon the question of fraud alleged by a party and also when it treats a judgment-debtor's application to set aside a sale, whose confirmation was premature and unauthorised by law, as one to set aside a sale which had been duly confirmed already. RAMAN v. DASOUNDHI, **61 P.R. 1887.**

(2388)—*S 152. O. 20, r. 6, O. 41, r. 11 (=ss. 206, 551, Civ. Pro. Code, 1882,—Order dismissing appeal under s. 551--Natura and effect —High Court's power to amend decree improperly drawn by Court below.*—An order dismissing an appeal under s. 551, Civ. Pro. Code, amounts to a decree, there being no distinction between an appeal, which is dismissed under the above section, and an appeal dismissed, under any other section of the Code, after full hearing. (3 M. 1, *R.*) The effect of the above order is to make the decree, which is confirmed, the final decree to be executed in the suit. The High Court has power to amend the decree, which has been confirmed by it, so as to bring it into conformity with the judgment, which is also confirmed by it. UMA SUNDARI DEVI v. BINDU BASHINI CHOWDHRANI, **24 C. 759.** [*F.*, L.B.R. 1893-1900, 449, 8 P.R. 1903, Rev.=33 P.L.R. 1904, 30 A. 290=A.W.N. 1908, 109=5 A.L.J. 584; *Appr.*, 528 P.L.R. 1900, 4 C.L.J. 566; *R.*, 22 M. 293, 9 C.W.N. 605, 48 P.R. 1906, F.B.=104 P.L.R. 1906, 6 C.L.J. 542.]

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(2389)—*S. 152, O. 20, r. 6, O. 41, r. 11 (=ss. 206 551, Civ. Pro. Code, 1882)—Execution of decree—Amendment of decree after rejection of appeal under s. 511, Civ. Pro. Code—Costs—Mistake in decree—Decree not specifying details of property in suit—Interpretation of decree with reference to plaint—Appeal.*—The plaintiff obtained a decree for possession of the property in suit, but the property was not specified in the decree or the judgment. The defendant's appeal was dismissed under s. 551. The plaintiff applied for execution of the decree. He was referred to the appellate Court on the ground that the decree was defective and only the appellate Court was competent to amend the decree after it was dealt with on appeal. He then made an application to the appellate Court, but it was rejected on the ground that the decree was not at variance with the judgment. *Held* on revision, that the application for execution was wrongly rejected, for the decree ought to be construed with reference to the plaint in which the property was described, and that the decree-holder should have appealed against the order refusing execution, for the appellate decree did not require amendment. After a decree is upheld on appeal by dismissal of the appeal under s. 551, the original Court is competent to amend its decree as to costs on discovery of error as to them. GORDHAN DAS v. RUGHNANDAN DAS, **182 P.L.R. 1905=74 P.R. 1905.**

(2390)—S. 152, O. XX, r. 6, O. XLI, r. 11—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 22 M. 293.

(2390-*a*)—*S. 152, O. 33, rr. 2, 3.—Amendment of decree—Jurisdiction—Decree—Judgment—Material irregularity.*—In a foreclosure suit, the plaintiff sued for a decree for principal, interest and costs. The Court decreed the suit with costs and ordered that the defendants should within six months pay the sum due as principal and costs, and failing that, the mortgaged property should be foreclosed. According to the above order, a decree was prepared and in the decree the words contained in the second half of the order were followed, so that the decree provided for payment of the principal and costs only. The decree-holder applied for amendment and prayed that in the judgment the words "with interest" might be added and the decree amended accordingly. The Subordinate Judge corrected the decree but did not add the words 'with interest' in the judgment: *Held*, that the Subordinate Judge acted with material irregularity in exercising his jurisdiction in this matter. The judgment as it stood did not direct payment of interest, and unless the judgment was amended, the decree could not be amended so as to include interest. RAM GHULAM v. SARJOO PERSHAD, **11 Ind. Cas. 896.**

(2391)—S. 152, O. XLI, r. 35—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, **11 A. 267, *F.B.***

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(2392)—S. 152 and O. XLV, r. 13—Scope and effect—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 11 C.L.J. 155=5 Ind. Cas. 723.

——S. 154=(1882, s. 3, para. 3.)

(2393)—S. 154—Effect of, on right of appeal—*See* APPEAL—GENERAL, 9 M.L.T. 259=21 M.L.J. 631.

(2393-*a*)—S. 154—*See* NOS. 71 (*a*) 1867, *supra*.

(2394)—*Ss. 154, 156, 157, 158 (=Civ. Pro. Code, 1882, s. 3)—Refusal by Commissioner to allow inspection of documents, order of Court confirming, if appealable—Civ. Pro. Code (Act VIII of 1859)—Civ. Pro. Code (Act XXIII of 861), s. 11—Equity Rule, No. 456.*—In this case a decree was made in 1870 referring it to a Commissioner to take an account of certain dealings between the parties. In the course of taking such accounts, the Comissioner refused to order the defendants to give inspection of certain books and papers to the plaintiff. At the request of the plaintiff the Commissioner made a special report under Rule 456 of the Equity Rules of the High Court, which was confirmed by a Judge of the High Court. The question arose whether such confirming order of the Judge was open to the appeal or not, and it was held that the order being one determining a mere question of procedure and not one in any way affecting the rights of the parties, it could not amount to a decree so as to be appealable as such. It was also contended that, if the order was not a decree, it was, at any rate, an order made on a question relating to the execution of the decree referring it to the Commissioner to take the accounts, and appealable under s. 11 of Act XXIII, of 1861, but it was held that that section read as an amendment to the Civ. Pro. Code of 1859 was, in terms, confined to questions arising in the execution of decree, that is, questions arising in the enforcement of the decree on the application of one or other of the parties to it. The old equity practice of the Supreme Court was introduced into the procedure of the High Court by virtue of its power of making rules not inconsistent with the Civ. Pro. Code. The application or report of the Commissioner, asking for the instructions of the Court in carrying out its orders, was one made under such practice, and could not be regarded as an order within the contemplation of s. 11 of Act XXIII of 1861. The order refusing inspection in the above proceedings which had been commenced before the 1st June, 1882, was passed subsequent to that date. The question arose whether the appealability of the order was to be determined by the Civ. Pro. Code of 1859 or of 1882. Now by s. 3 of the Civ. Pro. Code, 1882, proceedings after decree that had been commenced and were pending on 1st June, 1882, are not governed by that Code. Where the proceeding subsequent to 1st June 1882, which forms a part of the proceedings

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commenced before that date, and out of which the question arises, is so intimately connected with proceedings prior to that date as to be regarded as a part of them, it will be governed by the Code of 1859 and not of 1882. RUSTOMJEE BURJORJI v. KESSOWJI NAIK, **3 B. 287** [*R.*, 16 C. 267, *F.B.*]

(2395)—Ss. 154, 156, 157, 158—Standing timber is immoveable property within meaning of—under s. 3, cl. 25 and s. 4 of General Clauses Act—*See* BEN. ACT VIII OF 1885, ss. 144, 184 and 193, sch. III, art. 2, 7 C.L.J. 152.

(2396)—*Ss. 154, 156, 157, 158, O. 2 r. 2, O. 13, r. 9 (=Civ. Pro. Code, 1882, ss. 3, 43, 144) — Suit for possession of land—Subsequent conversion of moveables on the land—Second suit for damages for conversion.*—Res judicata—Plaintiff had sued for and obtained a decree for possession of certain land from which he had been evicted and for damages caused by the defendants having cut and removed certain trees from the said land. In the present suit, the claim was in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit and in respect of a quantity of timber which it was said had been stored on the land by the plaintiff and which also the defendant took away after the institution of the first suit. *Held* that the plaintiff's claim in respect of the trees cut and removed was in the nature of mesne profits. *Held* also that, as regards the claim for the timber stored on the land, the trespass on the land was by itself no proof of any conversion of the timber found on the land at the time the trespass took place. Notwithstanding the plaintiff's eviction from the land, the possession of the timber must be presumed to have continued in the plaintiff in the absence of proof of any act or acts on the part of the defendant with special reference to such goods, showing unequivocally that the plaintiff was entirely deprived of the use of those goods. The conversion took place only subsequent to the institution of the prior suit. The causes of action relied on in the present suit being different from those relied on in the previous suit, s. 43, Civ. Pro. Code, did not operate as a bar to the present claim. MOYI v. AVUTHRAMAN, **22 M. 197.** [*R.*, 78 P.R. 1902=137 P.L.R. 1902.]

(2397)—*S. 154 and O. 41, r. 33—Appellate Court, power of—Making decree in favour of party not made party in lower appellate Court—Right of appeal, saving of, when new Code came into force—Pending cases—Procedure.*—Under r. 33 of O. XLI of the Civ. Pro. Code, 1908, the High Court is competent to make a decree in favour of a party in a second appeal, although such party was not made a party in the appeal before the lower appellate Court. When the new Civ. Pro. Code came into force, it applied, so far as procedure is concerned, to all cases which were then pending or to be instituted. S. 154 of the Code means that nothing

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shall *prejudicially* affect any present right of appeal. It can have no bearing on the powers of an appellate Court in dealing with appeals before it. ABDUL AZIZ v. SHAIKH MOMIN, **9 Ind. Cas. 815**

——S. 156 (=1882, s. 3, first sentence).

(2397-*a*)—S. 156—*See* NOS. 2394, 2395, 2396, *supra.*

——S. 157 (=1882, s. 3, second sentence).

(2397-*b*)—S. 157—*See* NOS. 2394, 2395, 2396, *supra.*

——S. 158 (=1882, s. 3, cl. 2).

(2397-*c*)—S. 158—*See* NOS. 951, 2338, 2394, 2395, 2396, *supra.*

(2398)—S. 158, O. XXII, r. 4, s. 107 (2) and O. XXII, r 11—*See* LIMITATION ACT, 1908, arts. 171, 181, 10 A. 264, F.B.=A.W.N. 1888, 112.

The First Schedule.

——O. I, r. 1 (=1882, s. 26=1877, s. 26).

See PARTIES TO SUIT.

(2398-*a*)—O. I, r. 1—*See* NO. 467, *supra.*

(2399)—*O. 1, rr. 1, 3 and 4 (=ss. 26 and 28, Civ. Pro. Code, 1882)—Suit by transferee of mortgage against mortgagor and mortgagee (transferor)—Portion of mortgage-debt discharged prior to transfer—Misjoinder of defendants—English rr. 1 and 4, O. XVI.—Per Benson and Wallis, JJ. (White, C.J., Diss.)*—Where the transferee of a mortgage has brought a suit for sale against the mortgagor and has joined therewith a claim against his transferor (the original mortgagee) for damages in case it should appear that any portion of the mortgage-debt had been discharged by the mortgagor before the date of the transfer and so not be recoverable in the present suit from the mortgagor, *held*, the suit is not bad for misjoinder of defendants. *Per Wallis, J.* The use of the less definite words "in respect of the same matter" in s. 28 (than the words "in respect of the same cause of action" in s. 26) would seem to show that it was intended to allow joinder of defendants not only when relief was sought in respect of the same cause of action, but also when relief is sought in respect of separate causes of action against the different defendants so long as they all arise "in respect of the same matter." English decisions under r. 4, O. XVI, are not applicable to s. 28, Civ. Pro. Code, as the scope of the section is wider than that of the rule. *Obiter.* English decisions on r. 1, O XVI, apply to cases of joinder of plaintiffs under s. 26 of the Civ. Pro. Code. AIYATHURAI RAVUTHAN v. SAN MUHAMAD MEERA RAVUTHAN, **18 M.L.J. 238 =31 M. 252.** [25 M. 736, 27 M. 80, 29 M. 50, 8 C. 170, 8 C. 963, 12 C. 555, 31 B. 516, *R.*). [*Appr.*, 5 M.L.T. 282=6 M.L.T. 139=19 M. L.J. 399=4 Ind. Cas. 34, 4 Ind. Cas. 312=7 M.L.T. 16; *R.*, 6 N.L.R. 33, 4 Ind. Cas. 35=7 M.L.T. 113.]

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(2399-*a*)—O. I, rr. 1, 4 (*a*)—*See* PRACTICE AND PROCEDURE, 10 Bom. L.R. 327=32 B. 599.

(2400)—*O. 1, rr. 1, 3, 4 (a), (b), 8 (2), 10 (2), (3), (5) and 11, O. 6, r. 17. O. 7, r. 11 (=ss. 26, 28, 32 and 53 Civ. Pro. Code, 1882)—Misjoinder of causes of action and parties—Redemption suit—Mortgagor and his transferee of a portion of the mortgaged property can sue together to redeem it—Rejection of plaint—Revision—Punjab Courts Act (XVIII of 1884), s. 70 (a & b).*—N, B, sons of the original mortgagor and J, N, to whom the equity of redemption of a part of the mortgaged property had been sold joined in the suit for redeeming it. They also alleged that the mortgagees had wrongfully taken possession of a portion of the property in dispute in excess of what was mortgaged. *Held*, that the suit was rightly framed inasmuch as there was one interest between all the plaintiffs and only one cause of action. *Held*, also, that an order rejecting a plaint on the ground of misjoinder of parties or causes of action is open to revision either under cl. (*a*) or (*b*) of s. 70 of the Punjab Courts Act (XVIII of 1884). NIHAL SINGH v. CHAUGATTA SINGH, **9 P.W.R. 1908.**

(2401)—*O. 1, rr. 1, 4 (a) (=Civ. Pro. Code, 1882, s. 26)—Suit by widow and adopted son of deceased creditor—No contest as between plaintiffs—Claim in the alternative—Misjoinder of plaintiffs.*—The first plaintiff was the widow and the second plaintiff was the adopted son of a deceased creditor. As the *factum* and validity of the adoption were disputed by the reversioners, both the plaintiffs joined in bringing a suit to recover the amount due to the deceased. Both of them were agreed that either of them should take it. The defendants contended that the suit was bad for misjoinder of plaintiffs. *Held* that there was no contest as between the plaintiffs and there was not a different "cause of action" for each within the meaning of s. 26 of the Code. Consequently there was no misjoinder of plaintiffs. PINAPATI MRUTYUMJAYA v. PINAPATI JANAKAMMA. **26 M. 647, F.B.** (16 B. 119, *F.*; 6 M. 239, *Expl.*. [*R*, 28 M. 500.]

(2402)—*O. 1 rr. 1, 4 (a) (=s. 26, Civ. Pro. Code, 1882)—Parties—Partners.*—Where the plaintiff's partner claimed to be made co-plaintiff with the plaintiff, but the latter refused to join him and the suit was dismissed, *Held*, that the order of dismissal was right. HUSSAIN KHAN v. HIRA LAL, **189 P L.R. 1908, 2nd case.**

(2403)—*O. 1, rr. 1, 4 (a) (=Civ. Pro. Code, 1882, s. 26)—Tenants-in-common—Right to maintain joint action.*—Tenants-in-common may maintain a joint action for past profits against their common agent. SHAMSUNDAR BOHIDAR v. KUNJOBAN HOTA, **13 C.P.L.R. 130.** (18 A. 131, 22 C. 933, *commented on.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*continued.*

(2404)—*O. 1, rr. 1, 4 (a), 8 (1) (=ss. 26, 30, Civ. Pro. Code, 1882)—Common cause of action—Right to sue jointly.*—All those plaintiffs who have a common cause of action can institute a suit jointly under s. 30 of the Civ. Pro. Code, 1882, KALIDAS JIVRAM v. GOR PARJARAM HIRJI, **16 B. 309.** [*R.*, 20 C. 397.]

(2404-*a*)—O, I, rr. 1, 4, 9—*See* JOINDER OF CAUSES OF ACTION, 6 B. 266.

(2405)—*O. 1, rr. 1, 4 (a), 9 (=ss 26, 31, Civ. Pro. Code, 1882)—Misjoinder of causes of action—"Cause of action," meaning of.*—The qualification implied in the words "in respect of the same cause of action" in s. 26, Civ. Pro. Code, would be satisfied, if the facts which constituted the infringement of the right of the several plaintiffs were the same. Where a suit for recovery of possession was brought by four plaintiffs jointly and it was stated that plaintiff No. 4 had purchased a ten-annas share of the properties from the other three plaintiffs, *Held* that the suit was not bad for misjoinder of causes of action, SUNDAR JHA v. BANSMAN JHA, **10 C.W.N. 508=38 C. 367.**

(2405-*a*)—O. 1, rr. 1, 4 (*a*), 9—*See* PRE-EMPTION—GENERAL, 1 O.C. 308.

(2406)—*O. 1, rr. 1, 4 (a), 9, 8 (2), (3), (5), 11 (=ss. 26, 31, 32, Civ. Pro. Code, 1882)—Parties—Striking out names of parties—Power of Court.*—A suit was instituted, on a promissory note, by a firm of merchants and a person, who had obtained a transfer of the pro-note for, and on behalf of the firm. The defendant objected to the suit having been instituted by the two plaintiffs and the Court struck out the latter of the two. The right to sue had vested in the firm, but it was doubtful, when the suit was instituted, in which of the two plaintiffs the right to sue vested. *Held*, that the Court had no power, of its own motion, to strike out the name of one of the plaintiffs at that stage of the suit; the proper course would be to allow both the names to exist on the record and pass a decree, in favour of both or either, as the Court may ultimately determine. NANAK CHAND v. DURANT, **9 P.R. 1906=19 P L.R 1906.**

(2407)—*O. 1, rr. 1, 4 (a), 9, 13 (=Civ. Pro. Code, 1882 ss. 26, 31, 34)—Misjoinder of parties—Objection when to be taken—Persons jointly interested—Antagonistic claims of plaintiffs—Suit to set aside attachment*—An objection as to misjoinder of parties cannot be taken for the first time in appeal. The appellate Court ought not to allow the objection under s. 34 of the Code. The High Court reversed the order of remand passed by the lower appellate Court. The Court in this case found that the claims of the plaintiffs who were the widow and her adopted son, were not antagonistic inasmuch as both of them asserted the adoption. Both the plaintiffs made a common cause against the attachment of property in execution of decree, and they were jointly interested in disproving the alleged title of the defendant. They

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could therefore sue the defendant to set aside the attachment, under s. 26 of the Code. The second paragraph of s. 31 of the Code has no application to the case. FAKIRAPA v. RUDRAPA. **16 B. 119.** (6 M. 239, *D.*; 3 M.I.A. 229, 1 M.H.C. 197, *R.*), [*F.*, 22 C. 833, 13 C.P.L.R. 130, 26 M. 647, 5 Bom. L.R. 708=28 B. 94; *R.*, 18 A. 131=A.W.N. 1896, 2, 3 Bom. L.R. 878=26 B. 259, 38 P.R. 1903=87 P.L.R. 1903].

(2408)—*O. 1. rr. 1, 4 (a), 9, 13 (=Civ. Pro. Code, 1882, ss. 26, 31, 34:—Misjoinder of cause of action*—The plaintiffs (5 in number), brought a suit for the recovery of certain property, under a title of inheritance from one M, who died in 1881. The plaint set forth that the first three plaintiffs were entitled to succeed to the property in suit as heirs of M. and that they had sold in 1892 their interest in a portion of the property in suit to plaintiffs Nos. 4 and 5. *Held*, that the expression 'cause of action' in ss. 26 and 31 of the Code of Civil Procedure should be interpreted in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself; that plaintiffs Nos. 4 and 5 had the same cause of action arising from the infringement of the title of the first three plaintiffs as heirs of M by the assumption on the part of the defendants of the possession of the property in suit on the death of that lady; and that the suit was in accordance with the provisions of s. 26, Civ. Pro. Code. *Held*, further, that the provisions of s. 34 of the Code of Civil Procedure were not applicable to the case. AKBAR KHAN v. WAZIR KHAN, **3 O.C. 176.**

(2409)—*O. 1, rr. 1, 4 (a), O. 2, rr. 3, 6 (=ss 26 55, Civ. Pro Code, 1877)—Joinder of parties who claim adversely as plaintiffs—Misjoinder.* The words, "plaintiffs are jointly interested against the same defendant," in s. 45, Civ. Pro. Code, mean, it is not enough that the plaintiffs show a title in one or other of them to the whole or a portion of the estate in competition with the defendant, but they must each be jointly interested with the other in *the several causes of action* not necessarily *equally* interested, but *jointly* interested. [*R.* 13 C.P.L.R. 130]. Having regard to the language of s. 26 and that of the latter part of s. 45, the Code does not authorize the joining of plaintiffs in a suit in respect of distinct causes of action, in which they are not jointly interested and their interests are not merely conflicting, but antagonistic. [*Diss.*, 22 C. 833; *D.*, 16 B. 119.] Where a widow of a deceased Hindu, and a son alleged to have been adopted by that widow, are made plaintiffs in a suit against a third person (the widow questioning the adoption), such a suit is bad for misjoinder. LINGAMMAL v. VENKATAMMAL **6 M. 239** [*R.*, 38 P.R. 1903=87 P.L.R. 1903; *D.*, 5 Bom. L.R. 708=28 B. 94, 26 M. 647.]

(2410)—*O. 1, rr. 1, 4 (a). O. 6, r. 17, O. 7, r. 11 (=ss. 26 and 53, Civ. Pro. Code, 1882)*—Suit for libel—Misjoinder of plaintiffs and causes of action—Cause of action, meaning of—Six plaintiffs in libel suit, if suit to be dismissed.—Six members of the police force jointly sued to recover Rs. 20,000 for alleged libel by the defendants. *Held*, that the suit was bad for misjoinder of plaintiffs and causes of action. (22 C. 833, 11 C. 524, 26 B. 259, *R.*) The Court, however, instead of dismissing the suit, directed the plaintiffs to elect, if so advised, as to which one of them should proceed with the suit and that, after such election, the plaint be amended by striking out the other plaintiffs and making other consequential alterations. S. C. ALDRIDGE v. A. S. BARROW, **11 C.W.N. 680=34 C. 662.** [*R.*, 1 S.L.R. 181.]

(2410-*a*)—O. I, rr. 1, 4 (*a*), O. VI, r. 17, O. VII, r. 11—*See* TRANSFER OF CIVIL CASES, 28 M. 500.

(2410-*b*)—O. I, rr. 1, 4 (*a*) O. XVIII, rr. 1, 2 (1), (2), (3), 3—*See* PRACTICE AND PROCEDURE, 10 Bom. L.R. 327=32 B. 599.

(2410-*c*)—*O. I, rr. 1, 10—Suit by person having no right to sue—Person having right whether can be joined as plaintiff.*—A person who has no interest in the subject-matter of a suit and, therefore, no cause of action to institute the suit, cannot bring a suit and afterwards, in order to give himself a cause of action, add the name of some person in whom a right of action exists. The power given by the Civ. Pro. Code, to add parties as plaintiffs is limited, and no person should be added as a plaintiff, unless his presence before the Court is necessary. ABDULLAH BEG v. ABDUL HASAN, **11 Ind. Cas. 223.** (20 B. 537, *F*; 33 C. 657, 10 C.W.N. 662, 33 M. 115, 7 M.L.T. 185, 5 Ind. Cas. 931, 30 M. 419, 2 M.L.T. 447, *R.*)

——O. I, r. 3 (=1882, s. 28=1877, s. 28.)

See PARTIES TO SUIT.

(2411)—*O. I, r. 3—Purchaser—Mortgagee—Conditional sale—Party, addition of—High Court, revisional power of.*—A, a tenant under X, executed a conveyance of his holding in favour of B. X sued to eject B on the ground that the holding was non-transferable. A applied to be made a party to the suit, on the allegation that the conveyance was in reality a mortgage by conditional sale, and that he himself was still in possession. The Court refused the application. *Held*, that, to prevent multiplicity of litigation A should have been made a party defendant. *Held*, further, that, as the application of A had been improperly refused, it was competent to the High Court to interfere. DWARKA NATH SEN v. KISORI LAL GOSAIN, **11 C.L.J. 426=14 C.W.N. 703 =6 Ind. Cas. 549.** (11 C.L.J. 420, *F.*)

(2411-*a*)—O. *I*, r. *3*—Suit to set aside alienation by widow—Addition as defendants of alienees from widow's alienees—No misjoinder.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*See* MISJOINDER OF PARTIES AND CAUSES OF ACTION, 12 C.P.L.R. 9.

(2411-*b*)—O. I, r. 3—*See* NOS. 298-*a*, 503, 1684, 1771, 2399, 2400, *supra*.

(2412)—*O. I, r. 3, O. 2, r. 3 and s. 115—Suit against several defendants—Misjoinder of causes of action—Order returning plaint for amendment—Illegal—Revision — Construction of sections.*—Where, in a suit by some of several mortgagees instituted against the mortgagor and the other co-mortgagees who refused to join in the suit as plaintiffs, the plaintiffs who claimed two-third interest in the mortgage between themselves prayed for foreclosure as against the mortgagor, and prayed as against the co-mortgagees that, if the mortgagor had made payments to them as alleged by him shortly before suit, they should transfer to the plaintiffs two-thirds of the amount so paid, *held*, that the suit was not bad for misjoinder of causes of action against the several defendants. The provisions contained in O. 2, Civ. Pro. Code, 1908, entitled "Frame of the Suit" must be read so as not to clash with those in the preceding order regarding "the Parties to Suits," upon the well-known principle that the construction of a statute is to be made of all the parts together and not of one part only by itself. (11 B. 133, 31 M. 252, 1 N.L.R. 4, 9 C.P.L.R. 125, *R.*) The cause of action against the co mortgagees for the sums paid is identical with that against the mortgagor for any balance unpaid except for the actual payments to the mortgagees. The application of O. 1, r. 3, Civ. Pro. Code, 1908, is not incompatible with the existence of some discrepancy between the causes of action against several defendants. The word "case" in s. 115, Civ. Pro. Code, 1908, must be understood in its broadest and most ordinary sense (14 C. 768, 18 B. 61, *R.*) and an illegal order of a District Judge returning a plaint for amendment may be interfered with in revision by the High Court. MAHADEO v. NAGO, **7 N.L.R. 130.**

(2412-*a*)—O. I, r. 3, O. VII, r. 11, O. XLI, r. 23, s. 104, O. XLIII, r. 1—*See* MULTIFARIOUSNESS, 6 C.W.N. 585.

(2412-*b*)—O. I, rr. 3, 4—*See* MISJOINDER OF PLAINTIFFS AND CAUSES OF ACTION, 27 M. 94=13 M.L.J. 479.

(2413)—*O. 1 rr. 3, 4 (b) (=Civ. Pro. Code, s. 28)—Scope of section.*—The provisions of s. 28 are not imperative, but only allow a discretion; and in a suit for rent, where the defendant sets up the title of a third person under whom he claims to hold the land, it is much better, both in the interests of the Government revenue and for the convenience of a proper adjudication, that the question of title should be tried in a suit directly framed and brought for the purpose. LODAI MOLLAH v. KALLY DASS ROY, **8 C. 238=10 C.L.R. 581.**

(2414)—*O. I, rr. 3, 4 (b) =(s. 28 Civ. Pro. Code, 1882)—Joinder of parties and causes of action — Misjoinder — Trustees.*—A claim to direct a trustee to render accounts of the trust property during a certain period was joined with a claim against the trustee and others, who dealt with the trust property, to render accounts for another period. *Held*, the suit is not bad for misjoinder of parties and causes of action, as the claims related to the same matter. MOHAMED ALI SULTAN v. HAJEE ABDUL KHAELVI ROWTHER, **9 M.L.T. 233=9 Ind. Cas. 565.** (27 M. 80, *D.*, 29 M. 50, 31 M. 252, *R.*)

(2415)—*O. 1, rr. 3, 4 (b) (=Civ. Pro. Code, 1882, s 28)—Joinder of defendants.*—In a suit by A against B to enforce specific performance of a contract entered into by B with him, B's son may be added as a defendant for a declaration as against him that the agreement is binding on him, for, such a joinder is permitted by the terms of s. 28 Civ. Pro. Code. ALAGAPPA v. SIVA RAMA SUNDARA, **4 M.L.J. 288.**

(2416)—*O. I, rr. 3, 4 (b) (=s. 28, Civ. Pro. Code, 1882)—Persons joined as defendants—Relief claimed in the alternative—Suit not bad for misjoinder of parties and causes of action—Rent paid to manager of joint family—Family subsequently divided—Suit against the payers and the members of the family.*—Certain tenants paid rent to the manager of a joint family to whom they had executed a *muchilika*, but when the family became subsequently devided, one member sued the other members of his family for the recovery of his share of the income, and joined the tenants as parties to the suit, and his claims were laid in the alternative against them. *Held*, the suit in which the two claims were laid down in the alternative was not bad for misjoinder of causes of action and parties. YERUKOLA *alias* PENTA JOGIAH v. MUDIYA KAMUDU, **6 M.L.T. 282=6 M.L.T. 139.** (31 M. 252, 12 C. 555, 6 C.L.J. 190, *F.*)

(2417)—*O. I, rr. 3, 4 (b) (=s. 28, Civ. Pro. Code, 1882)—Malversation of ward's property by guardian—Property sold to and in possession of different defendants—Suit by ward against guardian, and the others for recovery of property—Whether parties and causes of action misjoined.*—Where, in a suit by a ward, the cause of action arose from the malversation of the guardian in regard to his ward's property and from the ward's right to have an account of his property and to recover it, and where the persons, to whom the ward's property was sold and who were in possession of it, were made co-defendants with the guardian, *held* that, under s. 28, Civ. Pro. Code, there was neither misjoinder of parties nor of causes of action. DORASAWMY PILLAY v. ANGAMMALL, **3 M.L.T. 286=18 M.L.J. 265.**

(2418)—*O. I, rr. 3, 4 (b) (=s. 28, Civ. Pro Code, 1882)—Misjoinder of parties and causes of action—Suit to determine to which of the defendants plaintiff is liable and to restrain the*

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other from interfering with plaintiff—Interpleader suit.—Plaintiffs alleged that both first and second defendants claimed a charge for the use of certain water and prayed the Court to determine which of the defendants was entitled to it and to restrain the other from interfering with plaintiff and to make him refund the charge he had already collected. *Held*, that the suit did not offend against the provisions of s. 28, Civ. Pro. Code, 1882. KOMARAPPAN NAICKEN v VENKATACHELLAM PILLAI, **4 Ind. Cas. 312=7 M.L.T. 16.** (31 M. 252, 18 M.L.J. 238, *Appl.*)

(2419)—*O. I, rr. 3, 4 (b), 9 (=Civ. Pro. Code 1877, ss. 26, 31)—Misjoinder—Plaintiffs having different shares in the same property)*—Persons owning different shares in the same property, who are alike affected by any transaction or by the acts of the defendants in relation to the whole of such property, may join in bringing a suit. RAM SEWAK SINGH v. NAKCHED SINGH, **4 A. 261, F.B.** [*R.*, 18 A. 131, 13 C. P.L.R. 130, 87 P.L.R. 1903=38 P.R. 1903.]

(2420)—*O. I, rr. 3, 4 (b) (=s. 28, Civ. Pro. Code, 1882)—Misjoinder of parties—Agent of plaintiff impleaded along with the debtors on alternative claim.*—Suit for the recovery of money lent to the 1st defendant by plaintiff's agent, the 4th defendant. The latter was impleaded and relief against him prayed for in the alternative in respect of the sum in question as the first defendant denied the loan *in toto* prior to the suit. Agreeing with the contention on behalf of the appellant, *held*, that s. 28, Civ. Pro Code, warrants such alternative claims being made, the matter in respect of which the claim is made being the same within the meaning of the section. MEYAPPA CHETTY v. PERIANNAN CHETTY, **16 M.L.J. 39=29 M. 50.** (27 M. 80, *D.*) [*R.*, 31 M. 252=18 M.L.J. 238, 6 N.L.R. 33.]

(2421)—*O. I, rr. 3, 4 (b) (=Civ. Pro. Code, 1882, s. 28)—Alternative claim.*—Under s. 28, such an alternative claim may be made against one or more of the several defendants. RAJDAUR CHOWDHRY v. KALAKISTNA BHATTACHARJYA, **8 C. 963=11 C.L.R. 330** [*R.*, 4 M.L.J. 288=19 M. 211, 29 M. 50=16 M.L.J. 39, 31 M. 252=18 M.L.J. 239.]

(2422)—*O. I. rr. 3, 4 (b) (=s. 28, Civ. Pro. Code, 1882)—Suit by trustee—Co-trustee made defendant without showing that he refused to be joined as plaintiff.*—A suit by a trustee, in which he joined a co-trustee as one of the defendants, should not be dismissed merely because it was not shown that the co-trustee refused to be joined as plaintiff. It is immaterial whether the co-trustee is made a defendant or a plaintiff. RASU MUDALIAR v. VEERASAWMI PILLAI, **4 M.L.T. 194.** (14 M. 489, 24 M. 296, *Not F.*; 29 M. 303, 26 C. 409, *F.*)

(2423)—*O. I, rr. 3, 4 (b) (=s. 28, Civ. Pro Code, 1882)—Misjoinder of defendants—Procedure.*—The plaintiff sued eleven persons jointly for a declaration of his proprietary title to certain trees. He stated in his plaint that he had previously applied in a Court of Revenue for entry of his name in respect of these same trees, and that "his application was opposed by the defendants Nos. 1 and 2, who, asserting their own proprietary title, denied the plaintiff's proprietary title." He further stated that the Court of Revenue had rejected his application and entered his name in respect of 36 only out of the 169 trees claimed. He went on to allege that he was in possession of all the trees in suit by virtue of his ownership and by right of his having planted them, and that the defendants had nothing to do with him, but were interfering with the trees on the strength of the above mentioned order of the Revenue Court. *Held*, that the suit framed as above described fell within the provisions of s. 28 of Civ. Pro. Code, and that the Court should have given judgment against such one or other of the defendants as it found to be liable according to their respective liabilities without amendment, or to have allowed the plaintiff to amend, but should not have dismissed the suit *in toto*. BRIJ MOHAN PANDE v. GHURHU RAI. **A.W.N. 1895, 23.**

(2423-*a*)—*O. I, rr. 3, 4 (b) (=Civ. Pro. Code, 1882, s. 28)—Cause of action—Parties to suits—Practice.*—Where the right to relief in a suit is in respect of the same matter, the plaintiff might join as defendants persons who hold decrees against different persons, but which decrees have been obtained by them in respect of the same property which the plaintiff claims in the suit as his. RAGUNATH MUKUND v. SAROSH K. R. KAMA, **23 B. 266.** [*F.*, 10 M. L.J. 234; *Cons.*, 1 P.R. 1905, 9=83 P.L.R. 1905; *R.*, 25 M. 736, 27 M. 94=13 M.L.J. 479, 9 O.C. 339.]

(2423-*a* 1)—O. I, rr. 3, 4 (*b*)—*See* ACCOUNTS—GENERAL, 1 O.C. 215.

(2423-*b*)—O. I, rr. 3, 4 (*b*)—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 13 C. 147.

(2423-*c*)—O. I, rr. 3, 4 (*b*)—*See* JOINDER OF PARTIES, 4 C.W.N. 590.

(2423-*d*)—O. I, rr. 3, 4 (*b*)—Test under—*See* LIMITATION ACT, 1908, art. 62, 9 M.L.T. 467=8 Ind. Cas. 1087.

(2423-*e*)—O. I. rr. 3, 4 (*b*)—*See* MISJOINDER OF CAUSES OF ACTION, 1 P.R. 1905=83 P. L.R. 1905.

(2423-*f*)—O. I, rr. 3, 4 (*b*)—*See* MISJOINDER OF PARTIES, 11 Bom. L.R. 34=33 B. 293=5 M.L.T. 230=1 Ind. Cas. 120.

(2423-*g*)—O. I, rr. 3, 4 (*b*)—*See* MULTIFARIOUSNESS, 9 Bom. L.R. 482=31, B. 516, 2 C. 555.

(2423-*h*)—O. I, rr. 3. 4 (*b*)—*See* REGISTRATION ACT, 1908, s. 17, A.W.N. 1905, 100=27 A. 564=2 A.L.J. 692.

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(2423-*i*)—O. I, rr. 3, 4 (b)—*See* RIGHT OF SUIT—MISCELLANEOUS, 2 C.W.N. 61.

(2424)—*O. I, rr. 3, 4 (b), 91=Civ. Pro. Code, 1877, ss. 28, 31)—Misjoinder of parties and causes of action.*—Where the matter of the various claims of the plaintiff against several defendants, was not the "same" in the sense of s. 28, Civ. Pro. Code, and the plaintiff's causes of action against the several defendants were distinct with regard to s. 31, *held* that the suit was rightly dismissed for misjoinder of parties and causes of action. ILHAI BEGAM v. KHURSHED ALI, **A.W.N. 1881, 172.**

(2425)—*O. I, rr. 3, 4, 9, O. 6, r. 17, O. 7, r. 11 (=Civ. Pro. Code, 1882, ss. 28, 31, 53)—Cause of action, meaning of—Misjoinder*—Plaintiff claiming the right to the property in suit on the death of a Hindu widow, and impugning three different sale-deeds executed by her while she was in possession, brought the suit against three sets of defendants, each set being in possession of distinct and separate portions of the property claimed. Such a suit was held not to be authorized by s. 28 of the Civ. Pro. Code. Nor was it a suit which was protected by the first paragraph of s. 31 of the Code, as there was in it not only misjoinder of parties but also misjoinder of cause of action. There was, so far as these three sets of defendants were concerned as sets, no joint cause of action against them in respect of the same matter. There being nothing in the Civ. Pro Code to authorise a suit against several defendants who were brought in, each in respect of a cause of action in which the others were not concerned, the Court of first instance should, in this case, have returned the plaint under s. 53, cl. (*h*), sub-s. 3 of the Code for amendment on the ground of its having been wrongly framed by reason of misjoinder of parties and of causes of action. GANESHI LAL v. KHAIRATI SINGH, **16 A. 279=A.W.N. 1894, 82.** (17 M.H.C. 290, 2 N.W.P. 221, 3 N.W.P. 86, 5 A. 163, 7 B. 289, 14 C. 435, 14 C. 681, *R.*) [*R.*, 9 C.P.L.R. 125, 3 O.C. 215, 6 O.C. 379, 1 P.R. 1905=83 P.L.R. 1905. 4 L.B.R. 183, 9 O.C. 326; *D.*, 13 C.P.L.R. 9, 2 C.L.J. 602, 29 A. 267=A.W.N. 1907, 36=4 A.L.J. 121, 30 A. 560=A.W.N. 1908, 235=5 A.L.J. 647=4 M.L.T. 392, F.B.]

(2426)—*O. I, rr. 3, 4 (b), O. 2, rr. 3, 6 (=Civ. Pro. Code, 1882, ss. 28, 45)—Misjoinder of causes of action.*—In a suit for possession of immoveable property, of which a part had been usufructuarily mortgaged by the first defendant to the second, on the ground that the first defendant had no title to make such a mortgage, while both the defendants maintained such title, it was *held* that there was no misjoinder of causes of action because the title of the second defendant was derived from the first, and was entirely dependent upon the failure of the plaintiff's claim against the latter, thereby giving rise to only one cause of action, *viz.*, the infringement

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of the plaintiff's right by the first defendant. INDAR KUAR v. GUR PRASAD, **11 A. 33=A.W.N. 1888, 283.** (5 A. 163, *Con.*) [*F.*, 24 A.358; *R.*, 13 C.P.L.R. 9, 29 A. 267=A.W.N. 1907, 36=4 A.L.J. 121, 30 A. 560=A.W.N. 1908, 235=5 A.L.J. 647=4 M.L.T. 392.]

(2427)—*O. I, rr. 3, 4 (b), O. 2, rr. 3 and 6 (=ss. 28, 45, Civ. Pro. Code, 1882)—Suit for possession of land as well as for refund of purchase-money—Joinder of parties and causes of action.*—A suit by a purchaser of property for recovery of possession of land, against a person who dispossessed him, and also against the vendor for refund of purchase-money, is not bad for misjoinder of parties and causes of action. SARAJUL HUQ KHAN v. ABDUL RAHMAN, **29 C. 257=6 C.W.N. 300.** (8 C. 963, 19 C. 123, *F.*; 23 C. 821, *D.*) [*R.*, 31 M. 252 =18 M.L.J. 238; *D.*, 6 C.W.N. 585.]

(2428)—*O. I, rr. 3, 4 (b), O. 2, rr. 3, 6 (=ss. 28, 45, Civ. Pro. Code, 1882)—Same matter, meaning of.*—'Matter' in s. 28 of the Code means the subject-matter of the suit. So, where the subject-matter of the suit was a debt of a certain sum with the interest thereon due under a promissory note, a suit against the makers of it, along with a person who subsequently became surety for the payment of amount due on the note, was *held*, to be not bad for multifariousness. MAUNG MEIK v. K. A. MEYAPPA CHETTI, **3 L.B.R. 191.** (5 A. 163, *R.*)

(2429)—*O. I, rr. 3, 4 (b), O. 2, rr. 3, 6 (=ss. 28, 45, Civ. Pro. Code, 1882)—Misjoinder of causes of action—Suit for partition by some of several* melvaramdars—Kudivaramdars *made parties to the suit, whether bad for misjoinder.*—Where, in a suit by some of several *melvaramdars* of a village, for the partition of the village, not only the other *melvaramdars*, but also the ryots or *kudivaramdars* were made defendants for the purpose or determining and defining certain rights as between the *melvaramdars* and the *kudivaramdars*, it was held that the suit was bad for misjoinder of causes of action. *Obiter dictum.*—In a suit for the partition of joint family property or in an administration suit, though it might be convenient to ascertain the precise amount of the debts due to the estate yet the making of all the debtors to the estate parties to the suit, with a view to recover the debts or establish such debts by a binding declaration, is bad for misjoinder of causes of action. RAMKRISHNA AIYAR v. KRISNA AIYAR, **18 M.L.J. 85.** (6 M. 90, *R.*)

(2429-*a*)—O. I, rr. 3, 4, (b), O. II, rr. 3, 6—*See* CAUSE OF ACTION, 5 P.R. 1896.

(2430)—*O. I, rr. 3, 4, (b), O. 2, rr. 6, 7, O. 6, r. 17, O. 7, r. 11, s. 99 (Civ. Pro. Code, 1882, ss. 28, 46, 53, 578)—Distinct causes of action—Misjoinder—Discretionary powers of Court.*—Where plaintiffs sue the first defendant, for damages for his breach of contract as an agent

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of the firm in which the first plaintiff and third defendant are partners, and the third defendant for dissolution of the partnership, the plaint alleges two distinct causes of action and therefore such a suit is not maintainable. The fact that the plaintiffs also make a claim for damages against the third defendant in the suit does not prevent the cause of action against the first defendant from being distinct from that against the third. Even if the plaintiffs were entitled to rely on the words "in respect of the same matter" in s. 28, Civ. Pro. Code, as warranting construction being placed upon the section from that which the English Courts have adopted with reference to the corresponding r. 4 of O. XVI, it cannot be said that the right to relief alleged to exist against the first defendant is in respect of the same matter as the right to relief alleged to exist against the third defendant. The matter in the one case is an alleged breach of contract by an agent of the firm. In the other case, it is the right of one partner in the firm as against the other partner, to have accounts taken, and the partnership wound up. There is the further objection to the plaint, that the plaintiff as one of the partners of a partnership firm cannot sue in his own name an agent of the firm for breach of contract with the firm, unless the cause ofaction has been in collusion with the other partner. Where the case of each defendant must be decided on its own merits without any reference to the case of another and the case of each will be different there is a misjoinder which must affect the merits of each man's case and which cannot therefore be passed over as a mere irregularity and condoned as such under s. 578, Civ. Pro. Code. (24 C. 540, *considered*). S. 46 Civ. Pro. Code, empowers the Court to order that a suit be confined to such of the causes of action as may be conveniently disposed of in one suit, and has no application to a case where separate causes of action are alleged against two defendants. (8 B. 616, *R.*) The power given to the Court by s. 53, Civ. Pro. Code, is only a discretionary power, and when a Court of first instance decides a question of misjoinder in favour of the plaintiffs in a suit, the defendant is not precluded from raising the question in appeal. MUTHAPPA CHETTY v. MUTHU PALNI CHETTY, **27 M. 80.** [*Not F.*, 31 M. 252=18 M.L.J. 238; *D.*, 29 M. 50=16 M.L.J. 39.]

(2431)—*O. I, r. 3, O. 2, r. 3—Misjoinder of parties and causes of action—Practice and procedure.*—The word "same" which precedes the words "act or transaction" in O. I, r. 3, Civ. Pro. Code, governs also the words "series of acts or transactions" and must be read before these words also. Before a plaintiff can join several persons as co-defendants in the same suit, two conditions must be fulfiled: first, the relief sought against the defendants, whether jointly, severally or in the alternative, must arise from the same act or transaction or

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from the same series of act or transactions; and secondly, there must arise between the plaintiff and all the defendants some common question either of fact or law. The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are jointly liable in respect of each and all of such causes of action, and the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation, and causes of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested. It is not necessary that every defendant should be interested as to all the the reliefs claimed in the suit, but it is necessary that there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary. UMABAI v. BHAVU BALVANT **11 Bom. L. R. 499=3 Ind. Cas. 165=34 B. 358.**

O. 1, r. 4 (=1882, ss. 26, 28=1877, ss. 26, 28.)

(2431-*a*)—O. I, r. 4—*See* NOS. 467, 503, 1684, 1771, 2399, 2399-*a*, 2400, 2401, 2402, 2403, 2404, 2404-*a*, 2405, 2405 *a*, 2406, 2507, 2408, 2409, 2410, 2410 *a*, 2410-*b*, 2412-*b*, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2423-*a* to *i*, 2424, 2425, 2426, 2427, 2428, 2429, 2429-*a*, 2430, *supra*.

(2431-*aa*)—O. I. rr. 4, 9—*See* INSOLVENCY—MISCELLANEOUS, 3 A. 799.

(2431-*b*)—O. I, r. 4, O. II, r. 3—*See* MULTIFARIOUSNESS, 5 A. 163, F.B.=A.W.N. 1882, 202.

——O. 1, r. 6 (=1882, ss. 29=1877, s. 29).

See PARTIES TO SUIT.

(2432)—*O. 1, r. 6. (=Civ. Pro. Code, 1882, s. 29)—Contract Act (IX of 1872), s. 43—Parties to suit—Suit by member of joint family against some of members of firm—Chief Court's power on appeal against order of remand to go behind findings of fact.*—The Court of first instance dismissed a suit based on an account stated, on the grounds that the plaintiff could not sue alone, being joint with his father and brother, and that the defendant could not be sued alone, being joint in business with his brother. On appeal, the lower appellate Court found that the plaintiff contracted with the defendant only on his own behalf, and not on behalf of his father and brother, and remanded the case, under s. 562 of the Civ. Pro. Code, to the original Court which decreed the claim. On appeal against the order of remand, *held*, (1) that the fact of a decree being passed after remand was no bar to the hearing of the appeal, (2) that the transaction in suit having been entered into by the plaintiff on his own behalf

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only, and being his own name, he could sue alone, and (3) that the decree was rightly passed against the defendant. Under s. 43 of the Contract Act, the plaintiff, in a suit brought upon a contract made by a firm, may select as defendants those partners against whom he wishes to proceed, allowing his right of suit against those, whom he does not make defendants, to be barred. (6 B. 700, *F.*) On an appeal from an order of remand, the Chief Court would accept findings of fact arrived at by the lower appellate Court in cases in which no appeal would lie to the Chief Court from the eventual decree in the suit. JAG LAL v. SHIB LAL, **26 P.L.R 1902=37 P.R. 1902.** (15 A. 413, 6 P.R. 1892 at p. 27. *R.*)

——O. 1, r. 8 (=1882, ss. 30, 32=1877, ss. 30, 32).

See PARTIES TO SUIT.

(2433)—*O. 1, r. 8—Parties, addition of—Administration suit—Practice.*—If a person, belonging to a body of persons on whose behalf the suit has been filed, claims to be added as a party, he must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests. In an administration suit, it is extremely undesirable that individual creditors should be added as parties, unless they show some very strong reason that the person, who has filed the suit on their behalf, is not conducting it in the proper way. It is not enough that they should be willing to bear their own costs. There is considerable delay caused by a fresh party coming in, and the costs of other parties consequently are increased. VASANJI TRICAMJI & CO. v. ISMAILBHAI SHIVJI, **11 Bom. L R. 1034=34 B. 420.**

(2433-*a*)—*O. 1, r. 8, O. 21, r. 50—Injunction does not bind persons not on record—Defendant sued in representative capacity—Decree binds only property of those so represented—But parties on record also personally liable—English law—Judicature Act—Similar provision—Suit against firm—Partners not on record—Execution against only their partnership property*—In all suits where one person is allowed to represent another or others as defendant in a representative capacity, any decree passed can bind the others only with respect to the property of the others which he can in law represent, although the parties on record, *es nomine*, may be made personally liable. An injunction in cases falling under O. 1, r. 8, Civ. Pro. Code, does not bind persons who are not parties on record. (12 M. 356, 33 M. 483, *R.*) Under the English Law, as laid down in the Judicature Act, O. 48-A, r. 8, where a judgment is against a firm, execution may issue only against any property of the partnership, so far as partners who are not individually served and those who have not appeared are concerned.

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O. XXI, r. 50 of the Civ. Pro. Code, corresponds to this rule. SAHIB THAMBI MARAKAYAR v. HAMID MARAKAYAR, **1911, 2 M.W.N. 534.**

(2433-*b*)—O. I, r. 8—Repreeentative suit by riparian owners—Division by Government for non-riparian purposes—Damage necessary—Cause of action distinct—*See* GOVERNMENT, 5 M.L.T. 149=19 M.L.J. 131=33 M. 141=2 Ind. Cas. 325.

(2433-*bb*)—O. I, r. 8—*See* PRACTICE AND PROCEDURE, 9 C. 604=13 C.L.R. 142.

(2433-*c*)—O. I, r. 8, s. 92—*See* LIMITATION ACT, 1908, s. 10, 8 B. 432.

(2433-*d*)—O. I, rr. 8, 10 (1), (2)—*See* LIMITATION ACT, 1908, s. 22, 14 C. 400.

(2433-*e*)—O. I, rr. 8, 10 (2), 11 and s. 99—*See* PRE EMPTION—MISCELLANEOUS, 15 P. L.R. 1900. Notes of judgment.

(2434)—*O. I, rr. 8, 10 (2), 11, s. 115 (=Civ. Pro. Code 1877, ss 32, 622)—Addition of parties—High Court's powers of revision.*—Where an order of the Court of first instance adding the Secretary of State for India a defendant was reversed by the lower appellate Court, *held* that no revision lies to the High Court from the order of the District Judge. JAIPRAGASH SINGH v. HARSHANKAR PRASAD, **A.W.N. 1882, 53.**

(2435)—*O. I rr. 8, 10 (2), 11, s. 115 (=Civ. Pro Code, 1887, ss. 32, 622)—Addition of parties—High Court, powers of revision.*—No application would lie to the High Court for revision of an order of a Subordinate Judge, made under s. 32, refusing to make the applicant a party to a suit pending in the Subordinate Court, as such an interlocutory proceeding, in a case in which an appeal would lie to the High Court, was not within s. 622, Civ. Pro. Code. GHUNRANI v. RAJ KUMAR, **A.W.N. 1882, 55.**

(2436)—*O. I, rr. 8, 13 (2) 11, O. 6, rr 17, 18) O 7, r. 11 (=Civ. Pro. Code, 1877, ss. 32, 53—Omission to join certain persons as parties to suit—Rejection of plaint.*—The Court of first instance, in this case, after the first hearing of the suit, "rejected the plaint under the provisions of s 53 (*f*), Civ. Pro. Code," on the ground that the plaintiff had knowingly omitted to implead as defendants his sisters whom he ought to have joined *Held*, in second appeal, that the Court of first instance had acted with irregularity necessarily prejudicial to plaintiff in "rejecting the plaint as it called it, in the last stage of the case, but in reality dismissing the suit with costs. The Courts of first instance should determine the case according to law, such persons as to that Court should seem proper having been duly made parties. MUHAMMAD TALIB v. GHAFURLLAH, **A W.N. 1882, 67.**

(2437)—*O. I, r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)—Numerous parties*—The numerous parties' mentioned in s. 30 of the Code of Civil

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Procedure mean parties capable of being ascertained. SAJEDUR RAJA v. BAIDYANATH DEB, **20 C. 397**. [*R.*, 9 M.L.J. 93.; *D and Disappr.* 33 C. 905=10 C.W.N. 867.]

(2438)—*O. 1, r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)—Several persons interested in result of suit—Permission to sue on behalf of all, when can be given.*—The permission required by s. 30, Civ. Pro. Code, may be given even subsequently to the filing of the suit. *Held* that a permission under the section granted after the defendants had been summoned was a good one. BALDEO BHARTHI v. BIR GIR, **22 A. 269=A. W.N 1900, 69.** (21 B. 784, *R.*) [*F.*, 25 M. 399; *R.*, 33 C. 905=10 C.W.N. 867, 91 P.R. 1901=113 P.L.R. 1901.]

(2439)—*O. 1, r. 8 (1) (=s. 30, Civ Pro. Code, 1882),—Suit relating to religious and charitable endowments—Suit by persons interested—Leave to sue not condition precedent.*—S. 30 of the Code dealt with procedure only and did not affect substantive rights. It was permissive and in no way prohibitive on its terms. The leave required by the section could be given at any stage of the suit and was not a condition precedent. The said section applied to two classes of cases. There are the cases in which the number of persons, who claim concurrent interests in the subject-matter, and therefore, according to strict rule, necessary parties to the suit, is so large that they cannot all be conveniently joined with any chance of the suit being brought to a conclusion. And there are the cases in which numerous persons have distinct but similar rights, which cannot be prosecuted in distinct suits. In the latter class of cases, for the sake of convenience and to prevent multiplicity of suits, the Court allows one person or a few persons to prosecute or defence suits on behalf of all the persons similarly interested. If the course prescribed by the said section was not followed in such a case, the only consequence was that the judgment did not bind the persons whose names were not on the record. To obviate this inconvenient consequence, it is competent to the Court, with the view of adjudicating completely and definitely on the matter in dispute, to require an amendment of the plaint. The omission to apply under the section was not by itself ground for dismissing the suit, but, when the objection was taken, the Court could not allow the suit to proceed, except on the terms of the plaint being amended and the requisite leave under the section being obtained. SRINIVASACHARI v. RANGACHARIAR, **7 M.L J. 281.**

(2440)—*O. 1, r. 8 (1) (=s 30, Civ Pro. Code, 1882—Leave to sue given after commencement of suit—Validity of leave to sue, given after previous refusal.*—Leave to sue under s. 30, Civ. Pro. Code, need not necessarily precede the commencement of the action, but may be given after the suit has commenced. (21 B. 784, 23 M. 28, 22 A. 269, *R.*) The validity of leave to sue under s 30, Civ. Pro. Code, is not affected by the fact that leave has previously been refused, as it is entirely a matter of discretion not affecting the merits of the case, and can only have affected the defendants in the matter of costs which could be dealt with at the time the order was made. CHENNU MENON v. KRISHNAN, **25 M. 399.**

(2441)—*O. 1, r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)—Leave of Court under, whether could be obtained after filing suit.*—In a suit brought under s. 30 of the Civ Pro. Code, it cannot be contended that the suit cannot be maintained without first obtaining from the Court the necessary leave to sue under the section and that such leave could not be granted afterwards. Some sections in the Code which require leave to be given obviously imply that, if it is not given before suit, it cannot be given at all, and the suit must be dismissed. This is not the case, however, in suits coming under s. 30. The question raises no point of jurisdiction, and there is nothing which makes it essential that leave should be given before the filing of the suit The provision is one dealing nearly with a convenient way of bringing all the parties before the Court and has nothing to do with jurisdiction. The word "sue" used in the section ordinarily includes the whole suit and everything done in the suit, and, therefore, seems to imply that leave should be given before anything done in the suit. But there is nothing to indicate that when it is not done, the matter should not be set right on the earliest occasion afterwards. FERNANDEZ v. RODRIGUES **21 B. 784, F.B.** [*F.*, 22 A. 269; *R.*, 25 M. 399.]

(2442)—*O. 1, r. 8 (1) (=s 30, Civ. Pro. Code, 1882)—Effect of order under section.*—The effect of an order under s. 30, Civ. Pro. Code, is that the parties who have obtained permission to sue as representatives have the conduct of the suit on behalf of all those they purport to represent. If any person is dissatisfied with the conduct of the suit, or deems that he is not properly represented, then it is open to him to make an application to secure his views being properly represented and if necessary to take the conduct of the suit out of the hands of those who by the permission of the Court represent him. DHUNCOOVERBAI v. ADVOCATE GENERAL, **1 Bom. L R. 743.**

(2443)—*O. 1, r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)*—Kattalaikars *in a temple—Right of one to sue on behalf of others.*—Plaintiffs instituted this suit on behalf of themselves and other *Kattalaikars*, under s. 30 of the Code, alleging that they, with the other *Kattalaikars*, had the exclusive right to perform the festivals in question, by themselves finding the necessary funds for the purpose. The lower appellate Court decided that the right claimed, if any, was an individual and not a collective right, that s. 30 did not apply to the case and that the suit was, therefore, bad for misjoinder of causes of action *Held*, that the suit being

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on behalf of *Kattalaikars*, and their olaim being, that, as *Kattalaikars*, they alone were entitled to celebrate the festivals in question as against every worshipper, who was not a *Kattalaikar*, they had the "same interest" in the suit so as to bring them within s. 30 of the Code. VAIDINATHA THAMBIRAN v. CHANDRASEKARA DIKSHITAR, **15 M.L J. 458.** [*Expl.*, 19 M.L.J. 743=7 M L.T. 248=5 Ind. Cas. 76.]

(2444)—*O. I. r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)— Malabar Law—Decree against* Karnavan—*Suit against* Karnavan *under s. 30, Civ. Pro. Code—Right of an* anandravan *to avoid the decree by a separate suit—Fraud.*— Where a suit was brought against the *karnavan* of a Malabar *tarwad* in his representative capacity under s. 30 of the Civ. Pro. Code, 1882, and the suit was decreed against *karnavan* after contest, it is not competent to an *anandravan* to avoid the decree by means of a suit, in the absence of allegations of fraud. OLAYAT GOVINDA v. DAMODARAN, **8 Ind. Cas. 435.** (20 M. 129, *F.*)

(2445)—*O. I, r. 8 (1) (=s. 30, Civ Pro. Code, 1882)—Charitable endowment, suit relating to charity under, interest necessary to institute.*—A suit relating to a charity established under a charitable endowment may be instituted by any member of the class intended to be benefited by such charity, for the support and preservation of which the aid of the Court is invoked by means of the suit. So, where according to the document evidencing such a charity, the class for which it was intended comprised the class of Brahmins generally, two Brahmin residents of the locality were held to be persons competent under s. 30 of the Civ. Pro. Code, to institute a suit in respect of the charity. GANAPATI AYYAN v. SAVITHRI AMMAL, **21 M. 10.** [*R.*, 33 C. 789=10 C.W.N. 581, 33 C. 905=10 C.W.N. 86.]

(2446)—*O. I, r. 8 (1) (=s. 30, Civ. Pro. Code, 1882)—Suit by persons suing in their own names, for themselves and for others—Joinder of parties—Rights common to plaintiff and others—Permission of Court to sue on behalf of others—Injunction—Specific Relief Act, 1877, s. 42—Limitation Act, sch. II, arts. 131 and 120.*— The shrine of a Mahomedan saint was at the instance of the Local Government taken charge of by the Deputy Commissioner in 1876. In April, 1890, the plaintiffs sued the defendant (Deputy Commissioner), as manager of the shrine for themselves and for the Dafali class generally, to which they themselves belonged, for the following reliefs, namely, (*a*) a declaration of right, *i.e.*, their own right to a moiety of the offerings made at the shrine, and (*b*) a declaration of the right of the Dafali class to a moiety of the said offerings. The defendant contested the suit on the following grounds; (1) that the plaintiffs were not competent to sue on behalf of the Dafali class, (2) that the proviso to s. 42, Specific Relief Act, was a bar to the declaration sought, and (3) that the suit was time-barred under art. 120 of the Limitation Act. After the institution of the suit, the plaintiffs applied to the Court, under s. 30, Civ. Pro. Code, for permission to sue on behalf of certain other Dafalis, but the permission was refused. *Held*, that the plaintiffs were not competent to sue for any Dafalis but themselves. The plaintiffs as the recognised agents of certain persons could not sue in their own names on behalf of those persons unless authorized by law to do so. A person authorized by another to institute a suit on his behalf must institute the suit in the name of the principal and not in his own name, inasmuch as the legal right to sue is vested in the principal and not in him. As a general rule, all persons in whom the right to any relief claimed is alleged to exist must be joined as plaintiffs to enable the Court to give judgment in their favour. S. 42 of the Specific Relief Act does not contain as exception to this rule and does not authorise a person, who claims a right common to him and other persons of the same class, to sue in his own name for a declaration of the right in favour of such class or authorize the Court, when the right claimed is common to a class of persons, to give a declaration in favour of the class at the suit of one of the class. The Plaintiffs could only sue on behalf of the person whose authorized agents they were, or on behalf of the Dafali class generally, under the provisions of s. 30, Code of Civil Procedure, after obtaining the permission of the Court. *Held*, that the proviso to s. 42 of the Specific Relief Act was not a bar to the suit. An injunction cannot be granted to compel a person to pay money, which he is under a legal obligation to pay but refuses to pay. *Held*, further, that the suit was governed by art. 131 of the Limitation Act, under which a period of twelve years is allowed from the time the enjoyment of the right is first refused, and that it was within time; and that even if it were governed by art. 120, it was within time. SHEIKH CHEDI v. DEPUTY COMMISSIONER, BAHRAITH, **3 O. C. 351.**

(2447)—*O. 1, r. 8 (1) (=s. 30; Civ. Pro Code, 1882)—Parties—Persons having the same interest in one cause.*—S. 30 of the old Code is an enabling section, and does not debar some of the members of a community from maintaining a suit in their own right. Hence, where two persons belonging to the Lodh community, alleging interference with their rights, brought a suit for a declaration that a *chaupal*, mortgaged by the *mukaddam* of the community belonged to the entire community, and that the latter alone had no power to make the mortgage, *held*, that the suit was maintainable. GULBA v. BASANTA, **7 A.L.J. 233=5 Ind. Cas. 547=32 A. 284.** (5 A. 497, 24 C. 315, *Appr.*)

(2448)—*O. 1 r. 8 (1) (=Civ. Pro Code, 1882, s. 30), applicability of—Joinder of parties—Malabar Tarwad.*—**The general rule that all persons**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

affected by a decree ought to be made parties, is subject to the exception of cases in which persons sue or are sued in their representative capacity, and the question of capacity to represent is rather a question of substantive law than of procedure. The provision in s. 30 of the Civ. Pro. Code, has no application to the members of a tarwad, for the provision is applicable only in cases where the persons interested are too numerous to be conveniently brought on the record, and is not inconsistent with a rule permitting suits by or against parties in their representative capacity. Further, the representative under s. 30 acquires his capacity as such by order of the Court and not by any provision of substantive law or custom. VASUDEVAN v. SANKARAN, **20 M. 129 F.B. = 7 M.L.J. 102** [*R.*, 29 M. 390, F.B. = 16 M.L.J. 307 = 1 M.L.T. 183.]

(2449)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882)—Practice—Parties to a suit-All interested persons—Representative order.*—It is a general rule that all persons interested ought to be made parties to a suit however numerous they may be so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented. This rule no doubt yields to the exigencies of particular cases and there are well established qualifications of it: one of them is power of the Court under s. 30 of the Civ. Pro. Code to make a representative order. SURSANGJI v. PARTAPSANG, **5 Bom. L.R. 937 = 28 B. 209.**

(2450)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882)—Unregistered religious society—Suit in the name of one member described as manager maintainable—Other members, whether necessary parties—Pre-emption—Owner of a plot of grove land not assessed to revenue, whether a co-sharer.*—The *Mahant* of an *akhara* brought a suit for pre-emption on behalf of the *akhara*, after obtaining permission under s. 30, Civ. Pro. Code. *Held*, that the suit could be maintained in the name of the *Mahant*, and it was not necessary to join all the members of the *akhara* as parties. The owner of a plot of grove-land, not assessed to revenue, is not a co-sharer and cannot resist a suit for pre-emption instituted by a co-sharer. ATMANAND v. BRAHM NARAIN, **4 A.L.J. 541 = A.W.N. 1907, 239.** (2 A.L.J. 612, *D.*)

(2451)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882—Suit by one* Kasipangu *holder—Objection as to non-joinder of other* Kasipangu *holders—Joinder as plaintiffs under s. 30—Improper—Right to more than Rs. 2,500—Suit in Court of District Munsif—Absence of jurisdiction.*—K, one of the *Kasipangu* holders of a Daroga, sued in the Court of the District Munsif at N to recover, from the defendants a sum of Rs. 1,232-15-10 due to her on account of fees due to her, and a further sum of Rs. 1,600, the estimated amount of damages resulting from loss caused to her by the improper management of the trust by the defendants (the plaintiff offering to pay additional court-fee if necessary). Defendants objected that the suit was bad for non-joinder of other *Kasipangu* holders as parties, and also contended that the suit did not lie in the Court of the District Munsiff, as its value exceeded its pecuniary jurisdiction. The other *Kasipangu* holders were joined as co-plaintiffs under s. 30, Civ. Pro Code, 1882. *Held*, that the other *Kasipangu* holders did not possess the same interest as the original plaintiff, and should not have been made as plaintiffs, and that the proper course would have been to have made them defendants. *Held*, also, that the District Munsif had no jurisdiction, because the plaintiff sought to establish her right to more than Rs. 2,500. KALIBA SAHIB v. BALGIS NACHIAL, **9 M.L.T. 483.**

(2452)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882)—Suit dismissed for want of notice as well as on merits.*—When more questions than one arise in a suit, according to the circumstances of the case, depending upon the nature of the questions and of the decision arrived at, it may be either necessary to decide them all, or sufficient to decide only some of them, for the disposal of the suit. Where, at the instance of the parties, the Court goes into two issues, one of law and the other on the facts, and finds on both issues against the plaintiff, the decision will operate as *res judicata*, even on the merits, notwithstanding the fact that the finding on the issue of law might, by itself, have been sufficient for the dismissal of the suit. PEARY MOHUN MUKERJEE v. AMBICA CHURN BANDOPADHYA, **24 C. 900.** (6 C. 319, 11 C. 301, P.C., 13 C. 17, 18 C. 647, *R.*; 17 A. 174, *D.*) [*F.*, 4 M.L.T. 90; *R.*; 9 C.W.N. 60, 5 C.L.J. 611 = 36 C. 193 = 1 Ind. Cas. 913.]

(2453)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882)—Dismissal of suit—Non service of notice—Non-publication of advertisement.*—The suit was dismissed on the ground that the notices required to be served under s. 30, Civ. Pro. Code, were not served, nor was any advertisement published; but the plaintiff applied, in his plaint, for permission, and the defendant in his written statement mentioned the names of the other persons interested in the plaint property. *Held*, as the plaintiff asked for permission in the plaint, even though there was no express order granting it, the presumption was that it had been granted, inasmuch as the plaint was admitted and registered. It is the duty of the Court to cause service of notices or the publication of advertisement. The plaintiff's suit should not have been dismissed for the failure of the Court to perform the duties imposed upon it by the section. MUKH LAL SINGH v. JAGDEO TEWARI, **35 C. 1021.**

(2454)—*O. I, r. 8 (1) (= s. 30, Civ. Pro. Code, 1882)—Suit for removal of a trustee, not affected by non-compliance with the provisions of s. 30.*—

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The right of worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the other worshippers; and, hence, a suit for the removal of a trustee of a Mahomedan endowment is not bad on the ground that the provisions of s. 30 of the Civ. Pro. Code, have not been complied with. Such a suit comes within the scope of s. 539, Civ. Pro. Code. MOHIUDDIN v. SAYIDUDDIN, **20 C. 810**. (8 C. 32, 11 C. 33, 7 A. 178, 5 A. 497, *R.*) [*R.*, 24 C. 385.]

(2454-*a*)—O. 1, r. 8 (1)—*See* COMMON LAND, 105 P.R. 1901.

(2454-*b*)—O. I, r. 8 (1)—*See* CO-SHARERS—SUIT BY CO-SHARERS, 5 A. 602=A.W.N. 1883, 155.

(2454-*c*)—O. I, r. 8 (1)—*See* HINDU LAW—JOINT FAMILY, 21 M.L.J. 508.

(2454-*d*)—O. I, r. 8 (1)—*See* LEAVE TO SUE, 11 C. 213.

(2454-*e*)—O. I, r. 8 (1)—Muhammadan Law — Religious endowment — Place used as cemetery—Form of suit—Permission of Court under—*See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, A.W.N. 1885, 219.

(2454-*f*)—O. I, r. 8 (1)—Claim of private right by plaintiff over land—Claim of public right by defendants—Parties—Irregularity in not recording formal order — Effect — *See* SPECIFIC RELIEF ACT, 1877, s. 42, 6 Ind. Cas. 46.

(2454-*g*)—O. I, r. 8 (1)—*See* TRUST, 9 M.L.J. 93.

(2454-*h*)—O. I, r. 8—*See* NOS. 104,*a*, 299 300, 301, 302, 1575, 1679, 1680, 1681, 1682, 1685, 1902, 2400, 2404, 2406, 2489, *supra* AND NOS. 2502, 2502(*a*) 3438, 4038, 5140, *infra*.

(2455)—*O. I, r. 8 (1), ss. 92, 93 (=ss. 30, 539, Civ. Pro. Code, 1882)—Public religious trust—Right of members of a sect to worship—Infringement—Right of suit—Special damage—Representative suit by some members—Notice on others, how served—Advertisement—S. 30, Civ. Pro. Code, application of.*—The plaintiffs, who were members of the *Satchasi* community in their village, purported to bring this suit under s. 30, on behalf of themselves and other members of that community for a declaration of their right to take part in the management of the worship of a goddess and for joint possession with the defendants of the land on which the worship was carried on. Notice of the suit was personally served on certain important members of the caste known to the plaintiff, and by advertisement in newspaper on others. *Held*—That the suit was properly instituted under s. 30, and the formalities prescribed by that section were sufficiently complied with. *Per Rampini, J.*—S. 539, Civ. Pro. Code, did not apply as the suit was not instituted on behal fof the general public, the members of the *Satchasi* community being a small and

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

easily determinable body. *Per Woodroffe, J.*—This was a case of public religious trust, though not a trust for the public at large, but only for a portion answering a particular description. (7 A. 182, *R.*) S. 30, Civ. Pro. Code deals with procedure only and does not affect substantive right of suit. Where the right to sue exists, it is open in cases of this nature for two persons to sue with permission under s. 539, or for one or more to sue on behalf of the rest with permission under s. 30 or for all interested to join in suing. (10 C.W.N. 581, *R.*) In the case of an infringement of a right of the general public, no suit can be brought under s. 30 or at all, unless on proof of special damage in which case either one person sues in respect of the infrigement of his individual right and the section does not apply, or if he should sue on behalf of others, similarly specially injured, he sues on their behalf, and not on behalf of the general public. (9 M. 463, *Appr.*) S. 30 should not, in its application, be limited to cases where the parties though numerous can be definitely ascertained. A suit may be instituted under this section, on behalf of a defined class of the general public though that class may, as in this case, be composed of a more or less indefinite number of persons. MONMOTHA NATH DAS v. HARISH CHANDRA DAS, **10 C.W.N. 867=33 C. 905.** (20 C. 397, *D. & Disappr.*) [*D.*, 52 P.W.R. 1908=78 P.L.R. 1908.]

(2456)—*O. 1. r. 8 (1), ss. 92, 93 (=ss. 30. 539 Civ. Pro. Code, 1882)—Suit for scheme and for declaring third defendant a duly appointed* Dharmakarta — *Maintainability — Specific Relief Act, s. 42, whether controls s. 539—No denial of legal character or right to property—No consequential relief — Maintainability — Applicability of the new Code—Procedure.*—Suit by plaintiffs as members of the Beri Chetty community, and followers and disciples of Sri Abhimana Sivaobariar, and worshippers of the temple of Muthukumaraswami, against 1 to 3 defendants, *inter alia* for settlement of a scheme and for a declaration that third defendant had been duly and validly elected *Dharmakarta*. Permission to sue under s. 30, Civ. Pro. Code, and sanction of the Advocate-General under s. 539, had been obtained by the plaintiffs. Objection was taken to the maintainability of the suit under s. 30, Civ. Pro. Code, and also as to whether plaintiffs were entitled to sue for a declaration of the third defendant's rights. *Held* that the case might be governed by the provisions of s. 539 of the old Code, and not by the corresponding but modified provisions of s. 92 of the new Code, as these provisions cannot be considered as dealing merely with procedure but affect the right of suit also. That, as regards the third defendant's rights, the relief claimed whether under s. 30 or s. 539 is purely declaratory, and such declaratory relief cannot be granted under s. 42, Specific Relief Act, as the plaintiffs and all the other members of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Beri Chetty caste, being disciples of Sri Abhimana and other Hindu worshippers cannot be said to be entitled to any legal character or to any right to any property which the defendants have denied or are interested in denying within the meaning of s. 42, so as to give the Court jurisdiction to pass a purely declaratory decree. That the suit is bad under s. 42, Specific Relief Act, also because the plaintiffs do not seek any further relief, such as an injunction restraining all or some of the defendants other than the third from interferring with the third defendant's rights to the office. (33 C. 789, *R.*) *Held* also, that the suit contemplated under s. 539 is a suit against a trustee, including under that term a person assuming to act as trustee, or a trustee *de son tort*, by persons having an interest in the trust, for one of the reliefs specified in the section. The suit for the assertion of the rights of one of the trustees taken by itself is not a suit for one of the reliefs specified in cls. (*a*) to (*c*) of the section. Nor can it be regarded as a suit "for such further or other relief as the nature of the case may require." (17 M. 462, F.B., *R.*) That the declaration of the rights of the third defendant cannot be said to be incidental to a prayer for settling a scheme, as a scheme can be well settled without going into the question of the third defendant's right. That s. 539 was neither intended to bar the assertion of private rights on the one hand, nor to afford a means of asserting them on the other. That where s. 539 expressly provides for a declaratory relief, it cannot be cut down by s. 42, Specific Relief Act. Where however the case comes within the supplementary provision as to "such further other relief as the nature of the case may require," the Court ought to be guided by the provisions of s. 42, Specific Relief Act, and ought to hold that the nature of the case does not require a merely declaratory relief to be given where further relief might have been sought for. A. MUNISWAMY CHETTY v. A. MURUGAPPA CHETTY, **7 M.L.T. 45=5 Ind. Cas. 515.**

(2457)—*O. I, r. 8 (1), ss. 92 and 93 (=ss. 30, 539, Civ. Pro. Code, 1882)—Suit by some members of a section of Chinese community at Calcutta against Secretary and Trustee of a Chinese temple and cemetery, for declaration of right of plaintiffs and their section to worship in the temple and make use of cemetery—Sanction of Advocate General obtained—Maintainability of suit.*—The Chinese inhabitants of Calcutta are divided into two classes, the *puntis* (carpenters) and the *hakalus* (shoe-makers). In Calcutta there is a Chinese temple and cemetery. Five members of the *punti* class obtained the sanction of the Advocate-General, under s. 539, and instituted the present suit against the secretary and trustee of the temple and cemetery, who was a *hakalu*, for a declaration that the temple and cemetery are the public property of the Chinese community and that the plaintiffs' community, including the plaintiffs, are entitled to the benefits, appertaining to the trust, for production of deeds, etc., belonging thereto and for the settlement of a scheme by the Court, and other incidental relief. On behalf of the defendant, objection was raised that the suit should have been brought under s. 30. *Held*, if, as alleged in the plaint, the private rights of the plaintiffs to worship at the temple have been infringed, he has a right of action under s. 539. The mere result that the interests of persons, other than the plaintiff and those persons associated with him as co-plaintiffs, will be affected, does not take away the right of an individual to sue under s. 539. The words of s. 539 contemplate that there are other persons, besides those permitted to sue, who will be affected. MAC MOCHI v. LEE CHIN, **9 C.W.N. 594.**

(2458)—*O. I, r. 8 (1), ss. 92, 93 (=ss. 30, 539, Civ. Pro. Code, 1882)—Suit for removal of trustee—Sanction under s. 539, not necessary—Trust in which others are interested—Suit regarding, by trustee—Permission under s. 30, Civ. Pro. Code, 1882—Necessity.*—A suit, which prays for the removal of a trustee, is not one falling under s. 539, Civ. Pro. Code, 1882 (=s. 92, Civ. Pro. Code, 1908) and no sanction is necessary for instituting such a suit. (17 M. 462, *R.*) Where, in a suit relating to a trust, many others besides the plaintiff are interested, *held*, that, even if no sanction under s. 18, Religious Endowments Act, 1863, is necessary, permission to sue is necessary under s. 30, Civ. Pro. Code, 1882. The fact that the plaintiff is a trustee does not exempt him from obtaining permission under s. 30, Civ. Pro. Code, 1882. MOHIDEEN KHAN SAHIB v. BALAI KHAN SAHIB, **8 M.L.T. 357=7 Ind. Cas. 868.**

(2459)—*O. I, r. 8 (1), ss. 92, 93 (=ss. 30, 539, Civ. Pro. Code, 1882)—Suit against special trustee by general trustee of temple—Sanction under s. 539 not necessary.*—The general trustee of a temple holds a special position in regard to the protection of its interests, and even before the enactment of the provision in s. 539 of the Civ. Pro. Code, he would have been entitled to resort to Courts to enforce the obligations of trustees appointed for special duties and to obtain all appropriate relief on behalf of the temple. Such rights of suit not having been affected by s. 539 of the Civ. Pro. Code, the general trustee can maintain such a suit without obtaining any sanction under the section. The section has been intended to apply to persons who, before its enactment, had, or where believed to have, no right to take proceedings for the purposes mentioned in it. In the case of such persons, the limitation requiring previous sanction for the suit was deemed necessay for the purpose of preventing any abuse of the powers conferred on them. NELLAIYAPPA PILLAI v. THANGAMA NACHUYAR, **21 M. 406 =8 M.L.J. 119.** [*F.*, 33 C. 789=10 C.W.N. 581; *R.*, 1 S.L.R. 155.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2459-*a*)—O. I, r. 8 (1) s. 102—*See* LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES, 6 C.L.J. 218.

(2460)—*O. I, rr. 8 (1), 13 (=ss. 30 and 34, Civ. Pro Code, 1882)—Joinder of parties—Signature and verification of plaint, by person named co-plaintiff.*—There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. MOHINI MOHUN DAS v. BUNGSI BUDDAN SAHA DAS **17 C. 580. P.C.** [*R.*, 22 A. 55=19 A.W.N. 172, 105 P.R. 1002.]

(2461)—*O. I, r. 8 (1), O. 41, r. 27 (=Civ. Pro. Code, 1882, ss. 30 and 568)—Abatement of appeal—Representative of deceased respondent selected for service of notice under s. 30 not brought upon record.*—When the appellant, fails to apply within the prescribed time to bring upon record the representatives of one of the respondents selected for the service of notice under s. 30 of the Civ. Pro. Code, the right to appeal does not service against the remaining respondents and the appeal must abate under s. 368. BAGI RAM v. RANA, **160 P.L.R. 1101.**

(2461-*a*)—O. I, rr. 8 (2), 10 (2), 11—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, A.W.N. 1883, 8.

(2462)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11 (=s. 32, Civ. Pro. Code, 1882)—. Questions involved in the suit,' what are—Questions arising between co-plaintiffs or co-defendants inter se, not under s. 32.*—S. 32 of the Civ. Pro. Code enables a Court to add a person as a party, where such addition is necessary to enable the Court to completely adjudicate upon 'all the questions involved in the suit.' 'All the questions' referred to in the section must be questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or between co-plaintiffs *inter se*. Questions having to be decided incidentally during an appeal, such as who the legal representative of a deceased party was, are not among those contemplated by the section. HAR NARAIN SINGH v. KHARAG SINGH, **9 A. 447=A.W.N. 1887, 89.** [*R.*, 118 P.R. 1890.]

(2463)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11 (=s. 32, Civ. Pro Code, 1882)—Applicability.*—S. 32, Civ. Pro. Code, 1882, cannot apply to the case of substitution, dismissal or addition of parties in divorce proceedings. RAMSAY v. BOYLE, **30 C. 489.**

(2464)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11 (=ss. 32, Civ Pro, Code 1882)—Addition of new party in partition suit before decree therein is engrossed on stamp paper, validity and propriety of—Aim of procedure in adding parties to suit—Stamp Act (II of 1899), s. 2, sch. I, art. 45.*—In a suit for partition, the Court passed its preliminary decree for partition directing the appointment of Commissioners for partition by metes and bounds. The Commissioners submitted their report, and the Court confirmed it. Before the final decree was drawn up, several applications were made and granted. The result was, that the plaintiff was made defendant, a defendant was made plaintiff, and a new person was added as a party to the suit. The appeal was against the last order, by the defendant, who was made plaintiff. *Held*, ordinarily, a judgment contains a decision as to the rights of the parties and directs what the relief granted is. The decree, which follows, is merely the formal expression of an adjudication arrived at in the judgment. After the judgment is pronounced, the parties are not required to do any act to enable the Court to frame and sign the decree, and, as provided in s. 205 of the Code, the decree has retrospective effect and bears the same date as the judgment. But, in a partition suit, the parties are required to furnish a non-judicial stamp-paper in order that the decree therein may be engrossed upon it. A partition decree to be operative must be engrossed upon the stamp-paper so furnished and until the Judge signs the decree so engrossed, it cannot be said that the suit had terminated. S. 32 of the Code authorises the Court to add a party 'at any time' in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. This must, however, be done before 'an effectual and complete' adjudication and settlement of the questions raised. The power of the Court depends on the question whether the case is *subjudice*. The order confirming the Commissioners' report in this case was only an interlocutory order made in the course of the suit and preparatory to the order, which would determine finally the rights of the parties and, on the date the order in dispute was made, there was no such adjudication and settlement. One of the aims of the present procedure-law in England as well as in India is the avoidance of a multiplicity of suits with reference to the same matter. In the present case, the addition of the person, who acquired all the rights of the original plaintiff, as a party to the suit, was eminently fitted for the avoidance of multiplicity of suits. JOTINDRA MOHUN TAGORE v. BEJOY CHAND MAHATAP, **32 C. 483.** (6 M. 227, 18 A. 332, 12 C. 612, 4 W.N. 1883, 173, 194, *Disc.*) [*R.*, 2 M.L.T. 260.]

(2465)—*O. I, rr. 8 (2), 10 (2), (3), (5) and 11=(s. 32, Civ. Pro. Code, 1882)—Joinder of parties—Discretion of plaintiff.*—A plaintiff must be left to exercise his own discretion as to joinder of defendants whose title is not necessarily involved in that of any other party to the suit. If he chooses to leave the question that may arise between himself and a third party to future settlement, he does so at his own risk. He is not bound to sue every possible adverse plaimant in one suit. JOITARAM v. RAMAKRISHNA, **4 Bom. L.R. 754=27 B. 31.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2466)—*O. 1, rr. 8 (2), 10 (2), (3) (5), 11 (=s. 32, Civ. Pro. Code 1877)—Addition of parties—Duty of Court.*—A Muhammadan lady instituted two suits, one against the mortgagee from her husband of a portion of her deceased father's estate, and the other against her brother for her share, under Muhammadan law, in her father's estate. The original Court dismissed both the suits holding that the plaintiff ought to have brought only one suit and not two, as in both she claimed by right of inheritance, and that in her suit against her brother she ought to have made all her brothers in possession of her father's estate defendants. *Held* that the fault rested primarily with the Munsiff who ought to have exercised the powers given him by s. 32, Civ. Pro. Code, by causing the plaint to be amended and bringing in the husband and his mortgagee and the rest of her brothers on the record in the suit against herbrother. HAFIZ UN-NISSA v. WAJID ALI, AND HAFIZ-UN-NISSA v. ASADYAR KHAN, **A.W.N. 1881 140.**

(2467)—*O. 1, rr. 8 (2), 10 (2), (3), (5) 11 (=s. 32, Civ. Pro. Code, 1882)—Addition of parties—Discretion—Appeal—Duty of appellate Court.*—The Court of first instance, in the exercise of its discretion, and without objection from the respondents, made the appellant a party upon his own application, and proceeded to deal with the question of ownership of the property between them. On appeal by the appellant the lower appellate Court refused to consider that question in the appeal. *Held* that the lower appellate Court should have considered that question and disposed of the appeal. RADHA PRASAD SINGH v. RAMBHAJAN, **A.W.N. 1883, 201.**

(2468)—*O. 1, rr. 8 (2), 10 (2), (3), (5) 11 (=s. 32, Civ. Pro. Code, 1882)—Substitution of parties—Court of second appeal, power of*—A Court of second appeal cannot substitute one defendant for another in the plaint in the original suit nor one appellant for another in the first appeal. CHOKALINGAM CHETTY v. MAUNG AUNG BAW, **1 L.B.R. 350.** [*D.*; 4 L.B.R. 95.]

(2469)—*O 1, rr 8 (2), 10 (2), (3), (5), 11 (=s. 32, Civ Pro Code, 1882)—Misjoinder of parties*—Plaintiffs 1 and 2 brought a suit as the daughter and adopted son respectively of N, to recover possession of N's property from the defendants. The plaint alleged that both were owners of the property and sought a declaration of the ownership of the plaintiffs as against the defendants; but it contained no allegation asking for relief in favour of plaintiff 1, in the event of plaintiff 2's adoption being found not proved: *Held*, that the suit was not bad for misjoinder since plaintiff 1 beyond alleging in the plaint that she was N's daughter did not set up her right to recover the property as his daughter, but claimed it with plaintiff 2 on the ground that the latter was N's son, and that she lived with him. NINGAWA v. RAMAPPA, **5 Bom. L.R. 708 = 28 B. 94.** [*R.*, 31 B. 80, 8 Bom. L.R 897; *D.*, 9 Bom. L.R. 1054; *Diss.*, 32 B. 7].

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2470)—*O. 1, rr. 8 (2), 10 (2), (3), (5), 11 (=s. 32, Civ. Pro. Code, 1882)—Order as to addition of party—Appeal from decree—Plea as to order not taken in memo. of appeal.*—Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree, to question the validity of an order, adding a person as a defendant, previously made in the case under s. 32, Civ. Pro. Code. BANSI LAL v. RAMJI LAL, **20 A. 370 = A.W.N. 1898, 75.** (15 A. 119. *R.*) [*R.*, 27 C. 11 = 3 C.W.N. 660, 24 A. 242].

(2471)—*O. 1, rr. 8 (2), 10 (2), (3), (5). 11 (=s. 32, Civ. Pro. Code, 1882)—Joinder of parties—Court adding a new defendant* proprio motu—*Plea of limitation.*—Where a party is joined to a suit by the order of the Court by its own motion under s. 32 of the Civ. Pro. Code, 1882, it is open to such party to raise in defence the plea of limitation. DAMODAR v. NAINSUKH, **8 Bom. L.R. 942.**

(2472)—*O. 1. rr. 8 (2), 10 (2), (3), (5). 11 (=s. 32, Civ. Pro. Code, 1882)—Addition of parties—Discretion of Court—Costs—Transfer of Property Act*, s. 85.—Where, in a suit on a mortgage, a Court of first instance refused an application by plaintiff (presented when a suit was nearly concluded) to amend the plaint and to add certain persons as defendants, on the ground that the application was too late and, also, on the ground, that an opportunity given to the plaintiff, during the hearing of the suit, to add new parties, was not taken advantage of by him, and dismissed the suit. *held*, that the Court had not properly exercised the discretion given to it under s. 32; that the petition ought to be granted on payment of the reasonable costs of an adjournment. BHAG MANI KUNWAR v SUBH NARAIN RAI. **A.W N. 1905, 35.** (A.W.N. 1905, 20, *F.*)

(2473)—*O. 1, rr. 8 (2), 10 (2), (3), (5), 11 (=s 32. Civ. Pro. Code, 1882)—Suit by a* benami *holder of a promissory note—Trusts Act (II of 1882), s. 81.*—*Held*, that, under s. 81 of the Indian Trusts Act of 1882, a *benami*-holder of a promissory note has an interest in note which is the security for the debt, and that he consequently has a right to sue upon the note. *Held*, that the Court had jurisdiction to add the real creditor as a plaintiff. ASHGAR HUSAIN v. SAJJAD MIRZA, **1 O.C. 10.**

(2474)—*O. 1, rr. 8 (2), 10, (2), (3), (5), 11 (=s. 32, Civ. Pro. Code, 1882)—Suit by adopted son to recover possession from widows of adoptive father—Mortgagee from widows proper party to suit.*—The mortgagee from the widows of a deceased Hindu is a proper party to a suit, by the latter's alleged adopted son, to recover from

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the widows possession of the property belonging to her husband. RAO LAL SINGH v. MUSST. RANI BHAGOTI, **2 C.P.L.R. 236.**

(2475)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11 (=s. 32, Civ. Pro. Code, 1882)—Parties, joinder of—Parties to suit by mortgagee—Mortgage—Transfer of Property Act, 1882, s. 85.*—The plaintiff, who was the mortgagee, sued the defendant (the mortgagor) for possession of the mortgaged property. Before issues were framed, two persons, R and S, applied to be made defendants in the suit, on the ground that they were the owners of the mortgaged property and the original defendant had no power to mortgage it. *Held* that, under the provisions of s. 32, Civ. Pro. Code, R and S could not be made defendants, nor was their presence necessary before the Court in order to enable the Court, effectually and completely, to adjudicate upon and settle all the questions involved in the suit. *Held*, further, that under s. 85 of the Transfer of Property Act, the plaintiff is only bound to join, as parties to a suit, persons having an interest in the property, provided that he has notice of such interest. That section moreover is intended to apply to persons, who admittedly have an interest in the property, and not to persons whose interest in the property is denied. SITLA BAKSH v. LALTA, **3 O C 94.**

(2475 *a*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* ACT I OF 1894, ss. 30, 53, 25 A. 133=A.W. N. 1902, 215.

(2475-*b*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* CIV. PRO. CODE, 1908, O. XXII, r. 5, 4 Bom. L.R. 980=27 B. 162.

(2475 *c*)—O. I, rr. 8 (2), 10 (2) (3), (5), 11—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 93 P.R. 1884.

(2475-*d*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1891, 175.

(2475-*e*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* INSURANCE, 3 S L R. 191=4 Ind. Cas. 1160.

(2475-*f*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* JOINDER OF PARTIES, 119 P.R. 1890.

(2475 *g*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* LIMITATION ACT, 1908, ss. 4, 5, 22 A.W. N. 1898, 58.

(2475-*h*)—O. I, rr. 8 (2), 10 (3), (5), 11—*See* LIMITATION ACT, 1908, s. 22, 27 C. 540=4 C.W.N. 459, 17 M. 12=4 M.L.J. 48.

(2475-*i*)—O. I, rr 8 (2), 10 (2), (3), (5), 11—Addition of party by Court after period of limitation — Effect.—*See* LIMITATION ACT, 1908, s. 22, 11 C.W.N. 350=35 C. 519=5 C.L. J. 242=2 M.L.T. 137.

(2475-*i*-1)—O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. XLI, r. 20, s. 108—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 19 M. 151.

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2475-*j*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—Addition of receiver as party—*See* RECEIVER, 14 C.W N. 653=6 Ind. Cas. 24.

(2475-*k*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11—*See* SPECIAL OR SECOND APPEAL—GENERAL, 3 M.L.J. 223.

(2476)—O. *I, rr. 8 (2), 10 (2), (3), (5), 11, s. 80 (=ss. 32 and 424 Civ. Pro. Code, 1882)—Secretary of State, addition of, as a party.*—S. 424 of the Code does not preclude the addition of the Secretary of State as a necessary party under s. 32 of the Code. BAL MOKOOND LALL v. JIRJUDHUN ROY, 9 **C. 271=11 C.L.R. 466.**

(2477)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11 and s. 104 O. 43, r. 1 (=ss. 32 and 588 (2), Civ. Pro. Code, 1882)—Order refusing application to be made defendant—Appeal.*—No appeal lies from an order refusing an application under s. 32 for being made a co-defendant. RUPRAM v. JAGANNASH SETH, **12 C.P.L.R. 41.** (2 A. 904, 13 C. 100, *R.*)

(2477-*a*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11, and s. 104. O. XLIII, r. 1—*See* APPEAL—ORDERS, 13 C. 100.

(2477-*b*)—O. I, rr. 8 (7), 10 (2), (3), (5), 11 and s. 104, O. XLIII, r. 1—*See* SPECIFIC RELIEF ACT, 1877, s. 9 A.W.N. 1886; 138.

(2478)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11, s. 115, (=ss. 32, 622, Civ. Pro. Code, 1882)—Powers of Court under s. 32, Civ. Pro. Code, 1882—Revisional powers of High Court—Civ. Pro. Code, 1882, s. 622.*—A, claiming to be the adopted son of R, sued the defendant to recover Rs. 384 14 0 due to his adoptive father. T (a third person) denied the plaintiff's adoption and applied to the Court under s. 32 of the Civ. Pro. Code, 1882, to be made a defendant in the suit on the ground that he claimed the estate of R adversely to the plaintiff. The Court passed an order making T a defendant. The plaintiff applied to the High Court under s. 622 for revision of this order. *Held* that the application for revision could not be entertained, the Court below not having erred in respect of jurisdiction in applying the discretionary provisions of s. 32, Civ Pro. Code, 1882. HARNARAIN SINGH v. BAKHTAWAR SINGH, **A W.N. 1885 259.**

(2479)—*O. I, rr. 8 (2), 10 (2), (3), (4), (5), 11, O. 7, rr. 1, 2, 4, 5, 6, s. 107 (2), O. 22, r. 11 (=ss. 32, 33, 50 (d), 582, Civ. Pro. Code, 1882)—Contract—Specific performance—Power to add parties—Plaint amendment of—Practice—Court of first instance—Appellate Court—Specific Relief Act, s. 27 (b).*—Where a claim is for the specific performance of a contract for the sale of land, s. 27 (*b*) of the Specific Relief Act makes it clear that such claim might be enforced not only against the vendor, but under certain circumstances against the second or subsequent purchaser also. It is open to a Court to make the subsequent purchaser a party to the suit under s. 32, Civ. Pro. Code, upon which under ss. 33 and 50 (*d*), any necessary amendment of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the plaint in consequence of his being added would be obligatory. The general rule as to parties is that all persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that questions raised in it shall not be raised again between the parties to the suit, or any of them, and third parties. (5 M. 52, *F.*) An appellate Court has power under ss. 582 and 32 of the Code, to order that a party shall be added to a suit. (10 B. 227, *F.*) When an appellate Court is of opinion that a person not a party to the suit should be made a party, the proper course is to remand the case to the Court of first instance and to direct that Court to bring on the particular person as a defendant or as a plaintiff (if he consents), give him time to file his written statement and opportunity to produce evidence, and try the issues raised between him and the opposite side. MAUNG TUN WA v. MAUNG THA KADO, **1 L.B.R. 252.** (18 A. 332, *F.*)

(2480)—*O. I, rr. 8 (2), 10 (2), (3), (5) and 11, 13, (=ss. 32, 34, Civ. Pro. Code, 1882)—Parties made under s. 32—No objection by the plaintiff—Waiver — Ex proprietary tenancy—Extinguishment—Proprietary title—Appeal to the District Judge.*—Certain persons were made parties to a suit under s. 32, Civ. Pro. Code, 1882, without any objection from the plaintiff. *Held* that the plaintiff must be deemed to have waived that objection and that he could not be allowed to make it a ground of objection in the second appeal. In a suit for ejectment in the Revenue Court, some of the defendants raised a question of proprietary title: *Held*, that the appeal lay to the District Judge. One R mortgaged his *zemindari* rights on the 1st April, 1896, and relinquished his rights in the *sir* on the 28th of April, 1896. R died on the 4th of November, 1902, R was, moreover, not in possession of the holding between 1896 and 1902. *Held*, that under these circumstances R's rights as ex-proprietary tenant must be deemed to have been extinguished in his life-time. MUSSAMMAT KAULA DEVI v. CHAJJU, **2 Ind. Cas 848.** (21 A. 204; A.W.N. 1904, 231, *R.*)

(2480-*a*)—O. I, rr. 8, 10 (2), (3), (5), 11, O. 1, r. 13—Suit against benamidar—Real owner made party—Nature of suit not changed—Objection as to non-joinder after the first hearing—Earliest opportunity—Waiver—*See* PRE-EMPTION—MISCELLANEOUS, 4 Ind. Cas. 488.

(2481)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11; O. 2, r. 2, s. 47 (=ss. 32, 43, 244, Civ. Pro. Code, 1882)—Parties*—When the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors from whom he can claim a discharge ought to be parties to the suit, in order that the decree passed therein may effectually discharge him as against all. But where the plaintiff describes himself as managing co-parcener and representative of the joint family, the omission to make all the members parties is only a formal error. (*R.*, 2 L.B.R. 246, 23 P.W.R. 1907 = 43 P.L.R. 1907, 69 P.R. 1906 = 118 P.L.R. 1906.) To enforce the liability of ancestral property in the hands of sons to satisfy their father's debt, the holder of a money-decree must have recourse to a separate suit, and when such suit is brought against the sons, they cannot plead that it is not maintainable by reason of the previous suit against their father, as the causes of action in the two suits are different. RAMAYYA v. VENKATARATNAM. **17 M. 122 = 4 M.L.J. 52.** [*Cons.*, 23 M. 292, F.B.]

(2481-*a*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. 2, rr. 3, 6—*See* JOINDER OF PARTIES, 8 B. 616.

(2482)—*O. I, rr. 8 (2) 10 (2), (3), (5), 11, O. 2, rr. 3, 6, 7 (=Civ. Pro. Code, 1882, ss. 32, 45, 46)—Court finding no cause of action against one defendant—Procedure.*—Where a Court, after issues had been framed, finds that the plaintiff has no cause of action against one of several defendants, it cannot dismiss the suit as against such defendant without trial. The powers given by ss. 32 and 45 could be exercised only before the first hearing, and the Court cannot therefore strike off a party or separate the causes of action and try one of them. The defendant could, however, prefer an application under s. 46 of the Civ. Pro. Code. SINGA REDDI OBALA REDDI v. MADAVA RAU, **20 M. 360.**

(2482-*a*)—O. 1, rr. 8 (2), 10 (2), (3), (5), 11, O. 22, r. 3 (1) and s. 364 of 1882—*See* LIMITATION—QUESTION OF LIMITATION, 21 C. 642.

(2483)—*O. I, rr. 8 (2), 10 (2) (3), (5), 11, O. 22, r. 4 (=Civ. Pro Code, 1882, ss. 32, 368)—Application for substitution of executors in place of heirs originally substituted—Delay—Bona fides.*—Where an applicant obtained substitution of the heirs of a defendant under s. 368, Civ. Pro. Code, without knowing that probate of the will of the said deceased had been granted, and subsequently after coming to know of it applied, more than six months after the death of the defendant, to have the names of the said heirs struck out and that of the executor substituted, *held*, that the application was one under s. 32, Civ. Pro. Code and that even if it were under s. 368, Civ. Pro. Code, it was not barred, as the applicant had throughout been actuated by a *bona fide* desire to effect substitution of the proper legal representatives and had shown sufficient cause for the delay. SYED HOSSEIN ALI v. ABDUR RAHIM, 7 C.W.N. 529.

(2485-*a*)—O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. 22, rr. 4, 10—*See* LIMITATION ACT, 1908, Arts. 171, 172, A.W.N. 1890, 21.

(2484)—*O. I, rr. 8 (2), 10 (2), (3), (5) and 11, O. 22, r. 10 (=Civ. Pro. Code, 1882, ss. 32 and 372)—Parties, joinder of—Assignment pending*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

suit, application to make assignees parties in case of—Auction-purchasers as parties in mortgage suit—Revision—Civ. Pro. Code, s. 622.— The plaintiff held a first mortgage on the property of the defendant. He sued the defendant for possession of the mortgaged property under a condition in the mortgage-deed. After the institution of his suit, the rights and interests of the defendant were put up to sale in execution of the decree obtained upon mortgages of later date than the mortgage in favour of the plaintiff. The plaintiff thereupon applied to the Court praying that the purchasers of the rights and interests of the defendant should be made parties to the suit. In his application the plaintiff referred only to s. 372 of the Code of Civil Procedure, but, after notice had been issued and all parties were before the Court, the plaintiff drew the attention of the Court to s. 32 also. The Subordinate Judge held that s. 372 did not cover the case of auction-purchasers and on that ground he rejected the application without considering it on the merits. The plaintiff applied to the Court of the Judicial Commissioner for revision of the Subordinate Judge's order. *Held*, that s. 372 of the Civ. Pro. Code covered the plaintiff's case and that the auction-purchasers should be added as parties. *Held*, further, that, inasmuch as the Subordinate Judge failed to exercise the jurisdiction which s. 372, Civ. Pro. Code, gave him in not dealing with the plaintiff's application on its merits and to consider whether that application should be granted under s. 32, Civ. Pro. Code, the Judicial Commissioner had power to interfere under s. 622, Civ. Pro. Code. SADHU SAH v. HAMID HUSAIN KHAN, **5 O.C. 91.** (S.C. 302, *F.*) [*R.*, 13 O.C. 109.]

(2485)—*O. 1, rr. 8 (2), 10 (2), (3), (5), 11, O. 22, r. 10, and s. 141 (=ss. 31, 371, 647, Civ. Pro. Code, 1882)—Execution appeal—Auction-purchaser, after institution of appeal, arrayed as respondent.*— The terms of s. 32 are very wide and empower the Court, at any time, either upon or without application, to order that the name of any person, whose presence before the Court may be necessary, be added in order to enable it effectually and completely to adjudicate upon and settle all the questions involved. Where a question arose in the execution department as to the nature of the property sought to be sold by the decree-holder, and after the institution of an appeal in the High Court; the property was sold by the execution Courts *Held*, that the auction-purchaser should be allowed to defend his interests by his name being added as a party in the array of respondents to the appeal in the High Court. AITMAD ALI KHAN v. THE ALLAHABAD BANK, LTD., **2 A L J. 516.**

(2486)—*O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. 31, r. 2 (=ss. 32, 438, Civ. Pro. Code, 1882)—Minor, suit against, for rent—Will—Executors, if all, necessary parties—Local limits of the jurisdiction of the Court, residing within*—Onus of proof—*Suit, if maintainable.*—Under s. 438 of the Code, where there are several executors, they must all be made parties, subject to the proviso, that an executor, living beyond the local limits of the jurisdiction of the Court need not be made a party. If a defendant insists than an executor, is a necessary, party, it is for him to show that he, the executor, lives within the local limits of the jurisdiction of the Court in which the suit is brought. KUMAR SARADINDU ROY v. DHAIRENDRA KANT ROY CHOWDHURY, **2 C.L J. 484.**

——O. 1, r. 9=(1882, s 31, 1877, s. 31.)

See MIS JOINDER OF PARTIES.

See NON-JOINDER OF PARTIES.

See PARTIES TO SUIT.

(2487)—*O. 1, r. 9 (=s. 31, Civ. Pro. Code, 1882)—Misjoinder—Cause of action.*—A Mahomedan widow and her daughter instituted a suit against her husband's heirs, for their shares in the husband's property, the widow alleging that certain conveyance and release which she was induced to execute under a false representation were invalid ; and the daughter relying on this and on the further allegation that the widow had no power in any case to execute the realease so far as the daughter's share was concerned. The defendants objected that the suit was bad for misjoinder and multifariousness : *Held*, that the suit was properly framed, as in the circumstances the two causes of action might properly be brought in the same suit. AMIRBIBI v. ABDUL, **3 Bom. L.R. 658.**

(2488)—*O. 1 r. 9 (=s. 31 Civ. Pro. Code, 1882—Non joinder—Duty of appellate Court——Punjab Land Revenue Act, 1871.*—A plaintiff sued eleven defendants, but the first Court impleaded some more ; the plaintiff on appeal again impleaded only those eleven defendants as respondents : *held* that the duty of the District Judge under s. 31, Civ. Pro. Code, was not to reject the appeal on that ground, but to decide it as between the impleaded parties only, or to direct the other defendants to be made respondents, under s. 559, Civ. Pro. Code. O. 41, r. 20) ; *held* also, that the suit filed when the Punjab Land Revenue Act, 1871 was in force was, under that Act cognizable by Civil Courts. ALI MIR v. GULAB DIN, **8 P.R. 1892.**

(2488-a)—O. 1, r. 9—*See* ACT XX OF 1863, 14 M. 103.

(2488-b)—O. 1, r. 9—*See* CO-SHARERS—SUIT BY CO-SHARERS, A.W.N. 1888, 156.

(2488-c)—O. 1, r. 9—*See* JOINDER OF PARTIES, 217 P.L.R. 1910=8 Ind. Cas. 1047.

(2488-d)—O. 1, r. 9—Misjoinder of causes of action, effect of—Whether decree can be reversed on that ground—*See* MISJOINDER OF CAUSE OF ACTION. 7 M.L.T. 364=5 Ind. Cas. 466.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2488-*d*-1)—O. 1, r. 9—*See* NOS. 467, 2404-*a*, 2405, 2405 *a*, 2406, 2407, 2408, 2419, 2424, 2425, 2431-*a*, *supra*.

(2488 *e*)—O. 1, r. 9, s. 99—*See* MISJOINDER OF CAUSES OF ACTION, 24 P.R. 1899.

(2489)—*O. 1, rr. 9, 8 (2) 10 (2), (3), (5), 11 (=ss. 31, 32, Civ Pro. Code, 1882)—Absence of cause of action—Right of suit by pers n having no right to sue.*—It is the duty of the Court of first instance to look carefully into preliminary objections and to see that useless litigation is promptly stopped on the threshold. It is obviously useless to go on with the case, when the plaintiffs have themselves no cause of action at all and the best way is for a fresh suit to be brought by the proper parties. MAUNG MYO v. MI MYIT SHU. **U.B.R. 1892—1896, Vol. 2, 244.**

(2490)—*O. 1, r. 9, O. 2, rr. 3, 6 (=ss. 31, 45, Civ Pro. Code*, 1882)—*Cause of action meaning of—Misjoinder.*—The Legislature in using the term "cause of action" has used it in its usual sense in the English Law, *viz.*, every fact which it should be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. In the suit in this case, the plaintiffs were three in number and they claimed to be declared sharers of one-half and one of the defendants a sharer in the other half of the property set forth in the plaint list. Plaintiffs Nos. 1 and 2 claimed title through the deceased owner, and it was set forth in the plaint that they had sold one half of their half share to plaintiff No. 3 who had also, on that account, joined in the suit. On behalf of the defendants it was contended that the suit was bad for misjoinder since the cause of action of the plaintiffs Nos. 1 and 2 was distinct and separate from the cause of action of plaintiff No. 3; and that, although the plaintiffs alleged a wrongful withholding of possession from them jointly, and they were mutually interested in defeating the defendants in the suit, the first two plaintiffs on the one hand and the third plaintiff on the other, had not, within the meaning of s. 45 of the Civ. Pro. Code, any cause of action, at the date of the suit, in which they were jointly interested. It was also pleaded that the suit was bad as contravening the provision in the second paragraph of s. 31 of the Code. The above pleas of the defendant were upheld on second appeal and the High Court held that the cause of action of the third plaintiff was distinct from the cause of action of the other two, that they were not jointly interested in the cause of action set forth in the plaint, that there was therefore misjoinder, and further that the three plaintiffs were not entitled jointly to bring or maintain one suit in respect of their separate causes of action. SALIMA BIBI v. SHEIKH MUHAMMAD, **18 A, 131=A.W.N.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

1896, 2. (W. R. 1864, 81; 2 W.R. 219. N.W. P. 1868, 242, 15 I. A. 156, 16 A. 165, 6 B. 266, 8. M. 361, 4 A 261. *R.* [*Not F.*, 2 O. C. 149, 33 C. 367=10 C.W.N. 508; *F.*, 18 A. 219, 2 C.L.J. 602; *R.*, 18 A. 396, 403, 432, 3 O. C. 176, 215, 13 C.P.L.R. 130, 23 A. 167, 27 M. 80, 38 P.R. 1903=87 P.L.R. 1903.]

(2491)—*O. 1, r. 9, O. 2, rr. 3, 6 (=ss. 31 and 45 Civ. Pro. Code*, 1882)—*Misjoinder of causes of action.*—Certain Jats sued for a declaration that the land in suit was their property, alleging that, at the settlement, the defendants had been wrongly entered as proprietors. During the pendency of the suit, certain butchers stating themselves to be proprietors of a part of the land in suit applied to be made co-plaintiffs. A joint application to the same effect was subsequently made by the original plaintiffs and the butchers, in which it was stated that they owned specified portions of the land. Objection was taken by the defendants on the ground of misjoinder but overruled, and the suit was eventually decreed. On appeal the divisional Judge dismissed the suit as bad for misjoinder of parties and causes of action. *Held*, that the order of dismissal was wrong, as the rights of jats and the butchers were not antogonistic, their causes of action were not distinct within the meaning of s. 31 of the Civ. Pro. Code, and no inconvenience was caused to defendants by their joinder, nor prejudice to their defence. ALLAH BAKSH v. SADIA ALI, **87 P.L.R. 1903=38 P.R. 1903.**

(2492)—*O. 1, r, 9, O. 2 rr. 4, 5 (=ss. 31, 44, Civ. Pro Code*, 1882)—*Suit by transferee from heir of deceased Muhammadan against another heir and transferee from such heir—No mis-joinder of defendants and causes of action—Joinder of claims to moveable and to immoveable property—Leave of Court.*—Where the plaintiff who had purchased a portion of the inheritance of a deceased Muhammadan from two of his heirs by two separate sale-deeds of different dates, sued for recovery of the shares of his vendors, impleading as defendants another heir of the deceased and certain transferees from him, who kept him out of possession, *held* that there was no misjoinder of defendants or causes of action. (11 A. 33, *F.* [*R.*, 29 A. 267=A. W.N. 1907, 36=4 A L J. 121, 30 A. 560=A. W N. 1908, 235=5 A.L J. 647=4 M.L.T. 392] With reference to the objection in the case mentioned in para (1), that the claim included both moveable and immoveable property, and that the leave of the Court for the joinder of the two claims had not been obtained, *held* that s 44, Civ. Pro. Code, did not apply to such a case. MAZHAR ALI KHAN v. SAJJAD HUSAIN KHAN, **24 A. 358=A.W.N. 1902, 85.** (10 M. 375, *R.*

(2492-*a*)—O. 1, r. 9, O. 6, rr. 17, 10, O. 7, r. 11—*See* JOINDER OF PARTIES, 14 O. 435.

(2492-*b*)—*O 1, r. 9. O 34, r. 1—Some members of a Hindu family made defendants—Whether trial can proceed—Non-joinder of some*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*Hindu Law—Interest of all members inseparable—Limitation.—Per* Karamat Husain, J. (Chamier, J., *dubitante*). In an action for sale upon a mortgage of joint family property, when some only of the members of the joint family are made defendants their rights and interests in the joint family property are neither defined nor separable from the rights and interests of those who are not before the Court. The Court, therefore, cannot proceed to deal, under O. 1, r. 9, Civ. Pro. Code, with the matter in controversy, so far as regards the rights and interests of the parties actually before it. Certain property was mortgaged to the plaintiff's father. Portions of the property were subsequently sold and a portion was purchased by one B. In a suit for sale, one of the minors in B's family was not made a defendant. Objection as to non-joinder was taken at the earliest possible opportunity, but it was not brought to the notice of the Court till after the period of limitation for bringing a suit against the minor had expired. *Held*, that the minor could not be impleaded subsequently, as the suit against him was barred by limitation. (7 A.L.J. 852, 7 A.L.J. 945, 28 B. 11, 33 C. 1079, *R.*) *Semble* (*Per* Chamier, J.). Had the members who are parties taken the objection at a later stage, the Court, on becoming aware of the existence of the minor, might have made a decree for the sale of the undivided interests of those members for the recovery of the whole debt, and left the purchaser at auction to work out his rights by partition, as is done where the undivided interest of a member of a joint family is attached and sold in execution of a money decree. GENDAN LAL v. BABU RAM, **9 A.L.J. 86.** (33 C. 613, *R.*)

——**O. 1, r. 10. para (1) (=1882 s. 27=1877, s 27, para (2) (=1882, s. 32=1877, s. 32); and para (4) (=1882, s. 33 1877, s. 33).**

See PARTIES TO SUIT.

(2493)—*O. 1, r. 10 (1)* (=*s. 27 Civ. Pro. Code*, 1882)—*Suit instituted against wrong person as defendant*—S. 27, Civ. Pro. Code, applies only to cases in which a suit has been instituted in the name of a wrong plaintiff, and not to cases in which a suit has been instituted against a wrong person as defendant. TUTIKA BASAVARAJU v. PARREY AND CO., **27 M. 315.**

(2494)—*O. 1, r. 10, (1)* (=*s. 27, Civ. Pro. Code*, 1882)—*No application to case of appeal filed in name of wrong person.*—S. 27 of the Civ. Pro. Code, does not apply to an appeal filed in the name of a wrong person. DWARKA NATH BISWAS v. DEBENDRA NATH TAGORE, **4 C.W.N. 58.**

(2495)—*O. 1, r. 10 (1)* (=*s 27, Civ. Pro. Code*, 1882)—*Suit by plaintiff having no right to sue—Substitution of right person.*—The words of the section "if the suit is brought in the name of a wrong plaintiff, cannot be construed as excluding altogether persons who may institute the suit without any right to do so. Where a suit is instituted by a person having no right to institute it, in the *bona fide* belief that he is entitled to do so, the Court has power under s. 27 to substitute the right person as plaintiff. KRISHNA BOI v. THE COLLECTOR AND GOVERNMENT AGENT, TANJORE, **30 M. 419=2 M.L.T. 447.** (6 C. 370, *R.*)

(2496)—*O. 1, r. 10 (1)* (=*s. 27 Civ. Pro. Code*, 1877)—The power under s. 27 ought to be exercised before the first hearing—*Per* Pontifex, J. CHUNDER COOMAR BOY v. GOCOOL CHUNDER BHUTTACHARJEE, **6 C. 370.** [*R.*, 30 M. 419=2 M.L.T. 447.]

(2497)—*O. 1, r. 10 (1)* (=*s. 27 Civ. Pro. Code*, 1882)—*Suit by agent in his own name—Dismissal of suit—Right of principal to appeal—Substitution of principal's name as plaintiff—s. 230, Contract Act.*—Where a suit was instituted by an agent in his own name, and without disclosing that he was merely an agent, and the suit was dismissed on the ground that the plaintiff being a mere agent could not sue in his own name, it was held, in an appeal by the principal: That, as the suit was commenced in the name of a wrong person through a *bona fide* mistake and as it was necessary for the determination of the real matter in dispute that the principal's name should be substituted for that of the agent, such substitution might have been made under s. 27, Civ. Pro. Code, that action under s. 27, Civ. Pro. Code, might have been taken in this case, on the inititative of the principal, or of the agent, or of the Court itself and, that the case was to be remanded, with the substitution of the name of the principal as plaintiff, for the determination of the case on the merits. A.L.S.P.S. SOOBRAMONION CHETTY v. MYAT THA U, **4 L.B.R. 98.** (1 L.B.R. 191, 350, *D.*, 2 N.W.P. 179, 21 B. 205, 20 M. 467, 12 W.R. 117, *R.*)

(2498)—*O. 1, r. 10 (1)* (=*s. 27 Civ. Pro. Code*, 1882)—*Substitution of name of another person as plaintiff—Application by plaintiff disclaiming interest in subject-matter of suit.*—The plaintiff brought a suit for pre-emption against the defendant in respect of an under-proprietary tenure, on the ground that she was the superior-proprietor. During the trial of the suit, she presented to the Court an application in which it was stated that she was mistaken in believing she was the superior proprietor, and she prayed that, under the provisions of s. 27 of the Code of Civil Procedure, the name of her son, who was the superior proprietor, might be substituted for her own in the plaint. Her son did not appear in the case and there was no evidence to show that he consented to the substitution of his name as plaintiff. The Court rejected the application and dismissed the suit. *Held*, that the name of the plaintiff's son could not be substituted of her own under s. 27, Civ. Pro. Code, and that her suit was rightly dismissed. SHEORAJ KUAR v. HARI KISHAN, **3 O.C. 347.** [*Rel.*, 7 O.C. 193.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2499)—*O. 1, r. 10 (1)—Plaint—Amendment—Substitution of proper plaintiff—Bar of limitation—Computation—Limitation Act (IX of 1908), s. 22.*—Suit on a promissory note executed in favour of M, by R and V as plaintiffs through their mother and guardian, M. In second appeal it was found that the suit could not be maintained unless M was the plaintiff. An application was then made to substitue M as plaintiff. *Held*, that M can be made a plaintiff on such application under O. 1, r. 10 (1), Civ. Pro. Code, 1908. (30 M. 419, *R.*) The utmost that could be done would be to date the amendment as of the date on which the Court of first instance ought to have made it, and that could not be earlier than the date of application. 20 M. 467, *R*; The effect of s. 22 of the Limitation Act, 1908, is that, in a suit of the kind, the mistake to be corrected under O. 1, r. 10 (1) must be corrected before the limitation period of the suit expires. SUBBARAYA IYER AND OTHERS v. VAITHINATHA IYER AND ANOTHER, **7 M.L.T. 185 = 33 M. 115 = 5 Ind. Cas. 931.** (21 B. 580. 14 C. 400, *R.*)

(2500)—*O. 1, r. 10—Partition-decree-execution—Death of plaintiff—Abatement of suit—Application to set aside abatement—Limitation Act (IX of 1908) Art. 171—Court—Inherent Powers—All parties to be before Court in partition-suit—Addition of parties.*—In a partition suit, a decree was passed on the 5th April, 1891 on a compromise. One Revchand who was a defendant in the suit died on 18th October, 1893, leaving him surviving a minor son named Lakhmichand who attained majority on the 7th February, 1907. He made an application on the 16th April, 1910 for bringing him on the record and for issuing a commission to effect a partition according to the rights declared in the partition-decree: *Held*, that the suit abated as soon as the Civ. Pro. Code of 1908 came into force, so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, was barred by art. 171 of the Limitation Act of 1908. That, in a partition suit, all the parties should be before the Court; and there was nothing in the Civ. Pro. Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice, and under O. 1, r. 10 the Court might, at any stage of the proceedings, order that the name of any person, whose presence might be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. LAKIMICHAND REWACHAND v. KACHUBHAI GULABCHAND, **13 Bom. L.R. 517.**

(2501)—*O. 1, r. 10 (1) (=s. 27, Civ. Pro. Code, 1882)—Suit by managing members of a joint Hindu family firm—Non-joinder of other members—Refusal of application to be joined as plaintiffs, whether justifiable—Limitation.*—In a suit by the managing members of a joint Hindu family firm, for a debt due to the firm, the defendants contented that the suit was not maintainable, as the other members of the family, several of them minors, were not joined as plaintiffs. The plaintiffs at once admitted the fact, and the other members of the family applied to be joined as plaintiffs. The lower Court refused the application. *Held*, by the Chief Court on appeal, that the omission of the names of the other members of the family was due to a *bona fide* mistake, in the belief, that such addition was not necessary, and that, under s. 27 of the Civ. Pro. Code, the remaining members of the family should be added as plaintiffs. (17 B. 413, *F.*; 28 B. 11, 15 B. 397, 7 A. 284, 57 P.R. 1905, 29 P.R. 1896, 69 P.R. 1906, 79 P.R. 1906, 86 P.R. 1891, 17 C. 160, 6 C. 815, 33 C. 657, *R.*) Where persons are added as plaintiffs, under s. 27 of the Code, the period of limitation counts from the date when the suit was originally instituted. BEHARI LALL v. RAM CHAND, (**49 P.R. 1907**. (15 C. 400, 17 B. 413, *R.*)

(2501-*a*)—O. I, r. 10 (1), whether covers the case of the non-joinder of a necessary party—*See* PARTNERSHIP—GENERAL, **1 S.L.R. 191.**

(2501-*b*)—O I, r. 10—*See* NOS. 298-*a* 302, 1576, 1691, 1685-*a*, 1902, 1935, 2338-*a*, 2400, 2406, 2410-*c*, 2433 *d*, 2433-*e*, 2434, 2435, 2436, 2461-*a*, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2475-*a* TO *k*, 2476, 2477, 2477-*a* AND *b*, 2478, 2479, 2480, 2480 *a*, 2481, 2481-*a*, 2482, 2482-*a*, 2483, 2483-*a* 2484, 2485, 2486, 2489, *supra*, AND NOS. 3434, 4038, 5140, *infra*.

(2502)—*O. 1, rr. 10 (1), 8, (2), 10 (2), (3); (5) and 11 (=ss. 27, 32 Civ. Pro. Code, 1882)—Suit instituted by wrong person—Addition of plaintiff—Addition of person as party who ought to have been joined.*—Where the plaintiff who instituted the suit had no right to sue, that right belonging to her children, and the Court allowed the addition of the children as plaintiffs, and a consequential amendment in the prayer of the plaint, and proceeded with the suit, *held*, that, in the circumstances, this course was equitable, and not at variance with any provision of law; and that, if there was any error, it was covered by s. 578 of the Code of Civil Procedure. (21 C. 866, 6 C.370, 24 C. 540, 20 A. 90, *R.*) Where of the five persons entitled to sue the appellant (defendant) in the same right for their share in the deceased's estate, only two were plaintiffs in the suit, *held*, after discussion of the effect of s. 32 of the Code of Civil Procedure, as interpreted by judicial authority, that the other three persons should have been added as parties; and that the case should be remanded for the addition of parties and re-trial on the merits. MA GYI v. MA YEIK, **2 L.B.R. 245.** (5 M. 32, 7 W.R. 202, 7 W.R. 315, 9 W.R. 158, 10 W.R. 86, 10 W.R. 368, 11 W.R. 361, 16 W.R. 19, 12 W.R. 247,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

12 W.R. 334, 13 W.R. 78, 13 W.R. 362, 15 W. R. 97, 13 W.R. 443, 2 A. 738, 17 M. 122, 9 A. 447, 23 A. 167, 9 W.R. 1, P.C., 9, *R.*) [*R.*, 2 L.B.R. 277.]

(2502-*a*)—O. 1, r. 10 (1), O. 1, rr. 8 (2), 10 (2), (3), (5), 11, O. 6, r. 17 and O. 7, r. 11 —*See* CONTRACT—MISCELLANEOUS, 28 P.L. R. 1905=49 *P.*R. 1905.

(2503)—*O. I, r. 10 (1), O. 6, r. 15 (2), (3) (= ss. 27 and 52, Civ. Pro. Code. 1882)—Suit brought by wrong person by mistake—Amendment—Suit of inconsistent nature, test of—Grant of letters of administration by suppression of will not appointing executors, if void* ab initio—*Sale by Administrator suppressing will, when void—"Shall remain trustee,* i. e., *guardians and next friends," if implies appointment of executors.*—S. 27 of the Code is applicable to cases where, by *bona fide* mistake, whether of law or fact, actions have been brought in the name of a wrong person. (20 M. 467, *R.*) A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio* and a sale of a property of the deceased by the Administrator, who has obtained a grant of administration under such circumstances, to a purchaser, who was ignorant of the suppression of the will, is valid, even where the grant is revoked after the sale. The defence of purchase for valuable consideration without notice is available against a claim based on an equitable title, but not against one based on a legal title. The will, in this case, contained the clause "On my demise G" son of P, or any full brother of G, that shall be born in equal shares, shall become the owner of the share or shares left by me and, until the said G attain majority, P and B wife of P, shall remain trustees, *i e.*, guardians and next friends." *Held*—that there was neither an express nor implied appointment of executors under that clause. GOPAL DAS AGHARWALLAH v. BUDREE DAS SUREKA, **10 C.W. N. 682=38 C. 637.** (20 M. 467, *F.*) [*R.*, 149 P.R, 1907, 1 S L.R. Civ. 191.]

(2504) *O. 1, r. 10 (1) O. 22, r. 4 (=ss. 27 368 of 1882, Civ. Pro, Code.)—Death of plaintiff-respondent pending appeal—Addition or substitution of name as plaintiff in a suit brought by one not entitled to bring it—Right of defendant to dismissal of suit brought by unauthorised person — Procedure.*—S., alleging himself to be the heir of B who died in December 1898, brought a suit for arrears of rent against H in respect of a certain land which formed part of the estate of B. H denied S's right to the estate of B and stated that a suit for the whole estate had been brought against S by the appellant. The Court of first instance decreed S's claim in part. At the time when the decree was passed, the appellant's suit was pending. H appealed to the District Judge and S filed objections under s. 561, Civ. Pro. Code. At this stage, the appellant's suit against S was decreed. The appellant then applied to have her name entered on the record of the lower appellate Court in place of that of S in the suit for arrears of rent. The District Judge held that the appellant was entitled to have her name added to, not substituted for, that of S as a respondent. *Held*, that the appellant had no right to thrust herself as plaintiff into the suit for arrears of rent which was brought by a person who had no right to bring it. A defendant has a right to the dismissal of a suit brought against him by anauthorised person and the defect cannot be cured by the addition or substitution of the name of the person who might have brought the suit, unless the case comes within s, 27, Civ. Pro. Code, RANI RAGHUBANS KUAR v. HASHMAT ALI. **7 O.C. 78.** [*Rel.*, 7 O.C. 193.]

(2505)—*O. 1, r. 10, cl. 2 (=s. 32 Civ. Pro. Code, 1882)—Partition suit—Mitakshara law—Joint Hindu family—Members alleged to have separated—Whether necessary parties—Construction of s. 32—Interpretation—Meaning an effect of the words "all questions involved in the suit.*—Plaintiff sued for partition of joint family property under the Mitakshara. He did not make A, a member of the joint family, and his sons, defendants in the suit, on the allegation that A and his sons had separated from the family, taking their share. The defendants in the suit insisted that A and his sons should be impleaded in the suit. A and his sons stated that they had separated from the family and they were not necessary parties. The lower Court made them parties. An appeal was preferred against that order. *Held*, that it is a general rule, a rule, upon which s. 32, of the old Code, 1882, and O. 1, r, 10, of the new Code, 1908, is founded, that all persons interested ought to be made parties, so that the Court may be enabled to do complete justice, by deciding upon and settling the rights of all persons interested, and that there are some special features in a partition-suit, which make it obligatory that all persons, interested in it and likely to be affected by it, should appear in the case either as plaintiffs or defendants. The expression "all questions involved in the suit" found in O 1, r 10, cl. 2, Civ. Pro. Code, 1908 (=s. 32 of the old Code), would in a partition suit include not only the questions arising out of the plaint, but of the plaint considered along with the statement of the defence. S. 32 of the old Code, 1882, is taken from r. 11, O. 16 of the rules of the English Supreme Court, 1883. The Courts ought to construe the words of s. 32 as largely as they can, in order to carry out in an effective manner the object with which it was incorporated in our Code. AMRUT v. MUKUND **5 N.L.R. 152=4 Ind. Cas. 236.**

(2506)—*O. 1, r. 10 (4), O 2, rr. 2, 4, 5, (=ss 33, 43, 44, Civ. Pro. Code, 1882)—Multifariousness—Omission to claim all reliefs plaintiff is entitled to—Joinder of claim to immoveable property along with claim for moveables.*—S. 33, Civ. Pro. Code, does not

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contemplate that, upon the addition of defendants to a suit, a cause of action different from that upon which the suit was founded, which may have accrued to the plaintiff against the added defendants, should be added to the claim. All that the section requires is that, when a defendant is added, the plaint should be amended in such a manner as may be necessary, and an amended copy of the summons served on the defendants. The amendment there referred to is such amendment as is necessitated by the addition of a defendant, and not such an amendment as would add to or alter the nature of the suit as originally brought. In the present case one R.D. brought a suit against two persons, M and G, claiming to recover certain cash, and jewels belonging to one Sahai, deceased. To that suit B.R. and B who had previously brought a suit for certain immoveable property belonging to the same estate, applied to be, and were added as defendants. After this H.L., the son of R D., brought a suit claiming possession of a house which originally belonged to Sahai, and which was alleged to be then in the possession of B.R. and B. *Held* that it was not necessary for R.D. under s. 33, Civ. Pro. Code, to amend his plaint when B R and B were added as defendants, so as to include the present claim by his son for the house; and that the present claim was not barred by reason of s. 43 of the Code. [*D.*, 5 P.W.R. 1907=28 P.L.R. 1907.] *Held*, further, in the case mentioned in para 1 (*d*), *supra* that in the original suit of R.D. he could not have added a claim for possession of immoveable property without violating the provisions of s. 44, Civ. Pro. Code, and that it was an additional reason for the maintenance of the subsequent suit by H.L. HINGU LAL v. BALDEO RAM, **24 A. 553=A.W.N. 1902, 170.** [*D.*, 5 P.W.R. 1907 =28 P.L.R. 1907.]

(2506-*a*)...O. 1, r. 11—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 3 P.R. 1881.

(2506-*b*)—O. 1, r. 11—*See* NOS. 302, 1681, 1902, 2400, 2406, 2433-*e*, 2434, 2435, 2436, 2461-*a*, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2475-*a* to *k*, 2476, 2477, 2477-*a* & *b*, 2478, 2479, 2480, 2480-*a*, 2481, 2481-*a*, 2482, 2482-*a*, 2483, 2483-*a*, 2484, 2485, 2486, 2489, 2502, 2502-*a*, *supra*, AND NOS. 3434, 4038, 5140, *infra*.

——O. I, r. 12 (=1882, s. 35=1877, s. 35.)

(2506-*c*)—O. 1, r. 12—*See* NO. 1585, *supra*.

——O. I, r. 13 (=1882, s. 34=1877, s. 34.)

See MISJOINDER OF PARTIES.

See NON-JOINDER OF PARTIES.

See PARTIES TO SUIT.

(2507)—*O. 1, r. 13 (=s. 34, Civ. Pro. Code, 1882)—Objection as to non-joinder of parties, time for the taking of—The objection cannot be raised for the first time in appeal.*—Plaintiff,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of and 1861 VIII of 1859)—*continued.*

describing himself as a *lambardar* of a village, sued to eject the defendants from certain lands, upon which he alleged them to have trespassed. No objection was taken to the suit in the first Court on the ground that the plaintiff was not the only *Malguzar*, and the only main issue, whether the alleged tenancy existed, was decided in plaintiff's favour. On appeal, the defendant contended that the suit was not maintainable, inasmuch as the plaintiff did not purport to sue as representative of the entire proprietary body; and the District Judge accepted the contention as sound. On second appeal, it was urged that the objection for want of parties must be deemed to have been waived by the defendant, the same not having been raised at the earliest possible opportunity, as required by s. 34 of the Code; also that the entire body of the landlords need not be represented on the record, where one of them seeks to eject an alleged trespasser. With regard to the first contention, *held*, that the objection for want of parties must be taken in all cases before the first hearing; otherwise it must be deemed to have been waived by the defendant, (14 M. 498, 7 C. 594, *F.*) As to the second point, *held*, that one member of a proprietary body is, as against every person but his co-proprietors, entitled to the possession of every part of the common lands. In such a case, one of the members suing a mere tespasser without joining the others as plaintiffs should be given at least a decree for joint possession with the defendants to the extent of the plaintiff's share in the property even when the defendant had taken the objection as to non-joinder of the other members in proper time. DARYAO SHAH GOND v. TIRAN SHAH GOND, **2 N.L.R. 45.** (15 C. 47, 19 C. 541, *F.*) [*R.*, 4 N.L.R. 45.]

(2508)—*O. 1, r. 13 (=s 34, Civ. Pro. Code, 1882)—Non-joinder of parties—Waiver—Accounts—Liability of firm acting as managing agents of a Company.*—Where the defendant was sued as the surviving partner of a firm, who were managing agents of the plaintiffs, a registered company, for accounts and it was objected for the first time on appeal that there were other members existing of the defendant's firm, and the suit was bad for non-joinder of parties, *held*, that the objection as to non-joinder, not having been made at the proper time, must be deemed to have been waived under s. 34 of the Civ. Pro. Code. (156 P.R. 1889, F.B., *R.*) *Held* also, that the relationship between the parties was of a fiduciary nature and the defendant was liable to render accounts, and that it was no answer to the suit that the defendant had made over the account-books to the plaintiffs. J. ANDERSON v. THE DELHI COTTON MILLS COY., LIMITED, **155 P.L.R. 1903.** (14 C. 147, P.C., 7 C. 627, *F.*)

(2508-*a*)—O. 1, r. 13—*See* CONTRACT ACT, 1872, s. 45. 156 P.R. 1889, F.B.

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(2508-*b*)—O. 1, r. 13—*See* JOINDER OF PARTIES, 64 P.R. 1881.

(2508-*c*)—O. 1, r. 13—*See* JOINDER OF PARTIES, 7 Ind. Cas. 102.

(2508-*d*)—O. 1, r. 13—*See* PRINCIPAL AND AGENT—MISCELLANEOUS, 69 P.R. 1903.

(2508-*e*)—O. 1, r. 13—*See* NOS. 299-*a*, 471, 472, 2407, 2408, 2460, 2480, 2480-*a*, *supra*.

(2509)—*O. 1, r. 13, O. 21 r. 63, s. 99 (=ss. 34, 283, 578, Civ. Pro. Code, 1882)—Injunction to restrain decree-holders from executing rent-decrees against the plaintiff's properties—Defect of parties, objection not taken in the first Court—Waiver of objection—One of several co-parceners, if competent to maintain the action—Exclusive owner as member of joint* Mitakshara *family—Second appeal—Construction of document, when a proper ground.*—Under s. 34, Civ. Pro. Code, 1882, all objections for want of parties have to be taken at the earliest possible opportunity, and, in all cases, before the first hearing, any such objection not so taken is to be deemed to have been waived by the defendant; but this provision does not entitle the plaintiff to a measure of relief larger than the right he really possesses. If the plaintiff merely asks for a relief larger than the fact asserted by him would warrant, he would not necessarily be debarred altogether from any relief to which, on the facts proved, he might be entitled (10 M. 322, 14 M. 498, 26 B. 141, 8 Bom. L.R. 99, *R.*) A member of a *Mitakshara* joint family is, regard being had to his position as such in relation to any portion of the family property, entitled, as against a trespasser or a person who seeks wrongfully to seize the property in execution of a decree obtained against a stranger, to recover possession or to ask for a declaration that the properties are not liable to be sold in execution as the properties of the alleged judgment-debtor. Every member of Mitakshara family in the position of the plaintiff in the present suit, is interested in the whole of the property, subject to the rights of his co-parceners. If, therefore, a member finds that the property in which he is jointly interested is about to be seized in execution as the property of a stranger who has no title therein, he is entitled to maintain an action to prevent the impending mischief. If the decree-holder insists that the co-parceners of the plaintiff should be brought on the record and if the objection is taken in time, they may be added as party-defendant; but the plaintiff is clearly entitled to maintain the action and to obtain the necessary declaration. (6 W.R. 311, 19 W.R. 195, 22 W.R. 2, *R.* 12 W.R. 248, *D.*; 7 C.L.J. 251, *Expl.*) There is a well-known distinction between non-joinder of necessary or indispensable parties and non-joinder of proper but not indispensable parties, and where, as here, the parties omitted are necessary only for the purpose of protecting the defendant from

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further litigation, the Court may, in its discretion, disregard the objection, if not raised at the proper stage. Under s. 578 of the Code, the appellate Court is not entitled to reverse the decree of the lower Court, on the ground that the co-parceners of the plaintiff have not been joined on the record, unless the appellate Court is satisfied that that omission has affected the merits of the case or the jurisdiction of the Court. The Court must, in a case of this description, look to the essential justice of the case, and keep in view the substance and merits, rather than strict adherence to what turns out, as in this case, to be a matter of form (2 M.I.A. 353, 6 M.I.A. 393, 6 A. 57, *R.*) The misconstruction of a document is not necessrily a ground for second appeal, unless the document is one which is the foundation of the suit, being in the nature of a contract or document of title. The mere fact, that some portion of the evidence is in writing, and the Judge makes a miske as to the meaning of it, does not afford a ground for second appeal. DURSUN SINGH v. DURBIJOY SINGH, 9 C L.J. 623 = 1 Ind. Cas. 530. (19 W.R. 223, 4 C.L.J. 198, *R.*)

—— O. II, r. 1 (=1882, s. 42=1877, s. 42.)

(2510)—*O. 2, r. 1—Partition-suit — Mesne profits for period during which suit is pending.*—In applying the provisions of s. 7, Civ. Pro. Code, 1859, the first thing to be considered is whether the cause of action in the second suit is the same as the cause of action in the first. If the cause of action be the same, the second suit is barred in respect of any portion of the claim omitted from the first suit; but not otherwise. Accordingly, where the plaintiff sued as a member of an undivided Hindu family, and for a share of a particular portion of the family property, leaving the rest undivided, and his suit was rejected, as it had not been brought for his whole share, it was held that this suit was no bar to a second suit to have the whole property divided, as the causes of action in the two suits were entirely distinct. In a suit for partition of hereditary property, it is not necessary for the plaintiff to trace back his genealogy to the original grantee, and to prove that no other descendant of that grantee except himself and the defendants are in existence. It is sufficient for him to show that he and they are the only representatives of the person who last held the property. If others claim a share, it is for them to show that they have any rights which operate to restrict the plaintiff's *prima facie* right to treat such property of himself and the defendants. There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending however long that period may be. KABAJIBIN RANOJI ET AL v. BAPUJI BIN MADHAVRAV, 8 B.H.C.A.C. 205 [*F.*, 21 M. 153, 8 M.L.J. 92; *R.*, 14 B. 31, 25 B. 115.]

(2511)—*O. 2, r. 1 (=s. 42, Civ. Pro. Code, 1882)—Suit for rent—Policy of law.*—A suit for

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the rents of the years 1282 and 1283 would be barred by s. 42 of the Civ. Pro. Code, 1882, if, after they became due, the plaintiffs brought a suit for the rent of the year 1281, as they might have included in that suit a claim for the rents of 1282 and 1283. (8 C.L.R. 297, *F.*) The wise policy of the law in enacting s. 42 of the Civ. Pro. Code, 1882 is to prevent people harassing their debtors by bringing two or three suits against them where one suit would suffice. HAFIZUNNESSA KHATUN v. BHYRAB CHUNDER DAS, **13 C.L.R. 214.**

(2512)—*O. 2, r. 1 (=s. 42, Civ. Pro. Code, 1877)—Suit for rent—Declaration of title to rent.*—The plaintiffs, sons by the second wife, sued the defendant, a son by the first wife, for Rs. 96 odd as their share of the rents of certain houses which had belonged to their deceased father. The defendant pleaded that the father had gifted away the houses in his life-time to his mother and he was in possession on his mother's account. *Held* that, as the plaintiffs were not in possession of the house and had never realized the rents thereof, they could not obtain a decree for rent, unless their right of inheritance and possession of the property were decreed in their favour. ASHIK MUHAMMAD v. ALI MUHAMMAD, **A.W.N. 1882, 208.**

(2512-*a*)—O. 2, r. 1—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 85, 88, 1 O.C. 53.

(2512-*b*)—O. 2, r. 1—*See* NOS. 303, 304, 305, 306, 306-*a*, 952, *supra* AND NO. 2721-*e*, *infra*.

(2513)—*O. 2, rr. 1, 2 (=ss. 42, 43 Civ. Pro. Code, 1882)—Suit for enhanced rent—Subsequent suit at original rate.*—Plaintiffs should, under ss. 42 and 43 of the Civ. Pro. Code, bring their entire claim and every remedy enforceable in respect of that claim into Court at once and, if they fail to do that in any suit, they cannot afterwards avail themselves of any other remedy, on which they have not chosen to insist in the first suit. So that a plaintiff, after unsuccessfully suing for rent at an enhanced rate, will not be allowed to sue for the original rent for previous years. KUNNOCK CHUNDER MOOKERJEE v. GURU DASS BISWAS, **9 C. 919=12 C.L.R. 919.** [*Overruled*, 15 C. 145, F.B.; *R.*, 14 B. 31.]

(2513-*a*)—*O. 2, rr. 1, 2 (=ss. 42, 43, Civ. Pro. Code*, 1882).—Even though a person's title to two different properties rests on the same title-deed, and the causes of action, for suing for possession of them, arising from his ouster from them on two different occasions, may be available at the time of suit, he is not bound to join them in one suit. RIAYATULLAH KHAN v. NASIR KHAN, **6 A. 616=A.W.N. 1884, 185.** (13 W.R. 196, 20 W.R. 103, *R.*). [*R.*, 27 B. 379.]

(2513-*b*)—*O. 2, rr. 1, 2 (=ss. 42, 43, Civ. Pro. Code*, 1882)—*Objection raised in the Court of appeal—Cause of action for a suit for divorce*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—Cause of action for a suit for partition—Whether it is necessary to claim partition in the suit for a divorce—Buddhist Law—Husband's suit for divorce—Wife's denial of allegations of misconduct.—The appellant and the respondent were Burmese Buddhists and husband and wife. The appellant filed a suit against the respondent for dissolution of the marriage, on the ground that the respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the appellant, and prayed for a decree on that ground. The respondent filed her written statement denying the allegations as to her misconduct and asking that the suit be dismissed. Witnesses were summoned, but on the day fixed for hearing, the respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given for a decree "as prayed for." Afterwards the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The respondent contended that the divorce had been by consent and had not been granted by reason of her fault. The first Court decreed the suit. The respondent appealed and, some time after she filed her memorandum of appeal, raised for the first time the point that the present suit of the appellant was barred under the Code of Civil Procedure (Act XIV of 1882), ss. 42 and 43 as he had failed to ask for a partition of the joint property in the previous action for divorce. The Court of appeal dismissed the suit on that ground alone. *Held*, that the proceedings at law disclosed, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted, and that the divorce was granted on the ground of a matrimonial offence on the part of the wife: *Held*, also, that the objection founded upon the Code of Civil Procedure (Act XI of 1882), ss. 42 and 43, should have been treated as a preliminary point, and as no notice of it was given by the respondent in the present action either in her defence, or at the trial, or in the grounds of appeal as first delivered, she was too late to raise the point in the Court of Appeal, except upon terms which would have indemnified the appellant for the omission to raise it at the proper time. *Held*, further, that the cause of action for the divorce was the misconduct of the wife, but the cause of action for the suit for partition was the divorce of the wife founded on that misconduct, and that the present suit was not barred by ss. 42 and 43 of the Code of Civil Procedure. *Held, lastly*, that partition might no doubt be treated as relief consequential upon the divorce, and therefore dealt with in the same suit, but there was not necessarily any hardship on the defendant in severing the two matters, and, if the Court should be of opinion that a petitioner had unnecessarily severed his claim for a partition from his claim for a divorce, it might, of course,

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punish the plaintiff by the exercise of its discretion as to costs, but such a severance did not come within the mischief aimed at by ss. 42 and 43 of the Code of Civil Procedure, so as to bar the claim for partition which might be founded on the decree for divorce itself. MAUNG PE v. MA LON MA GALE, **8 A.L.J. 739, P.C.**

(2513-*c*)—*O. 2, rr. 1, 2 (=ss. 42, 43, Civ. Pro. Code*, 1882)—*Mesne profits.*—Mesne profits which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a subsequent suit, because the cause of action is the same. MAUG CHIT LE v. MAUNG PAN NYO, **U.B.R. 1904, 1st Qr. Civ. Pro. Code, 1.** (3 A. 660, 11 M. 151, 19 C. 615, 17 A. 583, 1 L.B.R. 13, *F*; 8 C. 593, 12 C. 482, *R.*) [*R. and Diss.*, U B.R. 1906, 3rd Qr.Civ.Pro. Code, 50; *R.*, U.B.R. 1909, Civ. Pro. Code, 21.]

(2513-*d*)—*O. 2, rr. 1, 2 (=ss. 42, 43, Civ. Pro. Code*, 1882)—*Dismissal of previous suit, when bar to subsequent suit.*—Plaintiff brought a suit against defendant to eject him as a trespasser from certain land. The suit was dismissed on the ground that the defendant held a charge on the land of Rs. 100 and that the plaintiff was aware of it. The plaintiff subsequently sued the defendant to recover the land from him on payment of the Rs. 100 charge that he held upon the land as decided in the former suit. *Held* that the second suit was barred by ss. 42, 43, Civ. Pro. Code, and that he was clearly barred from bringing the second suit by s. 43, Civ. Pro. Code, as it must be taken that he abandoned or relinquished his claim on the real cause of action when he brought the first suit on a false one; in other words, that there was only one cause of action and the plaintiff omitted to sue upon it, and substituted a false one in its place. MUTHU NARAYANA REDDI v. RAYALU REDDI, **6 M.L.J. 51.**

(2513-*e*)—O. 2, rr. 1 and 2—*See* BOM. ACT XVII OF 1879, s. 15-D, 20 B. 469.

(2513-*f*)—O. 2, rr. 1, 2—Suit for possession by mortgagee entitled to foreclosure also, maintainability of—*See* MORTGAGE—FORECLOSURE, 12 O.C. 21=1 Ind. Cas. 327.

(2513-*g*)—O. 2, rr. 1, 2—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 17 B. 562.

(2513-*h*)—O. 21 rr. 1, 2—*See* RES JUDICATA—MATTERS IN ISSUE, 108 P.R. 1882.

(2514)—*O. 2, rr. 1, 2, 4, 5 (=ss. 42, 43, 44 Civ. Pro. Code*, 1882)—*Suit for land—Omission to claim mesne profits accrued due before date of suit—Subsequent suit for those profits.*—The plaintiff, in the present suit, had filed a suit against the present defendants to recover possession of certain land. In that suit, he did not claim mesne profits accruing due up to the date thereof. In the present suit, he claimed the mesne profits due to him in respect of the land up to the date of the previous suit also. The question for decision was whether the present suit, so far it concerned the claim for mesne profits accruing before the date of the first suit, was barred by the provisions of s. 43. *Held*, "cause of action" means every fact which is material to be proved to entitle a plaintiff to succeed and every fact which the defendant would have a right to traverse. The cause of action in a claim to recover possession of immoveable property is identical with the cause of action in a claim for the mesne profits of that property. Recovery of possession and mesne profits constitute the whole of the claim, which a plaintiff is entitled to make in respect of the cause of action, and, in accordance with the provisions of s. 43, if he omits to sue in respect of a portion of the claim, he shall not afterwards sue in respect of the portion omitted. The words "cause of action" in Rule A of s. 44 are not used in their ordinary meaning and are simply equivalent to "claim." The obscurity of s. 44 is no reason for disregarding the plain rules given in s. 43. The question was answered in the affirmative. MA NYEIN v. MA KON, **3 L.B.R. 56.**

(2514-*a*)—O. 2, rr. 1, 3, O. 6, rr. 17, 10, O. 7, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, 25 C. 371=2 C.W.N. 18, 201.

—O. II, r. 2 (=1882, s. 43=1877, s. 43=1859, s. 7).

See RELINQUISHMENT OF PORTION OF CLAIM.

(2515)—*O. 2, r. 2—Principle of section.*—The real principle underlying cases under s. 43 of the Civ. Pro. Code is that, if the several items which make up the claim are of the *same nature* and form part of the same course of dealing, *so as to pass under the same description* and *form part of one transaction*, they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts. But claims, which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may be made the subject of different suits, though they may arise out of the same contract.—Per *Garth, C. J.* ANDERSON WRIGHT AND CO. v. KALAGARLA SURJINARAIN, **12 C. 339.**

(2516)—*O. 2, r. 2 (=s. 43, Civ. Pro Code*, 1877)—*Applicablity*—The rule of law laid down in s. 43 is with reference to suits brought under the new Procedure Code (*i.e.*, of 1877) and not to those brought under the earlier Code. LUCHMI NARAIN SINGH v. ASSRUP KOER, **9 C. 43.**

(2517)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code*, 1882)—*Cause of action.*—S. 43, Civ. Pro. Code, applies where the cause of action in both the suits is one and the same, *i.e.*, wrongful inter-

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ference with the plaintiff's property, although the reliefs sought are in respect of different portions of that property. GANGA DIN v. MAHMUD ALI, **A.W.N. 1887, 108.** [*Diss.*, 6 O.C. 65, 12 O.C. 347.]

(2518)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882).—The claim and the remedy mentioned in s. 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit. ANDI v. THATHA, **10 M. 347.** [*R.*, 12 M. 285.]

(2519)—*O. 2. r. 2 (=s. 43, Civ. Pro. Code,* 1882)—*Applicability of—Subsequent suit must be between the same parties—Cause of action.*—S. 43, of the Code of 1882 is directed against two evils, *viz.*, the splitting of claims and the splitting of remedies in respect of one cause of action, and is founded on the maxim that no one shall be twice vexed for one and the same cause. In order that the section may apply, not merely must both suits arise out of the same cause of action, but they must be between the same parties or between parties under whom they or any of them claim. KUNWAR GOBIND KRISHNA NARAIN v. MUSSAMMAT SIRAJUNNISSA BEGAM, **6 Ind. Cas. 226=7 A.L.J. 627.** (19 A. 379, 24 A. 553, 1 Agra 109, *F.*; 4 A.L.J. 121. A.W.N. 1907, 36, 29 A. 267, 30 A. 560. A.W.N. 1908, 235, 5 A.L.J. 647, 4 M.L.T. 392, 24 C. 831, 29 C. 871, *D.*)

(2520)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882) — *Scope.*—The section applies to bar a subsequent suit, only in cases in which the plaintiff had knowledge of the claim he was entitled to make in the previous suit and did not make it. SANKARAN v. PARVATHI; NARANANCHETTH v. ARUNACHALAM CHETTI, **19 M. 145.**

(2521)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882)—*Scope of.*—S. 43, Civ. Pro. Code, only directs that every suit shall include the whole of the claim, to which the plaintiff is entitled, upon the cause of action on which the suit is founded, and it does not require the union of all the causes of action, arising from distinct and independent transactions, between the plaintiff and the defendant. SUBBAYYA v. VENKATESAPPA, **6 M. 49.**

(2522)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882)—*Cause of action.*—All that this section contemplates is that a suit, based on a certain cause of action, should include the whole of the claim to which the party may be entitled on that cause of action. It neither requires a party to bring his suit on all the causes of action he may have, nor does it bar him from suing again if he had given up any cause of action before. UDMI v. RAJI, **23 P.R. 1894.**

(2523)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882)—*Minor plaintiff.*—A minor suing by a next friend comes under the purview of the section. BUTA v. FAIZ BAKHSH, **76 P.R. 1893.**

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(2524)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882)—*Several breaches of the same contract—"Cause of action," explained.*—Where a purchaser of goods causes breach of his contract in more than one way, namely, by refusing to pay the price of the goods received by him, and by refusing to accept delivery of the remaining goods, both the refusals will afford cause of action only for one suit by the seller, the breaches having occurred in respect of a single contract; so, the reliefs in respect of both the breaches must be prayed for in one and the same suit. S. 43, Civ. Pro. Code, applies to such a case. (12 C. 339, *Appr.*) Per *Petheram, C.J.*—The words "the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action," in s. 43, Civ. Pro. Code, in such a case as the present, mean the entire claim which the plaintiff has against the defendant, at the time the action is brought, in respect of any failure or failures to accept or pay for goods purchased of him by the defendant under one contract, and the whole of such claim must be included in one action. (*Approving* the view taken by *Wilson, J.*, in 12 C. 339). Per *Prinsep, J.*—The term "cause of action" is to be construed with reference to the substance rather than to the form of action. DUNCAN BROTHERS & CO. v. JEETMULL SREEDHAREE LAL, **19 C. 372, F.B.** (12 B.L.R. 304, *F.*) [*R.*, 16 A. 165=14 A.W.N. 65, 28 P.R. 1907=23 P.L.R. 1908, A.W.N. 1908, 199; *D.*, 21 B. 267.]

(2525)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code,* 1882), *scope of—Co-sharer omiting to sue for portion of claim—Right of such co-sharer to sue for partition of joint estate, includig portion omitted in prior suit.*—S. 43, Civ. Pro. Code, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if he omits a portion of his claim, *i.e.*, of his claim in respect of that cause of action, he cannot afterwards sue for it. If a person is excluded from joint possession of joint property by his co-sharer, he has a cause of action against him for such exclusion, and every co-sharer has a right to bring an action against his co-sharer to have the joint estate partitioned, and to obtain possession of his separated share. The rights, to enforce which these actions may be brought, are separate and distinct, and the causes of action in the one case are not the same as in the other. Where, in a suit for possession of joint property, the plaintiff omitted a portion of the property from the claim, *held*, that the provisions of s. 43 do not bar the plaintiff from bringing a suit for partition of the said joint estate, including the portion omitted in the prior suit. ABDUR NASIR v. RASULAM, **20 C. 385.**

(2526)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code,* 1859)—*Cause of action, splitting of.*—S. 7, Act VIII of 1859, requires that, if all rights arising out of the same cause of action are not sued for together, the portion abandoned cannot be

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separately sued for afterwards, but does not enact a similar penalty for all rights under the same or similar titles, the right to sue for which may arise under different dates and causes of action, and the defendants as to which may be either only one party or different parties altogether. MOTHOOR MOHUN MUNDUL v. KHEMUNKUREE DOSSEE, **5 W.R. 182.**

(2527)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859—Accretion, suit for.*—The question whether land is formed by gradual accretion depends on evidence. (5 B.L.R. 321, *Cons.*) Suing for a new accretion after a former suit is not a splitting of action, within the meaning of s. 7, Civ. Pro. Code, 1859 PAHALWAN SINGH v. MAHARAJA MUHESSUR BUKSH SINGH BAHADUR, **9 B.L.R., P.C. 150=16 W.R. 5**

(2528)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Splitting of remedies and of claims—Mortgage—Transfer of Property Act (IV of 1882), s. 99.*—S. 43 of the Code of Civil Procedure, 1882, is directed against two evils,—the splitting of claims and the splitting of remedies. The primary object of s 99 of the Transfer of Property Act, 1882, is to relieve a mortgagee from the restriction placed on the splitting of his remedies by s. 43 of the Civ. Pro. Code, 1882, the rest of the restriction imposed by the latter section remains unimpaired. GOVIND v. PARASHARAM, **2 Bom. L R. 864=25 B. 161.** [*R.*, 30 B. 156=7 Bom. L.R. 811, 26 A. 223, A.W.N. 1904, 2, 11 C.W.N. 1011, F.B., 6 C. L.J. 320, F.B., 35 C. 61, F.B.]

(2529)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—"Omit to sue."*—The words "omit to sue" in s. 43 of the Code of Civil Procedure, refer to an omission which might have been avoided, not to an omission to claim that, which a party could not know he was entitled to. MARIATHODI v. APPU, **15 M. 296.** [*R.*, 23 B. 597.]

(2530)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—"To sue."*—Although a party may be barred, under s. 43 of the Civ. Pro. Code, from suing again in respect of the same cause of action, it is clear that it is only the remedy of suing which is barred The right whatever it might be to which a party is entitled still subsists. "To sue" in s. 43 of the Code of Civil Procedure, means to make a legal claim or to take legal proceedings against any person: it does not necessarily mean to file a suit by means of a plaint such as is referred to in the Code. Taking any legal proceedings in matters of any kind would be to sue. VAJERAM v. PURSHOTAMDAS, **7 Bom. L.R. 138.**

(2531)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)=s. 7, Civ Pro. Code, 1859(—Omission to sue—Test whether suit is barred.*—S. 7 of Act VIII of 1859 applies whether the omission to sue has been the result of knowledge and intention or not. The test as to whether a suit is barred by s. 7 of Act VIII of 1859 is whether

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the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit. BULWANT SINGH v. CHITTAN SINGH, **3 N.W.P. 27.** [*F.*, 1 A. 543.]

(2532)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Leave to omit remedies or split causes of action—Pecuniary jurisdiction of Court—Surplus collection made by mortgagee—Limitation Act (IX of 1871.) Sch. II, Art. 105—Act XV of 1877, s. 2, Sch. II. Arts. 105, 109—Act IX of 1908, Sch. I, Arts. 105, 109.*—Where a person is entitled to more than one remedy in respect of the same cause of action, the Court from which he should obtain leave to omit any of such remedies and bring a subsequent suit in respect thereof, is the Court before which the original suit is pending, even though the amount of the claim reserved for the subsequent suit be in excess of the pecuniary jurisdiction of this Court. A suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, may be brought within three years from the time when the mortgagor re-enters on the mortgaged property, under Art. 105 of the Limitation Acts of 1877 and 1908, and there is no restriction as to the way in which the mortgagor may obtain possession. If permission to bring a subsequent suit for surplus profits has been given in accordance with s. 43, Act XIV of 1882, or O. 2, r. 2, Act V of 1908, Sch. I, there is no conflict between the provisions of Arts. 105 and those of the section and order respectively. Art. 109, Limitation Act, does not apply to a suit by a mortgagor for surplus collection. Where the right to recover surplus collections became barred under art. 105, Sch. II, Act IX of 1871, the right was not revived by Act XV of 1877 or Act IX of 1908. MUHAMMAD FAIAZ ALI KHAN v. KALLU SINGH, **7 A.L.J. 1201=8 Ind. Cas. 689.** (30 A. 225, *Disc.*)

(2533)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Mortgage — Splitting of remedies — Transfer of Property Act (IV of 1882), s. 99.*—The primary object of s 99 of the Transfer of Property Act, 1882, is to relieve a mortgagee from the restriction placed on the splitting of his remedies by s. 43 of the Civ. Pro. Code, 1882, the rest of the restriction imposed by the later section remains unimpaired. GOVIND v. PARASHRAM, **2 Bom. L.R. 864—25 B. 161.** [*R.*, 30 B 156=7 Bom. L R. 811, 26 A. 223, A W.N. 1904, 2, 11 C.W N. 1011, F B., 6 C.L.J. 320, F.B., 35 C. 61, F.B.]

(2534)—*O. 2, r. 2 (=s 43, Civ. Pro Code, 1882)—Splitting of cause of action.*—S. 13 of the Civ. Pro. Code, 1882, applies only if the parties are the same, and s. 43, if the claims arise out of the same cause of action. The claims by A to obtain his share of the property owned jointly by him and B cannot be said to have been founded on the same cause of action as his claim to obtain his share of property owned jointly by him and B and C. The

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correct test for the application of s. 43 is whether the new suit is founded on a cause of action distinct from that which was the foundation of the old suit. S. 43 does not require that every suit shall include every cause of action, or every claim that a party has, but only that every suit shall include the whole of the cause of action for which the suit was brought. One rough test to determine whether the cause of action is the same or distinct is to see if the same evidence supports both claims. PURSHOTTAM v. ATMARAM, **1 Bom. L.R. 76 = 23 B. 597.** [*R.*, 19 M.L.J. 102.]

(2535)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Scope of section—Splitting up claim—Effect.*—The splitting of a claim is not allowed by s. 7, Civ. Pro. Code, 1859, which, however, does not require that all remedies by suit on all the securities which a creditor may hold to be enforced together. If a plaintiff, from negligence or other cause, omits to prefer a portion of his claim which seeks to charge the land, or, having preferred it, is content to accept an imperfect adjudication, or one which awards him only a portion of the relief claimed, he cannot afterwords bring forward in a fresh suit matter which might well have been then disposed of. MULUK FUQEER BUKSH v. LALLA MANOHUR DOSS, **2 N.W.P. 29.** [*App.*, 3 A. 388, F.B., *F.*; 10 B.H.C. 351, 2 A. 345; *R.*, 7 N.W.P. 17, F.B.]

(2536)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Splitting claim.*—S. 7, Civ. Pro. Code, 1859, is inoperative against the splitting of a claim into parts; the effect of an infringement of that direction is not that the suit, which does not include the whole claim, shall for this reason be barred. The words "in bar of suit" refer to any subsequent suit brought for the portion of the claim relinquished in the previous suit, and not to such previous suit itself. A plaintiff, who omits to sue for a portion of his claim, stating that he does not relinquish it but means to sue again for it, can gain nothing by such a statement. Neither can such a statement bar the first suit. MUSSUMAT SOONDER BEBEE v. KHILLOO MALL, **2 N.W.P. 90.** [*R.*, 32 M. 76; *Doub.*, 19 M.L.J. 10.]

(2537)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Dismissal or withdrawal of suit—Right to bring fresh suit.*—When a suit is dismissed or withdrawn under circumstances which do not preclude the plaintiffs from bringing a fresh suit, the provisions of s. 43 do not apply. RAMSING v. RAMCHANDRA GOPAL BHIDE. **14 C.P.L.R. 104.** (7 A. 624, *App.*; 17 A. 53, 10 M. 160, *R.*)

(2538)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Institution of two suits to same nature against same defendant—Decree in one whether bar to decree in another.*—Where two suits for declaration of title to and possession of shares in the same property were instituted on the same day against the same defendant by the plaintiff but the shares in the two cases had not been acquired at the same time: *Held* that, before a Court can properly apply the bar provided in s. 43 of the Civ. Pro. Code, to the institution of a second suit, it should be clearly satisfied and have before it very distinct materials to show that this was a *second* suit which it was impossible to ascertain in the circumstances abovementioned. ZAHUR HUSAIN v. MUHAMMAD HASAN, **A.W.N. 1888, 147.** [*Overruled*, 16 A. 165, F.B.]

(2539)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Execution of decree—Successive applications for execution in respect of different reliefs granted by same decree.*—S. 43 of the Civ. Pro. Code, is not applicable to proceedings in execution decrees. So held by *Edge, C.J., Tyrrell, Knox, Blair and Burkhitt, JJ.* Where a decree grants different reliefs, as, for example, possession of land and mesne profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief. So held by *Edge, C.J., Tyrrell, Blair and Burkhitt, JJ.* SADHO SARAN v. HOL PANDE, **A.W.N. 1893, 57 = 19 A. 98.** (18 C. 515, *R.*)

(2540)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Leave to omit to sue for certain remedies, whether can be made at first hearing.*—The plaint in this suit alleged a loan of a sum of money by the plaintiff to the defendant, and a mortgage of certain immoveable property of the defendant to the plaintiff to secure the same; and prayed for the decree for the money lent, with interest. The mortgage contained a personal covenant to repay the said loan after a certain date, then long since passed, with interest thereon at a stated rate. The suit being called on for hearing, the plaintiff applied under s. 43 of the Civ. Pro. Code, 1877, for leave to omit to sue for the remedies under the mortgage, reserving such remedies for a future action. It was contended by the defendant that the application was too late as it was not made *before* the first hearing. *Held* that the application was in time, as it was made directly the case was called on and before anything whatever was done towards the hearing of the case. PESTONJI BEZONJI v. ABDOOL RAHIMAN BIN SHAIK BUDOO, **5 B. 463.**

(2541)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Separate suits in respect of separate breaches of the same contract.*—*Quære* whether s. 43 of the Code of Civil Procedure prohibits the bringing of separate suits in respect of two separate and distinct breaches of the same contract. KEDAR NATH v. SURAJ NARAIN, **A.W.N. 1908, 199.** (12 C. 339, 19 C. 372, *R.*),

(2542)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, Act XIV of 1882)—Person omitting to sue in respect of portion of claim—Subsequent suit for the same barred.*—Where a person did not include a certain claim, the subject-matter of his subsequent suit, in his prior suit, and did not

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obtain the leave of the Court to omit it, but only stated in the plaint in the prior suit that he would bring a separate suit for the claim omitted, *held*, that the second suit for the portion so omitted was barred by s. 43 of the Civ. Pro. Code, the claim arising in the subsequent suit arising out of the same cause of action as that in the prior suit. MAKSUD ALI v. NAGRIS DEY, **20 C. 322.** [*R.*, 34 C. 223=5 C.L.J, 192; *Diss*, 30 A. 225=5 A.L.J. 192=A.W.N. 1908, 96.]

(2543)—*O. 2, r. 2—Omission to include entire grounds on which suit based—Second suit.*—A plaintiff omiting to include all the grounds on which his suit can be based, cannot bring a second suit on grounds which existed at the time the first suit was brought. PREMANUND GOSSAMEE v. RAM CHURN DEB, **20 W.R. 482.** [*R.*, 11 B.H C. 244].

(2544)—*O. 2, r. 2 (=s 43, Civ. Pro. Code, 1877)—Bond for money with collateral security—Omission of claim.*—An obligation and a collateral security for its performance constitute one cause of action, and a plaintiff cannot, in respect of it, sue first to enforce the obligation, and afterwards to enforce the security. GU MANI v. RAM PADARATH LAL, **2 A. 838.** [*R.* L.B.R. 1893-1900, 14.]

(2545)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Instalment bond—Splitting of cause of action—Bond payable by instalments—Suit for all instalments due.*—In a suit to recover money due on an instalment bond, the plaintiff sued to recover the amount of one instalment only, although by that time two instalments had accrued due. He then brought a second suit to recover the amount of the second instalement: *Held*, that the second suit was barred by s. 43 of the Civ. Pro. Code, 1882. NARAYAN v. NIMBA, **8 Bom. L.R. 547.**

(2546)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Joint promisors—Suit against one barred under s. 43—Whether it is also a bar against the other—Contract Act, s 43.*—R and S were tenants of a moiety each of certain lands, under separate Muchilikas, and they sold their interests to two persons A and B by separate deeds of sale. The plaintiff, the landlord, had instituted two suits in respect of each moiety against A only and recovered judgment. At the time of the first suit, the claim for rent up to 15th December, 1901 had accrued due, but was omitted to be included in the suit. At the time of the second suit, the claim for rent for faslies 1310 and 1311 in respect of S's moiety had accrued, but were not included in the suit. The present suit was against both A and B for rent for 6 faslies from 1310 to 1315. The Sub-Judge dismissed the suit as regards the claim for faslis 1310 and 1311 in respect of S's moiety and the claim for rent up to 15th December, 1901 as regard R's moiety, as barred by s. 43, Civ. Pro. Code, 1882. B was a member of the joint family with A, and liable with him to pay the rent. *Held* that, under s. 43, Civ. Pro. Code, the liability of A for the rent omitted

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to be claimed in the former suits is at an end; for that section provides that the plaintiff shall not afterwards sue in respect of the portion omitted. *Held* also that B was liable for the rent of faslis 1310 and 1311. *Quære*:—Whether the rule in *King* v. *Hoare*, 13 M. & W. 494, that a joint promisor is not liable in a subsequent suit, when judgment had been recovered against the co-promisor is applicable to the Mofussil in India, in view of s. 43 of the Contract Act. *Held*, further that s. 43 of the Contract Act does not lay down a mere rule of procedure, but makes the liability of each co-promisor joint and several. Under English law, however, the foundation of the rule in *King* v. *Hoare* is that the liability of the joint promisor is joint, and that the cause of action which is one and indivisible transit is *rem judicature*, and is therefore not available for a subsequent suit against a co-promisor. *Held*, also, that as the claim for rent for faslis 1310 and 1311 was not the subject-matter of the previous suits, the cause of action for the same had not merged in the previous judgments. Under s. 43, Civ. Pro. Code, although a subsequent suit against the same defendant is barred for rents which had accrued due, it is by the force of a special rule that relief not claimed in respect of a cause of action shall not be claimed in a subsequent suit, and not on the principle of merger in a judgment recovered. RAMANJULU NAIDU v. ARAMUDU AYENGAR, **7 M.L.T. 373=3 Ind. Cas. 735=33 M. 317.** (10 B. 453, 22 A. 307, 5 M. 37, 5 M. 133, 8 M. 376, 21 M. 256, 30 M. 495, 7 M. 295, 3 C. 353, 21 M. 153, *R.*)

(2547)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Mortgage—Prior suit for interest after expiry of term fixed—Subsequent suit for principal or interest—Bar.*—Where a mortgagee was, under the terms of the mortgage-deed, empowered, after the expiry of five years from the date of mortgage, to sue at once, if default was made in the payment of interest due, for the recovery of the principal amount, or if no such default had been made, to allow the mortgage to continue and go on, receiving the interest as he had done in the past, *Held*, that it was open, undoubtedly and admittedly, to the mortgagee, to sue, after the expiry of five years, for the recovery of the principal amount. Where, therefore, the mortgagee sued, after the expiry of the five years, only for the interest, and failed to claim the principal which was also due, *held*, that he was precluded by the provisions of s. 43, Civ. Pro. Code, 1882, from bringing a subsequent suit for the recovery of principal, or of interest that accrued due after the decision of the prior suit. If the plaintiff has no legal right to demand payment of the principal amount of his debt, he has, *a fortiori* no right to claim interest thereon. CHAUDHRI KUDAN MAL AND OTHERS v. SARDAR ALLAH DAD KHAN AND OTHERS, **19 P.R. 1910=36 P. W.R. 10=5 Ind. Cas. 821=167 P L.R. 1910.** (28 P.R. 1907, *F.*; 7 B. 446, 21 B. 237, *Not. F.*

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(2548)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action, splitting up of—Mortgage—Tender of amount—Mortgagee declining to accept but remaining in possession of property—Relationship between mortgagor and mortgagee after refusal to accept money due—Suit for redemption—Second suit to recover mesne profits from the date of tender to the date of delivery of possession—Transfer of Property Act (IV of 1882), ss. 62, 83.*—The plaintiff passed a usufructuary mortgage in favour of the defendant in 1884; and placed him in possession. In 1901, the plaintiff tendered the amount of the principal to the defendant but it was not accepted. The plaintiff then filed a suit, under s. 62 of the Transfer of Property Act, to recover possession of the mortgaged property, and at the same time under s. 83 of the Act deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession. In 1904, the plaintiff filed another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property in execution of the redemption decree in the first suit. The lower appellate Court disallowed the claim on the ground of *res judicata*. *Held*, that the present claim was barred either under s. 13 or 43 of the Civ. Pro. Code, for, the profits derived by the mortgagee, after a proper tender made or after the amount due had been deposited in Court, were profits for which he had to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and, as such, a claim to them by the mortgagor was one arising from and connected with his right to redeem or recover possession of the property. It was all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession. RUKHMINIBAI v. VENKATESH, **9 Bom. L.R. 958=31 B. 527.** [*R.*, 30 A. 225=A.W.N. 1908. 96=5 A.L.J. 192.]

(2549)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Several breaches of covenants made under one contract—Maintainability of separate suit for each breach—Cause of action.*—When principal and interest are both due under a mortgage bond, s. 43, says there can only be one suit for both. This cannot be overridden by an agreement between the debtor and the creditor that separate suits might be brought. Where there are several breaches of covenants made under one contract, one way of looking at the matter is that, at the date of the latter breach, the right of action based on the earlier breach, if it is not barred by limitation, is merged in that arising out of the latter breach. All the covenants to be performed under any contract, before the suit is brought, are to be treated as joined and merged into one by the contract, and the breach of all the covenants, enforcible before that time, deemed as one breach. GANGA RAM v. ABDUL RAHMAN, **28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907.** (15 I.A. 156, 22 C. 833, 16 A. 165, 25 A. 48, 6 C.W.N. 585, 17 P.R. 1897, 123 P.R. 1881, 129 P.R. 1889, 21 B. 267, 18 M. 257, 11 M. 210, 24 M. 431, 27 M. 116, 12 C. 339, 19 C. 372, 12 A. 203, 15 I.A. 66, 5 B. 181, *R.*) [*F.* 19 P.R. 1910.]

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(2550)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Former suit against hypothecated property alone—Subsequent suit against other property of deceased.*—Where, in a former suit, the plaintiff applied for relief only against the property hypothecated in his bond without asking for further relief against other non-hypothecated property of his debtor in the hands of the debtor's legal representatives, *held* that he could not subsequently apply for the latter remedy, when he found that the hypothecated property did not suffice to extinguish his debt. GAINDA KUAR v. DIP CHAND, **A.W.N. 1882, 160.**

(2551)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Splitting up cause of action—Suit for interest—Second suit for interest and principal.*—The mortgagee mentioned above, not having obtained possession, brought first a suit for unpaid interest due and got a decree; and it was held that a second suit for principal and residue of interest up to the date of suit was barred under the section, the claims having arisen out of the same cause of action, *viz.*, the non-delivery of possession of the mortgaged property. HIKMATULLAH KHAN v. IMAM ALI, **12 A. 203 A.W.N. 1890 87.** (A.W.N. 1888, 15, *Appl.*) [*R.*, 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907; *D.*, 21 B. 267, L.B.R. 1893-1900, 618.]

(2552)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Previous suit for redemption dismissed—Subsequent suit on admission of mortgage—Suit to redeem—No specific mortgage alleged—Effect.*—Where a previous suit for redemption had been dismissed on the ground that the specific mortgage alleged had not been proved and that no decree could be passed on the admission by defendant of some other previous mortgage, *held* that a subsequent suit for redemption on the basis of the admission made in the previous suit was barred under s. 43 of the Civ. Pro. Code. There was only one cause of action, and the plaintiff, having sued on a false claim while aware of his true right, should be taken to have relinquished his real claim. [*Overruled*, 29 M. 153, F.B.=16 M.L.J. 48; *Diss.*, 28 M. 406; *Disc.*, 26 M. 760=13 M.L.J. 448; *R.*, 17 C.P.L.R. 178, 31 M. 385]. It is not necessary that a plaintiff suing to redeem should allege and prove a specific mortgage. He can get a decree on an admission of mortgage previously made by the defendant. (*Obiter*). *Note.*—This case was a sequel to the case reported in 18 M. 462. RANGASAMI PILLAY v. KRISHNA PILLAI, **22 M. 259.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2553)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Breaches of terms in one contract—Principle underlying in s. 43.*—A claim for the price of goods sold, which is essentially a claim for a *debt*, is a cause of action of a different nature from a claim for compensation for not accepting goods pursuant to a contract, which is essentially a claim for *damages*. The two claims, being of a totally different nature, the fact of their arising under the same contract does not change their nature, or make them one and the same cause of action within the meaning of s. 43 of the Civ. Pro. Code.—Per *Garth, C.J.* Where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract, in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, the claim of the vendor arises out of one cause of action within the meaning of s. 43 of the Civ. Pro. Code and only one suit will lie.—Per *Wilson, J.* ANDERSON WRIGHT & CO. v. KALAGARLA SURJINARAIN, **12 C. 339.** [*Appr.*, 19 C. 372 ; *D.*, 21 B. 267 ; *R.*, 8 Bom. L.R. 547, A.W.N. 1908, 199, 28 P.R. 1907.]

(2554)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Contract for sale—Decree for specific performance—Execution of sale-deed by Court—Subsequent suit for possession—Maintainability.*—The defendant had entered into a contract to sell certain lands to the plaintiff. Plaintiff sued upon the contract and obtained a decree directing the defendant to execute a sale-deed in his favour. The defendant having failed to give a sale-deed accordingly, the plaintiff got one executed by the Court. The defendant, however, failed to deliver the lands to the plaintiff, though demanded by him. Hence the suit to recover the lands. *Held* that the suit was barred by the provisions of s. 43 of the Code as the right to possession arose coincidently with the right to the execution of a conveyance by the defendant. NARAYANA KAVIRAYAN v. KANDASAMI GOUNDAN, **22 M. 24.** [*Diss.*, 4 N.L.R. 14 ; *R.*, 12 M.L.J. 71, U.B.R. 1903, 1st Quarter, Buddist Law—Divorce, 12.]

(2555)—*O. 2, r. 2 (=s. 43, Civ Pro. Code, 1882)—Relinquishment of a portion of claim—Contract for sale—First suit for possession and damages—Second suit for specific performance and completion—Identity of cause of action.*—The parties entered into an agreement for the sale of a coffee estate to be completed by the 31st July, which provided, *inter alia*, that until such completion the expenditure on the estate should be provided by the purchasers and that possession of the estate should, until such date, continue with the vendors, whose manager was to be subject to the directions and control of the purchasers. Portions of the purchase-money were paid and the estate was, for some time, managed in terms of the agreement. Subsequently there was differences between

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the parties, each alleging default by the other, and in September following cross suits were instituted by the parties for possession and damages, the purchasers basing their claim upon the agreement but not asking for its completion, the vendors insisting that the contract had been broken by the purchasers with the result that the vendors were declared to be entitled to possession but that the purchasers were to have the management of the estate till the agreement was avoided in due course of law ; *held* that the subsequent suit by the purchasers for the specific performance of the agreement for sale and completion is barred under s. 43, Civ Pro. Code. The cause of action in both the suits is identically the same. In the former suit the purchasers made the agreement a basis of a claim for possession and damages, and in the second suit they made it a basis of a claim for transfer of the estate. RANGAYYA GOUNDEN v. NANJAPPA RAO, **6 C.W.N. 17, P.C.=24 M. 491.** [*F.*, 8 O.C. 389, 10 O.C. 44 ; *R.*, 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907, 10 O.C. 145.]

(2556)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Contract for sale—Suit for conveyance—Bar of subsequent suit for possession—Bar of representation.*—Where, under a contract for sale, the vendee is entitled to immediate possession, *i.e.*, where the rights to possession and conveyance arise coincidently, he must bring a single suit for conveyance and possession. If he is not entitled to immediate possession, he may first bring a suit for conveyance and then institute a suit for possession. A vendee instituted a suit for specific performance of a contract for sale. In execution of the decree obtained by him in the suit, he had a sale-deed executed by the vendor on behalf of himself and his minor brothers. The vendor not having given up possession of the property conveyed, the vendee sued him for possession making his brothers also parties to the suit. The defendants contended that the second suit was barred by s. 43 of the Code. *Held* that, as against first defendant, the vendor, the suit was barred by s. 43 of the Code. *Held* also that as the first defendant had represented his brothers also in the prior suit and as they were therefore bound by the decree therein, any bar which operated in favour of the first defendant equally availed to the brother defendants. CHINNA KRISHNA REDDI v. DORASAMI REDDI, **12 M.L.J. 71.**

(2557)—*O 2, r. 2 (=s. 43, Civ Pro. Code, 1882)—Sale—Suit to include whole claim—Multifariousness of suits.*—On the 23rd March, 1891, the defendants made a written agreement with the plaintiffs to sell to them a coffee plantation of which the defendants were owners subject to mortgages. Under the terms of the agreement, the defendants were to remain in possession of the property till 31st July, 1891, and in the interval, to pay off the mortgages on the property. The terms of the agreement were

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

observed down to August, 1891, when; however, disputes arose each party accusing the other of delay. The plaintiffs interrupted the work of defendants: and each instituted a suit against the other. In either of these suits, there was no relief prayed for and no issue framed on any point, except possession or compensation: the purchasers did not ask for completion of the agreement nor the vendors for its cancellation. On the 11th November, 1893, the purchasers filed the present suit praying for specific performance of the agreements. *Held*, that the suit was barred under s. 43 of the Civ. Pro. Code. RANGAYYA v. NANJAPPA, **3 Bom. L.R. 799.**

(2558)—*O. 2, r. 2 (=s 43, Civ. Pro. Code, 1882)—Limitation--Suit for specific performance of contract of sale dismissed—Subsequent suit for recovery of money paid as part price.*—Where plaintiff entered into a contract of purchase of some lands from the defendant and paid a portion of the consideration money in advance and sued for specific performance of the contract and failed in that suit, and subsequently sued more than three years after the date of the former suit for the recovery of the consideration paid, *held* that the plaintiff's present claim for re-payment of the consideration money formed part of the damages which he might and should have claimed alternatively in his previous action for specific performance, and that the suit was, therefore, barred by s. 43, Civ. Pro. Code, and that, even if it were not so, the plaintiff's action was barred by limitation as time began to run from the time when the plaintiff sought to enforce his right by bringing his action for specific performance. The general rule is that every suit speaks from the date of plaint and not from the date of the decree, though there may be cases in which limitation may begin to run from the date of the decree and not of the plaint. CHIDAMBARA NADAR v. SRINIVASA AIYENGAR, **8 M.L.J. 61.**

(2559)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Whether same for a suit for specific performance of a contract to reconvey land and for the mesne profits of the property—S. 19, Specific Relief Act (I of 1877).*—A suit for specific performance of a contract to re-convey a certain plot of land after its breach, and the claim for mesne profits of the property, to which the plaintiff is entitled in consequence of the delay on the defendant's part to execute the re-conveyance, are based on the same cause of action. A plaintiff instituted a suit for the specific performance of a contract to re-convey a plot of land, in which he did not claim mesne-profits to which he was entitled in consequence of the defendant's delay in performing the contract; subsequently to the decree for specific performance, he brought another suit for the mesne-profit; *held*, that the plaintiff's suit for mesne profits that accrued due before the institution of the suit for specific performance, was barred under s. 43, Civ. Pro. Code, 1882, is no bar to such a suit. Where the plaintiff's right to sue for damages for a breach of contract had come into existence when he sued for the breach, but he confined his claim to damages in respect of only one stipulation in the contract, omitting his claim as regards the others. *Held*, that the first para. of s. 43, Civ. Pro. Code, 1882, was a bar to his bringing a second suit in respect of the breach of other stipulations. RAJA BAHADUR SHIVLAL MOTILAL v. RAJEEVAPPA PAMPANNA, **11 Bom. L.R. 46=1 Ind. Cas. 319.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

ance, was barred under s. 43, Civ. Pro. Code. GANESH RAM PAL v. MOHESH RAM PAL, **13 C.W.N. 669=4 Ind. Cas. 534.**

(2560)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for damages—Subsequent suit for claim that had accrued due on the date of prior suit.*—A plaintiff, who, in a suit for damages for breach of a contract in not having made over possession to him of certain lease-hold properties, omits to sue for some portion of the damages that had accrued due for certain years at the time of suit, will be debarred from suing for them in a subsequent suit by s. 43 of the Civ. Pro. Code. SHEO SHUNKAR SAHOY v. HRIDOY NARAIN, **9 C. 143=12 C.L.R. 34.** (6 C. 791, *F.*) [*R.*, 12 C. 339, 482, 19 C. 615, 7 Bom. L.R. 107=29 B. 107.] *N.B.*—The above case is upheld in 12 C. 482, P.C. [*F.*, 11 M. 151; *Appl.*, 2 C.L.J. 490; *D.*, 19 B. 532, 5 C.L. J. 192=34 C. 223; *R.*, 19 C. 615, U.B.R. 1904, Civ. Pro. Code, 1. 3 L.B.R. 56, 9 O.C. 224.]

(2561)—*O. 2, r. 2. (=s. 7, Civ. Pro. Code, 1859)—Several wrong-doers—Suit against one bars subsequent suit against another.*—Where a plaintiff had sued for and obtained damages against one of several persons who had jointly defamed his character, *held* that a similar suit cannot be brought against another of such wrong-doers as it was barred under s. 7, Act VIII of 1859. MADUD ALI KHAN v. SALEEM AHMED KHAN, **4 N.W.P. 142.**

(2562)—*O. 2, r. 2 (=old s. 43=s. 7, Civ. Pro. Code, 1859)—Wrongful detention of property—Decree in former suit for recovery of property—Second suit for wrongful detention.*—A suit for damages for wrongful detention of property is barred under s. 7, Act VIII of 1859, after a decree in a former suit for the recovery or value of the same property. SHAIKH PUNJU v. SHAIKH OODOY **18 W.R. 337.**

(2563)—*O. 2, r. 2 (=s 43, Civ. Pro. Code 1882)—Causes of action splitting up of—Suit for breach of contract—Accrual of damages at its date—Second suit for damages.*—Where in a suit the plaintiff sets up a certain right and asks for relief, but the Court holds that he is not entitled to the right and dismisses the suit on the ground that the right has not come into existence, the plaintiff can bring another suit for that right and relief when the right accrues. S. 43, Civ. Pro. Code, 1882, is no bar to such a suit. Where the plaintiff's right to sue for damages for a breach of contract had come into existence when he sued for the breach, but he confined his claim to damages in respect of only one stipulation in the contract, omitting his claim as regards the others. *Held*, that the first para. of s. 43, Civ. Pro. Code, 1882, was a bar to his bringing a second suit in respect of the breach of other stipulations. RAJA BAHADUR SHIVLAL MOTILAL v. RAJEEVAPPA PAMPANNA, **11 Bom. L.R. 46=1 Ind. Cas. 319.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2564)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Mutation order—Right to an orchard and for voidance of mutatiin order.*—On the death of a person, the name of his mistress was recorded in respect of an orchard. First suit by the present plaintiff for voidance of the mutation order was dismissed on the ground that the plaintiff should have sued to establish his right to the orchard also. Second suit for voidance of the mutation order and to establish the right to the orchard was held to be barred. MAYA v. MANTORIA, **A.W.N. 1881, 93.**

(2565)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Relinquishment of part of claim.*—The appellants were directed by an award to pay the respondent certain moneys and to deliver to him certain title-deeds. They failed to do either of these things, and in 1870, the respondent sued them for such moneys. He subsequently sued them for the delivery of the title-deeds. *Held*, that the second suit was barred by the provisions of s. 43, Civ. Pro. Code. KAULESHAR RAI v. KHUDI RAI, **A.W.N. 1881, 72.**

(2566)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—First suit for divorce under Buddhist law—Subsequent suit for partition by the husband.*—A obtained a decree for divorce in the township Court on the ground that his wife B had committed a fault or offence which entitled him under Buddhist Law to a divorce from her. Then A filed a second suit for partition of their properties. *Held*, that the suit was barred by s. 43, Civ. Pro. Code, 1882. The remedies of a Burmese Buddhist spouse against his or her partner, for matrimonial fault committed by him or her, being in some cases a divorce and a partition of or declaration of right to the whole of the joint property or a decree ordering the other party to give up possession of it, the party who sues the other may ask for only a divorce if he or she so chooses, but if he or she chooses to sue for a divorce only, then, unless the leave of the Court for a subsequent suit for the other remedies has been obtained in such suit, a subsequent suit in which such remedies are claimed is barred by s. 43, Civ. Pro. Code, 1882. LON MA GALE v. MG PE, **5 L.B.R. 114.** (2 U.B.R. 1897, 1901, 28 ; 2 U.B.R. 1902-3, Divorce 6, 12, 1 L.B.R. 7, 2 U.B.R. 1904-1906, Divorce 3, *R.*)

(2567)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)*—Where a plaintiff has a right to a decree for maintenance against the defendant personally, or to a decree making the maintenance a charge on the property of the defendant, and possibly to both, it is clear that, on the principle to which effect is given by the provisions of the Code of Civil Procedure, the plaintiff is bound to ask for all the remedies in respect of the right of maintenance, to which she is then entitled, and as these claims arise out of one and the same cause of action, *viz.*, the right to maintenance, if she omits to ask for any remedy she is entitled to, she cannot afterwards seek it in a fresh suit. RANGAMMA v. VOHALAYYA, **11 M. 127.** [*Cons.*, 17 M. 268, *R.*, 22 M. 175.]

(2568)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882) —Previous suit for* melvaram *for subsequent fasli without claiming for previous fasli—Suit for* melvaram *for previous fasli barred.*—In a suit by an *inamdar* to recover from a *mirasdar* arrears of *melvaram* due for a fasli under a registered *muchilika*, where it appeared that he had already filed a suit in respect of the subsequent fasli, *held* that, though there was a separate *muchilika* for each fasli, there was yet one cause of action, *viz.*, the non-payment of rent to the landlord by the tenant, and that the suit was, therefore, barred by s. 43, Civ. Pro. Code. SHANMUGAM PILLAI v. SYED GULAM CHOSE, **27 M. 116.** [*R.*, 28 P. R. 1907=93 P.L.R. 1908=140 P.W.R. 1907, *D.*, 5 M.L.T. 105=32 M. 330.]

(2569)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Deposit, in Court, of rent, by tenant—Notice of deposit—Withdrawal of money, by landlord under protest—Suit for balance—Omission to sue for rent between date of deposit and of suit—Inclusion of such claim in a subsequent suit for rent not allowable—Deposit to be treated as part payment—Notice does not give a fresh and independent cause of action in respect of the balance then due.*—Under s. 61 of the Bengal Tenancy Act, the defendant, a tenant, deposited in Court the amount due as rent for a certain period, which he had tendered to, but had been refused by, the landlord; and, on a notice of deposit being served upon the landlord, the latter withdrew the money so deposited under protest, under s. 63 of the Act, and brought a suit for the balance without including his claim for the period between the date of deposit and that of the institution of the suit. In the present suit he claimed rent for such last-mentioned period. The defendant contended that the claim was barred under s. 43 of the Code, so far as such period was concerned and that notice given under s. 63 of the Tenancy Act cannot give the plaintiff a fresh and independent cause of action for the balance then due, without also suing for arrears due up to the date of the suit. *Held*, that, as his cause of action in the previous suit was the non-payment of certain arrears of rent, he, having regard to s. 43 of the Code, ought to have claimed all arrears of rent due at the date of the institution of the suit, and that, having failed to do so, he was not entitled to claim, in the present suit, rent for the period omitted in that suit; that the deposit of rent under s. 61 of the Bengal Tenancy Act must be treated as equivalent to part-payment and that notice of deposit under s. 63 of the Act does not give a fresh and independent cause of action in respect of the balance then due. ATUL KRISHNA GHOSE v. NRIPENDRO NARAIN GHOSE, **1 C.L.J. 114.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2570)—*O. 2. r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Rent for successive years—Bengal Tenancy Act VIII of 1885, ss. 69 and 70.*—A, a landlord, took proceedings against a tenant, B, for recovery of rent for the year 1305 by appraisement of the crops under ss. 69 and 70 of the Bengal Tenancy Act and realised his dues by execution. B then sued to set aside the proceedings as held without jurisdiction and obtained a decree for restitution. Meanwhile, A had sued and obtained a decree for 1306. After being compelled to make restitution, A sued for the rents of 1305 and 1307. *Held*, the claim for 1305 was barred by s. 43, Civ. Pro. Code, as it had not been included in the suit for 1306. S. 43, Civ. Pro. Code, includes accidental or involuntary omissions as well as acts of deliberate relinquishment and cannot be controlled by any considerations of the motives of the party to whom it is to be applied. (11 M.I.A. 551, *F.*) The claim for rent for several successive years constitutes one whole claim in respect of the cause of action within the meaning of s. 43, Civ. Pro. Code, even though the claim for one year be taken to have been extinguished by satisfaction and subsequently revived by cancellation of such satisfaction. SYED ABDULLA v. HURKISHEN SINGH, **2 C.L.J. 490.** (12 C. 50, 12 C. 482, 12 M.I.A. 244, *Appl.*)

(2571)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Splitting claim—Separate suits for rent due for successive years.*—S. 43, Civ. Pro. Code, prevents the maintenance of two suits each for one year's arrear of rent due in respect of the same tenancy. The proper course in such cases is that plaintiff should be allowed to withdraw both and to file one suit in a competent Court. ALAGU v. ABDOOLA, **8 M. 147.**

(2572)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit by guardian for arrears of* shrotriem *for certain years—Subsequent suit for arrears due for prior faslis—Maintainability.*—Plaintiff sued to recover arrears of *shrotriem* for certain faslis. During his minority, the Court of Wards, who acted as his guardian, had sued for arrears due for subsequent faslis and had relinquished the claim for the plaint faslis. *Held* that the suit was barred by s. 43, Civ. Pro. Code, notwithstanding that the plaintiff was a minor at the time of the first suit. The acts of a guardian in the conduct of a suit must be upheld unless it is shown that they were unreasonable or improper. GOPAL RAO v. NARASINGA RAO, **22 M. 309.**

(2573)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for rent—Failure to include arrears due in former suit.*—A co-sharer of a mahal sued the lambardar for the profits of his share in respect of the year 1285 Fasli. At that time profits were due to him in respect of the year 1287 Fasli also. In the present suit he sought to recover the profits for 1287 Fasli. *Held* that he was barred by the terms of s. 43 of the Code from including in the present suit what he might have included in the former suit but did not. CHEDU SINGH v. MAHTAB SINGH, **A.W.N. 1883, 142,** (6 C. 791, *F.*)

(2574)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Gift of holding by absolute occupancy tenant—Suit by Malguzar to set aside gift and recover possession—No award of possession by decree—Failure of execution in consequence—First suit for possession—Bar of suit.*—An absolute occupancy tenant had two daughters. She made a gift of the holding to them and put them in possession. Therefore, the Malguzar sued to set aside the deed of gift and to obtain possession of the lands. He obtained a decree to the effect that the deed of gift was invalid and that he was entitled to buy the lands at a price to be fixed by a Revenue Officer. Plaintiff then applied to a Revenue Officer, and had the price fixed, and after paying it into the treasury, sued out execution under his decree. It was however *held* that he could not obtain possession under the decree by execution thereof. Hence he brought the present suit for possession. *Held* that the plaintiff having once before sued for the possession of the same lands in exercise of his right as Malguzar the trial of the present suit for the same relief based on the same cause of action was barred under s. 43 of the Code. INCHARAM MALGUZAR v. MT. HULA, ETC., **3 C.P.L.R. 28.**

(2575)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for rent of a field in a holding—Necessity for including claim in respect of another field comprised in same holding.*—When a landlord has sued for arrears of rent due on account of one field in a holding, he is afterwards barred by s. 43 of the Code in suing for arrears of rent on account of another field in the same holding, which arrears had fallen due before the date of his first suit. AMRITRAO MEGHE v. BALIRAM. **8 C.P.L.R. 9.**

(2576)—*O. 2, r. 2 (=s. 43. Civ. Pro. Code, 1877)—Suit for rent—Splitting claims.*—Where a landlord sued his tenant for rent for a certain year only, though at the time the rent for some subsequent years had become due, *held*, a subsequent suit for rent for such years would be barred under s. 43 of the Civ. Pro. Code, TARUCK CHUNDER MOOKERJEE v. PANCHU MOHINI DEBYA, **6 C. 791=8 C.L.R. 297.** (2 W.R. Act X. Rul. 31, 17 W.R. 380, 24 W.R. 326, *overruled by s. 43, Civ. Pro. Code*, 1877). [*F.*, 9 C. 143, 13 C.L.R. 214, 12 C. 50; *D.*, 21 B. 267; *R.*, 12 C. 339, 36 C. 115=13 C.W.N. 287=9 C.L.J. 9.]

(2577)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Arrears of rent for three years—Suit in Civil Court for two years' arrears, attachment under Rent Recovery Act for arreas not included in.*—Where after the rents payable to a landlord for three faslis had accrued due, he happened to sue his tenants only for the rent of the two

faslis next preceding the suit, he would be precluded by the provisions of s. 43 of the Civ. Pro. Code from suing in the Civil Court again for the rent that he had omitted to include in the previous suit. This would, however, not preclude the landlord from adopting any other remedy which the law might have given him, to enable him to recover arrears of rent acorued due to time, as for instance, the summary process of distraint provided for by the Madras Rent Recovery Act (VIII of 1865). RAJAH ESWARA DOSS v. VENKATAROYER, **21 M. 236.**

(2578)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Eviction of tenant during period of lease—Suit by lessee for loss of income subsequent to eviction—Subsequent suit by him for damages for breach of implied covenant for quiet enjoyment—Maintainability.*—Where a lessee, who had instituted a suit against his lessor for the loss of income caused by his eviction before the expiry of his lease, sued the landlord again for damages for breach of the implied covenant for quiet enjoyment, the second suit was barred by the provisions of s. 43, Civ. Pro. Code. (Per *Muthusami Aiyar, J.*) Before the expiry of a lease, certain lands comprised under the lease were sold in execution of a decree and the lessee was evicted from those lands by the purchaser. The Court-sale was due to the default of the lessee to pay off a certain mortgage-debt of the lessor, the major portion of which the lessee had contracted to pay. The lessee now sued for damages for breach of the implied covenant for quiet enjoyment. Plaintiff contended that the purchaser was merely a *benamidar* for his lessor. *Held* that plaintiff was not entitled to recover from defendant damages on account of his loss of possession of the lands, as the sale thereof was the result of plaintiff's own default. As the mortgage-debt was one fastened on the property included in the lease, plaintiff could safely have paid the excess claim also and added it to the amount payable to himself on redemption. *Held* also that, even if the purchaser was a mere *benamidar* for the defendant, that fact could not be allowed to weigh against the defendant, as the sale was directly the result of plaintiff's default. LABATHEEN v. THURAI RAJA, **2 M.L.J. 190.**

(2579)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Eviction by person with paramount title—Suit for damages for breach of covenant for quiet enjoyment.*—Where a lessee has been evicted once and for all by the Malguzar, who has a title paramount to that of the lessor, the lessee can bring only one suit for damages for the breach of the covenant for quiet enjoyment. If he sues for damages representing the mesne profits of some years, he is barred by s. 43 of the Code from subsequently suing again for mesne profits for subsequent years. The case of an eviction by a person with paramount title differs from other breaches of the covenant for quiet enjoyment, upon which damages may be recovered from time to time as they accrue. TUKARAM KOSHTI v. LALSA PRANNATH, **3 N.L.R. 80.** (21 B. 175, *F.*)

(2580)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Failure to include all reliefs in first suit—Bar to second suit.*—K had leased out certain lands to the defendant. The plaintiff sued K and the defendant claiming, as heir to the deceased husband of K, possession of half the land leased to the defendant. He obtained a decree. Subsequently, he sued the defendant alone to set aside the lease in respect of his half share and for mesne profits. *Held* that the suit was barred by s. 43 of the Code. The present relief must have been claimed in the previous suit. NANAK CHAIT v. BAKHTAWAR SINGH. **A.W.N. 1883, 198.**

(2581)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for possession against a lessee dismissed as non-maintainable—Subsequent suit for declaration—Cause of action, remedies with respect to one—Claim as to one remedy.*—The defendant took a lease of certain lands from the lambardar of the mahal. On partition, the land in dispute fell into the plaintiff's share. He sued the defendant for possession of the land, treating him as a trespasser. It was held that the defendant was a tenant, and no suit for possession could be brought against him. The plaintiff's prayer to get declaratory relief alone was rejected by the Court, as having been advanced at a very late stage of the case in second appeal. The plaintiff then brought the present suit for a declaration as to his title to the lands in dispute. *Held*, that the latter suit was barred under the provisions of s. 43 of the Code, inasmuch as, where a plaintiff claims a remedy, to which he is not entitled, in respect of a certain cause of action, and does not claim a remedy, to which he is entitled, he cannot claim the latter in a subsequent suit founded on the same cause of action. BADRI BISAL v. MUSSAMMAT LALTA KOR, **10 O.C. 44. B.** (5 O. C. 173, 8 O.C. 389, 24 M. 491, *F.*; 3 A. 857, 14 B. 31, 8 C. 819, *R.*) [*R.* 13 O.C. 19.]

(2582)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Mesne profits due at date of suit for possession, separate suit for—Omission of claim for mesne profits in suit for possession.*—When a plaintiff at date of his suit for possession is entitled to mesne profits, he must claim them in the same suit; a separate suit for those profits is barred under the provisions of s. 43 of the Code. SHAHAMAT HUSAIN v. MURLI PRASAD; **9 O.C. 224.**, (19 C. 615, *not F.*; 11 M. 151, 17 A. 533, *R.*)

(2583)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Lessor and lessees—Omission of relief in the former suit—Subsequent suit for omitted relief barred.*—One R brought a suit in 1907 against the defendants for damages, on the ground that the defendants had dispossessed her from the lands in suit by ploughing up her standing crops on the said

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land and taking possession of the standing trees. She did not include then a claim for recovery of possession. Subsequent to the date of dispossession, but before the date of the suit in 1907, R executed a lease in respect of the land in favour of the plaintiff, who sued for recovery of possession and for mesne profits. *Held* that the suit was barred by s. 43, Civ. Pro. Code, 1882, inasmuch as the plaintiff's lessor, R, omitted to include in her previous suit the claim for possession, which she was entitled to make at the date of instituting her suit. RAM LAL v. MIR JAHANGIR ALI, **5 Ind. Cas. 126.**

(2584)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1887)—Suit for possession of immoveable property and future mesne profits—Subsequent suit for past mesne profits.*—Where the auction-purchaser of certain immoveable property sued for the possession of that property and for future mesne profits, and obtained a decree, *held* that a subsequent suit to recover mesne-profits which had accrued at the time of the former suit was barred. MASIHULLAH KHAN v. CHIRANJI LAL, **A.W.N. 1881, 58.**

(2585)—*O. 2, r. 2, (=s. 43 Civ. Pro. Code, 1887)—Previous suit for possession of land—No claim for mesne profits made—Subsequent suit for mesne profits.*—The plaintiff, who had previously brought a suit for possession of certain land, without claiming mesne profits for the period of his dispossession, could not claim in a subsequent suit mesne profits for that period. SURJ BALI v. G. J. WALLACE, **A.W.N. 1882, 3.**

(2586)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for land—Maintainability of subsequent suit for mesne profits accrued prior to former suit.*—A plaintiff, who sues for possession of land only without suing for mesne profits in respect of the same land which had then accrued due, and which he could have done in the same suit, is not entitled to bring another suit to recover the said mesne profits. VENKOBA v. SUBBANNA, **11 M. 151.** [*Diss.*, 19 C. 615; *Not F.*, 31 M. 405=4 M.L.T. 192, 5 M. L.T. 220; *F.*, 17 A. 533, 9 O.C. 224; *R.*, 19 B. 532, 27 M. 528, F.B.=18 M.L.J. 445, 9 O.C. 322, 3 L.B.R. 151, 5 M.L.T. 105, 32 M. 330.]

(2587)—*O. 2 r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for partition of portion of joint property.*—A suit for partition cannot be brought unless the whole estate is brought into the division. MA MYA v. MA MYE, **U.B.R. 1897. 1901, Vol. II 229.** (12 C. 567, 14 C. 122, 7 B. 272, *F.*) [*R.*, U.B.R. 1909, Civ. Pro. Code, 21.]

(2588)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Partition suit—Omission to include property, effect of—Subsequent suit for partition of that property.*—Where, in a suit for partition of a joint estate, the plaintiff intentionally omitted certain property from partition, although the cause of action for getting that property partitioned had arisen along with the cause of action with respect to the other property: *Held*, that s. 43, Civ. Pro. Code, operated to bar subsequent suit for partition in regard to the property so omitted. SHEOAMBAR SINGH v. KALKA BAKSH SINGH, **9 Ind. Cas. 424.** (7 B. 182, *F.*; 21 M. 153, *R.*)

(2589)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Partition suit—Omission to ask for partition of certain lands, effect of—Subsequent suit for partition of such lands, not maintainable—Act VIII of 1859, s. 7*—A suit had been brought previously by the present plaintiffs against the present defendants for the partition of certain debts due to the family, the plaint alleging that the other properties of the family had been divided. That suit had been compromised and withdrawn but without the permission of the Court. The present suit was for partition of certain land alleged to have been left for subsequent division at the time of the former partition, and it was held that the plaintiffs were bound, in their former suit to demand a partition of the whole property which remained undivided, *i.e.*, of the lands as well as of the debts; and, having intentionally omitted this, they were barred from bringing the present suit by the provisions of s. 7 of Act VIII of 1859, equally with those of s. 43 of Act X of 1877. UKHA v. DAGA, **7 B. 182.** [*R.*, U.B.R. 1897-1901, 222, 14 C.P.L.R. 104; *D.*, 21 M. 153=8 M.L.J. 92, 23 B. 597, 43 P.R. 1906=122 P. L.R. 1906.]

(2590)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Right to sue for undivided share*—Where the right to sue for the whole of an undivided estate has accrued to a plaintiff, the fact that his title in respect of the whole estate had a double root, would not enable him to bring two separate suits on the basis of the two separate titles. The first suit on one of them would be a bar to the second suit on the other. SHAFKAT-UN-NISA v. SHIB SAHAI, **4 A. 171=A.W.N. 1881, 174, 211.** [*R.*, 8 O.C. 65.]

(2591)—*O. 2 r. 2 (=s. 7, Civ. Pro. Code, 1859)—Separate and distinct causes of action not to be included in one suit—Several suits not to be based on same cause of action.*—S. 7 of Act VIII of 1859 does not require a plaintiff, who has separate and distinct causes of action against a defendant, to include them in one suit, but prohibits the making of one and the same cause of action the subject of several suits. DYARAM v. GOUREE SHUNKER, **3 N.W.P. 20.**

(2592)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Causes of action.*—S. 7 of the Civ. Pro. Code, 1859, requires that every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought, but not every cause of action, or every claim which the party has. Therefore, a previous suit for possession of land held under a will *in consequence* of plaintiff having been wrongfully dispossessed

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of it, would not bar a subsequent suit by him for personal property under the will. PITTAPUR RAJA v. SURIYA RAM, **8 M. 520, P.C =12 I.A. 116.** (11 M.I.A. 553, *R.*) [*F.*, 21 C. 157, P.C. 13 M.L.J. 448=26 M. 760, 7 C.L.J. 504=12 C.W.N. 292; *R.*, 15 C. 800, P. C. 20 B. 469, 19 A. 379, F.B., 21 M. 91, 8 M.L.J. 92, 25 M. 736, 26 M. 104, 1 C.L.J. 337.]

(2593)—*O. 2, r. 2—Cause of action of two suits not identical—Whether one suit barred by virtue of the other.*—Where the cause of action of a later suit is not identical with that of a former, the latter is not barred under O. 2, r. 2 of the Code. HAZARI LAL v. RAM CHUNDER, **10 Ind. Cas. 26.**

(2594)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Test about the application of—Causes of action, identity of.*—*Held*, that the test of the applicability of s. 43, Civ. Pro. Code, is not whether, at the date of the previous suit, the plaintiffs might or even ought to have alleged the existence of the cause of action upon which the second suit rests, but whether the causes of action alleged in the plaints in the two cases are one and the same or are distinct. In a previous suit brought by the plaintiffs for a declaration that the defendants had no right in certain land beyond that of ordinary tenants, they alleged that their cause of action arose in 1904, when the Revenue Courts, in a suit brought by the defendants to contest a notice of ejectment, decided that they had rights superior to those of ordinary tenants. The suit was dismissed on the ground that the plaintiffs ought to have sued for possession. The plaintiffs, thereupon, brought the present suit for possession of the allegation that their cause of action arose in 1899, when the defendants, on the strength of an erroneous settlement entry recording them in possession of the lands, dispossessed the plaintiffs' tenants who were actually in possession. *Held*, that the present suit was founded upon a cause of action which was essentially different from that on which the previous suit was based and was therefore not barred by s. 43 of the Code. ABDUL KASIM KHAN v. JAGGU SINGH, **13 O.C. 19=5 Ind. Cas. 439.** (5 O.C. 173, 8 O.C. 389, 10 O.C. 44, 18 B. 537, *R.*)

(2595)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Execution—Claim to attached property on two titles—Release of attachment by one order under s. 280—Two distinct suits by decree-holder, if maintainable—Suits filed on same day, order of filing how determined*—Where the plaintiffs brought two distinct suits under s. 283, Civ. Pro. Code, each relating to one of two items of property released from attachment in execution of their money-decree, the latter of the two suits so filed was *held* to be barred by s. 43 of the Code. The cause of action was the order under s. 280 of the Code which had been obtained by the defendant, the objector, and the right and title of the plaintiffs to bring the subjects of the attachment to sale in execution of their decree. The mere fact that the plaintiff's judgment-debtors held or were alleged to hold portions of the property under different titles could not split the plaintiff's cause of action into separate ones. Nor could the defendant's allegation of different titles in herself to different portions of the property split up the cause of action. S. 43 of the Code has nothing to do with the evidence which may be necessary or may be produced to support or defeat an alleged cause of action or with the desire of a plaintiff to bring more suits than one. In the case of two suits brought into Court on the same day it must be presumed, for the purposes of s. 43, until the contrary is proved, that the suits were presented and admitted in the order in which their numbers appear in the register. *Held, per Aikman, J. dissenting*, that, though it was the order in the execution department which necessitated the plaintiffs' suit, yet, since on the case set up by them their real causes of actin were the two different transactions entered into between judgment-debtors and the objector, they were entitled to bring separate suits. MURTI v. BHOLA RAM, **16 A. 165, F.B. =A.W.N. 1894, 66.**

(2596)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Relinquishment of party, of claim—Simultaneous institution.*—Where two suits are simultaneously instituted, even if the claims in both of them arose out of the same cause of action and should have been included in one and the same suit, the determination of one of them is no bar to the entertainment of the other; for, in such a case, there is no relinquishment of a claim, and no question of entertainment of a suit *after* such relinquishment or omission, or *after* the institution and determination of the other suit. KALESHAR PRASAD v. JAGAN NATH, **I. A. 650.** [*D.*, 9 M. 279; *F.*, 76 P.R. 1890; *Overruled*, 16 A. 165, F.B.=14 A.W.N. 65.]

(2597)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882), Splitting, of claim.*—*Held*, that, where permission to withdraw a claim or a portion of it with liberty to bring a fresh suit is granted, s. 43 of the Civ. Pro. Code, does not bar the fresh claim. BUTA v. BISHEN DAS, **37 P.L.R. 1911.** (17 A. 53, *F.*)

(2598)—*O. 2, r. 2 =s. 43, (Civ. Pro. Code, 1882)—Portion of claim—Intentional omission.*—A right which a litigant possesses, without knowing or having known that he possesses it, cannot be regarded as "a portion of his claim," within the meaning of s. 43 of Act XIV of 1882. G, who was the tenant of a holding, died, leaving a mother and a daughter, both of the same name. The plaintiff sued the mother as representing G for arrears of rent for 1313 Fasli, and obtained an *ex-parte* decree. In respect or the year 1314, he sued the daughter and obtained a decree. The decree in respect or 1313 was set aside, and at the re-hearing, the

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daughter was made a party. It was found that, at the time the plaintiff brought the suit in respect of 1314, he was not aware that the daughter was the tenant in 1313. *Held* that the plaintiff, having no knowledge, when he brought his suit in respect of 1314, that the daughter was the tenant in 1313, could not be said to have omitted to sue in respect of that year, and the suit for 1314 was not barred by the provisions of O. 2, r. 2, (2) of Act V of 1908. BATUL KUAR v. MUNNI LAL, **7 A.L.J 738 = 7 Ind. Cas. 289 = 32 A. 625.**

(2599)—*O. 2, r. 2—Claim for arrears of rent or mesne profits not barred by a previous suit for possession of the same property Different causes of action.*—In cases governed by the new Civ. Pro. Code, the relief sought in a claim for arrears of rent or mense profits of immoveable property and the relief sought in a suit for the recovery of that immoveable property must be regarded as based upon distinct and separate causes of action, and hence the restrictive provisions of O. 2, r. 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or mense profits, which became due before the suit for the recovery of the immoveable property was instituted. DUBASH KADER v. FAKEER MEERA, **8 Ind. Cas 445.** (3 L.B.R. 56, *Dis.*; 11 M. 151, 19 C. 615, 12 C. 482, *R.*)

(2600)—*O. 2, r. 2* (=s. 43, *Civ. Pro Code*, 1882),—*Splitting of claim—Distinct causes of action—Previous suit for profits—Subsequent suit for possession—S. 9, Specific Relief Act (I of 1877),—Suit for possession against trespasser based merely on possession.*—Where a person has been dispossessed of land by another, who has come upon the land when the harvest was lying out and ready for division between landlord and tenants and has taken the landlord's share of the produce, and the person so dispossessed has sued only for the money value of that share of the produce, s. 43 of the Civ. Pro. Code, does not bar a subsequent suit by him for possession of the land. A plaintiff, who has been forcibly dispossessed of immoveable property by a person having no title, can sue for possession simply on the strength of the possession which he had before he was dispossessed; provided he sues within the twelve years' period allowed by art. 142 of the 2 Schedule of the Limitation Act. In such a suit, unless defendant proves title, plaintiff should succeed without being asked to prove his own title to ownership; and even if the defendant proves that he (plaintiff) has no such title, s. 9 of the Specific Relief Act does not expressly take away this remedy, and was not intended to do so. ABDUL HAMID v. SARBULAND KHAN, **137 P.L.R. 1902 = 78 P.R. 1902.**

(2601)—*O. 2, r. 2* (=s. 43, *Civ. Pro. Code*, 1882,—*First suit for settlement of accounts and profits against co-sharer—Second suit for profits against the same defendent as lambardar*, ss.164, 165, *Agra Tenancy Act of* 1901.—The plaintiff brought two suits against the same defendant. One suit was for settlement of accounts under s. 165, Tenancy Act, against the defendant in his capacity as co-sharer, and the other was for share of profits under s. 164 in the defendant's capacity as lambardar. *Held*, that the suits were of different descriptions, and the causes of action for the two suits were not the same, inasmuch as the Legislature, by enacting ss. 164 and 165, Tenancy Act, contemplated two classes of suits. The second suit was not therefore barred by s. 43 of Act XIV of 1882. CHUNNO LAL v. RABHU DIAL, **7 A.L.J. 526 = 6 Ind. Cas. 809.**

(2602)—*O. 2, r. 2* (=s. 43, *Civ. Pro. Code*, 1882)—*Suit to set aside encumbrance—Co-sharers not made parties.*—Where a previous suit had been successfully brought to set aside certain encumbrances against some under-tenure holders without impleading other co-sharers of the defendants as parties, the failure does not bar a suit for the same purpose as against such other co-sharers, under s. 43, Civ. Pro. Code. SHUBHADRA DASSYA v. CHANDRA KUMAR NAG, **8 C.W.N. 54.**

(2603)—*O. 2, r. 2* (=s. 43, *Civ. Pro. Code*, 1882)—*Formal possession given by Court—Judgment-debtor persisting in taking rents from tenants—Cause of action.*—Formal possession given by the Court must be treated, as between the judgment-debtor and the decree-holder, as completely satisfying the order of the Court and so passing possession to the decree-holder. If the judgment-debtor persists in recovering rents from tenants after the date of delivery of such possession, there is a new cause of action to the decree-holder. AZIMDAD KHAN v. GHANSAM DAS, **1 A.L.J. 20.**

(2604)—*O. 2, r. 2* (=s. 43, *Civ. Pro. Code*, 1882)—*Previous suit for injunction restraining defendants from digging up and removing shells, dismissed—Subsequent suit for value of shells.*—A landlord having leased the right, to dig up and take shells from his land without causing any detriment to the use of the land by his agricultural tenants the lessee brought a suit against the agricultural tenants for a perpetual injunction restraining them from digging up shells and carrying away those which had been dug up and stored on the land. This suit having been dismissed on the ground that the case was not a fit one for an injunction, the lessee then brought a suit against the tenants for recovery of the value of the shells which were stored on the land at the time of the previous suit, but had since been removed by the defendants and converted to their own use. *Held*, that the suit was not barred by s. 43 of the Civ. Pro. Code. CHALADOM THOLAN v. KAKKATH KUNHAMBU, **25 M. 669 = 12 M.L.J. 406.**

(2605)—*O. 2, r. 2* (=s. 43, *Civ. Pro. Code*, 1882)—*Dismissal of suit for specific performance of agreement to renew kanom—Suit for recovery*

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of renewal fees paid on agreement,not barred.—The dismissal of a suit for specific performance of an agreement to renew a kanom does not bar, under s. 43, Civ. Pro. Code, a suit for recovery of renewal fees paid on the contract, for, the causes of action are different, the cause of action in the first suit being breach of contract and in the second suit being subsequent failure of consideration. PARANGODAN NAIR v. PERUMTODUKA ILLOT CHATA, **27 M. 380.**

(2606)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Dismissal of suit based on specific lease—Subsequent suit based on title—Causes of action different—Maintainability of subsequent suit.*—Where a suit based on specific lease for a term of years was dismissed, on the ground that the lease was not registered, a subsequent suit for possession based on title was not barred by s. 43 of the Code, inasmuch as the second suit was based on a cause of action different from that on which the first suit was based. NAGASAMY AIYAR v. PERUMAL AIYAR, **13 M.L.J. 475.**

(2607)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Sale of house and land on which house is situate—Zemindar, owner of land suit by, to avoid sale of land—Subsequent suit by zemindar for* haqq-i-chaha-ram *in respect of sale of house, not barred—Cause of action*—The plaintiff was the zemindar of certain land on which stood a house for which R and his predecessors had paid *pai jaut* to the plaintiff. R executed a sale-deeed in favour of one M by which he professed to convey to his vendee for a consideration of Rs. 2,000 not only the house but the land on which it stood. Thereupon the plaintiff instituted a suit against R and M for a declaration of his proprietary right to the land on which the house stood, for cancelment of the sale in so far as it purported to convey the land, and for arrears of rent. He obtained a decree in his favour on all the three heads. Two years hence, he brought a suit wherein he claimed as zemindar's *haqq-i-chaha-ram* Rs. 500 or one-fourth of the price paid by the vendee for the purchase of the house of R. *Held* that the plaintiff was not barred from maintaining the second suit under s. 43, Civ. Pro. Code, that the cause of action for the first suit was the wrongful act of R, in selling to his vendee the land on which his house stood and of which he was not the proprietor but a lessee, that the plaintiff became entitled to his due as zemindar by the lawful act of R in selling the house and that the plaintiff's cause of action in the second suit, was not the same as in the first suit, and that, further, Rule (*a*) of s. 44, Civ. Pro. Code, would have prohibited the plaintiff from joining his cause of action for the *haqq-i-chaha-ram* with is former suit in which he claimed a declaration of his right in immoveable property, such a due not falling within any of the exceptions mentioned in that section. GIRDHARI DAS v. RAGHUNATH PRASAD, **A. W.N. 1887, 77.**

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(2608)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Dismissal of enhancement of suit—Subsequent suit for rent at old rate.*—The dismissal of a suit for enhanced rent does not bar a subsequent suit for rent at the original rate. A suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and is founded entirely on different principles. SUDDER-UD-DIN AHMAD v. BANI MADHUB ROY CHOWDHRY, **15 C. 145 F.B.** (9 C. 919=12 C.L.R. 599, *overruled.*) [*R.*, 3 C.P.L.R. 3.]

(2609)—*O. 2, r. 2 (=old s. 43)—Relinquishment of claim by plaintiff*—s. 7, *Act VIII of* 1859—Where, in a former suit to set aside the sale of a tenure, plaintiff, in specifying the lands subject to that tenure, excluded a portion (which had been included once), as having been by a survey award included in the adjacent taluq, *held*, that such exclusion was not a relinquishment within the meaning of s. 7, Act VIII of 1859. PROSUNNO CHUNDER BANERJEE v. KALLY PERSAUD GHOSE, **W.R. 1864, 134.**

(2610)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for arrears of revenue—Cause of action.*—In 1881, the plaintiff sued the former zemindar and his vendees for arrears of revenue for the *kharif* (or early crop) of 1286 fasli. He added the former zemindar because he was personally liable for arrears of revenue due by him, and his vendees because their liability arose in respect of their holding the property on which the arrears had accrued. Subsequently, the same plaintiff instituted the present suit for moneys connected with the latter kist of 1286 *fasli* and the yearly kist of 1287 *fasli*. *Held* that this subsequent suit was not barred by s. 43 of the Code. The former zemindar who was a necessary party in the former suit was not liable for the present claim. So, if the plaintiff had included his present claim also in the former suit, his claim would have been liable to be defeated on the ground of misjoinder of causes of action. When the present suit has arisen out of a different cause of action from that of the former suit, the rule of procedure contained in s. 43 has no application to it. WAZIR MUHAMMAD v. AMANAT KHAN, **A.W.N. 1883, 172.**

(2611)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Prior suit on the alleged entrustment for safe custody—Subsequent suit for rent—Bar.*—Where a prior suit was brought on the basis of an alleged entrustment of the paddy by the zemindar to the tenant, and a subsequent suit for arrears of rent was brought against the tenant. *Held*, that the cause of action for the non-payment of rent was different from that in the prior suit, and that the subsequent suit was not barred by s. 43, Civ. Pro. Code, 1882. KADIR IBRAHIM ROWTHER v. ARUNACHELAM CHETTIAR, **19 M.L.J. 737=4 Ind. Cas. 1082=33 M. 397.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2612)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Relinquishment or omission to sue for one of several claims—Causes of action*—Onus.—Where a plaintiff has sustained an injury in respect of his proprietary or permanent interest in a certain land, and also an injury in respect of a temporary or leasehold interest in that land, and instituted two suits, it cannot be said that the two causes of action are so identical that he is precluded by s. 43, Civ. Pro. Code, from bringing the second suit. In the above case it lies on the defendant to show that the matters are the same. UPENDRA LALL MUKERJEE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **20 C. 716.**

(2613)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Second cause of action arising in suit upon original cause of action.*—The plaintiffs sued the defendants for damages on account of the alleged misappropriation by the defendants of the fruit of certain trees. The defendants in the course of that suit, for the first time, denied the plaintiffs' title to the trees. The plaintiffs' suit was dismissed, and they subsequently brought a second suit against the same defendants for recovery of possession of certain trees, including those to which the former suit related. *Held* that s. 43 of the Code of Civil Procedure did not apply to such subsequent suit. HER DAT RAI v. RAM PAL RAI, **A.W.N. 1894, 61.** (12 W.R. 290, *R.*)

(2614)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Plaint returned for presentation in proper Court—Increase of plaintiff's claim on the same cause of action in the meantime—Right of plaintiff to bring a suit for excess.*—Where a plaintiff presented a plaint in a Court of Small Causes for *malikana* for three years, and the Judge holding that the case was not cognizable by him returned the plaint for presentation to the proper Court, and where a subsequent instalment of *malikana* having in the meantime become due the same plaint without any alteration was presented in the Munsif's Court. *Held*, that the suit must be taken to have been commenced by the presentation of the plaint to the Court of Small Causes and not on its presentation in the Court of the Munsif, and the plaintiff was not barred by s. 43 of the Code of Civil Procedure from bringing a suit for the sum which had accrued after the plaint was presented in the first Court, but before its re-presentation in that of the Munsif. MOHSIN ALI v. IBRAHIM ALI, **A.W.N. 1890, 243.**

(2615)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)*—Sulehnamah—*Relinquishment of portion of claim.*—S, the plaintiff's guardian, and D, the husband of M, one of the defendants in the suit, held a *mouzah* in equal shares. S, sold the half share held by her to M; some portion of the *mouzah* being in the possession of the other defendants, S and D, sued them to recover it, and also for mesne-profits, and obtained a decree. The defendants appealed, whereupon S, filed a *sulehnamah*. The decree was upheld, however, by the lower appellate Court. In special appeal, the Sudder Court refused to give the renouncing plaintiff any decree for mesne-profits of a share. The plaintiff, who had then come of age, was not represented in the litigation in that Court. Shortly afterwards, he sued S and M, to set aside the sale to M, and obtained a decree. On D's death, M obtained possession of the land which had been the subject of the suit by S and D. The plaintiff now sued to recover a half share of the land sued for by S and D, and of the mesne-profits recovered or recoverable by M, under the decrees of the Sudder Court and the lower Courts, and to set aside the *sulehmanah*. *Held*, that as to M, the suit was not barred by s. 7, Act VIII of 1859. RAMLOCHUN LALL v. GOORPERSHAD, **5 N.W.P. 172.**

(2616)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for apportionment of mortgage-debt against purchasers of portions of mortgaged property.*—S. 43 of the Civ. Pro. Code, is no bar to the plaintiff's suit for apportionment of the mortgage-debt against purchasers of portions of mortgaged property by reason of his omission to make them parties to his mortgage suit. ROMMOY HAZRA v. PREMCHAND NASKAR, **5 C.W.N. 423.**

(2617)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Several mortgages to one person—Property same—Cause of action, one or several.—Quœre*:—Whether a person who holds several mortgages on the same property should bring one suit on all his mortgages, or could bring separate suits on each mortgage? SRI GOPAL v. PIRTHI SINGH, **24 A. 429, P.C.=6 C.W.N. 889=4 Bom. L.R. 827=29 I.A. 118.** [*Appl.*, 17 M.L.J. 301=2 M.L.T. 330=30 M. 353; *R.*, 9 C.L.J. 78=3 Ind. Cas. 686, 13 M.L.J. 448 =26 M. 760, 30 B. 156=7 Bom. L.R. 811.]

(2618)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Different suits on one mortgage.*—It is competent to a holder of two mortgages on the same property from the same person to maintain a suit on the latter one only for sale of the property subject to the prior mortgage. KESHAVRAM v. RANCHHOD, **7 Bom. L.R. 811 =30 B. 156.**

(2619)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Account stated—Mortgage transaction.*—The defendant traded in Zanzibar as the agent of one Khimji, who owned five shops within the German jurisdiction. To release from attachment these shops, the defendant obtained from the plaintiff a sum of Rs. 7,000 out of which he applied Rs. 5,869 in discharge of the attachment, and returned the balance to the plaintiff. As a security for the re-payment of Rs. 5,869, the defendant became personally responsible for the amount, and as part of the same transaction, he got a mortgage in his own favour from Khimji of the five shops and in turn sub-mortgaged them to

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the plaintiff. As a result of these transactions, the plaintiff debited Rs. 2,753 in the general account which was in the name of the defendant. The plaintiff then brought suit No. 193 of 1899 against the defendant to recover the balance due on this general account; and a few days later he brought another suit No. 196 of 1899 for the purpose of enforcing certain rights under the sub-mortgage. The first suit was decided in the plaintiff's favour; but the second was thrown out on the ground that it was barred under s. 43 of the Civ. Pro. Code. *Held*, that the second suit was not barred by s. 43 of the Civ. Pro. Code, since the two claims were not in respect of the same cause of action. The cause of action in the earlier suit was an adjusted account, in respect of the transaction arising out of the mortgage, and the mortgage constituted a cause of action in itself in the second. An account stated respecting a debt constitutes a new and dintinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. HANSRAJ v. LALJI, **6 Bom. L.R. 454=28 B. 447.**

(2620)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Two mortgages on the same date—Suit on one mortgage whether bar to suit on the other.*—Where two mortgages were executed on the same day and of one them recited that the other was the prior mortgage, a suit on the former mortgage did not bar a subsequent suit on the latter. SESHA AYYAR v. KRISHNA AYYANGAR, **24 M. 96=12 M.L.J. 383.**

(2621)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Omission by mortgagee to sue for one of several remedies.*—It was stipulated in a mortgage-bond that in default of regular payment of interest at the time fixed, the mortgagee might at his option, either foreclose and sue for possession before the expiry of the mortgage-term, or sue for the money by enforcement of the lien. Default having occurred in payment of interest, he sued for possession before the expiry of the mortgage-term after foreclosure proceedings taken. This suit having been rightly dismissed as premature (the terms of the bond notwithstanding), he sued for the enforcement of the lien. *Held* that this suit was not barred under s. 43 of the Civ. Pro. Code, as, under the law, he was not entitled, at the time of the first suit, to the remedy sought therein, and therefore, was not entitled to more than one remedy in respect of the same cause of action, *i.e.*, the failure of the mortgagor to pay interest in time. PIARI v. KHIALI RAM, **3 A. 857.** (3 A. 509, *R.*). [*Criticised*, 10 O.C. 44, F.B.; *R.*, 9 O.C. 322, 11 Bom.L.R. 46.]

(2622)—*O. 2, r. 2, (=s. 43, Civ. Pro. Code, 1877)—Decree against mortgagor enforcing lien—Subsequent suit against purchaser to enforce decree.*—A mortgagee obtained a decree against a mortgagor for the enforcement of the lien. He was resisted in bringing the mortgage to sale by a purchaser of the property in execution of a money-decree who was not made a defendant in the suit against the mortgagor. He brought a suit against such purchaser for a declaration that such property is liable to be sold under his decree. *Held* that second suit was not barred by the provisions of s. 43 of the Civ. Pro. Code. BEHRAICHI CHAUDHURI v. SURJU NAIK, **4 A. 257=A.W.N. 1882, 7.** [*R.*, L.B.R. 1893-1900, 14.]

(2623)—*O. 2, r. 2, (=s. 43, Civ. Pro. Code, 1877)—Money-decree or mortgage-bond, suit by assignee of—Whether he has lien on property sold—Registration.*—An assignee of a money-decree on a specially registered mortgage-deed sued to establish a lien on the mortgaged property subsequently sold. *Held* that the decree obtained under the mortgage-deed could not be held to be non-assignable and so incapable of execution, because the bond itself, being registered under s. 52 of the Registration Act, 1866, could not be sued upon by the assignee summarily and s. 43, Civ. Pro. Code, 1877, could not be pleaded as an answer to this suit; for, the mere fact of a mortgagee obtaining a money-decree will not of itself destroy the lien againt third persons who may have acquired the property from the mortgagor after the mortgage and the existence of a money-decree is no bar to his enforcing the lien against such third parties. MUSSAMMAT MAKHRI v. ADJUDHIA PERSHAD, **142 P.R. 1882.**

(2624)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Two mortgages on same property in favour of same person—Right of mortgagee to bring two suits separately.*—The section does not prevent the holder of two mortgages on the some property from instituting two separate suits in respect of them, as each mortgage is a transaction complete by itself. PARMALA v. DHOKAL, **4 C.P.L.R. 164.**

(2625)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Subsequent cause of action consequent on discovery of fraud.*—Where plaintiff sued for and obtained a decree for a declaration of his right to a share in a mortgage-debt, *held*, that s. 7, Civ. Pro. Code, was no bar to a subsequent suit by him for the recovery of his share of the amount due under the mortgage, afterwards discovered to have been fraudulently received by the same defendant prior to the first suit. LACHMAN SINGH v. SANWAL SINGH, **1 A. 543**, (N.W.P. 1871, 27, *R.*)

(2626)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court.*—Where a mortgagor, to whom the mortgaged property has been leased by the mortgagee, hypothecates such property to

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the latter as security for the rent payable by him, the decision of the Revenue Court in a suit for rent brought by the mortgagee, would not bar a subsequent suit by him in the Civil Court for the enforcement of the hypothecation which was not claimed in the Revenue Court, as it could only be claimed in a Civil Court. IMAMI BEGAM v. GOBIND PRASAD, **4 A. 318=A.W.N. 1882, 46.** (4 A. 180, *F.*)

(2627)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*Suit by usufructuary mortgagee for mortgage-money not a bar to subsequent suit by him for possession of mortgaged property.*—A usufructuary mortgagee sued to recover possession of the mortgaged property. The question for decision was whether the present suit was not barred under s. 43 of the Code by virtue of a previous unsuccessful suit by the plaintiff for recovery of the mortgage-money. *Held*, that the suit was not barred, the right claimed in the previous suit being the recovery of the mortgage-money by the sale of the property, which was quite different from the right claimed in the present suit, *viz.*, possession of the mortgaged property. RAGHAVA CHARIAR v. SESHADRI IYENGAR, **13 M.L.J. 374.**

(2628)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*Lis pendens.*—The purchaser of the equity of redemption of a portion of the mortgaged property, who obtains possession of that portion, on payment of the mortgage-debt under a decree for redemption against the mortgagee, is not prohibited, by s. 43, Civ. Pro. Code, from instituting a subsequent suit to recover possession of the remaining portion of the mortgaged property, from the mortgagee and his assignee, under a later purchase of the remaining portion of the equity of redemption. In the above case, the assignment of the mortgage pending the first suit was affected by *lis pendens*, only to the extent of the portion covered by the first purchase. BRAHANNAYAKI v. KRISHNA, **9 M. 92.** [*R.*, 12 M. 439.]

(2629)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*Previous suit for declaration and ejectment — Subsequent suit for redemption*—Res judicata.—Where the private purchaser first sued to have the Court-sale in execution of the mortgage-decree, above referred to, declared invalid against him and to eject the mortgagee-purchaser, and the suit was dismissed, a subsequent suit by him for redemption is not bad either under s. 13 or under s. 43 of the Civ. Pro. Code. The first suit was only to avoid the effect of the sale, and did not extinguish the inherent right to redeem. KUPPU NAYUDU v. VENKATA KRISHNA REDDI, **20 M. 82=6 M.L.J. 229.**

(2630)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*When second suit barred.*—Where a mortgagee obtains a decree against the mortgagor for the enforcement of the lien, and is resisted in bringing the mortgaged property to sale by a purchaser of the property in execution of a money-decree who was not made a defendant in the suit against the mortgagor, a second suit by the mortgagee against the purchaser for a declaration that such property is liable to be sold under his decree is not barred by the provisions of s. 43, Civ. Pro. Code. BHUP SINGH v. BULAB RAI, **A.W.N. 1886, 269.** (4 A. 257, *F.*

(2631)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*When subsequent suit barred.*—H executed a sale-deed to the plaintiff whereby he sold his share in a village. On that very day, he executed a simple mortgage-deed to the plaintiff in respect of his share in another village. A obtained a decree against H and in execution of the decree attached both the property which had been sold as well as that which had been mortgaged to the plaintiff. The plaintiff objected to the attachments and both his claims were disallowed. Then he brought a suit for a declaration that the property purchased by him from H was not liable to be sold in execution of A's decree. He obtained a decree in that suit as prayed for. Subsequently he brought the present suit for a declaration that the property mortgaged to him by H was not liable to be sold in execution of A's decree. *Held* that it was questionable whether the suit was barred by s. 43, Civ. Pro. Code, as the former suit had reference to the property purchased, that the order dismissing the claims must be taken as giving separate causes of action, that the titles were different, the properties were distinct, situate in different villages, and the attachments were distinct, and it was therefore questionable whether the plaintiff was bound to have included in the previous suit the relief claimed in the present suit. MUHAMMADIBRAHIM KHAN v. HABIBULLAH KHAN, **A.W.N. 1886, 113.** [*Overruled*, 16 A. 165, F.B.]

(2632)—*O.* 2, *r.* 2 (=s. 43, *Civ. Pro. Code*, 1882)—*Limitation Act, XV of 1877, art. 97—Contract to sell—Decree for specific performance—Failure of suit for possession—Subsequent suit for recovery of amount paid.*—The defendant agreed to convey certain property belonging to him and his son to the plaintiff. Disputes having arisen before the conveyance was executed, plaintiff sued for specific performance and got a decree, in pursuance of which the price was fully paid and a conveyance was executed. Plaintiff not having been given possession, sued for possession. It was then found, that the sale did not bind the son's interest in the property, and that, though the plaintiff was entitled to possession of the father's share, a division ought not to be effected on the ground of the inconvenience attending the division of the house. Plaintiff was awarded the value of the defendant's share, and the present suit was to recover the balance of the price paid, on the ground of failure of consideration to the extent of the son's share. The defendant contended that the suit was one for breach of contract to convey, and that

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plaintiff should have claimed damages as an alternative relief in the suit for specific performance, and that s. 43, Civ. Pro. Code, was therefore a bar to the present suit. He further contended that the suit was barred by limitation. *Held* that the contract to sell having been specifically enforced, no question as to its breach arose and the suit was really one for recovery of money the consideration for which had failed. The cause of action in the present suit was entirely different from that in the suit for specific performance, and s. 43, Civ. Pro. Code, had no application. *Held* also that the suit was not barred by limitation. The failure of consideration must be taken to have occurred when it was found in the suit for possession that the plaintiff was not entitled to recover the son's share. The present suit was within three years from that date and was, therefore, within time under art. 97 of the Limitation Act. VENKATARAMA AYYAR v. VENKATASUBRAHMANIAN, **24 M. 27=10 M.L.J. 217.** [*Expl.*, 26 B. 750; *R.*, 27 M. 380, 8 O.C. 166.]

(2633)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Sale—Supersession thereof by subsequent agreement—Dismissal of suit by vendee to recover property sold—Subsequent suit by him to recover money paid—Suit whether barred.*—Subsequent to the execution of a sale-deed, the parties agreed that in supersession thereof a new sale-deed, should be executed by the vendor in respect of properties less than those comprised under the first sale-deed. But the first document have been registered, the vendee sued to recover possession of the properties comprised thereunder. The suit was however dismissed on the ground that the first sale had been superseded. He therefore sued to recover the money paid by him as for failure of consideration. *Held* that the present suit was not barred by s. 43 of the Code. The plaintiff, when suing for the possession of the land for which he had paid the money, could not have anticipated the necessity to claim the re-payment of his purchase-money, and he therefore could not be expected to claim it in that action. PACHIAKUTTI UDAIYAN v. PANCHANADA PATTEN, **10 M.L.J. 204.**

(3634)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1877)—Distinct causes of action.*—Defendant was sued separately in the Munsiff's Court and in the Small Cause Court for prices of different things, but, on his objecting that there was only one account with the plaintiff and that the separate suit in the Small Cause Court was not maintainable, the plaint in the other suit was amended so as to include the other claim; it was held that the two causes of action, which were distinct when the suits were originally framed, became united and that there had been no "relinquishment" in the original suit, within the meaning of s. 43 of the Civ. Pro. Code. RAM TARRUN KOONDOO v. HOSSEIN BUKSH, **3 C. 785=2 C.L.R. 385.** (11 M.I.A. 468, *F.*)

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(2635)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Provision in bond for payment of whole amount due on default—Institution of suit for interest for a year—Waiver—Subsequent suit for principal and interest accruing due—Maintainability.*—A bond provided that, on default in the payment of interest on the date fixed in the bond, the whole amount due thereunder was payable. The obligor made default. The obligee sued for interest that accrued due up to the date of suit and in the plaint stated that he was willing to accept the principal and subsequent years' interest at the times fixed in the bond. Having obtained a decree for interest alone, the obligee sued subsequently for the principal amount and the interest which accrued due later on. *Held* that as the alternative provision in the bond was inserted for the exclusive benefit of the obligee, he had an option to sue either for the arrears of interest only, or for the same together with the principal amount. It was not necessary that he should manifest his intention of waiver by some overt act which could not be re-called. The institution of the suit and obtaining a decree for the arrears of interest showed that he had exercised the option. The subsequent suit was in consequence not barred by s. 43, Civ. Pro, Code. BADI BIBI SAHIBAL v. SAMI PILLAI, **2 M.L.J. 235.**

(2636)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882).*—Where the claim, in respect of which two separate suits have been brought, arises out of one and the same cause of action, namely, an obligation on the part of the debtor to pay, and a right in favour of the creditor to sue for the payment of, the sum which the debtor admitted as due on a settlement of accounts, and which he thereon promised to pay; the fact, that the debtor undertook to pay part of such sum at once, and part after expiry of a fixed time which had elapsed when the suits were brought, cannot enable the creditor to split an entire demand in a manner which s. 43 was intended to prohibit. In such a case there is no deed to dismiss both the suits, the decree in either may stand, provided the decree in the other is reversed, when it will not be open to the plaintiff to sue in respect of the sum claimed in the suit in which the decree is reversed. APPASAMI v. RAMASAMI, **9 M. 279.** (*N.F.*, 76 P.R. 1890; *R.*, 16 A. 165, F.B.)

(2637)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Several bonds passed in respect of one claim, separate suits maintainable on.*—When money is due on two or more bonds which have been originally passed in respect of a single claim, it is not incumbent on the plaintiff to unite the claims and sue for them in one action, but, it is optional with him to sue separately on each separate bond. There is nothing in the language of s. 43 of the Civ. Pro. Code, which would justify the Court in going behind the bonds to consider the circumstances out of which they sprung, although those circumstances

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might themselves have, at the time, constituted a cause of action. UMED DHOLCHAND v. PIR SAHEB JIVA MIYA, **7 B. 134.** [*R.*, 14 B. 31, *D.*, 9 M. 279.]

(2638)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Debt-bond with two alternatives for payment of principal—Suit and decree for interest accrued, subsequent suit for further interest not barred by.*—The terms of the bond in this case empowered the obligee either to sue for the whole sum as it fell due or, on default of such payment, to add the principal sum to an existing mortgage-debt foregoing his right to immediate repayment. So, when the obligee sued for three years' arrears of interest, as provided in the latter alternative in the bond, without suing for the principal then long overdue, he conclusively adopted the said latter alternative which reduced the obligation to this, *viz.*, that the interest should be paid periodically while the principal and any interest in arrears stood as a charge against the mortgaged property. A second suit brought by him for the further interest since accrued due was held to be maintainable and not be deemed to be barred by s. 43 of the Civ. Pro. Code. As the interest fell due under the second alternative which the obligee had conclusively elected to take advantage of, there was nothing to prevent him from separately suing for arrears of interest as it became due. SHRI SHAILAPA HEDLAPA v. BALAPA LOKANNA, **7 B. 446.** [*Appr.*, L.B.R. 1893—1900, 618; *R.*, 19 P.R. 1910=36 P.W.R. 1910.]

(2639)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Fee for medical attendance—Part paid by writing a promissory note—Suit on promissory note—Second suit for balance barred.*—P, a medical man, was engaged by R, defendant's father, on Rs. 100 per day. For a portion of the fee, R executed a promissory note, and the balance was agreed to be set off against R's fee for conducting a case of P in a Civil Court. After R's death, P sued the defendant on the promissosy note and got a decree. He then brought this suit for recovery of the balance, which was to be set off, and also a further sum for subsequent attendance, on the ground that, R having died, he (R) could not perform his part of the contract. *Held*, that the suit was barred by the provisions of s. 43. The causes of action of the two suits were in reality the same, that is, the breach of the agreement to pay Rs. 100 *per diem*, and the fact that a promissory note was given, in satisfaction of part of the debt, did not take the case out of s. 43. When the plaintiff brought his first suit, R was dead, and he could fall back upon the original agreement. But the suit for fees for subsequent attendance was not barred. PREO, NATH MUKERJI v. BISHVANATH PRASAD, **4 A.L.J. 83=A.W.N. 1907, 41=29 A. 256.**

(2640)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Plaintiff* **prima facie** *entitled to possession*—Onus *of proving that case falls under s. 43 is on defendant—Plaintiff's non-possession at the time of prior suit does not discharge the burden.*—At partition, certain premises fell to the lot of the plaintiffs. After partition, in 1898, the plaintiffs brought a suit for recovery of a portion of the premises which had fallen to their share. In the prior suit, they had not included in their claim the portion now in dispute: *Held*, that, the plaintiffs being *prima facie* entitled to recover possession of the premises, it lay upon the defendants to bring the case within s. 43 of Act XIV of 1882. The mere fact that the plaintiffs were not in possession of the particular portion now claimed at the date of the prior suit did not bring the case within the section. SHIBBA v. DALBAT, **2 Ind. Cas. 115.** (11 M.I.A. 551, 15 C. 900, 15 I.A. 106, *R.*)

(2641)—*O. 2, r. 2 (=s. 43, old Code)—Cause of action, splitting up of.*—In a suit for partition by one of four brothers, in which only two were made defendants, as the whereabouts of the other were not known, the plaintiff got a fourth share and the others a fourth each; and another fourth was reserved for the brother, abroad. Thirteen years later, the same brother brought another suit claiming therein a third of the share reserved. *Held* that s. 43 did not bar this suit, as the plaintiff cannot be said to be entitled to make this claim in respect of the cause of action in the previous suit. SHADI v. GAINDA, **127 P.R. 1890.**

(2642)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Relinquishment of, or omission to sue for, portion of claim—Separate claims in same right.*—Where the plaintiff claimed by a right of inheritance for partition of one out of a number of villages left by his ancestor, and the lower Courts dismissed the claim as untenable under s. 7, Act VIII of 1859, *held* that that section, though it might operate as a bar to any future claim by the plaintiff for partition of the remaining villages by right of inheritance, could not be held to bar the present claim. CHOE SINGH v. BAHADOOR SINGH, **1 Agra, 55.**

(2643)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Prior suit by tenant-in-common for partition of part of joint property—Subsequent suit sustainable in respect of remainder—Suit between tenants-in-common for partition—Exclusive possession of one tenant whether adverse possession—Limitation Act, 1877, Sch. II, arts. 142, 144.*—One of two tenants-in-common, having sued for partition of part of the property held by them as such, is not barred by s. 43 of the Civ. Pro. Code from bringing a separate suit in respect of the remainder of the property. In applying s. 43, it has to be seen whether the cause of action alleged in the plaint in the subsequent suit is identical with the cause of action alleged in the former suit. Where there has been an infringement of one right and one cause of action has arisen, the plaintiff must make his whole claim once for all in one suit.

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The right and the part of a tenant-in-common to have each field separately divided between himself and his co-tenant is one thing : the right to claim a partition of all the fields held by them as tenants-in-common is another thing, and the circumstance that there has been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort, would not preclude a subsequent general suit for partition. [*R.*, 26 M. 104, 87 P.R. 1903.] In the above suit, it was contended that, in the circumstances of the case, the suit fell within art. 142 of the schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till sometime within 12 years of the institution of the suit, and it was held that it must not be assumed that plaintiff has been dispossessed so as to render art. 142 applicable. There being no specific article relating to tenants-in-common, art. 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. As between tenants-in-common mere non-participation in the profits by one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession. The party claming to hold adversely must at least prove that it was in denial of the other's title that he excluded him from enjoyment of the property. There must be something amounting to ouster of the person against whom adverse possession is claimed, and, between tenants-in-common, there cannot be any such ouster or adverse possession until there has been a disclaimer by the ascertion of a hostile title and notice thereof to the owner, either direct or to be inferred from such open and notorious acts of exclusive ownership as might sufficiently warrant the inference that one of such tenants-in-common has been ousted by the other. ITTAPAN v. MANAVIKRAMA, **21 M. 153=8 M.L.J. 92.** [*F.*, 31 C. 970=9 C.W.N. 32 ; *Expl.*, 24 M. 246=10 M.L.J. 415, 12 M.L.J. 194 ; *R.*, 27 B. 43, 6 C. W.N. 601, 35 C. 961=12 C.W.N. 127=6 C.L.J. 735, 5 N.L.R 41, 19 M.L.J. 255=4 M.L.T. 327=6 M.L.T. 166.]

(2644)—*O. 2, r. 2, (=s. 43, Civ. Pro. Code, 1882)—If applicable to prior proceedings in Revenue Court—S. 158 (1) and (2), Punjab Land Revenue Act, XVII of 1887—Claim for additional share in respect of land already the subject-matter of partition proceedings not maintainable in Civil Courts.*—Where the plaintiffs applied to the Revenue authorities for partition of a Khata, a partition was duly made and was formally accepted by plaintiffs, to whom one-sixth was allotted. The plaintiffs, brought the present suit claiming one-twelfth share in addition, on the ground that previous mutation proceedings where wrong. *Held* that s. 43, Civ. Pro. Code, cannot be used to bar a suit in Civil Court, because of something that has happened in a Revenue Court in the partition case. The Revenue Court in the partition case was "empowered" to effect a partition, and, if it chose, to decide any question of title that might arise. The Revenue Court being so "empowered," s. 158 (1) of the Land Revenue Act prevents any Civil Court from taking cognizance of the matter. INAYAT v. NAMANG, **8 P.R. 1910=6 P.W.R. 1910=5 Ind. Cas. 253=165 P.L.R. 1910.**

(2645)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit by co-sharer for his share in certain property—Subsequent suit by him to recover his share in some other property—Maintainability.* A co-sharer is not like a co-parcener under the Hindu Law, bound to sue for division of all the properties held in common. A suit by him for his share in certain property does not bar a subsequent suit by him to recover his share in some other property. KUPPUSAMI AIYAR v. SUBRAMANIA AIYAR, **7 M.L.J. 73.**

(2646)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit to include whole claim—Discretion of plaintiff having several causes of action to sue in respect of one only—Subsequent suit in respect of another cause of actoin not barred.*—The defendants on the marriage of their sister F, took possession of her share in the property, and mortgaged the whole, including their own joint property, to one S. Thereupon, the plaintiffs instituted a suit against the present defendants and S for possession of one-third of the property mortgaged, on the allegation that they were F's reversioners, and, in respect of the remaining two-thirds, for a declaration that the alienation would not affect their reversionary rights, and obtained a decree for the relief sought. Subsequently, they instituted the present suit against the two sisters alone for possession of the residue of F's land. It was pleaded that the present suit was barred by s. 43, Civ. Pro. Code, by reason of the previous suit. *Held* that s. 43 was no bar to the present suit. The fact that a suit embracing the relief sought in the present suit and in the former suit might not have been bad for misjoinder did not necessarily entail that the present suit was barred by reason of the relief claimed not having been included in the former suit and that, although the respondent's right to possession of the share of F had accrued when the previous suit was instituted, the immediate cause of action was the execution of the mortgage, and the plaintiffs were entitled to sue separately for the relief claimed, which had no connection with the mortgage. MUSSAMMAT BADSHAH v. SAHIB. **87 P.R. 1903.** (14 M.I.A. 187, 6 C. 142, 21 M. 153, 149 P.R. 1890, 24 P.R. 1899, 24 C. 831, *R.*)

(2647)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Prior suit—Claim as reversionary heirs and also on other grounds—Objections as to joinder of claims—Subsequent suit based on reversionary title—Whether s. 43 bars suit.*—Where, on account of objections taken in the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

written statement by the defendant in a prior suit, on the ground that the claims of the plaintiffs in that suit, as reversionary heirs, could not be joined with the other claims in that suit, and that only the nearest of reversioners could sue on that ground and not all the plaintiffs jointly, a subsequent suit was filed by the representatives of one of the plaintiffs, claiming title as the nearest reversioners, *held*, that the title set up in the latter suit was not only different from, but also adverse to, that of the other plaintiffs in the prior suit, and that the subsequent suit was not barred by the provisions of s. 43, Civ. Pro. Code, 1882. RAJAH KESAVA VENKATAPPIAH ALIAS VENKATAPPA RAO GARU v. NAYAM VENKATRANGA ROW GARU, **7 M.L.T. 244=6 Ind. Cas. 603.**

(2648)—*O. 2. r. 2 (=s. 43, Civ. Pro. Code, 1882)—Possession—Cause of action—Splitting—Certificate of sale—Suit for exclusive possession of lands—Suit to recover share in joint land.*—Per *Chandavarkar and Aston, JJ.*—Where the purchaser at a Court sale sues to recovery exclusive possession of certain lands belonging to the judgment-debtors and on the termination of the proceedings in his favour, he institutes another suit to recover by partition the share of the judgment-debtors in other lands which are held by them jointly with their co-parceners, his second suit is not barred by the provisions of s. 43 of the Civ. Pro. Code although he bases his claims in both the suits upon the self-same certificate of sale issued to him by the Court. Per *Crowe, J. (dissenting)*—Both in this suit and the previous litigation plaintiff has relied on the title as evidenced by the certificate of sale. He may be entitled to more than one remedy in respect of the same cause of action, and he may sue for all or any of his remedies but if he omits (without leave of a Court obtained before the first hearing) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted. NARAYAN v. SHAMRAO, **5 Bom. L.R. 233=27 B. 379.** [*R.*, 13 C.W.N. 1031; *F.* 7 C.L.J. 384.]

(2649)—*O. 2, r. 2, (=s. 43 Civ. Pro. Code, 1882)—Suit for declaratory decree only.*—Where a plaintiff, mistakenly believing himself to be in possessions sue, merely for a declaratory decree, and where the Court, finding him not to be in possession, dismisses his suit on that ground without any enquiry into his rights, he is not precluded from subsequently suing for his entire cause of action. KOMOLA KAMINY DEBIA v. LOKENATH KUR, **8 C. 825. Foot note.** (8 C. 819, *F.*) [*R.*, 3 C.P.L.R. 3.]

(2650)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—"In respect of" a cause of action, meaning of—Prior suit for possession of house—Subsequent suit for arrears of rent—Cause of action.*—Where the plaintiff first brought a suit for possession against his tenant and, after obtaining a decree for possession, brought another suit for arrears of rent. *Held*, on a question whether the suit was barred by s. 43, Civ. Pro. Code, that the cause of action is clearly different, and the claim made is not part of the claim which the plaintiff was entitled to make "in respect of" the cause of action in the former suit. The cause of action for any portion of the rent is complete when that part of the rent is due and is unpaid; the cause of action for recovery of the property does not arise until the tenancy is determined—the one is founded on the obligation to pay for the occupation, the other on an obligation to withdraw from the occupation. A claim "in respect of" a cause of action is a claim "founded on" that cause of action. The difference between a claim "founded on" a cause of action and a claim "arising out of a cause of action," seems to be more a difference of metaphor than a difference in the quality of the claim. SUBBARAYA CHETTY v. RATHNAVELU CHETTY, **5 M.L.T. 105=32 M. 330=2 Ind. Cas. 313.** (19 C. 615, 11 M. 151, 11 M. 210, 9 C. 283, 17 A. 533, *R.*; 27 M. 116, *D.*)

(2651)—*O. 2, r. 2. (=s. 43, Civ, Pro, Code, 1882)—Dismissal of suit for declaration, whether bars subsequent suit for possession.*—The dismissal of a suit for declaration of A's title to land, on the ground that he ought to have sued for possession also, does not preclude him from subsequently bringing a suit for possession, since the causes of action in the two suits are different. The cause of action in the first suit is not an invasion of his possession but conduct throwing cloud on his title, while in the second suit the cause of action is an invasion of his possession. NARAYAN v. BHIWAJI, **6 N.L.R. 81=6 Ind. Cas. 926.** (8 C. 819, 12 C. 291, 14 A. 512, *F.*; 22 M. 24, 4 N.L.R. 14, *R.*)

(2652)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Prior suit for possession of lands—Subsequent suit for mesne profits of same lands, not barred.*—Where a person, after filing a suit for possession of certain lands, filed a suit for mesne-profits of the same lands, *held* that s. 43 does not bar the subsequent suit. GUTTA SARAMMA v. MAGANTI RAMANEDU, **4 M.L.T. 192=31 M. 405.** (11 M. 210, 9 C. 283, 19 C. 615, *F.*; 11 M. 151, *Not F.*) [*F.*, 5 M.L.T. 105 =32 M. 330, 5 M.L.T. 220.]

(2653)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for declaration of title and possession—Subsequent suit for possession—Cause of action.*—The dismissal of a suit for a declaration of title and confirmation of possession, on the ground that the plaintiff was not in possession on the date of the plaint, will not bar a subsequent suit for recovery of possession on the same title, under s. 43 of the Civ. Pro. Code. (11 M.I.A. 551, *R.*) A cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief, or to some part of the relief, prayed for, and is to be

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

sought for within the four corners of the plaint. JIBUNTI NATH KHAN v. SHIB NATH CHUCKERBUTTY, **8 C. 819=10 C.L.R. 537.** [*F.*, 8 C. 825, Foot-note, 12 C. 291, 14 A. 512=12 A.W.N. 80, 7 C.P L.R. 63; *R.*, 10 Bom. L.R. 117=32 B. 264, 3 C.P.L.R. 3, 14 B. 31, 14 M. 23, 16 M. 274; *D.*, 25 B. 189, 10 O.C. 44.]

(2654)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Decree for possession—Subsequent suit for mesne profits—No bar.*—This section does not bar a suit for mesne profits following on a successful suit for possession of immoveable property, a claim in respect of mesne-profits being a cause of action different from a suit for the recovery of immoveable property. MANUAL HAG v. MT. BAKHTAWARI BAI, **4 C.P.L.R. 88.**

(2655)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for declaration of title no bar to suit for possession.*—Where a declaratory decree has been refused on the ground that the plaintiff was out of possession, a subsequent suit for possession brought under the same title was held not barred under s. 43 of the Code, whether or not a fresh cause of action accrued between the institution of the first suit for a declaratory decree and the second suit for possession. L. ROOKE v. DOSAI SONAR, **7 C. P.L.R. 63.** (8 C. 819, 4 A. 261, 14 A. 512, *F.*)

(2656)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for possession—Maintainability—Prior suit for specific performance.*—Plaintiff sued the defendant for registration of a lease which the latter had granted to him and obtained a decree. Subsequently he sued for possession of the fields leased to him. The defendant contended that the suit for possession was barred by the provisions of s. 43, as the plaintiff could have claimed possession also in addition to the registration of the lease in the prior suit. *Held* that s. 43 of the Code did not apply to bar the present suit. NANAK CHAND v. NARENI, **A.W.N. 1883, 6.**

(2657)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit to cancel Court sale—Purchaser's possession not within plaintiff's knowledge—Subsequent suit for possession not barred by s. 43—Separate causes of action.*—The plaintiff filed a suit under s. 283, Civ. Pro. Code (whose claim for an attached property was dismissed) and got a decree. There was no prayer or decree for possession. A subsequent suit for possession was held not barred by s. 43 of the Code of Civil Procedure, because the cause of action for the subsequent suit was the wrongful withholding of possession from the plaintiff after her title had been declared in the previous suit, and also because the plaintiff was not aware of the transfer of possession under the Court sale which was sought to be set aside, whilst instituting the former suit. AMBU v. KETLILAMMA, **14 M. 28=1 M.L.J. 28.** [*Diss.*, 16 M. 140; *F.*, L.B.R. 1893-1900, 410, 29 M. 151, F.B., *R.*, 19 M. 145.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2658)—*O. 2, r. 2 (s.=43, Civ. Pro. Code, 1882)—Distinct trespasses at different times on different parts of same property—Cause of action—Maintainability of different suits.*—Where two distinct trespasses were committed at different times on different parts of the same plot of land, there was not one cause of action only. The owner of the land could maintain two distinct suits in respect of the trespasses, provided he did not so frame his first suit has to have made it obligatory on him to claim all the land which was wrongfully with held. KOTHANDA-RAMAPPA v. SUBBANNA, **10 M.L.J. 186.**

(2659)—*O. 2, r. 2. (=s. 43 Civ. Pro. Code, 1882).*—Where the plaintiff asked for and obtained a decree against the defendants in a previous suit, for the possession of a hill from which he had been evicted and for the damages caused by the defendant, having cut and removed certain trees from the said hill, and subsequently instituted a suit against the defendants for damages claimed in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit, and in respect of a quantity of timber which had been stored on the hill by the plaintiff and which also the defendant took away after the institution of the previous suit, *held* that the second suit was not barred under s. 43 Civ. Pro. Code, by the institution of the prior suit. THOTTATHIL AHMMAD v. MUTHEDATH AVUTHRAMAN, **8 M.L.J. 273.**

(2659-*a*)—*O. 2, r. 2 (=s. 43, Civ. Pro. Code, 1882)—Suit for injunction dismissed—Second suit for possession—Whether maintainable.*—There is no distinction in principle between the dismissal of a suit for declaration of title on the ground that the plaintiff was not in possession, and the dismissal of a suit for injunction on the same ground. Where a suit for an injunction is dismissed on the ground that the plaintiff is not or has not proved that he is in possession of the property, a subsequent suit for possession is not barred by the provisions of s. 43, Code of Civil Procedure, 1882. BANDE ALI v. GOKUL MISIR, **9 A.L.J. 111.**

(2659-*b*)—*O. 2, r. 2 (=s. 7, Civ. Pro. Code, 1859)—Mortgagee's lien—Limitation—Interest in land.*—A mortgagee taking out a money-decree is not bound to bring one suit for the whole of the property belonging to his judgment-debtor, if it has passed to different persons, under separate title-deeds; but may follow the property on which he has a lien into the hands, first of one purchaser and then of another, S. 7, Act VIII of 1859, does not bar a suit for a declaration that property in the defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for the portion of the property mortgaged. *In re* HURRY MOHUN PARAMANICK, **14 B.L.R. 418, Note=15 W.R. 486.** [*R.*, 20 B. 469.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2659-3)—*O. 2, r. 2 (=Civ Pro Code, 1882, s. 43)—Cause of action, splitting of—Suit for possession—Conversion before the date of the first suit—Damages not claimed in the first suit—Second suit to recover damages cannot lie—Transfer of Property Act (IV of 1882), ss. 3, 54—Immoveable property — Standing timber—Trees for cutting and converting into charcoal—Moveable property.*—In 1904 the plaintiff contracted with the co-owners of 15/16th share of two jungles to cut down and convert into charcoal trees of certain descriptions. In 1905 the plaintiff and his vendors sued the owner of the remaining 1/16th share and the person to whom it was sold by that owner, for possession by partition of their 15/16th share in the jungles by separating the share of the last-mentioned owner. The suit was decreed in the plaintiff's favour on the 17th January, 1908. On the 15th October, 1908, he brought another suit against the same defendants to recover damages for converting into charcoal the trees that stood in his share. It appeared that the conversion complained of had occurred before the first suit was instituted and that the plaintiff knew of it. *Held*, that the second suit was barred by the provisions of s. 43 of the Civ. Pro. Code of 1882; for, if the plaintiff had contracted for and acquired the right to the standing timber on 15/16th share of the jungles and that had already been converted by the defendant to his use at the time of the first suit, the plaintiff was bound to claim compensation in the first suit in respect of that conversion, and he could not again sue for damages as if a fresh cause of action had arisen. A contract for the cutting of all kinds of trees to be converted into charcoal upon the ground, excepting such trees as produce fruit or other forest produce, is not a contract for the sale of an interest in land, but is an agreement relating to moveable property. Trees answering to the above description are standing timber within the meaning of the Transfer of Property Act, 1882, and as such are not immoveable property. ALISAHEB BABA DIWAKAR v. MOHIDIN SADIK PATIL, **13 Bom. L.R. 874.**

(2659-4)—*O 2, r. 2—Assault—Actual loss and injured feelings—District Court and Small Cause Court—Jurisdiction.*—A claim to damages arising out of assault made up partly of actual pecuniary loss and partly of general damages for injury to feelings should be heard in the District Court. The Small Cause Court has jurisdiction only in respect to the actual loss and the claim cannot be split by suing for that part in the Small Cause Court and for the other part in the District Court. RUTTUN CHUND PAREE v. MUSSUMAT GOOJNEE, **53 P.R. 1868.**

(2659-5)—*O. 2, r. 2—Splitting cause of action.*—Plaintiff in 1872 sued for a declaration that certain lands recorded as property of defendant really belong to him. Four years afterwards he brought another suit in respect of land similarly recorded but which was, in 1872, under water and included under one number with the rest of the river-bed. *Held* that the second suit was barred by s. 7, Act VIII of 1859 and that the fact of the land being under water and having no separate number did not affect plaintiff's right to a declaration in 1872. NADAR KHAN v. ELAHI BAKSH, **90 P.R. 1877.**

(2659-6)—*O. 2, r. 2—Mistake of fact in suing—A second suit correcting omission*—Where plaintiff sued for hereditary shares jointly with another under a mistake of fact that the latter is also entitled to a share: *Held* that he could bring a second suit for what he had omitted, his omission being due to a mistake of fact. TAJAN v. IMAM BUX, **10 P.R. 1869.**

(2659-7)—*O. 2, r. 2 (=Civ. Pro. Code, 1859, s. 7)—Suit by reversioner to set aside alienation as barring inheritance—Suit to set aside mortgage by Hindu widow.*—The true test of the proper applicability of s. 7 of Act VIII of 1859 to any particular case must be whether there has been a splitting of the cause of action. R brought a suit against certain parties in possession to set aside certain alienations made by the widow of D, with the concurrence of her mother-in-law, under an assumed absolute power of disposition. R afterwards brought the present suit against certain mortgagees in possession, claiming under a mortgage executed by the same widow prior to the above-mentioned alienations, to set aside the mortgage of certain mauzas which formed part of the lands he sued for in the previous suit, on the ground that the widow had no power to charge the inheritance. *Held* that the present suit was not barred under s. 7 of Act VIII of 1859, as there was no splitting up of the same cause of action. KOOER GOLAB SINGH v RAO KURUN SINGH, **10 B. L.R. 1=14 M.I.A. 176=2 Suther. 474.** [*F.*, 2 M. 352, 7 C. 739; *R.*, 14 B. 31, 87 P.R. 1903.]

(2659-*a*)—O. II, r. 2—*See* ABATEMENT OF RENT, 24 W.R. 326.

(2659-*b*)—O. II, r. 2—*See* BENGAL ACT X OF 1859, 12 C. 50.

(2659-*c*)—O. II, r. 2—*See* U.P. ACT XII OF 1881, ss. 93 (*h*), 140, 7 A. 624=A.W.N. 1885. 129.

(2659 *cc*)—O. II, r. 2—*See* ATTACHMENT—PRIORITY OF ATTACHMENT, 11 W.R. 149=2 B.L.R. A.C. 230.

(2659-*d*)—O. II, r. 2—*See* BURDEN OF PROOF—MISCELLANEOUS, 19 W.R. 429.

(2659-*e*)—O. 2, r. 2—*See* CAUSE OF ACTION, 17 P.R. 1897, 70 P.R 1889, 190 P.R. 1888, 129 P.R. 1889, 35 P.R 1893.

(2659-*f*)—O. II, r. 2—*See* COMMON LAND, 113 P.R. 1900.

(2659-*g*)—O. II, r. 2—*See* CUSTOMS—PUNJAB—ADOPTION, 35 P.R. 1885.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2659-*h*)—O. II, r. 2 (=s. 43, Civ. Pro. Code, 1882)—*See* CUSTOMS—PUNJAB—ALIENATION, 47 P.R. 1894.

(2659-*hh*)—O. II, r. 2—*See* CUSTOMS—PUNJAB—INHERITANCE, 11 Ind. Cas. 35.

(2659-*i*)—O. II, r. 2—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 12 C. 291.

(2659-*j*)—O. II, r. 2—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 19 A. 98, F.B.=A. W.N. 1893, 57.

(2659-*jj*)—O. II, r. 2—Partition—Agreement to give one brother Rs. 5,000 for daughter's marriage—Pro-note in pursuance of agreement—Suit for partition—Subsequent suit on pro-note—Causes of action different—*See* HINDU LAW—PARTITION, 1912, 1 M.W.N. 59.

(2659-*k*)—O. II, r. 2—Suit by reversioner to set aside deed of gift—Subsequent suit for possession of property—*See* HINDU LAW—STRIDHANAM, 7 A.L.J. 153=5 Ind. Cas. 207 =32 A. 189.

(2659-*l*)—O. II, r. 2—Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcing of lien in Civil Court—Civ. Pro. Code, 1877, s. 43—*See* LEASE—GENERAL, 4 A. 180=2 A.W.N. 1882, 47.

(2659-*m*)—O. II, r. 2—Relinquishment of portion of relief by plaintiff—Effect—Right of defendant to put it forward as a defence—*See* LIMITATION ACT, 1908, s. 19, arts. 120, 148, 6 A.L.J. 931=3 Ind. Cas. 725=32 A. 33=6 M. L.T. 348.

(2659-*mm*)—O. II, r. 2—*See* MISJOINDER OF CAUSES OF ACTION, 9 B.H.C 257.

(2659-*n*)—O. II, r. 2—Subsequent mortgage—Payment of prior mortgages—Suit on subsequent mortgage—Separate suit for payments made under s. 74, Tr. P. Act—*See* MORTGAGE—GENERAL, 11 C.L.J. 551=6 Ind. Cas. 159=37 C. 589.

(2659-*o*)—O. II, r. 2—Suit for redemption decreed—Second suit for surplus profits recovered by mortgagee during mortgage, maintainability of, under section—Art. 105 of Limitation Act not to be construed so as to conflict with section—*See* MORTGAGE—REDEMPTION, 5 A.L.J. 192=A.W.N. 1908, 96=30 A. 225.

(2659-*p*)—O. II, r. 2—Suits in respect of different parcels of land—Different causes of action—Alternative claim common to all different suits—*See* MORTGAGE—REDEMPTION, 10 C.L.J. 83=3 Ind. Cas. 395.

(2659-*pp*)—O. II, r. 2—*See* MORTGAGE—REDEMPTION, 10 B.H.C. 369.

(2659-*q*)—O. II, r. 2—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 20 A. 322, F.B.=A.W.N. 1898, 58, 9 A. 23.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2659-*r*)—O. II, r. 2—*See* PARTITION—RIGHT TO PARTITION, 30 P.R. 1898.

(2659-*rr*)—O. II, r. 2—*See* POSSESSION—ADVERSE POSSESSION, 12 B.H.C. 148.

(2659-*rrr*)—O. II, r. 2—*See* POSSESSION, SUIT FOR POSSESSION, 2 A. 356, F.B.

(2659-*s*)—O. II, r. 2—Suit by mortgagee for possession—Failure to set up claim of pre-emption—Subsequent suit for pre-emption—Waiver—*See* PRE-EMPTION—MISCELLANEOUS, 99 P.R. 1910.

(2659-*t*)—O. II, r. 2—*See* RENT, SUIT FOR, 6 O.C. 341.

(2659-*u*)—O. II, r. 2—*See* RES JUDICATA—CAUSE OF ACTION, 12 W.R. 79, 14 W.R. 253.

(2659-*v*)—O. II, r. 2—*See* RES JUDICATA—COMPETENCY OF COURT, 27 M. 63=13 M. L.J. 23.

(2659-*vv*)—O. II, r. 2—*See* REVIEW—PRACTICE AND PROCEDURE, 20 W.R. 450.

(2659-*w*)—O. II, r. 2—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 13 P.R. 1896, Rev.

(2659-*x*)—O. II, r. 2—*See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 17 W.R. 122.

(2659-*y*)—O. II, r. 2—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 24 A. 501=A.W.N. 1902, 139.

(2659-*z*)—O. II, r. 2—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 14 A. 512=A.W.N. 1892, 80.

(2659-*a*-1)—O. II, r. 2—*See* SPLITTING UP CAUSE OF ACTION, 110 P.R. 1883.

(2659-*b*-1)—O. II, r. 2—Suit for share of inheritance and suit for maintenance—Civ. Pro. Code, 1882, s. 43—Doctrine of election—Succession Act, 1865, s. 172—*See* SUCCESSION ACT, 1865, s. 172, 12 C. 60.

(2659-*c*-1)—O. II, r. 2—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 9, 2 O.C. 17.

(2659-*d*-1)—O. II, r. 2—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 67, 99, A.W.N. 1887, 249.

(2659-*e*-1)—O. II, r. 2—Holder of two mortges on same property suing separately on each—*See* TRANSFER OF PROPERTY ACT, s. 85, 3 Ind. Cas. 175.

(2659-*f* 1)—O. II, r. 2—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 19 A. 379, F.B.=A.W.N. 1897, 94.

(2659 *g*-1)—O. II, r. 2—*See* TRUST, 18 B. 551.

(2659-*h*-1)—O. II, r. 2—*See* NOS. 279, 280, 305, 306, 306-*a*, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 358, 420, 435, 952, 1684, 2396, 2481, 2506, 2513, 2513-*a* to *h*. *supra*, AND NO. 4038, *infra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2660)— *O.* 2, r. 2, *s.* 2 (12), *O.* 20, *r.* 12, *s.* 47 (=*ss.* 43, 211, 212 *and* 244, *Civ. Pro. Code*, 1882)—*Suit for mesne profits.*—Mesne profits up to date of suit which can be claimed in the suit for possession of immoveable property, are profits, which were actually received by the person in wrongful possession, or might, with ordinary diligence, have been received before that date. NGA LU PE v. NGA SHWE YUN, **U.B R 1906, Civ. Pro. 50.** (U B R. 1904—1905, Civ. Pro. 1, *Diss.*)

(2660-*a*)—O. II, r. 2, s. 11—*See* REVISION—GENERAL, 26 P.R. 1899.

(2661)—*O.* 2, *r.* 2, *s.* 47 (= *ss* 43, 244, *Civ. Pro. Code*, 1882)—*Prior decree for possession of immoveable property—Subsequent mesne profits not claimed in plaint and not provided for in decree—Subsequent suit for recovery of such mesne profits not barred.*—Where, in a former suit, the plaintiff obtained a decree for recovery of immoveable property but did not claim or get a decree for mesne profits subsequent to the date of the suit, a subsequent suit where mesne profits are claimed for a period subsequent to the date of plaint in the former suit is not barred by s. 43, Civ. Pro. Code, as may be seen from the penultimate paragraph of s. 244, Civ. Pro. Code. JAGANNATHA RAO PANTULU GARU v. VELLANKI VENKATARAMA RAO, **11 M.L.J. 332.**

(2661-*a*)—O. II, r. 2, s. 47—Suit for possession of land—Wrong description of land given in plaint and in the decree—Order passed for execution, in respect of the property claimed but wrongly described in the decree, reversed—Fresh suit for declaration in respect of such property, whether barred—*See* POSSESSION—SUITS FOR POSSESSION, 5 M.L.T. 294=1 Ind. Cas. 806.

(2662)—*O.* 2, *rr.* 2, 3, 6 (=*ss.* 43 *and* 45, *Civ. Pro. Code*, 1882)—*Misjoinder of causes of action—Reversioner's suit for declaration against validity of transfer made by Hindu widow by separate deeds in favour of different persons—Transferees under separate deeds of different dates executed by widow, cause of action against.*—Certain reversioners sued for a declaration that certain alienations made by two Hindu widows P and M, were executed without legal necessity and were inoperative after their death. The deeds (1) and (2), dated 8th October, 1894 and (3) of 1st October, 1899, were executed by the two widows in favour of S and the deed (4) of the 7th July, 1904 was executed by P only in favour of R. *Held*, that having regard to the provisions of ss. 43 and 45 of the Code, the suit was bad so far that the cause of action with respect to the first 3 deeds should not have been joined with the cause of action with respect to the last deed (4) in one suit; and that the proper course was to allow the plaintiffs to make their election, which suit they would pursue without prejudice to their rights to bring fresh suit against the other defendant separately. SHEO RATAN v. GHISI-AWAN, **9 O.C. 326.** (7 B. 289, 16 A. 279, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2662-*a*)—*O.* 2, *rr.* 2, 4, 5 (=*ss.* 43, 44, *Civ. Pro. Code*, 1882)—*Omitting to sue or relinquishing Claim—Title to property not known—Cause of action—Suit for partition—Suit for declaration of title—claim to share of mortgage-decree with other property—Suit for immoveable property or declaration of title to it—Remand—Court of appeal—Civ. Pro. Code (Act V of 1908), O. 41, r. 23, power under.*—A plaintiff cannot be said to have omitted to sue under s. 43 of the Code of 1882, or to have intentionally relinquished his claim in respect of properties, the title to which was not brought to his notice at the time of the commencement of the previous suit. The causes of action in a suit for partition of joint properties and a suit for declaration of title on the ground that the defendants fraudulently took steps to recover debts, which, though they stood in the names of the defendants, belonged to the plaintiff and the defendants, are different. Where, in a suit for partition, the plaintiff stated that he ha discovered to the best of his ability what the joint properties were and called upon the defendants to mention if there were other properties jointly belonging to the members of the family, so that they might be brought into hotchpot and made the subject of the partition suit, and the defendants omitted deliberately to mention the properties which were in controversy in the subsequent suit: *Held*, that the decree in the partition suit did not affect the title of the plaintiff to the disputed properties in the subsequent suit or alter their character as joint properties, and the plaintiff had cause of action against the defendants for partition of those properties. The subsequent suit was not therefore barred under s. 43 of the Code of 1882. A suit claiming a share in the mortgage-decree with other properties was not one for recovery of immoveable property or to obtain a declaration of title to immoveable property within the meaning of s. 44 of the Code of 1882 (*a*). The powers of a Court of appeal under the Code of 1908 are much wider in respect of remand than the powers of a Court of appeal under the Code of 1882. GORA CHAND v. BASANTA, **15 C.L.J. 258=12 Ind. Cas. 684.**

(2663)—*O.* 2, *rr.* 2, 4, 5 (=*ss.* 43 *and* 44, *Civ. Pro Code*, 1882)—*Reliefs for declaration and damages arising out of one cause of action are one claim—Relief and cause of action distinguished.*—B got a declaratory decree to build a drain on a piece of land, which C and D claimed as their own and offered to allow B to build upon it, if he would pay its price. After obtaining the declaratory decree, B brought another suit for damages caused to him by C's and D's refusal. *Held*, that s. 43 of the Code of Civil Procedure barred the claim for damages inasmuch as there was only one act and one cause of action giving rise to more

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

than one relief which B ought to have joined in the first suit : *Held*, also, that under s. 44 of the Civ. Pro. Code, there is no bar to separate reliefs arising from the same cause of action being claimed in the same suit. BANARSIDAS v. MUNICIPAL COMMITTEE, DELHI, **5 P.W.R. 1907=28 P.L.R. 1907.** (10 M. 375, 506, 23 B. 379, 190 P.R. 1898, *F.*; 24 A. 553, 129 P.R. 1889, 78 P.R. 1902, 87 P.R. 1903, *D.*)

(2664)—*O. 2, rr. 2, 4, 5 (=ss. 43 & 44, Civ. Pro. Code, 1882)—Possession, suit for, subsequent to suit for mesne profits—Suit for profits when plaintiff entitled to possession also, effect of—Subsequent suit for mesne profits barred.* — *Held*, that having regard to the provisions of ss. 43 and 44 of the Code, a person having once sued for mesne profits with respect to land, for which he was then entitled to possession, cannot subsequently sue for possession of the same. SHEO RATAN MISRA v. RAM DHANI, **9 O.C. 322.** (19 C. 615, 17 A. 533, 9 O.C. 225, 3 A 857, *R.*)

(2664-*a*)—O. II, rr. 2, 4, 5—*See* COURT FEES ACT, 1870, s. 17, 7 A. 761=A.W.N. 1885, 218.

(2664-*b*)—O. II, rr. 2, 6 and O. VI, r. 17—*See* MISJOINDER—OF CAUSES OF ACTION. 41 P.R. 1887.

(2664-*c*)—O. II, r. 2, O VI, r. 17, O. VII, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, A.W.N. 1885, 167.

(2664-*d*)—O. II, r. 2, O VII, rr. 1 to 6—Allegations to be set out in the plaint—Suit for sale of mortgaged property—Right to personal decree—*See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 12 Bom. L.R. 531=7 Ind. Cas. 455 =34 B. 540.

(2665)—*O. 2, r. 2, O. 8, r. 6 (=ss. 43, 111, Civ. Pro. Code, 1882)—Set-off of an ascertained amount in a suit for money—Set-off only in respect of a portion of defendant's claim against plaintiffs—Subsequent suit by defendant for the remaining portion of the claim—Maintainability of suit.*—The plaintiff sued to recover from the defendant a sum of money alleged to be due on an adjustment of mutual accounts between the parties. The defendant pleaded that the suit was barred under para 2, s. 43 of the Code, inasmuch as the plaintiff had, in a previous suit, instituted against him by the present defendant, claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts under s. 11 of the Code, and had omitted to claim a set-off in respect of the remainder, which he sought to recover in the present action. *Held*, when the present plaintiff claimed, as defendant in the previous suit, a set-off under s. 111 of the Code, he was, so far as his claim to set-off was concerned, in the position of a plaintiff, within the meaning of s. 43 of the Code. Under s. 43, every suit should include the whole of a claim, which a plaintiff is entitled to make

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in respect of a cause of action. A person, who has a right of action against another for money payable on the account stated, is not entitled to sue first for one portion of the money payable on the stated account and then bring another action in respect of the balance, He is bound to include the whole amount in his claim founded on that cause of action in one suit. S 111 of the Code entitles the defendant to set-off against the plaintiff's demand an ascertained sum of money legally recoverable by him from the plaintiff, provided that the amount claimed to be set-off does not exceed the pecuniary limits of the jurisdiction of the Court. If the defendant's claim exceeds that which is made against him by the plaintiff, he will be entitled to a decree for the excess, it he proves the claim. A defendant is not bound to plead a set-off. He may, if he thinks proper, sue for the amount that is owing to him in a separate action ; but if he does rely on a set-off it is provded in s. 111 of the Code that the set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the cross claim. Therefore, a defendant, who sets up a claim by way of set-off, cannot split it; and while enforcing a portion of it under s. 111, cannot bring a suit to enforce the remainder. Suit was barred by s. 43 of the Code. NOWBUT PATAK v. MOHESH NARAIN LALL, **1 C.L.J. 364=32 C. 654.**

(2666)—*O. 2. r. 2, and O. 9, rr. 8, 9 (=ss. 43, 102, 103, Civ. Pro. Code, 1882)—S. 7, Act VIII of 1859, corresponding with first part of s. 43, Civ. Pro. Code, 1882—Gross negligence of next friend in suit instituted on behalf of minor.*—S. 7 of Act VIII of 1859 corresponds with the first part of s. 43, Civ. Pro. Code, 1882, and is as much a statutory bar as is s. 103 ; so if negligence gets rid of the statutory bar under s. 43, it equally gets rid of the one imposed by s. 103. A decree may be impeached where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of a decree. Gross regligence on the part of a next friend, exhibited in a suit brought by him on behalf of minors, prevents the effect of the statutory bar contained in s. 103, Civ. Pro. Code, to the filing of a fresh suit in respect of the same cause of action by them on attaining their majority. LALLA SHEO CHURN LAL v. RAMNANDAN, DOBEY, **22 C. 8.** (3 W.R., 46, *R.*; 10 C. 35, *Cons.*), [*F.*, 4 P.L.R. 1901; *R.*, 19 B. 571, 24 B. 547, 3 C.L.J. 119, 6 C.L.J. 448, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129, 10 O. C. 321 ; *D.*, 5 Bom. L R. 174].

(2667)—*O. 2, r. 2, O. 21, r 58 (=ss, 43, 278 Civ, Pro. Code, 1882)—Cause of action same and not distinct in two suits—Omission to sue for one of several remedies—'Cause of action,' meaning of.*—The defendants, in execution of a money-decree against G, caused certain moveable property to be attached. The plaintiffs

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

objected to the attachment under s. 278, Civ. Pro. Code, on the ground that the property belonged to them and not to G. The objection was disallowed. On the 18th July, 1898, the plaintiffs instituted a suit against the defendants for a declaration that the property was not liable to attachment and sale in execution of the decree. On the 2nd November, 1898, the Munsiff dismissed the suit on the ground that the property had been sold, that the plaintiff was, therefore, able to seek further relief than a mere declaration and that consequently the declaration sought could not be granted. In December, 1898, the plaintiffs instituted the present suit against the defendants in which they claimed Rs. 92-2-0, the value of the property, as a compensation for its illegal attachment. *Held*, that the cause of action on which the former suit was founded and the cause of action on which the present suit was founded were one and the same and not distinct; that such being the case, the plaintiffs were entitled in the former suit to make a claim for the value of the property as compensation for its illegal attachment; and that, having omitted to make such claim in the former suit, s. 43, Civ. Pro. Code, debarred them from it in the present suit. The expression 'cause of action' as used in s. 43, Civ. Pro. Code, is generally understood to mean every material fact which, if denied, the plaintiff must prove to entitle him to succeed; and it does not include the relief claimed. *Held*, therefore, that whether the plaintiffs claimed a declaration that the property was not liable to sale and attachment, or whether they claimed the value of the property as compensation for its illegal attachment, the same material facts would have to be proved to enable the plaintiffs to succeed, and those facts were that the property was their property, and that it had been attached; and that, in either case, the fact that they had objected to the attachment and objection had been disallowed, was not a material fact without proof of which they could not succeed. LAL BIHARI v. PALTAN, **5 O.C. 304.**

(2668)—*O. 2 r. 2, O. 21, r. 63 (=ss. 43, 283, Civ Pro. Code, 1882)—Suit for declaratory decree as to attached property without prayer for consequential relief—Institution of fresh suit to set aside sale and recover possession—Civ Pro. Code, s. 283—Specific Relief Act, s 42*—In a suit brought under s. 283, Civ. Pro. Code, the plaintiff, besides asking for a declaratory decree, may also pray for any consequential relief to which he is entitled. [16 B. 608, *F.*] Plaintiff, however, notwithstanding the provision of s. 42, Specific Relief Act, is not bound to ask for other relief than the declaratory decree, and, if he omits to ask for any other relief, he will not be barred by s. 43, Civ. Pro. Code, from instituting a fresh suit. MAUNG PYAW v. MAUNG PO OK, **L.B.R. 1893—1900, 410.** (14 M. 23, *Appl.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2668-*a*)—O. II, r. 2, O. XXI, r. 63, s. 73—*See* MISJOINDER—OF CAUSES OF ACTION, 43 P.R. 1897.

(2669)—*O. 2, r. 2, O 23, r. 1 (=ss. 43, 373, Civ. Pro. Code, 1882)—Suit withdrawn by permission.*—S. 43 of the Civ. Pro. Code does not apply in the case of a suit withdrawn by permission under s. 373; but the effect of such an order is to leave matters in the position in which they would have stood had no such suit been instituted. VENKATA v. RANGA, **10 M. 160.** [*Appr.*, 17 A. 53; *R.*, 14 C.P.L.R. 104, 10 C.W.N. 8=2 C.L.J. 480.]

(2670)—*O. 2, r. 2, O. 23, r. 1 (=ss 43, 373, Civ. Pro. Code, 1882)—Applicability of the Civ. Pro. Code to Revenue Courts—Act XII of 1881 (N.W.P. Rent)—Withdrawal of suit—Relinquishment of part of claim—By the Full Bench (Stuart, C.J., dissenting).*—The Revenue Courts in the N.W.P., in those matters of procedure upon which the Rent Act is silent, are governed by the provisions of the Civ. Pro. Code. (The principle of the decision in 9 C. 295, *F.*) *Held*, therefore, that the procedure prescribed by ss. 43 and 373 of the Civ. Pro. Code, with respect to the relinquishment of part of a claim and the withdrawal of a suit, is applicable to suits under the Rent Act, 1881. MADHO PRAKASH SINGH v. MURLI MANOHAR, **5 A. 406, F.B.=A.W.N. 1883. 92.** [*Appr.*, 12 C. 50; *R.*, 7 A. 36, 19 A. 510, 22 A. 132; *D.*, 6 A. 170, 21 C. 514, 36 C. 252=9 C.L.J. 125=13 C.W.N. 791.]

(2671)—*O. 2, r. 2, O. 23, r. 1 (=ss. 43 & 373 Civ. Pro. Code, 1882)—First suit for declaration of right and partition—Second suit for partition of joint property—Cause of action identical—First suit withdrawn—Second barred—Limitation Act (XV of 1877), art. 106—Suit for partition, a suit for a share in dissolved patnership*—The plaintiff brought a suit for declaration that certain property in Moradabad District purchased by the defendant in his name, was purchased with the money belonging to the parties and taken out of the partnership business of which the parties were joint owners and for partition of that property. The suit was withdrawn without permission to bring a fresh suit as the parties referred the matter in dispute to arbitration. The arbitration fell through and the plaintiff brought the suit for partition of certain property situate at Naini Tal which had been purchased in the joint names of the parties. In the plaint, he alleged that the property at Naini Tal was purchased with the profits of the partnership business. *Held*, that the cause of actions in both the suits were identical and the second suit was barred by s. 43 of the Code of Civil Procedure as the plaintiff ought to have included his present claim in the first suit. *Held*, further, that the suit was barred by s. 373 of the Code.—*Held* further, that the suit was also barred by art. 106 of the Limitation Act inasmuch as it was a suit for a share in the profits of a partnership which had been

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

dissolved more than 3 years before the suit. NAIZ AHMAD v. ABDUL HAMID, **5 A.L.J. 278 = A W.N. 1908, 131 = 30 A. 279.**

(2672)—*O. 2, r. 2, O. 23, r. 1 (=ss. 43, 373, Civ. Pro. Code, 1882)—Withdrawal of suit with liberty to bring fresh suit, on conditions or terms—Conditions, non-fulfilment of, effect of—Suit for recovery of possession of two plots of land—Omission to include portion of claim in previous suit, effect of—Cause of action same.*—When a plaintiff is permitted to withdraw from a suit on certain conditions and he does not fulfil the conditions imposed, he must be taken to have withdrawn without the permission of the Court, and be precluded from bringing a fresh suit for the same matter. When a plaintiff withdraws without permission, the suit, having regard to the language of the section, must be regarded as practically dismissed. A plaintiff cannot, having regard to sub-section 2 of s. 43, bring an action for a claim, which he ought to have included in a former suit brought by him which had been practically dismissed, HARI NATH DASS v. SYED HOSSAIN ALI, **2 C.L.J. 480 = 10 C.W.N. 8.**

(2673)—*O. 2, r. 2, O. 23, rr. 1, 2 (=ss. 43, 373 and 374, Civ. Pro. Code, Act XIV of 1882) —Proceedings in execution of decree.*—Ss. 43, 373 and 374 do not apply to proceedings in execution of a decree. RADHA KISHEN LALL v. RADHA PERSHAD SINGH, **18 C. 515.** (18 C. 462, *F.*; 12 A. 392, *Diss.*) [*F.*, 18 C. 635, 19 A. 90 = 13 A.W.N. 57, F.B.]

(2674)—*O. 2, r. 2, O. 23, r. 3 (=ss. 43 and 375, Civ. Pro. Code, 1882)—Previous suit between the parties compromised—Consent decree dealing with matters outside the suit—Suit on compromise—Cause of action.*—A suit by the plaintiff to recover his share in a certain village from the defendant was compromised, the defendant admitting the plaintiff's claim to the property and also agreeing, on certain terms, to give the plaintiff a certain share in another village. Embodying the terms of the compromise, a consent-decree was passed, with the reservation that only the property claimed in the suit could be obtained by the execution of the decree. The plaintiff has instituted the present suit to recover his share in the other village, referred to in the compromise, basing his right both upon title and on the deed of compromise. *Held*, that neither s. 43 nor s. 375 can bar any right of action arising out of the deed of compromise, and that the plaintiff has a right of suit on the contract expressed in the compromise independent of any right expressly reserved. PARSANNI v. NARAINI, **A.W.N. 1908, 128 = 2 A.L.J. 680.**

(2675)—*O. 2, r. 2 O, 33, r. 15 (=ss. 43, 413 Civ. Pro. Code, 1882)—Rejection of application for leave to sue in forma pauperis—No bar to subsequent original suit on same cause of action.*—S. 43, Civ. Pro. Code, applies only where there

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

has been *a suit*; and therefore it does not prohibit, when only an application for leave to sue in *forma pauperis* was made and rejected, the institution of a regular suit afterwards in respect of the same cause of action. Nor is there any bar to such a *subsequent regular suit*, contained in s. 413 of the Code, which prohibits only the making of a second *application to sue as pauper* after a former one in respect of the same cause of action has been rejected. NARAIN SINGH v. JASWANT SINGH, **21 A. 359 = A.W.N. 1899, 128.**

(2676)—*O. 2, r. 2, O. 41, r. 2 (=Civ. Pro. Code, 1877, ss 43, 542)—Plea of bar under s. 43, Civ. Pro. Code, taken in second appeal.*—Where a plea that a certain suit was not maintainable under s. 43, Civ. Pro. Code, 1877, was taken in the Court of first instance, but was not raised in the first appellate Court, nor in the memorandum of second appeal, the High Court refused to entertain such objections during the hearing of the second appeal. JHIM MAL v. BECHU NARAIN SINGH, **A W N. 1881, 144.**

(2677)—*O. 2, r. 2, sch. 2, r. 2 (=ss. 43, 525, Civ. Pro. Code, 1882)—Award of arbitrators—Suit for specific performance of contract of sale—Subsequent suit for possession—Maintainability—Specific Relief Act, s. 42.*—S. 43 of the Code of Civil Procedure can have no application to an application made under s. 525 of the Code. An arbitration award was to the following effect:—"Let the entire village of Batama be sold to the creditor for Rs. 3,300. Let the remainder of the debt be forgiven. Let the whole of the sir and *khudkasht* land be left for the maintenance of the debtors. Let the house which is mortgaged to the creditor be given to the debtors free of incumbrance." A decree was passed by the Court for specific performance of the award and the defendants having failed to obey the decree of the Court, the Court itself executed a sale-deed under s. 262 of the Civ. Pro. Code. Upon the basis of this deed, the plaintiff brought the present suit for possession of the village. *Held*, that the plaintiff was not compelled by s. 42 of the Specific Relief Act to add a prayer for possession in the previous suit for specific performance, and that s. 43, Civ. Pro Code, 1882 was no bar to the present suit by the plaintiff for possession. SHEODIN v. MT. GODHI BAI, **4 N.L.R. 14** (22 M. 24, *Diss.*; 18 B. 537, *F.*) [*Diss.*, 6 N.L.R. 81.]

(2678)—*O. 2, r. 2, sch. 2, r. 20 (=ss. 43 and 525 Civ. Pro. Code, 1882) — Application under s. 525—Subsequent suit for possession of property covered by award not barred.*—*Held*, that s. 43 of the Civ. Pro. Code does not bar a suit for possession of property allowed by an award to the plaintiff, by reason of the fact that the plaintiff had omitted to sue for its possession in an application filed by him previously under s. 525 of the Civ. Pro. Code. SULTAN SINGH v. NIDHAN SINGH, **107 P.L.R. 1902 = 68 P.R. 1902.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2678-*a*)—O. II, r. 2 (1)—*See* SPLITTING CAUSE OF ACTION, 9 P.R. 1881.

(2679)—*O. 2, rr 2, 3 (=s. 43, Civ. Pro. Code, 1882)—Cause of action—Splitting claim—Mortgagee entitled to arrear of* 'kasur' *and possession on breach of condition of mortgage—Suit for* kasur *filed and decreed—Subsequent suit for possession barred.*—Where, under the conditions of a mortgage, on the mortgagor making default in the payment of *kasur*, the mortgagee was entitled to both possession of the mortgaged land and arrears of *kasur* and he sued for arrears of *kasur* only: *Held*, that a subsequent suit for possession of the mortgaged land was barred under s. 43 of the Code of 1882, or O. 11, r. 2 (3) of the Code of 1908. MALIK KARIM BAKSH v. JATTU RAM, **31 P.L.R. 1910=8 Ind Cas. 224.** (28 P.R. 1907, 19 P.R. 1910, *F.*; 79 P.R. 1886, *Overruled by* 28 P.R. 1907, *R.*)

(2680)—*O. 2. r. 2 (3)—Omission to sue in the same suit for all the reliefs to which plaintiff is entitled—Subsequent suit for any omitted relief, barred.*—A, *bona fide* purchaser of certain land from B, built a house on the same. C, a mortgagee of B, obtained a decree against B, and in execution of the same caused the land as well as the house built on it to be proclaimed for sale. A, brought a suit against C, for a declaration that the mortgage-decree in respect of the suit should be declared null and void. Subsequently, he brought another suit for a similar declaration with regard to the house built by him. *Held*, that it was certainly open to A, to ask in the alternative in the first suit that the mortgage-decree should be executed only in respect of the land and that the house built by him as transferee for a value without notice of the mortgage should be exempted from the sale: that his omission to sue for this relief in the former suit constituted a bar to the latter suit under O. II, r. 2 (3). MAUNG KAUK SIT v. Y E.M. MUTHUVEERAPPA CHETTY, **9 Ind. Cas. 460.**

(2681)—*O. 2 r. 2 (3)—Declaratory suit for partition—Omission of relief—Separate suit—Limitation.*—In a prior suit, the plaintiffs sought for a declaration that a certain will executed by their father was null and void inasmuch as he had no right to dispose of by will the ancestral joint property. One of the defences raised in that suit was that the suit was barred by s. 42 of the Specific Relief Act, as the plaintiffs, being out of possession, had failed to ask for possession. The Subordinate Judge held that the plaintiffs, and the defendants were in joint possession, and hence overruled this plea of the defendants. The case went up to the Privy Council, but nowhere did the defendants challenge the finding of the Subordinate Judge. Later on, the plaintiffs brought this suit8for partition of the property: *Held*, that, under the circumstances, the second suit was not barred by the provisions of O. II, r. 2 (3) of the Code of Civil Procedure, 1908;

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Held, further, that the second suit was not barred by limitation, inasmuch as it had been brought within twelve years from the date of the Subordinate Judge's decision in the prior suit. KANHAYA LAL v. KUNWAL LAL BAHADUR, **7 Ind. Cas. 284.**

(2681-*a*)—O. II, r. 2 (3)—*See* RIGHT OF SUIT—MISCELLANEOUS, 47 P.R. 1884.

—— O. II, r. 3 (=1882, s. 45=1877, s. 45.)

See MISJOINDER OF CAUSES OF ACTION.

(2682)—*O. 2, r. 3 (=s. 45, Civ. Pro. Code, 1882)—Misjoinder of parties and cause of action—Suit for dissolution of two partnerships—Common partners--Proper course--Amendment—Return for, in appeal.*—Where, certain persons, who were the partners of a firm, started a petty partnership concern, in which all of them, together with certain strangers, were partners, and where the petty firm was sold to a third party, *held*, that one suit for the winding up and dissolution of the two firms together with a prayer for setting aside the sale of the smaller firm, will be bad for misjoinder of parties and causes of action, even though the accounts of one of the firms cannot be adjusted without looking into the accounts of the other, and though it might be necessary to appoint a receiver to recover anything due to the major firm from the petty firm (see s. 45, Civ. Pro. Code, 1882=O. II, r. 3, Civ. Pro. Code, 1908). *Held*, also, that, though it is impossible to allow the suit to proceed further as framed, to dismiss the suit at the stage of appeal for errors which should have been amended at the outset, would be a hardship on the plaintiffs, and that, therefore, the suit ought to be remanded with a direction to the lower Court that the plaint be returned for amendment. PARCHOMAL VASANDMAL v. VAMANDAS ALAMCHAND, **3 S.L.R. 108=4 Ind. Cas. 600.** (6 M. 239, *F.*)

(2682-*a*)—O. II, r. 3—*See* HINDU LAW—ALIENATION, 8 M. 75.

(2682-*b*)—O. II, r. 3—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 5 C.W.N. 880.

(2682-*c*)—O. II, r. 3—*See* NOS. 298-*a*, 334, 435, 504, 1684, 1686, 1772, 2249, 2409, 2412, 2426, 2427, 2428, 2429, 2429-*a*, 2431, 2431-*b*, 2481-*a*, 2482, 2490, 2491, 2514-*a*, 2662, *supra* AND NO. 2701-*a infra*.

(2683)—*O. 2, rr. 3, 4, 5, 6 (=ss. 44 and 45, Civ. Pro. Code, 1882)—Suit for declaration of title and cancellation of sale-deeds—Misjoinder of causes of action.*—When the plaintiff sued for a declaration of his title to certain immoveable property and also for the cancelment of two sale-deeds affecting the same property, it was *held* that there was no misjoinder of causes of action. NISAR HUSAIN v. NISAR ALI, **A.W.N. 1906, 54=3 A.L.J. 123.** (5 M. 161, 17 A. 274, 25 A. 229, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861, and VIII of 1859)—*continued.*

(2683 *a*)—*O.* 2, *rr.* 3, 4, 5, 6 (=*ss.* 44 *and* 45, *Civ. Pro. Code*, 1882)—*Suit to enforce mortgage—Necessary parties to such suit—Multifariousness.*—A suit to enforce a mortgage, in which the adverse claims of persons, not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee, are sought to be investigated, is open to objection on the ground of misjoinder and multifariousness under ss. 44 and 45 of the Code. JAJNESWAR DUTT v. BHUBAN MOHAN MITRA, **3 C. L.J. 205=33 C. 425.** (2 C.L.J. 602, *R.*) [*F.*, 8 C.L.J. 1, Note; *R.*, 10 C.L.J. 150.]

(2684)—*O.* 2, *rr.* 3, 6 (=*s.* 45, *Civ. Prv. Code*, 1882)—*Application of, to N.W.P. Tenancy Act—Suit for rent—Separate holdings—Joint suit not maintainable.*—S. 45 of the Code does not apply to suits for rent. A landlord cannot bring a joint suit for rent of several holdings both occupancy and non-occupancy. The N.W.P. Tenancy Act contemplates separate suit for arrears of rent in respect of separate holdings. JAGANNATH PRASAD v. TORE, **3 A.L.J. 611 =A.W.N. 1906. 253=29 A. 18.**

(2685)—*O.* 2, *rr.* 3 & 6 (=*s.* 45, *Civ. Pro. Code*, 1882)—*Joinder of causes of action—Alternative relief.*—A plaintiff may join in one suit, in the form of a prayer for alternative relief, a claim to enforce an agreement to refer a matter in dispute to arbitration and a claim for damages for a breach of such agreement. KO PON v. KO KIN AND PUSA YAUK, **L.B.R. 1872—1892, 355.** (4 C. 949, 6 C. 328, M.I.A. 438, 9 B.H.C. 1, *R.*)

(2686)—*O.* 2, *rr.* 3, 6 (=*s.* 45, *Civ. Pro. Code*, 1882)—*Suit for rent of agricultural holding and fishery rents—Joinder of the causes of action, legality of, under s.* 45—*Suit for fishery rents entertainable in odinary Civil Courts.*—These suits were instituted by the same plaintiffs against different defendants, for recovery of consolidated sums of money made up of the rents of the agricultural lands held by the defendants and the amounts contracted to be paid by them on account of fishery. The Munsiff decided wholly in favour of the plaintiffs but, on appeal, the District Judge held that the suit was not maintainable so far as it related to the fishery which was unconnected with the agricultural holdings and gave decrees for agricultural rents only. *Held*, since by contract the rents were consolidated, the tenants agreeing to pay sums so consolidated, the causes of action for both the rents were not different; but even assuming that the claims were based on different causes of action, plaintiffs were entitled to decree for the entire amount claimed, since the claims were such as could be joined together in one and the same suit in accordance with the provisions of s. 45 of the Code and the District Judge was, therefore, wrong in having held that the suits, so far as related to the rents of the fishery, were not maintainable. On the objection urged for the respondents that the claim for fishery rent was not entertainable in the Court of the Munsiff but only in a Court of Small Causes, *held*, that a suit for recovery of rent other than house rent, is not cognizable by Small Cause Courts and there is nothing in the definition of the word 'rent' in the Bengal Tenancy Act which excludes fishery rent. SHIB PROSAD CHUDHURI v. VAKI PALI, **33 C. 601.** [*R.*, 7 C.L.J. 152.]

(2687)—*O.* 2, *rr.* 3, 6 (=*s.* 45, *Civ. Pro. Code* 1882)—*Mortgage-suit—Multifariousness—Misjoinder of parties and causes of action.*—Three of the four mortgages held by the plaintiff were binding on defendants Nos. 1 to 10, members of a joint Hindu family. The fourth mortgage was by the second defendant in respect of his share of certain items of joint family property and was binding on his son, the ninth defendant. The eleventh and twelfth defendants were joined, as they were subsequent and prior mortgagees of certain items. *Held* that the suit was not bad on account of multifariousness. PARTHASARATHY NAICKEN v. THANDVARAYA MUDALIAR, **17 M L.J. 518.** (25 M. 108, *R.*)

(2688)—*O.* 2, *rr.* 3, 6 (=*s.* 45, *Civ.Pro Code*, 1882)—*Joinder of defendants—Possession under separate deeds—One cause of action.*—Where property is transferred under separate deeds, at different times, to different transferees, and the plaintiff brings one suit for possession against all the transferees, *held* that the suit is not bad for multifariousness. In a suit for ejectment against several defendants, who set up various titles to different parts of the land claimed, there is only one cause of action, and not several distinct and separate causes of action. PARBATI KUAR v. MAHMOOD FATIMA, **4 A.L.J. 121=A.W.N. 1907, 36=29 A. 267.** (16 A. 279, *D*; 21 C. 831, 29 C. 871, *F.*) [*R.*, 30 A. 560=A.W.N. 1908, 235=5 A.L.J. 647=4 M.L.J. 392, 33 B. 293=11 Bom. L.R. 34=5 M.L.T. 230=1 Ind Cas. 120.]

(2689)—*O.* 2, *rr.* 3, 6 (=*s.* 45, 1882, *Civ. Pro. Code*)—*Misjoinder of causes of action.*—The plaintiff brought a suit to enforce his right of pre-emption in respect of two sales against the vendor and the vendee. The two sales were made to the same vendee on the same day. The vendee defendant objected to the frame of the suit on the ground of misjoinder of causes of action. *Held* that the suit was bad for misjoinder of causes of action. The fact that the parties were the same would not be ground for uniting the causes of action in the same suit. HARBANS SINGH v. LACHMINA KUAR, **A.W.N. 1883, 230.** (3 A.W.N. 229=6 A. 106, 5 A. 163, *F.*) [*D.*, 17 A. 274.]

(2690)—*O.* 2, *rr.* 3, 6 (=*s.* 45, *Civ. Pro. Code*, 1882)—*Reversioner.*—A reversioner can claim the whole property to which the reversion extends, in one suit, whatever may be the number of illegal alienations by the tenant for

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life, and, therefore, he is at liberty also to sue for a declaration of his right, which is a remedy only ancillary to that right in regard to the whole. When the different alienees have been joined as defendants in one suit for a declaration, the suit does not become bad for misjoinder or multifariousness, notwithstanding the fact, that each alienee is interested only in regard to his item of property and in no others. MAHOMED v. KRISHNAN, **11 M. 106** (7 M.H. C. 290, *Cons.*) [*Not F.*, 9 C.P.L.R. 125, 6 C.W. N. 585, 1 P.R. 1905=83 P.L.R. 1905, 11 Bom. L. R. 34=5 M.L.T. 230; *R.*, 15 M. 19, 16 B. 608, 25 M. 736=12 M.L.J. 103; *Cons.*, 33 B. 293.]

(2690-*a*)—O. II, rr. 3, 6—*See* MULTIFARIOUSNESS, A. 106=A.W.N. 1883, 229.

(2690-*b*)—O. II, rr. 3, 6, s. 141—*See* BEN. ACT VIII OF 1885, s. 158, 24 C. 197=1 C.W. N. 236.

(2691)—*O. 2, rr. 3, 6, 7 (=ss. 45, 46, Civ. Pro. Code, 1882)—Scope and applicability of Civ. Pro. Code, 1882)—Misjoinder of causes of action, objection raised in second appeal, procedure,*—S. 45 of the Code applies to cases where there are only one plaintiff, one defendant and several causes of action, and also to cases where the plaintiffs and defendants, though consisting of two or more individuals, may be considered as a unit with reference to all the different causes of action. S 46 of the Code refers to s.45and when it speaks of several causes of action being united, which cannot be conveniently disposed of in one suit; it refers to several causes of action, which may be rightly united under the first paragraph of s. 45. There is no authority expressed in, or to be implied from, the provisions of the Civ. Pro. Code, which would warrant the joinder in one suit of different and distinct causes of action under circumstances not mentioned in the first paragraph of s. 45 of the Code. When, therefore, A claimed to recover a share of the property on the basis of a conveyance from one of the joint owners and B claimed to recover possession of another share under a lease granted by another co-sharer, a suit by A and B jointly is open to the charge of being bad for misjoinder of causes of action. SARALA SUNDARI DASI v. SARADA PROSAD SUR, **2 C.L.J. 602** [*R.*, 33 C. 425=3 C.L.J 205.]

(2691-*a*)—O. II, r. 3. O. XX, r. 12, s. 47—*See* DECREE—DECREE, FORM OF, 14 A. 531 =12 A.W.N. 164.

——O. II. r 4 (=1882, s. 44 (a)=1877, s. 44 (a).

See MISJOINDER OF CAUSES OF ACTION.

(2691-*a*-1)—O. II, r. 4—Whether defendant may by his conduct waive the benefit of the rule contained in this section—*See* RELIGIOUS ENDOWMENT, 8 C.L.J. 196.

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(2691-*b*)—O. II, r. 4—*See* NOS. 335, 339, 1773, 2492, 2506, 2514, 2662-*a* 2663, 2664, 2664-*a*, 2683, 2683-*a*, *supra* AND NO. 5699, *infra*.

(2692)—*O. 2, rr. , 5 (=s. 44, Rule A, Civ. Pro. Code*, 1882)—*Scope and applicability.*—There is nothing irregular in seeking to recover in one suit immoveable and moveable property, if the cause of action is the same in respect of both. GANESH DUTT THAKOOR v. JEWAEH THAKORAIN, **31 C. 262, P.C.=31 I A 10=8 C. W.N. 146=14 M.L.J. 8=6 Bom. L.R. 1.** (10 M. 375, *F.*) [*D.*, 17 M.L.J. 135.]

(2693)—*O. 2, rr. 4, 5 (=s. 44, Civ. Pro. Code*, 1882)—*Scope and applicability of.*—S. 44, Civ. Pro. Code, 1882, does not apply to a suit unless it is for recovery of immoveable property. Even in those cases, the defect of multifariousness is cured if leave of the Court is obtained previous to the bringing of the suit. NISTARINI DASSI v NUNDO LAL BOSE, **30 C. 369=7 C. W.N. 353.** [*Affirmed*, 33 C. 180, P.C.=9 C.W. N. 961=2 C.L.J. 189=7 Bom. L.R. 887=15 M.L.J. 331=32 I.A. 193.]

(2694)—*O. 2, rr. 4 and 5 (=s. 44 (b), Civ. Pro. Code*, 1882)—*Executors, administrators and heirs as such—Legatees and next-of-kin—Points of difference between — Misjoinder of causes of action.*—Those to whom rule (*b*) of s. 44 of the Civ. Pro. Code relates, have the common characteristic that they owe their legal condition to the death of another. But there are others, of whom this can be predicated, as for instance, legatees or next-of-kin, and yet they are not named in rule (*b*). But the common characteristic of executors, administrators and heirs which is not shared by legatees and next-of-kin is that the former not only acquire title from the deceased but they may represent him. In this is to be found the clue to the meaning of the rule. Thus, a claim may be made by or against the heir of a deceased Hindu as his representative, and again the same person may claim for his own benefit and in his own personal right, property of which the beneficial ownership has devolved on him by inheritance from, that is to say, as heir to, this deceased Hindu. His legal capacity in the two cases is absolutely distinct, and it is only in reference to his representative capacity that it can be said a claim has been made by or against an heir as such. HAFIZABOO v. MAHOMED CASAM, **8 Bom. L R. 734=31 B. 105.**

(2695)—*O. 2, rr. 4, 5 (=s. 44, Civ. Pro Code*, 1882)—*Joinder of claims under two mortgage-deeds over separate properties.*—S. 44 of the Civ. Pro Code, does not bar a suit by a mortgagee, holding two mortgages over different properties, for sale or foreclosure in respect of both deeds, whether a suit on a mortgage is regarded as a suit for recovery of immoveable property or not. A suit for sale or foreclosure in respect of a mortgage is not a suit for the

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recovery of immoveable property. RAGHUBAR DAYAL v. JWALA SINGH, **25 A. 229=A W.N. 1903, 19.** (5 M. 161, 17 A. 274, *R.*) [*R.*, 3 A. L.J. 123=A.W.N. 1906, 54 ; *Cited*, 6 A.L.J. 926]

(2696)—*O. 2, rr. 4, 5 (=Civ. Pro. Code*, 1882, *s. 44)*—Res judicata—*Joinder of causes of action.*—The law does not require a plaintiff and at once to assert all his titles to property or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court, join causes of action ; but he is nowhere compelled to do so. SHEO RATAN SINGH v. SHEO SAHAI MISRI, **6 A 358=A.W.N. 1884, 115.** [*Disappr.*, 25 B. 189.]

(2697)—*O. 2, rr. 4, 5 (=Civ. Pro. Code*, 1877, *s. 44)*—*Implied leave—Joinder.*—When objection to the joinder of certain causes of action is disallowed in the Court of first instance and the suit decreed, the proceedings of the Court imply and indicate that leave was given to the joinder. JAGARNATH DAS v. PABARU SINGH, **A.W.N. 1882, 207.**

(2698)—*O. 2, rr. 4, 5 (=Civ. Pro. Code*, 1882, *s. 44)*—*Suit for possession against some defendants — Money claim against others — Multifariousness—Guardian and ward—Alienation by guardian of minor's property—Suit to set aside alienation by minor on attaining majority —Burden of proof.*—In a suit for possession of immoveable property against some of the defendants, a money claim against the other defendants was asked for. The defendants did not take any objection in the Court of first instance on the score of multifariousness. *Held* that the money claim was liable to be dismissed, though a fresh suit on the same claim may be barred. In a suit by a plaintiff to set aside an alienation made by his guardian during his minority, the plaintiff is bound to show that the alienation is not binding on him, and, in the absence of such proof, the alienation will stand good. MALLA REDDY v. SESHADRI REDDY, **5 M.L.J. 53.**

(2699)—*O. 2 rr. 4, 5 (=s. 44, Civ. Pro. Code*, 1882)—*Suit by plaintiffs representing a community for declaration of title to a temple—Personal claim for damages—Misjoinder.*—A suit by the plaintiffs (on behalf of a community, for a declaration of their rights to the plaint temple, together with a personal claim for damages on account of obstruction, slander, and injury to property on a particular occasion, must be regarded as one to obtain a declaration of title to immoveable property and to recover damages ; and, as such, contravenes the provisions of s. 44, Civ. Pro. Code, even granting the cause of action to be the same. The observation of the Privy Council in 31 I.A. 10, must be limited to cases where a party sets up the same title to moveable and immoveable property, and it was not intended to apply to a case like the present, where a party claims a declaration of title and, in the same suit, sets

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up a claim for damages for tort. KATHAN v. SADAYAN, **17 M.L.J. 135.** (31 I.A. 10, *D.*)

(2699-*a*)—O. II, rr. 4, 5—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 16 A. 130=A.W.N. 1894, 11, 5 B. 554.

(2699-*b*)—O. II, rr. 4, 5—*See* JOINDER OF CAUSES OF ACTION, 18 A. 256=A.W.N. 1896, 52, 17 A. 274=A.W.N. 1895, 76, 5 M. 16) 10 M. 375.

(2699-*c*)—O. II, rr. 4, 5—*See* LIMITATION ACT, 1908, s. 14, 20 M. 48, F.B.

(2699-*d*)—O. II, rr. 4, 5—Suit to recover possession of property belonging to religous institution, with mesne profits realized therefrom—Whether bad for misjoinder of causes of action—*See* LIMITATION ACT, 1908, arts. 134, 144, 35 P.W.R. 1908, F.B.=102 P.L.R. 1908=30 P.R. 1908.

(2699 *e*)—O. II, rr. 4, 5—*See* MISJOINDER OF PARTIES, 9 A. 221=A.W.N. 1887, 31.

(2700)—*O. 2, rr. 4, 5, s. 99 (=ss. 44, 578, Civ. Pro. Code*, 1877)—*Joinder of cause of action—Personal claim and claim for immoveable property.*—Where the plaintiff sued for a house and for Rs. 600, a moiety of an estate left by a certain person, without obtaining the leave of the Court for the joinder of the claim for the personal with that for immoveable property, as required by s. 44, Rule *a* of Act X of 1877, and the defendant's objection to the frame of the suit was overruled by the Court of first instance, *held*, on second appeal, that although the suit appeared to be open to such objection, it could not be proper to interfere with the decision of the lower Court on that ground in reference to the provision of s. 578, Civ. Pro. Code, 1877. BULAKI v. MULCHAND, **A.W.N. 1881, 15.**

(2701)—*O. 2, rr. 4, 5, s. 115 (=ss. 44, Rule A, 622,—Civ. Pro. Code*, 1882)—*Suit to recover immoveable property and for declaration of right of way—Joinder, if illegal—"Immoveable property"—Interference by High Court in revision.*—A right of way, is immoveable property, and there is nothing in s. 44, Civ. Pro. Code, 1882, repugnant to the interpretation of the term "immoveable property" as including a right of way. (19 C 544, 23 B. 673, 21 W.R 178, 35 C. 889, *R.*) Provided that no danger of injustice arises, the section should be liberally construed. Where a plaintiff sued for recovery of possession of two adjacent plots of land and for declaration of his right of way over the road between them, and it appeared that the witnesses, who would prove acts of dispossession of the plots of land and the closing of the right of way, would be probably identical, and that nothing could be gained by compelling the plaintiff to bring two suits for the redress of what really appeared to be one wrong. *Held*, that the High Court would not

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interfere under s. 622 of the Code to set aside the orders of the lower Courts allowing the plaintiff to proceed with the suit. BEJOY CHANDRA NAG v. BUNKU BEHARI MAZUMDAR, **13 C.W.N. 451=9 C.L.J. 381=4 Ind. Cas. 116.**

(2701-*a*)—O. II, rr. 4, 5, 3, 6—*See* PRE-EMPTION—MISCELLANEOUS, 6 A.L.J. 926=32 A. 14=3 Ind. Cas. 735=6 M.L.T. 300.

—O. II. r. 5 (=1882, s. 144 (b) 1877, s. 144 (b).

(2701-*b*)— O. II, r. 5—*See* JOINDER OF CAUSES OF ACTION, 6 B. 387, F.B.

(2701-*c*)—O. II. r. 5—*See* NOS. 335, 339, 1773, 2492, 2506, 2514, 2662-*a*. 2663, 2664, 3664-*a*, 2683, 2683 *a*, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2699-*a*, 2699-*b*, 2699-*c*. 2699-*d*, 2699-*e*. 2701, 2701, 2701-*a*, *supra* AND NOS. 5699, *infra*

—O. II r. 6 (=1882 *cf.* ss. 46, 47=1877, *cf.* ss. 46. 57).

(2701-*d*)—O. II, r. 6—*See* NOS. 298-*a*, 334, 435, 504, 1774, 2409, 2426, 2427, 2428, 2429, 2429-*a*, 2430, 2481-*a*, 2482, 2490, 2491, 2662, 2664-*b* 2683, 2683-*a*, 2684, 2685, 2686, 2697, 2688, 2689, 2690, 2690-*a* & *b*, 2691, 2701-*a*, *supra*.

(2702)—*O* 2, *rr*. 6, 7, *s*. 47, *O*. 21 *r*. 95 (= *ss*. 47, 244 318, *Civ. Pro. Ceod*, 1892)—*Auction purchase—No cofirmation and no sale-certificate for a long time—Failure of auction-purchaser to ask for possession—Subsequent suit for possession and for correction of clerical error.*—Where the plaintiff obtained a decree on a hypothecation and in execution thereof purchased the property, the Court did not confirm the auction-sale and did not issue a sale-certificate for a long time after the decree. The plaintiff did not seek for possession of the property by moving the Court or otherwise. When, however, he did secure a sale-certificate, he brought a suit for possession of the hypothecated land and for the correction of a clerical error in his certificate. But the suit was held to be barred under s. 244, Civ Pro. Code, 1882. BHAGA SHAH v. BURA SHAH, **58 P.R. 1888.** (12 and 47 P.R. 1887, *R.*) [*Not F.*, 14 P.R. 1893.]

—O. II, r. 7 (=1882, s. 46=1877, s. 46.)

(2702-*a*)—O. II, r. 7—*See* NOS. 298-*a*, 2430, 2482, 2691, 2702, *supra*.

—O. III. r, 1 (=1882. s. 36=1877. s. 36=1859 s. 16.)

See LEGAL PRACTITIONERS.

(2703)—*O*. 3, *r*. 1 (=*s*. 36. *Civ. Pro. Code*, 1882)—*S*. 36, *Application sent by post.*—If any application is made to a Civil Court, it must be made by the applicant in person, or by his duly authorized agent in person, or by his duly appointed pleader in person. This is a standing rule, which cannot be departed from in any case. S. 36 of the Civ. Pro. Code, does not recognize the practice of parties, their agents, or their pleaders making applications to Court by post. MAUNG PO KAN v. AGUN SALABOY, **L.B.R. 1872—92, 504.**

(2703-*a*)—O III, r. 1—Government Political Agent in Native State of Minor Chief, whether could sue for property in British territory—Political Agent not certificated guardian under Minors Act XX of 1864—Civ. Pro. Code, 1882, s. 37. cl. (*e*)—Recognised agent—*See* BOM. ACT XX OF 1864, 11 B. 53.

(2703-*b*)—O. III, r. 1 (=s. 36 of Civ. Pro. Code of 1882)—*See* APPEAL—GENERAL, 6 P.R. 1896.

(2703-*b*-1)—O. III, r. 1—*See* BOM. REG. II OF 1827, s. 54, 22 B. 654.

(2703-*c*)—O. III, r. 1—*See* SALE—SALE FOR ARREARS OF RENT—UNDER-TENURES AND PORTIONS OF, SALE OF, 22 W.R. 541.

(2703-*d*)—O. III, r. 1—*See* NOS. 59, 104, *supra*.

(2704)—*O*. 3, *r*. 1, *s*. 26, *O*. 4, *r*. 1 (=*ss*. 36, 48, *Civ. Pro. Code*, 1882)—*Plaint—Presentation to proper officer—Presentation by proper person—Plaint ordered to be registered after limitation—Effect of such order.*—The limitation for filing a suit was to expire on the 18th of February, 1908. The pleader for the plaintiff came to the proper Court on the evening of the 17th of February, after the Judge and his *munsarim* had both left the Court, and persuaded the suits clerk to receive the plaint. Next day the suits clerk handed over the plaint to the *munsarim*, who noted how the plaint had reached his hands, and on the following day, February 19th, put it before the Judge. The Judge ordered: "Registered, subject to objection as to limitation, if any, made by other party." *Held*, that the making over of the plaint to the suits clerk on the 17th of February was no presentation within the meaning of s. 48 of the Code. *Held* further, that the reaching of the plaint to the *munsarim* on the 18th February through the suit's clerk could not be said to be a presentation by the pleader who had given the plaint to the suits clerk (21 M. 114, *R.*) *Held*, also, that the order passed by the Judge on the 19th of February to register the plaint was irrevalant, and could not be considered as having any retrospective effect, so as to validate the proceedings of the two previous days. SRI MAHARAJA PRABHU NARAIN SINGH v. SARJU MISR, **5 Ind. Cas. 330.**

(2705)—*O*.3, *r*. 1, *s*. 85, *O*. 3, *rr* 2, 3, O. 827, *r*. 2, *ss*. 16, 17, *cl*. 2, *Civ. Pro. Code*, 1859)—*Recognized agents.*—A recognized agent is not entitled, on behalf of his principal, either to institute a suit as plaintiff, or to put in appearance as defendant, in his own name. The professed gumasta of a firm no longer in existence

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cannot be regarded as a recognized agent within the meaning cl. 2, s. 17, Act VIII of 1859, even though the members have still to collect their duties or pay their liabilities. MOKHA HARAKRAJ JOSHI v. BISESWAR DOSS, 5 **B.L.R. App. 11=13 W.R. 345.** [D., 9 B.H.C. 427.]

(2706)—*O. 3, rr. 1 and 2—Recognised agents s. 17, Act VIII of 1859 (Civ. Pro. Code)—High Court's Charter—Held* that a recognised agent as described in s. 17 of Act VIII of 1859, has no option of addressing the Court. (*Vide* s. 10 of the Charter of the High Court.) PRANATH CHOWDHRY v. GANENDRO MOHUN TAGORE, **3 W.R. 108.**

(2706-*a*)—O. 3, rr. 1, 2, 4, ss. 132, 129, 130, 131—Right of one pleader to hold the brief of another, and plead in Court—*See* PRACTICE AND PROCEDURE, 9 O.C. 65.

(2707)—*O. 3, rr. 1, 2, O. 6, rr. 14, 15 (=ss. 36, 37 (c), 51, Civ. Pro. Code, 1882)—Plaint, signing and verification of.*—A plaint may be verified by any person proved to the satisfaction of the Court to be acquainted with the facts. Such person need not be a recognised agent at all. He may be a stranger to the suit. When a plaint has not been signed by a plaintiff himself, the Court, before which it is presented must reject it, unless it has been signed by an agent autorized by a power-of-attorney, either expresely or impliedly to sign a plaint on behalf of the plaintiff. MOOTALA AND CO. v. POONUSAWMY, **2 L.B.R. 41.** (3 C.L.R. 579. 4 B. 468, *D.*) [*R.*, 4 L.B.R. 284.]

(2708)—*O. 3, r. 1, O. 7, r. 15, O. 10, r. 4 (= ss. 36, 60, 120, Civ. Pro. Code, 1882)—Order appeable—S.588—Omission to mention section—Order directing party to appear in person.* The Subordinate Judge ordered some of the defendants to appear in person in his Court, without mentioning the section under which, the order was made *Held*, that the order was an order under s. 120 Civ. Pro. Code, 1885. Where a Court purporting to act under the Civ. Pro. Code passes an order for the personal appearance of a party, but omits to quote the section under which the order is passed, *held*, that such an order is open to appeal. ABDUL JALIL v. HUMERA BIBI, **6 A.L.J. 340=2 Ind. Cas 463.**

(2708-*a*)—*O. 3, rr. 1, 2, O. 9, rr. 6 and 8 (=ss. 36, 37, 100 102, Civ. Pro. Code, 1882)—Appearnce of party and recognised agent only for applying for adjournment—Adjournment refused—Effect.*—If a party to a suit is personally present on the day fixed for the hearing thereof only for the purpose of applying for adjournment, and the adjournment is refused by the Court, he must be considered to have put in his "appearance" within the meaning of ch. VII, Civ. Pro. Code, 1882. the purpose for which he appeared or the action which he took on appearance being immaterial. But, if the party is absent on the date of hearing and

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a pleader on his behalf applies for adjournment, (the pleader having no other instructions but to get an adjournment) which is refused; then the party must be considered not to have "appeared" by counsel within the meaning of ch. VII. An appearance may be made by a pleader or recognized agent, but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented. So, where a pleader who applies for an adjournment is accompanied by a recognised agent of the party, but the agent neither makes any application, nor does any act, the question would be not merely whether he is present in Courts when the application for adjournment is made, but whether he intends to appear and in fact does appear for the party in the exercise of his powers under s. 36 of the Code. This section does not say that the presence of the recognised agent in Court is necessarily an *appearance* by the party, but it is purely enabling. The mere presence of the agent in Court would not be an "appearance" in the suit, if he although able to do so, does not think proper to conduct the case on his principal's behalf. SOONDERLAL v. GOURPRASAD, **23 B. 414.** [*Diss*, 1 S. L.R. 115; *F.*, 5 C.L.J. 247=34 C. 403=11 C. W.N. 329=2 M.L.T. 12, 3 S L.R. 208; *Appr.*, 22 A. 66, 46 P.R. 1905, 3 M.L.T. 225=18 M.L. J. 51, 5 Ind. Cas. 23=19 M.L.J. 760=7 M.L. T. 369.]

(2709)—*O. 3, r. 1, O. 9, rr. 1, 6, 7, 13, s. 104, O. 43, r. 1 (=ss. 36, 96, 100, 101, 108, 588. Civ. Pro. Code, 1882)*—Under the provisions of ss. 36 and 96, Civ. Pro. Code, the appearance of the pleader of a party is equivalent to the appearance of the party himself. Therefore, when the respondent's advocate, in the absence of the respondent, appears at the hearing of the suit fixed for the taking of evidence, his appearance is an appearance which would prevent the proceedings from being *ex parte*. It is the duty of the defendant, who attended in person at the first hearing, to have given his pleader all necessary instructions and to have made all requisite preparation of the production of witnesses at the next hearing, and, if he fails to do what he ought to have done the other side should not be allowed to be prejudiced by his laches. The language of the Code is perfectly plain and simple and purposely adapted to the comprehension of simple minded Courts, and it would be wrong to give any encouragement to puzzle such Courts with conundrums of the sort, when is an appearance not an appearance? Ss. 100, 101 and 108 all come in ch. VII of the Code, headed "Of the appearance of the parties and consequence of the parties and consequence of non-appearance," and from the first (s. 96) it is obvious that the Chapter was meant primarily to deal with appearance at the first hearing and that the construction ordinarily to be put upon the words "ex parte" is the trial of a suit in which the defendant after being duly served

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with summons, fails to put in an appearance at the first hearing. MAUNG PO LWIN v. MAUNG PO KIN, **U.B.R. 1897—1901, Vol. II, 40.** (4 B.H.C. 206, 15 W.R., 143, 7 A. 538, 8 A. 140, 12 C. 605, 20 B. 293, 18 A. 241, *D*; 23 C. 738, *R.*)

(2710)—*O.* 3, *r.* 1, *O* 10, *rr.* 1, 2(= *ss.* 36, 117, 118, *Civ. Pro. Code*, 1882)—*Procedure—Obstruction—Appeal—Revision—Civil Justice Regulation*, s. 20—*Limitation Act*, s. 14.—A Court is bound to frame issues on the materials it has before it, and to proceed in accordance with the provisions of ss. 47 and 48 of the Civil Justice Regulation. It is the duty of the Court to allow a reasonable time to parties to procure legal advice and assistance, and to take into consideration the circumstances under which alone such advice and assistances are obtainable in Upper Burma; and it is the duty of an appellate Court in appealable cases to see that satisfactory cause is shown for not preferring an appeal under the provisions of s. 14, Limitation Act, before admitting an application for revision. S. 20, Civil Justice Regulation, expressly permits a party to be represented by an advocate duly appointed to act on his behalf, DAVARAYAN CHETTY v. MOIDEEN KOONJEE KAKA, **U.B.R. 1892—1896, 245.**

(2711)—*O.* 3, *r.* 1, *O.* 41, *r.* 17 (=*ss.* 36, 556, *Civ. Pro. Code*, 1882)—*Appeal—Pleader—unprepared—Dismissal for default—Procedure.*—When a duly appointed pleader applied to the Court for an adjournment on the ground of his unpreparedness, the Court cannot dismiss the appeal for default. (12 C. 635, *Diss.*) An order dismissing an appeal for default, must also be held to be a decree from which an appeal lies under s. 540 of the Civ Pro. Code. (But see the definition of "decree" in the new Code.) RAMCHANDRA PANDURANG NAICK v. MADHAV PURUSHOTTAM NAIK, **16 B. 23.** [*F.*, 18 A.W.N. 35=20 A. 294, 26 M 287, 17 C.P.L.R. 1; *R.*, 13 A.W.N. 25, 18 A. 241, 29 C. 529; 5 C.L.J. 247=11 C.W.N. 329=34 C. 403=2 M L.T. 123; *Diss.*, 23 C. 115, 1 L.B.R. 183; *Not F.*, 15 A. 359; 10 C P.L.R 32 *F.*, 19 B. 307, 30 C. 660, F P.—10 Bom. L.R. 160, Note; *R.*, 23 C 827, U.B R. 1897—1901, 206, 16 C.P.L.R. 151, 8 C.W.N. 621, 4 L.B.R. 17; 31 M. 157=3 M L.T. 336, 121 P.R. 1907=51 P.L.R. 1907.]

——O. III, r. 2 (=1882, s. 37=1877, s. 37=1859, s 17 (b).

(2712)—*O.* 3, *r.* 2—(=*Civ. Pro. Code*, 1882) s. 37)—*Object*—"*Reside*," *meaning of*—*Authority of vakil engaged by agent.*—The word "reside" is an ambiguous and elastic expression and should be interpreted with reference to the object and character of the provision in which it occurs. The purpose of s. 37 of the Civ. Pro. Code of 1882 is to provide for appearances being made and acts being done on behalf of suitors in Courts within the jurisdiction of which they are not, at the time, present. Therefore, a liberal construction should be put upon the term "non-resident" in that section. (6 B. 100, *F.*) The Zemindar of Ettiapuram gave a general power of attorney to a certain man, authorising him to institute suits on his behalf during his absence, and went to Delhi. The agent instituted the suit for arrears of rent which was returned for want of the power of attorney. At the time of representation of the plaint with the power of attorney annexed, the Zamindar had returned. *Held* (1) that the Zamindar's absence could not be treated as so short and temporary as to warrant his being looked upon as still resident within the jurisdiction of the Court in regard to the application of the section. (2) That the plaint must be treated as properly presented by the agent. (3) That the production of the power of attorney after the Zemindar's return could not affect the plaint which had been presented when he was away. (4) That the filing of the power of attorney on the date on which it was filed by the vakil who had been retained when the plaint was presented was an act perfectly within the power of the vakil. ZAMINDAR OF ETTIAPURAM v. SUBBA REDDY, **14 M.L.J. 223.**

(2713)—*O.* 3, *r.* 2 (=s. 37, *Civ. Pro. Code*, 1882)—'*Not resident*,' *meaning of.*—The words 'not resident,' in s. 37 of the Code signify a person who is not at the time, when some act is done by his agent, present within the jurisdiction of the Court. DAMODAR DAS v. INAYET HUSSAIN, **2 A.L.J. 626=A.W.N 1905, 221=28 A. 135.** (6 B. 100, *F.*)

(2714)—*O* 3, *r.* 2 (=*old s.* 37)—*Appointment of agent.*—No written authority is required for the appointment of a special agent under the last clause of s. 37. The appointment of a pleader by that special agent on the principal's behalf is valid. KARAM CHAND v. UDE SINGH, **134 P.R. 1890.**

(2715)—*O.* 3, *r.* 2 (=s. 37, *Civ. Pro. Code*, 1882)—*Recognised agent conducting suit and appeal without objection—Right as agent, to execute decree—Objection to agent's authority raised for first time in execution-proceedings.*—In this case, plaintiff P, residing outside the jurisdiction of the first Court, conducted his suit therein through S as his recognised agent. In the appeals from the suit, S continued to represent P without any objection by the other party. In proceedings in execution of the decree obtained by S, the objection was for the first time raised that, because P was residing within the jurisdiction of the appellate Court wherein such proceedings went on, she could not claim to be represented therein by the recognized agent, but it was held that, as she had been represented by the agent, without objection by the defendants throughout the litigation, in the suit as well as in the appeals, the defendants could not be allowed to question, for the first time in the execution-proceedings, the right of

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S to execute as agent the decree which he was allowed to obtain as such. PARVATIBAI v. VINAYAK PANDURANG, **12 B. 68.** [*F.*, 4 L. B.R. 284.]

(2715-*a*)—O. III, r. 2—*See* ACT XVIII OF 1879, s. 32, 14 C. 556, F.B.

(2715-*b*)—O. III, r. 2—*See* SUMMONS, 6 B. 100.

(2715-*c*)—O. III, r. 2—*See* NOS. 280, 1583, 1584, 1585, 1775, 2705, 2706-*a*, 2707, *supra.*

(2716)—*O.* 3, *r.* 2 *and s.* 85 (=*old ss.* 37, 432—*Scope.*—S. 37, Civ. Pro. Code, 1882, is not superseded by s. 432, which does not prevent the institution of a suit through a recognised agent other than the one appointed under s. 432. HIS HIGHNESS THE MAHARAJA OF JUMMU AND KASHMIR v. CHAUBHATTA, **165 P.R. 1889.** (10 C. 136, *R.*) [*R.*, 41 P.R. 1902.]

(2717)—*O.* 3, *r.* 2, s. 99 (=*ss.* 37 *and* 578, *Civ. Pro. Code*, 1882)—*Authority of agent to file a suit—Punjab Chief Court Rules and Orders framed under the section—Recognised Agents—Parties not residing within jurisdiction.*—A defendant is entitled to question the authority of an agent to file a suit on behalf of his principals, as, if the authority is defective, he is liable to be sued afresh at the instance of the principals. (19 C. 678, *R.*) A defect of this kind cannot be cured, as a mere irregularity under s. 578 of the Code, for the foundation of a suit is a valid plaint, and, if there be no valid plaint, the Court has no jurisdiction and there is no case to be tried by it and the suit must be dismissed. (A.W.N. 1899, 55, A.W.N. 1891, 152, *R.*) An agent carrying on business at Lyallpur, in the name of the partners of a firm resident in England, was held not to be a recognised agent, under cl. (*c*) of the Rules and Orders of the Chief Court, Punjab, made under s. 37 of the Civ. Pro. Code, corresponding to cl. (*c*) of s. 37, partly because it was not really he, but Karachi agents, who carried on the trade and business of the plaintiffs, and partly because there were other agents expressly authorised in matters of filing suits. Nor was he an agent under cl. (*d*), as according to the facts of the case, he was authorised not by the parties themselves, but only agents of such parties. It is impossible to say that "agent expressly authorised," referred to in cl. (*c*) of the rules applicable to the Punjab, necessarily means an agent actually present in the locality where the contracts are made or carried out. FATEH DIN v. RALLI, **109 P.R. 1907.**

(2718)—*O.* 3, *r.* 2, *O.* 21, *r.* 2 (*ss.* 37, 258, *Civ. Pro. Code*, 1882)—*Application under s.* 258 *by decree-holder's general agent—Limitation.*—Though an application by a decree-holder to certify an adjustment of a decree under s. 258 of the Civ. Pro. Code is a step-in-aid of execution, yet, it is not one in accordance with law if presented by one who calls himself a general mukhtear of the decree-holder when the latter is himself within the jurisdiction of the Court. KASUMRI v. BENI PRASAD, **26 A. 19=A.W.N. 1903, 172.** (23 A. 499; *R.*, 1 A. 510, *D.*) [*R.*, 34 P.L.R. 1906.]

(2719)—*O.* 3, *rr.* 2 *and* 3, *O.* 27, *r.* 2 *and s.* 85—*Throwing out case for technical defect—Plaint not filed by recognised agent.*—A case should not be thrown out by the lower appellate Court on a technical objection such as that the plaint had not been filed by a recognized agent within the meaning of s. 17, Civ. Pro. Code, 1859, when the merits of the case are not affected. MUNOO DOSSEE v. ISHAN CHUNDER BANERJEE, **15 W.R. 245.** [*R.*, 5 C.L.R. 484.]

(2720)—*O.* 3, *rr.* 2 *and* 3, *O.* 27, *r.* 2, *s.* 85—*Recognised agent—Representation in suit by or against firm of which agent is munim.*—The *munim* of a firm, not carrying on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognised agent of the owner of such firm within the meaning of s. 17, cl 2 of the Civ. Pro. Code, 1859. He can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm, whose affairs he is winding up. HIS HIGHNESS TUKOJI MAHARAJ HOLKAR v. PITAMBAR LAS NARANJI, **9 B.H.C. 427.**

(2721)—*O.* 3, *rr.* 2 *and* 3 *and O.* 27, *r.* 2 *and s.* 85 (=*old ss.* 17, 18, 417, 432)—Bona fides *of proceedings to keep decree alive.*—The *bona fides* of proceedings to keep a decree alive was inferred where the decree-holder had applied for execution, and served notice, but had been cajoled with promises to pay, and had abstained from proceeding further. *Held* that it was to some extent at least the duty of the Court to see that the notice was served on the right person and that the Court ought not to be satisfied with the return of service upon a party who was merely a mooktear and was not the recognised agent of the judgment-debtor in the sense in which the term is used in the Civ. Pro. Code. KRISTO CHUNDER GOOPTO v. FUZUL ALI KHAN, **17 W.R. 389.**

(2721-*a*)—O. III, rr. 2, 3, O. XXVII, r. 2, s. 85—*See* SUMMONS, 1 Hyde 97.

——O. III, r. 3 (=1882, s. 38=1877, s. 38=1859, s. 17).

(272-*b*)—*O.* 3, *r.* 3 (=*Civ. Pro. Code*, 1859, s. 17)—*Recognised agent—Presentation of plaint without power of attorney—Acceptance and retention by Court—Limitation.*—The plaintiff filed his suit before period of limitation in the proper Court. The plaint was presented by his daughter-in-law without a power of attorney who stated that plaintiff was lying extremely ill and as the period of limitation was expiring asked her to present the plaint. The Court on the same day directed the plaint to be kept in office and that the plaintiff should be produced

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in person. After the expiry of the period of limitation the plaintiff was brought to Court in a doolie and he appointed his nephew, his mukhtar for conducting the suit. *Held* that a written authority was not necessary in favour of the daughter-in-law, acting as recognised agent of the plaintiff under proviso to s. 17. Act VIII of 1859 added by Punjab Government, Notification No. 1225, dated 26th Sept., 1866 and the Court having accepted and retained the plaint it was filed in time. JODH SINGH v. WASSAWA SINGH, **9 P.R. 1878.**

(2721-*bb*)—O. III, r. 3—*See* NOS. 1584, 1585, 2705, 2719, 2720, 2721, 2721-*a*, *supra*.

——O. III, r. 4 (=1882, s. 39=1877, s. 39=1859, s. 18.)

(2721-*c*)—O. III, r. 4—*See* LEGAL PRACTITIONERS—PLEADER—GENERAL, 5 C.W.N. 816.

(2721-*cc*)—O. III, r. 4—*See* LEGAL PRACTITIONERS — PLEADER—APPOINTMENT AND APPEARANCE, 8 W.R. 92, 15 M. 135, 20 B. 198=P.J. 1895, 4, 20 B. 293.

(2721-*d*)—O. III, r. 4—*See* SANCTION TO PROSECUTE, 3 C.W.N. 579.

(2721-*d*-1)—O. III, r 4—*See* NOS. 104, 2706-*a*, *supra*.

(2721-*e*)—O. III, r. 4, O. II, r. 1—Attorney's appointment—Revocation—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 36 C. 609=13 C.W.N. 1172=2 Ind. Cas. 830.

(2722)—*O. 3, r. 4, O. 41, r. 21 (=ss. 39, 560, Civ Pro. Code, 1882)—Re-hearing of appeal, heard* ex parte—*Amendment — Limitation*—Vakalatnama—*Acceptance need not be in writing.*—An application for a re-hearing of an appeal presented originally within the period of limitation but returned for amendment and presented after amendment after the period of limitation, cannot be rejected as being out of time. *Per Banerjee, J.*—An application for re-hearing under s. 560, Civ. Pro. Code, 1882, which was returned for amendment, is not bad in law by reason of the pleader by whom it was filed not having accepted the *vakalatnama* authorising him to act for the respondent. S. 39, Civ. Pro. Code, does not require that the acceptance of a *vakalatnama* must be in writing. The absence of acceptance in writing cannot be said to vitiate the authority to act. All that the section requires is that the appointment of a pleader must be in writing and filed in Court (*Per Banerjee, J.*). SHAMA PROSAD GHOSE v. TAKI MULLIK, **5 C.W.N. 816.**

(2722-*a*)—O. III, rr. 4, 5, O. IX, r. 13—*See* APPEAL—DISMISSAL OF APPEAL, W.R. 1864, Mis. 21.

——O. III, r. 5 (1882, s. 40=1877, s. 40=1859, s. 18).

(2722-*b*)—O. III r. 5—*See* COMMISSION, 6 **C.W.N. 927.**

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(2722-*c*)—O. III, r. 5—*See* No 2722-*a* *supra*.

——O. IV, r. 1 (=1882, s. 48=1877, s. 48=1859, s. 25).

(2722-*d*)—O. IV, r. 1—*See* NOS. 208, 281, 514, 515, 516, 2704, *supra*.

——O. V. r. 1 (=1882, s. 64=1877, s. 54=1859, s. 41).

(2722-*e*)—O. V, r. 1—*See* NOS. 517, 518, *supra* AND NOS. 2789-*b*, 3035, *infra*.

—— O. V, r. 3 (=1882, s. 66=1877, s. 66=1859, s. 42).

See SUMMONS.

(2723)—O. 5, *rr.* 3 *and* 4 (=ss. 66, 67, *Civ. Pro. Code*, 1882=*s.* 42, *Civ. Pro. Code*, 1859)—*Order for personal appearance — Hearing* ex parte.—An order may be made for an *ex-parte* hearing on proof of service of summons issued under s. 42 Act VIII of 1859. KISTODHONE DUTT v. NILMONEY SINGH, **Cor. 3.**

(2723-*a*)—O. V, rr. 3, 4—*See* APPEAL—CASES WHERE APPEAL LIES OR NOT, 3 W.R. Act X, Rul. 162.

(2724)—*O.* 5, *rr.* 3, 4, *O.* II, *r.* 21 =(ss. 66, 67, 136, *Civ. Pro. Code*, 1882)—*Party to suit—Personal appearance—Production of documents—Appeal.*—A Court cannot pass an order under s. 66 of the Civ. Pro. Code, 1882, for the personal appearance of a party to a suit, in contravention of the provisions of s. 67, cl. (*b*). Such an order is appealable under cl. 3 of s. 588 of the Code. S. 136 of the Civ. Pro. Code refers only to cases in which a party is called upon to produce documents, and it gives the Court no authority to insist upon the production of documents by the party in person. KRISHNA RAM v. GOBIND PRASAD, **A.W.N. 1895, 143.**

(2725)—*O.* 5, *r.* 3, *O.* 9, *rr.* 4, 9, 12 (=*ss.* 66, 99, 103, 107, *Civ. Pro. Code*, 1877)—*Dismissal for default—Fresh suit.*—Where a suit was dismissed because the plaintiff was not present, nor had he produced his witnesses or accounts, but the pleader for the plaintiff was present and there was nothing on the record to show whether the defendant was present or not, *held* that a fresh suit for the same relief was not barred by s. 103, Civ. Pro. Code, 1877. HIRA LAL v. BHAWANI, **A.W.N 1881, 141.**

(2725-*a*)—O. V, r. 3, O. IX, rr. 9, 12, O. XLIII, r. 1, ss. 104, 96—*See* APPEAL—EX PARTE CASES, 8 A. 20=A.W.N. 1885, 321.

——O. V. r. 4 (1882, s. 67=1877, s. 67=1859, s. 42)

(2725-*b*)—O. V. r. 4—*See* NOS. 2723, 2723-*a* 2724 *supra* AND NO. 2771, *infra*.

——O. V, r. 5(=1882, s. 68=1877, s. 68=1859, s. 41.)

(2725-*c*)—O. V, r. 5—*See* RULE OF HIGH COURT AND SUPREME COURT—BOMBAY, **10 Bom. L.R. 301=32 B. 534.**

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(2725-*d*)—O. V, r. 5—*See* **NO. 517**, *supra* AND NO. 3035, *infra*.

—O. V. r, 6 (1882, s. 69=1877, s. 69=1859, s. 45.)

See SUMMONS.

(2726)—*O. 5, r. 6—Service of summons—Defendant*—Ex-parte *decree—Court's inherent powers to set it aside—Limitation Act (IX of 1908), art. 164—Knowledge of the decree.*—S. 79 of the Code of 1882 (O. V, r. 16 of the present Code) contemplates three distinct classes of service: (1) on the party in person; (2) on that party's duly appointed agent; and (3) upon any other person on behalf of that party. The law contemplates the third class of service, only when the party cannot himself be found. The Court has inherent powers to set aside *ex-parte* decrees of its own, upon any sufficient ground or when it appears that failure to do so would result in an abuse of its own processes; but it cannot exercise those powers so as to override the provisions of statutory limitations. The term "knowledge" used in art. 164 of the Limitation Act, 1908, means no more than knowledge of the fact that a decree of the kind is in existence: it does not embrace knowledge of the contents and general effect of the decree. ABDOOL HOOSEIN ESSUFALLY v. ESMAILJI ABDOOL HOOSEIN, **12 Bom. L.R. 462—61 Ind. Cas. 901.**

(2726)—(*a*)—O. V. r. 6—*See* RULE OF HIGH COURT AND SUPREME COURT — BOMBAY, 10 Bom. L.R. 301=32 B. 534.

(2726-*b*)—O. V. r. 6—*See* **NOS. 2852, 4889**, *infra*.

——O. V, r. 8 (=1882, s. 71=1877, s. 71).

(2726)—(*b*) (1)—O. V, r. 8—*See* RIGHT OF OCCUPANCY—GENERAL, 15 C.W.N. 703.

——O. V, r. 9 (=1882, s. 72=1877, s. 72=1859, s. 47.

See SUMMONS.

(2726)—(*c*)—O. V, r. 9—*See* JUDGMENT—FORM OF CONTENTS, 22 M. 12=8 M.L.J. 183.

(2727)—*O. 5, rr. 9, 12, 17, O. 9, r. 13—"Resides," meaning of—Substituted service—Change in law—Jurisdiction of first Court—Amendment of decree after appeal presented and amendment after appeal disposed of—Limitation Act* (1908), *sch. I, art. 164—"Knowledge," meaning of.*—For the purpose of service of summons, residence is not identical with ownership, that is, a permanent absentee cannot be described as resident in a place merely by virtue of ownership. Residence denotes the place where an individual eats, drinks and sleeps. Substituted service can be justified under O. 5, r. 17 of the Code, only when it is shown that proper efforts were made to find the

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defendant. In this respect the new Code has altered the law. The mere presentation of an appeal does not put it beyond the power of the original Court to deal in any manner with the judgment under appeal. But the position is different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal. (37 I.A. 70, 32 A. 295, 6 Ind. Cas. 669, 14 C.W.N. 667, 7 A.L.J. 507, 11 C.L.J. 560, 12 Bom. L.R. 444, 8 M.L.T. 457, 20 M.L.J. 587, 13 C.W.N. 846, 3 Ind. Cas. 468, M.W.N. 1910, 392, *Rel.*) Therefore, an original Court can entertain an application to set aside an *ex-parate* decree presented by one of the defendants, when an appeal preferred by the contesting defendants from the decree made against them in the same suit, is pending. The term "knowledge" in art. 164 of sch. I of the Limitation Act, 1908, means certain and clear conception of a fact, the fact being the decree in the suit. The expression "knowledge of *the* decree" means knowledge not of a decree but of the particular decree which is sought to be set aside, (5 Ind. Cas 525, 12 C.L.J. 53, 27 M. 602, 14 M.L.J. 321, 30 M. 535, 17 M.L.J. 436, *Not F.*) 11 Bom. L.R. 1296, 4 Ind. Cas. 586, *F.*) Therefore, where the petitioners' brothers had knowledge of the *ex-parate* decree made against the petitioner, the inference cannot reasonably be drawn that he had a similar knowledge of it, when it is proved that he lived away from his brothers who never communicated the fact of the decree to him. KUMUD NATH ROY CHAUDHRY v. RAI JATINDRA NATH CHAUDHRY, **9 Ind. Cas. 189 =13 C.W.N. 399.**

(2727-*a*)—O.V, r. 9, O. IX, r. 5—Application for fresh summons to defendant—*See* SUMMONS, 13 B. 500.

——— O. V, r. 10 (=1882, s 73=1877 s. 73=1859, s. 48.)

See SUMMONS.

(2727-*b*)—O. V. r. 10.—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, A.W.N. 1906, 208=3 A.L.J. 791.

(2728)—*O. 5, rr. 10, 12, 19, 20 (1) (=ss. 73, 75 & 82, Civ. Pro. Code, 1882)—Summons, substituted service of, when could be ordered.*—Whenever practicable the service of summons ought to be made by delivering or tendering a copy of it to the defendant in person (ss. 73 and 75 of the Code), and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered (s. 82 of the Code). Temporary absence by itself will not justify resort to such service. ABRAHAM PILLAI v. DONALD SMITH, **29 M. 324.** (21 M. 419, *F.*; 21 M. 325, *D.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. V, r. 11 (=1882, s. 74=1877, s. 74=1859, s. 48).

See SUMMONS.

(2728-*a*)—O. V, rr. 11 and 12, O. IX, rr. 13 and 14, O. XXXII, rr. 3 (1), 4 (2)—*See* PARTIES TO SUITS—GENERAL, 26 C. 267=3 C.W.N. 261.

(2729)—*O. 5, rr. 11, 22 (=ss. 74, 86, Civ. Pro. Code, 1882)—Summons—Service on defendants, members of partnership firm—Service on manager—"Unless the Court otherwise directs" in s. 74, Civ. Pro. Code).*—In a suit instituted against a partnership firm, all the members whereof were non-residents at the place in which the business was carried on, service of summons could not be made according to the provision of s. 80 of Act XIV of 1882, on the refusal of the manager of the firm to accept service, by affixing a copy of the summons on the outer door of the house in which the business was located. S. 80 contemplates that the persons sought to be served should be residing at the house. But service so effected was properly made in accordance with s. 74 of the Act, which contemplates service on the person having management of the business "unless the Court otherwise directs." These words do not imply, that in such a case the peon must go back to the Court, and secure an order from it, expressly authorising service in one of the ways mentioned in the proviso to s. 74. AKHOY KUMAR SAHA v. NAGENDRA LAL CHOWDHURY, **13 C.W.N. 490=1 Ind. Cas. 118.**

——O. V, r. 12 (=1882, s. 75=1877, s. 75=1892, s. 49).

(2729-*a*)—O. V, r. 12—*See* NOS. 2727, 2728, 2728-*a*, *supra*.

(2729-*a*-1)—O. V, rr. 12, 13—*See* BEN. ACT VIII OF 1885, s. 49, ch. I, r. 3, 28 C. 590=6 C. W.N. 67.

——O. V, r. 13 (=1882, s. 76=1877 s. 76.)

(2729-*a*-2)—O. V, r. 13—*See* NO. 2729-*a*-1, *supra*.

——O V, r. 14 (=1882, s. 77=1877, s. 77=1859 s. 61.)

(2729-*a*-3)—O. V, r. 14—*See* NO. 1538, *supra*.

——O. V r. 15 (=1882, s. 78=1877, s. 78=1859, s. 53.)

See SUMMONS.

(2729-*b*)—*O. 5, r. 15 (=s. 53, Civ. Pro. Code, 1859)—Defendant absent — Service of summons on brother—Proper service.*—Where defendant left his home, without leaving an agent to accept service of summons and after his departure, his brothers lived with defendant's family, it was held, that the Court might at its discretion dispense with personal service and serve the summons upon defendant's brother under s. 53, Civ. Pro. Code. SHEO LALL v. GUNGA RAM, **27 P.R. 1871.**

(2730)—*O. 5, rr. 15—23—Practice—Issue of summons—Summons transmitted for service to Court having jurisdiction in the place where defendant resides—Question of sufficiency or insufficiency to be determined by Court issuing summons.*—When a summons is sent for service to be effected, to a Court having jurisdiction in the place where the defendant resides, by another Court, it is for the Court to which such summons is sent for service to determine whether the service is sufficient or not. (22 C. 889, *Diss.*) The provisions of Rules 15 to 23 discussed. DWARKA PRASAD v. BRIJ MOHAN LAL, **8 A.L.J, 715.**

(2730-*a*)—O. V, rr. 16, 17, 19, 20 (1)—*See* PROCESS, 16 B. 117.

——O. V, r. 17 (=1882, s. 80=1877, s. 80=1859, s. 55.)

See SUMMONS.

(2731)—*O. 5, r. 17 (=s. 80, Civ. Pro. Code, 1882)—Practice—Writ of summons, service of.*—S. 80 of the Code is intented for cases in which the writ should be affixed in the way required by that section after a proper attempt has been made to find the defendant. An affidavit in support of service of a writ of summons under s. 80 of the Civ. Pro. Code, should show that proper efforts have been made to find out when and where the defendant is likely to be found. COHEN AND ANOTHER v. NURSING DASS AUDDY, **L.B.R. 1872—1892, 641.**

(2731-*a*)—O. V, r. 17—Summons posted at the house of a person known to have gone to a particular place—Validity—*See* U. P. ACT XXII OF 1886, s. 136, 13 O.C. 54=5 Ind. Cas. 804.

(2731-*b*)—O. V, r. 17—*See* NOS. 2727, 2730-*a*, *supra* AND NO. 5793, *infra*.

(2732)—. *O. 5, rr. 17, 19, 20 (1) (=ss. 80, 82 Civ. Pro. Code, 1882)—Service of summons by affixture—Practice.*—The object of the service of a summons (other than substituted service is that the defendant may be informed of the institution of the suit in due time before the day fixed for the hearing, and when, from the return of the serving officer, it appears that there is no likelihood that the summons will come to the defendant's knowledge in due time, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service. So, when a defendant is temporarily absent from home and is not represented at his house by an agent or male member of his family, the Court is not justified in treating a summons affixed to his door as due service. Under such circumstances, the summons should be again set to the defendant's house to be served upon him when the inquiries

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made show that he is likely to be at home and to be found there. BHOMSHETTI v. UMABAI, 21 B. 223. [*F.*, 21 M. 419=8 M.L.J. 84; *R.*, 21 M. 325=8 M.L.J. 58, 2 N.L.R. 63, 5 C.L.J. 555, 9 M.L.J. 118=8 Ind. Cas. 849; *D.*, 7 A. L.J. 286.]

(2733)—*O. 5, rr. 17, 19, 20 (1) (=ss. 80, 82, Civ. Pro. Code, 1882)—Substituted service—Summons*—S. 82 of the Code directs that before taking any further action under that section the Judge should himself examine the serving officer on oath. Before a Judge directs substituted service under s. 82, he should first satisfy himself that the defendant has been keeping out of the way for the purpose of avoiding the service. This implies that the defendant is aware that the writ is out against him. MORAN v. THE SIMLA BANK CORPORATION BANK, LIMITED, A.W.N. 1886, 35.

(2734)—*O. 5, rr. 17, 19, 20 (1) (=ss. 80, 82, Civ. Pro. Code, 1882)—Process, duty of serving officer towards personal service of—Substituted service, when proper.*—Mere temporary absence of the person to be served with a process issued by Court is not to be regarded as sufficient to justify the process-server resorting to substituted service, as by affixing the summons to the door. It is the duty of the peon entrusted with the process to take some pains and make all efforts to find out the person to be served, so that, if possible, service may be effected on him personally. SUBRAMANIA PILLAI v. SUBRAMANIA AYYAR, 21 M. 419. [*F.*, 2 N.L.R. 63, 29 M. 324. *R.*, 5 C.L.J. 555].

(2735)—*O. 5, rr. 17, 19, 20, (1), 21, 23, s. 28 (=ss. 80, 82 and 85, Civ. Pro. Code, 1882)—Summons, service of.*—The duty of a Court to which a summons is sent for service is explained in s. 85. It must proceed as if the summons had been issued by itself. Accordingly, if the summons is returned to it under s. 80, it must, under s. 82, if the return has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath touching his proceeding, and may make such further enquiry in the matter as it thinks fit, and shall either declare the summons to have been duly served or order such service as it thinks fit. It must, under these circumstances, make a proceeding in which shall be recorded the evidence taken and the declaration made and shall finally make a return in Form No. 121 of sch. III, which it shall transmit to the Court which issued the summons along with the record of its proceedings. Although Form No. 121 does not prescribe a declaration of due service or otherwise, such declarations must, when the summons has been returned by the serving officer under s. 80, be recorded in the proceeding required to be made under s. 82. The declaration being *ex-parte* will not be conclusive, but will be received by the Court which issued the summons as *prima facie* proof that it was

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duly served, if it contain a statement to that effect and the proceeding, on the face of it appears regular. (19 C. 201, *F.*) The Court issuing the summons is justified in looking at the return in order to satisfy itself that there has been a proper service. If the return shows that the service was not in fact according to law, the Court issuing the summons is not bound by the return. CHINAN CHETTY v. LUTCHMAN CHETTY, L.B.R. 1872—1892, 639, (10 B. 202, *F.*)

(2735-a)—*O. 5, rr. 17, 20 (=ss. 55 and 57, Civ. Pro. Code, 1859)—Substituted service when to be effected.*—The condition for affixing a summons on a dwelling house is that the defendant is dwelling in the house and cannot be found or that he has left the house to avoid service; hence where he had gone on pilgrimage to a shrine, such service was held to be bad. LEKH RAJ v. DAYEE CHAND, 38 P.R. 1868; GODUR v. BALUK RAM, 105 P.R. 1868.

(2736)—*O. 5, r. 17, O. 9, r. 7 (=ss. 80, 101, Civ. Pro. Code, 1882)—Summons to defendants' house—Absence of finding that there was no prospect of personal service—Sufficiency of service.*—In the absence of a finding by Court that there was no prospect of serving summons on defendant personally, or that defendant was in fact aware or must have been aware of the institution of the suit, the affixture of summons to the outer door of defendant's house is not good and sufficient service, and an *ex-parte* decree passed against defendant is liable to be set aside. THIRUMALASWAMI v. MUNIAYANDIA, 8 Ind. Cas. 849=9 M.L.T. 118. (21 M. 419, 21 B. 223, 29 M. 324, *R.*)

(2737)—*O. 5, r. 17, O. 9, rr. 7, 8 (=ss. 80, 101, 102, Civ. Pro. Code, 1882)—Ex-parte decree after substituted service—Dismissal of application under s. 101, whether affects right to apply under s. 108.*—On an application, under s. 101 of the Civ. Pro. Code, by a defendant against whom an *ex-parte* decree had been passed without personal service of the summons on him, the Court passed an order against him. He applied again under s. 108 of the Code, and it was *held* that though the unappealed order against him passed under s. 101 was no bar to the subsequent application under s. 108, yet he could not succeed on the merits, seeing that he had been properly served. The serving officer's return showed that, according to the information given to him, there was no prospect of his being able to serve the defendant personally with a reasonable time. Consequently, the service effected by him by affixing the summons to the door of the defendant's house amounted to a proper and sufficient service on him. SANKARALINGA MUDALI v. RUTHNASABAPATY MUDALIAR, 21 M. 324=8 C.L.J. 58. [*R.*, 23 M. 494, 2 N.L.R. 63; *D.*, 29 M. 324.]

(2738)—*O. 5, r. 17, O. 9, r. 13 (=ss. 80, 108, Civ. Pro. Code, 1882)—Application to set aside*

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ex-parte *decree—Irregularity in service of summons* —When a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not good service of the summons under s. 80 of the Civ. Pro. Code, if he thereupon does no more than fix the summons to the outer door of the house, but he must make further efforts to effect personal service. In an application under s. 108, Civ. Pro. Code, to set aside an *ex-parte* decree on the ground that the applicant was not served with notice of the suit, and had in fact come to know of the existence of the decree only about two weeks or more after it was past, it was found that the process-server attended at the house of the defendant and learnt on inquiry that he was not present in the house but had gone to another town; and the process-server, thereupon, without any further attempt to serve the summons on the defendant personally, affixed the summons to the outer door of the house in which the applicant resided. *Held* that under the circumstances, there was no proper service of the summons, and the *ex-parte* decree was ordered to be set aside so far as the applicant was concerned. SAKINA v. GAURI SAHAI, **24 A. 302=A.W.N. 1902, 68.** [*F.*, 8 Bom. L R. 757=30 B. 623; *R.*, 29 M. 324, 2 N.L.R. 63; *D.*, 7 A.L.J. 286.]

(2739)—*O. 5, r. 17, O. 16, rr. 10 to 13, 17, 18 (=ss 80, 174, Civ. Pro. Code, 1882)—Penal provision — Construction — Substituted service—Time to appear—Application for—Fine when to be imposed.*—The section is of a highly penal nature, and its provisions, in order to give validity to anything purporting to be done under them, must be strictly complied with. The circumstance that the process-server could not find the witness, though he says in his return that he knew where he was, is not sufficient *per se* to warrant the process-server in affixing a copy of the summons to the house of the witness, so as to constitute good substituted service under s. 80 of the Code. In cases where the witness was served as above, the penal powers of s. 174 of the Code should not be exercised. Where the witness has not been sufficiently served as above, the mere fact of his applying for time to appear would not preclude him from saying that there had been no such service of the summons as could warrant s. 174, Civ. Pro. Code, being put into force. Under s. 174, Civ. Pro. Code, the witness can only be fined when he has been arrested and brought before the Court after the arrest. KALI NARAIN ROY CHAUDHURI v. SHAIKH BAJOO, **3 C.W.N. 307.**

(2740)—*O. 5, r. 17, O. 21, r. 90 (ss. 80, 311, Civ. Pro. Code, 1877)—Irregularity in publishing sale.*—Where the peon who proclaimed a sale in execution of a decree did not do so by beat of drum, as a drum could not be found, but by mouth, loudly, *held* that the order confirming the sale could not be interfered with on that ground, as it was impossible to suppose that it had caused any substantial injury or materially affected the result of the sale. JIWA RAM v. MAKHAN LAL, **A.W.N. 1881, 16.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——**O. V. r. 19 (1882 s. 82=1877, s. 82=1859, s. 57).**

See SUMMONS.

(2740-*a*)—O. V. r. 19—Substituted service when to be granted—*See* ACT IV OF 1869 (DIVORCE), 4 L.B.R. 195.

(2740 *b*)—O. V, r. 19—Duty of Court under section before proceeding with appeal—*See* LIMITATION ACT, 1903, art. 169, 18 M L.J. 96.

(2740-*c*)—O. V, r. 19—*See* NOS. 2728, 2730-*a*, 2732, 2733, 2734, 2735, *supra*.

(2741)—*O. 5, rr. 19, 20 (1) (=s. 82, Civ. Pro. Code, 1882)—Application under—Substituted service—Practice and procedure.*—On an application for substituted service, it having been shown that diligent enquiries and various attempts to find the defendant had proved futile that, at the house where the defendant had last ordinarily resided, his uncle informed the serving officer that the defendant had left the house some years ago and he did not know where the defendant was residing; and that the defendant had not been heard of for over two years, the Court made an order for substituted service by affixing a copy of the summons on the notice board of the Court-house, by affixing another copy on the outer door of the house, in which the defendant was known to have last resided, and by advertising the summons in such of the Newspapers as the Registrar should direct. [*Wolverhampton and Stafford Shire Banking Co* v. *Bond*, 29 W.R. (Eng.) 599, F.] RUJNARAIN GHOSE v. TEK LAL SHAHA, **1 C.W.N. 104.**

(2742)—*O. 5, rr. 19, 20 (1) (=s. 82, Civ. Pro. Code, 1882)—Summons not duly served if provisions of section not complied with.*—Where there was nothing to show that the serving officer was examined on oath or that the Court declared that the summons was duly served as required by s. 82, it could not be said that the summons had been duly served. RAMCHANDRA RAO v. NATHURAM, **3 C.P.L.R. 141.**

(2743)—*O. 5, rr. 19, 20 (1) (=s. 82, Civ. Pro. Code, 1882)—Substituted service— Defendant keeping out of the way* —Where a defendant to a suit could not be found at his usual place of residence, and there was none to accept service of summons on his behalf, and the process-server, upon the third attempt to effect personal service, affixed the summons upon the door of house, *held*, that the defendant, under the circumstances, must be deemed to be keeping out of the way, and the service, as effected, was sufficient. ABBAS HUSSAIN v. ASHFAQ AHMAD, **7 A.L.J. 286=6 Ind. Cas. 282.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2743-*a*)—O. 5, rr. 19, 20 (1)—Unascertained persons—Service of summons—*See* PARTITION—GENERAL, 11 C.L.J. 580=6 Ind. Cas. 244.

(2743-*b*)—O. 5, rr. 19, 20 (1)—*See* PROCESS, 11 W.R. 496.

(2744)—*O. 5, rr.* 19, 20 (1) *O.* 9, r. 5, s. 107 (2), *O.* 22 r. 11 (=*ss.* 82, 99-*A and* 582 *Civ. Pro. Code*, 1882)—*Service not effected on respondent for more than a year—Substituted service, reason for—Appeal—Revision.*—In this case service of notice of appeal was not effected on one of the respondents for more than a year, and the Divisional Judge dismissed the appeal, holding that since it had not been disclosed that the respondent was keeping out of the way for the purpose of avoiding service, substituted service could not be ordered. On appeal to the Chief Court against the order dismissing the appeal, *held* that an order under s. 99-A of the Civ. Pro. Code was not appealable. Treating the appeal as an application for revision, the Divisional Court was directed to order substituted service and to decide the appeal after such service. S. 82 of the Civ. Pro. Code allows the Court to order substituted service also, if "for any other reason the summons cannot be served in the ordinary way." S. 99-A of the Civ. Pro. Code by force of s. 582 is applicable to appellate Courts. RATTAN SINGH v. POHLA SINGH, **46 P.L.R. 1902.**

(2745)—*O. 5, rr.* 19, 20 (1), *O.* 9, *r.* 13 (=*ss.* 82 *and* 108, *Civ. Pro. Code*, 1877)—*Practice—Substituted service of summons—Setting aside ex-parte decree.*—Although substituted service of the summons may be ordered in Bombay under s. 82, Civ. Pro. Code, 1877, the Court is to take into consideration the time necessary for notice of the fact being conveyed to the place where the defendant really is, wherever it may be, and shall fix the time for the defendant's appearance accordingly. And if an *ex-parte* decree be passed against the defendant, he is entitled, to have it set aside under s. 108, Civ. Pro. Code 1877, if he was unaware of the existence of the suit and thereby prevented from appearing in the case. MIRZA ALLY BEBANEE v. SYED HYDER HOOSEIN, **2. B. 449.** [*R.*, 62 P.L.R. 1904, 241=42 P.R. 1904.]

(2746)—*O. 5, rr.* 19, 20 (1), O. 9, *r.* 13 (=*ss.* 82 *and* 108, *Civ. Pro. Code*, 1882)—Ex-parte *decree—summons, substituted service of.*—The Court dismissed an application filed under s. 108 of the Civ. Pro. Code on the ground that the Judge, who decided the case, had written in his English proceedings that substituted service had been effected. The returned summons had been destroyed in the ordinary course and the Court did not permit oral evidence to be taken in respect of it. There was no order on the record by which substituted service was directed to be made. *Held*, that the defendants were not deprived of their remedy under s. 108 of the Civ. Pro. Code, merely because the original summons had been destroyed. GHALLU RAM v. DURGA DAS, **62 P.L.R. 1904=42 P.R. 1904.** (Bourke's Reports, p. 27 and 11 B. 449, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2747)—*O. 5. rr.* 19, 20 (1), O. 16, *r.* 10 to 13 17, 18=(*ss.* 82 *and* 174, *Civ Pro. Code*, 1882)—*No declaration by Judge under s* 82—*Whether invalidates order under s.* 174, *Civ Pro. Code.*—The omission of the Judge to record under s. 82 of the Code an express declaration that the process was duly served cannot invalidate his order under s. 174 of the Code. *In re* SREE KRISHNA DAS, **4 M.L.T. 288=19 M.L.J. 31 =3 Ind. Cas. 474.**

(2747-*a*)—O. V. rr. 19, 20 1, O. XVI. rr. 10 to 13, 17, 18—*See* PENAL CODE, A.W.N. 1905, 66.

——O. V, r. 20, para. (1) (=1882, s. 82, (2)= 1877, s. 82 (2)=1859, s. 57; para. (2)= 1882, s. 83=1877, s. 83 and para. (3)= 1882, s. 84=1877, s. 84=1859, s. 85).

See SUMMONS.

(2748)—*O. 5, r.* 20 (=*s.* 57 *Civ. Pro. Code*, 1859)—*Substituted service.*—Where several unsuccessful attempts to effect service of the petition upon the respondent had been made and the Court was satisfied that the respondent was purposely evading service, substituted service was held legal under s. 57 of Act VIII of 1859. ROBERTEST v. ROBERTEST, **68 P.R. 1870.**

(2748-*a*)—*O. 5, r.* 20 (1) (=*old s.* 82 (2)—s. 115 (=*old s.* 622)—"*Substituted service*" *when to be granted.*—The condition precedent to or during substituted service under this section is that the Court should be satisfied that the defendant is purposely evading summons. The non-fulfilment of this condition before passing a decree *ex parte* is a material irregularity which will justify the interference of the Chief Court under old s. 622 (=new s. 115), Civ. Pro. Code. LEKHU MAL v CHELA MAL, **104 P.R. 1888.**

(2748-*a*-1)—O. V, r. 20—*See* NOS. 2728, 2730-*a*, 2732, 2733, 2734, 2735, 2741, 2742, 2743, 2743-*a*, 2743-*b*, 2744, 2745, 2746, 2747, 2747-*a*, *supra.*

(2748-*b*)—*O. 5, rr.* 20 *and* 28 (=*ss.* 57, 62, *Civ. Pro. Code*, 1859)—*Substituted service—Suit against military officer in furlough—Limitation.*—S. 62, Act VIII of 1859, does not provide for the service of the summons on a military officer out of the British territories in India by transmitting a copy of the summons to his commanding officer and therefore the time during which such defendant may have been absent out of the said territories is to be excluded from the period of limitation under s. 13 of Act XIV of 1859. HOME v. JAMSETJEE, **41 P.R. 1871.**

——O. V, r. 21 (=1882, s. 85=1877, s. 85= 1859, s. 59.

(2748-*c*)—O. V, r. 21—*See* NOS. 419, 2735-*supra.*

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——O. V, r. 22 (=1882, s. 86=1877, s. 86).

(2748 *d*)—O. V, r. 22—*See* NO. 2729, *supra*.

——O. V, r. 23 (=1882, s. 85=1877, s. 85=1859, s. 59).

(2748-*e*)—O. V, r. 23—*See* NOS. 519, 2730, 2735, *supra*.

——O. V, r. 24 (=1882, ss. 87, 88=1877, ss. 87, 88).

See SUMMONS.

(2749)—*O. 5, rr. 24, 29 (=s. 87 of 1882)—Act XV of 1869 (Prisoner's Testimony Act, s. 16—Service of process—Signature of jailor—Judicial notice.*—Where the service of process had been made on the defendant, a prisoner in the Presidency jail, by leaving a copy of the summons with the jailor, as provided by s. 15 of the Prisoners' Testimony Act, XV of 1869, and the jailor had endorsed it in accordance with s. 16: *Held* that the Court will take judicial notice of the signature of the jailor under s. 16 Act XV of 1869. TAMOR SINGH v. KALIDAS ROY, **4 B.L.R. O.C. 51.**

——O. V, r. 25 (=1882, s. 89=1877, s. 89==1859, s, 60).

See SUMMONS.

(2750)—*O. 5, r. 25—Summons—Service—Registered post—Defendant residing out of British India—The postal packet returned as "refused"—Proper service—General Clauses Act (X of 1897), s. 27.*—A summons was sent to the defendant, who resided out of British India, by registered post under the provisions of O. V, r. 25 of the Civ. Pro. Code, of 1908. It was returned unserved, its envelope bearing the post man's endorsement: "Refused to take." A question arose whether it was proper service: *Held*, that, as it appeared that the envelope was properly addressed to the defendant, and had been duly stamped registered, and posted, the Court was entitled to draw the inference indicated in s. 27 of the General Clauses Act, 1897, and to hold that there was sufficient service. *Per Robertson, J.*—"The only rule if it can be called a rule, to be laid down, is that the Court must be guided in each case by its special circumstances, as to how far it will give effect to the return of a cover endorsed "refused or words to the like effect." BALURAM RAMKISSEN v. BAI PANNABAI, **13 Bom. L.R. 323.** (18 B. 606, *D.*)

(2750-*a*)—O. V, r. 25—*See* NO. 468, *supra*.

(2750-*b*)—*O. 2, r. 25, sch. 2, r. 10, O. 4, rr. 27, 28, 29 (=ss. 60 & 62, Civ. Pro. Code, 1859) Service of summons in foreign territory if valid.*—Though it may be an invasion of the jurisdiction of a country to attempt to force any one under its protection and temporary allegiance before a foreign tribunal yet a mere notification of proceedings is valid if authorised by the procedure of the Court. NATHOO v. GRAY, **82 P.R. 1869.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VII of 1859)—*continued.*

——O. V. r. 26 (=1882, s. 90=1877. s. 90).

(2750-*c*)—O. V, r. 26—*See* NO. 468, *supra*.

——O. V, r. 28 (=1882, s. 468=1887 s. 468 =1859 s. 62.)

See SUMMONS.

(2750-*d*)—O. V, r. 28—*See* NOS. 2748-*b* 2750-*b*, *supra*.

(2751)—*O. V, rr. 28, 29 (=s. 468, Civ. Pro. Code, 1882)—Army Act, 1881, s. 144—Sub-conductor of Ordnance*—The Sub-conductor of Ordnance on the establishment of the Indian Military Forces is a soldier within the meaning of s. 144 of the Army Act, 1881. A summons sent to him through the Commissary-General ought to be served on him (s. 468, Civ. Pro. Code), though the soldier is entitled to protection under s. 144 of the Army Act and is not compelled to appear in Court in person. ABRAHAM v. HOLMES, **11 M. 475.**

(2751-*a*)—O. V, rr. 28, 29—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF —MISCELLANEOUS, 10 M. 319.

——O. V, r. 29 (=1882, s. 468=1877, s. 468=1859, s. 62.)

(2751-*a*-1)—O. V, r. 29—*See* NOS. 2749, 2750-*b*, 2751, 2751-*a*, *supra*.

——O. VI, r. 7 New).

(2751-*a*-2)—O. VI, r. 7—*See* DECREE—FORM OF DECREE, 54 P.R. 1866, 97 P.R. 1868.

—— O. VI, r. 8 (New).

(2751-*a*-3)—O. VI. r. 8—*See* NO. 105, *supra*, AND NOS. 2795-*k*, 2795-*l*. *infra*.

——O. VI, r. 10 (New).

(2751-*a*-4)—O. VI, r. 10—*See* NOS 2492-*a* 2514-*a*, *supra*.

——O. VI, r. 14 (=1882, s. 51=1877, s. 51=1859, s. 27).

See PLEADINGS.

See PRACTICE AND PROCEDURE,

(2751-*a*-5)—O. VI, r. 14—*See* NOS. 1775 2707, *supra*.

(2751-*b*)—O. VI, rr. 14 and 15—Signing and verification of plaint — *See* PLAINT—VERIFICATION AND SIGNATURE, 48 P.R. 1896.

(2751-*c*)—O. VI, rr. 14 and 15—*See* PLAINT—VERIFICATION AND SIGNATURE, 4 N.L.R. 117, A.W.N. 1891, 152.

(2752-*d*)—O. VI, rr. 14,15—False verification of written statement—False evidence—Indian Penal Code, s. 191—*See* WRITTEN STATEMENT, 6 A. 626=A.W.N. 1884, 52.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2751-*e*)—O. VI, rr. 14, 15 (1), s. 99—*See* PLAINT—FORM AND CONTENTS OF PLAINT, 22 A. 55, F.B.=A.W.N. 1899, 172.

(2752)—*O. 6, rr. 14, 15, O. 14, rr. 1 & 2 (=ss 115 and 146, Civ. Pro Code, 1882)—Written statement received and not objected to, though not signed or verified according to law—Objection taken on appeal, after case fought out on merits—Appellate Court, if should be given effect to objection.*—It is not obligatory upon a defendant to put in a written statement. He may do so if he likes. S. 146 of the Civ. Pro. Code contemplates that issues may be settled, whether there was a written statement or not, though it is not obligatory on the Court to frame issues, if the defendant makes no defence. Where a written statement filed on behalf of the defendant was actually received by the Court, and no application was made by the plaintiff to have it taken off the file on the ground of its not being signed and verified by the defendant as required by s. 115 of the Civ. Pro. Code, and the question was raised for the first time in appeal, after the case had been fought out in the first Court on the footing of a proper written statement, *held*, that, in such circumstances, the appellate Court was not justified in decreeing the suit, on the footing that there was no defence, by reason of the written statement not being signed or verified by the defendant, and the case should have been tried on the merits. RUSTUN GAZI v. TARA PROSANNA CHOWDHURI, **11 C.W.N. 871.**

(2753)—*O. 6, rr. 14, 15, O. 29, r. 1 (=ss. 115, 435, Civ. Pro. Code, 1882)—Principal officer of a Corporation enabled to verify plaint or written statement—Requirements of s. 435 necessary in certain cases.*—By ss. 115 and 435, the Civ. Pro. Code enables a principal officer of a Corporation to verify a plaint or a written statement, and it is not necessary that permission for that purpose should be obtained; but it should be shown, in cases to which s. 435 applies, that the person purporting to verify a written statement is a principal officer of the Corporation, and is able to depose to the facts of the case. If a plaint, or a written statement, contains a statement to that effect, the verification in the usual form would probably be sufficient. SREENATH BANERJEE v. EAST INDIAN RAILWAY COMPANY, **22 C. 268.**

(2754)—*O. 6, rr. 14, 15 (1) (=s. 51, proviso, Civ. Pro Code, (1882)—Contract Act (IX of 1872), ss. 251, 263.*—Under s. 263, Contract Act, the rights and obligations of a dissolved firm continue in all things necessary for the purpose of winding up the business of the partnership. If, therefore, one of the partners of such firm signs and verifies a plaint on behalf of the firm, it would be valid under the proviso to s. 51, Civ. Pro. Code. U. AUNG MIN v. S. T. M. LUTCHUMANAN CHETTY, **9 Ind. Cas. 450.**

(2755 & 2756)—*O. 6, rr. 14 and 15 (1), s. 85 (=ss. 51 and 432, Civ. Pro. Code, 1882)—Suit by or against a Prince—Recognised Agent.*—A person appointed under s. 432 of the Civ. Pro. Code to prosecute or defend any suit on behalf of a Prince is deemed to be the recognised agent by whom appearances, acts and applications under the Civ. Pro. Code may be made or done on behalf of such Prince. Not only is such a person entitled to do such acts himself, but, under the concluding clause of s. 432, Civ. Pro. Code, he may authorize or appoint persons to make and do appearances, applications and acts in any such suit, as if he were himself a party to the suit. This includes the power to sign and verify a plaint. H. H. THE MAHARAJA OF KASHMIR v. MT. KARUM BHARI, **54 P.L.R. 1902=41 P.R. 1902.** (165 P.R. 1889, 19 A. 510, 10 C. 136, 3 C. 579, 4 B. 470, *R.*)

(2757)—*O. 6, r. 14, O. 19, r. 1—Plaint—Signing and verification—Plaintiff company incorporated in foreign country—Signature and verification by person holding general power-of-attorney—"Principal officer."*—There is nothing in r. 1, O. XIX, Civ. Pro. Code, to exclude from its operation a foreign company which is not incorporated as such in this country. (30 C. 103, *F.*) A plaint was filed in the Delhi Court on behalf of the Singer Manufacturing Company, which is incorporated in the United States of America and carries on an extensive business in respect of the sale of sewing machines in various parts of this country. The plaint was signed and verified on behalf of the company by one M who had been appointed agent for the company at Delhi by P who, in his turn, held a general power-of-attorney from the company's accredited English agents authorizing him to act for the company as their general attorney and agent in British India and to appoint sub-agents therein: *Held*, that the plaint was duly signed and verified on behalf of the company, M being the person having special knowledge of the facts relating to the claim and holding a general power-of-attorney for the Delhi District, by which he was duly authorised to sign the plaint on behalf of the absent company and that he was also the "principal officer" of the company within the meaning of O. XIX, r. 1, and competent, as such, to sign and verify the plaint. SINGER MANUFACTURING COMPANY, DELHI v. YAR MUHAMMAD KHAN, **160 P.L.R. 1911.**

——O. VI, r. 15 (=1882, s. 51=1877, s. 51=1859, s. 27.

(2757-*a*)—O. VI, r. 15—*See* NOS. 1775, 2503, 2707, 2751-*b* to *e*, 2752, 2753, 2754, 2755, 2756, *supra*, and NO. 4887, *infra*.

(2757-*a*-1)—O. VI, r. 15 (2) (3)—*See* PLAINT—VERIFICATION AND SIGNATURE, A.W.N. 1896, 75, 6 C. 675=7 C.L.R. 414.

(2757-*b*)—O. VI, r. 15 (2) (3), O. VI, r. 17, *cf.* O. VII, r. 11, s. 99—*See* PLAINT—VERIFICATION AND SIGNATURE, 18 A. 396=A.W.N. 1896, 102.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. VI, r. 17 (=1882, cf. s. 53=1877, cf. s. 53=1859, s 29).

See PLEADINGS.

See PRACTICE AND PROCEDURE.

(2758)—*O 6, r. 17—Amendment of pleading—Defence of limitation—General observations about amendment of plaint.*—The plaintiffs filed a suit for dissolution of an alleged partnership and accounts. It was found by the Court of first instance that they had advanced Rs. 4,001 to the defendants; but it dismissed the suit on the grounds that no partnership was created and that the suit as framed would not lie. The plaintiffs appealed, contending that the partnership had been created and the suit was in order. When the appeal came on for hearing, the plaintiffs prayed for leave to amend the plaint by adding a prayer for the recovery of Rs. 4,001. This amendment was allowed and the claim decreed. The defendants appealed on the ground that the amendment was wrongly allowed, especially as at its date the claim was time barred: *Held*, that the amendment was rightly allowed. The defence of limitation was, in the particular circumstances, a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received. *Per Batchelor, J.*—Under O. VI. r. 17, Civ. Pro. Code, 1908, it is clear that at any stage of the proceedings all amendments ought to be allowed which satisfy the two conditions (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments in plaints should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that, where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action, which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs, by depriving him of a good defence to the claim. The ultimate test, therefore, remains the same. Can the amendment be allowed without injustice to the other side, or can it not? *Per Beaman, J.*—Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs. There are two simple tests to ascertain whether a given case is within the principle. First, could the party seeking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule to be allowed. KISANDAS RUPCHAND v. RACHAPPA VITHOBA SHILVANT, **11 Bom. L.R. 1042=33 B. 644=4 Ind. Cas. 726.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2758-*a*)—*O. 6, r. 17—Plaint, amendment of—Mortgage-deed—Wrong description of property—Decree on mortgage—Discovery of fraud during execution—Fresh suit for declaration of the property intended to be mortgaged—Relief for rectification of deed—Amendment of plaint—Power to direct.*—Where, by fraud, a wrong description of the property really intended to be mortgaged was inserted in the mortgage-deed and a decree was obtained on the mortgage, and where, in execution of the decree, the fraud was discovered, and the present suit was instituted for a declaration that the property mortgaged was not the one described in the deed but something else: *Held*, that the plaintiffs were not entitled to the relief prayed for by them, because the Court cannot declare what would not be in accordance with the facts. *Held*, also, that the plaintiffs ought to have asked for the rectification of the deed and the sale of the lands really intended to be mortgaged, and that they ought to be allowed to amend the plaint by inserting a prayer for proper reliefs. The provisions of the Civ. Pro. Code, O. VI, r. 17, as to the Courts' power to amend the plaints are comprehensive. DRONAN RAJU RAMAYYA v. CHUNDARI RODDAYYA, **10 M.L.T. 116**

(2758-*b*)—*O. 6, r. 17—Misjoinder of causes of action—Claim for possession on the ground of defendant being a trespasser cannot be treated as one for redemption—Civ. Pro. Code, O. 6, r. 17.*—*Held*, that a suit for possession of immoveable property on the ground of the defendant being a trespasser cannot be transformed into one for redemption, especially at the last stage of the trial. *Held*, also, that a new Civ. Pro. Code cannot apply to a case disposed of before it has come into force. KALA v. MUSSAMMAT LACHMI, **167 P.W.R. 1911.**

(2758-*c*)—O VI, r. 17—Amendment of pleadings when may be allowed—*See* BEN. ACT I OF 1895, s. 15, 14 C.L.J. 83.

(2758-*d*)—O. VI, r. 17—*See* PLAINT—AMENDMENT OF PLAINT, 42 P.R. 1874, 8 Ind. Cas. 73=12 C.L.J. 556, 66 P.R. 1873.

(2758-*e*)—O. VI, r. 17—*See* NOS. 105, 195, 1932, 2400, 2410, 2410-*a*, 2425, 2430, 2436, 2492-*a*, 2502-*a*, 2514-*a*, 2664-*b*, 2664-*c*, 2757-*b*, *supra* AND NO. 4887, *infra*.

(2759)—*O. 6, r. 17, O. 7, r. 11 (=s. 53, Civ. Pro. Code, 1882)—Amendment long after institution of plaint and inconsistent with original claim.*—Having regard to the proviso of s. 53 of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the Code, an amendment of the plaint, a year or more after the institution of the suit and inconsistent with the original claim, is improper and should not be allowed. SHYAMA CHARAN NUNDY v. ABHIRAM GOSWAMI, **3 C.L.J. 306 =10 C.W.N. 738=33 C. 511.**

(2760)—*O. 6, r. 17, O. 7, r. 11 (=s. 53, Civ. Pro. Code, 1882)—Fresh points, presentation of, in first or second appeal—Amendment of plaint or memorandum of appeal—Case inconsistent with that originally pleaded.*—An amendment must not make out a case inconsistent with that originally pleaded. An amendment which radically transforms the nature of the claim cannot be made under s. 53, Civ. Pro. Code, and certainly not in appeal. MA KIN GYI v. CATCHICK. **L.B.R. 1893—1900, 518.** (25 W. R. 425, 5 M. 163, 6 B. 107, *F.*)

(2761)—*O 6, r. 17, O. 7, r. 11 (=s. 53, Civ. Pro. Code, 1882)—Plaint in a suit for injunction, whether could be amended into one for possession—Alteration in the relief prayed for, whether alters character of suit.*—Plaintiffs sued for an injunction restraining the defendant from interfering with their dealings, in respect of certain property of theirs, of which the defendant had taken wrongful possession. On the defendants pleading title to the property, plaintiffs prayed for amendment of their claim by claiming possession and damages. *Held*, that a suit for a declaration cannot be regarded as inconsistent with one for possession (11 M. 295, 15 M. 15, *F.*) and that an alteration in the relief prayed for, would not alter the character of the suit, so as to prevent an amendment of a plaint in that respect. HARJI MAL v. POKHAR DAS, **135 P R. 1906.** (20 C. 805, 26 C. 845. *F.*; 1 P.R. 1900, 161 P.R. 1888, *R.*)

(2762)—*O. 6 rr. 17, O. 7 r. 11 (=s. 53, Civ. Pro. Code 1882)—When plaint may and should be returned for amendment or amended.*—A Court can always give a relief short of or less than what is claimed. S 53, cl. (*c*), Civ. Pro. Code, 1882, distinctly provides that an amendment, so long as it does not alter the character of the suit, may be allowed at any time before judgment. The restriction is only as to the nature of the suit, the law prohibiting any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based on contract into an action on tort. But an alteration in the relief does not alter the character of a suit. MA MWE ZET v. MAUNG SAUNG. **U.B.R. 1897—1901 Vol. II, 231.** (2 A. 669, 10 B. 461, 11 M.I.A. 7, 12 W R. 248, *R.*; 20 C. 1, 20 C. 805, 11 M. 94, *F*; 13 B. 548, *R.*) [*F.*, 14 Bur. L.R. 91=U.B.R. 1907, Buddhist Law — Inheritance and pre-emption p. 1; *Expl.* U.B.R. 1907, 2nd Qr. Buddhist Law—Inheritance and pre-emption p. 1, *Cited*, U.B.R. 1906, 3rd Qr., Tort, 9.]

(2763)—*O. 6, r. 17, O. 7, r. 11 (=s. 53 proviso, Civ. Pro. Code, 1882)—Amendment of plaint — Alteration of nature of suit.*—The plaintiff originally claimed a share in two houses as heir to his wife; but subsequently he applied for and obtained leave to amend his plaint, so as to claim the whole of the two houses as his own property, the houses having originally been purchased by the plaintiff in the name of his wife. *Held* that this amendment was not obnoxious to the prohibition contained in the proviso to s. 53 of the Code. MIAN JAN v. ABDUL, **A.W.N. 1907, 203.** (25 C. 371, *R.*)

(2764)—*O. 6, r. 17 and O. 7, r. 11 (=s. 53, Civ Pro. Code, 1882)—Misjoinder of causes of action—Suit, dismissal of—Second appeal—Practice.*—Where a suit is not objected to on the score of misjoinder of causes of action at or before the settlement of issues in the Court of first instance, under s. 53 (*b*) (iii) of the Civ. Pro. Code, it is not permissible to dismiss the suit on that ground in second appeal. SANNA v. GANAPA, **5 Bom. L.R. 185.**

(2764-*a*)—O. VI, r. 17. O. VII r. 11—*See* CONTRACT ACT, 1872, s. 23, 3 L.B.R. 41.

(2764-*a*)—O. VI, r. 17, O. VII r. 11—*See* INJUCTION= SPECIAL CASES, 2 Sind. L.R. 65, 5 N.L.R. 57=2 Ind. Cas. 241,

(2764-*c*)—O. VI, r, 17,and O. VII, r. 11—*See* KABULIAT—IN RESPECT OF WHAT KABULIAT SUIT LIES, 12 O.C. 140. B.=2 Ind. Cas. 923.

(2764-*d*)—O. VI, r. 17, O. VIII, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, 117 P.L.R. 1904, 5 Bom. L.R. 329, 5 Bom. L.R. 643, 26 A. 281=A.W.N. 1903. 240. 6 C.W N. 326 A.W N. 1886, 248, A.W.N. 1887. 28, 186 P.R. 1882. 11 M. 136 5 Bom. L.R. 643 11 B. 570. 135 P.R. 1906=117 P.L.R, 1908, A,W,N. 1893 225 11 Ind. Cas, 856.

(2764-*e*)—C. VI, r. 17. O. VII. r. 11—Suit by bank in liquidation, bank the proper plaintiff in—*See* PLAINT—FORM AND CONTENTS OF PLAINT, 17 A. 292=A.WN. 1895, 81.

(2764-*ee*)—O. VI, r 17. O. VII, r. 11—*See* PLAINT—REJECTION OF PLAINT, 57 P.R. 1904.

2764-*f*)—O. VI, r. 17 and O. VII, r. 11—*See* PLAINT—RETURN OF PLAINT, 2 C.L.J. 11.

(2764-*g*)—O. VI, r. 17, O. VIII, r. 11—*See* PLAINT—VERIFICATION AND SIGNATURE, A.W.N. 1899, 55.

(2764-*h*)—O. VI, r. 17, O. VII, r, 11=*See* SUCCESSION ACT, 1865, ss. 332, 190, 1 L.B. R. 193.

(2764-*i*)—O. VI, r. 17, and O. VII, r. 11, O XXI, r. 17, s. 141—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 17 M. 67.

(2764-*j*)—O. VI. rr. 17, 18, O. VII, rr. 10, 11—*See* PLAINT—RETURN OF PLAINT, 8 B, 313, F.B., 6 M.L.T. 261=33 M. 262=3 Ind. Cas. 339.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2764-*k*)—O. VI, rr. 17, 18, O. VII, r. 11—*See* LIMITATION ACT, 1908, s. 3, 2 A. 832.

(2764-*l*)—O. VI, rr. 17, 18, O. VII, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, A.W. N. 1882, 129.

(2764-*m*)—O. VI, rr. 17 and 18. O. VII, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, 22 C. 692.

(2764 *n*)—O. VI, rr. 17, 18, O. VII, r. 11—*See* PLAINT—REJECTION OF, 126 P.R. 1881.

(2764-*o*)—O. VI, rr. 17, 18, O. VII, r. 11, O. XLI, r. 23—*See* PLAINT—AMENDMENT OF PLAINT, 2 A. 669.

(2765)—*O.* 6, *r.* 17, *O.* 7, *r.* 11, s. 104, *O.* 43, *r.* 1 (=*ss.* 53, 588 (6), *Civ. Pro. Code*, 1882)—*Amendment of plaint after framing of issues—Such amendment an amendment made by the Court and no appeal therefrom.*—Where an amendment of the plaint is made in the Court of first instance after the settlement of issues, such amendment can only come within cl. (*c*) of s. 53, the Code of Civil Procedure, and be an amendment by the Court. It matters not whether the plaintiff writes the amendment with his own hand or some one else does so. The amedment is an amendment of the Court, and for such amendment no provision is made for appeal. ZAHIR-UD-DIN AHMAD v. MUMTAZ-UD-DIN, **A.W.N. 1901, 140.** (A.W. N. 1889, 83, *R.*)

(2766)—*O.* 6, *r.* 17, *O.* 7, *r.* 11, *s.* 107 (2) *O.* 22, *r.* 11 (=*ss.* 53, 582, *Civ. Pro. Code*, 1882) —*Amedment of plaint—Power of appellate Court.*—An appellate Court has power, under s. 582 read with s. 53, Civ. Pro. Code, to allow an amendment of the plaint. RAJAH PEARY MOHAN MUKHERJEE v. NARENDRA KRISHNA MUKERJEE, **5 C.W.N. 273.** (9 C. 695, 22 C. 692, 20 M. 597, *R.*)

(2767)—*O.* 6, *r.* 17, *O.* 7, *r* 11, *s.* 107 (2), *O.* 22 *r.* 11 (=*ss.* 53, 582, *Civ. Pro. Code*, 1882—*Court fees Act* (*XII of* 1870)—*Appellate Court passing decree for larger amount when* ?—In the generality of cases, the appellate Court cannot pass a decree for a larger amount than that stated in the memorandum of appeal. In special cases, the Appellate Court may, when an amendment of the plaint is allowed and the additional Court-fees is paid, pass a decree for a sum larger than that claimed in the plaint. PERCIVAL v. COLLECTOR OF CHITTAGONG, **30 C. 516.**

(2768)—*O.* 6, *r.* 17 *and O.* 7, *r.* 11, *s.* 107 (2) *and O.* 22, *r.* 11 *and s.* 108 (=*ss* 53, 582, 587, *Civ. Pro. Code.* 1882)—*S.* 578, *applicability of, to cure defect of misjoinder—Receiver, possession of, effect of.*—Having regard to the provisions of s. 587, read with s. 582 of the Code, it is open to a party to raise the objection of misjoinder of causes of action in a second appeal, and it is equally open to a High Court, in such appeal, to make an order under s. 53, cl. (*b*) (*ii*), if

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

good grounds are made out. (20 W.R. 240, 18 A. 131, *F.*) S. 578 of the Code may cure an error in the decision due to misjoinder of causes of action, unless such error has either affected the merits of the case or the jurisdiction of the Court. The terms of O. 70, r. 1 of the Rules of the Supreme Court, are narrower and more restricted in scope than those of s. 578 of the Code. Even in second appeal, if a suit is founded to be bad for misjoinder of caues of action, the proper procedure to follow would be not to dismiss the suit altogether, but to direct the Court below to perform the duty which that Court ought to have performed under s. 53 of the Code, namely, to return the plaint for amendment. The possession of a Receiver appointed by the Court during the pendency of a suit should be regarded as possession for the party, who might ultimately turn out to be the true owner and entitled to possession as such. The effect of such possession by the Receiver is to destroy the adverse possession, if any, of either of the parties. SARALA SUNDARI DASI v. SARADA PROSAD SUR. **2 C.L.J. 602.** (11 C. 496, 17 M. 501, 20 A. 341, *Appl.*) [*R*, 33 C. 425=3 C. L.J. 205.]

(2769)—*O.* 6, *r.* 17, *O.* 7, *r.* 11, *O.* 6, *r.* 18 (=*ss.* 53, 54, *Civ. Pro. Code*, 1882)—*Receiving plaints.*—The receiving of plaints is not a merely mechanical operation. The Civ. Pro. Code (ss. 53 and 54) requires that the Court shall consider the plaint before action is taken upon it, and this is the more necessary in rural parts, because there litigants largely rely on the assistance of the Courts in the conduct of their suits. NGA SHWE WIN v. NGA CHAN, E, **L.B.R. 1872—1892, 365.** [*R.*, L.B.R. 1893—1900, 582.]

(2770)—*O.* 6, *r.* 17, *O* 7, *r.* 11, *O* 6, *r.* 18, *s* 104. *O* 43, *r.* 1 (=*ss.* 53, 54 *and* 588 (6), *Civ. Pro. Code, Act XIV of* 1882)—*Order returning plaint for amendment—Rejection of plaint for non-compliance with such order—Appeal—Suit for possession of land for grazing purposes—Buildings erected by defendant—Court-fee.*—An order directing a plaint to be returned for amendment, passed under s. 53 of the Civ. Pro. Code, is appealable under cl. 6 of s. 588. The right of appeal is not lost by reason of rejection of the plaint for plaintiff's non-compliance with such order. The plaintiffs claimed their right to use the land in suit for grazing purposes, and sued for possession and an injunction restraining the defendants from preventing the plaintiffs using the land for such purposes. *Held*, that, for purposes of Court-fee, the suit must be considered as one for possession of land, and that no extra Court-fee was required on the value of the wells and buildings erected on the land subsequent to their dispossession. RAMZAN v. ALLAHYAR, **78 P.L.R. 1903.** (4 A. 320, F.B., *R.*)

(2771)—*O.* 6, *r.* 17, *O.* 7, *r.* 11, *O.* 6, *r.* 18, *and O.* 5, *r.* 4 (=*ss.* 53, 54, 67, *Civ.Pro. Code*,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

1882)—*Properties exceeding pecuniary jurisdiction—Plaint returned for presentation to proper Court—Representation to the same Court after amending by striking off some items and properly valuing the rest—Jurisdiction.*—Where the Munsiff returned the plaint for presentation to the proper Court, on the ground that the subject-matter of suit was undervalued, and that, if properly valued, it would exceed the pecuniary jurisdiction of the Court, and the plaintiff amended the plaint by correcting the valuation, and striking off some of the properties, so as to bring the rest within the jurisdiction of the Munsiff, and re-presented the plaint with a petition that he relinquished his claim to the properties struck out, *Held*, in a petition for revising the order of the Munsiff, admitting the plaint on re-presentation, that the action of the Munsif fell within the letter of s. 57, Civ. Pro. Code, read with s. 54. Since under s. 53, cl. (c) the Court may of itself amend the plaint at any time before judgment, it cannot be said that the Court has no power to allow or accept the amendment, when it is made by the plaintiff and sanctioned by the Court. KARUM BAYIRA PONNUPUNDAN v. AUTHIMOOLA PONNUPUNDAN, **6 M.L.T. 261=33 M. 262=3 Ind. Cas. 338.**

(2772)—*O. 6, r. 17, O. 7, r. 11, O. 6, r. 18 and O 41, r 25 (=ss. 53, 54, 566, Civ. Pro Code, 1882)—Decree, execution of—Identification of land in dispute.*—In the Civ. Pro. Code, there is no provision authorising the dismissal of a suit on the ground that the land in dispute, as described in the plaint, cannot be identified, and that therefore, the decree is incapable of execution. KAZEM SHEIK v. DANESHI SHEIK, **1 C.W.N 574.**

(2773)—*O. 6, r. 17, O. 7, r. 11, O. 14, rr. 3, 4 (=ss. 53, 147, 149, Civ. Pro Code, 1882)—Plaintiff abandoning grounds set up in plaint and setting up new cause of action—Procedure.*—The plaintiff stated that her husband ill-treated her, took a second wife, and did not give her maintenance. At the hearing, she was allowed to change her case that she was induced to marry on a misrepresentation that her husband was unmarried. If the suit is not dismissed, or the plaint not returned for amendment under s. 53, Civ. Pro Code, the Court may, at any time before passing the decree, frame additional issues on such terms as it thinks fit (s. 149.) MA KIN v. MAUNG GALE, **L.B.R. 1893—1900. 130.**

(2774)—*O. 6, r. 17, O. 7, r. 11, O. 41, r. 23, s. 107 (2), O. 22, r. 11 (=ss. 53, 562, 582, Civ. Pro. Code, 1882)—Preliminary point—Remand—Amendment of plaint in appeal—Power of appellate Court to amend plaint—Suit for rent converted into one of ejectment.*—Where a suit is not disposed of on a preliminary point, it is not competent to a Court of appeal under s. 562, Civ. Pro. Code, to remand the case for a fresh

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

trial. The section, moreover, contemplates a remand back to the Court which first disposed of the suit, and to no other Court. An amendment of a plaint, which transforms radically the nature of the claim, cannot be made under s. 53, Civ. Pro. Code, and certainly not in appeal, s. 53 requires and permits amendment of the plaint before judgment, and not after. The large powers conferred on appeallate Courts by s. 582 do not authorize such a transformation of a suit in appeal. BAI SHRI MAJIRAJBA v. MAGANLAL BHAISHANKAR, **19 B. 303.** [*F.*, L.B.R. 1893—1900, 518; *R.*, 18 A. 131, 2 L.B.R. 4.]

(2774 *a*)—*O. 6, r. 17 and O. 14, r. 5—Amendment of pleadings and issues—Discretion—Revision—S. 70 (a), Punjab Courts Act (1884) as amended by Act XXV of 1899—Held*, that the exercise of the power of a Court to allow pleadings and issues to be amended, under O. VI, r. 17, and O. XIV, r. 5, is discretionary, and this discretion cannot be interfered with in revision until it is shown to have been abused or perversely exercised. INDAR NARAIN v. NANAK CHAND, **193 P.W R. 1911**

(2774-*a*1)—O. VI, r. 17, O. XIV, r. 5—*See* PLAINT—AMENDMENT OF PLAINT, 5 B. 609.

(2774-*b*)—O VI, r. 17, O. XIV, r. 5—Discretion and power to amend pleadings and issues—Interference in revision—*See* PLAINT=AMENDMENT OF PLAINT, 9 Ind. Cas. 267=51 P.L.R. 1911.

(2774-*c*)—O. VI, r. 17, O. XLIII, r. 1, ss. 104, 105—*See* APPEAL—ORDERS, A.W.N. 1889, 89.

—— O. VI, r. 18 (=1882 cf. s. 53=1877, cf. s. 53=1859, s. 29.)

See PLEADINGS.

See PRACTICE AND PROCEDURE.

(2774 *d*)—O. VI, r. 18—*See* NOS. 105, 340, 515, 516, 1932, 2436, 2754, 2764-*j* to *o*, 2769, 2770, 2771, 2772, *supra*, AND NOS. 2787-*b*, 2787-*c*, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2802-*a* to *d*, 2802-*d* and *i*, *infra*.

(2775)—*O 6, r. 18, O. 7, r. 11 (=s. 54, Civ. Pro. Code, 1882)—Limitation Act, 1877, s. 4—Contruction of statutes.*—(*a*) It is one of the primary rules of construction to be applied to statutes that, if statutes of the Legislature can be read so as to reconcile them, they are so to be read, as they are not to be read as in conflict, unless it is manifest and apparent that there is conflict between them. (*b*) If s. 54, Civ. Pro. Code, were to be construed as giving a Court power to extend limitation, that construction would be at variance with the plain wording of s. 4, Limitation Act, 1877, and with the clear intention of the Legislature as evidenced by the Act, that a suit should not be entertained, unless it was instituted within the periods of limitation prescribed by that Act. JAINTI PRASAD v. BACHU SINGH, **15 A. 65=13 A.W.N. 29.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2776)—*O.* 6, *r*, 18, *O.* 7, *r.* 11 (=*s.* 54, *Civ. Pro. Code*, 1882).—S. 54, Civ. Pro. Code, refers to the rejection of a plaint, in case it does not fulfil certain conditions. KASINATH DAS v. SADASIV PATNAIK, **20 C 805.**

(2777)—*O.* 6, *r.* 18, *O.* 7. *r.* 11 (=s. 54, *Civ. Pro. Code*, 1882)—*Plaint insufficiently stamped—Power of Court to order deficiency to be supplied beyond period of limitation.*—When a Court fixes a time under cl. (*a*) or cl. (*b*) of s. 54, Civ. Pro. Code, it must be a time within limitation, and the section does not give a Court any power to extend the ordinarily prescribed period of limitation for suit. DURGA SINGH v. BISHESHAR DAYAL, **24 A. 218=A.W.N. 1902, 27.** (15 A. 65, *F*; 19 C. 780, *Not F.*) [*Not F.*, 27 B. 330=5 Bom L R. 198. 82 P.W.R 1907=123 P.R. 1907=3 M.L.T. 63, 6 M.L.T. 129, F.B =32 M. 305=1 Ind. Cas. 507=4 Ind Cas. 503=19 M.L.J. 340; *R.*, 74 P.R. 1903=173 P.L.R. 1903; *D.*, 27 A. 197=24 A.W.N. 224=1 A.L.J, 641.]

(2778)—*O.* 6, *r.* 18, *O.* 7, *r.* 11 (=*s.* 54, *Civ. Pro. Code*, 1882)—*S.* 28, *Act VII of* 1870 (*Court Fees*)—*Insufficiently stamped plaint—Limitation.*—Under s. 54 *b*) Civ. Pro. Code, 1882, read with s. 28, Act VII of 1870, the Court has a discretionary power to fix a time within which the requisite Court fee is to be furnished. If the deficiency in stamp is supplied within the time fixed by the Court, the suit will be reckoned as instituted on the day the plaint was originally presented. (19 C. 780, 27 C. 814, *F.*) The Court may also enlarge the time granted for supplying the deficient Court-fee. RAJKISHORI KOER v. MADAN MOHAN SINGH, **31 C. 75.** [*F.*, 123 P.R. 1907=82 P.W.R. 1907=3 M.L.T. 63; *R.*, 8 O.C. 241.]

(2778-*a*)—O. VI, r. 18, O. VII, r. 11—*See* PLAINT—AMENDMENT OF PLAINT, W.R.F.B. 41=Marsh 127=1 Ind Jur. O.S. 44=1 Hay 269.

(2779)—*O.* 6, *r.* 18, *O.* 7, *r.* 11, ss. 100, 107 (2), O. 22, *r.* 11 (=*ss* 54, 584, 582, *Civ. Pro. Code*, 1882)—*Second appeal—Ejection of application for admission—Jurisdiction of single Judge of the High Court.*—A memorandum of appeal, in a second appeal, was presented to a single Judge of the High Court. He first directed that the record should be sent for at the expense of the applicant, and, on a subsequent date, made an order purporting to "dismiss" the appeal. Notice had not been issued to the respondent. *Held*, that the order was in reality an order rejecting an application for the admission of the appeal, and as such was within the jurisdiction of a single Judge. WILAYATI BEGAM v. RAM LAL, **A.W.N. 1906, 63.** (A.W. N. 1893, 115, *R.*)

(2780)—*O.* 6, *r.* 18, *O.* 7, *r.* 11, *s* 104, *O.* 43, *r.* 1 (=*ss.* 54 (*d*), 588, *Civ. Pro. Code*, 1882)—*Order admitting amended plaint after time—Appeal.*—No appeal lies against an order admitting an amended plaint after the time fixed. SHEIKHALI HUSAIN v. FAZAL HUSAIN KHAN, **4 Ind Cas. 492.**

(2781)—*O.* 6, *r.* 18, *O.* 7, *rr.* 11, 9, 14, *O.* 41, *r.* 9 (=*ss.* 54, 58. 59. 548, *Civ Pro. Code*, 1882)—*Plaint insufficiently stamped—Power of Court to order deficiency to be supplied beyond period of limitation—Presentation of plaint or memo, of appeal and admission of suit or appeal, distinction between.*—When a Court fixes a time under cl. (*a*) or cl. (*b*) of s. 54, Civ. Pro. Code, it must be a time within limitation, and the section does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. (19 C 747, 19 C. 780, *Discussed.*) [*Not F.*, 27 B. 330=5 Bom. L.R. 195, 123 P.R. 1907=82 P.W.R. 1907=3 M.L. T. 63, 6 M.L.T. 129=32 M. 305; *F.*, 24 A. 218, 23 A. 443; *R.*, 17 A. 288, 18 A.206, 20 M. 319, 20 A. 11, 24 A.W.N. 133, 19 M L J.340, F.B.; *D.*, 24 M. 331=25 M 380, 27 A. 197=24 A.W. N. 224=1 A.L J 641, 29 A. 749=4 A.L.J. 636=A.W.N. 1907, 253.] Where the question of limitation arises as to a suit or as to an appeal, there is a difference between the presentation of the plaint or memorandum of appeal and the admission of the suit or appeal, and this distinction is recognised by ss. 59 and 59 with regard to suits, and by s. 548 in the case of appeals. JAINTI PRASAD v. BACHU SINGH, **15 A. 65=A W N, 1893, 29**

——**O. VII, r. 1** (=**1882, s. 50=1877, s. 50=1859, s. 26.**)

See PLAINT.

(2781-*a*)—O. VII, r. 1—*See* NOS. 2479, 2664-*d*, *supra*.

(2781-*b*)—O. VII, rr. 1, 2—*See* HINDU LAW—JOINT FAMILY, 7 B. 467.

(2782)—*O.* 7, *rr.* 1, 2, 4, 5, 6 (=*s.* 50, *Civ. Pro. Code*, 1882)—*Cause of action—Allegation by plaintiff—Proof by plaintiff.*—A plaintiff when he files his suit must allege the cause of action in the manner prescribed in s. 50, Civ. Pro. Code, and must prove necessary allegations in so far as they are not admitted by the defendant. GANO v. SHRI DEV SIDHESHWAR, **4 Bom. L.R. 58=26 B. 360.**

(2783)—*O.* 7, *rr.* 1, 2, 4, 5, 6 (=*s.* 50, *Civ, Pro. Code*, 1882)—*Amendment—Bar of limitation.*—When a plaintiff does satisfy the requirements of s. 50 of the Civ. Pro. Code, 1882, by stating what is in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground should he be later advised that the latter is the true ground. YAKUB EBRAHIM SAYANI v. BAI RAHIMATBAI, **10 Bom. L.R. 346.** [*Not F.*, 11 Bom. L. R. 1187.]

(2784)—*O.* 7, *rr.* 1, 2, 4, 5, 6 (=*s.* 50, *Civ. Pro. Code*, 1882)—*Illus.* (*b*)—*Administrator, suit by—"Letters" must issue before he can sue—Non-suit.*—No suit is maintainable when

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

instituted by a person in his capacity as the administrator of the estate of a deceased person unless and until letters of administration are issued to him to entitle him to sue in such representative capacity. THE ADMINISTRATOR-GENERAL OF BENGAL v. LALIT MOHAN ROY, **12 C.W.N. 738.**

(2785)—*O. 7, rr. 1, 2, 4, 5, 6, (=s. 50, Civ. Pro. Code, 1882)—Plaint, amendment of, by referring to a document not included in the list of documents annexed.*—The amendment of a plaint, by referring to a document not included in the list of documents annexed to the plaint, is not such an amendment as will convert the suit into a suit of different and inconsistent character. GUNNAJI BHAVAJI v. MAKANJI KHUSHALCHAND, **11 Bom. L.R. 498=6 M.L. T. 234=3 Ind. Cas. 189=34 B. 250.**

(2786)—*O. 7, rr. 1, 2, 4, 5, 6,(=s. 50, Civ. Pro Code, 1882 .—Quære;*—Where a plaintiff can be allowed to take advantage of any express ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint, having regard to the terms of s. 50, Civ. Pro. Code, 1882. BENODE BEHARY MOOKERJEE v. RAJ NARAIN MITTER, **30 C. 699=7 C.W.N. 651.** [*R.*, 14 C.W.N. 128.]

(2786-*a*)—O. VII, rr. 1, 2, 4, 5, 6—*See* EVIDENCE ACT, 1872, s. 34, 8 Ind. Cas. 81.

(2786-*a*-1)—O. VII, rr. 1, 2, 4, 5, 6—*See* EVIDENCE ACT, 1872, s. 110, 11 A. 438.

(2786-*b*)—O. VII, rr. 1, 2, 4, 5, 6—*See* LIMITATION—GENERAL, 30 C. 699=7 C.W.N. 651.

(2786-*c*)—O. VII, rr. 1, 2, 4, 5, 6—Representation to proper Court after long delay—Non-averment of particulars required by s. 50—Endorsement of Court as to dates of receipt and return— Sufficient compliance—*See* LIMITATION ACT, 1908, s. 14, 9 Ind. Cas. 157.

(2786-*d*)—O. VII. rr. 1, 2, 4. 5, 6—Bar of limitation—Plea of exemption under s. 14 of the Limitation Act—Not alleged in plaint—Whether allowable in appeal—*See* LIMITATION ACT, 1908, s. 14, art. 120, 17 M.L.J. 281.

(2786-*e*)—O. VII, rr. 1, 2, 4, 5, 6—*See* MORTGAGE—REDEMPTION, A.W.N. 1889, 187.

(2786-*f*)—O. VIII, r. 1, 2, 4, 5, 6—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 16 B. 519.

(2787)—*O. 7, rr. 1, 2, 4, 5, 6, O. 27, rr. 2, 3, O. 29, r. 1 (=s 26, Civ. Pro. Code, 1859)—Intention of—The omission of Honourable, Maharaja, etc., no mis-naming;*—The plain intent of s. 26, Civ. Pro. Code, is to secure the definite statement of the subject and object-matters of the litigation, and the words "so far as they can be ascertained" were not intended to compel a plaintiff to insert every name and title to which the defendant may conceive himself entitled. The omission of the titles "Honourable" "Maharaja" in a plaint does not constitute such a mis-naming as to justify the dismissal of the plaint. ZAMINDAR OF BOBBILY v. ZAMINDAR OF VIZIANAGARAM, **3 M.H.C. 31.** [*Overruled*, **12** B.L.R. 443, P.C.]

(2787-*a*)—O. VII, rr. 1, 2, 4, 5, 6, O. XXVII, rr. 2, 3, O. XXIX, r. 1—*See* LIMITATION ACT, 1908, s. 3, Marsh 336=2 Hay 314.

(2787-*b*)—*O. 7, rr. 1, 2, 4, 5, 6, O. 27, rr. 2, 3, O. 29, r. 1., O. 6, r. 18, O. 7, r. 11 (=ss. 26, 29, Civ. Pro. Code, 1859) — Plaint—Title—of honor.*— The Privy Council held, upon the proper construction of the Civ. Pro. Code, that the description contemplated by s. 20 includes all those titles by which a party is known, and that, if the plaintiff from animosity, pique, or anything in fact but a *bona fide* dispute as to the right to a title, obstinately refused to give his adversary that title by which he is generally recognised, the Court ought not to permit or sanction that species of insult, but will exercise a sound discretion under s. 29, in first requiring the plaintiff to amend his plaint and afterwards in rejecting the plaint should the first order be contumaciously disobeyed. MAHARAJA OF VIZIANAGARAM v. RAJALAKSHMI CHALLAYA, **12 B L.R. 143, P C.=18 W.R. 301.**

(2787-*c*)—*O. 7, rr. 1, 3, 4, 5, 6, O. 27, rr. 2, 3, O. 29, r. 1, O. 6 r. 18, O. 7, r. 11 (=ss. 26, 29, Civ. Pro. Code, 1859)—Title of honor—Plaint.*—The object of s. 26, Act VIII of 1859, is to identify all parties to the suit; and the term "description" applies rather to the patronymic than to a title such as a *Roy Bahadoor*. A plaintiff's omission to insert in his plaint the words "Roy Bahadoor," though ordered to do so, in describing the person sued, was held to be no sufficient reason for the rejection of his plaint. KISHEN CHAND GOLACHA v. MEGHRAJ KOOTURIA ROY BAHADUR, **12 B.L.R. 443 Note=12 W.R. 450.**

(2788)—*O. 7, rr. 1, 2, 4, 5, 6, O. 33, r. 1, s. 115 (=ss. 50 (f), 401, 622, Civ. Pro. Code, 1882—Suit in forma pauperis—Relinquishment of part of claim—Court-fee—Revision.*—An applicant for leave to sue as a pauper for recovery of a dower debt stated in her application that, "out of the entire amount of dower Rs 125,000 are claimed and the rest is given up by the plaintiff." The Subordinate Judge, before whom the application was presented, *held* that this was not a proper compliance with s. 50 (*f*) of the Code of Civil Procedure, and further that, as no Court-fee was prescribed for a suit for recovery of dower, the case came within the latter part of the explanation to s. 401 of the Code, and accordingly rejected the application. *Held* that, although the findings of the Subordinate Judge on the above points were wrong, the case did not come within the provisions of s. 622 of the Code. MAHMUD-UN-NISSA v. AHMAD HUSAIN, **A.W.N. 1900, 214.** (7 A. 336, 11 C. 6, *R.*; 10 B. 270, *Diss.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. VII, r. 2 (=1882, s. 50=1877, s. 50=1859, s. 26.

(2788-*a*)—O. VII. r. 2—*See* NOS. 2479, 2664-*d*, 2781-*b*, 2782, 2783, 2784, 2785, 2786, 2786-*a to f*, 2787, 2787-*a to c*, 2788, *supra*.

——O. VII, r. 3 (=1882, s. 50, cl. 3=1877, s. 50, cl. 3=1859, s. 26.)

(2788-*b*)—O. VII, r. 3—*See* NO. 2664-*d*, *supra*.

——O. VII, r. 4 (=1882, s. 50, cl. 4=1877, s. 50 (4)=1859, s. 26).

(2788-*c*)—O. VII, r. 4—*See* NOS. 2479, 2664-*d*, 2782, 2783, 2784, 2785, 2786, 2786-*a to f*, 2787, 2787-*a to c*, 2788, *supra*.

——O. VII, r. 5 (=1882, s. 50, cl. 5=1877, s. 50 (5)=1859, s. 26).

(2788-*d*)—O. VII, r. 5—*See* NOS. 2479, 2664-*d*, 2782, 2783, 2784, 2785, 2786, 2786-*a to f*, 2787, 2787-*a to c*, 2788, *supra*.

——O. VII, r. 6 (=1882, s. 50, cl. 6=1877, s. 50, cl. 6=1859, s 26).

(2788-*d*-1)—O. VII, r. 6—*See* NOS. 2479, 2664-*d*, 2782, 2783, 2784, 2785, 2786, 2786-*a to f*, 2787, 2787-*a to c*, 2788, *supra*.

——O. VII, r. 7 (New.)

See PLAINT.

(2789)—*O. 7, r. 7—Suit for cancellation of sale-deed by vendor and for recovery of properties—Decree for unpaid purchase-money—Jurisdiction.*—In a suit for the cancellation of a sale-deed and for recovery of properties comprised in the sale on the ground of failure of consideration, the Court is justified, on the principle of O. VII, r. 7 of the Civ. Pro. Code, (Act V of 1908), in giving the plaintiff-vendor a decree for the amount of the purchase-money that, it finds, was not paid to him. MAHALINGA PATHAN v. TIRUMALAI PILLAI, **8 M.L.T. 433=8 Ind. Cas. 64.**

——O VII, r. 9 =(1882, s. 58 =1877, s. 58=1359, s 38).

(2789-*a*)—O. VII, r. 9—*See* NO. 2781, *supra*.

(2789-*b*)—*O. 7, r. 9, O. 7, r. 18, s. 27, O. 5 r. 1—(=ss. 58, 63, 64, Civ. Pro. Code, 1882)—Registered plaint—Court's order for production of plaintiff's account books—Failure to produce books, penalty for, as prescribed by s 63.*—Along with the plaint in this case which was duly registered under s. 58 of the Civ. Pro. Code, plaintiff had put up an extract from his account books. For comparing and verifying such extract, the Court ordered the plaintiff to produce his account-books within a date fixed for the purpose. On the plaintiff's failure to produce the books accordingly, the Court refused to issue summonses and rejected the plaint. *Held* in revision that the plaint having been registered

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

it was the duty of the Court to issue the summonses. Nothing in the Civ. Pro. Code empowered the lower Court to reject the plaint as it did. The penalty which the plaintiff incurder for not producing his original account on that day should be limited to that prescribed by s. 63, *viz.*, not being able to put in that account without the special leave of the Judge. GOPAL v. VISHNU, **22 B. 971.**

——O. VII, r. 10 (=1882, s. 57=1877, s. 57=1859, s. 30).

See PLAIT.

(2790)—*O. 7, r. 10 (=s. 57, Civ. Pro. Code, 1882)—Plaint, return of—Court's discretion to grant reasonable time to refile plaint returned to be filed in proper Court—Limitation, saving of.*—In an order under s. 57 of the Code of 1882, returning a plaint to be filed in the proper Court, the Court returning the plaint has a discretion to grant a reasonable time for the purpose, and if the plaintiff re-files it in the proper Court within that time, his suit will not be barred by limitation, even though he had filed the plaint in the wrong Court on the last date for limitation. NIBARAN CHANDRA BANERJEE v. S. C. MUKERJEE, **6 Ind. Cas. 637.**

(2790-*a*)—*O. 7, r. 10 (=s. 57, Civ. Pro. Code, 1882)—Institution of suit in wrong Court—Procedure to be adopted.*—*Bom. Act XVII of* 1879, s. 11.—Where a plaint is presented to a Court having to jurisdiction to try the suit, the proper procedure to be adopted by the Court is to return the plaint for presentation to the proper Court and not to reject it. In this case, a suit was brought in Court H, under the Dekhan Agriculturists' Relief Act, on the allegation that some of the defendants (who were alleged to be agriculturists) held lands within the jurisdiction of that Court. But the Court, having found that those defendants were not agriculturists and that the suit ought to have been brought in Court S, within whose jurisdiction the other defendants (who were agriculturists) resided, rejected the suit. *Held* that the plaint should not have been rejected, but should have been returned, under s. 57 of the Civ. Pro. Code, 1882, for presentation to the Court S. LADHAJI v. HARI, **23 B. 679.**

(2791)—*O. 7, r. (10 =s, 57, Civ. Pro. Code, 1882)—Want of jurisdiction—Return of plaint by appellate Court—Statement by pleader, binding on client*—Where, in order to bring the suit within the jurisdiction of the Court, the plaintiff's pleader wrongly stated the nature of a case, which was accepted by the other side, and the case was proceeded with, *held*, that the plaintiff was bound by the election of his vakil to treat the suit as of a particular nature, and could not question the jurisdiction of the Court, and claim the return of the plaint for presentation in the proper Court; for an appellate Court is

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

not bound, under all circumstances, to return a plaint where defect of jurisdiction appears. YACOOB v. MOHAN SINGH, **11 M. 482.**

(2791-*a*)—O. VII, r. 10—*See* APPEAL—ORDERS, 8 C. 834.

(2791-*b*)—O VII, r. 10—*See* APPELLATE COURT; POWERS OF APPELLATE COURT, 55 P.R. 1878.

(2791-*c*)—O VII, r. 10—Return of plaint—Old stamp—Credit to be given by proper Court—*See* COURT FEES ACT, 1870, s. 30, 21 M.L.J. 533, F.B.

(2791-*c*-1)—O. VII, r. 10—*See* PLAINT—RETURN OF PLAINT, 88 P.R. 1869, 39 P.R. 1872, 17 P.R. 1875.

(2791-*d*)—O. VII, r. 10—*See* PRINCIPAL AND AGENT—MISCELLANEOUS, 21 W.R. 107.

(2791-*e*)—O VII, r. 10—*See* REG. I OF 1877, AJMIR COURTS, s. 21, A.W.N. 1902. 215.

(2795 *f*)—O. VII, r. 10—*See* NOS. 392, 423, 425, 437, 469, 475, 505, 1933, 2764-*j*, *supra*, AND NOS. 2802-*h*, 4039. *infra*.

(2792)—*O* 7, *r.* 10, *s.* 107, (2), *O.* 22, *r.* 11, *s.* 104, *O.* 43. *r.* 1 (=ss. 57, 582, 588 (6) *of Civ. Pro Code*, 1882)—***Order returning an appeal for presentation to proper Court, appeal against Chief Court, appellate jurisdiction of.***—Ss. 57 and 582 of Civ. Pro. Code, can be read together and s. 588 (6) applies to memoranda of appeal as well as to plaints. The Chief Court, therefore, has jurisdiction to hear an appeal from an order of a District Judge, returning an appeal for presentation to the proper Court. MAUNG PO MYA v. PALANIAPPA CHETTY. **1 L.B.R. 32.** [*R.*, 14 M. 462, 9 A. 11.]

(2792-*a*)—O VII, r. 10, s. 115—*See* APPEAL—MISCELLANEOUS, 14 M. 462.

(2793)—*O.* 7, *r.* 10, *O.* 41, *r.* 23, *O.* 43, *r.* 1 (=ss. 57, 562, 588 (6), *Civ. Pro Code*, 1877)—*Return of plaint after trial to be presented to proper Court — Appeal — Power of appellate Court to remand.* Where a District Munsiff having jurisdiction in suits below Rs. 1,000 in value, fully tried the case and came to the conclusion that the jurisdictional value of the property was more than Rs. 1,000 and returned the plaint to be presented in a proper Court, *held* that the District Judge, if he was of opinion that the valuation of the suit by the plaintiff was correct, should not remand the case for re-trial, and was bound to decide the case on the merits. KUSHI RAM v. DALJIT KHAN, **A.W.N. 1882, 45.**

(2793-*a*)—O. VII, r. 10, O XLI, r. 23, O. XLIII, r. 1—*See* APPEAL—ORDERS, 3 A. 855.

(2793-*b*)—O. VII, r. 10 and O. XLIII, r. 1 and s. 104—*See* JURISDICTION OF REVENUE COURTS, 6 P.W.R. 1908=85 P.L.R. 1908.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2793-*c*)—O. VII, rr. 10, 13, O XLIII, r. 1—*See* COURT FEES, 7 B.L.R. 663, F.B.=16 W.R. F.B. 10.

——O. VII, r. 11 (=1882, ss. 53 and 54=1877, ss. 53 and 54=1859, ss. 29, 31 and 31).

See PLAINT.

(2794)—*O* 7, *r.* 11 (=*s* 54, *Civ. Pro. Code*, 1877)—*Rejection of plaint.*—A plaint can only be rejected under s. 54 of the Civ. Pro. Code before it is registered. HUBIBUL HOSSEIN v. MAHOMED REZA. **8 C. 192=10 C.L.R. 385.** *Diss.*, 12 A. 553, U.B.R. 1892—1896, Vol. II, 253, 27 C. 376, 1 N.L.R. 103, 4 C.L.J. 431=11 C.W.N. 38=1 M.L.T. 355=34 C. 20, F.B.]

(2795)—*O.* 7, *r.* 11 (=s. 54 (*b*), *Civ. Pro. Code*, 1877).—An appellate Court returning a memorandum of appeal as being insufficiently stamped, must fix a time within which the deficiency must be supplied. SHEO PARTAB SINGH v. SHEO GHOLAM SINGH, **2 A. 875.** [*Cons.*, 12 A. 129, F.B.]

(2795-*a*)—O. VII, r. 11—*See* ACT XV OF 1865, s. 30, 3 B.H.C. A.C. 112.

(2795-*b*)—O. VII, r. 11—Order of Assistant Collector rejecting plaint—Appeal—*See* U.P. ACT II OF 1901, s. 177, 5 Ind. Cas. 371.

(2795-*c*)—O. VII, r. 11—*See* COURT FEES ACT, 1870, s. 10, 2 M. 303.

(2795-*d*)—O VII, r. 11—Suit filed on last day of limitation on insufficient Court-fee—The insufficiency not discovered until after expiry of limitation for the suit—Suit held barred—*See* COURT-FEES ACT, 1870, s. 28, A.W.N. 1906, 21=28 A, 310=3 A L J. 838.

(2795-*e*)—O. VII, r. 11—*See* JURISDICTION OF CIVIL COUTS, 6 C.L.R. 201, P.C. 6 I.A. 120.

(2795 *f*)—O. VII, r. 11—*See* LIMITATION—MISCELLANEOUS, 12 W.R. 6, P.C=2 B.L.R. 11, P.C.=12 M.I.A. 292.

(2795-*g*)—O. VII, r. 11—*See* LIMITATION ACT, 1908, s. 3, 15 A. 65=A.W.N. 1893, 29.

(2795-*h*)—O VII, r. 11—Presentation of plaint on insufficient stamp—Time allowed for making good deficiency, and deficiency made good within time allowed, but after limitation period—Limitation—*See* LIMITATION ACT, 1908, s. 3, 6 M.L.T. 129, F.B.=32 M. 305=1 Ind. Cas. 507=19 M.L.J. 340=4 Ind. Cas. 503.

(2795-*i*)—O. VII, r. 11—*See* LIMITATION ACT, 1908, s. 3, art. 23, 2 O.C. 41.

(2795-*i*-1)—O. VII, r. 11—*See* BEN. REG. VII OF 1822, 2 B.L.R. P.C. 111, 137=12 M. I.A. 292=12 W.R. P.C. 6.

(2795-*j*)—O. VII, r. 11—*See* NOS. 56, 105. 195, 340, 515, 516, 1932, 2400, 2410, 2410-*a*, 2412-*a*, 2425, 2430, 2436, 2492-*a*, 2502-*a*,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

2514-*a*, 2664 *c*, 2757-*b*, 2759, 2760, 2761, 2762, 2763, 2764, 2764-*a*, TO *o*, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2778-*a*, 2779, 2780, 2781, 2787 *b*, 2787-*c*, *supra* AND NOS. 4887, 5684, *infra*.

(2795-*j*-1)—O. VII, r. 11, s. 107, O. XLI, r. 3—*See* COURT FEES ACT, ss. 10, 11, 28, 12 A. 129, F.B. = A.W.N. 1890, 39.

(2795-*k*)—O. VII, r. 11, O. VI, r. 8—*See* LIMITATION ACT, 1908, ss. 3, 4 & 5, 20 M. 319 = 7 M.L.J. 257.

(2795 *l*.—O. VII, r. 11 *cf.* O. VI, r. 8—*See* VALUATION OF SUITS, 13 B. 517.

(2796)—*O.* 7, *r.* 11, *O.* 6, *r.* 18, (=s. 54, *Civ. Pro. Code*, 1882).—S. 54, Civ. Pro, 1882, may be applied at any stage of a suit. KARAMAN SINGH v. NORMAN COCKELL, **1 C.W.N. 670.** (12 A. 553, *F.*) [*R.*, 27 C. 376, 3 N.L. R. 103, 34 C. 20, F B = 11 C.W.N. 38 = 4 C. L.J. 421 = 1 M L T. 355.]

(2797)—*O.* 7, *r.* 11, *O.* 6, *r.* 18 (=s. 54, cl. (*b*), *Civ. Pro. Code* 1882)—*Plaint, admission, registration and rejection of.*—It is competent to a Court to reject a plaint under s. 54, cl. (*b*) of the Civ. Pro. Code, after it has been admitted and duly registered. A plaint was presented on the 23rd June, 1902, insufficiently stamped. The plaintiffs were directed by the Court to pay the deficit Court fees on or before the 5th July; the Court fees were supplied on the 9th July. No prayer was made for extension of time, nor was an order made in that behalf; but the plaint was directed to be admitted and registered. At the final hearing, the plaint was rejected upon objection taken by the defendant that the deficit Court fees had not been paid within the time allowed. *Held*, that, under the circumstances of this case, the plaint ought not to have been rejected, but the Court ought to have proceeded with the suit, as if it had been instituted on the date the deficit Court fees were actually paid, dismissing such portion of the claim, if any, as might, in this view, be barred by limitation. PUDMANAND SINGH v. ANANT LAL MISSER, **4 C.L.J. 421, F.B = 11 C.W.N. 38 = 1 M.L.T. 355 = 34 C. 20.** [*R.*, 34 C. 305 = 5 C.L.J. 270.]

(2798)—*O.* 7 *r.* 11, *O.* 6, *r.* 18 (=s. 54 *Civ. Pro. Code*, 1882)—*Court Fees Act*, s. 10.—S. 54, Civ. Pro. Code, 1882 can be applied at any stage of a suit, as the section contains no limitation as to time. (2 M. 308, 8 C. 172, *D*; 12 A. 553, *F.*) S. 10 of the Court Fees Act does not conflict with s. 54, Civ. Pro. Code, and a dismissal under the former would not operate as a bar to a subsequent suit. (11 A. 92, *F.*) Where a suit had proceeded even to the framing of issues, and it was found that the plaint was undervalued and understamped, the plaint should have been rejected under s. 54 (*a*) and not dismissed under s. 158, Civ. Pro. Code, 1882, as a dismissal under this section would be a bar to a subsequent suit on the same subject matter, MALE v. MAUNG PO MAUNG **U.B.R. 1892—96, 253.**

(2799)—*O.* 7, *r.* 11, *O.* 6, *r.* 18 (=s. 54, *Civ. Pro Code*, 1882)—*Registration of plaint—Rejection.*—The terms of s. 54, Civ. Pro. Code, are imperative and mandatory. So the registration of a plaint does not prevent its rejection under s. 54. BRAHMOMOYI DASI v. ANDI SI, **27 C 376** (8 C, 192, *Diss.*) [*Appr.*, 34 C. 20 F.B. = 4 C.L.J. 421 = 11 C.W.N. 38 = 1 M.L.T. 355.]

(2800)—*O.* 7, *r.* 11, *O.* 6, *r.* 18 (=s 54, *Civ. Pro. Code*, 1882)—*Rejection of plaint—Procedure—Plaint not to be rejected in part.*—Under s. 54 of the Code, a Court cannot reject a plaint in part. RAGUBANS PURI v. JYOTISS SWARUPA, **A.W.N. 1907, 68 = 29 A. 325.**

(2801)—*O.* 7, *r.* 11, *O.* 6, *r.* 18 (=s. 54, *Civ. Pro. Code*, 1882)—*Jurisdiction of Civil Court—Burma Land and Revenue Act*, ss 15, 18, 19, 55 (*b*), 56—*Dispute as to right to occupy or to possess land not covered by a grant or lease or in respect of which no declaration has been made—Land occupied under rules regulating its temporary occupation.*—The jurisdiction of a Civil Court is not necessarily barred by s. 56, Burma Land and Revenue Act, in a dispute between persons as to the right to possess or occupy a part of a registered holding not covered by a grant or lease under s. 18 and in respect of which no declaration under s. 15 has been made, because there is no law requiring a landholder to obtain a declaration of his status under s. 15. But s. 56 of the Land and Revenue Act bars the jurisdiction of a Civil Court when the claimant admits, or when it otherwise appears, that he claims to occupy merely under s. 19, that is, under rules regulating the temporary occupation of land over which no person has a right of either of the cl. (*a*) and (*c*) of s. 6. The provisions of s. 56 of the Burma Land and Revenue Act, 1876, that *inter alia*, no Civil Court shall exercise jurisdiction in "claims to occupy or resort to lands under ss. 19, 20 and 21, and disputes as use or enjoyment of such lands between persons permitted to occupy or resort to the same" is a positive rule of law, which affords grounds for the rejection of a plaint. If a plaint does not contain particulars sufficient to make it appear on the face thereof that the Court has jurisdiction, this would be sufficient ground for returning such plaint for amendment under s. 53 of the Code. If, during the course of a suit, a Judge is satisfied on the evidence produced by the parties that the claim or dispute or part thereof is one covered by cl. (*b*) of s. 55 of the Land and Revenue Act, it would be his duty to dismiss the suit or such part thereof on the ground that the Court, over which he presided, had no jurisdiction to determine such claim or dispute. MAUNG YAT v. MAUNG TAROK, **1 L. B.R. 16.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2802)—*O. 7, r. 11, O. 6, r. 18 [=s. 54 (c) Civ. Pro. Code, 1882]—Non-joinder of a party as plaintiff.—Held* that, on objection taken by the defendant on the ground of the non-joinder of a party as plaintiff at the first hearing, the plaint may be rejected under s. 54 (c) without being returned for amendment, if the plaintiff insists on adhering to the allegation that the contract sued on was entered into with him alone; and that the appellate Court may dismiss his appeal against the order of rejection without giving him an opportunity to amend his plaint by adding the party who should originally have been added. PHOLU SHAW v. DITTA SINGH, **94 P.L.R. 1901=56 P.R. 1901.** (6 C. 815, 156 P.R. 1889, F.B., 96 P.R. 1891, F.B., *R.*)

(2802-*a*)—O. VII, r. 11, O. VI, r. 18—Payment of additional court-fee—Effect as regards limitation—*See* COURT FEES ACT, 1870, s. 10, 27 A. 197=A.W.N. 1904, 224.

(2802-*b*)—O. VII, r. 11, *cf.* O. VI, r. 18—*See* COURT FEES ACT, s. 28, A.W.N. 1904, 133.

(2802-*c*)—O. VII, r. 11, O. VI, r. 18—*See* LIMITATION ACT, 1908, s. 3, 27 C. 814=4 C. W.N. 818, 74 P.R. 1903.

(2802-*d*)—O. VII, r. 11, O. VI, r. 18—*See* VALUATION OF SUIT, 23 A. 423=A.W.N. 1901, 118.

(2802-*e*)—O. VII, r. 11, O. XVII, r. 3—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 11 A. 91, F.B.=8 A.W.N. 286.

(2802-*f*)—O. VII, r. 11, O. XLI, rr. 11, 3, ss. 107 (2), 100, 101—*See* SPECIAL OR SECOND APPEAL—ADMISSION OR REJECTION OF APPEAL, 15 A. 367=A.W.N. 1893, 115.

(2802-*g*)—O. VII, r. 11 (*c*), O. VI, r. 18—*See* LIMITATION ACT, 1908, s. 3, 13 A. 305=11 A.W.N. 99.

(2802-*h*)—O. VII, rr. 11, 10—*See* JURISDICTION OF CIVIL COURTS, 15 A. 387=A.W.N. 1893, 164, F.B.

(2802-*i*)—O. VII, r. 11, O. VI, r. 18, O. VII, r. 12, s. 100—*See* COURT FEES ACT, ss. 6, 10, 12, 28, 7 A. 528=A.W.N. 1885, 140.

(2803)—*O. 7, r. 11, O. 7, r. 13 and O. 43, r. 1 (=ss. 31, 36 Civ. Pro. Code, 1859)—Court Fees Act (VII of 1870), s. 12, cl. (i)—Plaint insufficiently stamped—Rejection of suit by District Judge—No right of appeal.*—There is no right of appeal against the rejection of a suit by a District Judge on the ground that the plaint was not properly stamped. Any such right to which the plaintiff might have been entitled under ss. 31, 36 of the Civ. Pro. Code, Act VIII of 1859, has been taken away by s. 12, cl (i) of the Court Fees Act, VII of 1870. NARAYAN MADHAVRAO NAIK AND ANOTHER v. THE COLLECTOR OF THANA, **2 B. 145.** [*F.*, 2 B. 219, 9 B. 355; *Expl.*, 10 B. 610, F.B.; *D.*, 4 M. 204, 12 C.L.R. 148, 4 M.L.J. 183, F.B., 23 B. 486.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. VII, r. 12 (=1882, s. 55=1877) s. 55).

See PLAINT.

(2803-*a*)—O. VII, r. 12—*See* NO. 2802 (i) *supra*.

(2804)—*O. 7, r. 16, O. 41, r. 18(=ss 55, 557, Civ. Pro. Code, 1882)—Order dismissing appeal under s 551, effect of—Lower Court, competency of, to amend its own decree after such dismissal.*—Where the High Court dismisses an appeal under s 551 of the Civ. Pro. Code, there is no decree of the High Court which can be executed and in which the decree of the lower Court should be taken to have become merged. Such order of dismissal cannot be said to have confirmed or varied or reversed the decree of the lower Court, which Court, therefore, has jurisdiction to amend its decree to bring it into accordance with its judgment. BABU v. VAJIR, **21 B. 548.** [*Diss.*, 22 M. 293, 8 P.R. 1903=33 P.L.R. 1904, 4 C.L.J. 566; *Not F.*, 30 A. 290=5 A.L.J. 584=A.W.N. 1908, 109, 11 C.L.J. 159=5 Ind. Cas. 261; *R.*, 10 M.L.J. 216, 74 P.R. 1905=182 P.L.R. 1905.]

——O. VII, r. 13 (=1882, s. 56=1877, s. 56=1859, s. 36).

See PLAINT.

(2804-*a*)—O. 7, *r.* 13 (=*Civ. Pro. Code*, 1977, s. 56)—*Illegal order of remand—Appeal.*—This was an appeal from an order by the lower appellate Court under s. 562, Civ. Pro. Code, 1877, remanding the case for re-trial and directing what issues should be tried. Before the appeal came on for hearing the Court of first instance had carried such order into effect. *Held* that, under the circumstances, it was useless then to discuss the propriety of the order. PRAG LAL v. RAGHUBAR DAS. **A.W.N. 1881, 174.** [*R.*, 4 O.C. 238, 30 A. 479, F.B. =A.W.N. 1908, 195=4 M.L.T. 162=5 A.L.J. 447.]

(2805)—O. VII, r. 13—*See* NOS. 341, 2793-*c*, 2803, *supra*.

(2805-*a*)—O VII, r. 13, O. XLIII, r. 1—*See* APPEAL—ORDERS, 42 P.R. 1874.

(2805-*b*)—O. VII, r. 13, O. XLIII, r. 1—*See* COURT FEES ACT, 1870, s. 12, cl. 1, 23 W. R. 296.

——O. VII, r. 14 (=1882, s. 59=1877 s. 59=1859, s, 39 (1)].

See PLAINT.

(2805-*c*)—O. VII r. 14—*See* INSPECTION OF DOCUMENTS, 9 Bom. L.R. 1084=32 B. 152.

(2805-*c*-1)—O. VII r. 14—*See* No, 2781, *supra*.

(2805-*d*)—O. VII, rr. 14 and 18—*See* PRODUCTION OF DOCUMENTS, 8 B. 377.

(2805-*e*)—O. VII, rr. 14, 18 O. XIII, rr. 1, 2—*See* PRODUCTION OF DOCUMENTS, 8 M. 373.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2805 *f*)—O VII, rr. 14, 17, 18—*See* EVIDENCE—MISCELLANEOUS, 12 W.R. 31, P.C. =3 B.L.R. 34, P.C. = 13 M.I.A. 77.

(2805 *g*)—O VII, rr. 14, 17, 18—*See* PRIVY COUNCIL, PRACTICE OF—GENERAL, 3 B.L. R.P.C. 34=12 W.R. 32, P.C. =13 M.I.A. 77.

(2805 *h*)—O. VII, rr. 14,17 & 18—*See* PRODUCTION OF DOCUMENTS, 1 Ind. Jur. O.S. 14.

(2806)—*S. 115, O. 7, rr. 14, 17, 18 and s. 99 (=ss. 582, 59, 63. 63, 578, Civ. Pro Code, 1882)—Appellate Court acting in contravention of s. 578 of the Civ. Pro. Code (Act XIV of 1882)—Court of first instance allowing document on which suit based to be produced at a late stage—Appellate Court, if may reject and on what ground—Dealing with case as if there was no evidence when in fact there was—High Court's power to interfere in revision.*—Where a document upon which a suit was based was not produced along with the plaint, but the Court allowed it to be produced at a later stage and, relying on it, gave the plaintiff a decree, but on appeal, the appellate Court rejected the document merely because it was not produced along with the plaint, and dismissed the suit, *held*, that, having regard to the provisions of s. 578 of the Civ. Pro. Code (Act XIV of 1882), the appellate Court acted illegally and with irregularity in the exercise of its jurisdiction, and the High Court could interfere. (11 C. 6, 3 C.W N. 581, *R.*) The policy underlying ss. 62 and 63 of the Civ. Pro. Code (Act XIV of 1882), is to exclude evidence, as to the existence of which at the date of the suit there may be reasonable doubt, and as to the genuineness of which suspicion might rightly arise because it was produced at a late stage. (8 B. 377, 12 C. W.N. 312, 8 C.L.J. 147, *R.*) The appellate Court in the above circumstances should have considered whether leave for the reception of the document was properly granted, and whether the trial was prejudiced thereby, and whether, by reason of the delay in the production of the document, there was a well-founded ground of suspicion that this document was not genuine. The appellate Court dealt with the case on the footing that, besides the excluded document, there was no other evidence to support the plaintiff's case, when, as a matter of fact, there was other evidence on the record. *Held*, that there was no proper trial and it was incumbent on the High Court to interfere. MEWA LAL SAHU v. KUMERJI JHA, **13 C.W. N. 797=10 C.L.J. 33=2 Ind Cas. 946.**

(2807)—*O. 7, r. 14, O 11, rr. 12, 13 (=ss. 59, 129, Civ Pro. Code, 1882)—Suit for dissolution of marriage on the ground of wife's adultery—Power to order discovery of documents in the possession of petitioner.*—In a suit for dissolution of marriage on the ground of wife's adultery, the co-respondent served the petitioner with an order under s. 59 of the Civ. Pro. Code, to file a list of all documents relied upon by him in support of his suit. The petitioner objected to the application on the ground that until issues had been framed or until the defence had been filed, he did not know what documents might be relevant. *Held*, that the petitioner was bound under s. 59 of the Civ. Pro. Code to file a list of all letters and documents in his possession or power which he relied on relating to the adultery charged. C. v. C. & B., **11 P.R. 1902.**

(2807-*a*)—O. VII, r. 14, O. 11, rr. 12, 13—*See* ACT IV OF 1869, ss. 51, 52. 11 P.R. 1902.

(2807-*b*—O. VII, r. 14, O (XIII, r. 1 (2) 3—*See* PRACTICE AND PROCEDURE, 21 M. 490.

——O. VII, r. 15 (=1882, s. 60=1877), s. 60.

(2807-*b*-1)—O. VII, r. 15. *See* No. 2708, *supra.*

——O. VII, r. 16 (=1882, s. 61=1877, s. 61.)

(2807 *c*)—O VII, r. 16—*See* PARTIES TO SUITS—GENERAL, 21 A. 754.

—— O. VII, r. 17 (=1882, s. 62=1877, s. 62=1859, s. 39.)

(2807-*d*)—O. VII, r. 17—*See* STAMP ACT, 1879, art. 22, 15 B. 687.

(2807-*d*-1)—O. VII, r. 17—*See* NOS. 2805-*f* TO. *h*, 2806, *supra* AND NO. 5000, *infra.*

(2807-*e*)—O. VII, rr. 17, 18—*See* PRACTICE AND PROCEDURE, 1 M.H.C. 168.

(2807 *f g*)—O. VII, rr. 17, 18—*See* PRODUCTION OF DOCUMENTS, 1 M H C. 168, Bourke, O C. 91=Cor. 151, Bourke O C., 152.

——O. VII. r. 18 (=1882, s. 63=1877, s. 63=1859, s. 39.)

See PLAINT.

(2807-*h*)—*O. 7, r. 18 (=s. 39, Civ. Pro. Code, 1859)—Reception of documents—Delay in production—Reason for delay*—Although the Courts are vested with a discretion under Act VIII of 1859 as to the reception of documents not submitted with the plaint sufficient reason must be assigned for the delay in producing them. GHOLAM MAHOMED v. MAYA DASS, **98 P R. 1867.**

(2807-*i*)—O. VII, r. 18—*See* NOS. 2805-*d to h*, 2806, 2807-*e to g*, *supra.*

——O. VIII, r. 1 (=1882, s. 110=1877, s. 110 =1859, s. 120.)

See WRITTEN STATEMENT.

(2808)—*O. 18, r. 1 (=s. 110, Civ. Pro. Code, 1877)—Supplemental written statement to be filed before hearing—Admissibility as evidence for affecting credit of witness.*—When a defendant, in a suit for wrongful dismisal, proposes to rely on a specific transaction, not embodied in his written statement as an instance of misconduct on the part of the plaintiff, he must

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file a supplemental written statement before the hearing; consequently, after the parties have entered on their case, such transaction could not be made the subject of an anciliary issue, but the Court, however, should allow the proposed questions to be put for the purpose of affecting the credit of a witness. MUNCHERSHAW BEZONGI v. THE NEW DHURUMSEY S. AND W. COMPANY, **4 B. 576.**

(2808-*a*)—O. VIII, r. 1—*See* NOS. 3032-*a*, 3217-*h*, *infra*.

——O. VIII, r. 5=(New.)

(2808-*a*)—O. VIII, r. 5—When defendants deemed to have admitted notice—*See* CONTRACT ACT, 1872, s. 73, 9 Ind. Cas. 470.

——O. VIII, r. 6 (=1882, s. 111=1877, s. 111 =1859, s. 121.)

See SET-OFF.

(2809)—*O.* 8, *r.* 6 (=s. 111, *Civ. Pro. Code*, 1882)—*Right of defendant to set-off a claim for unascertained amount.*—S. 111 of the Civ. Pro. Code does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of the Code; and the right exists not only in cases of material debts and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant should be driven to a cross suit. (2 M.H.C. 296 and 4 B. 407, *Appr., and Foll.*) Where, therefore, the suit was one for contribution in respect of a decree obtained jointly against the plaintiff and defendants, but liquidated by the plaintiff alone, in respect of arrears of rent of an *ijara* held by the plaintiff and defendants, *held* that the defendants were entitled to a set-off of the amounts they had paid for the plaintiff in respect of the same *ijara* rents for previous years, but not of an arrear of rent due to the defendants themselves from the plaintiff in respect of lands held by him in *nij jote*, which last could be recovered only by separate suit. BHAGHAT PANDA v. BAMDEB PANDA, **11 C. 557** [*Relied upon*, 16 C. 711; *R.*, 10 A. 587, 15 A. 9=12 A.W.N. 115, 21 B. 126, 19 A.W.N. 143, 8 C.W.N. 174.]

(2810)—*O.* 8, *r.* 6 (=s. 111, *Civ. Pro. Code*, 1882) *Set-off, right of, against receiver—Equitable set-off.*—S. 111 of the Civ. Pro. Code, is not exhaustive and does not preclude the defendant from relying on an equitable set-off, which cannot be brought strictly within the terms of the section. So, where a receiver sues for the debt due to a person, it is open to the defendant to urge against the receiver, a defence of set-off, which he could have urged against the creditor himself. Such a defence is allowable, although the sum claimed to be set-off is not "legally recoverable by the defendant from the plaintiff" (receiver), within the meaning of s. 111, Civ. Pro. Code. In such a case, it is further not necessary to have the written statement stamped as a plaint. SUBRAMANIAN CHETTIAR v. MUTHUSWAMY AIYENGAR, **17 M.L.J. 481.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859,—*continued.*

(2811)—*O.* 8, *r.* 6, (=s. 111, *Civ. Pro. Code*, 1882)—*Set-off—Damages not ascertained—Scope of section.*—In a claim for money due on a contract, unascertained damages for breach of a contract may be set-off. S. 111 is not an exhaustive enactment on the law of set-off, and it does not take away any rights of set-off, legal or equitable, which the parties would have independently of its provisions. GOBIND PARSHAD v. MURREE BREWERY CO., **47 P.R. 1885.**

(2812)—*O.* 8, *r.* 6 (=s. 111, *Civ. Pro. Code*, 1882)—*Cross demand arising out of same transaction—Specified amounts*—The right of set-off will be found to exist snot only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, although the cross demand may not amount to a set-off under s. 111 of the Code. Specified amounts are not necessarily ascertained debts. G. CHISHOLM v. GOPAL CHUNDER SURMA, **16 C. 711.** (11 C 507, *Relied on*; 2 M.H.C. 296. *R.*) [*D.*, 11 C.W.N. 215; *R.*, 15 A. 9=12 A.W.N. 115, 21 B. 126, 19 A.W.N. 143, 8 C.W.N. 174.]

(2813)—*O.* 8, *r.* 6 (=s. 111, *Civ. Pro. Code*, 1882)—*Equitable right of set-off exists when?*—An equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction though the claim sought to be set-off is not within the provisions of s. 111 of the Civ. Pro. Code. *Quære*—Whether, if the defendant's claim were one which the Small Cause Court could entertain, it would have power to make a decree in favour of the defendant for any balance which might be found due to him, after deducting a sufficient sum to satisfy his debt to the plaintiff. BROJENDRA NATH DAS v. THE BUDGE BUDGE JUTE MILL CO., **20 C. 527.**

(2814)—*O.* 8, *r.* 6 (=s. 111, *Civ. Pro. Code*, 1882) —*Set off—Technical and general—Plea of payment—Set-off of time-barred debts.*—The words "ascertained sum" in s. 111, Civ. Pro. Code, do not mean a sum admitted by the plaintiff, but a sum of money the amount of which is known. Where defendants sued upon an agreement to the effect that the rents payable on account of lands held by plaintiffs under defendants were credited to the plaintiffs on account of rent due to him from the defendants. *Held* that the plea was one of payment and of account and set-off in a general sense, and not one of technical set-off under s. 111, Civ. Pro. Code. *Held* further that, the true issue in the case being as stated above, the case could not be

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disposed of by saying that there could be no set-off in a technical sense of a time-barred debt EDWARD DALGLESH v. RAMDIN SINGH CHOWDHURY, **14 C.W.N. 170=5 Ind. Cas. 67.**

(2815)—*O.* 8, *r.* 6 (=*s.* 111, *Civ. Pro. Code*, 1882)—*Set-off and right to deduct distinguished.*—A set-off must be pleaded as such and is chargeable with a Court fee *ad valorem*, as if it were a plaint. The right of set-off, it has been said with reference to the English Law, which is practically re-produced in s. 111 of Civ. Pro. Code, "must be distinguished from the common law right of a defendant to reduce or defeat the claim of the plaintiff, by giving evidence of some matter arising in the course of the same transaction in respect of which the claim is made. In a suit for wages, defendant claimed up the right to deduct sums paid for plaintiff's passage money and house rent. There was no agreement that these should be deducted from plaintiff's wages. The Court held that defendant was not entitled to deduct the amounts, but must plead a set-off under s. 111, Civ. Pro. Code. J. N. JOHANNES v. R. W. MARSHALL, **U.B.R. 1897—1901, Vol II, 244.**

(2816)—*O.* 8, *r.* 6 (=*s.* 111, *Civ. Pro. Code*, 1882)—*Rent-suit—When set off allowed.*—In a rent-suit, a money-decree against plaintiff may be set-off. But if the defendant had applied for execution of the decree, then, s. 111, Civ. Pro. Code will cease to apply. BHARAT PROSAD SAHI v. RAMESHWAR KOER, **30 C. 1066=8 C.W.N. 118.** [*D.*, 11 C.W.N. 215.]

(2817)—*O.* 8, *r.* 6 (=*s.* 111, *Civ. Pro. Code*, 1882)—*Money-decrees against landlord—Assignment by landlord of rental claim—Right of tenant to claim set-off as against assignee.*—Where a tenant held money-decrees against his landlord, an assignee from the landlord of rental claim against the tenant was entitled to the claim, subject only to the right of the tenant to set-off the amount due under the decrees. SITARAM BRAHMIN v. KANHAIYALAL, **16 C.P.L R. 118.** (8 A. 396, 15 M. 29, *R.*)

(2818)—*O* 8, *r.* 6 (=*s.* 111, *Civ. Pro. Code*, 1882)—*Set-off—Claim for damages—Court fee, stamp on written statement containing set-off.*—A claim for damages for failure to supply goods of the contract quality and description cannot be made the subject of a set-off under s. 116 of the Code of Civil Procedure. (8 B.L.R 307, *R.*) A written statement claiming a set-off under s. 111 of the Code of Civil Procedure need not bear a Court-fee stamp. MAHOMED NASSORUDIN v. S. OPPENHEIMER, **2 L.B.R. 186.** (13 B 672, 8 A. 396, 15 M. 29, 5 B. 400, 12 C. 367, *R.*)

(2819)—*O.* 8, *r.* 6 (=*s.* 111, *Civ. Pro. Code*, 1882)—*Set-off—Bengal Tenancy Act* (VIII *of* 1885), *s.* 67—*Interest.*—In a suit for rent brought by a landlord, the tenant defendant claimed a set-off for costs decreed in his favour

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in a previous rent-suit brought by the benamidar of the landlord against the defendant, and in which the landlord was made a *pro forma* defendant: *Held*—That the set-off could not be allowed. (10 C. 697, 30 C. 1066, *D.*) Interest was claimed in the suit at a rate of more than 12 per cent. per annum, on the basis of a kabuliyat executed before the passing of the Bengal Tenancy Act, the tenant being proved to have acquired the holding by private purchase: *Held*—that the stipulation as to interest must be given effect to. TILUK CHANDRA ROY v. JASODA KUMAR ROY, **11 C.W.N. 215.**

(2819 *a*)—*O.* 8, *r.* 6 (=*s* 121, *Civ. Pro. Code*, 1859)—*Suit for house-rent—Money spent in repairs pleaded as set-off—Plea valid*—Plaintiff sued for house-rent and defendant pleaded that he had spent what was due for rent in repairs, which plaintiff was bound to execute but refused. *Held* that the defendant's plea was admissible as a set off under s. 121 of Civ. Pro. Code and it involved a claim cognizable by a Small Cause Court. WARBURTON v. ANDERSON, **25 P.R. 1876.**

(2820)—*O.* 8, *r.* 6 (=*s.* 111, *Civ Pro. Code*, 1882)—*Court-fees—Set-off claimed in a written statement.*—Where, in a suit for rent, the question was as to whether defendant was entitled to claim a deduction on account of payment made by him for cesses payable by the plaintiff on account of years previous to those for which rent was claimed. *Held*, that the payment cannot be treated as part-payment of the rents sued for, but as an antecedent debt. The claim was, therefore, in the nature of a set-off and Court fees must be paid for the same. GUISE J.J. v. ANANTHA RAM RATHI, **10 C.W N. 199.** (8 C.W.N. 174, *Not F.*)

(2820-*a*)—O. VIII, r. 6—Equitable set-off—Right to set-off unascertained damages—*See* CONTRACT—BREACH OF CONTRACT, 37 C. 334=6 Ind. Cas. 924.

(2820-*b*)—O. VIII, r. 6—*See* HINDU LAW—JOINT FAMILY, 5 P.L.R. 1900.

(2820-*c*)—O. VIII, r. 6—*See* MORTGAGE—USUFRUCTUARY MORTGAGE, 2 A. 252.

(2820-*d*)—O. VIII, r. 6—*See* PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 53 P.R. 1898.

(2820-*e*)—O. VIII, r. 6—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 18, Exp. 1, 21 C. 419.

(2820-*f*)—O. VIII, r. 6—*See* STAMP, 21 B. 126.

(2820-*g*) O. VIII, r. 6—*See* NO. 2665, *supra*.

(2821)—O. 8, *r.* 6, O. 20, *r.* 6 (=*ss* 111, 221, *Civ. Pro. Code*, 1887).—S. 221 seems to assume that it is usual for a decree to make costs payable to the pleader, instead of to the party; which practice, if it existed, would of

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itself, negative the right of set-off; and it does not define the word "lien." But to decide that the provision applies in the above case, would be to give to the solicitor of an unsuccessful litigant priority over the successful litigant. BRIJNATH DASS v. JUGGERNATH DASS, **4 C. 742=4 C.L.R. 122.**

(2822)—*O. 8, r. 6, O 20, r. 19 (=ss. 111, 216, (ii) Civ. Pro. Code, 1882)—Suit for dissolution of partnership—Accounts asked for and balance found due claimed to be paid—Set-off—Forum of appeal.*—The class of suits mentioned in the section, as those for recovery of money, is in contradistinction to suits for the recovery of immoveable property, restitution of conjugal rights, and the like; and it contemplates a class of cases in which or out of which a money claim arises. So, although a mere suit for dissolution of partnership or even for a declaration that an account should be taken, would not be a suit for money, still, when there is a prayer that such balance as might be found due to the plaintiff upon taking accounts might be paid to him, it is clearly a suit for money within the section; and a set-off can be claimed in such a case. When, as a result of the plea of set-off, the Court decrees in favour of the defendant a sum above Rs. 5,000, then by virtue of s. 216 (ii), an appeal lies to the High Court and not to the District Court. RAMJIVAN MAL v. CHAND MAL, **10 A 587=A.W.N. 1888, 258.**

(2822-*a*)—O. VIII, r. 6, O. XX, r. 19—*See* SET-OFF, 2 M.H.C. 296.

(2822-*b*)—*O. 8, r. 6, O. 20, r. 19, s. 102 (=ss. 111, 216, 596 Civ Pro. Code, 1882)—Set off—Claim to—When allowed*—A plea of set off is available where the claims on both sides are in respect of liquidated debts which can readily and without difficulty be ascertained, and not only when a sum of money is found due to the plaintiff. GOSWAMI CHANDRA DEOJI v. DURGAPADA DUTTACHARYA, **7 A.L.J. 105=5 Ind Cas 211.**

——O. VIII, r. 9 (=1882, s. 112=1877, s. 112=1859, s. 122).

See SET-OFF.

(2823)—*O. 8, r. 9 (=s. 112, Civ. Pro Code, 1882)—Presentation of statement expressing inability to put in the debated statement ordered, whether a 'failure to present' within s. 113—Taxation of costs on appeal—Court-Fees Act, s. 13, applicability of.*—Where the plaintiffs in a case, who were directed by the Court to put in further written statement under s. 112, Civ Pro. Code, filed a statement as to their inability to supply the particulars called for by the Court. *Held*, the order having been practically complied with by the plaintiffs, so far as their information permitted, they could not be regarded as having 'failed to present' a statement within s. 113 of the Code, so as to enable the Court to proceed under that section. In acting under s. 113, the Court may pass a decree, if the circumstances admit of any decree being passed; but an order merely dismissing a suit under the section, without any adjudication upon any right claimed or defence set up is not a decree; and an appeal from such an order is to be treated as an appeal under s. 588, Civ. Pro. Code, and so, where the order having been in terms of a decree, appellant had paid the full Court-fee on his appeal therefrom, *held*, that s. 13 of the Court Fees Act must be held to apply to the case and the stamp duty paid by the appellant should be refunded to him. ORR v. NAGAPPA CHETTY, **16 M L.J. 30.** (22 M. 221, *R.*)

(2823-*a*)—O VIII, r. 9—*See* RULES OF HIGH COURTS AND SUPREME COURTS—BOMBAY, 10 Bom. L.R 301=32 B. 534

(2823-*b*)—O. VIII, r. 9—*See* WRITTEN STATEMENT, 3 B.L.R. App. 11 (*b*), 11 W.R. 71, 6 B.L.R. 42, note.

(2823-*c*)—O. VIII, r. 9, O. XIV, r. 1—*See* INTERROGATORIES, 17 C. 540.

—— O. VIII, r. 10 (=1882, s. 113=1877, s. 113).

See SET-OFF.

(2823-*a1*)—O. VIII, r. 10—*See* LIMITATION ACT, 1908, s. 19, 25 P.R. 1886.

(2823-*b1*)—O. VIII, r. 10—*See* No. 30 11 a, *supra.*

(2824)—*O. 8, r. 10 (=old s. 113)—O 11, r. 21 (=old s. 136)—Order to file written statement—Failure—Procedure of Court—S. 10 (=old s. 12)*—Where, in a suit for partition, certain account books could not be spared by a foreign Court, the defendants were ordered to file a written statement setting forth in detail the joint property, and a balance-sheet at the date of the suit, etc. On the failure of the defendants to comply with this order, the Court struck their defence off the record and proceeded with the case *ex parte*. *Held* that the order was illegal. As the Court did not wish them to supplement their defence by a further statement of fact, which they might believe to be material to their case, s. 113 is inapplicable to this case. The document called for not being in the power of the defendants, nor in case, s. 136 (=O XI), r. 21) also cannot apply. There is nothing in the Civ. Pro. Code to authorise a Court in striking out the defence of a defendant *suo motu* without being moved to it by the plaintiff. 80 P.R. 1889, *R.* HANS RAJ v. JANDA MAL AND DWARAKA DAS, **59 P.R. 1892.**

—— O IX, r 1 (=1882, s. 96=1877, s. 96=1859, s. 109).

(2824-*a*)—O. IX, r. 1—*See* RULES OF HIGH COURTS AND SUPREME COURTS—BOMBAY, 10 Bom L.R. 301=32 B. 534.

(2824-*a-1*)—O IX, r. 1—*See* NO. 2709, *supra.*

(2824-*b*)—*O 9, r. 1, O 17, r. 3—Appearance—Advocate appearing and applying for adjournment and then withdrawing on the application*

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for adjournment being refused—Ex-parte *decree — Application for setting aside — Sufficient reason.*—Where time was given to the defendant to summon his witnesses but he failed to summon them, whereupon his pleader applied for a postponement of the case and, on his application being refused, withdrew his appearance: *Held* that the withdrawal of his appearance by a pleader, who had represented the defendant in this case continuously for over two years, simply because the Court proceeded under O. XVII, r. 3, to decide the suit forthwith, declining to give further time to the defendant would not necessarily render the subsequent proceedings *ex parte*. In every application for setting aside a decree the petitioner must satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. PALANEAPPA CHETTY v. MUTHU CHETTY, **10 Ind. Cas 770.**

——O. IX, r. 2 (=1882, s. 97=1877, s. 97).

(2825) *O. 9, r. 2 (=s. 97, Civ. Pro. Code, 1882)—Dismissal of suit under s. 97, Civ. Pro. Code (Act XIV of 1882) for not paying process-fee—S. 97, Civ. Pro. Code, applies only to first hearing — Course to be adopted after plaint is returned for amendment—Chief Court's power of revision.*—*Held*, that when a plaint is returned for amendment the proper course is to give another date for next hearing of the case after the day by which the amended plaint is to be re-filed. *Held* also, that s. 97, Civ. Pro. Code is applicable only to cases in which plaintiff fails to file *Thulubana* for the first hearing. *Held* further, that as a general rule, the Chief Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances. SHAHABDIN v. ANJAMAN I-NAUMANIA, **65 P. W.R. 1908.**

(2826)—*O. 9, r. 2—Suit dismissed for want of process fee—Order of appellate Court restoring suit—Appeal*—There is no appeal from the order of an appellate Court restoring a suit dismissed for want of payment process-fee. ABDUR RAHMAN v. SUGHRA BEGAM, **9 Ind. Cas. 484.**

(2827)—*O. 9, r. 2*—Tullubanah—*Ss. 5 and 6 Act XXIII of 1861—Default—Ignorance of Karpurdaz.*—The default under ss. 5 and 6 Act XXIII of 1861, owing to the appellant's omission to deposit the requisite *Tullubanah* in the proper Court, is not excused by the fact of his having been committed by an ignorant karpurdaz. PRAN CHUNDER ROY v. JUGGESSUR MOOKERJEE, **11 W.R. 417.**

(2827-*a*)—*O. 9, r. 2, O. 48, r. 1—Meaning of failure, in O. 9, r. 2—Omissin to pay Court-fee.*—The 'failure' contemplated by r. 2, O. IX Civ. Pro. Code, is not confined to an entire omission to pay the requisite Court-fee, but also includes an omission to pay that fee

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within the time which the Court is required to fix for payment under O. XLVIII. r. 1 of the Code. SADANAND v. NATHIA, **7 N.L.R. 114.**

(2828)—*O.9. rr. 2, 3, O. 15 r. 4 (=ss. 97, 98 155, Civ. Pro. Code, 1882)—Failure to produce evidence—Dismissal — Restoration—Review — Procedure.*—When a Court passes an order dismissing a suit owing to the failure on the part of the plaintiff to produce his evidence on the date to which the case was adjourned at his request such order must be held to have been made under s. 155 of the Code. A Munsif is not competent to restore a case so dismissed to his file. If he does so his act is *ultra vires*. The Munsif's proceeding, setting aside his first decision, cannot be said to be in the nature of a review of judgment. The Munsif's order under s. 155 of the Code is a decree, and the proper course for the plaintiff in such a case is to appeal against that decree and not to apply for the restoration of the case to the file. PARTAB RAI v. RAM KISHEN, **A.W.N. 1883, 171.** [*R.*, 9 A. 427, 8 C.W.N. 313.]

(2828 *a*)—O. IX, rr. 2, 3, 4, O XXIII, r. 1, s. 141—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1889, 204.

(2828-*b*)—*O. 9, rr. 2 and 4—Suit against minor defendant—Guardian ad litem—Service of summons on minor—Not paying process fee for serving guardian—Sufficient cause—Punjab Courts Act. XVIII of 1884, s. 70 (a).*—*Held*, that:—1. Where a person assigns good and sufficient cause for not doing an act which he is legally bound to do, a Court, in arbitrarily rejecting it, fails to exercise a judicial discretion. So where, on the refusal of both the mother and father of a minor defendant to act as guardian *ad litem*, the Court appoints *Nazir* of the Court to represent the minor, plaintiff cannot be asked to pay process-fee for summoning that officer. 2. A guardian *ad litem* is not a defendant in a suit, and the penal provisions of O. 9, r. 2 of the Code have no application to the case of a failure to pay in process-fee for summons to be served on him. 3. A minor should personally be served in all cases. *Quære.*—Whether the service of summons only on the guardian *ad litem* of a minor is sufficient service for the purposes of the Code. Procedure to be followed in such like cases, pointed out. GOBIND RAM v. MUHAMMAD ALI, **115 P.W.R. 1911.** (14 C. 204, *R.*)

——O IX, r. 3 (=1882, s. 98=1877, s 98=1859, s. 110.)

(2829)—*O.9 r. 3 (=s. 98, Civ. Pro Code, 1882)—Adjournment of suit without notice to parties—Legality of dismissal of suit for default.*—The dismissal of a suit for default on an adjourned date, of which the parties had no notice, is illegal. LALBA KOSHTI v. KONDU, **14 C P L. R. 134.**

(2830)—*O. 9, r. 3 (=s. 98, C. P. Code, 1882)—Dismissal of suit for default in appearance—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Parties to be informed of place of hearing as well as date.—Held, that officers presiding over Courts of Justice, when on tour, should not dismiss any suit for default in appearance, without satisfactory evidence that due notice of the exact date and place of hearing was given to the parties. Every judicial officer ought to inform the parties either by an order in Court given in his presence or by notice of the date and place of hearing. To post a general notice and programme of the tour at headquarters is not a sufficient notice within the meaning of Civ. Pro. Code. NAND LAL v. DIT RAJ, **37 P R 1901**. (7 P.R. 1892, Rev., 45 P.R. 1875, *R.*)

(2830-*a*)—*O.* 9, *r.* 3 (=*Civ. Pro. Code*, 1908, s. 110)—*Proceedings against defendant while in jail—No deduction from period of limitation.*—Plaintiff's suit was dismissed under s. 110 both parties being absent and the suit was brought on file again on the application of plaintiff. Defendant being put in jail, the Court ordered a non-suit until he came out of jail, plaintiff offering no objection to the order. On the release of the defendant, the plaintiff applied to have the case brought on again. *Held* that his course was to bring afresh unless precluded by the rules of limitation and that no deduction will be made from the period of limitation on account of defendant's imprisonment there being nothing against a prisoner in jail being served with a summons in a suit against him. JANEE v. WARIS, **39 P.R. 1869.**

(2830-*b*)—O. IX, r. 3—*See* NOS. 210, 342, 1868, 2828, 2828-*a*, *supra*, AND NO. 2848, *infra*.

(2831)—*O.* 9, *r.* 3, *ss.* 99, 105 (=*ss* 103, 578, 591, *Civ. Pro. Code*, 1882)—*Order of Assistant Collector refusing to restore suit dismissed for default—Appeal—Order of remand in a case in which no appeal lies*—Ultra vires—*Proceeding after remand ineffective Second appeal High Court's power to interfere — Finality of remand order passed without jurisdiction.*—No appeal lies from an order of the Assistant Collector refusing to restore a suit dismissed in default. If an appeal is preferred and the appellate Court allows the appeal and remands the case to the lower Court for further hearing, the remand is *ultra vires*, and proceedings taken thereafter are all without jurisdiction. Provisions of s. 578, Civ. Pro. Code, 1882, clearly indicate that the High Court can in second appeal enter into a question which goes direct to the jurisdiction of the Court deciding the appeal. S. 591 of the Code deals with the order which the Court had jurisdiction to make, but in the making of which the Court had committed an error or irregularity. BABU BAIJ NATH SINGH v. GAJRAJ SINGH, **6 Ind. Cas. 464=7 A.L.J. 675**. (12 A. 510, *R.*)

(2832)—*O.* 9, *rr.* 3, 4 (=*ss.* 98, 99, *Civ. Pro. Code*, 1882=*s.* 110, *Civ. Pro. Code*, 1859)—*Practice.*—When a case has been struck out in consequence of the non-appearance of the plaintiff, the Court will grant a fresh summons. PEARY MOHUN DOSS v. PARBUTTY CHURN MOOKERJEE, 1 **Ind. Jur. N.S. 40.**

(2833)—*O.* 9, *rr.* 3, 4 (=*ss.* 98, 99, *Civ. Pro. Code*, 1882=*s.* 110, *Civ. Pro. Code*, 1859)—*Case struck out for default in appearance.*—Where a case had been struck out for non-attendance of the parties, an order was made for its restoration, on an affidavit that the absence of the parties was owing to an understanding between them for an adjournment, and that the plaintiff had a case on the merits. The order was made apparently under s. 119. DAMOODUR DOSS v. CHOONEE BIBEE, **Cor. 120, 123=2 Hyde 216.**

(2834)—*O* 9, *rr.* 3 and 4 (=*old* ss. 98, 99)—*Striking off suit for non-appearance of plaintiff or defendant—Fresh suit.*—The striking off of a suit on the day of hearing, because neither plaintiff nor defendant is present, does not bar the plaintiff from suing again. POGHA MAHTOON v. GOOROO BAHBOO, **24. W.R. 114.**

(2835)—*O.* 9, *rr.* 3 *and* 4 (=s. 110, *Civ. Pro. Code*, 1859)—*Failure to pay Court-fee for summons to additional defendants—Dismissal of suit—Act XXIII of* 1861, *ss.* 5 *and* 7—*Civ. Pro Code*, 1877, *s.* 99.—The irregular dismissal of a suit, as against the defendants, by an order purporting to be made under s. 110 of the Civ. Pro. Code, 1859, on a day previous to the hearing, on the ground of the failure of the plaintiff to deposit the *talabana* required for summoning certain persons proposed to be made additional defendants in the suit, could not preclude the plaintiff from instituting a fresh suit. GULAB DAI v. JIWAN RAM, **2 A. 318.**

(2836)—*O.* 9, *rr.* 3, 4 (=*Civ. Pro. Code*, 1882, *ss* 98, 99).—Where a suit has been erroneously struck off the file on the parties non-appearance at the hearing, and, on application made therefor, it is restored to file, the decree passed in the suit is not made without jurisdiction. ALWAR v. SESHAMMAL, **10 M. 290.**

(2837)—*O.* 9, *rr.* 3 *and* 4 (=*ss.* 98 *and* 99 of 1882)—*Court's discretion—Restoration of cases struck off the file.*—Every Court of Justice may, in its discretion, restore to its files any case which it has itself removed therefrom undetermined. DEEN DYAL PURAMANICK v. RAM COOMAR CHOWDHRY, **9 W.R. 283.**

(2838)—*O.* 9, *rr.* 3, 4 (=*ss.* 98, 99, *Civ. Pro. Code*, 1882=*s.* 110, *Civ. Pro Code*, 1859), —*Default in appearance—Inability to attend.*—The affidavit of a party alleging inability to attend from illness is not enough to satisfy the Court, but for this purpose there must be a medical certificate, or the affidavits of third parties. DHUNSOOK DOSS v. HURRY BABOO, **Bourke, O.C. 115.**

(2838-*a*)—O. IX, rr. 3 and 4—*See* APPEAL—EX-PARTE CASES, **Marsh, 630.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2838-*b*)—O. IX rr. 3, 4—*See* MINOR—SUITS BY AND AGAINST MINORS, 3 B.L.R. App. 130.

(2839)—*O.* 9, *rr.* 3, 4, *s.* 114, *O.* 47, *r.* 1, O. 47, *r.* 2 (=*ss.* 98, 99, 623, 624, *Civ. Pro. Code*, 1882)—*Order of dismissal. suit under s.* 98—*Nature of—Failure to seek, remedy under s.* 99—*Review under s.* 623, *whether available, when other remedies exist.—Held*, that an order dismissing a suit under s. 98, is a "judgment" within the meaning of s. 642, Civ. Pro. Code, and that, where a party omits to avail himself of his proper remedies under s. 99, Civ. Pro. Code, no application for review can be entertained under s, 623, Civ. Pro. Code. INDER SINGH v RAM SINGH, **33 P R. 1109=44 P L R. 1101=31 P. W.R. 1909=3 Ind. Cas. 900** (2 C.W.N. 818, *F.*)

(2840)—*O* 9, *rr.* 3 *and* 4, *s.* 741 (=*ss.* 98, 99 647, *Civ. Pro. Code*, 1882)—*Procedure in respect of applications.*—By s. 647, of the Civ. Pro. Code, the procedure in respect of suits is made applicable to applications. Therefore, where an application under s. 549 of the Civ. Pro. Code, praying that an appellant might be required to give security for the costs of the appeal, was dismissed after notice issued to the appellant, owing to the non-appearance of both the parties, *held*, on an application to restore the application to the file, that s. 99 applied to the case. LAKHMI CHAND v. GATTO BAI, **7 A. 542 =A.W.N. 1885, 127.**

(2841)—*O.* 9, *rr.* 3, 4 *and* 13 (=*ss.* 98, 99 and 108 *of* 1882 (=*ss.* 110 *and* 119, *Civ. Pro Code*, 1859)—*Execution of decree in the absence of judgment-debtor.*—S. 119 of Act VIII of 1859 provides a remedy, when a case in execution of a decree is disposed of in the absence of the judgment-debtor, and there is no appeal. SEETUL PERSHAD v. MAHOMED KUREEN KHAN, **5 N.W. P. 164.**

(2841-*a*)—O. IX, rr. 3, 4, 8—*See* EXECUTION OF DECREE—MISCELLANEOUS, 3 B.L. R. App. 17=11 W.R. 567.

(2841-*b*)—O IX, rr, 3, 4, 13 and XLIII, r. 1 and s. 114—*See* REVIEW—REVIEW, WHEN LIES, 7 N.W.P. 126.

(2841-*c*)—O. IX, rr. 3, 9—*See* LANDLORD AND TENANT—MISCELLANEOUS, 15 M. 111.

(2842)—*O* 9, *rr.* 3,4, *O* 17. *rr.* 2, 3 (=*ss.* 98, 99, 157, 158, *Civ. Pro. Code*, 1882) *Application for adjournment by pleader—Rejection of application—Withdrawal of pleader from suit—Dismissal of suit for plaintiff's default—Whether fresh suit maintainable.*—An application was made on behalf of the plaintiff for a further adjournment of a week on the grounds that his witnesses were not present, and that copies of certain documents could not be got from Court. The application was rejected, where upon the plaintiff's pleader stated that he was not in a position to proceed with the case for want of evidence. The defendant was absent and the suit was dismissed "for the plaintiff's default or rather for want of prosecution." The plaintiff brought a fresh suit on the same cause of action. *Held* that the mere physical presence of a pleader not instructed for the purpose of proceeding with a suit is not an appearance in the sense of Chapter VII of the Civ. Pro. Code, of 1882, and that the suit was dismissed for default. (10 C.W.N. 40, *Rel. on.*) *Held*, also that the case fell under s. 98, Civ. Pro. Code and that the plaintiff was entitled to bring a fresh suit, under s. 99. BEJOY CHAND MAHTAB v. SATISH CHANDRA CHOWDHURY, **9 Ind. Cas. 842.**

(2843)—*O.* 9, *rr.* 3,4, *O.* 17, *rr.* 2, 3 (=*ss.* 98, 99, 157, 158, *Civ. Pro Code*, 1882)—*Striking case off file for default, in appearance.*—The order of a District Munsiff to strike a case off his file on neither party appearing, is an illegal order. Assuming that the case was dismissed, an order restoring the case to file on the application of a party, is not open to appeal to the District Court. ALWAR v. SESHAMMAL, **10 M. 270** [*R.*, 34 C. 235=5 C.L.J. 260, 10 O.C. 171, 18 M.L.J. 51=3 M.L.T. 225.]

(2844)—*O.* 9, *r.* 3, *O.* 17, *r.* 2 (=*ss.* 98, 157 *Civ. Pro. Code*, 1882)—*Hearing of suit after settlement of issues—Absence of parties and pleaders—Procedure—Decreeing plaintiff's suit without recording reasons—Dismissal of suit.*—Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders are absent, the suit should not be dismissed, but the Court, dealing with the claim, should pass an order under s. 98, Civ. Pro. Code, 1882, and then record reasons for any decision it arrives at on the materials before it RAMANATAHAN v. KARUPPAYEE, **8 Ind. Cas. 156.**

(2845)—*O.* 9, *r.* 3, *O.* 17, *r.* 2 (=*ss.* 98, 157, *Civ. Pro. Code*, 1882)—*Hearing after settlement of issues—Parties and pleaders absent—Dismissal of suit—Proper course.*—Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders were absent, the Court ought not to dismiss the suit altogether, but ought to proceed under s. 98, Civ. Pro. Code, 1882, and record its reasons for any decision it arrives at. RAMANATHAN CHETTIAR v. KARUPPAYEE, **8 M.L.T. 450**

(2845-*a*)—O. IX. r. 3, O. XLI, r. 10—*See* SECURITY FOR COSTS, 21 B. 576.

(2846)—*O.* 9, *r.* 3 *and sch II, r.* 5 (=*ss.* 98 *and* 510 *of Code of* 1882)—*Arbitration pending—Power of Court to dismiss suit*—When a suit is referred to arbitration and is pending before the arbitrators, the Court has no power to dismiss the suit under s. 98 of the Act of 1882 (=O. 9, r. 3,) Civ. Pro. Code, unless an express order superseding the arbitration under s. 510, Civ. Pro. Code, has been passed. The order of dismissal under s. 98 of the Code of 1882 cannot by itself operate as such order. IMAM DIN **v. JAWAHARI, 10 P.R. 1899.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. IX, r. 4 (=1882 s. 99=1877, s. 99=1859, s. 110).

(2847)—*O* 9, *r*. 4 (=s. 99, *Civ. Pro. Code*, 1882)—*Non-appearance of parties Dismissal of suit—Restoring the suit to the file—Costs*—Where a suit is restored to the file under s. 99, Civ. Pro. Code, the Court has no jurisdiction at that time to pass any order as to the general costs of the suit. S. 99, unlike s. 103 of the Code, does not empower the Court to make terms as to costs. KRISHNA v. GANESH, **3 Bom. L.R. 734=26 B. 201.**

(2847-*a*)—*O*, IX, *r*, 4——*See Nos.* 342, 1868, 2725, 2828-*a*, 2828-*b*, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2838-a and b, 2839, 2840, 2841, 2841-*a* and *b*, 2842, 2843 *supra.*

(2848)—*O*. 9, *rr*. 4, 3, 6, 7, 8, 13, *O*. 17, *rr*. 2, 3 (=*ss* 110, 111, 114, 119, 147, 148, *Civ. Pro. Code*, 1859)—*Powers of Court.*—S. 148 of the Code must have been intended to apply to all cases of adjournments to a future day for the purpose of enabling parties to produce evidence on that day. In all such cases, if the parties or either of them shall not appear in person or by a pleader, s. 147 authorizes the Court to proceed in the manner pointed out in ss. 110, 111 or 114 as the case may be; but the language of s. 147 does not raise any question about the meaning of the words "a party to whom time may have been granted;" for it speaks of adjournments generally; and s. 146, though it clearly authorizes the Court to grant time and adjourn the hearing of the suit upon application by the parties or either of them, is not limited to such applications but gives to the Court independently of any application, a general power to adjourn the hearing of the suit from time to time. Ss. 110, 111 and 114 of the Code have reference only to the first hearing of the suit which may be either on the day named in the summons or a subsequent day to which the first hearing may have been adjourned. S. 119 of the Code does not empower a Judge to set aside a decree passed under s. 148. COMALAMMAL v. RUNGASAWMY IYENGAR, **4 M.H.C. 56** [*Diss.*, 5 C.L.J. 260=34 C. 235; *F.*, 6 M H.C 262; *R.*, 10 M. 272, 18 M.L.J. 51=3 M.L.T. 225, 7 M.L.T. 369=19 M.L J. 760=5 Ind. Cas. 23 *D*; 4 M.H.C. 251, 1 M. 287, 10 M. 270.]

——O. IX, r. 5 (=1882, s. 99-A).

(2848-*a*)—O. IX, r. 5—Suit against principal debtor and surety—Failure to serve summons on principal debtor, surety's liability not affected by—*See* PRINCIPAL AND SURETY—DISCHARGE OF SURETY, 14 B. 267.

(2848-*b*)—O. IX, r. 5—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 3 A.L.J. 576, F.B =A.W.N. 1906, 233=1 M.L.T. 447=28 A. 749.

(2848 *c*)—O. IX, r. 5—*See* SUMMONS, 7 Bom. L.R. 928, 3 Bom. L.R. 402.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2848-*d*)—O. IX, r. 5—*See* Nos. 2223, 2727, *a* 2744 *supra.*

——O. IX r. 6(=1882, s. 100=1877, s. 100=1859, ss. 111, 112 and 113.

(2849)—*O*. 9, *r*. 6—Ex-parte *decision after both parties filed evidence*—An *ex-parte* decision was held to be illegal after both parties have filed evidence, even though defendant fails to appear. ANUND CHUNDER MOOKERJEE v. DIGAMBUREE DASSEE, **2 W.R. 1.**

(2850)—*O*. 9, *r*. 6 (=*s*. 100, *Civ. Pro. Code*, 1877)—*Non-appearance of defendant—Procedure on failure of proof of service upon defendant*—When the plaintiff appears and the defendant does not appear, the proper procedure is that prescribed by s. 100 of the Civ. Pro. Code (of 1877) whether the defendant had been summoned only to appear and answer the claim or has, in addition, been summoned to attend and give evidence. It is not necessary before proceeding to hear the suit *ex parte* under s. 100 that all the processes prescribed by law for compelling the attendance of the defendant as a witness should be exhausted; due proof of service of summons upon the defendant is sufficient. If such proof is not given, the courses to be adopted are one or other of those mentioned in cls. (*b* and (*c*) of s. 100, according to the circumstances of the case. TARUCK NATH MULLICK v. JEAMAT NOSYA, **5 C. 353.**

(2851)—*O*. 9, *r*. 6 (*s*. 100, *Civ. Pro. Code*, 1859)—*Adjournment necessary—Appearance—Time to produce evidence*—Where, if defendant had not appeared, the Court would have been bound under s. 113, Civ. Pro. Code, 1859, to adjourn the hearing, on the ground that sufficient time had not been given, it was held that his appearing ought not to put him in a worse position, and that time should be given him to produce evidence. SHEIKH AWLAD v. SHAIKH ABDOOL KUREEM, **18 W.R 141.**

(2851-*a*)—O. IX, r. 6—*See* EX—PARTE DECREE, 61 P.R. 1867, 79 P.R. 1868, 85 P. R. 1866.

(2851-*a* 1)—O. IX, r. 6—*See* RULES OF HIGH COURTS AND SUPREME COURTS—BOMBAY, 10 Bom. L.R. 301=32 B. 534.

(2851-*a* 2) O. IX, r. 6—*See* Nos. 518, 2703-a, 2709, 2848 *Supra* and No. 2859, *Infra.*

(2851-*b*)—O. IX, r. 6, s. 141—*See* NOTICE, 18 B. 59.

(2852)—*O*. 9, *r*. 6, *O*. 5, *r*. 6 (=*ss*. 100 (*a*), 69 *Civ. Pro. Code*, 1882)—Ex-parte *proceeding—Summons, due service of—Time, sufficient for appearance, allowed.*—S 100 (*a*) of Civ. Pro. Code, makes it incumbent upon Courts, before proceeding *ex parte*, to find that the summons in the case has been duly served upon the defendant proceeded against. In a case in which the process-server has not known the defendant before serving the summons, it is

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Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859),—*continued.*

necessary, in the first place, before proceeding with the case *ex parte*, to have the evidence of some one who did know him or her before the service, and who can state on oath that the summons in the case had, in his presence been personally served on the person for whom it was intended, or, that a copy of it had been affixed to the outer door of the house in which he personally knew that the defendant ordinarily resided. Without such evidence, the Judge is not justified in proceeding to hear a case *ex-parte*. "Duly served" in s. 100 (*a* of the Code means, amongst other things, served as contemplated by s. 69 of the Code, that is to say, within a time sufficient to allow of the defendant appearing on the fixed day in the summons and being able to answer on that day. It should have been considered whether service on the afternoon on the 27th January on an old woman of 65 years of age to appear and answer at a Court some distance off on the morning of the 29th January was due service. MA SHWE PON v. K. K. A. R. C. RAMAN CHETTY, **1 L.B.R. 226.**

(2852-*a*)—O. IX, r. 6 & O. XXXII, rr. 3 (1), 4 (2)—Guardian *ad litem*, appointment of, *ex parte*—Validity—*See* MINOR—SUITS BY AND AGAINST MINORS, 14 C. 204, F.B.

(2853)—*O. 9, rr. 6, 7 (=s. 111, Civ. Pro. Code, 1859)—Non appearance of defendant—Adjourned hearing—Costs.*—A case had been placed on the undefended board in consequence of the non-appearance of the defendant, and the hearing had been adjourned at the instance of the plaintiffs to a subsequent day. On that day the defendant appeared and it was contended that he could not be heard until he had shown good cause for his previous non-appearance, or at least that the Court would put him on terms. The Court held that the defendant was entitled to appear as of right, and an application that he should pay the costs of a postponement was refused. The costs were ordered to be costs in the cause. NEWTON v. KURNEEDHONE, **9 B. L.R. App. 15.**

(2853-*a*)—O. IX, rr. 6, 7, O. XIV, rr. 1, 2, 3—*See* ISSUES—FRAMING ISSUES, 15 W.R. **145.**

(2853-*b*)—*O. 9, rr. 6, 7, O. 17, r. 2 (=ss. 111 and 147, Civ. Pro. Code, 1859)—Hearing adjourned after issues framed—Absence of defendant*—Ex parte.—In this case the parties were present at the first hearing, issues were framed and the case adjourned. At the adjourned hearing defendant did not appear. *Held* that the decree passed against him was *ex parte*. *In re* A REFERENCE BY THE JUDGE, SMALL CAUSE COURT, DELHI. **6 P.R. 1866.**

(2854)—*O. 9, rr. 6, 7, 13 (=old s 108= ss. 111, 119 of 1859)—Application for rehearing on ground of non-service of summons—Service of summons, finding as to—Appearance sufficient to prevent* ex-parte *judgment.*—Where a defendant, not having appeared till nearly a month after the date fixed for the first hearing, applies for a re-hearing on the ground that the summons had not been duly served, *held* that the service of summons, found as a fact by both the lower Courts, must be taken for granted in the special appeal. The mere fact that a defendant who had not appeared till nearly a month after the date fixed for the first hearing, applied by a vakeel for leave to be heard in answer, under the last part of s. 111, Act VIII of 1859, is not an appearance within the meaning of s. 119, and sufficient to prevent an *ex parte* judgment. SYED MAHOMED HOSSEIN v. SHAIK MUNTOZUL HUQ, **18 W. R. 400.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2855)—*O. 9, rr. 6, 13 (=ss. 100, 108, Civ. Pro. Code, 1882)—"Appearance," meaning of—Decree passed on adjourned date,* ex party *decree*—A summons issued to a defendant in a suit was served by affixture of a copy thereof to the outer door of the house in which the defendant ordinarily resided, and on the day notified in the summons, a pleader not properly authorised, appeared and applied for time for filing an answer to the claim. The application was refused, but the case was ordered to stand over to the next following day, and, no one appearing on that day, a decree was passed against the defendant. An application by the defendant to get the *ex parte* decree against him, set aside, was rejected by the first Court which *held* that the decree in question had not in fact been passed *ex parte* on appeal to the High Court against the above order of rejection it was held that by the "appearance" referred to in s. 100 of the Civ. Pro. Code, is meant proper appearance in answer to a summons to appear and answer the claim on the day therein specified, and that, upon the facts in this case, there never having been any appearance in the proper sense of the word by or on behalf of the defendant, the decree passed in the suit was an *ex parte* decree liable to be set aside on the defendant satisfying the Court that the summons was not duly served, or that he was prevented by sufficient cause from appearing. CHAUDHRI RAJ KUMAR v. JUGAL KISHORE, **18 A. 241=A.W.N. 1896, 47.** (7 A. 538, 8 A. 140, *R.*; A.W.N. 1893, 25, A.W.N. 1893, 208, 5 I.A. 233, *D.*) [*R.*, 1 S.L.R. 115; *D.*, U.B. R. 1897-1901, 240.]

(2856)—*O 9, rr. 6, 13, s. 104, O. 43, r. 1 (=ss. 100, 108, 588, Civ Pro. Code, 1882)—Rules of 4th April, 1894—Rule 28—High Court's power in revision—Service of summons*—Ex-parte *decree.*—A summons was served personally upon the defendants who was a Railway servant. He endorsed on it that he could not accept it unless it was served through his officer and returned it to the peon. The Court however proceeded with the suit and passed an *ex parte* decree. The application to set it aside was dismissed. *Held*, that the High Court could interfere with the order in revision. *Held*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

further, that the rule passed by the High Court that summons on Railway servants should be served through their officers had the force of law and the service on the defendant in this case was no service at all. WAZIR KHAN v. NAQUI YAWAR, **6 A.L.J. 45=1 Ind. Cas. 163.**

(2856-*a*)—O. IX, rr. 6, 13, s. 104, O. XLIII, r. 1—*Ex-parte* order absolute—Refusal to set it aside—Appeal—*See* EX PARTE ORDER, 2 Ind. Cas. 67.

(2857)—*O. 9. rr.* 6, 13, *O.* 17, *r.* 2, (=*ss.* 100, 108 *and* 157, *Civ. Pro. Code*, 1882)—Ex parte *judgment—Parties failing to appear on day fixed.*—S. 108 of the Code of Civil Procedure applies to every case in which a decree is passed *ex parte* against a defendant, either under s. 100, by reason of his non-appearence at the first hearing, or under s. 157 by reason of his non-appearance at an adjourned hearing. (2 A. 67, *D.*; 21 C. 269, *Overruled*). *Per Banerji, J.*—Observations on the distinction between "review" and "revival," made. JONARDAN DOBEY v. RAMDHONE SINGH, **23 C. 788, F B.** [*F.*, 2 C.W.N. 693, 4 M.L T. 216= 31 M. 505 =19 M.L.J. 222 ; *Relied on*, 8 C W.N. 621 ; *R.*, 23 C. 991, 19 A. 355=17 A.W.N. 89, 20 A, 195, 11 C.P.L.R. 41, U.B.R. 1897—1901, Vol. II, 240, 2 N.L.R. 179, 34 C. 235=5 C L. J. 260, 11 C.W.N. 329=5 C.L.J. 247=2 M.L. T. 123=34 C. 403, F B. ; *Not F.*, 30 M. 54, F.B.=16 M.L.J. 479=1 M.L.T. 268 ; *Appr.*, 12 O.C. 25=1 Ind. Cas. 329.]

(2858)—*O.* 9, *rr.* 6, 13, *O.* 17, *rr.* 2, 3, *s.* 115 (=*ss.* 100, 108, 157, 158 *and* 622, *Civ. Pro. Code*, 1882) — *Ajourned hearing—Decree* ex-parte—*Restoration of suit—Revision.*—Where, on a date to which a suit was adjourned for hearing, the Court, after taking evidence, passed an *ex parte* decree. *held*, that the order was passed under s. 100 read with s. 157, Civ. Pro. Code, and could be set aside by an application under s. 108 ; (34 C. 235, 8 C.W.N. 621, *F.*) *held*, also, that, though the order under s. 108 passed by the lower Court was not, in form, a proper order, the High Court ought not, in the exercise of the discretion given to it under s. 622, Civ. Pro Code, to interfere with it. NAGENDRA KUMAR BASU v. NABIN MANDAL, **36. C. 189=1 Ind. Cas 741.** (23 A. 462, *Expl.*)

——**O. IX, r 7 (=1882, s. 101=1877, s. 101=1859, s. 111).**

(2858-*a*)—O. IX, r. 7—Application to set aside *ex parte* proceedings—When to be made —*See* REMAND, 7 N.L.R. 172.

(2858 *b*)—O. IX, r. 7—*See* RULES OF HIGH COURTS AND SUPREME COURTS—BOMBAY, 10 Bom.L.R. 301=32 B. 534.

(2858-*c*)—O. IX, r. 7—*See* NOS. 518, 2709, 2736, 2737, 2848, 2853, 2853-*a*, 2854, *supra.*

2859)—*O.* 9, *rr.* 7 *and* 13 (=*ss.* 111 *and* 119, *Civ. Pro. Code*, 1859)—*Written statement*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

filed—Counsel stating no instructions—Ex parte decree—Costs.—In a certain suit, the defendant had appeared and put in a written statement, and the hearing was thereupon adjourned. But when the suit was called on for final disposal, the defendant's Counsel applied for an adjournment on the ground that a telegram had been received on the previous day stating that the defendant, who had gone to fetch his witnesses had been taken ill on the way back, and was consequently unable to be present at the hearing. The application for adjournment was refused. The defendant's Counsel then being asked whether he appeared, said that he did not and that he had received no instructions in the case. The suit was heard and a decree was given for the plaintiff. The defendant afterwards applied for setting aside the decree on the ground that he had been prevented by sickness from being present when the case was called on. *Held* that the defendant had brought himself within the provisions of s. 119 of Act VIII of 1859 and that he was entitled to have the judgment set aside, and that the time for appearance was not the occasion on which the adjournment took place but when the case came on for final disposal. [*Not F.*, 11 C.L.R. 537 ; *F.*, 4 C. 318, 23 B. 414 ; *R.*, 2 A. 67, P.C., 7 A. 538, 5 C.L.J. 247, F.B.=11 C.W.N. 329=2 M.L.T. 123=34 C. 403, F.B ; *D.*, 23 C. 991.] S. 119 of Act VIII of 1859 is in no way connected with, and is entirely independent of s. 111 of the Act, and s. 119 does not provide for costs. Therefore if a man comes himself before the Court, and can satisfy the Court that he was not able to attend at the hearing owing to illness or other good cause, he ought not to be made to pay costs, but the costs should be costs in the cause. THE ADMINISTRATOR-GENERAL OF BENGAL v. LALA DYARAM DAS, **6 B. L.R. 688.**

(2860)—*O.* 9, *rr.* 7 *and* 13 (=*ss.* 101, 108, *Civ. Pro. Code*, 1882)—*Refusal of defendant to be heard—Competency of Court to set aside* ex parte *decree.*—Where a defendant was refused a hearing under s. 101 and a decree was passed *ex parte* against him, it was competent to the Court to set aside the *ex parte* decree under s. 108 of the Code. BHAOO PATEL v. NAROO KUNBI, **10 C.P.L.R. 45.** (8 C. 272, *R.*)

(2861)—*O.* 9, *r.* 7, *O.* 17, *r.* 2, *s.* 104, *O.* 43, *r.* 1, *s.* 105 (=*ss.* 101, 157, 588, 591, *Civ. Pro. Code*, 1882)—*Setting aside* ex parte *order—Right of appeal as to the terms under which it is so set aside.*—A Court which, after recording certain statements, decided that sufficient cause for the defendant's non-appearance had not been shown, but, nevertheless, set aside the *ex-parte* order, strictly speaking, exceeds its jurisdiction. Reading together ss. 101 and 157, it could only have rejected the application to set aside the order and proceeded to record its judgment. An appellate Court cannot, on

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

appeal from the decree passed in such a case, interfere with the terms imposed upon the defendant when setting aside the *ex parte* order. S. 588 gives him no right of appeal as to the terms on which he should be put, nor can it be said that the term imposed "affected the decision of the case" within the meaning of s. 591. The words "affecting the decision of the case" in s. 591 mean "affecting the decision of the case with reference to the merits of it." MOHOMAD AKBAR KHAN v. R.B. KASTURCHAND DAGA, **2 N L.R. 179.** (23 C. 738, F.B. 20 B. 380, 16 C. 426, *R.*; 22 C. 981, 24 A. 46, 25 A. 280, *R.*)

——O. IX, r. 8 (=1882, s. 102=1877, s. 102=1859, s. 114).

(2862)—*O. 9, r. 8 (=Civ. Pro. Code, 1882, s. 102;—Duty of parties to be in attendance.*—A Court is not in any way bound to do more than have a cause called and it is the duty of the parties and their legal respresentatives to be in attendance. BALARAM v. MULLA, **5 C.P.L. R. 81.**

(2863)—*O. 9, r. 8 (=s. 102, Civ Pro. Code of 1882)—Dismissal of suit under.*—Res judicata. —The dismissal of a suit in terms of s. 102 was not intended to operate in favour of the defendant as *res judiacta*. It imposes, however, when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. CHAND KOER v PARTAB SINGH, **16 C. 98=15 I.A 156, P.C.** [*F.*, 4 L.B.R. 17, F.B.; *Cited*, 15 A. 359; *R.*, 22 M. 221, 5 O C. 294, 6 O L.J. 362, 121 P.R. 1907=51 P.W.R. 1907, F.B.]

(2864)—*O. 9, r. 8 (=old s. 102)—Dismissal under—Effect—Different causes of action no bar.* —Though a dismissal under this section for the plaintiff's non-appearance will bar a fresh suit in respect of the same cause of action. it will not operate as *res judicata*. But, if the causes of action be different, even this section would not be a bar to the subsequent suit with regard to the same property. MUSST. CHAND KOER v. PARTAP SINGH, **177 P.R. 1888, P.C.**

(2865)—*O. 9, r. 8—Plea of want of opportunity by absent party—Default.*—A plaintiff not present to support his own case cannot plead want of opportunity to rebut defendant's evidence. RADHA JEEBAN MOOSTOFEE v. GREES CHUNDER ROY, **8 W.R. 461.**

(2866)—*O. 9, r. 8 (=s. 102, Civ. Pro. Code)—Dismissal for default—Appeal*—Where a suit is dismissed for default under s. 102. Civ. Pro. Code, an appeal lies. PERAMANAYAGAM v. ARUNACHELLA, **1 M L.J. 385.** (9 A. 427, *F.*).

(2867)—*O. 9, r. 8 (=old s. 102)—Dismissal —Appeal—Grounds.*—The fact that the plaintiff had a good excuse for not being present on the day fixed for the hearing is no ground for an appeal against an order under this section,

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dismissing the plaintiff's suit for default. There is no other ground for appeal, than under s. 103, to ask the Court to set the dismissal aside on the ground of new matter. BHAGWAN SINGH v. PARI, **32 P.R. 1889.** [*R.*, 121 P.R. 1907=51 P.W.R. 1907; *Cons.*, 52 P.R. 1905=133 P.L.R. 1905; *Expl.*, 12 O.C. 405.]

(2868)—*O. 9, r. 8 (=s. 102, Civ. Pro. Code, 1882)—Portion of claim dismissed on the merits and the rest abandoned—Applicability of section thereafter—Dismissal as for default—Appeal on the merits, where section wrongly applied.*—Certain properties which were purchased by the plaintiff at public auction were attached in execution of a money-decree against his vendor. Plaintiff satisfied the decree under protest and then sued the decree-holder for recovery of the amount paid and for damages for wrongful attachment. The Court *held* that, as the payment was voluntary, the claim to recover it was not maintainable, but that the suit might proceed on the question of damages. Plaintiff prayed for the drawing up of a formal decree with regard to the portion of the claim which was dismissed, and also to withdraw the rest of the claim with liberty to bring a fresh suit under s. 373, Civ. Pro. Code, 1882. Both prayers having been refused, plaintiff unconditionally withdrew the claim for damages. The defendant thereafter proceeded to give evidence on all the issues raised in the case, the plaintiff not appearing. In the result, the Court, purporting to act under s. 102, Civ. Pro. Code, dismissed the suit for default. The plaintiff appealed to the Chief Court which held that, the suit having been dismissed under s. 102, Civ. Pro. Code, no appeal lay. On further appeal to the Judicial Committee, *held*, that the case was not one to be dealt with under s. 102, Civ. Pro. Code, inasmuch as the claim for recovery of the money paid to discharge the attachment had been fully determined adversely to the plaintiff by the Court's previous order, and the rest of the claim had been abandoned, leaving nothing to be tried. *Held* further that the case should go back to the Chief Court to decide the appeal on the merits. KANHAYA LAL v. THE NATIONAL BANK OF INDIA, LTD., **14 C.W.N. 594, P C.=12 Bom. L.R. 430=11 C.L.J. 449—37 C. 426=8 M.L.T. 1=6 Ind. Cas. 592=20 M.L.J. 470.**

(2868-*a*)—*O. 9, r. 8 (=s. 102, Civ. Pro. Code, 1882)—Case and application to restore it dismissed in default in early part of the day—Sufficient cause.*—*Held*, that, the Courts should wait for the parties for some reasonable time when the case is called on for hearing. A case or a petition is not to be dismissed in early part of the day. *Held*, also, that, where temporary absence of plaintiff or his pleader has been satisfactorily explained, a case or a petition should be restored, especially where dismissal has taken place at 11 A.M. CHAUDRI JESA RAM v. THAKAR DAS, **197 P.W.R. 1911.**

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(2868-*a*1)—O. IX, r. 8—Order dismissing suit in default—Not decree—Not appealable—*See* APPEAL—MISCELLANEOUS, 51 P.W.R. 1907=21 P.R. 1907, F.B.

(2868-*b*)—O. IX, r. 8—*See* RES JUDICATA—JUDGMENT ON PRELIMINARY POINTS, EFFECTS OF, 23 W.R. 58.

(2868-*c*)—O. IX, r. 8—*See* SPECIAL OR SECOND APPEAL — APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 5 C.P. L.R. 81.

(2868-*d*)—O. IX, r. 8—S. 102, effect of, on proceedings under s. 90 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 1 N.L.R. 143.

(2868-*e*)—O. IX, r. 8—*See* NOS. 88, 93, 106, 306, 2666, 2708-*a*, 2737, 2841-*a*, 2848, *supra*, AND NOS. 3153, 3955, 5226, *infra*.

(2869)—*O* 9, *r*. 8, *s*. 114, *O*. 47, *r*. 1(=ss. 102, 623, *Civ. Pro. Code*, 1882)—*Suit dismissed for default—Application for review of judgment without prior application to set aside dismissal order.*—If, on the dismissal of a suit for default under s. 102, the plaintiff applies for review of judgment without applying to re-instate the suit under s. 103 of the Code, his application can be entertained by the Court. RAJ NARAIN PURKAIT v. ANANGA MOHAN BHANDARI, **26 C. 598**. (2 C.W.N. 318, *D.*) [*F.*, 121 P.R. 1907 =51 P.W.R. 1907; *R.*, 7 P.L.R. 1900, 30.]

(2870)—*O*. 9, *rr*. 8, 9 (=*old ss*. 102 *and* 103)—"*Plaintiff*," *meaning of*.—The word "plaintiff" as used in these sections includes his heirs or representatives in interest, who could be in no better position as to the subsequent suit than the plaintiff himself. MAMRAJ v. CHANDWA MAL, **117 P.R. 1891**. (80 P.R. 1894, 15 C. 442, *R*.) [*R.*, 43 P.R. 1907.]

(2871)—*O*. 9, *rr*. 8, 9(=ss. 102, 103, *Civ. Pro. Code*, 1882)—*Dismissal of suit for default under s*. 102—*Application under s*. 103 *to set aside order of dismissal*—"*Sufficient cause for non appearance of the plaintiff*," *what amounts to*.—A suit was dismissed for default under s. 102 of the Civ. Pro. Code. In his affidavit presented with the application made under s. 103 for setting aside the order of dismissal, the plaintiff stated that he was in the Court-house on the appointed day and waited for some time as the Judge happened to be sitting on the appellate side that day, that, thinking that a part-heard case standing above his suit on the list would take up time, he left the Court-house and went to assist his employer, who had sent a messenger to call him to explain some part of some mercantile transaction, and that, when he returned in about half an hour, he found that his suit had been called on for hearing and dismissed for default. *Held* that the facts disclosed by the affidavit did not constitute "sufficient cause for non-appearance" within the meaning of s. 103, so as to entitle the plaintiff to have the suit restored to file. *Held* also that the plaintiff was not taken unawares, that he was not under any compulsion to leave the Court-house, that his absence was not due to any weighty cause, and that he accepted the risk of the case being called on in his absence. MANILAL DHUNJI v. GULAM HUSEIN VAZEER, **13 B. 12**. [*F.*, 10 Bom. L.R. 904; *R.*, 23 C. 991.]

(2872)—*O*. 9, *rr*. 8, 9 (=*old ss*. 102, 103)—*Striking-off—Fresh suit*.—A suit "*number kharij*" or "struck-off" is not a passing of judgment by default under s. 114, Act VIII of 1859, precluding plaintiff from bringing a fresh suit. KHOOB LALL SINGH v. TOOLSEE SINGH, **17 W.R. 219**.

(2873)—*O*. 9, *rr*. 8, 9 (=*ss*. 102, 103, *Civ. Pro. Code*, 1882)—*Suit by widow—Dismissal for default—Subsequent suit by reversioners*.—A suit brought by a Hindu widow in respect of her husband's estate was dismissed for default under s. 102, Civ. Pro. Code, 1882. This order of dismissal would, under s. 103, be no bar for a fresh suit by the reversionary heirs of her husband in respect of the same matter. VIRUMAL v. MUSSAMAT BHAGWANDEVI, **80 P.R. 1884**. [*R.*, 117 P.R. 1891, 139 P.R. 1888.]

(2874) *O*. 9, *rr*. 8 *and* 9 (=*old ss*. 102 *and* 103)—*Dismissal of Plaintiff's suit—Conditions*.—Dismissal of suit for plaintiff's non-attendance is a penalty not to be inflicted, unless upon proof of deliberate disobedience of Court's distinct order to attend. PEAREE MOHUN BOSE v. HURISH CHUNDER BHOSE, **17 W.R. 141**.

(2875—*O*. 9, *rr*. 8, 9 (=*ss*. 102, 103, *Civ. Pro. Code*, 1882)—*Appearance of parties—Application under s*. 103.—When the defendant, or, by party of reasoning the plaintiff, is prevented from proceeding with the case by unavoidable absence, or is prevented from instructing his Pleader or Counsel from unavoidable causes or *bona fide* mistake, it would amount to a non-appearance under s. 102 of the Code. But where the plaintiff was present and instructed Counsel to apply for an adjournment and, when that was refused, he took no further steps, such circumstances amount to an appearance on the part of the plaintiff, and his application under s. 103 may be refused. RAMPERTAB MULL v. JAKEERAM AGURWALLAH, **23 C. 991**. (7 A. 538, 8 A. 140, 13 B. 12, 23 C. 738, *R.*; 12 C. 605, *Cons.*; 6 B.L.R. 683, *D.*) [*D.*, 34 C. 403=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123, F.B.]

(2876)—*O*. 9, *rr*. 8 *and* 9 (=ss. 102, 103, *Civ. Pro Code*, 1882)—*Suit for redemption dismissed for default—Fresh suit for the same barred*.—If a mortgagor sues for redemption and his suit is dismissed under s. 102, Civ. Pro. Code, and he, thereafter, brings a fresh suit for redemption of the same mortgage, the cause of action in the second suit is the same as the cause of action in the first and is barred by

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s. 103 of the Civ. Pro. Code. GURDITTA v. NARAIN DAS **43 P.R. 1907=169 P.L.R 1908.** (15 C 422, P.C., 117 P.R. 1891, 32 P.R 1905, *F.*; 10 B 28, *D*; 25 M. 30, F.B., 7 B. 467, 13 B. 567, 19 A. 202, *Appr*; 86 P.R. 1877, 14 P.R. 1881, 6 M. 119, 7 M. 432, 11 A. 386, 15 M. 366, *Doubted.*) [*R.*, 73 P.R 1903.]

(2877)—*O* 9, *rr.* 8, 9 (=ss. 102, 103, *Civ. Pro. Code*, 1882)—*Order dismissing suit for default of appearance, construction of—Application for restoration of suit—Legality of order*—"*Appearance,*" *what is.*—Where apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear, it is to be taken that the suit is dismissed under s. 102, Civ. Pro. Code, and the plaintiff has a remedy under s. 103, Civ. Pro. Code. It cannot be questioned, on an application under s. 103, Civ. Pro. Code, in such a case, whether the order which is sought to be set aside could legally have been made under s. 102. The plaintiff's success upon such application depends on his ability to prove that he was prevented by any efficient cause from appearing when the suit was called on for hearing. The defendant may, for the purpose of showing that no such cause existed, prove that, in fact, the plaintiff had appeared, and that he was not prevented by any sufficient reason from appearing at the hearing; but that is a question to be determined for the purpose of considering whether the plaintiff has been able to substantiate his application under s. 103, Civ. Pro. Code, to set aside the dismissal. [*R.*, 8 C.W.N. 621, 1 S.L.R. 115, 18 M.L.J. 51=3 M.L.T. 225, 1 S.L.R. 224, 19 M.L.J. 760=5 Ind. Cas. 23, 34 C. 403=11 C.W.N. 329=2 M.L.T. 123=5 C.L.J 247.] It is not "appearance" whithin the meaning of s. 102, Civ. Pro. Code, where the pleader was not duly instructed and able to answer all material questions relating to the suit, but was instructed only to apply for an adjournment. LALTA PRASAD v. NAND KISHORE, **22 A. 66, F.B.=A.W.N. 1899, 176.** (20 A. 195, 23 B. 414, *Appr.*; N.W.P. 1873, 74, N.W.P. 1875, 77, 3 A. 519, *R.*) [*R.*, 34 C. 403=11 C.W.N. 329=2 M.L.T. 123=5 C.L.J. 247].

(2878)—*O.* 9, *rr.* 8 *and* 9 (=ss. 102 and 103, *Civ. Pro. Code*, 1882)—*Representative of deceased plaintiff. Application by. for order to set aside dismissal of suit—Dismissal of suit in default—Substitution of name of representative of deceased plaintiff.*—The applicant's father brought a suit in the Munsif's Court, which was dismissed under s. 102 of the Code of Civil Procedure. The applicant then applied under s. 103 of the Code for an order to set the dismissal aside, alleging that his father had been ill on the day of hearing and had died two days later. The lower Courts dismissed the application holding that no one but the plaintiff in a suit could apply under s. 103. *Held* that s. 103 of the Code of Civil Procedure may be construed as permitting a representative to apply at one and the same time for the substitution of his name in place of that of the deceased and for an order to set aside the dismissal of the suit. Upon the name of the representative being entered on the record, the application proper under s. 103 could then proceed. RAMPYARE v. RUP NARAIN, **6 O.C. 34.** [*R.*, 9 O.C. 35.]

(2879)—*O* 9, *rr.* 8, 9 (=ss. 102, 103, *Civ. Pro Code*, 1882)—*Dismissal of suit—Plaintiff's pleader present but none of the plaintiff's witnesses.*—Where, on the day fixed for the hearing of a suit, the plaintiff's pleader appeared, but, in consequence of none of the plaintiff's witnesses being present, was unable to support the plaintiff's case and the suit was consequently dismsesed, *held* that this was not a dismissal for default of appearance and did not entitle the plaintiffs to apply under s. 103 of the Civ. Pro. Code, for re hearing. FAZAD AHMED v. BAHADHUR SINGH. **A.W.N. 1893, 25.** (16 B. 23, 8 A. 140, 12 C. 605, *R.*) [*D.*, 18 A. 241=A.W.N. 1896, 47.]

(2880)—*O.* 9, *rr.* 8, 9 (=ss. 102, 103, *Civ Pro. Code*, 1882 *Trial of suit in the plaintiff's absence—Duty of revenue Court to give notice of the date and place to parties.*—Revenue Courts are bound to give the parties notice of the date and the place of trial of cases. If a Revenue Officer is on tour and unable to make a programme of dates he should postpone their hearing till his return to the *Sadr*. He should, for the convenience of the parties, make programme of his tours and adhere to them. If he has to vary his tour he should take timely steps to give parties fresh notice. Every record should show that due notice of date and place has been given. If the record does not show this, it should be presumed that due notice was not given. TEGHA v. MUSSAMMAT PURSENUN, **12 P.L.R. 1903=8 P.R. 1902.**

(2880-*a*)—*O.* 9, *rr.* 8, 9 (=ss. 102, 103, *Civ. Pro. Code*, 1882)—*Dismissal of suit for default—Presidency Small Cause Courts Act XV of* 1882), s. 38—*Remedies open to plaintiff—Limitation.*—S. 38 of the Presidency Small Cause Courts Act (XV of 1882) is no bar to a plaintiff, whose suit has been dismissed for default, applying under s. 103 of the Civ. Pro. Code, 1882, for setting aside the order of dismissal. He has two remedies open to him under different enactments. If he chooses to apply for a new trial under s. 38 of Act XV of 1882, he must do so within eight days. And if he prefers to apply to have the order of dismissal set aside under s. 103 of the Civ. Pro. Code, 1882, he can do so within 30 days under art. 163 of the Limitation Act, 1877. SOONDERLAL v. GOURPRASAD, **23 B. 414** [*R.*, 26 M. 163.]

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(2881)—*O.* 9, *rr.* 8 & 9 (=*ss.* 102, 103 *of* 1882 =s 114, *Civ. Pro. Code*, 1859)—*Right of appeal of decree holder—Re-hearing.*—A decree-holder has no right of appeal from a Court's action taken under s. 114, Code of Civil Procedure, 1859, but if aggrieved may apply for a re-hearing. KALEE KRISTO THAKOOR v. MAHOMED KADER, **12 W.R. 428.**

(2882)—*O.* 9, *rr.* 8 *and* 9 (=*ss.* 102, 103, *Civ. Pro. Code*, 1882=*s.* 114, *Civ. Pro. Code*, 1859) —*Default—Abandonment of proceedings.*—The abandonment of proceedings under s. 269, Civ Pro. Code, 1859, does not amount to dismissal on default under s. 114, Civ. Pro. Code, 1859. FUTTAH ALI v. KUBEEM ALI, **10 W.R. 61.**

(2882-*a*)—O. IX. rr. 8 and 9—Applicability of to a reference under s. 18 of the Land Acquisition Act—*See* ACT I OF 1894, ss. 12, 18, 31, 53, 10 C.W.N. 991=2 C.L.J. 359.

(2882-*b*)—O. IX, rr. 8 and 9—*See* APPEAL—EX PARTE CASES, 22 M. 221, 9 A. 427=A.W. N. 1887, 66.

(2883)—*O.* 9, *rr.* 8, 9, *s.* 47. O. 21, *r.* 90, *s.* 141 (=*ss.* 102, 103, 244, 311 *and* 647, *Civ. Pro. Code*, 1882)—*Application to set aside sale—Dismissal for default—No application to set dismissal aside—Fresh application cannot be made.*—Where an application under ss. 244 and 311, Civ. Pro. Code, 1882, for setting aside an execution sale is dismissed for default, the applicant is precluded from making a fresh application of the same nature, without making an application under ss. 102 and 133, to set aside the order of dismissal. S. 647 of the Code applies to an application under ss. 244 and 311. ABDUR RAHMAN MULLICK v. KHORBAN MULLICK MATWALI, **2 Ind. Cas. 156.** (17 A. 106, P.C. =22 I.A. 44, *D.*)

(2884)—O. 9, *rr.* 8, 9, *s.* 104, *O.* 43, *r.* 1 (=*ss.* 103 102, 588 (8), *Civ. Pro. Code*, 1882) —*Suit dismissed for default—Appeal from order of dismissal.*—For an application under s 103 of the Civ. Pro. Code, a period of 30 days from the date of the order dismissing the suit, is allowed and the Courts have no alternative other than dismissing the application, if not presented within that period, but this does not affect the appeal from the original order dismissing the suit, which has the force of a decree. SAHIB DITTA v. RODA, **83 P.R. 1902.**

(2884-*a*)—O. IX, rr. 8 9 and 9, s. 104, O. XLII, r. 1—*See* APPEAL—ORDERS, 83 P.R. 1902.

(2884-*b*)—O. IX, rr. 8, 9, O. XLIII, r. 1, s. 104—*See* APPEAL—DECREES AND EXECUTION OF DECREES 10 B. 433.

(2885)—*O.* 9, *rr.* 8, 9 *and* 13 (=*ss.* 114, 119, *Civ. Pro. Code*, 1859)—*Striking off for default—Remedy by motion.*—In a case struck off for default, where the order has been properly made under Act VIII of 1859, s. 114, the remedy is by motion under s. 119; if improperly made, it is open to appeal. ULUCK MONEE CHOWDHRAIN v. PANCHOO COOMAR CHUNDER CHOWDHRY, **21 W.R. 124.**

(2886)—*O.* 9, *rr.* 8 *and* 9, *O.* 17, *r.* 2 *and s.* 115 (=*ss.* 102, 103, 157 *and* 622, *Civ. Pro. Code*, 1882)—*Order dismissing suit for default—Appeal—Adjournment of part-heard suit—Non-appearance of plaintiff on adjourned day—Proper procedure—Dismissal of suit for default—Petition to restore suit—No sufficient cause for non-appearance—Dismissal of petition—Dismissal of suit in the belief that that was the only procedure to be followed—Revision.*—No appeal lies from an order dismissing a suit for default of appearance of plaintiff, because the order dismissing the suit is not a decree under the Code. Where a part heard suit was adjourned for further hearing and the plaintiff and his pleader were absent when the suit was, called on for hearing on the adjourned day, the proper procedure was to have proceeded under s. 157 and not under s. 102 of the Code. Where a suit was dismissed for non-appearance of the plaintiff and his pleader, an application for restoration of the suit could not be entertained unless there was sufficient cause for the non-appearance. Where a suit was dismissed for the non-appearance of the plaintiff and his pleader on the date to which the suit had been adjourned for further hearing, in the belief that that was the only procedure to be followed in such a case, and the proper procedure for the Court was to have proceeded under s. 157 of the Code, the High Court could interfere in revision as the Court, in failing to proceed under s. 157, failed to exercise a jurisdiction vested in it by law. MAHARAJAH OF VIZIANAGARAM v. LINGAM KRISHNA BHUPATHI, **12 M.L.J. 473.** [*F.*, 8 M.L.T. 60=20 M.L.J. 535=6 Ind. Cas. 233=M.W.N. 1910, 215; *R.*, 121 P.R. 1907=51 P.W.R. 1907, F.B., 34 C. 235=5 C.L.J. 260.]

(2887)—*O* 9, *rr.* 8, 9, *O* 17, *rr.* 2, 3 (=*ss.* 102 103, 157 *and* 158, *Civ. Pro. Code*, 1882)—*Adjourned hearing—Default—Dismissal—Restoration.*—A, the plaintiff in a suit, took out processes against his witnesses; they did not, however, though served, appear on the adjourned date fixed for trial. The pleader for the plaintiff prayed for the issue of a warrant for the arrest of one of them. This was refused. The pleader then intimated that he had no further instructions to appear in the suit which was thereupon dismissed. *Held*, that the dismissal was not under s. 158 of the Code, but was under s. 157 read with s. 102 of the Code. It was, therefore, competent to the plaintiff to apply under s. 103 of the Code, to have the order of dismissal set aside. Scope of ss. 157 and 158 of the Code, explained. If there are no materials on the record at an adjourned date of hearing the Court ought to proceed under s. 157 of the Code. If, however,

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there are materials, the Court ought to proceed under s. 158 of the Code. MARIAN NISSA *alias* DOMAN BIBI v. RAMKALPA GORAIN, **5 C.L.J. 260=34 C. 235.** [*F.*, 36 C. 189; *R.*, 1 S.L.R. 224, 19 M.L.J. 760; *Relied on*, 5 Ind. Cas. 499.]

(2888)—*O. 9, rr. 8 and 9, O 17, rr. 2 and 3(=ss. 102, 103, 157, 158 Civ Pro. Code. 1882)—Pleader applying for adjournment—Effect.*—In this case the hearing of the suit had been fixed for the 9th November. On that day, on the case being called on, the pleader for the several parties put in an application for adjournment on the ground that the parties and their witnesses had been prevented from being present by the fever epidemic. An adjournment for one hour only was granted to enable the pleader for the plaintiffs to consider what course he should pursue. On the case being called on at 2 P.M., the pleader for the plaintiffs got up and left the Court. His name was called out and the names of the plaintiffs were also called out. The pleader had not stated that he had no instructions to proceed with the suit. The Judge dismissed the suit. *Held*, that the order dismissing the suit was an order under ss. 102 and 157 and not under s. 158 of the Code, and that the plaintiff's remedy was by an application under s. 103 of the Code. ALLAHDINO v. NAWALMAL, 1 **S.L.R. 224.**

(2889)—*O. 9, rr. 8, 9, O. 7, r. 3(=ss. 102,103 158, Civ. Pro. Code*, 1882)—*Adjourned hearing—Refusal of application for process—Intimation by pleader that he has no further instructions—Dismissal of suit, whether under s. 102.*—Where, at an adjourned hearing of a suit, the witnesses on behalf of a party were not in attendance, and the party applied for the issue of warrants against them, but the Court refused the application, and the pleader thereupon intimated that he had no further instructions to appear, and the suit was dismissed. *Held*, that the dismissal was not under s. 158, but under s. 102 of the Code. GANGA RAI v. GUDAR RAI, **5 Ind. Cas. 499.** (34 C. 235, 5 C.L.J. 260, *Rel. on.*)

(2890)—*O. 9, rr. 8, 9, O. 22, r. 8 (=ss. 102, 103, 370, Civ Pro. Code*, 1882)—*Applicability—Suit dismissed for non-appearance of plaintiff or official assignee—Insolvency.*—S. 370 only applies to a case where there is an actual bankruptcy or insolvency. It does not apply to a case where there has been an application to declare the plaintiff an insolvent and a vesting order made, but no adjudication declaring the plaintiff an insolvent. In such a case, s. 103 applies, if there is dismissal of a suit for non-appearance of the plaintiff or the Official Assignee on the hearing date. AMRITA LAL MUKERJEE v. RAKHALI DASSI DEBI, **27 C. 217=4 C.W.N. 294.**

(2890-*a*)—O. IX, rr. 8, 13—*See* EX-PARTE DECREE, 2 B.H.C. 267.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2890-*b*)—O. IX, rr. 8 and 13—*See* REVIEW—REVIEW WHEN LIES, 5 N.W.P. 74.

(2891)—*O. 9, rr. 8, 13, O. 15, r. 4 (=ss. 102, 108, 155, Civ. Pro. Code*, 1882)—*Application for adjournment.*—Counsel's appearance in Court, merely to apply for an adjournment, is no such an appearance in the suit as will make ss. 102, 103 Civ. Pro Code, 1882, inapplicable. HINGA BIBEE v. MUNNA BIBEE, **31 C 150=8 C W N 97.** [*R.*, 46 P.R. 1905=178 P.L.R. 1905, 34 C. 403, F.B.=11C W.N 329=5 C.L. J. 247=2 M.L.T. 123, 1 S.L.R. 115, 10 Bom. L.R. 904.]

(2892)—*O. 9, r. 8, O. 15, r. 4, O. 17, r. 2, s. 115 (=ss. 102, 155, 157, 622, Civ. Pro. Code*, 1882)—*Appeal—Revision.*—After the issues in a suit were framed and a defendant was added, the suit was adjourned to a certain day for disposal, because the added defendant had not put in her defence to the action. On the adjourned date, the plaintiff, a *pardahnashin* lady, naturally was not present, and her pleader was engaged in another Court, when the case was called on, and her claim was dismissed on the ground that she, the plaintiff, did not appear. An application was made to the Munsiff to set aside the order of dismissal. The application was refused by the Munsiff because he considered that the dismissal of the suit was under s. 155, Civ. Pro. Code, and that the plaintiff's remedy was by way of an application for review of the decree, and not by an application to set the order of dismissal aside. On appeal the District Judge set aside the Munsiff's order and directed the Munsiff to restore the application to his file and dispose of it on the merits. The defendants applied to the High Court under s. 622, Civ. Pro. Code, for revision against the order of the District Judge. *Held* that the suit was and must be treated as having been dismissed under s. 102 or s. 157, Civ. Pro. Code, and that in both cases an appeal from the order of the Munsiff refusing to set aside the dismissal lay to the District Judge and that therefore the District Judge had on appeal power to send the case back, that the application had further no merits, and that therefore the High Court would not interfere with the order of the District Judge. SHEONANDAN v. JAMNA, **A.W.N. 1887, 65.**

(2893)—*O. 9, r. 8, O. 17, rr. 1, 2 (=ss. 102, 156, 157, Civ Pro. Code*, 1882)—*Part heard case—Adjourned day—Failure of plaintiff to appear on—Dismissal for default—Propriety—Court's duty.*—Where a partly heard case was adjourned to a certain date for further hearing and where, owing to the failure of plaintiff to appear on that date, the lower Court dismissed the suit for default, *held*, that the lower Court did not properly exercise its discretion in dismissing the suit under s. 102, Civ. Pro. Code, 1882, and that it was clearly the duty of the Judge to proceed to hear the defendant, unless, on consideration of the evidence for the plaintiff, he was of opinion that the suit should be dismissed

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and to adjudicate the case on its merits. RAM DAM PANDEY v NARAYAN MURTI AND KURMAYA, LEGAL REPRESENTATIVES OF G. KRISHNA MURTI, DECEASED, **5 L B R. 75=3 Ind. Cas. 683.** (25 A. 194, *R.*)

(2894)—*O. 9, r. 8, O. 17, r. 2 (=ss. 102, 157, Civ. Pro. Code, 1882)—Appeal from order dismissing plaintiff's case in default—Plaintiff declining to appear on date fixed for argument—Decree—Dismissal of case in default of plaintiff*—The appellants filed a suit on the 20th July, 1899, praying for a declaration that certain immoveable property attached by the respondent was not liable to be attached and sold in execution of his decree. They were apparently dissatisfied with certain orders passed by the lower Court in the course of the trial of the case, and on the 3rd January, 1901, they filed an application in which they said that they declined to argue the case and virtually announced that they did not intend to appear again. The next and the last date on which the case came on was the 28th January 1901. On that date, neither the appellants nor their pleaders appeared. The respondent was present. The lower Court recorded the following order: "It is now 1-4 p. m., plaintiffs being absent, I have nothing for it but to dismiss the suit in default. Plaintiffs' claim is dismiss in default with costs." No section was specified in that order. *Held* that the order of the Court must be held to have been made under s. 157 read with s. 102 of the Code of Civil Procedure, that it was not a decree, not being an adjudication upon any right claimed, and was not appealable. GHAZANFAR ALI KHAN. v. ASHARF LAL, **5 O. C. 294.** [*R.*, 6 O.C. 48; *F.*, 10 O.C. 171.]

(2895)—*O. 9, r. 8, O. 17, r. 2 (=ss 102, 157, Civ. Pro. Code, 1882)—"Appearance," meaning of—Application by pleader for adjournment—Refusal—Pleader stating that he had no instructions—Effect—Dismissal under s. 157, Civ. Pro. Code—Authority to represent client—Barrister and pleader, distinction between.*—On the date to which the plaintiff's suit was adjourned for hearing, an application was put in by his pleader for postponement owing to plaintiff's illness, and it was rejected. The Court then examined the plaintiff's pleader who stated that he was appointed to present the application and that he was not in any way acquainted with the facts of the case. *Held*, that, where, at any adjourned hearing of the suit, there is no appearance by the plaintiff and there are no materials on record, the appropriate procedure is that laid down by s. 157, Civ. Pro. Code, 1882. (*Per Crouch, A.J.C.*) An appearance at an application for adjournment which is refused is not an appearance at the hearing of the suit. (34 C. 235, 1 S.L.R. 224, 34 C. 403 F.B., *R.*) An "appearance" is nothing more than physical attendance in the Court. If, therefore, when the hearing commences, the plaintiff or his duly appointed

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pleader is actually present in Court, there is an appearance of the plaintiff at the hearing. If it be desired that there should be no appearance, the result can, in reality, be attained only by the plaintiff and his pleader walking out of the Court when the case is called on for hearing. But it is considered sufficient for the pleader to do something or say something implying a request that the Court should regard him as absent, and for the Court to do something or say something to intimate that the request has been granted, or at any rate, not been refused. The usual formula used by pleaders. "I am not instructed" or "I have no instructions" is perfectly well understood by most Judges; and where no dissent is expressed, the general opinion seems to be that the pleader is fairly justified in assuming that he is being treated as not present. (23 B. 414, 22 A. 66, 30 M. 374, *R.*) *Held*, that, on the facts of the present case, the presumption that the order of dismissal was under s. 157, Civ. Pro. Code, 1882, holds good. The authority of a Barrister or Advocate to represent a party is based on the fact that he has "received instructions" from an Attorney or Solicitor. Instructions are not merely the information as to facts, but constitute his authority to represent the client. If, therefore, he states in Court that he has no instructions, that concludes the question of his representation. But a pleader's authority is based on the fact that a 'vakalatnama' has been filed. And his authority can be terminated only on a written application by the client and with the consent of the Court. FAKIR MAHOMED v. VIRAN, WIFE OF KOJI, **3 S.L R. 208=6 Ind. Cas. 851.**

(2896)—*O. 9, r. 8, sch. II, r. 8—Arbitration—Application by arbitrator for extension of time allowed for making award—Dismissal for default.*—The arbitrator applied for extension of period allowed for making the award. The plaintiff failed to attend Court on the date fixed in the case and the Court dismissed the suit. *Held*, that the action of the Court was harsh; when a case is under arbitration, a Court should not hastily dismiss the suit for non-appearance in Court of the plaintiff. Much less should this be done when the arbitrator has made an application for extension of time for filing award. *Held* also, that, when an arbitrator asks for extension of time and there is no reason to suspect that, being in collusion with either party, he is wilfully delaying matters or that in any other way there is bad faith in his conduct, the Court should always grant reasonable extension. MUSSAMMAT RAM KAUR v. SETH MULTANI CHAND, **29 P.L.R. 1910=8 Ind. Cas. 224.**

—— O IX, r. 9 (=1882, s. 103=1877, s. 103=1859, s. 119.)

(2897)—*O 9, r. 9 (=s. 103, Civ. Pro. Code, 1882)—Scope.*—The operation of s. 103 is

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confined only to those cases, where a second suit is brought for the same object and cause of action as the suit which is dismissed—*Per Garth, C.J.* GOBIND CHUNDER ADDYA v. AFZUL RAB BANI, **9 C. 426=12 C.L.R. 29.**

(2898)—*O. 9, r. 9. (=Civ. Pro. Code, 1882, s. 103)—Suit for redemption by purchaser of mortgaged land against mortgagee—Subsequent suit for possession by purchaser against vendor and mortgagee—Causes of action different.*—In 1881, plaintiff, a purchaser of certain mortgaged property, brought a suit for redemption against the mortgagee, and this was dismissed for default under s. 102 of the Civ. Pro. Code. The plaintiff, however, had arranged with his vendor that the latter would pay off the mortgage. He subsequently brought this suit against both the vendor and the mortgagee for possession of the land. The defendant pleaded that the present suit was barred by s. 103, Civ. Pro. Code. *Held* that s. 103 of the Code should receive a somewhat strict construction, that the first was against the mortgagee alone for redemption based on plaintiff's purchase of the equity of redemption ; that his present case was that he contracted for the purchase of the property from the vendor, who undertook to clear it of the mortgage and that the mortgagee had since purchased the equity of redemption from the vendor with full knowledge of the said contract with the plaintiff ; and that, therefore, s. 103 of the Code was no bar to the present suit. RAMACHANDRA JIVAJI TILVE v. KHATAL MAHOMED GORI, **10 B. 28.** [*D.*, 43 P.R. 1907=169 P.L.R. 1908=101 P.W.R. 1907.]

(2899)—*O. 9, r. 9 (=1882, Civ. Pro. Code, s. 103)*—"*Sufficient cause.*"—Where it is not shown that any fresh circumstances had operated to prevent a plaintiff who was present on the first day of trial from appearing on the subsequent day to which it was adjourned in the natural course of things by the Court, there is not "sufficient cause" within the meaning of Civ. Pro. Code, s. 103, for restoration of the suit. SREEMUTTY TOOLSY MONEY DASSEE v. SREEMUTTY PROSAD MONEY DASSEE, **2 C.W.N. 490.**

(2900)—*O. 9, r. 9 (=s. 103, Civ. Pro. Code, 1882)—Dismissal of suit for default—Ground for dismissal order being set aside.*—The only ground on which an order of dismissal of a suit for default, can be set aside in pursuance of the law as laid down in s. 103 of the Code, is that of the plaintiff's being prevented by any sufficient cause from appearing when the suit was called on for hearing. A. L. A. R. LAKSHMANAN CHETTY v. V. R. P. P. L. YELLAYAPPA CHETTY, **4 L.B.R. 221.**

(2901)—*O. 9, r. 9 (=s. 103, Civ. Pro. Code, 1882) — Dismissal for default — Grounds for restoration—Plaintiff's absence contumacious.*—Assuming that, apart from the sufficiency or otherwise of the cause preventing a plaintiff from appearing in Court when his suit is called on for hearing, a Court may restore a suit dismissed for default of appearance, on a suitable order as to costs, looking to the importance of the cause, to the high value of the property involved and the persistence with which the litigation is conducted by the plaintiff, (26 M. 599, *R.*), if the non-appearance was due only to some trifling neglect or to ignorance of the consequences of his action in not appearing ; but a Court will not order a restoration when the plaintiff's absence was wilful and contumacious and amounted to a refusal to submit himself to the jurisdiction of the Court. Counsel's appearance in Court on instructions only to apply for an adjournment, is no appearance for the purposes of the conduct of the suit. GURDIT SINGH v. SOHAN SINGH, **46 P.R. 1905=173 P.L.R. 1905.** (23 B. 417, 31 C. 150, *R.*)

(2902)—*O. 9, r. 9 (=s. 103, Civ. Pro. Code, 1882), if applies to probate proceedings—Probate and Administration Act V of 1881), s. 83—Dismissal of application for probate for default—Executor if may propound will again*—Res judicata—*Deterrent costs sufficient remedy against vexatious conduct.*—A refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. But if probate has been refused, not on the merits, but merely by reason of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to probate, and therefore, it may be again propounded. If, therefore, an application for probate by the executor of a Will has been dismissed for default, that fact itself cannot debar an application by any other person claiming an interest under the will, and therefore, necessarily also, by the executor himself. An executor presenting an application for probate of a Will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. S. 103 of the Civ. Pro. Code (Act XIV of 1882), would therefore be in terms inapplicable to such an application RAMANI DEBI v. KUMUD BANDU MOOKERJEE, **14 C.W.N. 224=7 Ind. Cas. 126=12 C.L.J. 185.** (21 B. 563, *Rel. on.*)

(2903)—*O. 9 r. 9 (=s 103, Civ. Pro. Code, 1882)—Partition — Joint property—First suit dismissed for default—Second suit, maintainability of.*—The right to enforce a partition is a legal incident of a joint tenancy, and, so long as such tenancy subsists, any of the joint tenants may apply to the Court for partition of the joint property. (13 A. 309, *R.*) *Held*, therefore, where the first suit for partition was dismissed for default of appearance, a second suit for the same relief would lie. BISHESHAR DAS v. RAM PERSHAD, **3 A.L.J. 379=A.W.N. 1906, 142=28 A. 627.**

(2904)—*O. 9, r. 9 (=old s. 103)—Dismissal—Application to set aside—Limitation Act, 1877, sch. 2, art. 163.*—An application to set aside the dismissal of a suit for default, if not made within 30 days from the date of such

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dismissal, will be barred under art. 163. sch. II, Limitation Act, 1877. NUR MUHAMMAD v. DINA, **15 P.R. 1897.** [*R.*, 61 P.R. 1907 = 45 P.W R. 1907 = 33 P L.R. 1907.]

(2905)—*O.* 9, *r.* 9 (=*s.* 103, *Civ Pro. Code*, 1882)—*Applicability—Plaintiff in former suit not plaintiff in the latter suit—Limitation Act (XV of 1877), art.* 120—*Right to sue arises when cause of action is complete—Knowledge or ignorance immaterial in the absence of fraudulent concealment—Suit by junior members of tarwad—Limitation.*—Suit for declaring that a lease granted by the *karnavathi* was not binding on the tarwad and for other reliefs. A previous suit had been brought by some other members of the tarwad to question the validity of another lease executed by the same *karnavathi*. and it had been dismissed for default. The plaintiff in the present suit was the 7th defendant in that suit. *Held* that the suit was not barred by s. 103, Civ. Pro. Code, inasmuch as the plaintiffs in the previous suit are not the plaintiffs in the present suit. S. 103 cannot apply to a case, unless the plaintiffs in the prior suit are also plaintiffs in the subsequent suit, or unless the plaintiff in the latter suit can be regarded as having been also a plaintiff in the former. *Held* that, inasmuch as the present plaintiff was not only a defendant, but a contesting defendant in the previous suit, the present plaintiff cannot be held to have been represented by the plaintiffs in the prior suit. A suit for declaration that an alienation by the karnavan of tarwad property is not binding on the tarwad is governed by art. 120. In the absence of fraudulent concealment, the knowledge or ignorance of the plaintiff in regard to the alienation questioned is not material. The right to sue accrues as soon as the cause of action is complete, *i.e.*, on the date of the alienation. OTTAPPURAKAL THAZHATE SOOPI v. CHERICHIL PALLIKAL UPPATHUMMA, **33 M. 31 = 5 Ind. Cas. 698.** (11 M. 378, *F.*)

(2905-*a*)—O. IX, r. 9—Reference to Civil Court for apportionment of compensation—Dismissal for default—Restoration—Sufficient cause—*See* ACT I OF 1894, ss. 30, 53 & 54, 11 C.W.N. 430.

(2905-*b*)—O IX, r. 9—Dismissal of suit in Revenue Court—Applicability of Civ. Pro Code—*See* U. P. ACT, II OF 1901, ss. 193, 197 (1), 2 A.L.J. 116.

(2905-*c*)—O. IX, r. 9—*See* DISMISSAL OF SUITS, 2 Bom. L.R. 206.

(2905-*c*-1)—O. IX, r. 9—*See* EX PARTE DECREE, 87 P.R. 1879.

(2905-*c*-2)—O IX, r. 9—*See* MORTGAGE—REDEMPTION, 32 P.R. 1905 = 39 P.L.R. 1905.

(2905-*c*-3)—O. IX, r. 9—*See* NOS. 92, 306, 343 344, 2190, 2246, 2250, 2251, 2252, 2253, 2666, 2725, 2725-*a*, 2841-*c*, 2848, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2882-*a*, 2883, 2884, 2884-*a&b*. 2885, 2886, 2887, 2888, 2889, 2890, *supra*, and NOS. 3153, 4318 *infra*.

(2905-*d*)—*O.* 9, *rr.* 9, 13 (=*Civ. Pro. Code*, 1859), *s.* 119—*Act X of* 1859, *s.* 58—**Ex parte** *decree, application to set aside.*—Process for enforcing judgment is executed within the meaning of s. 119, Act VIII of 1859, when an attachment of the property takes place; and if a party means to contest the validity of the decree, on the ground that he had no notice of the summons, he must come in within 30 days from that time, and not from the time that the property is actually sold, in cases under Act VIII of 1859, and within 15 days in cases tried under s. 58, Act X of 1859 RADHA BINODE CHOWDHRY v. DIGUMBUREE DOSSEE. **B.L.R. Sup. Vol. 947 = 9 W R. 236.** [*F.*, 8 B.H.C. A.C. 44; *R.*, 8 B.L.R. 78 = 15 W.R. 315; *Expl.*, 9 W.R. 330.]

(2905-*e*)—O. XI, rr. 9, 13—*See* CAUSE OF ACTION, 24 W.R. 362.

(2905-*f*)—O. IX, rr. 9, 13—*See* RE-HEARING, 18 W.R. 207 = 13 B.L.R. 216, Note.

(2905-*g*)—O. 9, rr. 9 and 13—*See* VALUATION OF APPEALS, 4 W.R. Mis. 15.

(2905-*h*)—O. IX, r. 9, s. 96—*See* APPEAL—EX PARTE CASES, 3 A. 292.

(2906)—*O.* 9, *r.* 9, *ss.* 99, 105 (=*Civ. Pro. Code*, 1882, *ss.* 103, 578, 591)—*Objection to re-opening a case not having been taken in Original Court point cannot be raised in Appellate Court.*—An order under s. 103, Civ. Pro. Code, is not an order affecting the decision of a case within the meaning of s. 591, Civ. Pro. Code, 1882. SHEWDATROY BHISSASUR DASS v. MOLLA TAR. **U.B.R. 1897—1901, Vol. II. 237.** (22 C. 981, *R.*)

(2907)—*O.* 9, *rr.* 9, 13 *and O.* 17, *r.* 2 (=*Civ. Pro. Code*, 1882, *ss.* 103, 108, 157)—*Suit dismissed at adjourned hearing.*—Where a suit has been dismissed under s 157, Civ. Pro. Code, the suit may be revived and s. 108, Civ. Pro. Code, will apply. MUSSAMAT JAMINA BIBI v. SERI CHAND BHAGAT, **2 C.W.N. 693.** (23 C. 738, *R.*)

(2908)—*O.* 9, *rr.* 9, 13 *and O.* 41, *r.* 14 (=*Civ Pro Code*, 1882, *ss.* 103, 108 *and* 558)—*Restoration application—Effect of existence of sufficient cause for non-appearance—Power of Court to restore in the absence of sufficient cause—Exercise of discretion on merits of case.*—Ss. 103, 108, 558 and 560, Civ. Pro. Code, contain affirmative provisions. There is no reason to import into these sections negative words to the effect that the Court shall not set aside an order of dismissal or decree passed *ex parte*, if the party or his Vakil was not prevented by sufficient cause from appearing. The application to restore may be based upon any ground

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which would be a just and proper one for granting the application, and it need not be based upon one ground only, *viz.*, that the applicant was prevented by sufficient cause from appearing. The distinction is that when appearance was prevented by a sufficient cause, the Court has no discretion in the matter under the Code, and must restore the case to file whatever may *prima facie* be the merits of the suit or the defence thereto; whereas in other cases when there may be just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its judicial discretion. SOMAYYA v. SUBBAMMA, **26 M. 599.** [*Not F.*, 10 Bom. L.R. 904; *Doubted*, 9 Bom. L.R. 319, Note; *R.*, 121 P R 1907=51 P.W.R. 1907, 46 P.R. 1905=173 P.L R. 1905 72 P.R. 1905=173 P.L.R. 1905, 72 P.R. 1905=159 P L R. 1905, 30 M. 274=17 M.L J. 225, 32 B. 534=10 Bom. L.R. 301, U.B.R. 1909, 2nd Qr., Civ. Pro. Code, 27.]

(2908-*a*)—*O.* 9, *rr.* 9 *and* 13, *O.* 21, *rr.* 46 *and* 54—Ex parte *decree—Application to set aside made after time—Discretion of Court to admit.*—A Court has no discretion to set aside an *ex parte* decree on application made more than 30 days after process for enforcing the decree has been executed, even though it appear that the defendant had as a matter of fact not known of the execution till within 30 days before he made his application. A party insisting upon the provisions of a severe and stringent law like that relating to *ex parte* decisions is bound to see that every formality is strictly complied with. Where this is not done a Court is bound to hold for the purpose of Act VIII of 1859 that no process has been executed CHOWDRI HIAT v. JAI KISHAN, **32 P.R. 1878.**

(2908-*b*)—O IX, rr. 9 and 13, O. XLVII, r. 1, s. 114—*See* NEW TRIAL, 15 W.R. 431.

(2909)—*O.* 9, *r.* 9, *O.* 17, *r.* 2 (=*ss.* 103, 157, *Civ. Pro. Code*, 1882)—*High Court's power to interfere with order of restoration—Lower Court's discretion—Sufficient cause.*—An appellate or revisional authority ought not, generally, to interfere in a case, when the Court, before which a suit has been instituted and has been dismissed without being tried, is of opinion that the case ought to be tried. A generous construction should be placed on the enactment, which gives the power to restore. The general policy of the Legislature, in a matter of this sort, is shown by the fact that a right of appeal is given against an order refusing to restore, but no right of appeal is given against an order of restoration. As to the question of sufficient cause, a Court of revision ought not lightly to interfere with the discretion exercised by the lower Court. GOPAL ROW v. MARIA SOSAIYA PILLAI, **17 M.L.J. 225=30 M. 274.** (26 M. 599, *R.*)

(2910)—*O.* 9, *r.* 9, *O.* 17, *r.* 3, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 103, 158, 588)—*Application to restore case to file of pending cases—Revision—Appeal*—On an application by the petitioner, purporting to be made under s. 103 of the Civ. Pro. Code, for restoration of a case to the file of pending cases, the Court found that the case in question had been dismissed under s. 158 of the Code, and on the ground that the order of dismissal was appealable and also rejected, the application on the merits. The petitioner then applied to the High Court for revision of the order rejecting his application for restoration. *Held* that, under the above circumstances, an appeal lay from the order in question and, therefore, the application for revision was not entertainable. KHADIM HUSAIN v. SHANKAR LAL, **A.W.N. 1893, 44.** (19 W.R. 122, 10 B. 433, *R.*)

(2910-*a*)—O. IX, r. 9, O. XXI, r. 58, s. 114, O. XLVII, r. 1, s. 141—*See* ATTACHMENT—MISCELLANEOUS, 76 P.R. 1903.

(2911)—*O.* 9, *r.* 9, *O.* 21, *r.* 88, *s.* 104, *O* 43, *r.* 1 (=*ss.* 103, 310 *and* 588 (8), *Civ. Pro. Code*, 1882)—*Appeal—Order refusing to restore an application under s.* 310 *which had been dismissed for default of appearance—Held* that no appeal lies from an order refusing to restore to the file of pending applications an application under s. 310 of the Code of Civil Procedure, which had been dismissed for default of appearance. GHASITI BIBI v. ABDUL SAMAD, **A.W.N. 1907, 186=29 A. 596.** (31 C. 207, 10 B. 433, 11 M. 319, *F.*)

(2912)—*O.* 9, *r.* 9, O. 21, *r.* 90 (=*ss.* 103 311, *Civ. Pro Code*, 1882)—*Order rejecting application under s.* 103, *for reviving application under s.* 311, *dismissed for non-appearance—Appeal*—No appeal lies against the order of the Court rejecting the application of the judgment-debtor, purporting to be one under s. 103, Civ. Pro. Code, 1882, for the purpose of reviving an application made under s. 311 of the Code, which had been dismissed for non-appearance of the judgment-debtor. JUNG BAHADUR v. MAHDEO PROSAD, **31 C 207=8 C.W.N. 160.** (19 W.R 122, 10 B. 433, 11 M. 319. *F.*) [*F.*, 29 A. 596=A.W.N. 1907, 186; *R.*, 3 C.L.J. 276, 10 O C. 353.]

(2913)—*O.* 9, *r.* 9. *O.* 21, *rr.* 90, 92, *s.* 104, *O* 43, *r.* 1 (=*ss* 103, 311, 312, 588, *cl* (8) *and cl* (16), *Civ Pro Code* 1882)—*Appeal—Confirmation of sale—Order refusing to set aside* ex parte *dismissal of application to set aside sale*—If an application to set aside a sale is dismissed for default and the sale is confirmed, the order of confirmation is appealable under cl. (16) of s. 588, Civ. Pro. Code, 1882. But there is no appeal from an order refusing to set aside the *ex parte* order of dismissal of an application to set aside a sale under s. 311 of the Code. MRINALINI CHOWDHURANI v. BENODE CHANDRA MITRA, **6 Ind. Cas. 148.** (27 C, 414, 31 C. 207, 29 A. 596, A.W.N. 1907, 186, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2913-*a*)—O. IX, r. 9, O. XLI, r. 19—*See* APPEAL—EX-PARTE CASES, 1 Ind. Jur. O.S. 49, Marsb. 30—O. IX, r. 10 (=1882, s. 105=1877, s. 105=1859, s. 116).

——O. IX, r. 10 (=1882, s. 105=1877, s. 105 =1859, s. 116).

(2913-*a*-1)—O. IX, r. 10—*See* No. 5227, *infra*.

—— O. IX, r. 11 (=1882, s. 106=1877, s 106 =1859, s. 116).

(2913-*b*)—O. IX, r. 11—*See* RES JUDICATA —MISCELLANEOUS, 10 C.W.N. 40.

(2913-*c*)—O. IX, r. 11—*See* No. 345, *supra*, and No. 5227, *infra*.

(2914)—*O. 9, rr. 11 and 13 (=ss. 106 and 108, Civ. Pro. Code, 1882)*—Ex parte *decree, order setting aside—Order obtained by one defendant, if enures to the benefit of all—Decree, if whole, set aside—Principles governing such cases.*—S. 108 of the Civ. Pro. Code must be read with s. 106, and effect should be given to all the provisions contained in them. It cannot be laid down as an inflexible rule of law, that, whenever an order is made under s. 108 of the Code, the effect is to set aside the whole decree, although it may have been made against some of the defendants after a contest, or although an unsuccessful effort may have been made by some of the defendants to set aside the *ex parte* decree. It is not obligatory upon the Court to set aside the whole decree and to re-open the entire suit under all circumstances. (4 C.W.N. 456, 8 W.R. 260, *R.*; 25 C. 155, *Expl. and D.*) Principles, which should be supplied in determining whether the entire decree is to be set aside or whether it should be set aside only in so far as it affects the applicant, discussed and explained. JADUBANSA NARAIN v. MOHUNT HARI CHARAN BHARATI, **6 C.L.J. 226.**

(2915)—*O. 9, rr. 11, 13 (=ss. 106, 108, Civ. Pro. Code, 1882)—Appearance by pleader—Application for adjournment, refusal—Decree passed, whether* ex parte.—Where a vakil is only instructed to make an application for an adjournment, and, on such application being refused, he leaves the Court and takes no part in the hearing of the case, the decree passed is to be regarded as an *ex parte* decree. There is nothing in s. 106, which conflicts with or limits the operation of s. 108, and the application of the latter section is not limited to the case of a sole defendant who has not appeared, or to the case where there are several defendants, and none of them has appeared. G.P. COOKE v. THE EQUITABLE COAL CO., LTD., **8 C.W.N. 621.** [*App.*, 34 C. 403=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123.]

(2916)—*O. 9, rr. 11, 13 (=ss. 106, 108, Civ. Pro. Code, 1882)*—Ex parte *decree against several defendants—Decree set aside as against one on his application—Effect—Case if re-opened as against other contesting defendants.*—Having regard to the language of ss. 106 and 108 of the Civ. Pro. Code, 1882, an application by a co-defendant praying for setting aside an *ex parte* decree in a small cause suit, if granted, does not re-open the case against the defendant or defendants who were present and contested the suit. MANAKU *Kom* PEDRU v. SITARAM ATMARAM VAGH, **18 B. 142.** [*Not F.*, **24 A.** 383=22 A.W.N. 76, F.B.; *F.*, 15 C.P.L.R. 179, 6 C.L.J. 226, 31 M. 454=18 M.L.J. 453=4 M. L.T. 230.]

—— O. IX, r. 12 (=1882, s. 107=1877, s. 107 =1859 s. 117).

(2916-*a*)—*O. 9, r. 12 (=Civ. Pro. Code, 1882, s. 107)—Applicability to summoning of party as witness.*—S. 107 contemplates a summons issued after the perusal of the plaint for the first appearance of the defendant in person on the date specified for the hearing, or an order passed at the same time for the personal appearance of the plaintiff on that date. It does not contemplate the summoning of a party as a witness at any stage of the proceedings. SHEIK WAZIR v. MT. PHULLA, **6 C.P.L.R. 83.**

(2917)—O. IX, r. 12—*See* Nos. 2725, 2725-*a*, *supra*.

(2917-*a*)—O. IX, r. 12, O. XXVI, rr. 13, 14—*See* LIMITATION ACT, 1908, art. 164, **20 A.** 311=A.W.N. 1898, 45.

—— O. IX, r. 13 (=1882, s. 108=1877, s. 108 =1859, s. 119.)

(2918)—*O. 9, r. 13 (=s. 108, Civ. Pro. Code, 1882), object of.*—The first object and purpose for which Courts sit is that the parties shall be heard. The object of s. 108 is to ensure within reasonable limits as to public convenience, that every defendant shall have a hearing. This is ensured, notwithstanding the fact that the defendant did not appear when the case was called on, if he had not been served with summons, or was prevented by sufficient cause from appearing. CHINTAMONY DASSI v. RAGHOONATH SAHOO, **22 C 981.**

(2919)—*O. 9, r. 13 (=Civ Pro. Code, 1882, s. 108)—What it contemplates.*—S. 108, Civ. Pro. Code, contemplates the case of a Court setting aside its own decree and not that of another and a higher tribunal. MONOMOHINI CHOWDHURANI v. NARA NARAYAN ROY CHOWDHRI, **4 C.W.N. 456.** (25 C. 155, *D.*)

(2920)—*O. 9, r. 13 (=s. 108, Civ, Pro. Code, 1882)—Jurisdiction of Court under, to set aside an* ex parte *decree.*—A Court has ample jurisdiction under s. 108 of the Code to set aside an *ex parte* decree at the instance of the defendant, on condition of his finding a surety who would be responsible for any amount that might be found due from him by any decree to be subsequently made in the suit. SONATUN SHAHA v. DINO NATH SHAHA, **26 C. 223=3 C.W.N. 228.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2921)—*O. 9, r. 13 (=s. 108, Civ. Pro. Code, 1882=s. 119, Civ. Pro. Code, 1859)—Cases in appeal*—S. 119, Act VIII of 1859, did not apply to cases in appeal. ANONYMOUS, **1 Ind. Jur. O.S. 68.**

(2922)—*O. 9, r. 13 (=Civ. Pro. Code, 1882, s. 108)—Sufficient cause for non-appearance—No mention in petition.*—S. 108 of the Civ. Pro. Code, 1882, does not apply if, in the petition for re-hearing, the petitioner does not state that he was prevented by any sufficient cause from appearing when the suit was heard. HARIHUR PEESHAD NARAIN SINGH v. BUDDU PERSHAD, **13 C.L.R. 254.**

(2923)—*O. 9, r. 13*—Ex-parte *decision in appeal—Applicability of s. 119, Act VIII of 1859, Civ. Pro. Code.*—S. 119, Act VIII of 1859, will not apply to a decision passed on appeal against a respondent *ex parte*. OMDA BIBEE v. ACOWRIE SINGH, **7 W.R. 425.**

(2924)—*O. 9, r. 13 (=Civ. Pro. Code, 1882, s. 108)—Applicability to order declaring one an insolvent—Fraud—Inherent power of Court.*—S. 108 of the Civ. Pro. Code, does not apply to the setting aside of an *ex-parte* order declaring a person an insolvent. But where such an order is obtained by a creditor by a fraudulent misrepresentation of the residence of the insolvent or other fraud, the order is one passed without jurisdiction and the Court has inherent power to set it aside. SARAT CHANDRA MUKERJI v. MAHOMED HOSSEIN, **8 C.W.N. 468.** (5 C.W.N. 91, *Relied on.*)

(2925)—*Civ. Pro. Code, 1908, O. 9, r. 13, (=s. 108 of 1882)—Bengal Act VIII of 1869, ss. 34, 103—Civ. Pro. Code, 1859, s. 119*—Ex parte *decree, application to set aside.*—S. 103, Act VIII of 1869 (B.C.) applies to applications for a review of any judgment or order passed in any suit brought under the provisions of the Act. It does not apply to application for a rehearing of a suit which has been decided *ex parte* against the defendant. It applies only to reviews; and s. 119 of the Act will, under the provisions of s. 34, apply to applications for a re-hearing of cases decided *ex parte*. MUSST DRABAMAYI GUPTIA v. TARACHARAN SEN, **7 B.L.R. 207=16 W.R. 17.**

(2926)—*O. 9, r. 13 (=s. 119, Civ. Pro. Code, 1859)—Personal service of process not necessary.*—S. 119 of the Code of Civil Procedure does not require personal service of the process for the purpose of enforcing judgment. BABA BRUHM PURGASH v. DUMREE LALL, **1 N.W. P. 133.**

(2927)—O. 9, *r.* 13 (=*s.* 119, *Civ. Pro. Code, 1859)*—Ex parte *decree, setting aside of.*—The object of s. 119, Act VIII of 1859, is to compel a defendant, who desires to set aside an *ex parte* decree, to apply as soon as possible (*i.e.*,) within 30 days from the 1st actual execution of process to enforce the decree. SHAIKH GHOLAM AHYAH v. SHAM SOONDUR KOONWAREE, **7 W.R. 375.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2928)—*O. 9, r. 13 (=s. 119, Civ Pro. Code, 1859)*—Ex-parte *judgment—Appeal.*—S. 119, Civ. Pro. Code, 1859, precludes an appeal from a judgment passed *ex parte* against a defendant, who has not appeared *at all*, but in the case of a defendant, who has once appeared, but who fails to appear on a day to which the case has been adjourned. ZAIN-UL-ABDIN KHAN v. AHMAD RAZA KAHN, **2 A. 67, P.C.=5 I.A. 233.** [*Ap.*, 23 B. 414; *F.*, 11 C.L.R. 537, 21 C. 269; *R.*, 8 A. 354=6 A.W.N. 110, 20 B. 380, 34 C. 403, F.B.=5 C.L.J. 247=11 C.W.N. 329 =2 M.L.T. 123; *D.*, 7 A. 538=5 A.W.N. 144, 23 C. 738, F.B., 18 A. 241, 20 A. 195.]

(2929)—*O. 9, r. 13 (=s. 108 Civ. Pro. Code, 1882)*—Ex-parte *decree—"The decree," meaning of.*—In s. 108, the words "the decree," mean the whole decree made in the suit. When a decree passed *ex parte* against some only of several defendants in a suit, is set aside under s. 108, Civ. Pro. Code, the entire decree is set aside, and the whole suit must be reheard, even as against defendants who had appeared and against whom a decree was passsd on contest. MAHOMED HAMIDULLA v. TOHURENISSA, **25 C. 155=1 C W.N. 652.** [*F.*, 5 C.W.N. 58, 5 C.L.J. 202; *Commented on*, 26 M. 604; *Expl.*, 4 M.L.T. 230=31 M. 454=18 M.L.J. 543; *R.*, 25 C. 175=1 C.W.N. 656; *Cons.*, 24 A. 383=22 A.W.N. 76; *Diss.*, 15 C.P.L.R. 179; *D.*, 4 C.W.N. 456, 20 A.W.N. 14, 3 C.L.J. 160, 6 C.L.J. 226.]

(2930)—*O. 9, r. 13 (=s. 108, Civ. Pro. Code, 1882)—Scope of section—Mortgage-deed, Construction of—Interest.*—A mortgage-deed provided. "I shall without any objection pay to the said creditor the fixed amount of interest for six months from this day."-Where the first mortgagee is made a party to a suit, but he does not appear, and in the operative part of the decree which gives effect to a compromise and directs as between the second and third mortgagees the sale of property in default of payment, not one word is said about the first mortgagee, *held* that s. 108 of the Code, even if exhaustive, does not apply to the case of the first mortgagee. *Held* that the amount secured by the mortgage *plus* interest at the stipulated rate formed a charge on the property, and that the case amounted to one of money lent at interest and made payable on the security of certain property. NAND RAM v. RAM DAYAL, **1 A.L.J. 470.**

(2931)—*O. 9, r. 13*—Ex-parte *decree, application to set aside—Duty of Court before issuing notice to the opposite side.*—When an application is made to set aside an *ex-parte* decree, the Court, before issuing notice to the other side, must ascertain whether or not the summons had been duly served, and whether or not the applicant had been prevented by sufficient cause from appearing when his case was called on for hearing. DOLLO v. SIBLA KUAR, **9 Ind. Cas. 31.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2932)—*O. 9, r. 13 (= Civ. Pro. Code, 1882, s. 108)*—"*Sufficient cause*"—*Non-appearance of guardian of minor*—Ex-parte *decree*—*Setting aside of, against one*—*Effect as against others.*—The simple fact that a guardian did not appear in a suit is not a sufficient cause within the meaning of s. 108, Civ. Pro. Code, for setting aside an *ex-parte* decree against a minor. There are different considerations which bear upon the matter, the question always being whether, in what the guardian did, he acted in the best interest of his ward. (6 C.L.R. 69, *Expl.*) [*R.*, 6 C.L.J. 448.] Where an *ex parte* decree is set aside under s. 108, Civ. Pro. Code, on the application of one of the *ex parte* defendants, the decree against the other *ex parte* defendants also ought to be set aside. AJODHYA PERSHAD SINGH v. SHEO PERSHAD SAHU, **5 C.W.N. 58.** (2 C. 155, *Appr.*) [*R.*, 24 A. 383=22 A.W.N. 176, 6 C.L.J. 226.]

(2933)—*O. 9, r. 13 (= s. 108, Civ. Pro. Code, 1882)*—Ex-parte *decree against some defendants*—*Decree one and indivisible*—Ex parte *decree set aside*—*Decree set aside in its entirety.*—In a suit for a sale on the basis of a mortgage, some of the defendants did not appear, while the rest contested the claim. Finally a decree was given against all the defendants, it being *ex parte* against those who had not appeared. On the latter's application the *ex-parte* decree was set aside, and, on re-hearing the suit, the Court restricted itself to the case of the defendants at whose instance the *ex-parte* decree had been set aside. Ultimately a decree was passed against all the defendants, and, within three years of the last decree, the decree-holder applied for an order absolute. The defendants, against whom the first decree had been passed after contest, contended that the application was barred, as more than three years had elapsed from the date of the original decree against them: *Held*, that the original decree, being one, and indivisible, was set aside in its entirety, and that the decree-holder's application, therefore, was within time: *Held* further that the word "decree" in s. 108, Civ. Pro. Code, meant the whole decree made in the suit and that a decree could not be set aside in part. SAMODH DHAR DUBE v. BHULADHAR DUBE, **5 Ind Cas. 284.** (24 A. 383, 29 A. 633, A.W.N. 1907, 201, 4 A.L.J. 552, 25 A. 155, 1 C.W.N. 652, *R.*).

(2934)—*O 9, r. 13—Miscellaneous proceedings—Application for re-hearing*—An application for substitution of names was decided *ex parte*. On an application made for re-hearing *held*, that O. 9, r. 13, was applicable to proceedings of this kind as well as to suits. KHUSHALGIR v. GOBINGIR, **6 A.L.J. 760.** (17 A. 106, *F.*)

(2935)—*O 9 r. 13=(s. 108, Civ. Pro. Code, 1882)—Jurisdiction to enquire into subsequent fraud—Setting aside decree partially.*—Where an *ex-parte* decree is found to have been obtained without service of summons, and the record shows that it has been subsequently assented to, but the genuineness of such assent is disputed by the defendant, the Court has jurisdiction to investigate whether, in fact, there was any assent in order to enable it to decide whether any order ought to be made under s. 108 for setting aside the decree. When a decree, passed *ex parte* against several defendants, is set aside and the case revived at the instance of one of them, under s. 108, the order does not necessarily revive the whole suit to the benefit of the other defendants, whose prayer under the section has been heard and rejected. KUNJA BEHARI GHOSE v. DURGAMONI DASSI, **3 C.L.J. 160** (25 C. 155, *D.*) [*R.*, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129, 6 C.L.J. 224.]

(2936)—*O. 9, r. 13 (=108 of 1882)*—Ex-parte *judgment—Plaintiff's witnesses, cross examination of.*—On the failure of a defendant duly summoned to attend without lawful excuse, the Court may pass an *ex parte* judgment. But where he had appeared and filed a written statement, the case would not be an *ex-parte* one, and he may cross-examine the plaintiff's witnesses. SHAHZADA PAKAKTAR v. JAKRIRAM BHOKATH, **11 W.R. 5.**

(2937)—*O. 9, r. 13—Second application to set aside* ex parte *decree after dismissal of first.*—Procedure under Act X of 1859 does not provide for second application to set aside *ex-parte* decree after the dismissal of first application for default. SUDEROODDEEN v. HURONATH SEIN, **8 W.R. 87.**

(2938)—*O. 9, r. 13 (= old s. 108)*—Ex-parte *decree confirmed in appeal—Application to set aside*—An *ex parte* decree confirmed on appeal cannot be set aside by the first Court, as this merger in the decree of the appellate Court. MEHDI v. BAHDAR, **30 P.R. 1900** [*R.*, 48 P.R. 1906; *F.*, 8 P.R. 1908, Rev; *Cited*, 123 P.R. 1907=3 M.L.T. 63=82 P.W.R. 1907; 58 P.R. 1905=59 P.L.R, 1905.]

(2939)—*O. 9, r. 13 (= s. 119, Civ. Pro. Code, 1859)—Joint decree passed by District Judge on appeal—Execution of decree in Court below—Objection—Jurisdiction of Subordinate Judge.*—Where M suing A and others on a bond-debt obtains a decree against A alone, and appeals to the District Judge who passed a decree declaring all parties to be liable jointly; and on the decree-holder taking out execution, two of the defendants apply to the Sub-Judge under Act VIII of 1859, s. 119: *Held* that the Sub-Judge has no jurisdiction, but the proper course for the parties is to apply to the District Judge under s. 119. ZIMUTUNNISSA BIBEE v. MUDDUN MOHUN PAL, **22 W.R. 537.**

(2940)—*O. 9, r. 13 (= s. 108, Civ. Pro. Code, 1882), hearing of application under, during pendency of appeal.*—Where after preferring an application for setting aside an *ex parte* decree under s. 108, Civ. Pro. Code, the defendant

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

preferred an appeal against the decree. *Held*, that the first Court had jurisdiction to hear the application during the pendency of the appeal. SARAT CHANDRA DHAL v. DAMODAR MANNA. **12 C.W.N. 885.** (9 W.R. 201, 27 M. 602, *R*; B L.R. F.B., 362, *Rel.*) [*Affirmed*, 13 C.W.N. 846.]

(2941)—*O.* 9, *r.* 13 (=*Civ. Pro Code*, 1882, *s.* 108)—*Decree* ex parte—*Jurisdiction of District Judge to re-open* ex parte *decree appealed against to Chief Court by plaintiff.*—Where the plaintiff, on obtaining an *ex parte* decree for the major portion of his claim, had unsuccessfully appealed to the Divisional Judge and the Chief Court as regards the portion disallowed, the District Judge, on the application of the defendant, after the decision of the Chief Court, re-opened the case under s. 108 of the Code of Civil Procedure. *Held* that, under s. 108 of the Code, the Chief Court only had jurisdiction, at the time the application was made, and that the District Judge, in setting aside a decree which in point of law was no longer existent, at the time, acted *ultra vires*. SAYAD ZAHUR-UL-HASSAN v. GANDU MAL, **4 P.R. 1901.**

(2942)—*O.* 9, *r.* 13 (=*s* 108, *Civ. Pro. Code*, 1882)—*Decree* ex parte *against one and on contest against other defendants—Appeal—Decree affirmed—Jurisdiction of first Court to set aside* ex parte *decree—Second appeal—Question of jurisdiction and important point of law allowed to be taken for the first time in second appeal.*—After an appeal is filed against a decree of a lower Court, which proceeds on a ground common to all the defendants, the power to set aside the original decree on an application under s. 108, Civ. Pro. Code, 1882, by any of the defendants, against whom the decree was passed *ex parte*, becomes vested in the appellate Court only, and the first Court does not continue to exercise jurisdiction, in the matter. (30 M 535, 17 M.L J 436, *F.*; 4 C.W.N 456, *D.*) A contention which involves a question of jurisdiction and an important point of law may be permitted to be taken for the first time in second appeal. DHANAI SARDAR v. TARAK NATH CHOWDHURI, **5 Ind. Cas. 525=12 C.L. J. 53.**

(2943)—*O* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882)—*Setting aside* ex parte *decree--Presidency Small Causes Court.*—The Court of Small Causes at Bombay has inherent power to deal with an application to set aside as order made *ex parte* and to set it aside upon a proper cause being substantiated. TYEB BEG v. ALLIBHAI, **8 Bom. L R. 803=31 B. 45.**

(2944)—*O.* 9, *r.* 13 (=108 *of* 1882)—*Act VIII of* 1859, *s* 119—Ex parte *decree—Appeal—Prima facie case—Procedure.*—In dealing with a suit *ex parte*, a Court is bound to see that the plaintiff's case is at least *prima facie* proved; the mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true. Where a case was decided *ex parte* notwithstanding repeated applications of the defendant's pleader for further reasonable time to produce witnesses, who on account of their places of abode being in distant and different districts could not be produced within the limited time allowed, the High Court remanded the case for re-trial. AMRITNATH JHA v. BABOO ROY DHUNPAT SINGH BAHADUR, **8 B.L.R. 44=15 W.R. 503.**

(2945)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, *s.* 108)—*Decree* ex parte *against defendant deceased, legal representative not entitled to apply to set aside*,—It is not competent to the legal representative of a deceased defendant against whom an *ex parte* decree has been passed, to apply to the Court, under s. 108 of the Civ. Pro. Code, to get such *ex parte* decree set aside, since the section is in term limited to the defendant against whom the decree has been passed *ex parte* and gives no right to the legal representative of the defendant, or to any person other than the defendant himself, to apply for getting the decree set aside. JANKI PRASAD v. SUKHRANI, **21 A. 274=A W N. 1899, 58.** [*Diss.*, 29 C. 33, 36 P.R. 1903=88 P.L.R. 1903; *R.*, 6 O.C. 34; *D.*, 29 A. 574=A.W.N. 1907, 176=4 A.L.J. 480.]

(2946)—*O.* 9, *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882)—*Death of defendant against whom* ex parte *decree has been passed—Legal representative, right of.*—The legal representatives of a deceased defendant against whom an *ex parte* decree has been passed, can apply under s. 108, Civ. Pro. Code, to have the *ex parte* decree set aside. GANODA PRASAD ROY v. SHIB NARAIN MUKERJEE, **29 C. 33.** (21 A. 274. *Diss.*) [*F.*, 36 P.R 1903=88 P.L.R. 1903; *R*, 6 O.C. 34, 29 A. 574=A.W.N. 1907, 176=4 A.L.J. 480.]

(2947)—*O.* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882)—*Decree* ex parte—*Application to set aside decree—Right of representative to continue proceedings initiated by defendant.*—Where proceedings under s. 108 of the Code of Civil Procedure have been initiated by the defendant, the legal representative of the defendant is entitled to continue such proceedings. BETI JEO v. SHAM BIHARI LAL, **A.W.N. 1907, 176=4 A L.J. 480=29 A. 574.** (21 A. 274, *D.*; 29 C. 33, *R.*)

(2948)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882 *s.* 108)—Ex parte *proceedings—Death of defendant—Right of heir of defendant to apply to set aside* ex parte *order.*—*Held*, that where a defendant, against whom a decree has been passed *ex parte*, dies, his legal representative is competent to apply, under s. 108 of the Code of Civil Procedure, for an order to set aside the *ex parte* decree. MUSSAMMAT JAS KUAR v. BHAI MAHTAB SINGH, **88 P L R. 1903=36 P.R. 1903.** (21 A. 274, *Diss. from*; 29 C. 33, *F.*)

(2949)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, *s.* 108)—*Setting aside* ex parte *decree on condition of payment of costs.*—*Held*, that an *ex-parte*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*.

decree, ordered to be set aside on payment of costs within a certain time, remains in full force until such payment, and where the condition is not strictly carried out, the order imposing it becomes inoperative. GHULAM MUHAMMAD v. TULSI RAM, **60 P.R. 1904.**

(2950)—*O.* 9, *r.* 13 (=*s.* 119, *Civ. Pro. Code*, 1859)—*Order setting aside* ex parte *decree, legality of—Right to object to*—Although an order setting aside an *ex parte* decree and ordering a re-hearing is final, in the sense that it is not by itself open to appeal, the party affected by the order is not precluded by s. 119 of Act VIII of 1859 (=s. 108 of Act XIV of 1882) from objecting to the legality of the order on the ground that it was passed after the period of limitation and so without jurisdiction. RUNGLALL MISSER v. TOKHUN MISSER, **2 C. 114.**

(2951)—*O.* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882)—*Suit to set aside* ex parte *decree and sale on the ground of fraud—Refusal of application to set aside* ex parte *decree.*—A suit will lie to set aside an *ex parte* decree and a sale held in execution of such decree when both the decree and the sale are impeached on the ground of fraud (but not otherwise), though an application to set aside the decree under s. 108, Civ. Pro. Code, had been previously refused. RADHA RAMAN SHAH v. PRAN NATH ROY, **28 C. 475, P.C.=5 C.W.N. 757.** [*R.*, 29 C. 395, P.C.=6 C.W.N. 473, 34 C. 241=5 C.L.J. 385, 10 C.L.J. 336, 13 C.W.N. 1197=10 C.L.J. 420 =2 Ind. Cas. 29; *D.*, 29 A. 212=A.W.N. 1907, 31=4 A.L.J. 51; *F.*, 13 C.W.N. 493=9 C.L.J. 367.]

(2952)—*O.* 9, *r.* 13—*Formal appearance by defendant does not prevent decree from being regarded* ex parte.—The fact that defendant makes a bare appearance in Court and puts in a written statement does not prevent a decision from being regarded *ex parte* under the Civ. Pro. Code. PURUS RAM v. JUYUNTEE PERSHAD, **1 N.W.P. 154.** [*Con.*, 2 A. 67, P.C.]

(2953)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, s. 108)—*Case not to be opened as against non appearing defendant.*—Where a decree is set aside on the application of a defendant against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit, even though the cause of action be common against all the defendants. LALJI v. MT. AMTUL BASHIR, **15 C.P.L.R. 179.**

(2954)—*O.* 9, r. 13—*Objection after decree by defendant as to misjoinder of causes of action.*—Where one of several defendants, against whom a suit has been decreed, files a statement objecting for the first time that two distinct causes of action against two different individules have been improperly joined, the Court cannot re-open the whole case, or set aside the decree referring to the other defendants. HURO KRISHNO DOSS v. MOTTE CHAND BABOO, **8 W.R. 260.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*.

(2955)—*O.* 9, *r.* 13 (=*s.* 119, *Civ. Pro. Code*, 1859)—*Application by one defendant re-opens whole case against others—Plaintiff's appearance to object—Step in and of execution.*—An application under s. 119, Act VIII of 1859 by one of several defendants, re-opens the case against all the defendants, and the plaintiff's appearance to oppose it is a step taken to keep the decree in force. NISTARINEE DASSEE v. DEBNATH BOSE, **20 W.R. 286.**

(2956)—*O.* 9, *r.* 13 (=*old* s. 108)—*Summons not served*—Ex parte *decree—Sufficient cause for defendant's non-appearance.*—Where defendant swore that no summons was served in the case which led to the *ex parte* decree, and that the contract under which the case was decreed had been broken by plaintiff himself; *Held* that a sufficient case was shown for defendant's previous non-appearance, and a *prima facie* case leading to the conclusion that there had been a failure of justice. ANUND MOYEE DOSSEE CHOWDHRAIN v. ANUND SOONDUR MOZOOMDAR, **13 W.R. 237.**

(2957)—*O.* 9, *r.* 13 (=*old* s. 108)—*Absence of notice—Application for re-hearing.*—Where a party, alleging that property attached in execution was not hers, and that she had no notice of either suit or decree, makes an application for a rehearing under s. 119, Civ. Pro. Code, 1859, after the time allowed, she is entitled to a hearing if her plea is made out. SOOKH MOYEE DOSSEE v. NURMODA DOSSEE, **18 W.R. 210.** [*R.*, 25 W.R. 72.]

(2958)—*O.* 9, *r.* 13 (=*old s.* 108)—*Defendant prevented by plaintiff's fraud from appearance*—Ex parte *decision—Restoration.*—Where defendant is prevented by plaintiff's fraud from appearing on the last day of hearing, the suit is decided *ex parte*, and the first Court is right in restoring the case under Act VIII of 1859, s. 119. DENOO PAROYE v. CHINTA MONEE CHOWDHRY, **18 W.R. 457.** [*Con.*, 23 C. 733, F.B.]

(2959)—*O.* 9, *r.* 13 (=*old* s. 108)—*New trial granted—Allegation that summons not duly served—Dismissal of suit—Reversal of decree by lower appellate Court—Validity.*—Where, on the application of one out of many defendants, a new trial is granted, and the statement of another defendant against whom *ex parte* judgment was given, alleging that summons had not been duly served, was received, and the suit was dismissed *in toto*. *Held* that the lower Appellate Court in appeal ought not to reverse the decree as to the second defendant, on the ground that no petition was presented under s. 119 of the Code, but ought to try the case on the merits. KOROONA MOYEE DEBIA v. NUBO KISHEN MOOKERJEE, **11 W.R. 18** [*R.*, 6 C.L.J. 226.]

(2960)—*O.* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882)—Ex parte *decree—Satisfaction—Decree, setting aside of.*—Satisfaction of an *ex parte*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decree does not disentitle a judgment-debtor from applying to a Court to set it aside. ZENDOOLAL v. KISHORILAL, **1 Bom. L.R. 213=23 B. 716.**

(2961)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, *s.* 108)—*Judgment* ex-parte—*Service of summons on defendant—Substituted service—Residence out of jurisdiction.*—The Civil Justice Regulation requires that the service of summons on a defendant, shall, when practicable, be on the defendant in person ; if he cannot be found, it may be made on an adult male member of his family residing with him ; and when he cannot be found and there is no such person, service may be effected by posting the copy on the outer door of the house in which the defendant is dwelling, if he is dwelling at any place within the local limits of the jurisdiction of the Court. In s. 33 of the Regulation, the word "dwelling" is not used, but the word "resided," showing that a distinction was made between the case of a person permanently living in a place and a casual resident. The inference seems to be that, before the Court issues substituted summons, it should cause a summons to be served in one of the ways mentioned above on a permanent dweller within the jurisdiction and, when the defendant is out of the jurisdiction, service should be effected in the place where he dwells according to the rules there applicable. And this is only reasonable as the defendant, who is not trying to evade process, is entitled to have notice at his permanent dwelling-place, where he can make arrangements to meet the case that may be brought against him. This being so, s. 44 of the Regulation provides that, when a defendant proves to the satisfaction of the Court that the summons was not duly served, the Court shall pass an order setting aside the judgment *ex parte*. MAUNG KYWE v. MA SHWE ME, **U.B.R. 1892—1896, 262.**

(2962)—*O.* 9, *r.* 13 (=*s.* 108 *of* 1882)—Ex-parte *judgment—Act VIII of* 1859, *ss.* 116, 119.—Where a decree for possession is passed without any special orders under s. 116, Act VIII of 1859, regarding a defendant who did not appear, there has been no *ex-parte* judgment. SHEELABUTTY DEBIA v. TARINEE CHURN CHUCKERBUTTY, **9 W.R. 597.**

(2963)—*O.* 9, *r.* 13—*Refusal of retrial of* ex-parte *decree—Proceedings.*—A refusal of retrial of an *ex-parte* decree is final, and proceedings taken after it bad in law. RUNG LALL MISSER v. TOKHUN MISSER, **25 W.R. 304.**

(2964)—*O.* 9, *r.* 13 (=*s.* 119, *Civ. Pro. Code*, 1859)—*Decree*—Ex-parte.—The refusal by the Court to receive a written statement not tendered on the date fixed, does not render the decree in the suit *ex-parte*, when the issues in the cause were settled in the presence of the defendant's pleader, who was, moreover, permitted to cross-examine and did cross-examine the witnesses. RAGHAPA *bin* HANMAPA v. PARAPA *bin* SHIVAPA, **1 B. 217.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2965)—*O.* 9, *r.* 13 (=*Civ. Pro. Oode*, 1882, *s.* 108)—Ex-parte *decree, dismissal of application to set aside—Suit to set the decree aside on the ground of fraud, maintainability of.*—An application made by the present plaintiff under s. 108 of the Civ. Pro. Code of 1882 to set aside an *ex-parte* decree obtained against him by the defendant was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex-parte* decree and the proceedings relating to it were null and void as having been obtained by the exercise of fraud. The decree of the Court of first instance dismissing the suit as not maintainable was set aside by the lower appellate Court, and the High Court agreed with the latter for the reason that the application under s. 103 had never been heard on the merits and that the special grounds for the present suit were never considered by the Court. DWARKA PRASAD v. LACHHOMAN DAS, **21 A. 289=A.W.N. 1899, 67.** (24 C. 546, *F.*) [*R.*, 22 A.W.N. 187.]

(2966)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1859, *s.* 119, *and* 1877, *s.* 108)—Ex-parte *decree—Minor defendants—Non-appearance—Sufficient cause.*—In a suit against A and her minor sons, summons was served on A and she was *ex parte*. The suit was decreed against A personally and as guardian of her infant sons. Subsequently, A on behalf of her minor sons and on her own behalf applied to set aside the *ex-parte* decree on the ground that the summons had not been duly served. *Held* that the application must be granted, as the infants were not responsible for their non-appearance. The infants have a right to say that they have been prevented by sufficient cause from appearing when the case was called on. Whether the summons was served or not, the Court had power to set aside the decree as against them. The High Court, however, refused to interfere so far as A was concerned. KESHO PERSHAD v. HIRDAY NARAIN, **6 C.L.R. 69.** [*Expl.*, 5 C.W.N. 58 ; *R.*, 24 A. 383, F.B.=22 A.W.N. 76, 15 C.P.L.R. 179 ; *D.*, 6 C.L.J. 448.]

(2967)—*O.* 9, *r.* 13, *Punjab Courts Act*, 1884, *ss.* 17, 28, 35 (=*old s.* 108)—*Transfer of officer passing* ex-parte *decree—Application to set aside.*—An *ex-parte* decree was passed by a special Judge, invested with the powers of a Munsiff. An application to set it aside was, on his transfer made to another Judge invested with the same powers. The latter could not, under the Punjab Courts Act, 1884, ss. 17, 28, 35, reject the application on the ground that he was not the successor of the former, as the application was made to the Court which still continued to exist and whose business was directed to be done by the officer in question. KUTAB-UD-DIN v. RUPA, **158 P.R. 1890.**

(2968 & 2969)—*O.* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882)—Ex-parte *decree—Order to set aside on payment of plaintiff's costs—Non-compliance—Rejection of defendant's application—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Discretion of Court.—Where an order under s. 108 of the Code of Civil Procedure was granted to a defendant conditionally on his paying certain costs of the plaintiff by a date fixed in the order, and where, on the date so fixed, such costs not having been paid, the Court rejected the defendant's application: *held* that the Court was acting within the powers conferred on it by s. 108 of the Code of Civil Procedure and had exercised a sound discretion. BHIKHARI DAS v. JAWAHIR LAL, **A.W.N. 1892, 216.**

(2970)—*O.* 9, *r.* 13 (=*old s.* 108)—*Money deposited in Court—Application for it after 3 years—Limitation Act*, 1877, *sch* 2, *art.* 179.—The money deposited under this section becomes the decree-holder's money, if the *ex-parte* decree is upheld. No application for execution of the decree need be made. An application to obtain payment of the same may be made even after 3 years and would not be barred under art. 179, sch. II, Limitation Act. INAYAT ALI v. LACHMAN SINGH, **8 P.R. 1898.**

(2971)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, s. 108)—*Setting aside* ex-parte *order absolute for foreclosure.*—An *ex-parte* order absolute for foreclosure may be set aside on application made therefor. AMOLAKCHAND v. JAWHIR MAHOMED, **16 C.P.L.R. 92.**

(2972)—*O.* 9, *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882=*Civ. Pro. Code*, 1859, s. 119)—Ex-parte *judgment—Appeal.*—Where a defendant was absent when the adjourned hearing of his case commenced, but came into Court before judgment was recorded, and his evidence was on the record, the judgment against him was held not to be an *ex-parte* judgment within the meaning of s. 119, Act VIII of 1859 GORACHAND GOSWAMI v. RAGHU MANDAL, **3 B.L.R. App. 121.** [*App*, 2 A. 67, P.C.=5, I.A. 233.]

(2973)—*O.* 9, *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882)—*Application to set aside* ex-parte *decree under s* 90 *of the Transfer of Property Act.*—An application made under s. 108 of the Code to set aside an *ex-parte* decree passed under s. 90 of the Transfer of Property Act is not maintainable. GURDIN PANDY v. RAI GOKUL CHAND BAHADUR, 9 **O.C. 288** (15 A. 84, *R.*)

(2974)—*O* 9, *r.* 13 (=s. 119, *Civ. Pro. Code*, 1859—*Absence at adjourned hearing—Decree, ex parte—Appeal.*—Where a defendant is absent on the day to which a case is adjourned and the case is decreed against him, *ex parte*, he is not debarred from appeal under cl. 1, s. 118, Civ. Pro. Code (Act VIII of 1859). KALEE CHURN DUTT v. MODHOO SOODHUN GHOSE, **6 W.R. 86.**

(2975)—*O.* 9, *r.* 13—Ex-parte *decree, setting aside of—S.* 119 *of Civ. Pro. Code (Act VIII of* 1859)—Petitioner, under s. 119 of Civ. Pro. Code (Act VIII of 1859) alleged that an *ex-parte* decree had been obtained against him upon a petition of confession of judgment made by some person fraudulently engaged to personate him and prayed that the decree may be set aside. *Held* that the Court must enquire into the truth of the allegation made by the petitioner and, if the allegations are substantial, the *ex-parte* decree may be set aside. KAROONA MOYEE DOSSEE v. NUBO KISHORE SEIN, **6 W.R. Mis. 36.**

(2976)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, s. 108)—Ex-parte *decree setting aside of, when divisible—Defendants with separate defence—Appeal*—Where an *ex-parte* decree is divisible, it is, though in form a single decree, equivalent to two decrees, and when on an application by one set of defendants (A A) who had a separate defence it is set aside under s. 108, Civ. Pro. Code, it remains still a good and binding decree against the other set of defendants (B B) as the latter or no party to the re-hearing, and the first Court has no jurisdiction to re-try the case as against them, as they are no parties to the subsequent decree passed on the re-trial, and an application by them as against that decree is incompetent. MOHIM CHANDRA GUHA v. ANANDA CHARAN DUTT, **6 C.W.N. 109.** [*R.*, 6 C.L.J 246, 5 C.L.J. 202.]

(2977)—*O.* 9. *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882)—*T. P. Act. IV of* 1882, s. 89—*Mortgage decree for different sums against two sets of defendants—Procedure.*—Where, after an *ex-parte* decree for sale had been passed against three defendants, one of them got it set aside under s. 108 of the Civ. Pro. Code, and the decree eventually passed against him was only for a smaller sum than was originally decreed, while the original decree against the other two had become final, *held*, on an application for an order absolute under s. 89 of the T. P. Act, that the proper order to be passed was an order for sale of the whole hypotheca with the condition that the property belonging exclusively to the successful defendant should not be sold unless the property belonging to the others had been sold and had failed to raise the smaller sum. SHAIDA HUSSAIN v. HUB HUSSAIN, **25 A. 42=A.W.N. 1902, 189.** [*R.*, 6 C.L.J. 226.]

(2978)—*O.* 9, *r.* 13 (=s. 108, *Civ. Pro Code*, 1882)—*Adjourned date of hearing—Party not appearing—Filing written statement—Application to set aside decree.*—A defendant, after filing a written statement, failed to appear at any adjourned hearing and an *ex parte* decree was passed. *Held*, he can apply under s 108 of the Code to set aside the decree. MUNIAPPAN CHETTY v. BALAYAN CHETTY, **4 M.L.T. 21 =19 M L J. 222=35 M. 503.** (18 M.L.J, 51, 23 C. 738, 20 B. 390, 20 A. 195. *F.*)

(2979)—*O.* 9, *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882)—Ex-parte *decree set aside at the instance of some of several defendants—Effect—Revival of the whole case.*—Where the question involved

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in a case is whether the liability of the defendants is joint or several, and, in such case, the *ex-parte* decree is set aside, on the application of some of several defendants, the entire decree is set aside, and the trial *de novo* ought to be a trial of the whole case, in the presence of all the parties. *In re* HARI DAS KARMAKAR, **5 C. L. J. 202.** (6 C.W.N. 109, *D.*; 25 C. 155, *F.*) [*R.*, 6 C.L.J. 226.]

(2980)—*O. 9, r. 13 (=s. 108, Civ. Pro. Code, 1882)—Suit to set aside decree—Decree* ex parte *—Only fraud, non service of summons—Application to set aside* ex-parte *decree dismissed—Suit not maintainable.*—Where the plaintiff claimed to set aside a decree, on the ground of fraud, and the only fraud alleged was the non-service of summons, and the plaintiff had previously unsuccessfully applied to set aside the *ex parte* decree under s. 108 of the Code, *held* that the suit was not maintainable. PURAN CHAND v. SHEO DAT RAI, **4 A. L J. 51=A W. N. 1907, 31=29 A. 212.** (28 C. 475, 29 C. 395, *D.*) [*F.*, 29 A. 608=4 A.L.J. 668=A.W. N. 1907, 191; *R.*, 37 C. 197=11 C.L.J. 250=14 C.W.N. 507=5 Ind. Cas. 198.]

(2981)—O. 9, *r.* 13 (=s. 108, *Civ. Pro. Code*, 1882)—*Decree on an alleged compromise repudiated by defendants, whether* ex parte.—Where a Court finds that an alleged compromise, on which the decree was based, was not actually entered into by the defendants, that the defendants were not duly served with summonses and were not present or represented at the trial, it is justified in holding the decree so made as an *ex-parte* decree and that the defendants are entitled to apply under s. 108. BHOLAI NASKAR v. ALACH NASKAR, **3 C.L.J. 158.** [*R.*, 3 C.L J. 160, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.]

(2982)—*O* 9, *r.* 13 (=s. 108 *Civ. Pro. Code*, 1882)—Ex-parte *decree against a number of defendants—One defendant applying to set it aside—Decree set aside as against all defendants—Validity.*—The petitioner brought a suit to recover a certain sum of money from three persons personally and as managers of a devastanam, being revenue paid by him for the defendants. The defendants did not appear and the petitioner obtained an *ex-parte* decree ordering the defendants personally and from the devastanam to pay to the plaintiff the amount claimed with interest and costs. The third defendant applied, under s. 108, Civ. Pro. Code, to have the decree set aside, and the District Munsiff set aside the whole decree as against all the defendants. *Held*, that the *ex-parte* decree as against the defendants, other than the one who had shown sufficient cause within the meaning of s. 108, could not be set aside. VALIA KONIKKAL EDATAIL CHERIA PANJI ACHAN v. MARUTHA VEERA KAVUNDAN, **4 M.L.T. 230.** (26 M. 604, 18 B. 142, 8 W.R. 260, 25 C. 155, 4 C.W.N. 456, 24 A. 383, *R. & Expl.*]

(2983)—*O* 9, *r.* 13 (=s. 108, *Civ Pro. Code*, 1882)—*Application to set aside* ex-parte *decree*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—Dismissal—High Court reversing dismissal and ordering remand — Construction. — The application of defendant, under s. 108 of the Civ. Pro. Code, to set aside an *ex-parte* decree was dismissed by the Subordinate Judge. Against that order of dismissal, an appeal was taken to the High Court by the defendant. The High Court set aside the order of the Subordinate Judge and ordered that "the case be and it hereby is remanded under s. 562 of the Code to the Court of the said Subordinate Judge to be disposed of on the merits." *Held*, on the construction of this order, that what was remanded was merely the application immediately before the Court, to wit the application to set aside the decree, and that it was that application which the Subordinate Judge would, under the remand, proceed to dispose of by allowing the respondent to endeavour to satisfy him of the conditions specified in s. 108, and then if that be done, by setting aside the decree. RAI RADHA KISHEN v. COLLECTOR OF JAUNPUR, **3 Bom. L R. 78.**

(2984)—*O.* 9, *r.* 13 (=s. 119, *Civ. Pro. Code*, 1859)—*Application for re-trial of case decided* ex parte—*Calling for record—Appellate Court.*—Where the lower appellate Court admits an application under s. 119, Act VIII of 1859, for re-trial of a case decided *ex parte*, it does right to sent for the record that the case as a suit may be tried by the appellate Court. KHOOB LALL SAHOO v. SHAIKH KODIR BUKSH, **15 W.R. 431.**

(2985)—*O.* 9, *r.* 13 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 119)—Ex-parte *judgment in appeal—Remedy.*—Where an *ex-parte* judgment is passed in a regular appeal, the respondent cannot prefer a special appeal from judgment but he must first proceed under s. 119, Civ. Pro. Code, to get rid of the *ex-parte* judgment against him. DEVAPPA SETTI v. RAMANADHA BHATT, **3 M H.C. 109.** [*Diss.*, 6 M.H.C. 1, 20 W.R. 402; *Not F.*, 6 B.H.C. 161; *F.*, 22 W.R. 527.]

(2986)—*O.* 9, *r.* 13—*Suit under s.* 59, *Act X of* 1859, *revival of—Effect.*—The revival of a suit under s. 58, Act X of 1859, does not reopen the case as regards all the defendants, but only as regards the party, who has applied to have his particular case revived and heard on the merits. BROJONATH SURMAH CHUCKERBUTTY v. ANUND MOYEE DEBIA CHOWDHRAIN, **7 W.R 237.**

(2987)—*O.* 9, *r.* 13 (=s. 108 *of* 1882)—*Revival of suit decreed* ex parte—*Review.*—Where a defendant in a suit decreed *ex parte* obtains a revival of it, no application for review is necessary on his part. NUBO KRISTO MUKERJEE v. NUDIAR CHAND HATTEE, **12 W.R. 374.**

(2988)—*O* 9, *r.* 13 (=s 108 *of* 1882)—Ex-parte *decree—Review—Appeal.*—In the case of an *ex-parte* decree, the proper course is an application, for review not a special appeal. BEEJOY GOBIND SIRCAR v. RADHA BENODE MISSER, **10 W.R. 348.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(2989)—*O.* 9, *r.* 13 (=*old s.* 108)—*Revision of order setting aside* ex-parte *decree*—S. 115 (=*s.* 622, *Civ. Pro. Code*, 1882).—Where revision was sought for, of an order made under s. 108, Civ. Pro. Code, 1882, setting aside an *ex-parte* decree, seven years subsequent to the date of the decree, *held* that no revision could, under s. 115 (=old s. 622), be granted ; the suit being a suit from which an appeal could be preferred, the word "case" meaning the whole suit. HASSAN ALI SHAH v. SALIG RAM, **125 P.R. 1892.** (114 P.R. 1883, *F.*) *But, see*, **60 P.R. 1897, F.B.** [*R.*, 76 P.R. 1902.]

(2990)—*O.* 9, *r.* 13—Ex-parte *hearing—Duly appointed pleader not instructed or instructed not to answer—Appeal.—Held* that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant but not instructed to answer, or instructed not to answer at all, was an *ex-parte* hearing, and that no appeal lay from a judgment passed in such suit. BHIMACHARYA *bin* VYANKATACHARYA v. FAKIRAPPA *bin* ANANDAPPA, **4 B.H.C. A.C. 206.** [*Diss.*, 20 W.R. 53 ; *Appr.*, 6 B.L.R. O.C. 688, 23 B. 414 ; *R.*, 15 W.R 502, 16 B. 23, 7 A. 538, 5 C.L.J. 247, F.B., 34 C. 403, F.B., 11 C.W.N. 329, F.B., 2 U.B.R. 1897—1901, 240.]

(2991)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, *s.* 108)—*Pleader retiring at hearing for want of instructions—Whether judgment* ex parte.—Where the pleader for the defendant says, on the date of hearing, that he has no instructions, and retires from the case, and a judgment follows, such judgment is an *ex-parte* judgment, within the meaning of s. 108, Civ. Pro. Code. SHANKAR DAT DUBE v. RADHA KRISHNA, **20 A. 195=A.W.N. 1898, 17.** (19 A. 355, 23 C. 738, 5 I.A. 233, *R.*) [*Affirm.*, 23 A. 220, P.C.; *Appr.*, 23 B. 414 ; *R.*, 22 A. 66, F.B., 34 C. 403, F.B.=11 C.W.N. 329=5 C.L.J. 247=4 M.L.T. 123, 1 S.L.R. 115, 31 M. 505=4 M.L.T. 216=19 M.L.T. 222; *D.*, 20 A. 294, 17 C.P.L.R. 1.]

(2992)—*O.* 9, *r.* 13 (=*old s.* 108)—*Appearance by pleader not sufficiently instructed to proceed with case—Case coming on hearing—Decree passed not* ex parte.—Where a duly-authorized vakeel of the defendant appears for his client, and the case comes on for hearing, the decree on such hearing is not an *ex-parte* decree, even though the pleader be not sufficiently instructed to proceed with the case. DHAN BHAGUT v. RAMESSUR DUTT SINGH, **20 W.R. 53.** [*R.*, 16 B. 23, 8 C.W.N. 621, 11 C.W.N. 329, F.B., 34 C, 403, F.B.]

(2993)—*O.* 9, *r.* 13 (=*s.* 108, *Civ. Pro. Code*, 1882=*s.* 119, *Civ. Pro. Code*, 1859)—*Appearance—Appearance by pleader*—Ex-parte *decision.*—An appearance in person or by pleader, without putting in any answer or written statement, is an appearance within the meaning of s. 119 of Act VIII of 1859, and the judgment pronounced thereafter is not an *ex-parte* judgment, and therefore an appeal will lie. GOLUCKBUR v. BISHONATH GEEREE, **Marsh 32.**

(2994)—*O.* 9, *r.* 13 (=*Civ. Pro. Code*, 1882, *s.* 108)—Ex-parte *decree—Appearance of party.*—A party to a suit cannot claim to have a decree against him set aside as an *ex-parte* decree, when, in fact, an appearance was made by a pleader in his behalf on the day fixed for the hearing, even though such pleader was, for some reason, unable to proceed with the suit. GANGA DAS v. INDARMAN, **A.W.N. 1893, 208.** (A.W.N. 1893, 25, *Followed.*) [*D.*, 18 A. 241].

(2995)—*O.* 9, *r.* 13—*Appearance of defendant through pleader—No written statement filed*—Ex-parte *decision—Appeal.*—Where the defendant appeared through a pleader when the case was tried, *held* that a decision pronounced in such a case cannot be legally called an *ex-parte* decree precluding an appeal, because the defendant had not filed any written statement or made any verbal one. JANKEE RAM DOSS v. CHANDRABULLY DEBIA, **7 W.R. 205.**

(2996)—*O.* 9, *r.* 13 (=*s.* 108 *Civ. Pro. Code*, 1882)—Ex-parte *decree against several defendants—Execution against some of them—Application by others to set the decree aside.*—Where an *ex-parte* decree is passed against more defendants than one, and the decree is executed against one of them only than that is not an execution of process for enforcing judgment against the others within the meaning of art. 164 of the Limitation Act, 1877. The latter can, therefore, apply to have the *ex-parte* decree set aside within thirty days of the date of any process in execution against them. HANMANT v. SHANKAR, **9 Bom. L.R. 323=31 B. 303.**

(2997)—*O.* 9, *r.* 13—*Application to set aside* ex-parte *decree*—S. 119 *of Act VIII of* 1859 (*Civ. Pro. Code*)—*Limitation.*—An application by a defendant to set aside an *ex-parte* decree passed against him under s. 119 of Act VIII of 1859 is in time, if it is made within 30 days after the execution of any process against the person or property of the judgment-debtor—process so executed as to make it certain that the debtor has got notice of the execution of the decree against him. SHIB CHUNDER BHADOORE v. LACKEE DEBIA AHOWDHAR IN, **6 W.R. Mis. 51.**

(2997-*a*)—*O* 9, *r.* 13—Ex-parte *decree—Setting aside—Defendant present in Court house though not present in Court when cause called out—Appearance—Sufficient cause.*—When the defendant is in fact present in the Court-house on the day of hearing, but does not appear in Court when the case is called out, and a decree is passed against him in his absence, it is, so far as he is concerned, *ex parte*. Where a party is alleged to have been seen within the precincts of the Court on the day of

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the trial of a case, it does not follow that he must be taken to have appeared within the meaning of O. IX, r. 13 of the Code of 1908. The phrase "to file an appearance" is used without implying that the party so filing an appearance has been physically present in Court. The mere bodily presence of a party, who has no legal assistance and is perhaps too terrified to put himself forward and endeavour to represent his own case, does not satisfy all the required connotation of the word "appearance." MANILAL JESHANGLAL v. VIRCHAND JEYCHAND, **13 Bom. L.R. 1222.**

(2997-*b*)—*O. 9, r. 13 (=Civ. Pro. Code, 1859, s. 119)—Defendant summoned in wrong name—Summons served on the right person*—Ex parte—*Fresh suit.*—A summons was erroneously addressed to defendant under a wrong name, but it was served on the right person. He did not appear to answer the suit and an *ex-parte* decree was passed against him. The error was detected, when execution was applied for. *Held* that the plaintiff should sue again as if nothing had been done. HURSAHAI v. BHAWANI DASS, **9 P.R. 1868.**

(2997-*c*)—*O. 9, r. 13 (=Civ. Pro. Code, 1859, s. 119)—Defendant present at institution of suit and appeal—Absence at trial on remand*—Ex parte.—Where a defendant appeared in the suit at its institution and on appeal and in the Chief Court, and failed to appear at the trial on remand, it was held that the judgment passed on remand was *ex parte* within the meaning of s. 119 of Act VIII of 1859 and therefore no appeal would lie from it. MUSSAMMAT GOOJREE v. RUTTUN CHAND PUREE, **3 P.R. 1869.**

(2997-*d*)—*O. 9, r. 13 (=s. 119, Civ. Pro. Code, 1859)—Execution of an* ex parte *decree—No process for enforcing judgment—Application to set aside* ex parte *decree.*—In the execution of an *ex parte* decree, the usual notice to show cause was issued to the defendant who being absent was not served. Upon the defendant's non-appearance, order was issued to carry out the execution of the decree. About a year afterwards the defendant applied under s. 119 of Act VIII of 1859 to set aside the *ex parte* decree urging that he had no notice either of the suit or of the execution of decree and that he was still in possession of lands. *Held* that no process for enforcing the judgment has been executed and consequently the application was not barred by time. MOOLA SINGH v. WASAWA SINGH, **94 P.R. 1869.**

(2997-*e*)—O. 9, r. 13—*See* APPEAL—EX PARTE CASES, 1 A. 748, F.B., 60 P.R. 1883, 23 W.R. 147.

(2997-*f*)—O. IX, r. 13—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 8 B.L.R. 78=15 W.R. 315.

(2997-*g*)—O. IX, r. 13—*See* ATTACHMENT—ALIENATION DURING ATTACHMENT, 1 B.L.R.A.C. 71=10 W.R. 99.

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(2997-*h*)—O. IX, r. 13—*See* DECREE—MISCELLANEOUS, 1 Bom.L.R. 213=23 B. 716.

(2997-*i*)=O. IX, r. 13—*See* EX PARTE DECREE, 59 P.R. 1871, 152 P.R. 1879.

(2997-*j*)—O. IX, r. 13—*See* LACHES, 5 W.R. Mis. 11.

(2997-*k*)—O. IX, r. 13—*See* LIMITATION—GENERAL, A.W.N 1907, 204=4 A L.J. 552=29 A. 623.

(2997-*l*)—O. IX, r. 13—*See* LIMITATION ACT, 1908, art. 164, 13 W.R. 436, 17 B. 507.

(2997-*m*)—O. IX, r. 13—*Ex parte* decree set aside—Trial of suit *de novo*—*See* MINORITY, 6 Ind. Cas. 373.

(2997-*n*)—O IX, r. 13—*See* MORTGAGE—FORECLOSURE, 6 Ind. Cas. 306.

(2997-*o*)—O. IX, r. 13—*See* PRACTICE AND PROCEDURE, 3 C. 228.

(2997-*p*)—O IX, r. 13—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 38, 3 C. L.J. 199.

(2997-*q*)—O. IX, r. 13—*See* RES JUDICATA—ADJUDICATIONS, A.W.N. 1907, 191=4 A. L.J. 668=29 A. 608.

(2997-*r*)—O. IX, r. 13—*See* RES JUDICATA—MISCELLANEOUS, A.W.N. 1882, 4.

(2997-*s*)—O. IX, r. 13—*See* SUMMONS, 3 B. L.R. App. 7, 24 W.R. 262.

(2997-*t*)—O. IX, r. 13—Mortgage—Order absolute for foreclosure or sale without notice to mortgagor—Maintainability of application to set aside such order—*See* TRANSFER OF PROPERTY ACT, ss. 87, 89, 32 C. 253, F.B.=9 C.W.N. 81.

(2997-*u*)—O IX, r. 13—*See* NOS. 94,346, 347, 518, 953, 1709, 1893, 1903, 1924, 1925, 2191, 2192, 2290, 2709, 2722-*a*, 2727, 2728-*a*, 2738, 2745, 2746, 2841, 2841-*b*, 2848, 2854, 2855, 2856, 2856 *a*, 2857, 2858, 2859, 2860, 2885, 2890-*a* & *b*, 2891, 2905-*d* to *g*, 2907, 2908, 2908-*b*, 2914, 2915, 2916, *supra* and No. 3423 *infra*.

(2998)—*O. 9, r. 13, s. 47 (ss. 108, 244, Civ. Pro. Code, 1882)—Executions sale and its confirmation—Subsequent setting aside of decree—Effect—Decree-holder, purchaser—Application for setting aside sale.*—A wide and liberal construction must be placed on s. 244. (25 C. 175, 3 C.W.N. 6, 26 C. 727, *Relied on.*) Distinction between the case of the decree-holder and of a third party being the auction-purchaser, referred to, and explained. (10 A. 166, P.C., 10 C. 220, *R.*) Where the decree-holder is himself the auction-purchaser, and the *ex parte* decree, in execution of which he purchased, has been subsequently set aside under s. 108, Civ. Pro. Code, 1882, the sale cannot stand, even though it had been duly confirmed. (15 I.A. 15, 10 C. 220, *R.*; 19 W.R. 416, *D.*) An

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application to set aside the sale under the circumstances come under s. 244. SET UMEDMAL v. SRINATHRAY, **27 C 810=4 C.W.N 692.** (25 C. 175, 3 C.W.N. 6, 26 C. 727, *R.*) [*F.*, 9 C.W.N. 134; *App.* 31 C. 499; *R.*, 27 M. 98, 6 C.L.J. 102, 5 C.L.J. 328, 35 C 61=11 C.W.N. 1011=6 C.L.J. 320, F.B.; *D.*, 6 C.L.J. 92, 13 C.W.N. 710.]

(2999)—*O.* 9, *r.* 13, *s.* 47 (=*Civ. Pro. Code*, 1882, ss. 108, 244)—Ex parte *decree, sale under—Decree set aside.*—Where the decree-holder purchases property sold in execution of an *ex parte* decree which was subsequently set aside under s. 108, Civ. Pro. Code, it is competent to a Court under s. 244 to go into the question of the validity of the sale and to determine that the sale is bad. SRI MAHARANI BENI PERSAD KOERI v. LOKHI RAI, **3 C.W.N. 6** (19 C. 683, 17 C. 769, *Relied on.*) [*F.*, 27 C. 810=4 C.W.N. 692.]

(3000)—*O.* 9, *r.* 13, *s.* 47, *O.* 21, *r.* 90, s. 99 (=ss. 108, 244, 311, 578, *Civ. Pro Code*, 1882) —*Suit to set aside sale held in execution of rent-decree, if maintainable—Rent-decree* ex parte, *fraudulent—Sale, collusive—Suit, if may be treated as an application under s* 244—*Limitation Act* (XV *of* 1877), *sch. II, art.* 178—*Time from which limitation runs—Purchaser, remedy of—Demand, order of, if proper, when original suit not decided on a preliminary point—Prejudice.*—An execution sale may be challenged on the ground of fraud in the execution proceeding; it may also be challenged on the ground that the decree, on which the proceedings are founded, is itself tainted with fraud. In the former case, the remedy of the person affected, is by an application under s 244 of the Code of Civil Procedure. In the latter case, the remedy is by a regular suit. (19 C. 683, 21 C. 605, 3 C.W.N. 395, *R.*) If the decree is tainted with fraud, a suit will lie to set aside the execution sale, even though the decree may have been previously set aside under s. 108 of the Code of Civil Procedure, and there is no subsisting decree to be set aside in the suit, in which the sale is impeached. (27 C. 197, *R.*) Cases can only be enquired into under s 244, Civ. Pro. Code, when the existence of a decree, which is susceptible and capable of execution, is conceded, and it does not apply to a case, when the object is to impugn the decree itself. (31 C. 179, 4 C.L.J. 475, *R.*) If there was fraud in the execution proceedings, it would be open to the party affected by the fraud, to make an application under s. 244, Civ. Pro. Code; if, instead of an application, he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance, and there is no real want of jurisdiction. (19 W.R. 90, 14 C. 605, 22 C. 483, 3 C.W.N. 395, 18 A. 106, *R.*) The application to have the sale set aside under s. 244, Civ. Pro. Code, may be made within 3 years from the date of the sale, under art. 178 of the sch. II of the Limitation Act. (2 C.W.N. 691, 26 C. 324, *R.*) S. 578

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of the Civ. Pro. Code cures the defect in an irregular order of remand made by an appellate Court, unless the merits of the case are shown to have been affected in any way by the order. DEBENDRA NATH BHATTACHARJEE v. PRASANNA KUMAR CHAKRAVARTI, **5 C.L.J. 328.** (5 C.L.J. 71, *R.*)

(3001)—*O.* 9, *r.* 13, *s.* 50, *O.* 22, *r.* 4 (=ss. 108, 234, 368, *Civ Pro Code*, 1882)—Ex parte *decree against a defendant—Application by representatives of the defendant to be brought on record, maintainability of.*—An *ex parte* decree was passed against a defendant in a suit. An application was made, after the death of such defendant, by his representatives, praying to set aside the decree under s. 108 of the Code and to add them (the representatives) as the legal representatives of the original defendant. *Held*, where a defendant dies before a decree, s. 368 of the Code provides for an application by the representatives of the deceased defendant to be brought on record. In this case, the defendant died after decree. The section applicable after decree is s. 234 of the Code, which does not authorise any application to be made by the representatives of the deceased judgment-debtor to bring them on the record, but only authorises the plaintiffs to make such an application. S. 108 of the Code only authorises applications by the defendant against whom an *ex parte* decree has been made. Therefore, the application could not be entertained. SAMBASIVA CHETTY v. VEERAPPARUMAL MUDALI, **28 M. 361.** [*D.*, 6 M.L.T. 269.]

(3001-*a*)—O. 9, r. 13, s. 96—*See* APPEAL—EX PARTE CASES, 9 M. 445, 23 M. 260, 4 A. 387=A.W.N. 1882, 87. F.B.

(3002)—*O.* 9, *r.* 13, ss. 96, 114, *O.* 47, *r.* 1 (=*Civ. Pro. Code*, 1882, ss. 108, 540, 623)—*Suit to set aside decree—Decree not tainted by fraud—Right of suit.*—The only ways in which a decree may be set aside by a party thereto, are by appeal, by proceedings under s. 108, Civ. Pro. Code, and similar sections, and by application for review. Except in case of fraud, a suit does not lie to set aside a decree. SADHO MISSER v. GOLAB SINGH, **3 C.W.N. 375.** [*R.*, 10 C.W.N. 1024, 13 C.W.N. 1197.]

(3003)—*O.* 9, *r.* 13, *s.* 104, *O.* 43, *r.* 1, *s.* 141 (=ss. 108, 588 (9) *and* 647, *Civ. Pro. Code*, 1882)—Ex parte *order under* s. 280 *order refusing to set aside an, whether appealable under* s. 588 (9).—S. 588 (9) of the Code applies only to what is expressly mentioned therein, namely, orders, rejecting applications, under s. 108, for an order to set aside a decree *ex parte*. The applicant in this case had not made an application to set aside a decree. What had been passed against him was an order under s. 280, which is not a decree, because, though, the procedure prescribed with the respect to decrees in s. 108 of the Code has been extended by s. 647 to orders passed *ex parte*, that section cannot, in any way, operate so as to allow an

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appeal under s. 588 (9), in which only decrees are mentioned and not orders nor any reference made to s. 647. LU BEIN v. PO SEIN, **3 L.B.R 203, F B.** (16 C. 31 ; *Diss.*, 11 M. 26, *R.*)

(3004)—*O. 9, r. 13, s. 105 (=ss. 108, 591, Civ. Pro. Code, 1882)*—Ex parte *decree affirmed in appeal—Application to set it aside—Jurisdiction—Challenged in appeal against final decree.*—When a decree originally passed by the Court of first instance is affirmed in appeal, the decree of the appellate Court becomes the decree in the cause, and the Court of first instance has no jurisdiction to entertain an application to set aside that decree. A decree passed *ex parte* against one of the defendants was affirmed on appeal of the defendants who had appeared. On the application of the defendant who had not appeared, the Court of first instance set aside the decree. *Held*, that the Court acted *ultra vires*, and the appellate Court could set it aside when an appeal was filed against the final decree, the orders referred to in s. 591 of the Code of 1882 being orders which the Court has jurisdiction to make, but in making which it commits an error or irregularity. PALAKDHARI RAI v. MANKARAN RAI. **7 A.L J. 598 =6 Ind. Cas. 205.** (5 Ind. Cas. 525, *R.*)

(3005)—*O 9, r. 13, s. 105 (=ss. 108, 591, Civ. Pro. Code, 1882)—Jurisdiction—Account suit valued at less than ten thousand rupees before Munsiff—Final decree exceeding pecuniary limit—Appeal—Preliminary decree—Final decree—Court Fees Act (VII of 1870, s 7, paras 4, 5, 6, 9, 10—Suits Valuation Act (VII of 1887), s. 8—Bengal N.W P and Assam Civil Courts Act, XII of 1887), s. 19.*—In a suit for accounts and recovery of papers, brought before a Munsiff, who had pecuniary jurisdiction to try suits up to Rs. 1,000 in value, the claim for recovery of papers was valued at Rs. 50 and that for accounts at Rs. 150, with a prayer that additional Court-fees would be paid for any amount to be found due in excess ; after the preliminary decree the amount due was ascertained to be Rs. 8,424. *Held*, that the plaintiff cannot obtain a decree for a sum above Rs. 1,000, *i.e.*, in excess of the limit of the Munsiff's pecuniary jurisdiction. That the plaintiff ought to be called upon to relinquish the excess and thus place the case formally within the pecuniary jurisdiction of the Court of his deliberate choice, or the Court may in such a cases remit the excess or presume the excess to be remitted. (21 C. 550, 25 M. 543, *D.*) In an appeal against the final decree, the propriety of the preliminary decree may also be questioned. The dismissal for default of an application under s. 108, Civ. Pro. Code, to set aside an *ex parte* preliminary decree, is no bar to the decree being questioned in an appeal preferred against the final decree. The refusal of an application under s. 108, Civ. Pro. Code, is no bar to the trial in a subsequent proceeding of a question which the refusal of the application has not determined. (5 C.W.N. 757=I.L.R. 28 C. 475, 6 C.W.N. 473=I.L.R. 29 C. 395, *Relied on.*) Where, on the failure of arbitrators to submit their award on the day fixed, the Court proceeded to try the suit and passed a decree *ex parte* against the defendants. *Held*, that the dismissal of the defendants' application under s. 108, Civ. Pro. Code, for default was no bar to the Appellate Court setting aside the *ex parte* decree on the defendants' appeal, on the ground that the suit should not have been tried on a date on which it had not been fixed for hearing GOLAP SINGH v. INDRA COOMAR HAZRA, **13 C.W.N. 493=9 C L.J. 367=5 M.L. T. 360=1 Ind Cas. 86.**

(3006)—O. IX, r. 13, s. 105—Maintainability of objection against order setting aside *ex parte* decree, in appeal against decree in suit—Order setting aside *ex parte* decree, whether affects decision of the case—*See* APPEAL—ORERS, 9 C.W N. 584.

(3007)—*O. 9, r. 13, s. 114, O. 47, r. 1 (=ss. 108, 623, Civ. Pro. Code, 1882)—Appearance of parties.*—S. 623 of the Civ. Pro. Code, 1882, applies to all cases whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants. HARIHUR PERSHAD NARAIN SINGH v. BUDDU PERSHAD, **13 C.L.R. 254.**

(3008)—*O. 9, r. 13, s. 114, O. 47, r. 1 (=ss. 108, 623, Civ. Pro. Code, 1882)—Ex parte proceedings, setting aside of—Revival of suit—Jurisdiction of First Court after Appellate Court's decree*—Where a suit, against four defendants, was dismissed after being contested by defendants Nos. 1 and 2 only, and on appeal a decree was passed against defendants Nos. 3 and 4, who had been made parties to the appeal: *Held*, that the first Court had no jurisdiction to revive the suit, upon an application of defendants Nos. 3 and 4, under s. 108 or 623 of the Civ. Pro. Code, 1882, as the result of such revival would be to interfere with the decree of the Appellate Court. BISWAMBHAR MIRDHA v. SARUP CHANDRA GAIN, **1 Ind. Cas. 186.**

(3009)—*O 9, r. 13, s. 114, O. 47, rr. 1, 7 and 9 (=ss. 108, 623, 629, Civ. Pro. Code, 1882)—Review—Application by representatives of a deceased party for review of ex parte decree against the latter—Appeal against order admitting application for review.*—L, father of the respondents, obtained a decree against the appellant for partition of a half share in certain immoveable property. The appellant objected, under s. 244 of the Code, to a portion of the property decreed and his application was granted *ex parte* by the Subordinate Judge on the 12th September 1903. L seems to have been ill at the time and died soon afterwards. On the 12th December, his sons asked for a review of the *ex parte* order. The Subordinate Judge granted the review, and restored the original decree. The District Judge maintained this order. *Held*, that, notwithstanding s. 108, the terms of s. 623 were sufficiently wide to

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admit of an application being made by the representatives of a deceased party, who would be materially affected by the decree ; and that, having regard to provisions of s. 629, no appeal lay against the order admitting the application for review except on the question of limitation. DEBI DASS v. NARAIN PERSHAD, **9 O.C. 35.**

(3010)—*O. 9, r. 13, s. 115 (=ss. 108, 622, Civ. Pro. Code, 1882)—Re-opening a suit without enquiry, a material irregularity within s. 622.*—In this case the Court of first instance, in the matter of an application of the respondent to get an *ex parte* decree set aside, sent notice to the parties and forthwith set aside the *ex parte* decree, and proceeded to try the regular suit. *Held*, on revision, that the Court, by re-opening the regular case, as it did, without making enquiry and satisfying itself on the points specified in s. 108, acted illegally or with material irregularity, within the meaning of s. 622 of the Code. The necessity of notice to the opposite party shows that the Legislature intended that the opposite party should have the opportunity of opposing the application and the Court in having re-opened the case, immediately after giving notice and without making any enquiry at all, failed to carry out the intention of the Legislature and acted in a manner in which s 108 did not authorise it to act. NGA THA DIN, MI TIN v. NGA PO CHAN, **U.B.R. 1906, Civ. Pro. Code, 42.** (U.B.R. 1904—1905, Civ. Pro. Code, p. 26, *R.*)

(3010-*a*)—O. IX, r. 13, s. 115—*See* REVISION—GENERAL, 29 C. 33.

(3010-*b*)—O. IX, r. 13, ss. 115, 141—Setting aside *ex parte* order absolute for foreclosure—Right to notice before order absolute—Interference in case of improperly delaying or refusing order absolute—*See* MORTGAGE—FORECLOSURE, 3 N.L.R. 55.

(3010-*c*)—O IX, r. 13, s 141—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 38, Chap. VII, 8 Bom. L R. 803.

(3011)—*O. 9, r. 13, s. 144 (1) (=ss. 103, 583, Civ. Pro. Code, 1882)—Civ. Pro. Code (Act V of 1908), s. 144—Ex parte decree—Setting aside—Sale under decree set aside—Subsequent decree—Sale not revived.*—After an *ex parte* decree is set aside under s. 108, it cannot, by any subsequent proceeding be taken to be revived, and, therefore, a sale held under the *ex-parte* decree must be set aside when the decree itself is set aside; and if there be again a decree made against the defendant, the new decree is not a revival of the former decree, and the sale cannot be revived. RAGHUNANDAN SINGH v. JAGDIS SINGH, **3 Ind. Cas. 30=14 C.W.N. 182.**

(3011-*a*)—O. IX, r. 13, O. VIII, r. 10—*See* LIMITATION ACT, 1908, ss. 3, 4 and 5, 4 O.C. 372.

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(3012)—*O. 9, r. 13, O. 11, r. 21 (=Civ. Pro. Code, of 1882, ss. 108, 136)—Failure to file affidavit of documents—Defence struck out and decree passed—Ex parte decree, meaning of—S. 136, construction of.*—Where the defendants had entered appearance and filed written statements, and on their failure to file their affidavit of documents, their defence was struck out under s. 136, Civ. Pro. Code, and the case was heard as an undefended cause and a decree made, and an application was subsequently made under s. 108, Civ. Pro. Code, to set aside the decree, *held* that the wording of s. 108, as well as its position in the Act, shows that its operation is limited to decrees made *ex parte* under the provisions of Chapter VII, and does not govern other decrees made *ex parte*, unless where it has been extended to these decrees by other provisions of the Code, and that the decree was not an *ex parte* decree within the meaning of s. 108, Civ. Pro. Code. Whatever may be the effect of the clause "and to be placed in the position as if he had not appeared and answered" in s. 136, Civ. Pro. Code, it does not introduce into the class of cases dealt with by s. 108, a new class of cases of an entirely different character. KESHARIA ACCOMAR SREESUNGJEE v. POTOOAH SETT, **2 C.W.N 676.** (7 M. 159, *R.*; 9 C. 923, *D.*)

(3012-*a*)—O. IX, r. 13, O. XI, r. 21—*See* APPEAL—EX PARTE CASES, 7 A. 159=A.W.N. 1884, 313.

(3013)—*O. 9, r. 13, O. 17, r. 2 (=ss. 108, 157, Civ. Pro. Code, 1882)—Absence of defendant at adjourned hearing—Decree passed if ex parte.*—The provision in s. 157 of the Civ. Pro. Code, 1882, that "the Court may proceed to dispose of the suit, etc.," is only as regards the procedure of the Court. But if such procedure includes the making of an *ex parte* decree, there is no reason for holding that the decree is not subject to the usual incidents of such decrees (*viz.*, an application by the absent defendant to set it aside and have the suit restored, as provided by s. 108 of the Civ. Pro. Code). It is plain that the absent defendant may be able to show a perfectly good reason for his absence on the day of the *adjourned* hearing, and if he can do so, the injustice of deciding behind his back would be just as great as on the *first* hearing. *Held*, therefore, that a defendant is entitled to avail himself of s. 108 of the Civ. Pro. Code, 1882, where an *ex parte* decree was passed against him at an adjourned hearing. R. A. HILDRETH v. SAYAJI PIRAJI, CONTRACTOR, **20 B. 380.** (7 A. 538, 5 I.A. 233, P C., *R.*) [*F.*, 31 M. 505=4 M.L.T. 216 =19 M.L.J. 222; *R.*, 2 N.L R. 179.]

(3014)—*O. 9, r. 13, O 17, r. 2 (=Civ. Pro. Code, 1882, ss. 108, 157)—Suit—Adjournment of hearing—"Appearance" of defendant.*—Where there is nothing on the record of a suit to show that the defendants had done anything beyond instructing their pleader at the outset

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to defend the suit, the mere presence of the pleader at an adjourned hearing, when evidence is recorded on issues of fact which had been settled, does not constitute an appearance of the parties, and the decree passed against the defendants under such circumstances, would be an *ex-parte* decree. RAMTAHAL RAM v. RAMESHAR RAM, **8 A. 140=A.W.N. 1886, 42.** (7 A. 538, *F.*) [*Appr.*, 23 B. 414; *Cons.*, 23 C. 991; *R.*, 18 A. 241, U.B.R. 1897—1901. 240, 5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123=34 C. 403.]

(3015)—*O.* 9, *r.* 13, *O.* 17, *r.* 2 (=*ss.* 108, 157, *Civ. Pro Code*, 1882)—*Suit decreed* ex-parte—*Application for setting aside the* ex-parte *decree—Whether at the stage of the hearing the suit was decreed* ex-parte.—At the hearing of a suit, after the plaintiff closed his case, the defendant contested the whole case of the plaintiff, filed some documents himself and examined some witnesses. On the fourth day after the defence began, as some of the expected witnesses for the defence had not turned up, application for adjournment was made by defendant's Counsel. The case was adjourned for the next day, *first*, to enable the witnesses to attend, and *secondly*, if such witnesses did not attend, for a proper application, supported by affidavit, for adjournment being made. On the next day the application for adjournment was refused, and the suit was decreed *ex partee*. The defendant, without appealing against the order refusing adjournment, applied under s. 108, Civ. Pro. Code, for setting aside the *ex-parte* decree. *Held*, under the circumstances, the decree had not been passed *ex-parte* and that the defendant was not entitled to apply under s. 108. The defendant was not, however, without remedy: if he was not satisfied with the order refusing adjournment, his course was by way of appeal against that order, and if the appellate Court considers any further evidence necessary, it may direct that evidence to be taken; or possibly the defendant might, if in time, apply for a review. KADER KHAN v. JUGGESWAR PRASAD SINGH, **35 C. 1023.**

(3015-*a*)—*O.* 9, *r.* 13 *and O.* 17, *r.* 2 (=*Civ. Pro. Code*, 1859, *ss.* 119 *&* 147)—*Defendant falsely personated—Decree* ex parte.—Where the defendant was falsely personated at the hearing, *held*, that the decree passed in the suit for the plaintiff was *ex parte*. JAMAL DEEN v. NIHAL SINGH, **87 P.R. 1869.**

(3016)—*O.* 9, *r.* 13 *and O.* 17, *r.* 2 (=*ss.* 108, 157, *Civ. Pro. Code*, 1882)—*S.* 37, *Act XV of* 1882, *Presidency Small Cause Courts.*—Ex-parte *judgment at adjourned hearing*—Where, in a small cause suit, the defendant, who appeared at the first hearing, and on whose application the trial was adjourned, failed to appear on the adjourned date, *held*, that a decree passed against him on that day after the hearing of the case was not one made *ex parte*,

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that the defendant was not entitled to obtain the benefit of s. 108, Civ. Pro. Code, and that his only remedy was by an application for a new trial under s. 37 of the Presidency Small Cause Court Act, 1882. SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE, **21 C. 269.** [*Overruled*, 23 C. 738: *R.*, 23 C. 325; 82 P.R. 1895, 2 C.W.N. 693; *Disappr.*, 20 B. 380.]

(3016-*a*)—*O.* 9, *r.* 13 (=*old s.* 108), *O.* 17, *r.* 2 (=*old s.* 157).—A defendant appeared at the first hearing of a case but failed to appear at the adjourned hearing. An *ex-parte* decree was passed against him. The defendant then applied to the Court to set aside the *ex-parte* decree under s. 108, Civ. Pro. Code, 1882. But his application was refused and the Chief Court *held*, on appeal, that s. 157, Civ. Pro. Code, 1882, applied to the case, as the order directing an *ex parte* hearing of the case was passed, not for the defendant's contumacy, but on account of his non-appearance; that, as the Court had, under s. 157, Civ. Pro. Code, 1882, proceeded *ex parte*, the decree was an *ex-parte* decree, to which s. 108, was applicable; that, therefore, the application under s. 108, Civ. Pro. Code, was properly entertained and that the order rejecting the application was appealable. BALDEO SAHAI v. MANOHAR LAL, **82 P.R. 1895.** (21 C. 269, *R.*)

(3016-*b*)—O. IX, r. 13, O. XVII, r. 2—*See* APPEAL—EX PARTE CASES, 19 A. 355=A.W.N. 1897, 89.

(3017)—*O.* 9, *r.* 13 *O.* 17, *rr.* 2 *and* 3 (=*ss.* 108, 157, 158, *Civ. Pro. Code*, 1882)—*Defendants applying for adjournment after settlement of issues—Suit adjourned to a fixed day—Minor defendant applying for adjournment through Vakil—Refusal—Vakil informing Court that he has no instructions and abstaining from taking further part in the case—Hearing of suit proceeded with, minor's guardian* ad litem *only being absent—Decree against both defendants—Decree against minor whether* ex parte.—A suit against a father and his minor son, who was stated to have been adopted by the father's uncle, for the recovery of mortgage money, was owing to alleged negotiations for a compromise, and on the request of the parties, finally adjourned, after the settlement of issues to the 26th June 1901. On the 24th June, the alleged adoptive mother of the 2nd defendant, being his guardian *ad litem*, presented a petition praying for two month's time to enable her to produce evidence on the 2nd defendant's behalf. On this petition being rejected, the vakil, who till then appeared for the 2nd defendant and who moved the application, informed the Court that he had no instructions and abstained from taking any further part in the suit. The case was proceeded with, the guardian *ad litem* of the 2nd defendant only being absent and a decree, including also the share of the 2nd defendant, (who had pleaded that, owing to his adoption, the mortgage was not binding on

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him to the extent of his interest in the land, was passed in favour of the plaintiffs. On the plaintiff's proceeding to execute, the 2nd defendant's guardian *ad litem* applied, under s. 108, Civ. Pro. Code, to the District Judge, to have the decree set aside, who dismissed the application, being of opinion that the decree should be taken as one passed under s. 158, Civ. Pro. Code. *Held*, the case not being one in which time had been specifically granted to the 2nd defendant to produce his evidence or to cause the evidence of his witnesses or to perform some other act necessary to the further progress of the suit and the adjournment being an adjournment of the suit for the convenience of all the parties, that the ground taken by the District Judge in dismissing the petition was clearly unsustainable, that the action of the Court must be taken to have been under the first of s. 157 of the Civ. Pro. Code, and that the latter part of s. 157 had absolutely no application to a case, like the present, where the Court at once proceeded to trial and judgment. (4 M.H.C. 56, 254, 6 M.H.C. 262, 10 M. 270, *R.*) *Held*, further, that the decree passed against the 2nd defendant must be held, under the above circumstances, to have been *ex parte*, although his pleader was present and applied for adjournment. (22 A. 66, 23 B. 414, *R.*) In cases where a pleader informs the Court that he has no instructions, it would be well explicity to ascertain whether the pleader severs his connection with the case. RAMANUJA REDDIAR v. RAMASWAMI AIYANGAR, **3 M L T 226=18 M L.J. 31.** [*F.*, 31 M. 505=19 M.L.J. 222=4 M.L.T. 216, 5 Ind. Cas. 23=33 M. 241=19 M.L.J. 760=7 M.L.T. 369.]

(3018)—*O. 9, r. 13, O. 17, r. 2, O. 41, r. 23 (=Civ. Pro. Code, 1882, ss. 108, 157, 562)—Ex parte decree—Defendant absent Pleader stating no instructions—Appeal from order refusing application under s. 108, Civ. Pro. Code—Remand under s. 562 Civ. Pro. Code—Appeal against other final or interlocutory High Court's certificate to appeal to Privy Council, effect of.*—The decree passed even at an adjourned hearing of a suit in the absence of the defendant,—his pleader stating to the Court that he had no instructions, and the Court refusing to grant an adjournment—is an *ex-parte* decree within the meaning of s. 108, Civ. Pro. Code. [*R.*, 8 C.W.N. 621, 5 C.L.J. 247, F.B.=34 C. 403=11 C.W.N. 329=2 M.L.T. 123.] In an appeal from an order refusing to set aside a decree under s. 108, Civ. Pro. Code, on the ground that that section did not apply, the only case which can be remanded by the appellate Court, to be tried on its merits, is the application under s. 108, Civ. Pro. Code, and not the original case, the decree in which it is sought to be set aside. Such order of remand is not a final order in the sense of s. 595 (*a*) as modified by s. 594, Civ. Pro. Code. It is a purely interlocutory order directing procedure, and no appeal lies therefrom to the *Privy Council* under s. 595, Civ. Pro. Code. The mere fact that the High Court, on the assumption that it was a final order, have certified the sufficiency of the amount and value of the suit, cannot make appealable that which does not fulfil the statutory conditions. RAI RADHA KISSEN v. THE COLLECTOR OF JAUNPORE, **5 C.W.N. 153=28 I.A. 28=23 A. 220, P.C.**

(3019)—*O. 9, r. 130, O. 17, r. 3 (=ss. 108 and 158, Civ. Pro. Code, 1882)—Restoration of ex-parte decree after setting it aside.*—A Court cannot, after having set aside an *ex-parte* decree, proceed to uphold that decree, as if it was acting still existing. The Court should, if it was under s. 158, proceed to decide the suit, as it then stood before it, if it could do so. K. V. R. M. M RAMAN CHETTIAR v. MEER KARI MOHIDEEN SAHIB, **17 M.L.J. 81.**

(3020)—*O. 9, r. 13, O. 21, r. 2, s. 104, O. 43 r. 1, s. 114, O. 47, r. 1 (=ss. 108, 258, 588 and 623, Civ. Pro. Code, 1882)—Application to certify an alleged adjustment of decree—Appeal—Review of judgment.*—A judgement-debtor made an application under s. 258 of the Code, asking the Court to issue notice to the decree-holder to show cause why an alleged adjustment of the decree should not be recorded as certified. This application was granted. Thereupon, the decree-holder made an application under s. 108 of the Code to have the order set aside. The Court rejected this application, refusing also to treat it as an application for review under s. 623 of the Code. Against this order, the decree holder appealed, under s. 588 (*b*) of the Code, as from an order under s. 108, and also took a plea to the effect, that the Court below ought to have treated his applications as one under s. 623 and to have disposed of it as such. The lower appellate Court *held* that there was no valid ground for interfering with the order on the application under s. 108, but went on to direct that the application should be restored to the file of the Court below and disposed of as an application for review of judgment. *Held*, on appeal from this order by the judgement debtor, that an appeal lay to the High Court. But if not, the Court was justified in treating the memorandum of appeal as an application in revision, inasmuch as the order of the Court below was passed without jurisdiction. NANDA v. RAMJI LAL, **A W.N. 1906, 58=3 A.L.J. 119.**

(3021)—*O. 9, r. 13, O. 21, r. 22 (=ss. 108, 248, Civ. Pro. Code, 1882)—Notice served under, whether an execution of process for enforcing judgment—Limitation Act, art. 164.*—A notice served under s. 248 is an execution of a process for enforcing judgment under art. 164 of the Limitation Act. GURANDITTA v. ZIYADA, **110 P L R. 1905.**

(3021-*a*)—O. IX, r. 13, O. XXI, r. 22—*See* EXECUTION OF DECREE—NOTICE OF EXECUTION, **22 W.R. 5.**

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(3022)—*O. 9, r. 13, O. 21, r. 89 (=ss. 108, 310-A, Civ. Pro. Code, 1882)—Deposit and subsequent petition to keep it in Court - Effect—Provincial Small Cause Courts Act, 1887, s 17.* —Where a judgment-debtor made an application and deposit within the time prescribed by s. 310-A of the Civ. Pro. Code, and subsequently put in another petition praying that the money might be kept in Court pending decision of an application he had made under s. 101 to have the *ex-parte* decree set aside, *held* that, though the Court might have properly rejected the petition to keep the money in Court, it could not dismiss the application under s. 310-A, since the deposit was unconditional at the time it was made. (1 C.W.N. 132, *D.*) Where, as shown above, a deposit was made for the purpose of an application under s. 310-A and a further application was made under s. 108 to have the *ex-parte* decree set aside, *held* that the deposit was such as was required by s. 17 of Act IX of 1887, and no further deposit was necessary. HANOOMAN SINGH v. LUCHMAN SAHOO **8 C.W.N. 355.**

(3023)—*O. 9, r. 13 and O. 21 r. 90 (=ss. 108, 311, Civ. Pro. Code, 1882)—Decree—Sale in execution—Fraud—Application to set aside decree—Suit to set aside decree and sale.*—S. 108 and 311 of the Civ. Pro. Code limit the attention of the Court to specific matters, and assume the existence of a real suit. They bear no application where the suit itself is attacked as a fraud: and the fraudulent and violent incidents of its progress are treated as parts and indicia of a whole. The plaintiff applied, under ss. 108 and 311, of the Civ. Pro. Code to have a decree and sale thereunder set aside. This application was refused, and he did not appeal against the refusal. The plaintiff brought a suit "for setting aside the decree and auction sales on finding them to be illegal, fraudulent and collusive." The defendants contended that the suit did not lie, as the plaintiff did not seek first to set aside the refusal: *Held*, that this operated as no bar to the suit. KHAGENDRA NATH v. PRAN NATH, **4 Bom. L.R. 363.**

(3023 *a*)—O. IX, r. 13, O XXI, r. 90—*See* RIGHT OF SUIT - FRESH SUITS, 29 C. 395, P.C. = 29 I.A. 99 = 6 C.W.N. 473.

(3024)—*O. 9, r. 13, O 32, rr. 3 (1) 4 (2) (=ss. 108, 44, Civ Pro. Code, 1882)—Guardian ad litem not appointed—Ex-parte decree against minors Application to set aside decree - Setting aside decree whether to be against minors only or against all defendants—Construction of.*—In this case, a suit was brought for recovery of money due on a balance of account against three persons of whom two were minors. The plaintiff asked for an order for the appointment of the first defendant as the guardian *ad litem* of the minor's, and the Court thereupon, issued two notices to the first defendant, one to appear and defend the suit brought against him, and the other calling upon him to appear and state whether he was willing to act as guardian *ad litem* for the minors. No appearance was made by or on behalf of the defendants on the day fixed for hearing of the suit, and the Court taking up the case passed an *ex-parte* decree against all the three defendants. In execution of the decree, applications were made on behalf of the minor defendants under s. 108, Civ. Pro. Code, to set aside the *ex-parte* decree. *Held* by the *Full Bench* that the decree should be set aside as against the minors, as there was no formal or informal appointment of a guardian *ad litem* for them in the suit as prescribed by s. 443, Civ. Pro. Code, the mere notice to the first defendant proposing to appoint him as such guardian being quite insufficient. (14 C. 204, 6 C.L.R. 69, *R. / D.*, 10 O.C. 321; *R.*, 5 C.L.J. 434.] *Held* also that because the decree in the case mentioned in this case was one and indivisible, it could not be set aside against the minors alone, but as a whole. [*R.*, 25 A. 42, 26 M. 604 = 13 M.L.J. 308, 29 A. 623 = A.W.N. 1907, 204 = 4 A.L.J. 552, 6 C.L.J. 226, 31 M. 454 = 4 M.L.T. 230 = 18 M.L.J. 543.] *Per Stanley, C.J.*—It is a well-known rule of construction that nothing is to be added to, or taken from, a statute unless adequate grounds are found, either in the course of the enactment or in the context, or in the consequences which would result from the literal interpretation, to justify the inference that the Legislature intended something which it had omitted to express. (25 C. 155, 5 C.W.N. 58, 18 B. 142, *Not F.*). No such grounds exist in the case of s. 108, Civ. Pro. Code. The direction given in the section, *viz.*, that the Court shall set aside the decree, cannot be taken to mean that the decree shall be set aside only as against party who may apply for it and show sufficient cause. Again, at the end of the section, the Court is directed, after passing an order setting aside the decree, to appoint a day for proceeding with the *suit*. This is an indication that it was the entire decree which was in the contemplation of the Legislature, and not the decree so far as it affected one or more only of the defendants, for the direction is to *proceed with the suit*, not to proceed with the suit as against the defendant who had succeeded in having the decree set aside. Therefore, where an order is made under s. 108 of the Civ. Pro. Code, the decree set aside is primarily the whole decree and the suit to be proceeded with is the whole suit. It is necessarily so when the decree is one and indivisible. But it may be that, where a decree passed against several defendants consists in reality of separate decrees against each, the decree can be set aside in part. *Per Aikman, J.* —The words "the decree" in s. 108, Civ. Pro. Code, refer back to the opening words of the section, and denote the decree passed *ex-parte* against the defendant who makes out a case for having it set aside. The direction 'to proceed with the suit,' means, except under exceptional circumstances, to proceed with the suit against the defendant who has succeeded

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in getting the *ex-parte* decree set aside. (8 W. R. 260, 15 W R. 371, 4 C.W.N. 456, *R.*, 1 W. R. 222, 7 W.R. 237, 8 Bom. L.R. 142, 25 C. 155, *Cons.*) Therefore, s. 108 of the Civ. Pro. Code, primarily applies so far only as concerns the particular defendant who seeks to get an *ex-parte* decree against him set aside. But, there may, however, be exceptional circumstances, where it may be necessary in the interests of justice that the whole decree should be re-opened. Thus, where the decree is one and indivisible, it must be set aside as a whole or not at all, although the application to set aside the decree may be the application of one only of the defendants. **N.B.**—An exhaustive review of the Indian case-law on the construction of the section will be found in this judgment. BHURA MAL v. HAR KISHAN DAS, **24 A. 383, F.B. = A.W.N. 1902, 76.** [*R.*, 25 A. 42, 26 M. 604 = 13 M.L.J. 308, 29 A. 623 = A.W.N. 1907, 204 = 4 A.L.J. 552, 6 C.L. J. 226, 31 M. 454 = 4 M.L.T. 230 = 18 M.L.J. 543, 25 A. 44.]

(3024-*a*)—O. IX. r. 13, O. XXXIX, rr. 1 to 3, O. XL, rr. 1 to 3—Court's inherent power to remove Receiver—Cancelment of *ex-parte* order appointing Receiver—Refusal to hand over property to Receiver—Practice—Temporary injunction—Duty of Court—*See* RECEIVER, 4 L.B. R. 356.

(3025)—*O.* 9, *r.* 13, *O.* 41, *r.* 5 (= *ss.* 108, 545, *Civ. Pro. Code*, 1882)—*Stay of execution—Powers of appellate Court.*—When no appeal has been preferred against the decree in the original suits, s. 545, Civ. Pro. Code, 1882, has no application. It is not competent to an appellate Court to stay proceedings in execution of a decree of a Subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under s 108, Civ. Pro. Code, BHAGWAT RAJKOER v. SHEO GHOLAM SAHU, **31 C. 1081 = 9 C.W.N. 123.** (28 C. 734, 5 C.W.N. 781, 8 C.W.N. 572, *D.*)

(3026)—*O.* 9, *r.* 13, *O.* 41. *r.* 11 (= *Civ. Pro. Code*, 1882, *ss.* 108 *and* 551)—Ex-parte *decree—Application to set aside after confirmation on appeal — Appeal treated as application under* s. 108—*Rulings of the Financial Commissioner.* —When an *ex-parte* decree has been confirmed on appeal under s. 551 of the Civ. Pro. Code, the decree of the original Court must be regarded as having merged in the decree of the Court of appeal and the application under s. 108 to set aside the *ex-parte* decree must be made to the appellate Court, in whose decree the decree of the lower Court has merged. (P. L.R. Vol. I, p. 407, 30 P.R. 1900, 4 P.R. 1901, *F.*; 21 B. 549, *Not F.*; 24 C. 759, 11 A. 819, 3 M. 1, 11 A. 267, *R.*) When an *ex-parte* decree was confirmed on appeal under s. 551 of the Civ. Pro. Code, and the original Court rejected the petition filed under s. 108 of the Code made to it subsequent to the dismissal of the appeal, and an appeal filed against the order rejecting the application was dismissed. *Held*, that the application made to the original Court was rightly rejected, as it ought to have been made to the appellate Court; and that the appellate Court should have treated the appeal as an application made to it to set aside the *ex-parte* decree. It is expedient that the rulings of the Financial Commissioner, more especially on the technical points of law, should be in accordance with the rulings of the Chief Court of the Punjab. MAHR RANA v. THAKER DAS, **33 P.L.R. 1904 = 8 P.R. 1903, Rev.**

(3027)—*O.* 9, *r.* 13, *O.* 41, *rr.* 12, 23, 104, *O.* 43, *r.* 1 (= *Civ. Pro. Code*, 1882, *ss.* 108, 552, 562, 588 *and* 650)—Ex-parte *decree—Power of appellate Court to remand suit for re hearing on grounds other than those specified in s.* 562.—When a suit is decided *ex parte*, an appellate Court has jurisdiction, in an appeal against the decree so passed, to reverse the decree of the Court of first instance, on the ground that the first Court was wrong in proceeding to decide the suit *ex parte*, and to remand the suit for rehearing, such order of remand not being passed under s. 562, or for any of the reasons mentioned therein. *Per White, C. J.*—There is a power to remand a case when the appellate Court reverses an order refusing to set aside an *ex-parte* decree, and it seems anomalous to hold that there is no such power when the appellate Court allows an appeal against a decree upon the ground that there ought not to have been an *ex-parte* decree. SADHU KRISHNA AIYAR v. KUPPAN IYENGAR, **1 M.L.T. 268 F.B. = 16 M.L.J. 479 = 30 M. 54.** (23 M. 445, 23 A. 167, *F.*; 17 B. 733, 23 M. 260, *Not F.*; 23 C. 739, 23 M. 447, 28 M. 437, 12 A. 510, *R.*) [*Diss.* 12 O.C. 25; *R.*, 6 C.L.J. 547 = 12 C.W.N. 590.]

(3028)—*O.* 9, *r.* 13, *O.* 41, *r.* 19—*Dismissal for default — Grounds for—Scope.*—O. XLI, r. 19, and the kindred provisions in O. IX, r. 13, mean that the application may be based upon any ground, which would be a just and proper one for granting the application, and not that the application can be upon one ground only, *viz.*, that the applicant was prevented by sufficient cause from appearing. The affirmative provisions of the Code that the plaintiff or appellant may prove that he was prevented by sufficient cause—do not imply the negative *viz.*, that an application for restoration cannot be granted unless sufficient cause (in this sense) is shown. NAGA CHOK v. NAGA ON GAING, **U. B.R. 1909, Civil Procedure 27** (26 M. 599, *R.*)

(3028-*a*)—O. IX, r. 13, O. XLI, r. 21—*See* APPELLATE COURT—POWERS OF, 70 P.R. 1885.

(3029)—*O.* 9, *r.* 13, *O.* 41, *r.* 23 (= *ss.* 108, 562, *Civ. Pro. Code*, 1882)—*Re-hearing—Remand of case—Trial on merits.*—In an application under s. 108 of the Civ. Pro. Code on the grounds of fraud and suppression of summons, the Munsiff rejected the application holding

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there was no fraud and no suppression. On appeal the District Judge passed the following judgment. "This was an application under s. 108, Civ. Pro. Code, After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly that the appeal be allowed and the suit be remanded to the lower Court for trial on merits:" *Held*, this was not a proper judgment. The case having been in fact tried on the merits, the District Judge had no jurisdiction to remand it, but should have come to a conclusion on the evidence. SONAULLA SARKAR v. BEAKE MANDAL, **7 C.L.J. 379.**

(3029-*a*)—O. IX, r. 13, O. XLI, r. 23—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 23 A. 220=28 I.A. 28=5 C.W.N. 153, P.C.

(3029-*b*)—*O.* IX, r. 13, O. XLI, r. 27—*see* APPELLATE COURT-ADDITIONAL EVIDENCE ON APPEAL, 17 W.R. 390.

(3030)—*O.* 9, *r.* 13, *O.* 47, *r* 1—Ex-parte *decree—Summons not served upon defendant—Review of judgment—Application beyond time—Excuse of delay—Limitation Act (IX of* 1901), *art.* 164.—The plaintiff filed a suit against the defendants, a firm of merchants at Glasgow, and served the writ of summons, upon a Bombay firm who were not agents of the defendants. An *ex-parte* decree was passed on the 29th March, 1910 On the 8th May, 1910, the plaintiff served the defendants with the decree demanding execution. The defendants applied on the 1st August, 1910, for review of the judgment. It was contended on behalf of the plaintiff, first, that an *ex-parte* decree could not be set aside by an application for review; and, secondly, that the application was time-barred, whether it was an application to set aside the *ex-parte* decree or an application for review. *Held* that, as there was no service of summons on the defendants, and as they consequently were prevented from laying their defence before the Court, that was a sufficient cause for granting the application for review of judgment and thereby setting aside the *ex-parte* decree. SHAVAKSHA RUTTONJI BOMONJI v. HUGH HOGARTH AND SONS, **12 Bom. L.R. 886=8 Ind. Cas. 616.**

(3031)—*O.* 9, *r.* 13, *sch.* II, *r.* 16, *O.* XLI, *r.* 21 (=*ss.* 108, 522 *and* 560, *Civ Pro. Code*, 1882)—*Appeal by some defendants—Ex parte defendant—Application to set aside* ex-parte *decree—Court having power to entertain such application—Limitation Act, arts.* 164 *and* 169 *—Scope of.*—Where, after an appeal by some of the defendants from a judgment of the lower Court was dismissed, a defendant, who was *ex parte* of the lower Court, seeking to set aside the decree, under s. 108 of the Code, on the ground that he was never served with notice, should apply to the appellate Court, under s. 522 of the Code (27 M. 602, *R.*). The power to pass an order, under s. 108, is distinct from the power to set aside an *ex parte* appellate decree conferred by s. 560, which only enables the Court to direct the appeal from the original decree to be reheard, thus temporarily restoring the original decree. Art. 164 of the Limitation Act applies to an application which involves setting aside the original decree under s. 108 of the Code, whether made to the original Court or to the Court of appeal after an appeal has been filed; and art. 169 applies only to applications for the rehearing of an appeal heard *ex parte* in the absence of the respondent. Art. 169 of the Limitation Act is wholly inapplicable to applications by a party, who has never been served, to set aside the whole proceedings in the suit; such applications are governed by art. 164. SANKARA BHATTA v. SUBRAYA BHATTA, **17 M.L.J. 436=30 M. 535.** [*R.*, 32 M. 416=19 M.L.J. 388=6 M.L.T. 135=2 Ind. Cas. 802, 5 Ind. Cas. 525.]

——O. IX, r. 14 (=1882, s. 109=1877, s. 109.)

(3031-*a*)—O. IX r. 14—See No. 2728-*a*, *supra*.

(3032)—*O.* 9, *r* 14, *s.* 47, *O.* 22, *r.* 10 (=*ss.* 109, 244, 372, *Civ. Pro. Code*, 1882)—"*Opposite party*"—*Attaching creditor—Whether included in the term—Not entitled to notice—Right to apply for execution—Representative of decree-holder.*—An attaching creditor of a decree has no interest in the decree within the meaning of s. 372, Civ. Pro. Code, 1882 (=O. 22, r. 10, Civ. Pro. Code, 1908), and is not entitled to be made a party to the appeal against the decree attached by him. The term "opposite party" in S. 109, Civ. Pro. Code, 1882 (=O. 9, r. 14, Civ. Pro. Code, 1908), does not include an attaching creditor, and the only persons entitled to notice under that section are those who are already on record as parties (20 A. 38, *R.*) *Obiter.*—An attaching creditor is entitled to apply for execution of the decree in satisfaction of his own decree, and, for that purpose, he may be deemed to be the representative of the decree-holder within the meaning of s. 244, Civ. Pro. Code, 1882 (=s. 47, Civ. Pro. Code, 1908). SEVUGAN CHETTY v. OBLA MUNISAMI AIYER, **20 M.L.J. 524=7 Ind. Cas. 66=8 M.L.T. 237.** (29 M. 311, *R.*)

(3032 *a*)—O. IX, r. 14, O. 8, r. 1, s. 115—*See* REVISION—GENERAL, 6 O.C. 216.

——O. X, r. 1 (=1882, s. 117=1877, s. 117).

(3033)—*O.* 10, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 117)—*Remand for retrial for non-compliance with provisions of.*—Where the parties were not properly examined in the manner provided for by s. 117 of the Code and there was an abuse of written statements, the case was remanded to the Court of first instance for retrial. DULLICHAND v. AJUDHIA PERSHAD, **9 C.P.L.R. 11.**

(3033-*a*)—O. X, r. 1—See No. 2710, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*continued.*

——O X, r 2 (=1882, s. 118=1877, s. 118=1859, s. 125.)

(3034)—*O* 10, *r.* 2 (=s. 118, *Civ. Pro. Code*, 1882)—*Statement made under-Not to be regarded as deposition.*—S. 118 is a provision merely to enable the Court to ascertain what the questions in controversy between the parties are and is not intended to be in substitution for regular examination on oath. Any statement made by a party while being examined under that section, was binding only on the person who made the statement. JANKI PRASHAD v. ARKU LAL, **2 A.L.J. 777.**

(3034-*a*)—O. X, r. 2—*See* RULES OF HIGH COUTS AND SUPREME COURTS, BOMBAY, 10 Bom. L.R. 301=32 B. 534.

(3034-*a*-1)—O. X, r. 2—*See* NO. 2710, *supra.*

(3034-*b*)—O. X, r. 2, O. XIV, rr. 1, 2, 3—*See* PRACTICE AND PROCEDURE, A.W.N. 1902, 35.

(3035)—*O.* 10, *rr.* 2 *and* 3, *s.* 27, *O.* 5, *rr.* 1 *and* 5 (=*Civ. Pro. Code*, 1882, *ss.* 118, 119 *and* 641=*ss.* 125. 41, *Civ Pro. Code*, 1859)—*Defendants not appearing to explain non attendance—Powers of Court.*—Where defendants summoned under s. 41, Act VIII of 1859, do not appear and give sufficient reasons for non-attendance, the Court of first instance may dispose of the case in their absence; s. 125, Civ. Pro. Code, 1859, applied to a case where a party appears by pleader who has appeared at the proper time. JOY PROKASH SINGH v. MEGHRAJ SINGH, **12 W.R. 207.**

(3036)—*O.* 10, *rr.* 2, 3 (=*Civ. Pro Code, Act* VIII *of* 1859, *s.* 125)—*Appearance of defendant by pleader - Omission to put in written statement—Power of Court to try suit ex parte.*—Where a defendant appeared either in person or by pleader, the mere circumstance that no written statement was put in on behalf of the defendant did not authorize the trial of the suit *ex parte*. SIVARAJADHANI NILAKANTHAM PILLAY v. KUPPA PANTULU RAMIAH PANTULU **2 M.H.C. 311.**

——O. X r. 3 (=1882, s. 119, =1887. s. 199=1859, s 125.)

(3036-*a*)—O. X, r. 3—*See* NOS. 3035, 3036, *supra.*

——O. X, r. 4 (=1882 s. 120=1877. s. 120=1859, s. 127.

(3037)—*O* 10, *r.* 4 (=s. 120, *Civ. Pro. Code*, 1882)—*Court - Questions -- Pleader.*—The powers vested in a Court under s. 120 of the Civ. Pro. Code, 1882, are discretionary. The intention of the section seems to be to enable the Courrt not only to get obscure points cleared up by obtaining information from either of the parties, but also if possible to get admissions so as to narrow down the issues. BHIMA RAO v. VENKAT RAO, **5 Bom. L.R. 687.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VII of 1859)—*continued.*

(3038)—*O.* 10, *r.* 4 (=s. 120, *Civ. Pro. Code*, 1882)—*Act* V *of* 1908, *s.* 11—*Dismissal of suit for plaintiff's default — Decree—Subsequent suit on the same cause of action*—Res judicata.—An order dismissing a suit under s. 120 of the Civ. Pro. Code on the ground of the plaintiff's default to appear in obedience of the Court's order, is a decree, and a subsequent suit on the same cause of action is barred under s. 11 of the Civ. Pro. Code, 1908. PUNAMCHAND v. CAPT. E.J. MOOLISON, **13 Bom. L.R. 658.**

(3039)—*O.* 10, *r.* 4 (=s. 120 *of* 1882)—*Inability to answer questions necessary for settling issues.*—Where neither plaintiff's mooktear nor plaintiff himself can answer questions necessary for the settlement of issues, the suit may be dismissed. MAHARAJAH NILMONEE SINGH DEO BAHADOOR v. RAM HAREE MISSER, **2 W.R. 161.**

(3040)—*O.* 10, *r.* 4 (=*old s.* 120)—*Plaintiff's pleader unable to prove what witnesses material —Proper procedure.*—The proper course for a Judge where plaintiff's pleader is unable on the day of trial to prove which of his absent witnesses against whom he has applied for further processes to be issued are material, was held to be to allow the plaintiff a certain time to produce evidence upon this point upon payment by him of all the defendant's costs of the adjournment. PEAREE MOHUN BOSE v. HURISHE CHUNDER GHOSE, **17 W R. 141.**

(3040-*a*)—*O.* 10, *r.* 4 (=*Civ Pro. Code*, 1882, s. 120)—*Party to suit summoned to attend as witness—Refusal to appear—Order under.*—Where a party to a suit, represented by a pleader and summoned to attend the Court and give evidence on behalf of his opponent refuses to do so alleging that by reason of his rank he is exempted from personal appearance in Courts, *held* that a decree should not be passed against him under s. 120, Civ. Pro. Code, 1882, unless his pleader refuses or is unable to answer any material question. SATU v. HANMANT RAO, **23 B. 318.**

(3040-*b*)—O. X, r. 4—*See* LIMITATION ACT, 1908, s. 14, A.W.N. 1895, 242.

(3040-*c*)—O. X, r. 4—*See* NO. 2708, *supra*, and NOS. 3136, 3137, *infra.*

(3041)—*O* 10, *r.* 4, *O.* 43, r. 1, s. 104 (=*Civ. Pro. Code*, 1882. *ss* 120, 588 (10)—*Appeal —Personal attendance of plaintiff.*—A sued B and C for Rs. 97 on a mortgage bond. The defence was part satisfaction which was endorsed by the plaintiff on the back of the bond. A decree having been passed in favour of the plaintiff for a smaller amount than sued for (Rs. 56), the plaintiff appealed. The appellate Court remanded the case for the trial of an issue relating to the genuineness of the endorsement on the back of the bond sued upon. The first Court, in course of the trial upon remand, directed the personal attendance of the plaintiff

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

to answer to the genuineness of a letter produced by the defendants. The order was set aside in appeal. *Held*, that no appeal lies from an order passed under the first paragraph of s. 120. *Held*, that the order under s. 120 of the Civ. Pro. Code, from which an appeal is allowed by s. 588, cl. 10, is an order under the second paragraph of s. 120. RAM OHARAN v. LALA SHAMBHU NATH, **3 O.C. 31.**

——O. XI, r. 1 (=1882, s. 121).

(3041-*a*)—O. 11, r. 1—Omission to make a puisne mortgagee party to a suit—Registration—Notice—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 3, 85, 8 Ind. Cas. 1199.

(3042)—*O. 11, rr. 1, 11 and 21 (=ss. 121, 127 136, Civ. Pro. Code, 1882)—Omission to answer interrogatories — Effect.*—The omission to answer interrogatories, delivered after leave granted under s. 121, Civ. Pro. Code, does not render the party, so omitting to answer, liable to have his defence struck out, under s. 136 of the Civ. Pro. Code. (10 C. 505, *Overruled*) PREM SUKH CHUNDER v. INDRO NATH BANERJEE, **18 C. 420.** [*F.*, 19 B. 307, 8 O. C. 172.]

——O. XI, r. 2 (New).

(3042-*a*)—O. XI, r. 2—*See* CUSTOMS PUNJAB—INHERITANCE), 201 P.L.R. 1911.

(3042-*a*-1)—O. 11, r. 2—*See* MAHOMEDAN LAW—DOWER, 8 A.L.J. 27=9 Ind. Cas. 200.

——O. XI, r. 6 (=1882, s. 125=1877, s. 125.)

(3042-*b*)—O. XI, rr. 6, 11—*See* INTERROGATORIES, 14 C. 703.

——O. XI, r. 8 (=1882, s. 126=1877, s. 126).

(3043)—*O. 11, rr. 8, 11, 21 (=ss. 126, 127, 136, Civ. Pro. Code, 1882)—Interrogatories to defendant—Extension of time allowed—Defence struck out before expiry of ten days—Validity thereof.*—On the 14th November, 1903, the leave of the Court was obtained to serve the defendant in a suit with interrogatories under Chap. X of the Code. There was no direct evidence as to the exact date on which the interrogatories were served on the defendant. On behalf of the defendant, an application was made for extension of time till the 30th. However, on the 24th November, the Court passed an order under s. 127. The question for determination was whether or not an order to have the defence of the defendant struck out was proper and valid. *Held*, no order can be passed under s. 127 until there has been an omission or refusal to answer interrogatories. There was certainly no refusal, for the defendant only asked for time, and on the 24th, there had been no omission, for the ten days allowed by law had not expired. Consequently, the order striking out the defence was not proper. PANDIT BAKHT NARAIN v. BHOGA SINGH, **8 O.C. 172. (18 C. 420, F.B., *F.*).**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XI, r. 11 (=1882, s. 127=1877 s. 127).

(3043-*a*)—O. XI, r. 11—*See* NOS. 3042, 3042-*b*, 3043, *supra.*

——O. XI, r. 12 (=1882, s. 129=1877, s. 129).

(3043-*a*-1)—*O.* XI, r. 12—Order for discovery when allowed and disallowed—*See* ACT I OF 1894, ss. 11, 18, 12 C.L.J. 505=8 Ind. Cas. 107.

(3043-*a* 2)—*O.* XI, r. 12—*See* NOS. 2807, 2807-*a*, *supra.*

(3043-*b*)—O. XI, rr. 12, 13 and 21—*See* INSPECTION OF DOCUMENTS, 8 A. 265, 22 C. 891.

——O. XI, r. 13 (New).

(3043-*c*)—O. XI, r. 13—*See* NOS. 2807, 2807-*a* 3043-*b*, *supra.*

——O. XI. r. 13 (New).

(3044)—*O. 11, rr. 13, 18 (2)—Filing of affidavit of documents by one party—Subsequent application by other party for discovery and inspection—Not precluded.*—The filing of an affidavit of documents under O. XI, r. 13, Civ. Pro. Code, 1908, by one party, does not preclude the other party from making a subsequent application for discovery and inspection under O. XI, r. 18 (2). BASANTA KUMAR GOSWAMI v. KUMUDINI DASEE, **38 C. 428.**

——O XI, r. 14 (=1882, s. 130=1877, s 130).

(3045)—*O 11, r 14 (=s 130, Civ. Pro. Code, 1882)—Inspection of documents produced by order of Court—High Court's power to interfere in revision with lower Court's exercise of discretion.*—Where documents are produced in obedience to an order of the Court made under s. 130, the Court has jurisdiction to deal with such documents, when produced, in such manner as appears just. The High Court cannot interfere in revision with the discretion exercised by the lower Court under this section. The principle, however, on which the discretion should be exercised in such cases is that, where the documents have been filed as relating to matters in issue in the suit, the opposite party should be allowed to inspect and take copies of them, unless they relate *exclusively* to the case of the party producing them, and contain nothing to support his opponent's case. Further, when the documents, inspection of which is denied, are letters written by the party seeking inspection, a very strong case should be made out for refusing inspection. BALAMONI v. RAMASAWMY CHETTIAR, 17 **M.L.J. 79=2 M.L.T. 88=30 M. 230.** (9 M. 257, 18 B. 35, *F.*)

(3046)—*O 11, r. 14—Documents, production of, order for, before framing of issues—Commission, when to be issued—Commissioner, power of—Right to inspection—Revision—Charter Act (Stat. 24 and 25, Vict., Chap. 104) s. 15.*—An order under O. XI, r. 14 of the Code for the production of documents, can be made before the issues have been framed.

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The order for the production of documents is to be limited to such documents alone as relate to matters in question in the suit, and the Court must, consequently, before it makes the order, determine for the purpose thereof what are the matters in question in the suit. A party cannot obtain a commission for the inspection or production of books or papers, in order that he may ransack them for evidence to make out his case ; he is entitled to production or inspection only when the same is material and necessary to establish his cause of action. When the Court is satisfied that an order for production of documents should be made, the time and place of inspection should be specified, and it should also give directions as to the manner of inspection. A Court should not delegate to the Commissioner the exercise of the power, which the Court possesses under r. 14, to require the production of any document. When a particular document has been produced before the Commissioner and marked by him in the manner directed by the Court, it will be open to the plaintiffs to inspect it, and if they are advised that the production of any particular document in Court is necessary in the interests of justice, they must make an appropriate application to the Court, and the question will then be dealt with by the Court in the presence of both parties under O. 11, r. 14. A right to inspection ordinarily includes the right to have copies of the document. The plaintiffs will be at liberty not merely to inspect the documents but also to make note of their contents. If they find it necessary to obtain copy of a document, they must apply to the Court for directions. If the High Court is satisfied that an interlocutory order, such as an order for the production of documents, has been made without jurisdiction, or under such circumstances as are likely to cause irreparable injury to one of the litigants, it has power to set matters right, under s. 15 of Statute 24 and 25 Vic., Chapter 101. GOBIND MOHUN DOSS v. KUNJA BEHARY DOSS, **10 C.L.J. 407 = 14 C.W.N. 147 = 4 Ind. Cas. 364.**

(3047)—*O. 11, r. 14 (=s. 130, Civ. Pro. Code, 1882)—Indian Evidence Act (I of 1872), s. 126—Document, production of—Privilege attaching to documents—Legal adviser—Court—Discretion.*—Under the Evidence Act, in regard to certain documents when they are absolutely privileged, the Court has no power whatever to order production. But under s. 130 of the Civ. Pro. Code, 1882, the Court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. And although a document may not be such as passed directly between the legal adviser and the client, yet if it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the Court will not compel the production of such a document. VISHNU v. NEW YORK LIFE INSURANCE CO., **7 Bom. L.R. 709.**

(3047-*a*)—O. XI, r. 14—*See* EVIDENCE ACT, 1872, s. 126, 7 Bom. L.R. 709.

(3047-*b*)—O. XI, r. 14—*See* INSPECTION OF DOCUMENTS, 28 C. 424.

(3048)—*O. 11, rr. 14 and 21 (=old ss. 130, 136)—Production of documents.*—S. 130 does not apply to a general direction, without any particular object in view, to a party to produce all the documents in possession within a certain date. The order in s. 130 should be served on the party to whom it is given and not to be merely announced verbally. An order under this section could not be made with respect to documents not in the power of the defendants or not in existence. S. 136 should be used very sparingly, the order under it being made conditional and a little more time being given for compliance with the order. JAISUKH v. DINA NATH, **58 P.R. 1898.**

(3049)—*O. 11, rr. 14, 21 (=old ss. 130, 136)—Penal Code, s. 188—Order to produce document—Failure to do so—Effect*—if a defendant, ordered by the Court to produce a document, fails to do so, the Court cannot of its own motion, without an application by the plaintiff and requiring the defendant to show cause, strike out his defence, but it can prosecute him under s. 188, I.P.C. SOHARA v. MUSST. ZAINALE, **80 P.R. 1889.**

(3049-*a*)—O XI, r. 14, O. XXVI r. 5, ss. 105, 115—*See* REVISION—MISCELLANEOUS, 9 M. 256.

——O. XI, r. 15 (=1882, s. 131=1877, s. 131).

(3050)—*O. II, r. 15 (=Civ. Pro. Code, 1882, s. 131)—"Any other party"—Co-defendants.*—The words "any other party" in s. 131, Civ. Pro. Code, does not refer only to the defendant as contrasted with the plaintiff, or *vice versa*, but to any two parties, whether plaintiff or defendants, co-plaintiffs or co-defendants, between whom it is necessary to adjust rights. There is no objection to one defendant seeking discovery of inspection as against a co-defendant, provided that such co-defendant can be regarded as an opposite party. V, the father of the plaintiff, died in 1887, leaving the plaintiff a minor. The third defendant obtained letters of administration to V's estate during the minority of the plaintiff. Shortly after the plaintiff attained his majority, he and the third defendant executed a mortgage of V's estate to defendants 1 and 2, the consideration for which was alleged to be certain debts due by V on promissory notes, advances made to the third defendant for the purposes of the administration, and a sum paid in cash on the execution of mortgage-deed. The plaintiff now brought the suit to have the mortgage set aside and an account taken of what was really due in respect of the alleged consideration, alleging

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fraud and misrepresentation and undue influence on the part of the third defendant as to the debts of V, and denying that the amount which ought to have been paid in cash was so paid. *Held* that the first two defendants were entitled to inspection of certain account books and documents as against the third defendant under s. 131, Civ. Pro. Code, that it was very possible that first defendant not having been able to set aside the mortgage as regards himself, the third defendant was colluding with the plantiff to enable him to save what he could from the fire, and that under such circumstances he should be considered as a "party opposite" to the first two defendants, although eventually the Court might not be able to make any order between him and them. ANANDRO VITHAL VARADI v. BUDRA MALLA, **17 B. 384.**

(2051)—*O. 11, r. 15—Inspection of documents*—Verbatim *copies of documents may be taken—Costs of inspection to be borne by the party inspecting—Practice.*—Parties can take *verbatim et literatim* copies of documents of which inspection is allowed. The costs of inspection to be paid by the party inspecting, though, under exceptional circumstances, such costs may be made costs in the cause. FATMABAI v. HAJEE CASSAM JUSAB, **11 Bom. L.R. 402=2 Ind. Cas. 422.**

(3051-*a*) O. XI, r. 15—Inspection of documents, jurisdiction of a Judge to give—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, cl. 15, 4 Bom. L.R. 342.

(3051-*a*-1)—*O. 11, rr. 15 and 20, O. 13, r. 7—Interlocutory order—Document, right of inspection by other party—Danger of being tampered with—S. 70 (a), Act XXV of 1899—Revision.*—Plaintiff sued defendants to give up possession, alleging the property to have been mortgaged, to him by a third person. Defendants in their written statement specifically referred to several documents contained in a sealed envelope attached to the written statement, but prayed that it be kept intact for the time being. The District Judge after hearing both sides allowed the application of the plaintiff to inspect the record. Defendants came in revision. *Held*, that the opposite party is entitled to inspect the documents specifically referred to (O. XI, r. 15) unless the Court is satisfied that inspection should not be allowed (O. XI, r. 20). *Held*, also, as the Court allowed inspection after hearing both sides, no revision lies. SARDAR HARI SINGH v. RAM CHAND, **185 P.W.R. 1911.** (9 M. 256, 30 M. 230, 18 B. 368. *F.*)

(3051-*b*)—O. XI, rr. 15, 21—*See* INSPECTION OF DOCUMENTS, 14 C. 768.

——O. XI, r. 18, para (1) (=1882, s. 133=1877, s. 133); para (2) (=1882, s. 134=1877, s. 134.

(3051-*c*)—O. XI, r. 18—*See* NO. 3044, *supra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3052)—*O. 11, rr. 18 (1), 21, O. 41, rr. 23, 24, 25 (=Civ. Pro. Code, 1877, ss. 133, 136, 562, 565, 566)—Failure to allow defendants inspection of account books—Remand.*—In a suit on a bond, the defendants alleged that they had paid, in addition to the amount admitted by the plaintiff to have been paid, certain amounts on two occasions, and the sums were entered in the plaintiff's account books. The plaintiff was ordered by the Court to produce the account books for a certain year and, on the plaintiff's failure, dismissed the whole suit. But the lower appellate Court held that the defendants were entitled to be credited with the sum they said they had paid over and above what the plaintiff had given him credit, and remanded the case to the lower Court for finding out what amount was still due to the plaintiff. *Held*, by the High Court, that the first portion of the order or the lower appellate Court, was proper, but the order of remand was irregular, and that the Judge should proceed under the provisions of s. 565 or s. 566. SADA SUKH v. RAMBHAROSA, **A.W.N. 1881, 147.**

(3052-*a*)—O. XI, r. 18 (2)—*See* INTERROGATORIES, 23 C. 117.

——O. XI, r. 20 (=1882, s. 135=1877, s. 135).

(3052-*b*)—O. XI, r. 20—*See* INSPECTION OF DOCUMENTS, 10 C. 808.

(3052-*c*)—O. XI, r. 20—*See* NO. 3051-*a*, *supra.*

——O. XI, r. 21 (=1882, s. 136=1877, s. 136).

(3053)—*O. 11, r. 21 (=s. 136, Civ. Pro. Code, 1882)—Scope of—Discretion—Defence when to be struck off.*—S. 136 of the Code of Civil Procedure is based upon O. 31, Rule 21 of the Supreme Courts in England. It renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever. (5 C. 707=5 C.L.R 509,9 C. 923, *R.*) If there is obstinacy or contumacy on the part of the defendants or a wilful attempt to disregard the order of the Court, an order under s. 136 of the Civ. Pro. Code, is appropriate. BANSHI SINGH v. PALIT SINGH, **7 C. L.J. 295.**

(3054)—*O. 11, r. 21 (=s. 136, Civ. Pro. Code, 1877)—Exercise of powers under.*—The Court should not exercise the powers given to it under s. 136 of the Civ. Pro. Code except in extreme cases. SHAM KISHORE MUNDLE v. SHOSHI BHOOSUN BISWAS, **5 C. 707=5 C.L.R. 509.** [*R.*, 17 A.W.N. 140, 7 C.L.J. 295.]

(3055)—*O. 11, r. 21 (=Civ. Pro. Code, 1882, s. 136)—Procedure—Circumstances under which s. 136 should be applied—Undue delay of plaintiff in moving Court.*—The provisions of s. 136 of the Code of Civil Procedure ought not to be put in force except in extreme cases. Where

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the defendant had not complied with an order for discovery within the time limited by the Court's order in that behalf, but had subsequently been permitted to file a written statement and to produce documents which he relied on in support of his defence, which documents remained upon the record of the case for some six months before the plaintiffs applied under s. 136; and where, further, it appeared that the plaintiffs had been in no way prejudiced by the non-compliance of the defendant with the orders of the Court, *held* that the Court had not properly exercised its discretion in applying s. 136 and striking out the defendant's defence. SOBHA RAM v. SARDAR SINGH, **A.W.N. 1897, 140.** (5 C. 707, *R.*)

(3056)—*O* 11, *r.* 21—*Jurisdiction of Court to strike out defence of defendant of its own motion.*—*Held* that a Court has no power to strike out the defence of a defendant *of its own motion* under rule 21 of Order XI of the Civ. Pro Code. LALA DAS v. A. SPRATT. **84 P.L.R. 1910 = 8 Ind. Cas. 245.** (80 P.R. 1889, 59 P.R. 1892, *F.*)

(3057)—*O.* 11, *r.* 21 (=*Civ. Pro. Code*, 1882, *s.* 136)—*Exercise of powers.*—*Held*, that the powers under s. 136, Civ. Pro. Code, should be used with caution, and that it is certainly not contemplated that, when the Court in which the disobedience has occurred, has refrained from acting, or has refused to act under the section, the appellate Court should, *suo moto*, or on application in appeal, dismiss a suit, or strike out a defence, for such disobedience, which did not take place before itself. AMIN CHAND v. TIRKHA, **P.L R. 1900, p. 400.**

(3058)—*O.* 11, *r.* 21—*Penal Code, ss.* 175 *and* 188—*Difference between s.* 136 *of the old, and Order* 11, *rule* 21 *of the new Code*—*Disobeying order for production or inspection of documents.*—*Held*, that a party to a suit failing to comply with an order for production or inspection of documents can be dealt with only in the manner prescribed by Order XI, rule 21, and is not punishable under s. 175 or any other section of the Penal Code. RAM CHAND v. THE CROWN, **16 P.W.R. 1910, Cr. = 5 Ind. Cas. 842.**

(3059)—*O.* 11, *r.* 21 (=*s.* 136, *Civ. Pro. Code*, 1882)—*Order for production of account books in Court—Disobedience to such order—Dismissal of suit in consequence of disobedience—Wrong exercise of discretion—Legality of dismissal.*—The plaintiffs, a firm of merchants, carrying on business at Karachi, brought a suit at Agra, against defendants, who resided at the latter place, for a sum of money. The defendants applied for an order on plaintiffs directing the production in Court of the latter's books of account for inspection, upon a general suggestion, in no way specific, that, probably, entries might be found therein inconsistent with the plaintiffs' case. The plaintiffs showed cause to the contrary, alleging that there were several difficulties in the matter of transmission of the books to Agra, and alleging, also, that their current business would suffer, if the books of one whole year should be taken to Agra. The Court, however, passed an order directing the production of the accounts. The plaintiffs disobeyed the order, with the result that their suit was dismissed. *Held*, the order for the production of the accounts, under the circumstances, and the absolute dismissal of the suit in consequence of disobedience thereto were wrong, and that the lower Court had wrongly exercised its discretion. CHUNNI LAL v. MESSRS. RALLI BROTHERS, **A.W.N. 1905, 62.**

(3060)—*O.* 11, *r.* 21 (=1882, *Civ. Pro. Code, s.* 136)—*Procedure—Non production of account books by minor defendant—Discretion of Court in acting under s.* 136.—In a suit in which the principal defendant was a minor under the guardianship of his step-mother, the plaintiff applied for the production by the minor of certain account books which had belonged to the minor's deceased uncle. On this application, the Court issued a summons under s. 136 of the Code of Civil Procedure to the minor to appear and produce the books. Some were produced, and it was stated on behalf of the minor that if there were others, and if they could be found, they also would be produced. The remaining books, if there were any, were not produced and it was stated on behalf of the minor that they could not be traced. Ultimately, on the motion of the plaintiff, the Court took action under s. 136 of the Code and struck out the minor's defence to the suit. On the same day that the plaintiff applied to the Court to take action under s. 136, the minor himself appeared and made an application stating that his guardian was colluding with the plaintiff, and asking for the appointment of another guardian, also asking the Court to appoint a guardian *ad litem*. *Held* that, under the above circumstances, the Court was wrong in exercising the powers given by s. 136 of the Code. KAMTA PRASAD v. KAMTA NATH, **A.W.N. 1896, 156.**

(3061)—*O.* 11, *r.* 21 (=*s.* 136, *Civ. Pro. Code*, 1882)—*Order under — Appeal.*—As an order under s. 136, Civ. Pro. Code, 1882, dismissing a suit comes within the meaning of a "decree" an appeal lies from it. KHUSHALI MAL v. PALA MAL, **43 P.R 1898.** [*R.*, **131** P.R. 1907 = 51 P.W.R. 1907.]

(3062)—*O.* 11, *r.* 21 (=*old s.* 136, *Civ. Pro. Code*, 1882)—*Inspection of documents—Non-compliance with order for—Power of Appellate Court.*—If the Court of the first instance has not punished the plaintiff for his contumacy under s. 130, the Court of Appeal has no power the punish the plaintiff by way of dismissing the suit on that ground. AMIR CHAND v. TIRKAH, **36 P.R. 1900.**

(3062-*a*)—O. XI, r. 21—*See* **CONTEMPT OF COURT, 7 B. 1.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3062-b)—O. XI, r. 21—Power of Registrar (Original Side) to dismiss suit under, for want of prosecution—*See* RULES OF HIGH COURTS AND SUPREME COURTS, CALCUTTA, 6 C.L.J. 374.

(3062-b-1)—O. XI, r. 21—*See* NOS. 107, 2724, 2824, 3012, 3012-*a*, 3042, 3043, 3043-*b*, 3048, 3049, 3051-*b*, 3052, *supra*.

(3062-c)—O. XI, r. 21, s. 105—Jurisdiction of High Courts to commit for contempt—Order of committal for contempt, appeal lies from, under s. 15 of Letters Patent, 1865—*See* CONTEMPT OF COURT, 7 B. 5.

(3062-d)—O. XI, r. 21, O. XVI, r. 20—Defendant examined as plaintiff's witness—Adjourned hearing—Undertaking to appear on—Failure—Defence struck out—Illegality—*See* ST. 23 & 24 Vic., C. 104, s. 15, 10 M.L.T. 451.

——O. XIII, r. 1 (=1882, ss. 138, 140=1877, ss. 138, 140=1859, ss. 128, 129).

(3062-d-1)—O. XIII, r. 1—*See* NOS. 2805-*e*, 2807-*b*, *supra*.

(3062-e)—O. 13, *r.* 1 (1) (=*Civ. Pro. Code*, 1882, s. 138)—*Scope of—Late production of suspicious documents.*—S. 138 of the Civ. Pro. Code, has been enacted with the object of preventing fraud by the late production of suspicious documents. It cannot therefore be so construed as to shut out formal evidence beyond suspicion such as certified copies of public documents like records of Government. RANCHHOD v. THE SECRETARY OF STATE FOR INDIA, **22 B. 173.** [*F.*, 12 C.W.N. 312=8 C.L.J. 147; *Appr.*, 6 C.L.J. 621.]

(3063)—*O.* 13, *rr.* 1 *and* 2—*Object of section.*—The main object of s. 128, Civ. Pro. Code, 1859, was to prevent parties from manufacturing evidence pending the trial, to meet unexpected exigencies when they have found in the course of the trial some necessity or expediency of being fortified with documents which they had not at their command at the time when the trial commenced; it was intended to inexorably shut out true, good and valuable evidence, as to the quality of which the Court could have no possibility of doubt, simply because the party had, without good and assignable cause, abstained from bringing it before the Court at the first hearing. The section was limited to documents in the possession or under the immediate control of the party. SYED IKRAM HOSSEIN v. RAM LOCHUN DUTT, **23 W.R. 29.** [*F.*, 22 B. 173, 12 C.W.N. 312=8 C.L.J. 147; *R.*, 6 C.L.J. 621.]

(3064)—*O.* 13, *rr.* 1 *and* 2 (=*ss.* 138, 139, *Civ. Pro. Code*, 1882=*s.* 128, *Civ. Pro. Code*, 1859)—*Documents produced, but not filed*—This section applies to documents which have been produced at the filing of the plaint, but not filed, and in this way is not incompatible with s. 39. PREMSOOKH CHUNDER v. RAJKISTO, **1 Hyde 145.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VII of 1859)—*continued.*

(3065)—*O.* 13, *rr.* 1, 2 (=*Civ. Pro. Code*, 1859, *s.* 128)—*Evidence documentary.*—The parties are required to bring with them and have in readiness, at the first hearing of the suit, to be produced when called upon by the Court, all their documentary evidence of every description. It is not necessary for the parties to file the same unless it is called for by the Court. MAHBUB HOSSEIN v. PATASU KUMARI, **1 B L.R.A.C. 120=10 W R. 179.** [*F.*, 22 B. 173, 12 C.W.N. 312=8 C.L.J. 147.]

(3066)—*O.* 13, *rr.* 1, 2 (=s. 128, *Civ. Pro. Code*, 1859)—*Duty of party under section—Construction.*—Under Act VIII of 1859, s. 128, a party is bound to be prepared at once to tender the documentary evidence bearing on the issues framed by the Court. The wrods "first hearing in the suit" do not mean the first hearing on the issues. GOUR HUREE CHOUDHRY v. FRAN HUREE LAHA, **21 W.R. 42.** [*F.*, 12 C.W.N. 312=8 C.L.J. 147.]

(3067)—*O.* 13, *rr.* 1 *and* 2 (=*old ss.* 138 *and* 139)—*Documents mentioned in plaint and filed on issue day—Evidence.*—A Court is bound to receive as evidence authenticated documents named in the plaint and filed on the day for fixing issues, even though through inadvertence of the amlah they were not made part of the record. RAM RUNJUN CHUCKERBUTTY v. ANUND COOMAR MOOKERJEE, **15 W.R. 323.**

(3068)—*O.* 13, *rr.* 1 *and* 2 (=*ss.* 138, 139, *Civ. Pro. Code*, 1882=*s.* 128, *Civ. Pro. Code*, 1859)—*Filing documents with plaint.—Translation of document.*—By s. 128 of Act VIII of 1859, it was not necessary to file with the plaint all the documents that the plaintiff intended to give in evidence. A document which is to be given in evidence need not be translated previous to the hearing of the case. KAMENEE DOSSEE v. HURROMONEY DOSSEE, **Bourke, O.C. 91=Cor. 151.**

(3069)—*O.* 13, *rr.* 1 *and* 2—*Exhibits.*—Documents produced in Court under s. 128, Act VIII of 1859, become Exhibits. SREEMUNT RAWJEE GUNESH v. RAO JALEE PERSHAD BAHADOOR, **8 W.R. 91.**

(3070)—*O.* 13, *rr.* 1 *and* 2 (=*ss.* 138, 139 of 1882)—*Remand—Fresh issues—Further evidence.*—Where fresh evidence is tendered after the issues in a case are settled, the grounds on which it was not tendered before must be stated; and the Judge may either receive or reject it, stating his reasons on the record. Where a case is remanded to be tried on fresh issues, the parties are entitled to have a day fixed for the reception of further evidence. WATSON & CO. v. KUNHYE BAHADOOR, **9 W.R. 294.**

(3070-*a*—O. XIII, rr. 1, 2—*See* SUPERINTENDENCE OF HIGH COURT, 18 W.R. 511.

(3071)—*O.* 13, *rr.* 1 (1) *and* 2, *and s.* 100 (=*ss.* 138, 139, *and* 584, *Civ. Pro. Code*, 1882, —*Documents not mentioned in list filed with*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

plaint—Discretion of Court in excluding—Certified copies of public documents or record of judicial proceedings — Erroneous exclusion—Second appeal.—When a plaintiff seeks to produce documents at the trial which he had failed to mention in the list annexed to the plaint, the Court has clearly a discretion under s. 139 of the Civ. Pro. Code, whether to receive or to reject them. But in exercising this discretion the Court has to bear in mind that the section was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings. (23 W.R. 29, 23 B. 173, *Relied on.*) When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has ample power to interfere under s. 584, Civ. Pro. Code. (20 C. 740, 8 B. 377, 8 M. 373, *F.*) Unless called upon by the Court, it is not obligatory on the plaintiff to produce documents on which he relies but which he has not filed with the plaint, at the first hearing when issues are framed. TALEWAR SINGH v. BHAGWAN DAS, **12 C.W.N. 312=8 C.L.J. 147.** (1 B.L.R. 120, 21 W.R. 42, *F.*) [*R.*, 10 C.L.J. 33=13 C.W.N. 797.]

(3072)—*O.* 13, *rr.* 1 (2), 3—*Objection—Chittahs—Filed for want of time—Rejection after inspection.*—SOODUKHINA CHOWDHRAIN v. RAJ MOHUN BOSE, **11 W.R. 350.**

(3073)—*O.* 13, *rr.* 1 (2), 3—*Documents—Evidence.*—Attention of the Courts drawn to the provisions of the Civ. Pro. Code prohibiting Courts from receiving on the record documents irrelevant or inadmissible. ISSUR CHUNDER GHOSE v. RUSSEEK LALL MUNDUL, **11 W.R. 576.**

(3074)—*O.* 13, *rr.* 1 (2), 3 (=*old s.* 140 *of* 1882)—*Duty of Court in suits under section* — At the stage of a suit referred to in Act VIII of 1859, ss. 128, 129 and 132, the Court should separate the documents, into the relevant and irrelevant. The admission of a document does not apply that it is evidence, and filing it with the record does not give it authority. Courts of first instance ought to specify what portions of the documentary evidence on the record they have accepted, and what portions they have refused to listen to. All proceedings of parties in respect of documentary evidence ought to be recorded on the proceedings of the Court by the Judge's own note. TUMEEZOODDY v. BUSARUT, **21 W.R. 76.** [*F.*, 22 W.R. 428.]

(3075)—*O.* 13, *rr.* 1 (2), 3 *and* 6 (=*Civ. Pro. Code*, 1882, *ss.* 140, 142)—*Stamp Act, II of* 1899, *ss.* 35, 36—*Insufficiently stamped document admitted in evidence—Objection as to its admissibility.*—Where an insufficiently stamped document was not rejected under s. 142 of the Code but was marked as an exhibit under s. 140, having regard to the language of s. 36 of the Stamp Act, no objection could be raised as to its admissibility, at any later stage of the suit, on the ground that the provisions of s. 35 of the Act as to the levy of penalty had not been complied with. SUGAPPA v. GOVINDAPPA, **12 M.L.J. 351.**

——O. XIII, r. 2 (=1882, s. 139=1877, s. 139=1859, s. 128).

(3075-*a*)—O. XIII, r. 2—*See* NOS. 2805-*e* 3063 to 3070, 3070-*a*, 3071 *supra.*

——O. XIII, r. 3 (=1882, s. 140=1877, s. 140=1859, s. 129).

(3075-*a*-1) O. XIII, r. 3—*See* NOS. 2807-*b*, 3072, 3073, 3074, 3075, *Supra.*

——O. XIII, r. 4 (=1882, s. 141=1877 s. 141=1859 s. 132).

(3075-*a*-2)—O. XIII, r. 4—*See* EVIDENCE—MISCELLANEOUS, A.W.N. 1888, 22.

(3075-*b*)—O. XIII, rr. 4 and 5—*See* RIGHT OF SUIT—GENERAL, 6 W.R. 2.

(3075-*c*)—O. XIII, rr. 4, 5, O. XXVI, rr. 7, 8. —*See* COMMISSION, 6 C.L.R. 109.

——O. XIII, r. 5 (=1882, s. 141-A=1877, s. 141=1859, s. 132.)

(3075-*d*)—O. XIII, r. 5—*See* NOS. 3075-*b*, 307-*c*, *supora.*

(3076)—*O.* 13, *rr.* 5 *and* 7 (=*ss.* 141-A, 142-A, *Civ. Pro. Code*, 1882).—A copy or an extract from an entry in an account book, filed under the provisions of ss. 141-A and 142-A of the Civ. Pro. Code, 1882, does not require to be stamped under art. 24 of sch. I of the Stamp Act, 1899. KASTUR v. FAKIRIA, **4 Bom. L.R. 223=26 B. 522.** [*R.*, 27 B. 150.]

(3076-*a*)—O. XIII, rr. 5, 7—*See* STAMP ACT, 1899, art. 24, 4 Bom. L.R. 223=26 B. 522.

—O. XIII, r. 6 (=1882, s. 142=1877, s. 142=1859, s. 134).

(3076-*a*-1)—O. XIII, r. 6—*See* NO. 3075, *supra.*

——O. XIII, r. 7 (=1882, s. 142=1877. s. 142=1859, s. 134.)

(3076-*b*)—O. XIII, r. 7—*See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 14 A. 356=A.W.N. 1892, 42.

(3076-*b*-1)—O. XIII, r. 7—*See* NOS. 3051-*a*-1, 3076, 3076-*a*, *supra.*

——O. XIII, r. 9 (=1882, s. 144=1877, s. 144=1859, ss. 133, 136, 137.

(3076-*c*)—O. XIII, r. 9—*See* ATTACHMENT—MODE OF ATTACHMENT, 9 W.R. 133.

(3076-*d*)—O. XIII, r. 9—*See* NO. 2396, *supra*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XIII, r. 10 (=1882, s. 137=1877, s. 137 =1859, s. 138.)

(3077)—*O.* XIII, *r.* 10 (=*Civ. Pro. Code*, 1882, s. 137—*Practice of High Court as to sending for record of previous suit.*—The provisions of s. 137 of the Code of Civil Procedure must be strictly complied with; and the High Court will not, in second appeal, send for the record of a previous suit, merely because such record has been sent for and inspected by the lower Courts where no such application, as is provided for by s. 137, has been made to it. HIRA SINGH v. RAM LAL, **A.W.N. 1894, 3.**

(3078)—*O.* 13, *r.* 10—*Application to send for records of other suits—Duty of Court under* s. 138, *Act VIII of* 1859.—Where a party to a suit applies to the Court to send for the records of some other suit, the Court is not bound to do so under s. 138, Act VIII of 1859. HEERAMUN ROY v. KAZEE TAHOOUR ENAM, **7 W.R. 109.**

(3079)—*O.* 13, *r.* 10 (=*old s.* 137 *of* 1882)—*Duty of Court under Act VIII* of 1859, s. 138.—The Court need only send for the papers specifically mentioned in an application under s. 138. Act VIII of 1859. MUSSAMUT JANOKEE BEBEE v. SHAH HABEEBUL HOSSEIN, **W.R. 1864, 272.**

(3080)—*O.* 13, *r.* 10 (=s. 138. *Civ. Pro. Code*, 1859)—*Documents filed in another Court—S.* 138, *Civ. Pro Code* (*Act* VIII *of* 1859).—The Court should send for documents filed in another Court under s. 138, Civ. Pro. Code (Act VIII of 1859). ROMUN KISHEN DEY v. SHEIKH KADIR BUKHSH, **6 W.R. 79.**

(3081)—*O.* 13, *r.* 10 (=s. 137 *of* 1882)—*Permission to add grounds of appeal for non examination of witnesses.*—Additional grounds of appeal by reason of non-examination of witnesses, and non-production of documents filed in another pending case, RUGHOONAUTH BOSE v. OOMED ALI, **W.R.F.B., 177.**

(3082)—*O.* 13, *r.* 10 (=*old s.* 137 *of* 1882)—*Documentary evidence with record of another case—Duty of Court to send for document—Procedure—Civ. Pro. Code*, 1859, *ss.* 136, 138.—A Court is not bound to send for documentary evidence which is with the record of another case, but is required by a party to prove his case, on the ground that he was unable to procure the originals, and that copies would be useless, as he could not get them attested. His proper course would be to proceed under s. 136 or s. 138, Act VIII of 1859. LOUIS CORAAH v. GOONOO CHURN GHOSE, **18 W.R. 13.**

(3083)—*O.* 13, *r.* 10 (=*old s.* 137 *of* 1882)—*Records from Government office—From Court of Wards—Summons.*—Records from a Government office must be sent for by the Court; papers from a Court of Wards must be obtained by the party needing them, by means of a summons on the proper Officer. SOBBEE JHA v. SHOSHUNATH JHA, **15 W.R. 150.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3084)—*O.* 13, *r.* 10 (=s. 137, *Civ. Pro. Code*, 1882=s. 138, *Civ. Pro. Code*, 1859)—*Suit on registered bond—Production of Registrar's books—Summons to Deputy Registrar.*—Where in a suit on a registered bond defendant fails to summon the Deputy Registrar, it is not necessary for the Judge to use the discretion given in s. 138, Act VIII of 1859. MONMOHINEE DABEE v. SREEDAHMA CHURN RANNAH, **14 W.R. 302.**

(3084-*a*)—*O.* 13, *r.* 10 (=*Civ. Pro. Code*, 1859, *s.* 138)—*Record of a criminal case—Inspection in a civil suit.*—In a civil suit, the record of a criminal case or any other case may be inspected under s. 138, Civ. Pro. Code. FAKIR-UD-DIN v. MUSSAMMAT HOSSEIN BIBI, **32 P.R. 1874.**

(3084-*a*-1)—O. XIII, r. 10—*See* EVIDENCE—DECREES. JUDGMENTS AND PROCEEDINGS IN SUITS, 32 P.R. 1874.

(3084-*a*-2)—O. XIII, r. 10—*See* PLEADINGS, 2 B.H.C. 341.

(3084-*b*)—O. XIII, r. 10—*See* RECORDS, 4 C.L.R. 36.

(3084-*c*)—O. XIII, r. 10, O. XLI, r. 27—*See* INSPECTION OF DOCUMENTS, 15 W.R. 173.

——O. XIV, r. 1 (=1882, s. 146=1877, s. 146 =1859, s. 139).

(3084-*c*-1)—O. XIV, r. 1—*See* NOS. 298*a*, 2752, 2823 *c*, 2853*a*, 3034-*b supra.*

(3084-*d*)—O XIV. rr. 1, 2—*See* VARIANCE BETWEEN PLEADING AND PROOF, 11 M. 376.

(3085)—*O.* 14, *rr.* 1, 2, 3, 5, *O.* 41, *rr.* 2, 3 (=*Act* VIII *of* 1859, *ss.* 139, 141, 351)—*High Court—Remand—Issues—Rejection of evidence—Appeal.*—In a case as to the amount of maintenance to be awarded out of an estate which was remanded by the Privy Council for the purpose of ascertaining and fixing the amount of such maintenance and for decision under s. 351 of the Civ. Pro. Code, 1859, it was held that it could not be objected that no issues were directed in the manner prescribed by the practice of the Courts in India. *Held*, further, that, during the enquiry in question, either party, could have produced evidence in support of his case, and where in his grounds of appeal from the judgment of the Zillah Judge passed on such inquiry, the defendant did not urge that the Judge improperly rejected evidence tendered by the defendant, he could not, in appeal to the Privy Council, raise that objection. KACHE-KALYANA RUNGAPPA KALAKKA TOLA UDIAR v. KACHIVIGA JAYA RUNGAPPA KALAKKA TOLA UDIAR, **2 B.L.R.P.C. 72=12 M.I.A. 495 =11 W.R.P.C. 33.**

(3086)—*O.* 14, *rr.* 1, 2 *and* 5 (=*Civ. Pro. Code*, 1882, *ss.* 146, 149)—*Amendment of plaint—First hearing of suit—Pre-emption claimed by two ladies.*—Two ladies brought a joint suit for pre-emption alleging a joint title. The elder

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

lady was the widow of the last male proprietor of the share from which the right of pre-emption arose. The younger lady was the widow of the son of the last male proprietor. On the day appointed for framing the issues, the issues were framed and recorded under s. 146, Civ. Pro. Code. The hearing was not further proceeded with on that day. Owing to some change in the officers of the Court, the hearing of the case was proceeded with by another Judge. An application was then made to allow the proceedings to be amended by striking out the claim of the younger widow. That application was refused, and the action was dismissed on the ground that the two widows could not be entitled to claim for pre-emption *Held*, on appeal, that if one of the widows was entitled to claim for pre-emption, the other could not have been, that consequently a stranger had been joined as co-plaintiff, that the application to strike out the name of the younger widow was not made till after the first hearing, that it was then consequently too late to apply to the new Judge, when he took up the suit to proceed with it under Chapter XV, Civ. Pro. Code, and that therefore the appeal should be dismissed. BHAWANI KUAR v. NARAIN SINGH, **A.W.N. 1887, 247.** (7 A. 860, 5 A. 197, *F.*)

(3087)—*O.* 14, *rr.* 1, 2, *O.* 41. *r.* 2 (=*Civ. Pro Code*, 1882, *ss.* 146, 542)—*Framing of issues—New ground of objection in appeal.*—S. 146, Code of Civil Procedure, provides that, at the first hearing of the suit, the Court shall, after reading the plaint and written statement and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or law the parties are at variance and shall then frame issues. The Judge should not have noticed the strange remedy demanded by the plaintiffs, and have ascertained whether the defendant admitted its correctness. The District Judge, in appeal, had power, under s. 542, Code of Civil Procedure, to hear the appellant in support of a new ground of objection, even though it had not been, as it was, set forth in the memorandum as a ground of appeal, and, considering that this was a matter of law going to the root of the case and not inconsistent with the defendant's line of defence, there is no doubt that the Lower Appellate Court should have considered it. There are several cases in which, even in special appeal, the High Courts have held it to be right to permit new points to be argued. (3 C. 612, *R.*) MAUNG SAING v. MA SO, **U.B.R. 1892—1896, 268.** (2 A. 884, 3 C. 612, 22 W.R. 216, 353, *R.*) [*Contra*, 2 U.B.R. 1897—1901, 333; *R. and F.*, 2 U.B.R. 1897—1901, 435.]

—— O. XIV, r. 2 (=1882, s. 146, cl. 6=1877, s. 146, cl. 6=1859, s. 139.

(3087-*a*)—*O XIV, r.* 2—*See* NOS. 2752, 2853 *a* 3034-*b*, 3034-*d*, 3085, 3086, 3087 *supra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—— O. XIV., r. 3, (1882, s. 147=1877, s. 147=1859 s. 139).

(3087-*b*)—*O.* XIV, *r.* 3=*See* NOS. 2773, 2853-*a*, 3034-*b*, 3085 *supra.*

—— O. XIV, r. 4 (=1882, s. 148=1877, s. 148=1859, s. 140.)

(3088)—*O.* 14. *r.* 4 (=*Civ. Pro. Code*, 1882, *s.* 148)—*Application to set aside* ex parte *decree—Application by one of two defendants—Defence not common to both defendants—Decree set aside in toto—Validity of order.*—Plaintiff sued on a pro-note made by first defendant alone and joined the undivided nephew of the first defendant as a party to the suit, on the ground that the pro-note was for a debt binding on the family including the nephew. Neither defendant appeared and the Court passed a decree *ex parte* against both the defendants. The decree proceeded on the footing that the debt was incurred for a family purpose. The nephew alone applied under s. 108 of Civ. Pro. Code, that the decree passed *ex parte* might be set aside. *Held*, that the decree could not be set aside *in toto* against both the defendants. There was no contention as to the making of the note and the consideration therefor. That being so, the contention of the nephew that the debt was one not binding upon him was a defence peculiar to him and not one common to him and the first defendant. Consequently, the first Court was not warranted by law in setting aside the decree as against the first defendant also, as the correctness of the decree did not depend on the character of the debt. GOPALA CHETTI v. SUBBIER **26 M. 604=13 M.L.J. 308.** (25 C. 155, *Cons.*) [*R.*, 121 P.R. 1907=51 P.W.R. 1907, 6 C.L.J. 226, 31 M. 454=18 M.L.J. 543=4 M.L.T. 230.]

(3088-*a*)—O. XIV, r. 4—*See* NO. 2778 *supra.*

—— O. XIV, r. 5 (1882, s. 149=1877, s. 149=1859, s. 141)

(3088-*a1*)—*O* 14, *r* 5—*Power of Court to add fresh issue—New plea should not be allowed after remand—Pleadings—Will—Original not forthcoming—Presumption—Revocation—Hindu Law—Widow—Power to make endowment*—A party to a suit ought not to be allowed to raise, after remand, a new plea, which was not advanced either in the Court below or in the High Court before remand. Although a Court has power under O. XIV, r.5 of the Code to add any issue before judgment is pronounced, yet, in exercising that power, it ought not to allow a new plea to be put forward and add an issue shortly before pronouncing judgment. Where an original will is not forthcoming, the presumption is that it was destroyed by the testator with a view to revoking it. A Hindu widow has no power to make an endowment of her husband's property except for purposes conducing to the spiritual welfare of her husband. SOHAN BIBI v. HIRAN BIBI, **10 Ind. Cas. 230.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3088 *a* 2)—O. XIV, r. 5—*See* VARIANCE BETWEEN PLEADING AND PROOF, 1 N.W.P. 28=Ed. 1873, 26.

(3088-*a*-3)—O. XIV, r. 5—*See* NOS. 2774-*a* 2774-*a*-1, 2774-*b*, 3085, 3086, *supra*.

——O. XIV, r. 6 (=1882, s. 150=1877, s. 150 =1859, s. 142).

(3088-*b*)—O. XIV, rr. 6, 7—*See* AGREEMENT, 29 C. 306=6 C.W.N. 121.

(3089—*O.* 14, *rr.* 6, 7, s. 96 (=ss. 150, 151, 540, *Civ. Pro. Code*, 1882)—*Appeal.*—A decree passed under the terms of ss. 150, 151, Civ. Pro. Code, is appealable. In an ordinary suit, the duty of settling the issues between the parties for trial is placed upon the Court under s. 146, Civ Pro. Code, ss. 150 and 151, simply enable the parties themselves, by mutual agreement to settle the issues that are to be tried, but those sections do not place the Court on a higher footing as to finality in respect to proceedings held for the trial of those issues. SHUGAN CHAND v. JUDAYAL MAL, **A.W.N. 1886, 233.**

——O. XIV, r.7, (=1882, s. 151=1877, s.151= 1859, s. 143.)

(3089-*a*)—O. XIV, r. 7—*See* NOS. 551, 3088-*b*, 3089, *supra*.

——O. XV, r. 3 (=1882, s. 154=1877, s. 154= 1859, s. 145).

(3090)—*O* 15 *r.* 3 (=*Civ Pro. Code*, 1882, s. 154)—*Disposal of case at the first hearing—Procedure.*—It is not competent for the Court to act under s. 154 of the Civ. Pro. Code and dispose of the case at the first hearing, when the plaintiff's pleader has appeared and objected to the adoption of such procedure. KRISHNA BHUPATI v. RAMAMURTI, **16 M. 198.**

(3091)—*O.* 15, *rr.* 3, 4 (=ss. 154, 155, *Civ. Pro Code*, 1882=s. 145, *Civ Pro. Code*, 1859) —*Power of sitting Judge—Practice.*—When the issues are framed and the plaintiff and defendant are ready and willing to proceed, the sitting Judge has power, under s. 145, to proceed to the hearing and final disposal of the case. ANONYMOUS **1 Ind. Jur. O.S. 14.**

——O. XV, r. 1 (=1882, s. 155=1877, s. 155= 1859, s. 145).

(3092)—*O.* 15. *r.* 4 (=*old* ss. 154, 155)—*Fixing day for hearing—Documents not produced at proper time.*—The great object of the Procedure Code in fixing a day for the hearing of a case is that the parties may be confronted together. The Court commits no error in refusing to send subsequently for documents not produced at the proper time, is not satisfied that they are necessary. SOBBEEJHA v. SHOSHEENATH JHA, **15 W.R. 150.**

(3093)—*O.* 15, *r.* 4—*Suit posted for final disposal—Adjournment*—S. 145, *Act VIII of* 1859. —A suit, in which further evidence is required, must be adjourned by the Court under s. 145, Act VIII of 1859 (although it had been posted for final disposal), unless it is satisfied that the plaintiff had, without sufficient cause, failed to produce his evidence. MOONSHEE SYUD AMEER ALI v. BABOO RUN RAHADOOR SINGH, **7 W R. 84.**

(3094)—*O.* 15, *r.* 4. (=s. 145, *Civ Pro Code*, 1859)—*Final disposal of suit on day fixed for settlement of issues.*—When a case is postal for the settlement of issues, the Court ought not to proceed to dispose finally of the case except with reference to the specific circumstances detailed in s. 145, Act VIII of 1859. SHEIKH JEEAWUN v. GOLAB KHAN, **1 N.W.P. 147.**

(3094-*a*)—O. XV, r. 4—*See* IMP ACTS, ACT IV OF 1869. ss. 10, 18, 23, 27, 32, 34, L.B.R. 1872—92, 527.

(3094-*b*)—O. XV, r. 4—*See* NOS. 2828, 2891, 2892, 3091, *supra*.

(3095)—*O.* 15, *r.* 4, *s* 114, *O* 47. *r.* 1 (= ss. 155, 623, *Civ. Pro Code*, 1882—"*For any other sufficient reason*"—*Application for review.* —The parties to a suit endeavoured to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he, the defendant, would inform the Court of what was going on, in consequence of which the plaintiff did not attend in person on the day fixed by the Munsif for disposing of the case and did not instruct his pleader as to the cause of his absence. On the case being called on, the pleader stated that the plaintiff had failed to produce his evidence and the Munsif dismissed the claim. The plaintiff applied to the Munsif for a review of judgment. *Held* that, under s. 155, Civ. Pro. Code, the Munsif was not justified in dismissing the suit, unless the plaintiff failed, without sufficient cause, to produce his evidence, that there was sufficient cause, that the application for review was rightly granted, and that a liberal and wide interpretation ought to be placed upon the words in s. 623, Civ. Pro. Code, "for any other sufficient reason" KADIR BAKHSH v. ABDUL RAHMAN, **A.W.N. 1887, 105**

——O. XVI, r. 1 (=1882, s. 159=1877, s. 152 =1859, s. 149).

(3095-*a*)—O. XVI—*See* NO. 2219, *supra*.

(3096)—*O* 16, *r* 1 (=*Civ Pro. Code*, 1882, s. 159)—*Power of Court to refuse to issue summonses to witnesses.*—A Court is not given a discretion under s. 159 of the Code enabling it to refuse an application for issue of summonses to witnesses MOHANLAL KALAR v. UPASHIA, **13 C.P.L.R 152.** (16 A. 218, 15 B. 86, 7 C. 560, *F.*) [*R.*, 5 N.L.R. 181.]

(3097)—*O.* 16, *r.* 1—*Right of a party to have summons issued—Right to an adjournment when summons prove abortive—Inherent power of Court to prevent abuse of its process under s.* 151—*Hindu law—Joint family governed by*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Mitakshara law—Right of grandson, during the lifetime of father to impeach transactions by grandfather—Transactions immoral and illegal—Right of grandson to sue for partition—S 85, Transfer of Property Act—Mortgage suits—Right of Manager of joint family to represent the co-parcenary.—The right of a party to have summonses issued for securing the attendance of his witnesses, if applied for before the hearing, is absolute. (13 C.P.L.R. 152, 9 B. 308, *R.*) But the Court has inherent power under s. 15, to prevent abuse of its process, and refuse to issue summonses, where it is convinced that a vexatious desire to obstruct the course of justice is the governing motive of the party applying for summonses. Though to have summons issed, if applied for before the hearing, is an absolute right of a party, that right does not extend to his being entitled to an adjournment, if, for any reason which is an ordinary incident of the proceedings for service of process, the summons fails of its object. When the Court gives reasonable time for securing effective service and its advantage is lost owing to anything being left undone which could and should have been done, the party guilty of such laches cannot ask that the trial be prolonged in order to escape from the consequences of his own laches. In a joint family governed by the Mitaksbara law, a grandson can maintain a suit for partition of ancestral family property, even when his father and grandfather are both alieve, if they allow it to be wasted and the grandson's interest is imperilled. (18 M. 179, 31 C. 111, *F.*; 6 A. 560, 16 B. 29. *R.*) A grandson may challenge his grandfather's mortgage, if the transaction involves a sacrifice of his vested right by birth, by reason of its being tainted with immorality or illegality. Except in cases to which s. 85 of the Transfer of Property Act applies, a manager of a joint Hindu family represents the whole co-parcenary in litigations affecting the family property, where his act is *bona fide* and in the interest of the family and within the scope of his authority. In all such cases, the decree obtained in the suit by or against the manager will be presumed to have been obtained by or against him in his representative capacity, and as such will be operative against the whole family. MOTI v. KANHYA, **5 N.L.R. 181.**

(3098)—*O.* 16, *r.* 1, *s.* 33, *O.* 20, *r.* 1. (=*Civ. Pro. Code*, 1882, *ss.* 159, 198)—*Witness—Summoning and attendance of witnesses—Judgment—Judgment to be pronounced in open Court on fixed day—Suit for pre-emption.*—The only question to be decided was as to the price of the subject-matter of the sale. The plaintiff, on the day fixed for the hearing, applied for coercive process against one of the vendees, who had been summoned as a witness for him, but had failed to attend. The Judge observed that, as the vendee was the leading man in the District, he should not be compelled to appear in

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Court and that his evidence would be unnecessary and, after examining one of the vendors and hearing the arguments, recorded an order that the case was closed and that the judgment would be delivered on a certain day. Subsequently the Judge wrote his judgment a week before the date fixed for its delivery and dated it on the day on which it was written. *Held*, that the omission to summon the vendee was a substantial error in procedure. Under the provisions of the Code of Civil Procedure, the plaintiff had the absolute right of summoning any witness he named to give evidence in the Court, and the Judge had no power to fetter the plaintiff's discretion, and was, therefore, bound to take coercive measures against the vendee and to give every assistance to the plaintiff for securing the attendance of his witness. *Held*, also, that the Judge was bound to wait until the date fixed and not to announce judgment at an earlier date, and that, in neglecting to take this course, his action was in flagrant violation of the provisions of law, and that, therefore, the judgment was a nullity. PARAS RAM v. JOTU PERSHAD, **61 P.R. 1904.**

(3099)—*O.* 16, *r.* 1, *s.* 99 (=*Civ. Pro. Code*, 1882, *ss.* 159, 578)—*Order of Court refusing to issue summonses to witnesses effect of—Appeal; from order.*—Where the applicant for a summons to his witnesses has negligently, or with intent to delay the hearing, postponed the making of his application until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but, nevertheless, it would be the duty of the Court to order the summons asked for to issue, as a Court is not given a discretion under s. 159 of the Civ. Pro. Code, enabling it to refuse such an application. Where the refusal of an application to procure the attendance of witnesses has been taken as a ground of appeal from the decree in the suit, s. 578 of the Code would apply, if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits of the case, it would be a good ground of appeal. BHAGWAT DAS v. DEBI DIN, **16 A. 218=A. W N. 1894, 45.** (7 C. 560, 15 B. 86, *Appr.*) [*R.*, 13 C.P.L.R. 152.]

——O. XVI, r. 2 (=1882, s. 160=1877, s. 160 =1859, s. 151).

(3099-*a*)—*O.* 16, *rr.* 2, 3, 4 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 151)—*Set-off—Suit for arrears of rent—Claim for contribution—Equitable set-off—Claim in equity.*—In a suit by one of several co-sharers in a *mauza* against a person who held a lease of the said property from the plaintiff and her co-sharers, to recover a sum of money as the plaintiff's share of arrears of rent due for a certain period, the defendant, whilst admitting the plaintiff's claim to the rent for which she sued, pleaded that, during the years in question, he had paid on behalf of all the shareholders the Government revenue due in

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

respect of the *mouza* and claimed to set off in this suit the plaintiff's *quota* of such revenue against the arrears of rent due from him to the plaintiff. *Held* that the obligation of the plaintiff, if there was any, to re-pay the defendant her *quota* of the Government revenue, not being a debt resting upon a contract between herself and him, or even upon a *quasi* contract, but being an obligation to be ascertained and determined by the application of the principles of equity to circumstances surrounding the defendant, her co-sharers and the plaintiff, which were exceedingly complicated, the Court could not try a question of this kind by way of set off to the plaintiff's claim under the provisions of s. 121, Civ. Pro. Code, 1859. If the claim which the plaintiff in equity brings against the defendant is so connected with the counter-claim which the defendant sets up against the plaintiff that the one cannot be properly and sufficiently inquired into and ascertained without consideration of the other, then a Court of equity will allow a set-off, which the defendant in this way makes. To admit a set-off, therefore, there must be, by the nature of the two claims, such a connection between them that the truth or completeness of the one cannot be judged of or measured without reference to, and a consideration of the other. HOSSERIMA BIBI v. JAMES SMITH, **13 B.L.R. 440=22 W. R. 15.**

(3100)—*O. 16, rr. 2, 4 (=ss. 160 and 162, Civ. Pro. Code, 1882)—Witness—Non-payment of expenses at the time of summons Power of Court to order payment before passing decree*—Before the passing of a decree, the Court has power to order the payment of travelling and other expenses to a witness, who had been summoned by a party to the suit, in case where such expenses have not been paid at the time of issuing the summons. Ss. 160 and 162 of the Code contemplate that the expenses should be paid by the party, who asks the Court to summon the witness, before he gives his evidence, but they do not declare that, unless this is done, the Court has no power to require their payment. They are intended for the benefit of the persons summoned and there is nothing in them to protect the party, who asks the Court to issue a summons, from his liability to pay the expenses of the witness, if the Court, *per in curiam*, or in order to save delay, issues the summons without seeing that the party applying for the summons discharges the duty imposed on him by the law. CHENCHURAMAYYA v. NARASIMHAYYA, **17 M.L.J. 435.**

(3101)—*O. 16, rr. 2, 4, O. 21, r. 11 (2) (=ss. 160, 162, 235, Civ. Pro Code, 1882)—Additional sum "allowed" to defray additional expense of witness—Transmission of "bill" to another Court "ordered"—Whether constitutes order for payment executable by attachment and sale—Civ. Pro. Code, 1882, s. 622 (=Civ. Pro. Code, 1908, s. 115)—Refusal by Court to execute order transmitted—Revision.*—Where an application by a witness, who claimed an additional sum for defraying his expenses and prayed for an order directing the plaintiff to pay him that amount, was "allowed" by the Munsif, and another application which contained a prayer that, to realise the amount, an order might be passed directing that "the bill might be sent" to the Court of the Munsif of P, was "ordered" but the application was rejected by the Munsif of P, on the ground that there was no order directing payment and for attachment and sale on default of payment. *Held*, that the first order was an order for payment and that the second taken together with the first application was an order that such sum may be levied by attachment and sale of the property of the plaintiff within the jurisdiction of the Court of the Munsif of *P*. *Held*, also, that the order of the Munsif of P is open to revision under s. 622, Civ. Pro. Code, 1882, because the law allows no course open for the Judge to follow on the admitted facts of the case, and the Munsif erroneously thought that he had no power. MANAVIKRAMAN *styled* ETTAN ETTAN RAJAH v. VEERARAYAN *styled* AMIYAN VALIA RAJAH **7 M.L.T. 76=5 Ind. Cas. 742.**

—— O. XVI, r. 3 (=1882, s. 161=1877, s. 161 =1859, s. 151).

(3101-*a*)—O. XVI, r. 3—*See* NO. 3099-*a*, *supra*.

—— O. XVI, r. 4 (=1882, s. 162=1877, s. 162 =1859, s. 151.)

(3101-*b*)—O. XVI, r. 4—*See* NOS. 3099-*a* 3100, 3101, *supra*.

—— O. XVI, r. 5 (=1882, s. 163=1877, s. 163 =1859, s. 152).

(3102)—*O. 16, rr. 5, 7 (=Act VIII of 1859, s. 177, 178, 179)—Kingdom of Ava is territory of native Prince or State—Commission to take evidence*)—The kingdom of Ava is not the territory of a native Prince or State in alliance with the British Government within the meaning of s. 177, Act VIII of 1859. A commission for the examination of a witness at Mandalay can issue only from the High Court. If the evidence taken by a commission issued under s. 178 is given on oath or affirmation, it will be admissible without consent of parties, upon proof of the facts necessary for that purpose under s. 179, Act VIII of 1859. AGA MAHAMAD JAFFER TEHRANI v. MIRZA NAZIRULLAH, **2 B.L.R.A.C. 73=10 W.R. 285.**

—— O. XVI, r. 6 (=1882, s. 164=1877, s. 164=1859, s. 153).

(3102-*a*)—O. XVI, r. 6—*See* ABATEMENT OF RENT, 8 W.R. 1902.

—— O. XVI, r. 7 (=1882, s. 165=1877, s. 165).

(3102-*b*)—O. XVI, r. 7—*See* SANCTION TO PROSECUTE, A.W.N. 1891, 40.

(3102-*c*)—O. XVI, r. 7—*See* NO. 3102 *supra*.

(3103)—*O. 16, r. 7, O. 18, r. 4 (=ss. 165, 181, Civ. Pro. Code, 1882)—Burden of proof on*

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

defendant of proving plaintiff's adoption—Adoptive father, though cited as witness, abandoned, by both sides—Defendant applying for examination of adoptive father after both sides had closed case—Application properly to be refused—Laxity in conduct of litigation—Best evidence—Evidence Act, ss. 11 and 43.—One Ramkrangir, when he was joint with his younger brother K and acted as *karta* of the joint family, conveyed, on 12th October, 1903, to one Puri a portion of the joint property. In January, 1905, K sued to obtain possession of half the aforesaid share, claiming that the sale was void for want of consideration, and, in any case, could not bind him, as it was neither necessary nor beneficial to his interests. The defendant, *inter alia*, alleged that the plaintiff was adopted soon after October 1898 by one S, thereby losing all title to the property of his natural family. The defendant had the burden of proving that the plaintiff had been adopted by S. The general rule that the best evidence should be given required him to put the adoptive father into the box. But he deliberately closed his case without tendering S, though both sides had included S in their lists of witnesses. After the case was closed and was posted for judgment, the defendant applied for leave to examine S, who was present in Court. The first Court refused to examine S. *Held* that s. 181, Civ. Pro. Code, had no application under the circumstances, that there was no reason whatever why the first Court should have exercised the power conferred on it by s. 165, Civ. Pro. Code, and that it was not bound to examine S, but exercised the discretion allowed in such matters, not only legally, but wisely. To countenance a manœuvre of this sort would only lead to laxity in the conduct of litigation. If a party wants a certain person examined, he must tender him for examination, and s. 181, Civ. Pro. Code, does not require a Court to examine a witness, simply because he may be present in Court. (6 W.R. 231, 13 W R. 185, *F.*) It was objected, also, that the pleadings did not include an allegation that S, being a *nihang*, could not adopt, and that the first Court should not have relied on orders recorded in a suit not *inter partes*, showing that J, whom the defendant's witnesses described as having taken a prominent part in the adoption ceremony in 1900 or later, was already dead in April 1899; *held* that the fact that J died early in 1899 was relevant under s. 11 of the Indian Evidence Act, and, if he was treated as dead, in a civil suit to which he was a party, the Court's order was good evidence of a fact which might be proved otherwise (See s. 43 in the Indian Evidence Act). RAMKRISHNA PURI v. KISANGIR, **4 N.L.R. 129.**

——O. XVI, r. 10 (=1882, s. 168=1877, s. 168 =1859, s. 159).

3104)—*O.* 16, *r.* 10—*Absconding witness—Court's discretion.*—A Court is not competent to issue the proclamation and attachment mentioned in s. 159, Code of Civil Procedure, unless it is proved to its satisfaction that the evidence of the witness is material and that he is avoiding the summons, and after these circumstances have been shown, it is a matter of discretion to issue the proclamation and attachment, and after issue to let the case stand over. KALEE DASS CHUCKERBUTTY v ESHAN CHUNDER CHATTERJEE, **13 W.R. 416.**

(3104-*a*)—O. XVI r. 10—*See* PLAINT—AMENDMENT OF PLAINT, 20 W.R. 6.

(3104-*b*)—O. XVI, *r.* 10—*See* NOS. 2739. 2747, 2747-*a supra.*

——O XVI, r. 11 (=1882 s. 169=1877 s. 169=1859, s. 150.)

(3104-*c*)—O. XVI, *r.* 11—*See* NOS. 2739, 2747, 2747-*a*, *supra* and No. 4674, *infra.*

——O XVI, r. 12 (=1882, s. 170=1877, s. 170 =1859, s. 160).

(3105)—*O.* 16, *r.* 12 (=s. 170, *Civ. Pro. Code*, 1882)—*Order—Appeal—Auction sale when complete—Confirmation.*—An order under s. 170 of the Code of 1882 is not appealable. An auction sale does not become complete until it is confirmed by the Court. BADRI PRASAD v TEJ SINGH, **7 Ind. Cas. 100=7 A.L.J. 1152.**

(3105-*a*)—O. XVI, r. 12—*See* NOS. 2739, 2747, 2747-*a*. *Supra*

——OXVI, r. 13 (= New.)

(3105-*b*)—O. XVI, *r.* 13—*See* NOS. 2739, 2747, 2747-*a*, *Supra.*

——O. XVI, r. 14 (=1882, s. 171=1877, s. 171.)

(3106) *O.* 16, *r.* 14 (=s. 171, *Civ Pro. Code* 1882)—*Additional witnesses—Power of Civil Courts to call for—Civil proceedings between parties—Practice.*—In criminal cases, no doubt, a Magistrate should exercise his discretion and may give remands in order to allow additional evidence for the prosecution or defence to be brought forward, for, it is a matter of public interest that crime should not go unpunished of an innocent man be punished. The same considerations do not apply to civil proceedings between parties. It is true that s. 171, Civ. Pro. Code, gives the Court power to call additional witnesses not named by the parties, but the power is rarely exercised as the parties themselves are generally required to look after their own interests. MAUNG GYI v. MAUNG MEIK GALE, **L.B R. 1893—1900, 658.**

(3107)—*O.* 16, *r.* 14—*Jurisdiction—Small Cause suit—Suit to recover price of skins of animals—Evidence—Witness required by Court but not wanted by party.*—A suit to recover the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

price of skins of certain animals, alleged to belong by custom to the plaintiff is not excepted from the cognizance of a Small Cause Court. Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire to call, the Court is not justified in insisting on the defendant paying the amount necessary to secure the attendance of the witness, and, on defendant's refusal to do so, declining to issue summonses for the attendance of his witnesses. In such a case the correct procedure is to take action under O. 16, r. 11 of the Code. BILLA v. CHHUTA, **153. P.L.R. 1911.**

(3107-a)—O. XVI, r, 14. O XXVI, r. 9—Suit relating to boundaries of land—Doubt as to identity of land—Duty of Judge—Procedure to be followed—Inspection of land—Issuing commission—Witnesses to be called by Court—*See* BOUNDARY, 5 L.B.R. 1=2 Ind. Cas. 347.

——O. XVI, r. 15 (=1882, s. 172=1877, s. 172=1859 s. 167).

(3107-a-1)—*O. 16 r. 15—Summons to produce documents—Documents not specified—Witness's duty—Search-fee—Whether can be claimed.*—Where a summons was issued calling upon the Chief Officer of the Karachi Municipality to cause the production of certain entries from his records, which were not specified, and where the Chief Officer caused a search to be made and claimed a search-fee; *Held*, that there was no provision, under which the search fee could be claimed from the party who caused the summons to be issued. A witness is bound to produce documents duly specified when summoned by Court, but he is not bound to produce documents not duly specified. He might apply for the specification of the documents. REWACHAND KHIMANMAL v. LALOO, **5 S.L.R. 44.**

——O. XVI, r. 17 (=1882 ss. 174 (1), 175=1877, ss. 174 (1) 175=1859, ss 168, 169).

(3107-b)—O. XVI, r. 17—The section does and apply in the case of appeals, under cl. 15 of the Letters Patent, from judgments of the High Court in the exercise of its original jurisdiction. —*See* HINDU LAW — RELIGIOUS ENDOWMENT, 29 M. 1.

(3107-c)—O XVI, r. 17—*See* RES JUDICATA —COMPETENCY OF COURT, 9 W.R. 359.

(3107 *d*)—O. XVI, r. 17—*See* NOS. 2739, 2747, 2747-*a supra*.

——O. XVI r. 18 (=1882 s. 174=1877 s. 174 =1859 s. 169).

(3107 *e*—O. XVI, r. 19—*See* NOS. 2739, 2747, 2747-*a supra*.

——O XVI r. 20 (=1882, s. 177=1877, s. 177=1859, s. 170.)

(3108)—*O.* 16, r. 20 (=*Civ. Pro. Code*, 1859, s. 170)—*When penalty under section incurred*

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*Production of documents.*—To render a party liable to the penalty prescribed in s. 170. Civ. Pro. Code, 1859, it must be shown that, notice having been duly served on him, the requisition was not complied with. GOOROODOSS ROY v. GREEDHUR SEIN, **11 W.R. 110.**

(3109)—*O.* 16, *r.* 20 (=*old s.* 177)—*Defendant bona fide requiring plaintiff's evidence—Suit not to be decreed before taking such evidence.*—Under the Code of Civil Procedure a defendant who, *bona fide* and for a substantial reason requires the evidence of the plaintiff to be taken ought not in ordinary circumstances to have a decree against him until that evidence has been given. ROY DHUNPAT SINGH BAHADOOR v. PREM BIBEE, **24 W.R. 72.**

(3110)—*O.* 16, *r.* 20 (=*Civ. Pro. Code, Act VIII of* 1859, s 170)—*Plaintiff's disregard of summons.*—Under s. 170, Act VIII of 1859, it is discretionary with a Court to pass such order as it thinks proper in regard to a plaintiff who disobeys its summons to attend, and it is no ground of special appeal that further steps were not taken by the first or lower appellate Court. NARAYANDAS v. MAHARAJAH OF BURDWAN, **1 B.L.R.S.N. 11-d.**

(3111)—*O.* 16, *r.* 20—*Party not attending as witness—Effect—S.* 170, *Act VIII of* 1859, *Civ. Pro. Code.*—It is not imperative on the Court to give decree against the non attending party, such a course of procedure is simply discretionary. RAJ CHUNDER GHOSE v. KOYASH CHUNDER BANERJEE, **6 W.R. Act X, 86.**

(3112)—*O.* 16, *r.* 20 (=*Civ. Pro. Code*, 1859, s. 170—*Non-attendance of party—Judgment—Written statement.*—There is nothing in the Civ. Pro. Code, or any other law which says that the provisions of s. 170, Act VIII of 1859, apply to those cases only in which the party summoning his opponent is not in a position to prove his case otherwise than by the evidence of that opponent. Nor can a Judge refuse to reply upon the evidence of witnesses produced by one party merely because the other party says from beforehand that he and the witnesses are not on good terms. KASINAUTH SHAHA v. DWARAKANATH SIRKAR, **9 B.L.R. 215=17 W.R. 550.**

(3113)—*O.* 16, *r.* 20 (=*Civ. Pro. Code, s.* 170 *of* 1859)—*Great caution to be observed.*—The penal provision of s. 170, Civ. Pro. Code, however necessary in this country to meet extreme cases, ought to be exercised with the most temperate discretion. Where the Court might have treated one of the defendants as in default, and passed judgment against him under the above section, but, instead of doing so, overlooked the default and made an order adjourning the further hearing of the suit, and, on the day to which the hearing was adjourned, disposed of the suit under s. 170, *held* that the Court, by its own act was not in a position to treat the defendant as in default. P. VASUDEVAN NAMBUDRIPAD v. KOVILAGATHA VALIA RANY, **4 M.H.C. 281.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859,—*continued.*

(3114)- *O.* 16 *r* 20 (=*Civ Pro. Code*, 1859, *s.* 170)—*Failure to comply with order to attend to give evidence in particular suit Dismissal of suit* —S. 170, Civ Pro. Code, requires that there should be a failure to comply with an order to attend to give evidence in the particular suit. The power to give judgment has reference to the suit in which the party is specifically ordered to give evidence. ARUNACHELLA MUDALY v. VENKATACHELLA MUDALY, **3 M H.C. 269.**

(3115)—*O.* 16, *r.* 20—*Suit, Dismissal of, for default*— *S.* 170, *Act VIII of* 1859 *Applicability.*—Where there is no proof of cognizance on the party of the plaintiff of the order of the Court or of wilful default on his part, the stringent provisions of s. 170, Act VIII of 1859, are not applicable. They ought to be applied only to cases of contumacious litigants. DATAHURUKMAN SINGH v. OODOY CHAND PYNE, **6 W R 247.**

(3116 —*O* 16, *r.* 20 (=*s.* 170. *Civ Pro. Code* 1859)— *Refusal of defendant to appear as a witness*—S. 170 of Act V III of 1859 gives the Civil Court a discretion either to pass judgment against a defendant refusing or failing to appear as a witness, or to pass such other order in relation to the suit as the Court may deem proper. Under it the first Court may decide against a defendant on the ground of his failure to appear, even without going into the plaintiff's evidence; and the lower Appellate Court is equally within the law in going into the whole case on its merits. GOPI LAL BOSE v. KALENATH MOOKERJEE **8 W R. 89.**

(3117)—*O* 16, *r.* 20 (=*s.* 170 *Civ. Pro Code* 1859)— *Power of Court in execution case* —S. 170 of Act VIII of 1859 gives a Court power, in an execution case, to summon a party to give evidence, and, on his failing to do so, to give judgment against him. SYUD DESHAN HOSSEIN v. MUSSAMUT KHODEJA, **8 W.R. 64.**

(3118)- *O.* 16, *r.* 20 (=*s.* 70. *Civ. Pro Code*, 1859)— *Dismissal of suit for default* —Under s. 170 of Code of Civil Procedure (Act VIII of 1859), the Court can dismiss the suit as against the plaintiff who fails or refuses to appear, and in respect of those plaintiffs who appear, the Court must pass a decree in the usual way. PROSUNNO COOMAR SHAHA v. GOOROO PERSHAD ROY. **1 W.R. 26.** *See, also*, **1 W R. 168.**

(3119)—*O* 16, *r.* 20 (=*s.* 177 *Limitation Act* 1882,—*Plaintiff not proving his case. Application of section against defendant*—S. 170, Act VIII of 1859, ought not to be put in force against a defendant declining to appear and give evidence when plaintiff gives no evidence in support of his case. SYUD SHAH ALEH AHMED SAJJADANUSHEEN v. BEBEE PAUSEEBUN, **17 W R. 363.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)- *continued.*

(3120) *O.* 16, *r.* 20 (=*s.* 170, *Civ Pro. Code*, 1859)- *Court not to presume everything against defaulting party—Court to require proof.* - In a case which Act VIII of 1859, s. 170 is provided to meet, the Court ought not to take everything for granted against the party in fault, but to require the other party to prove his case so far as he can without the desired evidence, to consider well the effect of the default or refusal with reference to the rules of evidence, and to hear what evidence the defaulting party adduced before imposing upon him the penalty of default. MOULVIE MAHOMED HAMIDOOLLA v. DURBESH SHAIKH, **24 W.R. 314.**

(3121)—*O.* 16, *r.* 20 (=*old s* 177 —*Plaintiff and defendant giving no evidence—Plaintiff not to get decree Refusal to obey summons*—*S* 170, *Civ Pro. Code*, 1859—*Default.* A plaintiff giving no evidence in support of his claim is not entitled to a decree because the defendant has given none The Court should apply the provisions of s. 170, Civ Pro. Code, 1859, where a defendant contumaciously refuses to appear in answer to a summons. THAKOOR LAL MISSER v. BROHMO MOYEE DABEE, **15 W R. 283.**

(3122)—*O.* 16 *r.* 20- *Plaintiff giving no evidence—Decree - Defendant's default to give evidence.*—A plaintiff adducing no evidence in support of his case cannot get a decree merely on the failure of defendant to give evidence. DAMOODER BHOOSHUN v. RUGHOONATH PAJNA, **12 W.R 242** [*F.*, 15 W.R 253.]

(3123) *O.* 16 *r.* 20 (s. 177, *Civ Pro Code*, 1882)— *Defendant's evading giving evidence as witness not sufficient for a verse decisions.*— The avoidance of defendant to give evidence, when cited as a witness to give evidence, is not alone sufficient to justify an adverse decision of the suit against him under s. 170 of the Civ. Pro. Code. His absence may be an unfavourable circumstance, but the Court will not always be disposed to attach to it such weight as to regard it as justifying a decree in plaintiff's favour. All litigants are entitled to the protection of the Court from extortionate claims made upon them by those whose professional aid they seek. Brokes and meddlers in litigation, who avail themselves of the weakness and ignorance of suitors to obtain from them, under a pretence of services to be rendered, engagements for the payment of money, will find that protection will be afforded by the Court against them also. ROOP NARAIN MISR v. KASHEE RAM SINGH TIMBIRAM **2 N W P. 67.**

3124)- *O* 16 *r.* 20—*Suits under Act X of* 1859—*Applicability of ss.* 166 *and* 170, *Act VIII of* 1859, *Civ. Pro. Code—Right of defendant to examine plaintiff* —The provisions of ss. 166 and 170 of Act VIII of 1859 apply to suits under Act X of 1859 These sections were extended to such suits by s. 67 of that law. The right of a defendant to summon plaintiff

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

to give evidence is not taken away by the fact that the Court examines the plaintiff's agent. SOOPUN KHAN v. HURO PERSHAD PAUL, **4 W.R. Act X, 50.**

(3125)—*O.* 16, *r.* 20 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 170)—*Refusal to attend—Dismissal—Principle.*—Where a party, summoned to attend as a witness, refuses to give evidence, and the party who requires his evidence is unable to make out his case without it, the suit should not be dismissed for want of proof. In a suit for contribution in respect of Government revenue, in which the defendants, as co-sharers, were summoned by the plaintiff to prove facts which were peculiarly within their knowledge, such as, the extent of their own shares and the amount paid by them on account of revenue, the Court should not have dismissed the suit on the failure of the defendants to appear, as the points, on which the plaintiff relied, might reasonably be presumed to be within the knowledge of the defaulting parties. SRIMATI HEMANGINI DASI v. RAMNIDHI KUNDU, **1 B.L.R. S.N. 10=10 W.R. 158.**

(3126)—*O.* 16, *r.* 20 (=*old s.* 177 *of* 1882)—*Defendant as witness—Summons—Non-appearance—Inquiry into cause of non-appearance.*—Where a defendant summoned as a witness does not appear, the Court must adjudicate on the sufficiency of his excuse. BHALLY MAHOMED BUKSHEE v NOBIN CHUNDER ROY CHOWDHRY, **15 W.R. 269.**

(3127)—*O.* 16, *r.* 20 (=*old s.* 177 *of* 1882)—*Defendant evading witness summons—No reason for non attendance—Willingness immaterial.*—A defendant's saying that he was willing to attend when he showed no reason for non attendance is no lawful excuse for evading summons as a witness. What is or is not a lawful excuse (within the meaning of s. 170) must depend upon the circumstances of each case. BABOO DOORGA DUTT SINGH v. JHEENGOOR JHA, **18 W R. 63.**

(3128)—*O* 16, *r.* 20 (=*old s.* 177 *of* 1882)—*Sufficient evidence for plaintiff—Failure of plaintiff to obey summons—Decree for plaintiff.*—Where there is sufficient evidence to prove plaintiff's claim, he is entitled to a decree, notwithstanding his failure to attend to a summons under s. 170, Act VIII of 1859. HERBERT COWELL v. ISHEN CHUNDER SEN, **18 W R 16.**

(3129)—*O.* 16, *r.* 20 (=*old s.* 177 *of* 1882)—*Evidence of parties as witnesses*—In a suit by a plaintiff for the recovery of the amount due under two bonds, defendant pleaded that they were given to plaintiff by his father but that he had no personal knowledge of the facts or details. On defendant's default to appear, the lower Appellate Court decreed the plaintiff's case. *Held*, reversing the decision and remanding the case, that plaintiff must give at least

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

prima facie evidence in support of his allegation that the defendant had personal knowledge of the facts in dispute. THAKOOR LAITH NARAIN DEO v. BOLAKEE CHOWDHRY, **W.R. 1864, 24.**

(3130)—*O.* 16, *r.* 20(=*s.* 177 of 1882)—*Plaintiff's liability to give evidence determined by competent Court — Technical objection.*—Where plaintiff's liability to appear and give evidence is already determined by a competent Court and not denied by himself, he cannot take advantage of a technical objection put into his mouth by the Judge to show that he is not bound to appear. JHOOMUCK SINGH v. JEETUN LALL, **12 W.R. 359.**

(3131)—*O.* 16, *r.* 20 (=*Civ. Pro. Code*, 1859, *s.* 170)—*Suit for* durputni *rent—Production of document— Certified copy— Evidence.*—Where in a suit for *durputnee* rent defendant fails to produce a bynamah produced on a former occasion, or to show that he could not do so, judgment might have been passed against him under s. 170, Act VIII of 1859. When he cannot rebut the certified copy produced by a plaintiff, this copy is good evidence in support of plaintiff's case. TARA CHAND BANERJEE v. BOISTUB CHURN BHUDRO, **16 W.R. 196.**

(3132)—*O.* 16, *r.* 20 (=*s.* 177, *Civ. Pro. Code*, 1882=ss. 126, 170, *Civ. Pro. Code*, 1859)—*Order of Court requiring party to attend, disobedience to—Subsequent decree in his favour.*—The plaintiff was ordered to attend and give evidence under s. 170, Act VIII of 1859, but failed to do so. The Court however, being satisfied with the evidence in support of his case, gave a decree in his favour. *Held* that the decree was valid. BISSONAUTH MOJOOMDAR v. KHETTUR CHUNDER SEN, **Marsh 467.**

(3133)—*O.* 16, *r.* 20—*One of several plaintiffs refusing to appear and give evidence—Effect.*—In case of one of several plaintiffs refusing to appear and give evidence, as required by the Court, judgment may be passed against him only and not against all. BENODE RAM SEIN v. BROHMO MOYEE DEBIA, **1 W.R. 168.**

(3134) *O.* 16, *r.* 20 (=*Old s.* 177 *of* 1882)—*Judgment for refusing to answer questions—Civ. Pro. Code*, 1859, *s* 126—*Dismissal of suit—Reversal of dismissal order.*—A judgment passed against a plaintiff, under s. 126 of Act VIII of 1859, was reversed by the High Court in special appeal; as there was nothing on the record to show that the party refused to answer any *material* question relating to the suit." KRISHNAJI A NIMKAR v. VISHNU A. NIMKAR, **2 B H C 340**

(3135)—*O.* 16, *r.* 20 (=*Civ. Pro Code, s.* 170 *of* 1859)—*Partnership suit Defendant failing to produce accounts, as required by Court Power of Court*—If, in a suit to recover the balance of money alleged to be due on a partnership transaction, the defendant is examined as a witness by the plaintiff, and is asked by the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Court to produce certain accounts which are proved to the Court's satisfaction to be in his custody and are relevant and material evidence in the suit, and refuses to produce them, the Court is justified in giving judgment against the defendant under s. 170, Civ. Pro. Code. KATAKAM VENKAIYA v. BHUPALAM PEDDA MULLASAPPAH, **4 M.H.C. 142.**

(3135 *a*)—O. XVI, r. 20—*See* APPEAL—EX PARTE CASES, Marsh 598, 5 W.R. 270.

(3135-*b*)—O. XVI, r. 20—*See* APPEAL—ORDERS, 4 W.R. Act X, Rul. 18.

(3135-*c*)—O. XVI, r. 20—Exercise of Court's discretion under—*See* PROBATE—JURISDICTION IN PROBATE CASES, 9 B. 241.

(3135-*d*)—O. XVI, r. 20—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, W.R. 1864, 133.

(3135-*e*)—O. XVI, r. 20—*See* No. 3062-*d*, *supra*.

(3136)—*O.* 16, *r.* 20, *O.* 10, *r.* 4 (=ss. 170 *and* 127, *Civ. Pro. Code*, 1859)—*Court not to pass verdict against party failing to appear.*—A Court cannot, under s. 127 or s. 170, Civ. Pro. Code, 1859, impose penal consequences, on a party failing to appear, by passing a verdict against him, unless he has wilfully refused to obey the order to attend, and his evidence is material. *Quære.*—Whether the party must be proved by other evidence to have personally received notice of the order to attend, before the penal provisions of Civ Pro. Code, 1859, s. 127 or s. 170 are applied? RAJ CHOOKUN DUSWANDI v. BUSJEET TEWAREE, **20 W.R. 168.**

(3137)—*O.* 16, *r* 20, *O.* 21, *rr.* 1, 2, *O.* 10, *r.* 4 (=*Civ. Pro. Code*, 1859, *ss.* 170, 206, 127). —Act VIII of 1859, s. 206, applies only to proceedings taken while the decree is in execution. Before applying the provisions of either s 127 or s. 170, Act VIII of 1859, it is absolutely necessary that the Court should strictly conform to the law in making the order for the attendance of a party to the suit. OBHOY CHURN MOOKERJEE v. MUSSAMUT PEAREE DOSSIA, **22 W.R. 270.**

—— O. XVII, r. 1 (=1882, s. 156=1877, s. 156 =1859, s. 146).

(3138)—*O.* 17, *r.* 1 (=*Civ. Pro. Code*, 1877, *s.* 156)—*Adjournment for attendance of witnesses—Discretion of Court.*—Although there is a discretion to be exercised as to the granting of adjournments for the attendance of witnesses, yet, unless there is a pressing necessity for proceeding with the cause or the application for adjournment is obviously frivolous, it should not be hastily rejected. Of course, the Court in granting it may put the party applying under the obligation of paying the costs of the day in any event. JHANDA SINGH v. DUNGAR MAL, **A.W.N. 1882, 127.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3138-*a*)—O. XVII, r. 1—*See* LETTERS PATENT, HIGH COURT, 1865, MADRAS, cl. 15, 14 M. 88.

(3138-*b*)—O. XVII, r. 1—*See* WITNESS—SUMMONS TO AND ATTENDANCE OF WITNESSES, 20 W.R. 2.

(3138-*c*)—O. XVII, r. 1—*See* NOS. 1826, 2893, *supra*.

(3139)—O. 17, *rr.* 1, 2 (=*Civ. Pro. Code*, *XIV of* 1882, *ss.* 156, 157)—*Restoration of suit, application for—Adjournment by Court—Semble.*—Ss. 156 and 157, Civ. Pro. Code, have no application to an adjournment not made at the instance of the parties, but necessitated by the rules of the Court regulating the disposal of its own business. SREEMUTTY TOOLSY MONEY DASSEE v. SREEMUTTY PROSAD MONEY DASSEE, **2 C.W.N. 490.**

(3140)—*O.* 17, *r.* 1 *and O.* 18, *r.* 4 (=*Civ. Pro. Code*, 1882, *ss.* 156, 181)—*Legality of refusal to examine witness present in Court.*—Where a party desires to examine a witness present in Court, the Court cannot refuse to examine him on the ground that his name has not been found in the original application for summons given by that party. MT. MANBI v. LAL MIYAN, **10 C.P.L.R. 92.** (15 B. 86, *R.*)

(3141)—*O.* 17, *r.* 1, *and O.* 23, *r.* 1 (=*ss.* 156 *and* 373, *Civ. Pro. Code*, 1882)—*Jurisdiction to pass order conditional upon payment of costs.*—A Court has no jurisdiction under s. 156 to pass an order conditional upon payment of costs, such as is provided in s. 373 of the Code. MUSTHAN ROWTHAR v. NATHARSA ROWTHAR, **4 M.L.T. 200.**

(3141-*a*)—O. XVII, r. 1, O. XXVI, rr. 7, 8—*See* COMMISSION, 13 C.W.N. 525=36 C. 566=1 Ind. Cas. 366=11 C.L.J. 150.

—— O. XVII, r. 2. (=1882, s. 157=1877 s. 157=1859, s. 147).

(3142)—*O.* 17, *r.* 2 (=*s.* 157, *Civ. Pro. Code*, 1882)—*Scope.*—Chap. VII, Civ. Pro Code, relates to the appearance of parties and the consequence of their non-appearance at the first hearing, whereas Ch. XIII, of which s. 157 forms a part, contains a procedure for the trial of a suit on adjournment after the first hearing. SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE, **21 C. 269.**

(3143)—*O.* 17, *r.* 2 (=*s.* 147 *of* 1859—*Application for adjournment.*—*Held*, that the Judge ought to have granted an adjournment, where it was applied for on the first day after the Judge's return to the District, and that the applicant really had an opportunity of appearing before the Judge for the purpose of filing documents and producing witnesses, s 147, Act VIII of 1859 not applying where no day has been fixed for hearing. BABOO SEETARAM SAHOO v. ROY BABOO SHEOGOLLAM SAHOO BAHADOOR, **18 W.R. 325.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3144)—*O.* 17, *r.* 2 (=s. 157, *Civ. Pro. Code*, 1882)—*Plaintiff and plaintiff's vakil absent—Plaintiff's absence satisfactorily explained—Restoration.*—Where the plaintiff has shown sufficient reason for his own absence, and where his presence is necessary, *held*, that he is entitled to ask for restoration, even if his vakil was in default. VENCATACHALAPATHI CHETTY v. PERIYASAMI UDAYAN, **7 M.L.T. 308=6 Ind. Cas. 681.** (19 M.L.J. 760, *F.*)

(3144-*a*)—O. XVII, r, 2—See NOS. 306, 518, 2842 to 2845, 2848, 2853-*b*, 2857, 2858, 2861, 2886 to 2888, 2892, to 2895, 2907, 2909, 3013, 3014, 3015, 3015-*a*, 3016, 3016-*a*, &*b*, 3017, 3018, 3139, *supra.*

(3145)—*O.* 17, *r.* 2, *s.* 104, *O.* 43, *r* 1, *s.* 115 (=*ss.* 157, 588, *cl.* (6), 622 *Civ. Pro Code*, 1882)—*Appellate order returning appeal memo for presentation to proper Court—Revision.*—An appellate order returning appeal memo to be presented to the proper Court is not appealable. The remedy is under s. 622, Civ. Pro. Code, 1882. RAGHUNATH CHARAN SINGH v. SHAMO KOERI, **31 C. 344** (14 M. 462, *Dist.*) [*F.*, 17 C. P.L.R. 129.]

(3146)—*O.* 17, *rr.* 2 *and* 3 (=*Civ. Pro. Code*, 1882, *ss.* 157, 158)—*Failure to appear—Failure to produce evidence—Procedure.*—S. 157 refers especially to the case where the defendant fails to appear and there has been no trial; s. 158 to a case where there has been a trial and in which the defendant may or may not appear. The former section has regard to the failure of a party to appear, the latter to the failure of a party to produce evidence. GANESH MOTIRAM v. DEOSING, **3 C.P.L.R. 21.**

(3147)—*O.* 17, *rr.* 2 *and* 3 (=*old ss.* 157 *and* 158)—*Order under s.* 158—*Scope of s.* 158.—Any order of the Court under this section must make it plain that it was made under this section and not under s. 157, though specific warning that action under s. 158 will be taken need not, in order to take such action, be given to the party concerned. If a suit is dismissed under s. 158, a fresh suit will be barred. This section, being very stringent, should be applied only when the facts do not admit of the application of any other section. KALE SHAH v. SHAHABAL SHAH, **80 P.R 1899.** [*R.*, 30 P. R. 1906=82 P.L.R. 1906; 9 P.R. 1908.]

(3148)—*O.* 17, *r.* 2 *and* 3 (=*Civ. Pro. Code*, 1882, *ss.* 157, 158)—*Distinction between, in the matter of revival of suit decreed.*—The distinction between s. 157 and s. 158 is that, where a decree passed under the former section may be revived by application, a decree under the latter section cannot be revived by application; it may, however, be reviewed, or appealed against. SHEODAYAL SINGH RAJ GOND v. KAUSAL PRASAD, **11 C.P.L.R. 94.**

(3149)—*O.* 17, *rr.* 2, 3 (=*Civ. Pro. Code*, 1882, *ss.* 157, 158)—*Dimissal suit for non-appearance of plaintiff at adjourned hearing.*—An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader was *held* to be an order under s. 157 and its consequential s. 102 of the Civ. Pro. Code, 1882, and not an order under s. 158 of the Code. SHRIMANT SAGAJI RAO v. S. SMITH, **20 B. 736.** [*Not F.*, M.W.N. 213=8 M.L.T. 60=20 M.L.J. 535; *F.*, 34 C. 235=5 C.L.J. 260; 32 M. 241=5 Ind. Cas. 23=7 M.L.T. 369=19 M.L.J. 760; *R.*, 5 O.C. 294, 121 P.R. 1907=51 P.W.R. 1907.]

(3150)—*O.* 17, *rr* 2, 3, (=*ss.* 157, 158, *Civ. Pro. Code*, 1882)—*Absence of plaintiff and pleader on adjourned date—Procedure.*—Where the plaintiff and his pleader failed to appear on the date to which the suit was adjourned after all the plaintiff's evidence had been taken, *held* that the Court should proceed, to decide the suit under s. 158 of the Civ. Pro. Code, and not dismiss it under s. 102. BADAM v. NATHU SINGH, **25 A. 194=A.W.N. 1903, 6.** [*R.*, 5 C.L.J. 260=34 C. 235, 5 L.B.R. 75; *Commented on*, 19 M.L.J. 760=5 Ind. Cas. 23.]

(3151)—*O.* 17, *rr.* 2, 3 (=*Civ. Pro. Code, Act VIII of* 1859, *ss.* 147, 148)—*Appeal.*—Where the parties to a suit appeared on the day fixed for the first hearing and on the application of the defendants' vakil, the hearing was adjourned in order to enable them to obtain certain documents from the Collector's office and afterwards put in written statements, and they failed to do this on the day to which the hearing was adjourned, and on the day of final hearing they were still in default and also failed to appear in person or by vakil, and a decree was given for the plaintiff, *held* that the decree was not an *ex-parte* decree under s. 147, Civ. Pro. Code, for non-appearance, but a decree under s. 148 and was therefore appealable RANGASAMY MUDALIAR v. SIRANGAN, **4 M.H.C. 254.** [*Diss.*, 5 C.L.J. 260=34 C. 235; *F.*, 6 M.H.C.R 262; *R.*, 18 M.L.J. 51=3 M. L.T. 225, 19 M.L.J. 760=5 Ind. Cas. 23=7 M.L.T. 369; *D.*, 1 M. 287.]

(3152)—*O.* 17, *rr.* 2, 3 (=ss. 157, 158, *Civ. Pro. Code*, 1882)—*Date fixed for evidence—Non-appearance of plaintiffs—Dismissal under r.* 2 *changed to one under r.* 3—On plaintiff's non-appearance on a date fixed for evidence after settlement of issues, the suit was dismissed under s. 158, Civ. Pro. Code, 1882. An application under s. 103, Civ. Pro. Code, 1882, by the plaintiff to restore the case to the file (O. IX, r. 9) was dismissed. *Held* that the suit should not have been dismissed under S. 158, Civ. Pro. Code, 1882, but for default under s. 157, Civ. Pro. Code, 1882, thereby making s. 103, Civ. Pro. Code, 1882, applicable, as the case had not been adjourned in favour of either party for the production of evidence or to cause the attendance of witnesses. RAM NATH v. MUNARAJ, **139 P.R. 1884.** [*R.*, 0 P.R. 1906=820 P.L.R. 1906.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3153)—*O. 17, rr. 2, 3, O. 9, rr. 8, 9 (=ss. 157, 158, 102, 103, Civ. Pro. Code, 1882)—Time given to plaintiff to produce evidence—Default in appearance on adjourned date—Statement by plaintiff's vakil that he had no instructions—Nature of order to be passed—What section to be applied—Scope of ss. 157, 158*—Plaintiff obtained time from Court to produce his evidence on a certain date. On that day he did not appear and his vakil stated that he had no instructions. The Munsiff, instead of dealing with the case under s. 157 of Act XIV of 1882, disposed of it under s. 158 on the issues raised. *Held*, that there was clearly a default in appearance on the adjourned date and that the Munsiff was wrong in disposing of the suit under s. 158, Civ. Pro. Code, as he should have disposed of it under s. 157. Ss. 157 and 158, of Act XIV of 1882, should, if possible, be read as mutually exclusive. S. 157 deals with cases of failure to appear, and s. 158 with cases of failure to do the thing for which time has been granted; neither can be treated as an exception to the other, for there may be failure to do the thing for which time has been granted, the parties themselves being present, and there may be failure to appear even when no time is granted to do anything in particular. When a case is set down for hearing, whether it is on the original or the adjourned date, the first question for the Court is, are the parties in attendance? If both or either of the parties have or has failed to appear, the Court is bound to deal with the matter under Ch. VII, or s. 157 read with Ch. VII, as the case may be. Any other defect in the case or default of any party is a matter for investigation and orders, only after the question of default in appearance has been settled. The appearance of the parties or more correctly the determination of the consequences of non-appearance has a natural precedence over the disposal of matters arising in the trial of the case. Therefore, if there be default in appearance on the adjourned date of hearing, s. 157 should alone be applied, no matter whether there has or has not been default of the kind referred to in s. 158. It is only in case the parties are in attendance and there is a failure to do what a party is given time to do, that s. 158 is to be put in requisition. CHANDRAMATHI AMMAL v. C. S. NARAYANASAMI IYER, **3 Ind Cas 23 =19 M.L.J 760=7 M.L.T 369=33 M. 241.** (23 B. 414, 19 M.L.J. 51, 3 M.L.T. 225, 22 A. 66, 34 C. 235, 5 C.L.J. 260, 20 B. 736, *F.*; 4 M.H.C. 254, 4 M.H.C. 56, *Disappr.*)

——O. XVII, r. 3 (=1882, s. 158=1877, s. 158 =1859, s. 148.)

(3154)—*O. 17, r. 3 (=o'd s. 158)—Remand by Appellate Court—Sufficient cause.*—S. 148, Act VIII of 1859, does not prevent an Appellate Court, on good and sufficient cause, from remanding a case disposed of thereunder, in order that justice may be done. LOCHUN MUNDUL v. WURZEER PURMANICK, **13 W.R. 464.**

(3155)—O. 17, r. 3 (=s. 158, *Civ. Pro. Code*, 1882).—The section applies to a party to whom time has been given to do some act and who makes default. RAMAYA v. RANGAYA, **7 M. 41.** [*R.*, 13 M. 510, 34 C. 235=5 C.L.J. 260; *D.*, 15 A. 49.]

3156)—*O. 27, r. 3 (=s 158, Civ. Pro. Code*, 1882).—The somewhat stringent provisions of the section, cannot be put in force unless the party has had distinct notice, in respect of *time* of what is required of him, and that default in the matter of time is of the essence of the particular kind of default contemplated. SHAIK SAHEB v. MAHOMED, **13 M. 510.** [*R.*, 18 M. 466.]

(3157)—*O. 17, r. 3 (=Civ. Pro. Code*, 1882, s. 158).—The provisions of s. 158 of the Civ. Pro. Code are very stringent and should only be applied when the facts do not admit of the application of any other and the case properly falls under that section. S. 158 is not applicable to a case when no time is given to a party to produce evidence or to do any act for the further progress of the suit. SHANKAR DAS v. HANRAM, **74 P.L.R. 1904.**

(3158)—*O. 17, r. 3 (=s. 158, Civ Pro. Code*, 1882)—*Mere default of party to attend Court in person—Court not to pass decree against him under s. 158 but to proceed under s. 175.*—S. 158 of the Code is applicable only to cases where any party to a suit, to whom time has been granted, fails to do certain specified acts for which time has been allowed. (80 P.R.1889, *R.*) It contemplates cases where the parties, have expressly obtained time to produce evidence and does not refer to adjournments by the Court, in the ordinary course, of its own motion. (139 P.R. 1884, *R.*) So where a defendant required to attend Court in person failed to be present on the date of the hearing, the only course open to the Court was *held* to be to proceed under s. 157. In the absence of anything to show that the defendant had expressly asked for time and then made a default, the Court could not pass an order to decide the case forthwith under s. 158 of the Code. PANNA LAL v. BULL, **30 P.R. 1906=82 P.L.R. 1906.** [*R.*, 9 P.R. 1908.]

(3159)—*O. 17, r. 3 (=s. 158, Civ. Pro. Code, 1882)—Power of dismissing suit—Plaintiff adducing some evidence—Non-service on some of plaintiff's witnesses*—It is only under very exceptional circumstances, and when no other provisions of the Code are applicable to a case, that resort should be had to the very stringent provisions of s. 158 of the Civ. Pro. Code. Where four of the witnesses of the plaintiff were examined, it is not open to the Court to dismiss the suit under this section without taking into consideration the evidence on the record, simply

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

because some of the plaintiff's witnesses who had been summoned to attend on the date of hearing were not served with notice. KARTAR v. SURASTI, **9 P.R. 1908=28 P.W.R. 1908=98 P.L.R. 1908.** [*R.*, 142 P.R. 1908.]

(3160)—*O. 17, r. 3 (=Civ. Pro Code, 1859, s. 148)—Adjournments by Court to give effect to process—Scope of s. 148, Act VIII of 1859.*—Where adjournments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under Act VIII of 1859, s. 148, which contemplates a case where a party has obtained time to produce his witnesses, and has failed to do so. PEAREE MOHUN BERA v. SHAMA CHURN MYTEE, **19 W.R. 34.** [*R.*, 31 C. 235, 5 C.L.J. 260.]

(3161)—*O. 17, r. 3 (=s. 158, Civ. Pro. Code, 1882=s. 148, Civ. Pro. Code, 1859)—Remand—Evidence.*—Where an Appellate Court remands a case under s. 158, Act VIII of 1859, the lower Court has no power to receive fresh evidence. PADMALOCHAN v. SIRDAR KHAN, **3 B.L.R. App. 91.**

(3162)—*O. 17, r. 3 (=Civ. Pro. Code, 1882, s. 158)—Application for execution of decree struck off for non-payment of costs of attachment—Subsequent application, if maintainable—Act VI of 1882, s. 4.*—Where an order was passed striking off an application for attachment of immoveable property in execution of a decree, on the ground that the decree-holders had not paid into Court the costs of the attachment as directed, *held* that, no fresh application of a precisely similar nature (*i.e.*, similar in parties, similar in object and similar in subject-matter) is entertainable, whether the order was one under s. 158, Civ. Pro. Code, deciding the application for attachment, or whether its effect was merely to remove the application from the file of pending applications without deciding it. PHEKU v. PIRTHI PAL SINGH, **15 A. 49=A.W.N. 1892, 222.** [*R.*, 15 A. 84, F.B., 16 A. 26.]

(3163)—*O. 17, r. 3 (=Civ. Pro. Code, 1882, s. 158)—A holiday fixed for hearing of a case to suit plaintiff's pleader—Refusal of pleader to appear on that day—Right of Court proceed under s. 158.*—Where a gazetted holiday was fixed for hearing arguments in a case, by arrangements with the parties and so as to suit the convenience of the plaintiff's pleader, but the latter declined to appear on that day, it was *held* that neither side having objected when the said date was fixed, it was their duty to be present on such day and, in default of there so appearing, the proper course for the Court was to proceed to judgment in terms of s. 158, Civ. Pro Code. BHAGWAN DAS v. HAR PERSHAD **111 P.R. 1906=92 P.L.R. 1907.** (55 P.R. 1898, 82 P.R. 1901, *R.*)

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(3164)—*O. 17, r. 3 (=Civ. Pro Code, 1882, s. 158)—Suit dismissed for default—Plaintiff misled by previous action of the Court—Discretion of the Court.*—Two cases involving similar issues were ordered by an officiating District Judge to be tried together, one of the cases being transferred from the file of the Subordinate Judge to that of the District Judge for that purpose. The District Judge's successor in office dissociated the two cases, and ultimately fixed the 6th February for the hearing of one of them, and the 8th April for the hearing of the other, apparently in ignorance of the order passed by his predecessor. On the 30th January, the plaintiff in the case, which was fixed for the 6th February, applied for the summoning of witnesses and for a postponement of the hearing. The District Judge granted the application for summonses but refused to postpone the hearing of the case. In consequence of this action, the attendance of the necessary witnesses could not be procured in time, and, on the 6th February, the District Judge, purporting to act under s. 158 of the Civ. Pro. Code, dismissed the plaintiff's suit for default. The plaintiff then appealed to the High Court. *Held* that, even if the order of the District Judge under s. 158 of the Civ. Pro. Code, could be considered, on a proper construction of that section, as a legal order, still the plaintiff might reasonably be taken to have been misled by the action of the Court, and, under the circumstances, the Court had not exercised a sound discretion in dismissing the plaintiff's suit. DULHIN SONRAJ KUARI v. AUDHAN SINGH, **A.W.N. 1891, 112.**

(3165)—*O. 17, r. 3—Civ. Pro Code, 1882, s. 158—Execution of decree—Order striking off application for sale of attached property but maintaining attachment.*—A decree-holder, having attached certain moveable property of her judgment-debtor, applied to have a specified portion of such property sold. The Court executing the decree ordered the decree-holder to pay certain fees for issue of notice to the opposite side for the purpose of an inquiry as to whether the property sought to be sold was or was not ancestral property and directed that the case should be brought up again on a date named in the order. On that date, the Court passed an order striking off the application for sale on the main, and practically the sole, ground that the *talabana* required had not been paid, but at the same time specifically maintaining the attachment. *Held* that such an order could not be taken to have an effect similar to that of an order in a suit under s. 158 of the Civ. Pro. Code, and to be a bar to any subsequent application of a similar nature. WILAYAT HUSAIN v. SHAFIT BEGAM, **A.W.N. 1893, 12.**

(3166.—*O. 17, r. 3 (=Act VIII of 1859, s. 148).*—Where issues were settled and the case had been adjourned for final disposal, an order of dismissal under—for the non-appearance of the

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plaintiff could not be properly made. RYALL v. SHERMAN, **1 M. 287.**

(3167)—*O. 17, r. 3—Dismissal of suit for plaintiff's failure to produce an English translation of accounts—Failure to take evidence—Legality of dismissal.*—Where the plaintiff, who was ordered by Court to produce an English translation of his accounts before the adjourned date, failed to do so, and the Court thereupon dismissed his suit without taking the evidence that plaintiff tendered: *Held*, that the order of dismissal was wrong and that the Court was bound to take evidence which was available and adjudicate thereon. BADAR MAL v. GUDU MIYA, **8 Ind.Cas.850=9 M.L.T. 163.**

(3168)—*O. 17, r. 3 (=old s. 158 of 1882)—Attendance of witnesses—Pleaders—Application for re-hearing rejected—Effect.*—The plaintiff, upon whose application the Court of the first instance adjourned the hearing of the suit, failed to cause the attendance of his witnesses on the day fixed for the further hearing, and the Court of the first instance threw out the suit, stating that it did so under s 110, Act VIII of 1859. Both parties to the suit were represented on that day by their pleaders. The Court of the first instance subsequently entertained and rejected an application under s. 119 for a re-hearing. The lower appellate Court admitted and allowed an appeal against the order of the Court of the first instance. Both the orders of the lower Courts were reversed, it being held that the Court of the first instance must be regarded as having acted under s. 148 of the Code. KASHI PARSHAD v DEBI DAS, **7 N.W.P. 77.** [*Over ruled*, 22 A. 66, F.B.; *D.*, 34 C. 225.]

(3168-*a*)—*O. 17, r. 3 (=Civ. Pro Code, 1859, s. 148)—Plaintiff failing to produce witness s on fixed d t—Suit d smissed by first Court—Duty of Commissioner appeal to enquire into the cause of plaintiff's default.*—The Court having asked plaintiff to produce witnesses on a certain day, both parties failed to appear that day and the suit was dismissed. Two days afterwards the plaintiff applied to have his case restored to the file on the ground of his being prevented by illness to produce witnesses on that date. The Lower Court refused the application. The Commission, on appeal, omitted to decide whether plaintiff had been prevented by any sufficient cause from producing on that date. *Held*, that the Commissioner, by this omission erred in law, and that the procedure of the first Court was harsh and injurious. KESRA SINGH v. SAHIB SINGH, **14 P.R. 1870.**

(3168-*a*-1)—*O. 17, r. 3 (=Civ. Pro Code, 1859 s. 148)—Non-attendance of either party—On adjourned hearing—Procedure.*—Where a part heard case has been adjourned and the parties do not appear on the day of adjourned hearing, the Court may order another adjournment to enable the parties to appear. If Court do not pass such an order, it must dismiss the suit under ss. 110 and 147, Civ. Pro. Code. It cannot decide the suit on the record, for s. 148 does not apply in that case. SAIN DAS v. MUSSAMMAT RAJJI, **32 P.R. 1875.**

(3168-*a* 2)—*O. 17, r. 3 (=Civ. Pro. Code, 1859, s. 148)—Value of the suit under dispute—Plaintiff's case disposed of before ascertainment of the value—Power of Court to do so.*—Where the value of the suit was under dispute and had not been ascertained, it was held that the record was not complete, and that the Court had no power to dispose of the suit under s. 148, Civ. Pro. Code, reserving the valuation of the suit for a supplementary order as to stamp and costs. MUSSAMMAT UTTUR KOUR v. ATMA SINGH, **20 P.R. 1870.**

(3168-*a* 3)—O. XVII, r. 3—*See* DISMISSAL OF SUIT, 23 A. 462=A.W.N. 1901, 149.

(3168-*b*)—O. XVII, r. 3—*See* REMAND, **12** W.R. 23.

(3168-*c*)—O XVII, r. 3—*See* RES JUDICATA—ADJUDICATION, 10 M 272.

(3168-*d*)—O XVII, r 3—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 11 W.R. 250.

(3168-*e*)—O XVII, r. 3—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 18 M. 131.

(3168-*e*-1)—O XVII, *r.* 3—*See* NOS. 306, 348, 349, 2802-*e*, 2824 *b*, 2842, 2843 2848, 2858, 2887, 2888, 2889. 2910, 3017, 3019, 3146, to 3153, *supra* and NO. 5748, *Infra*.

(3168-*f*)—O. XVII, r. 3 ss. 68, 70, 71—Execution of decree—Powers of Collector to whose Court a decree has been transferred for execution—*See* COLLECTOR, A.W.N. 1893, 28.

(3169)—*O. 17, r. 3, s. 104, O 43, r. 1 (=ss. 558 and 588, Civ Pro Code, 1882)—Power of District Judge to dismiss the suit under s 158—Appeal against an order of the District Judge, dismissing the suit under s 158—Preliminary objection that no appeal lay from such an order—Order of District Judge—Order of District Judge, dismissing the suit under s. 158, amounts to decree—Appellate Court, power of, to act under s. 158, confined to appeals before it.*—The plaintiffs-appellants after producing some evidence in the Court of first instance absented themselves on the date fixed by the Court for producing other evidence in the case. The Court, however, on the evidence as it stood on the record, passed a decree in favour of the plaintiffs-appellants. On appeal by the defendant, the District Judge allowed the appeal and passed an order, dismissing the suit, under the provisions of s. 158 of the Code. A further appeal was lodged by the plaintiffs-appellants against the order of the District Judge, dismissing the suit. On the hearing of

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the appeal a preliminary objection was taken, that no appeal lay as the order passed by the District Judge was under s. 158. *Held* that the District Judge had no power on appeal to pass an order under s. 158, and even assuming that he had, he could only exercise such powers with reference to the appeal before him, and not with reference to the suit in the Court of first instance. The Judge having set aside what was undoubtedly a decree, his order dismissing the suit also amounted to a decree and an appeal lay from his order. KUSHER v. JUGRAG SINGH, **10 O.C. 245.**

(3169-*a*)—*O. 17, r. 3, O. 9, r. 4—Adjourned hearing—Plaintiffs absent—Want of instruction to pleader—Dismissal of suit—Remedy.*—At an adjourned hearing of a suit, the plaintiffs were not present and their pleader intimated to the Court that he had no instructions to go on with the case. The suit was thereupon dismissed on the ground that the claim was not proved. The plaintiffs then made an application for restoration under O. IX, r. 4. The Munsif dismissed the application and his order was affirmed by the District Judge. Upon revision, *held* that the application did not lie, the plaintiffs' remedy being by way of appeal against the Munsif's decree. GAURA BIBI v. GHASITIYA, **8 A.L.J. 1265.** (22 A. 66, *F.*)

(3170)—*O. 17, r. 3, O. 41, r. 19, s. 114, O. 47, r. 1 (=ss. 158, 558, 623, Civ. Pro. Code, 1882) —Limitation Act (XV of 1877), sch. II, art. 168—Suit dismissed in default—Appeal against dismissal also dismissed in default—Application to restore appeal made after expiry of 30 days—Application treated as review—Review.*—A suit was dismissed under s. 158, Civ. Pro. Code. The plaintiff appealed, but the appeal was dismissed by the Divisional Judge in default of prosecution. An application to restore the appeal was made after the expiry of 30 days prescribed by the Limitation Act for such applications. Notice was issued to the defendants to show cause against the granting of the applications, and the Divisional Judge after issue of the notice was succeeded by another Judge, who re-heard the appeal and upheld the order of the original Court. The plaintiff applied for revision. *Held*, that the order passed under s. 158 of the Code was illegal and the case must be tried on the merits. (23 H. 462, *R.*) It was contended that, the application to re-hear the appeal having been made after the expiry of 30 days and the period not being extendible, the order of dismissal became final. *Held*, that, treating the application as one for review, there was no irregularity in the proceedings of the lower appellate Court. KASHI RAM v. GOPI MAL, **7 P.L. R. 1910=6 Ind. Cas 482=124 P.W R. 1910.**

(3171)—*O. 17, r. 3, O. 41, r. 27—Procedure—Order for parties to appear with witnesses at adjourned hearing — Default of plaintiff's witnesses — Dismissal of suit.*—On a

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date to which the hearing had been adjourned, the witnesses for the plaintiffs in a suit pending in the Court of the Subordinate Judge did not appear (the parties with their respective pleaders being present), but neither an application for adjournment was made nor an order to enforce the attendance of the witnesses was asked for by the plaintiffs, and the Court apparently acting under O. XVII, r. 3, Code of Civil Procedure, dismissed the suit. The District Judge, on appeal, dealt with the case as though the plaintiffs had made a default in appearing and remanded the case for trial according to the law. *Held*, that the Judge had committed an error of procedure and he ought to have proceeded under O. XLI, r. 27 of the Code. RAM NARAIN DUBE v. JAGDEO MISIR, **8 A.L.J. 839.**

——O. XVIII, r. 1 (=1882, s. 179=1877, s. 179.

(3171-*a*)—O. XVIII, r. 1—*See* NOS. 298-*a*, 2410, *supra*.

(3171 *a*-1)—O. XVIII, rr. 1, 2 (1)—*See* MESNE PROFITS—RIGHT TO MESNE PROFITS, 9 C.L.R. 1.

(3171-*b*)—O. XVIII, rr. 1, 2 (1)—*See* RIGHT TO BEGIN, 7 C.L.R 274.

(3171 *c*)—O. XVIII, rr. 1, 2 (1), (2), 3 (3)—Examination of defendant as witness for plaintiff at the very outset of the case, propriety of —*See* RES JUDICATA, MISCELLANEOUS, 116 P.W. R 1908.

——O. XVIII, r. 2, para (1) (=1882, s. 179=1877, s. 179, and para (2) (=1882, s, 180 =1877, s 180).

(3172)—*O 18, r. 2—Suit by decree-holder against judgment-debtor—Two daughters of debtor intervene—Death of one—Default of other to produce evidence—Effect.*—Where two daughters of a judgment-debtor intervened to claim certain property in respect of which a suit was brought by the decree-holder, and one of the two daughters died during the pendency of the suit, the heir of the deceased daughter could not be held responsible for the default of the survivor to produce evidence. RAMAUNGHONARAIN v. BESSIN LAUL, **5 W R. 179.**

(3172-*a*)—O. XVIII, r. 2—*See* NOS. 2410-*b*, 3171-*c*, *supra*

(3172-*b*)—O. XVIII, rr. 2 (2), (3), 3—*See* EVIDENCE—GENERAL, 6 B.L.R. App. 70=14 W.R 397.

——O. XVIII, r. 3 (=1882, s. 180=1877, s. 180.

(3172-*c*) O XVIII, r. 3—*See* NOS. 2410-*b*, 3171 *c*, 3172-*d*, *supra*.

——O. XVIII, r. 4 (=1882, s. 181=1877, s. 181 =1859, s. 172).

(3172-*d*)—O. XVIII, r. 4—*See* NOS. 399, 3103, 3140, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XVIII. r. 5 (=1882, s. 182=1877, s. 182=1859, s. 172.

(3172-*e*)—O. XVIII, r. 5—*See* NO. 399, *supra*.

——O. XVIII, r. 6 (=1882, s. 183=1877, s. 183 =1859, s. 172).

(3172-*f*)—O. XVIII, r. 6—*See* NO. 399 *supra*.

——O. XVIII, r. 8 (=1882, s. 184=1877, s 184 =1859, s. 172).

(3173)—*O.* 18, *r.* 8 (=*Civ. Pro Code*, 1877, *s.* 184)—*Insolvency cases—Procedure—Revision.* —Where the District Judge allowed an application to be declared an insolvent, without considering every one of the objections urged before him, and did not dispose of each point separately and clearly on the evidence; *held* that the order was liable to be enterfered within revision. BENI PRASAD v. MUHAMMAD KHAN, **A.W.N. 1882, 184.**

(3173-*a*)—O. XVIII, r. 8—*See* NO. 399, *supra*.

——O. XVIII, r. 9 (=1882, s. 185=1877, s. 185 =1859 s. 172).

(3173-*b*) O. XVIII, r. 9—*See* NO. 399 *supra*.

——O. XVIII, r. 10 (1882 s. 186=1877 s. 186=1859, s. 172)

(3173-*c*) O. XVIII, r. 10—*See* NO. 399, *supra*

——O. XVIII, r. 11 (=1882 s. 187=1877, s. 187, 1859, s. 172).

(3173-*d*)—O. XVIII, r. 11—*See* NO. 399 *supra*

——O. XVIII, r. 12 (=1882, s. 188=1877, s. 188=1859, s. 172).

(3173-*e*)—O. XVIII, r. 12—*See* NO. 399, *supra*.

——O. XVII, r. 13 (=1882, s 189=1877, s. 189=1859, s 172).

(3174)—*O* 18, *r.* 13 (=*ss* 189, *Civ Pro. Code*, 1882)—*Mode of recording evidence—Substance of each witness's evidence to be recorded Abstract of whole evidence not enough—Evidence of payment*—A Mofussil Small Cause Court ought, in taking evidence, to record the substance of each witness's evidence Recording, simply, an abstract of the substance of the whole of the evidence let in by the plaintiff or the defendent, is not a due compliance with the provisions of this section. Where a payment is alleged by the plaintiff to take his case out of the bar by limitation, the Court ought to find whether such payment was on account of principal or interest due under the bond sued on. AMRITHA SHAHA v. PANCHKORI SHAHA **9 C W.N. 418.**

(3175—*O.* 18, *r* 13 (=*Civ Pro Code*, 1882, *s.* 189,—*Recording the substance of evidence.*—Case in which it was held, setting aside the judgment and decree of a Small Cause Court Judge and directing a new trial, that the

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evidence was not recorded in accordance with s. 189 of the Civ. Pro Code. CHETHRU GOPE v. SRI CHARAN BHAGAT, **9 C.W.N. 420.** (9 C. W.N. 418. *F.*)

(3175-*a*)—O. XVIII, r. 13—*See* NO. 399, *supra*.

——O. XVIII, r. 14= (=1882, s. 190=1877, s. 190=1859, s. 172).

(3175-*b*)—O.XVIII, r. 14—*See* NO 399, *supra*.

——O. XVIII, r. 15 (=1882, s. 191=1877, s. 191).

(3176—*O.* 18, *r.* 15 (=*s.* 191, *Civ. Pro. Code*, 1882)—*Suit commenced by wrong plaintiff—Order of appellate Court directing the first Court to dispose of the suit after substituting new plaintiffs—Right of defendant to claim de novo trial after remand.*—A suit was disposed of by the Munsif, though objection was taken by defendant to plaintiff's maintaining the suit. On appeal, the Sub-Judge remanded the suit for disposal after striking off the plaintiff's name from the record and substituting new plaintiffs in his stead. When the suit came on for hearing before the Munsif after the remand order, the defendant asked the successor of the District Munsif, who had originally disposed of the suit, for a *de novo* trial. This was refused: *Held*, that a *de novo* trial should have been granted s. 191, Civ. Pro. Code, 1882, not applying to the case. KRISHNA BAI v. COLLECTOR AND GOVERNMENT AGENT, TANJORE, **9 Ind. Cas. 254=9 M L T 824.**

(3176-*a*)—O. XVIII, r. 15—*See* JUDGE—POWERS AND DUTIES OF JUDGES, 8 A. 576=A.W N 1886, 195, F.B., 8 A. 35=A.W.N. 1885. 332.

(3176-*b*)—O. XVIII, r. 15—*See* NO. 506 *supra*.

(3177)—*O.* 18, *r.* 15, *s.* 33, *O.* 20, *r.* 1, *O.* 41, *rr.* 23, 25 (=*Civ Pro. Code* 1882, *ss.* 191, 158, 562, 566)—*Power of Judge to decide case on evidence taken down by his predecessor—Competency of Chief Court to remand case on grounds other than specified in ss 562 and 566, Code of Civil Procedure.*—*Held*, that a Judge, who has not heard any part of the evidence and before whom no part of the proceedings have taken place, is not competent to proceed to judgment, until he has given the parties an opportunity of appearing before him and stating their respective cases. Judgments recorded without observing these essential rules of procedure are illegal and must be set aside. It is competent for the Chief Court to remand a case to rectify errors, omissions and defects, which, unless so rectified, would result in serious miscarriage or failure of justice, on grounds other than those provided for in ss. 562 and 566 of the Code of Civil Procedure. SHER KHAN v. BAHADUR SHAH, **91 P.R. 1904.** (7 A 857, 8 A. 35, 110 P.R. 1886, 17 A. 29, 23 M. 445, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3178)—*O. 18, r. 15, O. 20, r. 1—Evidence recorded by one Judge—Power of successor to decide Transfer of case—Notice to parties.*—Though s. 191 (O XVIII, r. 15) provides for the case of a Judge dying or leaving the Court before the conclusion of a suit and gives his successor power to deal with the evidence, as if he himself had taken it down, it does not empower the Judge to decide a case on evidence taken down by his predecessor, without giving notice to the parties and giving them an opportunity of being heard before judgment is pronounced. SARDAR MAHTAB SINGH v. MUSST. SOBHA KAUR, **110 P.R. 1886.** [*R.*, 91 P.R. 1904.]

(3179)—*O. 18, r. 15, O. 20, r. 1, s. 33 (=Civ. Pro. Code, 1882, ch. 15, ss. 191, 195)—Hearing of suit—Power of Judge to act on evidence taken down by his predecessor.*—Where a Judge who has taken all the evidence in a suit and completed the hearing except for the arguments of Counsel on both sides, is transferred, his successor cannot take up the case at that point, and proceed to pass judgment and decree. The two hearings of the case cannot thus be linked together and virtually made one. The succeeding Judge should take up the case at the point which it had reached before the commencement of the hearing under Ch. XV of the Civ. Pro Code. He should fix a day for the entire hearing of the suit before himself. He should hear the plaintiff's opening statement of his case, allow both sides to produce their evidence (and this, under s. 191 of the Civ. Pro. Code, can be done by allowing the evidence taken by his predecessor to be put in); and after hearing the arguments on both sides, he should finally decide the case which he had thus himself heard and tried. If the succeeding Judge does not adopt this course, but continues the case from the point at which it was left off by his predecessor, and decides the case upon materials which were never before him, he acts illegally, and his judgment and decree would be nullities. JAGRAM DAS v. NARAIN LAL, **7 A 857 = A.W. N. 1885, 285.** [*Diss.*, 8 A 576, F.B.; *F.*, 5 A. 35, 8 A. 576, F.B.; *Discussed*, 5 A. 576, F.B.; *R.*, 7 A.W.N. 247, 10 A. 80, 30 P.L.R. 1905 = 9 P.R. 1901.]

(3180)—*O. 18, r. 15, O. 20, r. 1, s. 33 (=ss. 191, 195, Civ. Pro. Code, 1882)—Suit tried partly by one Judge and partly by another—Preliminary decree—Completion of evidence—Findings of former Judge.* This suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to certain findings and directed that after certain evidence had been taken with regard to the mortgage of the lands the final decree should take a certain shape. The Judge who finished the case disagreed with his predecessor and gave a different decree to that ordered by the first Judge. *Held*, that the order of the first Judge did not have the force of a decree and that it was the decision of the second Judge that decided the suit, and that it was that decree that was appealable, and not the order of the first Judge. MA NYO v. MA YAUK, **4 L.B.R 256.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

— O. XVIII, r. 16 (=1882, s. 192=1877, s. 192=1859, s. 173.)

(3180-*a*)—O. XVIII, r. 16—*See* NO. 399, *supra*.

— O XIX, r. 3 (1882, s. 194=1877, s 194.)

(3180 *b*)—O. XIX, r. 1—*See* NO. 2757, *supra*.

— O. XIX, r. 3 (=1882, s. 196=1877, s. 196.)

(3181)—*O 19, r. 3—Affidavit, contents of—Practice—Re-hearing of an application—Jurisdiction of Courts.*—Where one proposes to rely on an affidavit, the provisions of O. XIX, r. 3, must be strictly followed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to Judge whether it would be safe to act on the deponent's belief. The Court has inherent power to re-hear a matter before the Court's order passed at a previous hearing is perfected. PADMABATI DASI v. RASIK LAL DHAR, **37 C. 259=6 Ind Cas. 666.**

— O. XX, r 1 (1882, s. 198=1877, s. 198=1859, s. 183.)

(3181-*a*)—O. XX, r. 1—*See* NOS. 399, 521, 522, 523, 3098, 3177 to 3180, *supra*.

— O. XX, r. 2 =(1882, s 199=1877, s 199.)

(3182)—*O 20, r. 2 (=s 199, Civ. Pro. Code, 1882—Judgment written when Judge on leave—Delivery by successor in office—Validity—Evidence Act (I of 1872), s. 65, cl. (e) and cl. (g)—Collectorate records—Evidence of record-keeper and clerks as to general result of their examination of the records—Admissibility.*—Where a Judge who had heard a case took leave, before putting his judgment in writing, and his judgment subsequently written was delivered by his successor in office, *held*, that the judgment was properly pronounced, the provisions of s. 199, Civ. Pro. Code, having been complied with. When, in order to ascertain the history of certain properties in suit, the Judge took the evidence of the record keeper and clerks in charge of the Collectorate records and registers, as to the general result of their examination of these documents, and it did not appear that the documents could be conveniently examined in Court, *held*, that s. 65, cl. (e) of the Evidence Act does not require that certified copies of the records should be produced in such circumstances, the case falling

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within the provision of cl. (*g*) of that section, and the Judge acted rightly under the latter clause. RANI SUNDAR KOER v. CHANDRESHWAR PROSAD NARAYAN SINGH, **11 C.W.N 501=34 C. 293.** [*Appr.*, 35 C. 756=12 C.W.N. 682=7 C.L.J. 666=4 M.L.T. 33.]

(3183)—*O. 20, r. 2 (=s. 199, Civ. Pro. Code, 1882)—Judgment, written after Judge was transferred—Validity—Judgment reserved too long.*—A Judge who heard the evidence in the case is entitled, under s. 199 of the Code of Civil Procedure, to write his judgment and sent it to his successor for delivery, although the judgment was written by him after he left the judicial post which he was occupying when he heard the case. SATYENDRA NATH ROY CHOWDHURI v SRIMATI THAKURANI KASTURA KUMARI GHATWALIN AND LALA BRIJ BEHARI SAHAI v. SRIMATI THAKURANI KASTURA KUMARI GHATWALIN, **12 C.W.N. 682, F.B.=7 C.L.J. 666=4 M.L.T. 33=35 C. 756.** (11 C.W.N. 501, 34 C. 233, *Appr.*; 7 Bom. L.R. 951, 9 W.R. 1, 17 W.R. 475, *R.*)

(3184)—*O. 20, r. 2 (=Civ. Pro. Code, 1882, s. 199)—Judgment written by a Judge after making over charge of his office not invalid.*—The action of the Judge in taking away records to another district is exceedingly irregular. A judgment written by a Judge after he has left the district and pronounced by his successor is not invalid. MAUNG THA HMWE v. MAUNG AUNG BA, **U.B.R 1897—1901, Vol. II, 246.** (17 W.R. 475, *F.*)

(3184-*a*)—O. XX, r. 2—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 3 B. 202.

(3185)—*O. 20, r. 2. O. 41, r. 25 (=Civ. Pro. Code, 1882, ss. 199 and 566)—Transfer of Juage after hearing but before judgment—Judgment pronounced by his successor—Appeal—Issues remitted by Appellate Court.*—A Subordinate Judge heard a suit, but was transferred before he had delivered judgment. He however, sent his judgment to his successor in office, by whom it was delivered. On appeal the District Judge, under the erroneous opinion that the Subordinate Judge had no power to deliver the judgment of his predecessor, remanded all the issues to the lower Court for trial and report, purporting to act under s. 566 of the Code of Civil Procedure. The High Court whilst holding that the order remitting issues under s. 566 ought not to have been made, declined to interfere, is not being shown that any injustice had been done to any party by reason of the procedure adopted by the Court below. EAST HOPETOWN TEA COMPANY, LD. v. KALLU, **A.W.N. 1904, 131.**

——O. XX, r. 3 (=1882, s. 202=1877, s. 202=1859, s. 185.

(3186)—*O. 20, r. 3 (=Civ. Pro. Code, 1877, s. 202)—Omission to decree for partition—Correction of judgment—Review.*—The omission to enter in the judgment a decision in favour of the plaintiff's claim for partition, in a suit for possession and partition, is not an error which can be corrected under s. 207, Civ. Pro. Code, 1887. It is an omission to decree a part of the claim, and so affects a material part of the case. The proper remedy is by review of judgment. GANGA SAHAI v. CHEDA LAL, **A.W.N. 1881, 57.**

(3187)—*O. 20, r. 3 (=Civ. Pro. Code, 1877, s. 202)—Addition to judgment.*—In a suit by respondent for possession of a grove containing 21 mango trees, and for the recovery of Rs. 40, the value of mangoes, the lower appellate Court, on the 21st, July, 1880, gave him a decree for Rs. 14, for value of fruits appropriated. On the 14th August, 1880, the lower appellate Court added a postcript to its judgment and gave a decree for the land. *Held* that it was not proper to make the addition. HARJAS v. SHIB DAYAL, **A.W.N. 1881, 95.**

(3188)—*O 20, r. 3 (=Civ. Pro. Code, 1882, s. 202—Application for leave to appeal to Privy Council—Amendment of judgment—Limitation Act, XV of 1877, art 177.*—On an application by the applicants under s. 202 of the Code of Civil Procedure, certain arithmetical errors were corrected by the Court in the judgment passed on the 13th May 1898. The decree had not been drawn up prior to 6th June 1898, the date of the amendment. It was subsequently prepared in accordance with the amended judgment, and bore date 13th May 1898, the date of the judgment. The applicant applied under s. 598, Civ. Pro. Code, for permission to appeal to Her Majesty in Council "from the decree of 13th May 1898, as amended by an order of 6th June 1898." The application was made more than six months after 13th May, 1898. *Held*, that the application was barred by the law of limitation under art. 177 of Act XV of 1877. The judgment, having been amended under s. 202 of the Civ. Pro. Code, the amendment had not the effect of substituting a new judgment bearing the date 6th June 1898, for the judgment of 13th May 1898, and the decree, which was prepared subsequent to the amendment, was rightly dated 13th May 1898. ZINAT BIBI v. JAHANGIR BAKHSH KHAN, **2 O.C. 235.**

(3188-*a*) O. XX, r. 3—*See* NO. 2330, *supra.*

(3189)—*O. 20, r. 3, s. 99 (=Civ. Pro. Code, 1882, ss. 202, 578)—Evidence Act, s 91—Judge not dating order on claim—Order not invalid—Date may be proved by other evidence.*—It is an irregularity on the part of a Judge, who disallows a persons claim, not to date the order whereby he disallows it. But this irregularity does not invalidate the order. Regard being had to ss. 578 and 202, Civ. Pro. Code, it cannot be considered that the omission to date the order is fatal to its acquiring legal operation from the date on which the order was made; the omission to date it is a mere error of form

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which does not preclude the date from being proved by other evidence. SURYANARAYANA v. NILAMANI. **1 M.L.J. 478.**

(3190)—*O. 20, r. 3, O. 47, r. 1, s. 114 (=ss. 202 and 623, Civ Pro. Code, 1882)—Judgment—Clerical errors—Review not necessary*—When inadvertently wrong words are used in a judgment in describing the property in suit, the corrections may be made on an application under s. 202 of the Civ. Pro. Code and an application for review is not necessary to do so. MULA RAM v. BARHMI, **40 P L R. 1908=49 P.W.R. 1908.**

(3190 *a*)—O. XX, r. 3 (1)—*See* PRACTICE AND PROCEDURE, 15 B. 145.

——O. XX, r. 4 (=1882, s. 203=1877, s. 203=1859, s. 185).

(3191)—*O. 20, r. 4 (=old s. 203)—Object—Section discretionary.*—This section, though not requiring Judges of Small Cause Courts to give reason for their decision on simple questions of fact, does not empower them to decide difficult questions of law in an arbitrary and off-hand manner, without assigning their reasons for the same. The discretion given in this section must be exercised in a reasonable and judicial manner and if it is not so exercised, the Chief Court can revise such order. HARI MAL v. NIKKA, **78 P.R. 1895.**

(3192)—*O. 20, r. 4 (=old s. 203)—Limit of discretion given under*—This section being merely permissive, the discretion thereby given must be judicially exercised. Where intricate legal questions are involved, there must be something on the record to satisfy the superior Court that the Judge has not ignored any material considerations. SARUT CHAND v. BOMBAY, BARODA, AND CENTRAL INDIA RAILWAY COMPANY, **41 P.R. 1896.** [*F.*, 57 P.R. 1901.]

(3193)—*O. 20, r. 4 (=s. 203, Civ. Pro. Code, 1882)—Judgment of appellate Court, contents of—Judgment of reversal.*—In reversing a decision of the first Court, the lower appellate Court should state the *facts* and also the *points* which are raised before it, and then its decision on such points and the reasons for that decision. The High Court should not be left to spell out the meaning of the lower appellate Court by gathering together portions of findings both from the judgment of the first Court and the judgment in appeal. BASART ALI v. MAHOMED ROSHAN, **7 Ind. Cas 421.**

(3194)—*O. 20, r. 4 (=Civ. Pro. Code, 1882, s. 203)—Judgment of Small Cause Court—Contents of—Small Cause Court Act, 1887, s. 25.*—*Held*, that the judgment of a Small Causes Court should bear some indication that the Judge applied his mind to the weighing of the evidence on the record, or of the conclusion arrived at by him, and that the mere words "issue not proved and claim be dismissed" are obviously inadequate under s. 203 of the Civ. Pro. Code. SAMAND KHAN v. PIR BAKSH, **57 P.R. 1901.** (13 A. 533, 23 B. 335, 41 P.R. 1896, *F.*)

(3194 *a*)—*O. 20, r. 4—Judgment—Requirements of, under r. 4—Non compliance with—Illegality—Judgment of Court of Small Causes.*—The requirements of a judgment as laid down by O. XX, r. 4, Civ. Pro. Code, 1908, are imperative, and no judgment which does not supply them is a legal decision of the case. No judgment of a Court of Small Causes, which does not specifically set out the points for determination, or from the terms of which such points cannot be readily ascertained, is a legal decision of the case. HASANKHAN v. JASRAJ, **7 N.L.R. 146.**

(3194-*a*-1)—*O. 20, r. 4 (=Civ. Pro. Code, 1882, s. 203)—Small Cause suit—Judgment not in accordance with law—Interference by High Court—Provincial Small Cause Courts Act (IX of 1887), s. 25.*—Where, in a small cause suit to recover a certain sum of money, the plaintiff called six witnesses to prove his claim (the defendant being *ex parte*) and the Judge dismissed the claim with the judgment—"Claim not proved, claim rejected with costs," the High Court interfered in the exercise of its powers of revision under s. 25 of Act IX of 1887 and gave a decree for the plaintiff, the judgment of the Small Cause Court not being in accordance with s. 203 of the Civ Pro. Code, 1882. In a case where there is nothing to excite suspicion and the plaintiff has given such proof of his claim as the law requires, the plaintiff is entitled and the High Court is entitled to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim—*Per Farran, C.J.* A decree founded on a judgment not containing the decision on the points required by s. 203, Civ. Pro. Code, 1882, is not according to law. The error under s. 203 brings the case within the jurisdiction of the High Court, which would, on feeling convinced that a failurr of justice has occurred, pass an order which will rectify the mistake—*Per Fulton, J.* BAI JASODA v. BAMANSHA, **23 B. 334.** [*F.*, 5 C.L.J. 413; *Cons. & Expl.*, 27 B. 563; *R.*, 6 C.L.J. 527.]

(3194-*a*-2)—O. XX, r. 4—Judgment not defective merely because no specific issues framed—*See* CONTRACT ACT, 1872, s. 73, 5 M.L.T. 215.

(3194-*b*)—O. XX, r. 4—Procedure to be followed in appealable cases—*See* LIMITATION ACT, 1908, art. 120, 4 P.W.R. 1907=27 P.L.R. 1907.

(3194-*c*)—O. XX, r. 4—*See* SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF—MISCELLANEOUS, 15 M.L.J. 223.

(3194-*d*)—O. XX, r. 4, s. 99—*See* HIGH COURT, JURISDICTION OF—N.W.P., A.W.N. 1892, 160.

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(3195) *O 20, r 4, O 41, r. 23, s 141 (=ss 203, 561, 647, Civ. Pro Code, 1882)—Judgment of Small Cause Court Revision.*—S. 203 will not enable even a Small Cause Court Judge to dispose of a case in a manner which gives neither the points, nor any guarantee that he sufficiently understood the cause. The High Court, on revision, remanded a Small Cause suit for retrial under the analogy of s. 562 read with s. 647, on the ground that the judgment of the lower Court did not comply with the provisions of s. 203 MALIK RAHMAT v. SHIVA PRASAD, **13 A 533=A.W N. 1891, 172** [*Dis.* 12 A W.N 160; *Not F.*, 6 C.L.J 527; *F.* 57 P.R 1901.]

— O XX. r. 5 (=1882, s. 204=1877, s. 204 =1859, s. 186).

(3196—*O. 20 r. 5 (=Civ. Pro Code, 1882, s. 204—Judgment in appealable cases—Finding on all issues not to be incorporated in decree.*—Though it is advisable that in appealable cases the Court should as far as may be practicable record its findings on all important issues in a suit or appeal and not merely the one on which the final decision is based, yet, the finding in such issue or issues, should not form part of the decree. BALDEO SINGH v DHARAM KUNWAR **26 A. 234** (5 W R.P.C. 63, *R.*

(3196-*a*)—O XX, r. 5—*See* ISSUES—MISCELLANEOUS, 10 C. 1095.

(3196-*b*)—O XX, r. 5—*See* NO. 350, *supra*, and NO 5467, *infra*.

(3197)—*O 20, r. 5, O 41, rr. 23, 31 (=ss. 204, 562, 574, Civ. Pro. Code, 1882)—Dismissal on suit of some of the issues—Jurisdiction of Court to determine other issues—Remand—Practice.*—In a suit for ejectment, the main issues in the case related to the validity of the plaintiff's lease and the character of the defendant's holding The first Court held that the plaintiff's lease was not valid, but instead of dismissing the suit on that one point entered into the merits and found on the evidence that the defendants had a permanent right and could not be ejected on a notice to quit The lower appellate Court affirmed the first Court's judgment on all points The High Court, reversing the finding on the first point, *held* that the plaintiff's lease was valid. *Held* by *Maclean, C.J.*, agreeing with *Mitra, J.*—That the lower Courts had jurisdiction and very properly exercised that jurisdiction in deciding all the issues, and it was not necessary to remand the case, there being the finding of fact that the defendant's rights were permanent. *Per Mitra J.*—Chapter XLI of the Code, 1882, which deals with appeals from original decrees, contains nothing which may be construed as expressly taking away the power of an appellate Court to record its findings on all the points argued before it, notwithstanding that by force of s. 582, s. 204, may apply to appeals. 5 W.R. P.C 63, *Relied on*: 10 C. 1095, 11 C. 01; *Ibid.*, 544, 6 C. 319, 4 M. 134, *R.*)—*Per Rampini J.*—The case should be remanded for the determination of the nature of the defendants' tenancy inasmuch as the lower Courts had no jurisdiction to determine such issues after having held on the first issue that the suit was not maintainable. ISMAIL KHAN MAHOMED v HARI CHARAN PAL, **9 C W N. 60.** 5 W.R. P.C. 63, *D.*; 4 M 134, 10 C. 1095, 11 C. 544, 13 C. 17, 18 C. 647, 18 B. 597, 17 A. 174, 24 C. 900, 4 C.W.N. 210, 5 C.W. N 846, 6 C.W.N. 352, *R.*)

— O. XX. r 6 (1882, ss. 206, 221=1877, ss 206, 221=1859, s. 189.)

(3198)—*O 20, r. 6 (=s. 206, Civ. Pro. Code, 1877)—Contents of decree—Civ. Pro. Code, 1877, s. 206.*—S. 206 of the Civ. Pro. Code, 1877, requires, among other things, that a decree "shall specify clearly the relief granted or the determination of the suit." *Held*, accordingly, in a suit on a hypothecation bond, in which the property hypothecated was detailed and the property itself impleaded as a defendant, that a "Decree for plaintiff in favour of his claim and costs against defendant" was to be regarded as a simple money-decree, and not as one for the enforcement of the lien. THAMMAN SINGH v. GANGA RAM **2 A 342.** [*F.*, 2 A. 345, 3 A. 388, F.B =A.W.N. 1881, 45; *D.*, 11 B. 177.]

(3199)—*O 20, r. 6 (=Civ Pro. Code, 1877, s. 206)—Decree not embodying provisions of judgment—Amendment on appeal*—Where the lower appellate Court decided that certain additions to the mortgaged property made by the mortgagee should be demolished and that the mortgagee was entitled to take away the materials, but the decree was silent about the removal of the materials, *held*, that, although the proper course would have been to have applied for the amendment of the decree, and not to have preferred an appeal, the decree of the lower Court should be supplemented by declaring the mortgagee entitled to remove the materials when the building was demolished. BANSI v. HIRA LAL, **A.W.N. 1881, 60.**

(3199-*a*)—O. XX, r. 6—*See* LIMITATION ACT 1908, art. 181, 11 B. 284.

(3199-*b*)—O. XX, r. 6—*See* LIMITATION ACT, 1908, art. 181, 4 A. 23=1 A.W N. 114.

(3199-*c*)—O. XX, r. 6—*See* REVIEW—GENERAL, A W.N. 1882, 72.

(3199-*d*)—O XX, r 6—*See* NOS. 196, 351, 352 513, 537 to 545, 1707, 2350 to 2390, 2621, *supra*, and NOS 3225-*h*, 3236, 5300, *infra*.

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(3199-*d*)—O. 20, r. 6, s. 115—Limitation for application under section—Power of High Court to interfere in revision where the lower Court declined to correct a clerical error—*See* LIMITATION—GENERAL, 11 O.C. 208.

(3199-*e*)—O. 20, r. 6, s. 115—*See* REVISION—GENERAL, 101 P.R. 1888.

(3199-*f*)—O. 20, r 6, s. 152—*See* COSTS—SPECIAL CASES, 4 M.L.J. 280.

(3199-*g*)—O. 20, r. 6 and s. 152—Application for amendment of order absolute, not a step-in-aid of execution—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1905, 108=2 A. L.J. 287=27 A. 575.

(3199-*h*)—O. 20, r. 6, s. 152—Pleader's fees, how to be calculated in a suit for pre-emption—Oudh Civil Digest, paragraph 288, Rule 4—Decree, amendment of—*See* LEGAL PRACTITIONERS—PLEADER, 7 O.C. 43.

(3199-*i*)—O. 20, r. 6, s. 152—*See* LIMITATION ACT, 1908, art. 181, 9 A. 364=A.W.N. 1887, 79.

(3199-*j*)—O. 20, r. 6, s. 152—*See* LIMITATION ACT, 1908, art. 182—STEP-IN-AID OF EXECUTION, 13 A. 124=A.W.N. 1891, 32.

(3199 *k*)—O. 20, r. 6, s. 152—*See* TRANSFER OF PROPERTY ACT, 1882, s. 90, A.W.N. 1904, 268.

(3200)—*O. 20, r. 6, ss. 152, 47 (=ss. 206 and 244, Civ. Pro. Code, 1882)—Decree awarding interest at a higher rate than what the judgment provided—Amendment of decree after execution—Application for restitution of excess money realized in execution—Limitation Act, arts. 178 and 179.*—A certain decree, as drawn up, awarded interest on the decretal amount at a higher rate than what the judgment had provided. In execution, the decree-holder realized the amount specified in the decree. More than three years later, the decree was amended at the instance of the judgment-debtor. Thereupon, the judgment-debtor applied to the Court below for a refund of the amount, which had been realized from him in excess of the sum payable under the decree as amended. *Held*, that the application by the judgment-debtor was not an application for execution, but one, under s. 244, Civ. Pro. Code, for restitution of an amount which had, in execution of the decree, been realized in excess. Such an application is not governed by art. 179 but by art. 178 of the Limitation Act, time beginning to run from the date the decree was amended. Before that date, no application for a refund of the amount could be made, as such application would have been inconsistent with the terms of the decree as it then stood. HARNAM CHANDAR v. MUHAMMAD YAR KHAN, **A.W.N. 1905, 63=2 A.L.J. 169=27 A. 485.** (20 A. 304, *D.*)

(3201)—*O. 20, r. 6, ss. 152, 114, O. 47, r. 1 (=ss. 206, 263, Civ. Pro. Code, 1882)—Review of judgment—Application to bring decree*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

into confirmity with judgment.—Held that where a decree-holder applied under s. 623 of the Civ. Pro. Code, for review of judgment instead of under s. 206 to have his decree brought into conformity with the judgment, this was no reason for disturbing the order which he obtained and which he was in fact entitled to, although the applicaction should, strictly speaking, have been made under s. 206. GHULAM MOHI-UD-DIN KHAH v. DHANNO. **A.W.N. 1893, 123.**

(3201-*a*)—O. 20, r. 6, s. 152, s. 115—*See* POSSESSION—GENERAL, 6 A. 125=A.W.N. 1882, 60.

(3201-*b*)—O. 20, r. 6, s. 152, sch. II, rr. 16, 20, 21—*See* AWARD, 4 O.C. 82.

(3202)—*O. 20, rr. 6, 7 (=s. 189, Civ. Pro. Code, 1859)—Contents of decree Civ. Pro. Code, 1877, s. 206.*—Where, in a suit for money and enforcement of the lien on the property hypothecated in a bond, the decree was for the "claim as brought" without any specification as to the relief sought by the plaintiff for the enforcement of the lien, *held*, that this was only a money-decree and not one enforcing the lien. It is not for the Court to construe the relief granted by a decree by reference to the particulars of the claim set forth in it. These are required to be set forth in the decree, but it is also obligatory to sets up clearly the relief granted or other determination of the suit. HARSUKH v. MEGHRAJ, **2 A. 345.** (H.C.R.N. W.P., 1870, p. 29, R.A. NO. 75, 1873, F.B. *Unrep.*; 2 A. 342, *F.*; S.A. NO. 155 of 1877 (1878); *Unrep. not followed*) [*F.*, 3 A. 388, F.B.=1 A.W.N. 43.]

——O. XX, r. 7 (=1882, s. 205=1877 s. 205 =1859, s. 189),

(3203)—*O. 20, r. 7 (=s. 205, Civ. Pro. Code, 1882)—Death of one of the plaintiffs after judgment and before decree—Validity of decree—Appeal—Defect of parties—Suit for rent by several plaintiffs—Joint decree in favour of all—Death of one of plaintiffs—Respondents-Heirs of deceased not brought on record, effect of.*—The fact that one of the plaintiffs dies subsequent to the date of delivery of judgment but before the decree was actually drawn up, does not affect the validity of the decree, as the decree is, under s. 205, Civ. Pro. Code, to bear the date on which the judgment is pronounced. Where, in an appeal by the defendent against a decree for arrears of rent passed jointly in favour of all the plaintiffs, the heirs of one of the plaintiffs who died subsequent to the date of the delivery of judgment against which the appeal is preferred, were not made parties, *held*, that the appeal could not proceed and must fail by reason of defect of parties. BEJOY GOPAL BOSE v, UMESH CHUNDRA BOSE, **6 C.W.N. 196.** [*F.*, C.W.N. 981.]

(3203-a)—O. XX, r. 7—*See* No. 3202, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—O XX. r. 9 (=1882, s. 207=1877, s. 207 =1859 s. 190).

(3204)—*O.* 20, *r.* 9 (=s. 207, *Civ. Pro. Code*, 1882)—*Decree—Omission to specify boundaries or numbers of immoveable property decreed—Details in the plaint to be read in the decree.*—In this case, the decree of the first Court described the property decreed as the property "in suit" without specification of *kharsa* numbers or boundaries and so also did the judgment. There was no variance with the judgment nor any clerical or arithmetical error, calling for an amendment under s. 206, Civ. Pro. Code. The executing Court, however, declined to execute in the absence of full details in the decree. *Held*, that the Court should have read into the decree the details given in the plaint and should have proceeded to execute the decree with the help of those details. GORDHAN DAS v. RUGHNANDAN DAS, **74 P.R. 1905=182 P.L.R. 1905.** [*R.*, 48, P.R. 1906=104 P.L.R. 1906.]

(3204-*a*)—O. XX, r. 9—*See* NO. 5305, *infra.*

—O. XX, r. 10 (=1882, s. 208=1877, s. 208 =1859, s. 191.)

(3204-*b*) O. 20, r. 10 *See* NO. 2384, *supra.*

(3205)—*O.* 20, *r.* 10, *O.* 21, *r.* 31 (=*Civ. Pro. Code*, 1882, *ss.* 208, 259)—*Alternative decree for money in decree for moveable property—No option given to judgment-debtor—Alternative remedy enforceable after order for delivery becoming fruitless.*—The judgment-debtor gets no option under a decree for the return of moveable property. The money amount inserted in the decree is inserted under s. 208 of the Code which requires that an amount of money should be inserted in the decree as an alternative if delivery cannot be had. It is therefore only when, after putting in force s. 259 of the Code, it is found that it is impossible to obtain the property ordered to be delivered, that the alternative amount in the decree comes into operation. MANAVIKRAMAN v. MOYANKUTTI **18 M.L.J. 444.**

—O. XX, r. 11, (=1882, s. 210=1877, s. 210 =1859, s. 194.)

(3206)—*O.* 20, *r.* 11 (=*Civ. Pro. Code*, 1859, s. 194).—It should not be applied to an action for money due on an instalment bond, the terms of which had been broken. LUCHMENAUTH DOOGUR, v. HARADHUN MOOKERJEE, **2 Hay 95.**

(3207 & 3208)—*O.* 20, *r.* 11 (=*old* s. 210)—*Scope of—Decree payable by instalments.*—This section which enables a Court to order, in passing money-decrees, payment to be made by instalments, will not appy to a decree in a suit for recovering a debt by the sale of immoveable property hypothecated as a security for the payment of the same. AMIR CHAND v. KARM, **49 P.R. 1887.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3209)—*O.* 20, *r.* 11 (=*Civ. Pro. Code*, 1882, s. 210)—*Inherent power of Court to stay execution at the time of decree.*—The power to order stay of execution at the time of passing a decree is not unreasonable or in violation of any principles of justice, in view of O. XX, r. 11, Civ. Prc. Code, 1908. The old Code though it did not expressly confer such a power did dot take away such powers as are inherent in a Court to do justice between the parties. PALANIAPPA CHETTIAR v. VELAYUTHA PILLAI, **7 M.L.T. 151=5 Ind. Cas. 421.**

(3210)—*O.* 20, *r.* 11 (=*Civ. Pro. Code*, 1882, s. 210)—*Application for instalments to be fixed.*—Where an application not purporting or reciting itself to be a petition under s. 210, Civ. Pro. Code, is in every respect exactly what a petition under that section might be expected to be, and was presented within two and a half months after the passing of the decree, *held*, that the petition must be presumed to have been made under s. 210, Civ. Pro. Code, notwithstanding that the word *ikrarnama* was used in the petition and the order passed by the Court was merely to enter it in the register of undischarged decrees. NABI BAKSH v. GORI MAL. **23 P.L.R. 1901.**

(3211)—*O.* 20, *r.* 11—*Decree—Instalments.*—The discretion vested in a Court under O. 20, r. 11, to make a decree payable in instalments, must be judicially and not arbitarily exercised. The mere fact that the defendant is hard-pressed is not by itself a sufficient reason to justify a decree for instalments spread over for many years. BALGOBINDRAM BHAKAT v. CHHEDDILAL SAHA, **11 C.L.J. 431=6 Ind. Cas. 552.**

(3212)—*O.* 20, *r.* 11 (=s. 210, *Civ. Pro. Code*, 1882)—*High Court—Order to make money-decrees payable by instalments.*—Under s. 210 of the Civ. Pro. Code, the High Court has the power to make its money-decrees payable by instalment. POMA v. GILLESPIE, **9 Bom. L. R. 143=31 B. 348.**

(3213)—*O.* 20, *r.* 11 (=*Civ. Pro. Code*, 1882 s. 210)—*Instalments-bond—Power to pass decree payable by instalments.*—Where an instalment-bond provided that, in default of payment of any one of the instalments, the whole amount would be recoverable, *held*, that the Court had no jurisdiction, without the consent of the parties to pass a decree for payment by instalments. BALDEO DAS v. DASAUNDHI KHAN, **187 P.L.R. 1901.** (4 B. 96, *F.*)

(3214)—*O.* 20, *r.* 11 (=s. 214, *Civ. Pro. Code*, 1882)—*Formal order not drawn up—Construction of order—Real intention—Limitation.*—In construing pleadings, judgments and decrees and orders passed in this country, the most liberal construction must always be accepted. Where a judgment was passed on the 21st July, 1902, and on the 24th, an arrangement by the parties to pay the decretal amount by instalments was filed and explained to the judgment-debtor, who accepted the terms but no formal

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orders were passed under s. 210, Civ. Pro. Code and the formal decree in the case was drawn up on the 25th, according to the original judgment, the decree bearing the date of the judgment, and, thereafter, the judgment-debtor paid the instalments regularly up to June, 1905. *Held*, an application by the decree-holder for execution for the balance of the judgment-debt, presented on the 17th February, 1906, was not barred. KEDAR NATH BANERJEE v. KULMAN SARDAR, **5 C.L.J. 25.**

(3215)—*O. 20, r. 11 (=s. 210, Civ. Pro. Code, 1882)—Lenders and borrowers—Suit on promissory note — Equitable mortgage as security for loan—Decree for payment of claim by instalments.*—Where the suit was on a promissory-note, but it appeared that, as security for the loan, the plaintiffs held the title-deeds of a house, or in other words, an equitable mortgage, and the Court ordered payment of the claim by instalments, *held* that, if the plaintiffs had pursued all their remedies and had sued to have their lien declared, and for a mortgage-decree for sale, the defendant would have had time given within which to pay, and that if the lenders abandon their proper remedy in order to avoid one of the consequences of the original contract with the borrower, it is not unreasonable or inequitable that the Court should, as far as possible, put the borrowers in the same position as if the lenders had sought for their proper remedy. ALANEAPPA CHETTY v. MIRAJAM BEE, **1 L.B.R. 81.**

(3216)—*O. 20, r. 11—Court's power to order payment of decree by instalments.*—Where, without the consent of the plaintiff, a Court orders a defendant to satisfy a decree for Rs. 1,200 by 12 instalments of Rs. 100 per annum, *held*, that such an order deferring execution of the decree for 12 years can only be passed for some sufficient reason. RAM GOPAL ROY v. RAM TONOO CHATTERJEE, **6 W.R. 89.**

(3217)—*O. 20, r. 11 (=Civ. Pro. Code, 1877, s. 210)—Decree directing payment by instalments—Validity.*—The Court of first instance gave a decree for the suit amount, costs and interest at 6 per cent, but directed that the amount of the decree should be payable by ten equal half-yearly instalments, with interests at 6 per cent. as the defendants were "in an embarrassed condition." The plaintiff on appeal contended that his interest would be injurisously affected by the decree. The High Court allowed the appellant's contention and gave him a decree in a lump sum for the whole claim and costs, with interests at 6 per cent. BISHEN CHAND v. JANG BAHDUR, **A.W.N. 1882, 102.**

(3217-*a*)—O. 20. r. 11—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 9 BOM. L.R. 143=31 B. 348.

(3217-*b*)—O. 20, r. 11—*See* INSTALMENTS, 4 B. 96.

Civ. Pro. Code (Acts V of 1908, XIV of 1882 X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3217-*c*)—O. 20, r. 11—*See* LIMITATION ACT, 1908, ART. 182—PERIOD FROM WHICH LIMITATION BEGINS TO RUN, 7 M. 152.

(3217-*d*)—O. 20, r. 11—*See* NEGOTIABLE INSTRUMENTS—GENERAL, 2 N.L.R. 179.

(3217-*e*)—O. 20, r. 11—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 1 Agra 116.

(3217-*f*)—O. 20, r. 11, s. 45—*See* SURETY. LIABILITY OF SURETY, 3 A. 809=A.W.N. 1881, 78.

(3217-*g*)—O. 20, r. 11, s. 115—Decree for rent under Bengal Tenancy Act—Payment by instalments—*See* BEN. ACT VIII OF 1885, 11, C.W.N. 857.

(3217-*h*)—O. 20, *r.* 11 (=*old s.* 210)—*O.* 8, *r.* 1 (=*old s.* 110)—*Application not specifically under s.* 210, *though such in effect—Court how to treat it.*—An application, though not purporting to be made under s. 210, which was yet in every respect what a petition under that section ought to be and which was presented within the limitation period, was held to be one under s. 210 where the conduct of the parties showed that they treated it as such. NABI BAKSH v. GORI MAL, **96 P.R. 1900.** (61 P.R. 1886, 26 P.R. 1894, 12 A. 571, *Dis.*).

(3217-*h*)—*O.* 20, *r.* 11 *and O.* 34, *r.* 6—*Personal decree against mortgagor — Court's discretion to direct payment by instalment—Judicial discretion—Second appeal.*—In making a decree under O. 34, r. 6 of the Code, against a mortgagor personally the Court may direct the payment of the decretal amount in instalments under O. 20, r. 11 of the Code. Whether or not the Court exercised a sound judicial discretion in making the order cannot be reviewed in second appeal. BIDHU SHEKAR BANDAPDHAYA v. SUDHURY MAHATABUDDIN, **15 C.W.N. 1083,** (11 C.L.J. 431, *D.*)

——O. XX, r. 12 (=1882, ss. 211, 212=1877, ss. 211, 212=1859, ss. 196, 197).

(3217-*i*)—O. 20, r. 12—Interest on mesne profits when claimable — *See* INTEREST—SPECIAL CASES, 33 C. 329.

(3217-*j*)—O. 20, r. 12—*See* MESNE PROFITS—MODE OF ASSESSMENT, 12 W.R. 75.

(3217-*k*)—O. 20, r. 12—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 1 B.L.R.A.C. 138=10 W.R. 62, 6 C.W.N. 732, 9 M.L.J. 163.

(3217-*l*)—O. 20, r. 12 and s. 2 (12)—Mesne profits between the date of the darkhast and the date of awarding possession—*See* MESNE PROFITS—GENERAL, 1 Bom. L.R. 638=24 B. 149.

(3217-*l*)—O. XX, r. 12=*See* NOS. 128 to 150, 169, 276, 336, 353, 533, 2660, 2661-*a*, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3217-*m*)—O. 20, r. 12, s. 2 (12)—*See* MESNE PROFITS—MODE OF ASSESSMENT. 2 Bom. L.R. 709.

—— O. XX, r. 13 (=1882, s. 213=1877, s. 213).

(3218)—*O. 21, r. 13 (=s. 213, Civ. Pro. Code, 1877)—Administration suit—Jurisdiction of Civil Court* —S. 212, Civ. Pro. Code, recognises the possibility of administration suits being instituted and tried under the Code, providing for them accordingly. The jurisdiction as to such a suit does not depend upon whether the deceased person is one to whose estate the Indian Succession Act is applicable. MUSSAMMAT RUKMAN v. BRIJ MOHAN LAL, **68 P.R. 1881.**

(3218-*a*)—O. 20, r. 13—*See* PUN. ACT IV OF 1872, s. 17, 67 P.R. 1892.

(3219)—*O. 20, r. 13, ss. 52, 64 (=ss. 213, 252, 276, Civ. Pro. Code, 1882)*—Lis pendens—*Money decree against the estate of a deceased debtor—Claim for mere money-decree not an administration suit—Mortgage by heir—Rights of decree holder and mortgagee* —The creditor of a deceased person obtained a decree for money payable by instalments against his assets in the hands of his son and heir, the defendant in the case. Pending the appeal by the plaintiff, the defendant mortgaged the property in suit which belonged to the deceased debtor to satisfy the claim of another creditor of the deceased. The plaintiff contended that the mortgage was invalid having been made pending the disposal of his case and that he could sell the property free from the mortgage lien. *Held*, that the decree obtained by the plaintiff not being a decree binding the property, and his suit not being one in the nature of an administration suit, the mortgage was not invalid, and the plaintiff could sell the property only subject to the mortgage. BAGHU MAL v. PAT RAM, **52 P.L.R. 1908**, (7 A. 122, 9 C. 406, 29 M. 508, 26 A. 28, *Appr.*; 19 A. 504, 8 C. 20, 370, *Disappr.*)

(3220)—*O. 20, r. 13, s. 73, O. 38, r. 12, ss. 115, 136 (=ss. 213, 295, 490, 622, 648, Civ. Pro. Code, 1882)—Attachment prior to judgment —Application for rateable distribution—Order by District Judge.*—When there has been an attachment before judgment, the attaching creditor is entitled to a rateable share, under s. 295, and no fresh application after decree and before realization is necessary. (19 M. 72, *R.*) Under s. 648, Civ. Pro. Code, even property outside the jurisdiction of the Court in which a suit is pending can be attached by that Court in anticipation of its judgment. AMARA VEERAYYA v. ANUMALA CHETTI PICHAYYA, **4 M.L.T. 348.** (7 C.W.N. 216, *R.*)

—— O. XX, r. 14 (=1882, s. 214=1877, s. 214).

(3221)—*O. 20, r. 14 (=Civ. Pro. Code, 1882, s. 214)—Pre-emption—Person asserting right in possession—Applicability.*—S. 214 of the Code contemplates cases where the party seeking to enforce a right of pre-emption is out of possession and is inapplicable to instances in which parties setting up such a right are already in possession. KRISHNA MENON v. KESAVAN, **20 M. 305.**

(3222)—*O. 20, r. 14 (=s. 214, Civ. Pro. Code, 1882)—Decree for pre-emption—Money not deposited within time fixed—Obligation or liability incurred—No vested right in procedure—Code of Civil Procedure (1908), s. 148—General Clauses Act (1897), s. 6.*—Where a decree for pre-emption directed that the consideration for the sale should be deposited within a certain time which expired after the coming into operation of the new Code of Civil Procedure, *held*, that no extension of time could be granted. The plaintiff had incurred an obligation or liability under the old Code, and it was not a matter of procedure, and having regard to the provisions of s. 6 of the General Clauses Act, 1897, s. 148 of Act V of 1908—the new Code of Civil Procedure—even if it is applicable to a suit for pre-emption, did not apply to the present case. JUG RAM v. JEWA RAM, **6 A.L.J. 647=3 Ind. Cas. 497.** [*R.*, 32 A. 499=7 A.L.J. 420.]

(3223)—*O. 20, r. 14—Decree in pre-emption suit—Decree fixing price to be paid, and allowing costs to be deducted—Payment of decree amount after deducting costs—Appellate Court raising the price to be paid and reversing order as to costs—Payment of difference without costs previously recovered, whether sufficient compliance with the appellate decree—Subsequent suit for costs.*—In a suit for pre-emption, the lower Court gave a decree in favour of A for possession of property on payment of Rs. 430, authorising A to pay the amount after deducting Rs. 5-14-0, the costs adjudged to him. A paid the amount deducting the costs within the time fixed by the Court. But on appeal by the vendee, the price to be paid was raised to Rs. 512 and the order as to costs was also reversed. No notice of the exact additional amount to be paid was given to A, who paid in Rs. 82, the difference between Rs. 430 and 512. The vendee contended that the appellate decree was not complied with, since the costs already recovered by A were not also paid, and A therefore lost his right to possession. *Held*, since the appellate Court's order did not call upon A to pay in Rs. 512 and costs, but Rs. 512 only, the payment of the difference between Rs. 430 and Rs. 512 within the time allowed, *without the costs* already realised, was a sufficient compliance with the decree of the appellate Court and the vendee was separately entitled to recover costs. BHAGWANA v. GORU, **56 P.R. 1910=6 Ind. Cas. 954 =133 P.L.R. 1910.** (10 A. 400, *F.*)

(3224)—*O. 20, r. 14 (=Civ. Pro. Code, 1882, s. 214)—Pre-emption decree not providing that it would become void on pre-emptor's failure*

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to pay purchase-money—Effect of failure.—A pre-emption decree becomes void after the expiry of the period fixed for the payment of the purchase-money, even if no condition be entered in the decree that it should, in the event of failure on the part of the pre-emptor to pay the purchase-money, lapse and become void. GURDIT SINGH v. HUKAM SINGH, **167 P.L.R. 1903=58 P.R. 1903.** (14 A. 529, *F.*)

(3225)—*O.* 20, *r.* 14 (=*s.* 214, *Civ. Pro. Code*, 1882)—*Execution of decree—Pre-emption—Money paid into Court in accordance with a decree for pre-emption—Such money immediately property of person on whose account it was deposited.*—Where a decree is given for pre-emption upon payment of a specified sum on or before a certain date, the moment the pre-emptor complies with the terms of the decree in his favour by payment into Court of the amount due from him, he acquires a title to the property, and the money becomes that of the person for payment to whom it was deposited. HAKIM VILAYAT ALI v. ABDUS-SALAM, **A.W.N. 1895, 13.**

(3225-*a*)—O. 20, r. 14—*See* APPEAL—MISCELLANEOUS, A.W.N. 1888, 22.

(3225-*b*)—O. 20, r. 14—*See* PRE-EMPTION—LOSS OF RIGHT TO PRE EMPT BY WAIVER, ETC., 18 A. 223=A.W.N. 1896, 43.

(3225-*c*)—O. 20, r. 14—Suit for pre-emption—Appeal by purchaser for enhancement of purchase-money—Construction of decree of appellate Court confirming decree of first Court but silent as to time for payment of purchase—*See* PRE-EMPTION—PURCHASE-MONEY, 48 P.R. 1906, F.B.=104 P.L.R. 1906.

(3225-*d*)—O. 20, r. 14—*See* PRE-EMPTION—PURCHASE-MONEY, 67 P.R. 1895, A.W.N. 1890, 92 A.W.N. 1887, 243, 70 P.R. 1890, F.B.

(3225-*e*)—O. 20, r. 14—Decree for pre-emption—Effect of default of payment within time—Appeal—Execution of decree—*See* PRE-EMPTION—MISCELLANEOUS, A.W.N. 1888, 4.

(3225-*f*)—O. 20, r. 14, ss. 47, 115—*See* PRE-EMPTION—MISCELLANEOUS, 11 O.C. 144.

(3225 *g*)—O. 20, r. 14, s. 144 (1)—*See* PRE-EMPTION—PURCHASE MONEY, 10 A. 400=A.W.N. 1888, 74.

(3225-*h*)—O. 20, rr. 14, 6 (3), O. 21, r. 19—*See* PRE-EMPTION—MISCELLANEOUS, 6 A. 351=A.W.N. 1884, 125.

——O. XX, r. 15 (=1882, s. 215=1877, s. 215).

(3226)—*O.* 20, *r.* 15 (=1882, *Civ. Pro Code*, s. 215)—*Partnership—Dissolution—Application for winding up—Return of plaint—Jurisdiction.* When there was nothing on the face of the plaint to show that the partnership was not subsisting, the suit must be regarded as one for dissolution of partnership and not merely one for winding up the business of the firm. Such a suit must therefore be regarded as an ordinary one under s. 215 of the Code and, as such, should be entertained in the Munsif's Court. A District Judge has no jurisdiction to entertain such a case. JAIPAL SINGH v. MATADIN RAM, **A.W.N. 1888, 205.**

(3227)—*O.* 20, *r.* 15 (=*Civ. Pro. Code*, 1882, *s.* 215 (*a*)—*Suit for accounts—Appeal—Small Cause Court suit—Punjab Courts Act*, *s.* 40 (1) (*i*)—*Further appeal—Court Fees Act*, 1870, s. 7 (*iv*) (*f*)—*Deficiency for appeal to the lower appellate Court—Application for heirs to be brought on record—Limitation.*—In this suit, the plaintiffs prayed (1) that accounts might be taken and explained to them; (2) to be allowed to inspect the strong room in which the offerings were stored; (3) for partition of such of the offerings as were partible, and for their share on partition. The suit was valued at Rs. 130, as the approximate share of the plaintiffs, and at Rs. 500, or account of the inspection of the strong room. The suit entailed the consideration of rules for the management of the Bajreshuri temple at Bhaun, Kangra. The defendants were the *Chowdharis*, and the plaintiffs were the rest of the *pujaris* and shareholders of the temple. It was declared by the first Court that the plaintiffs were entitled to have accounts taken every six months. *Held*, that the suit was a suit for an account, though a share in the collections was claimed, and the suit was excluded by art. 31, sch. II, Act IX of 1887, from the jurisdiction of the Court of Small Causes. (21 B. 248, 17 B. 42, *R.*) A further appeal lay under s. 40 (1) proviso (i) under certificate granted by the Divisional Judge. *Held*, also that the preliminary order directing accounts to be taken, being a decree, was appealable. (8 A. 520, 9 B. 183, 18 C. 464, *Dist.*) *Held*, also, that the further appeal was chargeable with an *ad valorem* Court-fee under s. 7 (12) (*f*) of the Court Fees Act No question as to the amount of the fee payable having been raised in, or decided by the Divisional Court, the appellants were not called upon to make up the deficiency in the Court. (115 P.R. 1884, *F.*) Having regard to the number of parties, applications for representatives to be brought on the record for the parties, who died pending the appeals filed after the expiry of the period of limitation, were allowed. KAKA RAM v. RAM SARN, **137 P.L.R. 1901=13 P.R. 1901.**

(3227-*a*)—O. 20, r. 15—*See* CONTRACT ACT, 1872, s. 265, 5 A. 500=A.W.N. 1883, 100.

(3227-*b*)—O. 20, r. 15—*See* JURISDICTION OF CIVIL COURTS, 7 A. 227, F.B.=A.W.N. 1885, 18.

(3227-*c*)—O. 20, r. 15—*See* NOS. 470, 507, *supra.*

(3228)—*O.* 20, *rr.* 15, 19 (=*ss.* 215 *and* 216, *Civ. Pro. Code*, 1882)—*Decree in favour of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

defendant—Account of partnership—Plaintiff's suit should be dismissed when nothing due to him.—The cases in which a decree can be made in favour of the defendant are those provided for by s. 216 of the Code. In a suit where the plaintiff prayed for taking an account of a dissolved partnership and alleged that a sum of Rs. 200 was due to him, but, on taking accounts, it appeared that nothing was due to him but something was due to the defendants, *held*, that no decree should be made in favour of the defendants, but the suit ought to be dismissed. MISRI LAL v. BENARSI LAL, **3 A.L.J. 233=A.W.N. 1906, 111.**

——O. XX, r. 16 (=1882, s. 215-A).

(3228-*a*)—O. 20, r. 16—Suit for accounts—Procedure—Fixing date for accounts—*See* ACCOUNTS—SUIT FOR ACCOUNTS, A.W.N. 1905, 1.

(3228-*b*)—O. 20, r. 16—Preliminary decree—Appeal against such decree—Court-fees—*See* COURT FEES ACT, 1870, s. 7 (iv) (*b*), 150 P.R. 1908.

(3228-*b*-1)—O. 20, r. 15—*See* NO. 470, *supra*.

(3228-*c*)—O. 20, rr. 16, 19—Suit for accounts by principal—Claim for set-off by agent, necessity for—*See* PRINCIPAL AND AGENT—GENERAL, 7 A.L.J. 543=6 Ind. Cas. 162=32 A. 525.

(3229)—*O.* 20, *r.* 16, *O.* 41, *r.* 5 (=*ss.* 215-*A.* 545, *Civ. Pro. Code*, 1882)—*Stay of preliminary order—Power of appellate Court.*—When an appeal is pending in the High Court against a preliminary order made in a subordinate Court under s. 215-A, Civ. Pro. Code, 1882, the High Court which has *seisin* of the appeal, (apart from the question whether the case falls within s. 545 of the Code), can make an order staying the carrying out of such order, pending the hearing of the appeal. BALKISHEN SHAU v. KHUGNU, **31 C. 722, F.B.=8 C.W.N. 572.** [*F.*, 33 C. 927=3 C.L.J. 67; *R.*, 3 C.L.J. 29, 34 C. 1037. F.B.=11 C.W.N. 1030=6 C.L.J. 298; *D.*, 34 C. 1081=9 C.W.N. 123.]

——O. XX, r. 19 (=1882 and s. 216=1877, s. 216=1859 s. 195).

(3229-*a*)—O.20, r. 19—*See* NOS. 2822, 2822-*a* 2822-*b*, 3228, 3228-*c*, *supra*.

——O. XX, r. 20 (=1882, s. 217=1877, s. 217=1859, s. 198

(3229-*b*)—*O.* 20, *r.* 20 (=*Civ. Pro. Code*, 1859, *s.* 198) — *Delay in furnishing copies of judgments—Admission of special appeal* —When stamps are put in by a party to a suit as required by Act VIII of 1859, s. 198, a copy of the decree and judgment must be furnished to him without further costs. A District Judge is not justified in delaying the giving of the copy until blank papers are put in by the applicant. RAJAH NILMONEY SINGH DEO v. CHINIBAS MHAANTI, **12 B.L.R. App. 8=20 W.R. 405.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXI, r.1 (=1882, s. 257=1877, s. 257=1859, s. 206).

See EXECUTION OF DECREE.

See LIMITATION ACT, 1908, art. 182.

(3230)—*O.* 21, *r.* 1 (=*Civ. Pro. Code*, 1877, *s.* 257 (*a*))—S.: 257 (*a*) of Civ. Pro. Code, 1877, applies only as between the parties to the suit and decree. YELLA v. MUNISAMI, **6 M. 101,** [*F.*, 13 B. 671; *Appr.*, 11 A. 228; *R.*, 6 C.P.L.R. 133, 19 M. 230. U.B.R. 1897—1901, Vol. II, 252, 61 P.L.R 1907=71 P.W.R. 1907 =29 P.R. 1908; *D.*, 6 Bom. L.R. 344=28 B. 383.]

(3231)—*O.* 21, *r.* 1 (=*s.* 257, *Civ. Pro. Code*, 1882)—*Decree, payment of—Judgment-debtor.*—A judgment-debtor has the right, under s. 257, Civ. Pro. Code, 1882, to elect to pay the money into Court. MADHAV v. RAVJI, **1 Bom. L.R. 644.**

(3232)—*O.* 21, *r.* 1 — *Decree—Payment of money—Payment into the Court—Court closed on the date of payment—Payment made on the opening of Court.*—It was provided by a decree that, if the plaintiff paid Rs. 100 by the 10th April 1909 to defendants, the property in dispute would belong to the plaintiff by ownership; otherwise, the ownership would rest with the defendants. The plaintiff did not pay the money to the defendants but elected to pay the money into Court. And as the Court was closed from the 10th to 13th April, 1909, the payment was made into Court on the 14th April, 1909. The lower Courts held that, as the money had by the terms of the decree to be paid to the defendants, the plaintiff had no option to pay it into Court; and that, therefore, the payment into Court was not in compliance with the terms of the decree: *Held* that r. 1 of O. XXI of the Code provided that all money payable under a decree should be paid into Court or out of Court to the decree-holder. The rule enacted that payment into Court is a valid compliance with a decree, even though the decree directed payment to the decree-holder. WANA RAVJI v. NATU MURHA, **12 Bom. L.R. 818.**

(3233)—*O.* 21, *r.* 1 (=*s.* 257 (*a*), *Act XIV of* 1882, *Civ. Pro. Code*,)—*Decree—Execution—Agreement receiving sanction of Court of execution under s* 257, (*a*)—*Agreement how enforced.*—Where the parties come to a specific agreement, which has received the sanction of the Court of execution under s. 257 (*a*), Civ. Pro. Code, that the money due under that agreement should be realised as in execution of decree rather than by recourse to a separate suit, the execution Court is competent to realise the money on the application of the judgment-creditor in the manner agreed upon, the Court which would try the regular suit brought upon such an agreement being the same Court which would execute the decree to enforce its

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

terms. THAKOOR DYAL SINGH v. SARJU PERSHAD MISSER, **20 C. 22.** (15 B.L.R. 283, 24 W.R. 193. *Relied on.*) [*R.*, 88 P.R. 1904; *Appr.*, 61 P.L.R. 1907=71 P.W.R. 1907=29 P.R. 1908, F.B.]

(3234)—*O.* 21, *r.* 1 (=s. 257, *Civ. Pro. Code* 1882)—*Death of decree-holder, if relieves, judgment debtor of duty of payment—Mode of payment—Delay in payment of instalment—Interest.*—The death of the decree-holder does not relieve the judgment debtor of the duty of paying up the decretal debt in one of the several modes specified in s. 257, Civ. Pro. Code, 1882. He should either deposit the amount in Court as directed in cl. (*a*) or should take directions from the Court under cl. (*c*). Where the judgment-debtor, upon the death of the decree-holder, failed to deposit the balance due under an instalment decree till long after the date fixed for the payment of the instalment. *Held* that the judgment-debtor was liable to pay interest for the period during which the instalment remained unpaid. NARENDRA CHANDRA LAHIRI v. CHARU CHANDRA SINGH, **14 C.W.N. 146=5 Ind. Cas. 63.**

(3235)—*O.* 21, *r.* 1 (=*s.* 257, *Civ. Pro. Code*, 1882)—*Whether agreement under the section bars execution of original decree.*—A decree passed by a District Court was transferred to a Sub-Court for execution. Since such transfer, the parties agreed that the decree-amount should be paid by instalments, and applied to the Sub-Court to record satisfaction of the decree and the Sub-Court did record accordingly. The judgment-debtor paid some instalments out of Court and then committed default. The decree-holder, thereupon applied to the District Court, that passed the decree, to execute the decree by arrest of the judgment-debtor in respect of the instalments in arrears. This petition was dismissed. The decree-holder, then, applied for execution of the original decree itself and applied for stay of proceedings till the disposal of this appeal which was one against the order of dismissal of the application for the execution of the decree, so far as it concerned the instalments due under the agreement come to between the parties since the original transfer of the decree to the Sub-Judge. The question for decision, under the circumstances, was whether the original decree was executable in its original condition or as modified by the agreement above alluded to or whether the decree was so completely extinguished as to be incapable of execution and so as to necessitate a fresh suit on the agreement, by reason of the agreement taking the place of the original decree and by reason of satisfaction being recorded by the Sub-Judge. *Held*, the agreement and the record of satisfaction thereof did not render the original decree unenforcible in execution; the effect of the record of satisfaction merely amounted to striking the execution-proceedings off the register of pending cases. The lower Court ought to

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

have given effect to and executed, the original decree after excluding the modification sought to be imported under the agreement. NAMAN RAM v. MUHAMMAD NAWAZ KHAN, **27 P.L.R. 1905.** (11 C. 671, 20 C. 32, 31 C. 822, 19 B. 546, 28 B. 393, 24 M. 683, 24 A. 282, 88 P.R. 1904, *R.*)

(3236)—O. 21, r. 1—See NOS. 534, 577, 3137, *supra.*

(3237)—*O.* 21, *r.* 1, *s.* 35, *O.* 20, *r.* 6 (3) (=*Civ. Pro. Code*, 1882, *ss.* 257, 218)—*Order of Court to pay day costs, not a decree.*—Where an order was made under s. 218 of the Code, that the defendant should pay the costs of the day, and his attorney lodged the amount in Court, treating the order as a decree, under s. 257, it was held that the section had no application to the amount of costs awarded in applications or under orders which are not decrees within the definition of s. 2 of the Code. SHANKS v. THE SECRETARY OF STATE, **12 M. 120.**

(3238)—*O.* 21, *rr.* 1 *and* 2 (=*s.* 206, *Civ. Pro. Code*, 1859)—*Applicability.*—S. 206, Act VIII of 1859, applies where execution is sought after that law of a decree passed before its enactment. BYKUNT GHOSE v. KISHEN CHUNDER GHOSE, **2 W.R. Mis. 43.**

(3239)—*O.* 21, *rr.* 1 *and* 2 (=*s.* 206, *Civ. Pro. Code*, 1859)—*Applicability to Act X of* 1859.—The provisions of Act VIII of 1859, s. 206, are applicable to proceedings under Act X of 1859. GOUR GOBIND SIRCAR v. HUREE MOHUN BANERJEE, **22 W.R. 204.**

(3240)—*O.* 21, *rr.* 1, 2 (*Civ. Pro. Code*, 1882, *s.* 258 (=s. 206, *Civ. Pro. Code*, 1859)—*Debtor under money-decree right of, to pay money into Court—Adjustments to be made through Court.*—Under s. 206, a debtor under a money-decree can *at any time* bring the amount of his debt into Court to be paid to the judgment-creditor; and by analogy any person against whom there is a decree for the delivery of moveable or immoveable property, may make satisfaction with the knowledge of the Court in such a way as circumstances will admit of. *Quære.*—Where a party simply acts in obedience to a decree, is he debarred from showing that he has done so by the words, "no adjustment of a decree, in part or in whole, &c." in s. 206, Civ. Pro. Code, 1859. By s. 206, Civ. Pro. Code, 1859, all adjustments of decree must be made with knowledge of the Court. RAJ LUCKHEE CHOWDHRAIN v. SHIB DYAL TEWAREE CHOWDHRY, **18 W.R. 520.**

(3241)—*O.* 21, *rr.* 1, 2 (=*Civ. Pro. Code*, 1859 s. 206)—*Abuse of process of Court—Satisfaction of decree—Framing issue, necessity of.*—In executing decrees, whilst giving effect to s. 206 of Act VIII of 1859, a Court should also take reasonable care that its process is not about to be abused for fraudulent purposes. It may, by examining the judgment-debtor and others

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having knowledge, inform itself whether the decree has, or has not been satisfied. This, however, is merely an inquiry to inform the Court; there is no necessity to frame and decide an issue PAREECHUT v. RAGHO GOORDEO, **2 N.W.P. 48.**

(3242)—*O.* 21, *rr.* 1 *and* 2 (=*s.* 206, *Civ. Pro. Code*, 1859)—*Adjustment not made through Court—Plea of final release by debtor—Date of.*—Where the debtor pleaded a final release, it was held that he should have been called upon to state when the alleged arrangement took place and that, if it was subsequent to Act VIII of 1859, the decree should have been allowed to proceed, as s. 206, Civ. Pro. Code, 1859, forbade Courts from recognising any adjustments not made through the Court, and that, if it was prior to such Act, the Court should consider only the *bona fides* of the adjustment and decide the case. BRINDABUN CHUNDER SIRCAR CHOWDHRY v. KHOSHAL CHUNDER DUTT, **2 W.R. Mis. 2.**

(3243)—*O.* 21, *rr.* 1 *and* 2 (=*s.* 206, *Civ. Pro. Code*, 1859)—*Decree—Payment out of Court—Suit—Act XXIII of* 1861, *s.* 11.—*Held* that .206, Act VIII of 1859, and s. 11, Act XXIII of 1861, notwithstanding, if a judgment-debtor makes a payment to the decree-holder out of Court in satisfaction of his decree and the decree-holder, disregarding such payment, and failing to certify such payment to the Court, executes and realizes the amount of his decree, the judgment-debtor can bring an action in the Civil Court against the decree-holder for damages to recover the money which he paid the decree-holder in the first instance out of Court. GUNAMANI DASI v. PRANKISHORI DASI, **5 B.L.R. 223, F.B. =13 W.R. 69, F.B.** [*F.*, 4 B. 295, 7 A. 124=A.W.N. 1884, 277, 10 C. 354, 11 C. 671, 16 C. 504; *R.*, 11 B.H.C. 151, 22 W.R. 270, 3 A. 538, 5 M. 397, F.B., 9 C. 788=12 C.L.R. 390, 83 P.R. 1884, 15 C. 187, 17 C 769, F.B., 31 C. 480=8 C.W.N. 395, 35 C. 870 =12 C.W.N. 674=7 C.L.J. 543; *D.*, 10 B. 155, 11 B. 6, F.B. 21 C. 437.]

(3244)—*O.* 21, *rr.* 1, 2 (=*Civ. Pro. Code*, 1859, s. 206)—*Decree adjusted between parties by contract binding upon them—Court not bound to issue process upon original decree.*—Where a decree has been adjusted between the parties by a contract binding upon them, a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract, although the decree-holder refuses to certify the adjustment of the decree under s. 206, Civ. Pro. Code, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract. KRISHNAJI KESAVA PUNDIT v. SUBBARAYA TAKKER, **7 M.H.C. 387.** [*R.*, 2 M.L.J. 221.]

(3245)—*O.* 21, *rr.* 1, 2 (=*Civ. Pro. Code*, 1859, *s.* 206)—*Instalment bond—Limitation*—Kistbandi—*Payment.*—Where nearly six years after the execution by judgment-debtors of two *kistbandis*, several payments entered on the back of the *kistbandis*, though not made through or certified to the Court or denied by the judgment-debtors, the plaintiff is entitled to prove the payments made to show that his right to sue out execution under the *kistbandi* is not barred by limitation. BHUBANESWARI DEBI v. DINANATH SANDYAL, **2 B.L.R.A.C. 320=11 W.R. 232.** [*Appr.*, 13 W.R. 40, F.B.= 4 B.L.R. 130, F.B.; *R.*, 15 W.R. 459.]

(3245 *a*)—*O.* 21, *rr.* 1, 2 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 206)—*Payment towards decree, out of Court and not certified—Decree-holder collecting the sum a second time by process of Court—Judgment-debtor cannot maintain suit to recover the amount overpaid.*—When the judgment-debtor pays a certain sum of money towards the decree, out of Court, and the payment is not certified to the Court which is therefore debarred by s. 206, Civ. Pro. Code, from recognizing the payment, and the decree-holder fraudulently levies the same sum a second time through the process of the Court, the judgment-debtors cannot maintain a suit to recover the sum overpaid. (By a majority of the Court, *Scotland, C.J.* and *Innes, J.*, *dissenting*). ARUNACHELLA PILLAI v. APPAVU PILLAI, **3 M.H.C. 188.** [*Diss.*, 1 A. 388; *Not F.*, 6 M. 41; *R.*, 7 M.H.C. 387, 3 A. 538, 5 A. 94, 5 M. 397, 11 B. 6; *D.*, 1 M. 203.]

(3246)—*O.* 21, *rr.* 1 *and* 2 (=*s.* 206, *Civ. Pro. Code*, 1859).—A suit to enforce a contract by which a dispute is adjusted between a decree-holder and judgment-debtor is not barred by Act VIII of 1859, s. 206. NUJEEM MULLICK v. ERFAN MOLLAH, **22 W.R. 298.** [*Appr.*, 7 A. 124; *D.*, 21 C. 437, *R.*, 2 M.L.J. 221, 5 M.L.J. 140, 11 B. 6.]

(3247)—O. 21, rr. 1, 2—*See* APPEAL—ORDERS, W.R. 1864, Mis. 38.

(3248)—O. 21, rr. 1 and 2—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, **22 W.R. 214.**

(3249 to 3252)—O. 21, rr. 1 and 2—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, **4 B.H.C. 85.**

(3253)—O. 21, rr. 1 and 2—*See* LIMITATION ACT, 1908, art. 84, 1 B. 505.

(3254)—O. 21, rr. 1, 2—*See* REVIEW—JURISDICTION TO REVIEW, 3 W.R. Act X, Rul. 7.

——O. XXI, r. 2 (=1882, s. 258=1877, s. 266 =1859, s. 206).

See LIMITATION ACT, 1908, art. 182.

(3255)—O. 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1877, *unamended*)—*Decree—Payment out of Court—Satisfaction not certified—Execution—Right of judgment-debtor to recover money paid out of Court by suit.*—S. 258 of the Code expressly makes it the duty of the decree-holder to certify to the Court, any payment made out

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of Court in satisfaction of a decree, and if the decree-holder, either by fraud or by negligence, fails to discharge that duty, and by reason of such failure, the debtor has to pay his debt a second time, a suit would lie at the instance of the judgment-debtor against the decree-holder, on the ground of his fraud or negligence. VIRARAGHAVA v. SUBBACKA, **5 M. 397, F.B.** [*F.*, 6 M. 41, 10 C. 354, 23 B. 394; *Appr.*, 8 M. 277; *Exp.*, 15 M. 302; *R.*, 10 B. 288, 11 B. 6, 21 C. 427, 20 M. 369, 30 M. 545; *D.*, 18 M. 26; *Diss.*, 16 M.L.J. 54.]

(3256)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Payment out of Court—Duty of decree-holder receiving payment—Failure to certify payment to Court—Suit by judgment-debtor to recover amount—Damages.*—The law casts on a decree-holder receiving payment of the judgement-debt out of Court, the duty of certifying such payment in satisfaction of the decree; and if he fails to do so, there is a breach of that duty. This implies that the cause of action accrues when the judgment-creditor fails to fulfil his duty in the matter. (5 M. 397, F.B., *F.*; Referred case No. 9 of 1905, Madras (Unreported) *Not F.*) So, where a judgment-debtor remitted money by Post Office Order, which was received by the decree-holder, who failed, however, to certify receipt of the amount, and enter satisfaction in Court, it was held, that a suit would lie to recover the amount so paid, as damages, by reason of the defendant's failure to certify it to the Court. MEDAI THALALVOI v. KALIAM ANNI, **3 M.L.T. 15=30 M. 545.**

(3257)—*O.* 21, *r.* 2—*Execution of decree—Adjsutment of decree—Remand—Presumption.*—K, an execution-creditor of C, applied to the Court by which the decree was passed, and caused C to be imprisoned under it. C then entered into a compromise upon certain terms with K for the adjustment of the decree, and K thereupon, *but without certifying the terms of such adjustment to the Court*, petitioned for the release of C, who was accordingly released. Subsequently K again applied to the Court to compel satisfaction of the whole amount of the decree against C. This application was opposed by C on the ground that an adjustment of the decree had taken place between him and K. The Judge however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court, under s. 206 of the Civ. Pro. Code. *Held*, that the Judge was in error that it was the duty of K, on applying for the release of C, to certify the adjustment to the Court that it would be unjust to allow him to take advantage of his own omission to do so; and that, not having done so, the presumption against him was that the decree had been satisfied in full; but that, under the circumstances, it would be the most equitable course to direct the Judge to inquire into the terms of the adjustment. Case remanded for that purpose. CHANGO *valad* DUDHA MAHAJAN v. KALURAM NARAYAN-DASS, **4 B..H.C.A.C. 120.**

(3258)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Payment in satisfaction of decree not certified to Court.*—Where a payment in satisfaction of a decree is not certified to the Court executing the decree, the Court must proceed as if such payment had not been made. Where payment in satisfaction of a decree is made to the judgment-creditor, and he refuse to certify it to the Court, he can be made liable to refund it in an action. MEER MAHOMED KAZEN JOWHURRY v. KHETOO BEBEE, 20 **W.R. 150.** [*F.*, 7 A. 124 *R.*, 11 B. 6, F.B.]

(3259)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882), *s.* 258)—*Suit for possession by landlord*—Mirasi *tenure—Direction in decree for payment of rent—Payment of rent by tenant—Effect—Payment whether to be certified to Court.*—Where, in a possessory suit by an *inamdar* against the tenant who set up a right to hold the lands under a *mirasi* tenure, the Court, finding that such was the nature of tenure, passes a decree directing payment of rent "as before," or, in default, that plaintiff should recover possession, rents paid by the defendant to the plaintiff out of Court must be deemed as paid under the *mirasi* tennure and not under the decree, and, as such, need not be certified to the Court under s. 258, Civ. Pro. Code, 1882. KEDARI v. GAJAI, **18 B. 690.**

(3260)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Uncertified agreement in supersession of decree competency of judgment debtors to plead.*—In objection to an application for execution, it is not competent for the judgment-debtors to set up an uncertified agreement in supersession of the decree sought to be executed, since such a plea is unsustainable by reason of the provisions in s. 258 of the Civ. Pro. Code. GANAPATHY AIYAR v. CHINNA CHENGA REDDY, **16 M.L.J. 33=29 M. 312.** (21 M. 356, *F.*; 21 M. 409, *Doubted*) [*F.*, 17 M.L.J. 527, *R.*, 12 C.L.J. 312=7 Ind. Cas. 55.]

(3261)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Execution of decree—Power of one of several joint decree-holders to certify satisfaction of entire decree.*—One of two or more joint decree-holders is not competent, without direct authority from the other decree-holders, to certify the Court satisfction of the entire decree by payment out of Court. (26 A. 334, 25 M. 431, *F.*; 22 W.R. 77, *D.*) The payment, if real, cannot operate as discharge of the decree except as to the share therein of the recipient. DHANRAJ v. UJAIN SINGH, **34 P.R. 1906=93 P.L.R. 1906.**

(3262)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1852)—*Uncertified adjustment of decree—Question as to adjustment between decree-holder and third party.*—The provisions of s. 258 of the Civ. Pro. Code, do not debar a Court from

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trying and determining, as between a decree-holder and a third party, the question whether the decree of the former has been adjusted out of Court, even though such adjustment may not have been certified to the Court. TEGH SINGH v. AMIN CHAND, **5 A. 269=A.W.N. 1883, 18.** (3 A, 533, 3 A. 538, *F.*) [*R.*, 10 B. 155.]

(3263)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Application for decree absolute for foreclosure—Plea of payment by defendant—No bar to inquiry.*—S. 258 does not prohibit an enquiry into the plea of the defendant that the debt has been paid, if it arises in the course of proceedings on an application under s. 87, Transfer of Property Act for an order absolute for foreclosure of the mortgage. SITARAM AMRIT BRAMAN v. DHARMU, **16 C.P.L.R. 111.** (8 C.P.LR. 113, 25 C. 133. *R.*)

(3264)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Applicability to application under s. 89 of Act IV of 1882—Jurisdiction to enquire into payments.*—S. 258 of the Civ. Pro. Code, not having been made applicable to applications under s. 89 of the Transfer of Property Act, by any rule issued under s. 104 of the same Act, no certificate is necessary for payment pleaded in discharge of a mortgage decree. Even if s. 258 be applicable, until a decree absolute is made under s. 89 of the T. P. Act, there is no decree capable of execution and therefore no such certificate for payment is necessary or possible, [*Diss.*, 30 A. 248=5 A.L.J. 272=A. W.N. 1908. 103, 4 L.B.R. 83; *D.*, 9 C.L.J. 358; *R.*, 12 C.W.N. 282=7 C.L.J. 581=3 M.L T. 202.] The Court to which application is made under s. 89 of the T.P. Act, though not an executing Court, has jurisdiction to ascertain what balance of the mortgage-debt is actually outstanding and to pass a decree for such balance only. HATEM ALI KHUNDKAR v. ABDUL GAFFUR KHAN, **8 C.W.N. 102.** [*R.*, 12 C.W.N. 282=7 C.L.J. 581=3 M.L.T. 202.]

(3265)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882)—Decree—Execution—Adjustment of decree outside the Court—Adjustment not certified to the Court—Decree holder acting under adjustment and receiving money under it for several years—Estoppel by conduct—Indian Evidence Act (I of 1872), s. 115—Fraudulent execution of decree—Criminal law.*—In execution of a decree, an adjustment of it outside the Court was pleaded. The adjustment not having been certified to the Court under s. 258 of the Code of 1882, it was contended that the Court could not recognise it as valid. The Court overruled the contention, holding that, as the decree-holder had acted upon the adjustment and received moneys under it, he was estopped by conduct under s. 115, Evidence Act, 1872. On appeal: *Held*, the view of the lower Court give the go-bye to the plain language of the last paragraph of s. 258 of the Code. S. 258 says that a Court, which is asked to execute a decree for money, shall not recognise for the purposes of execution any adjustment of it, whole or partial, or any payment, made outside the Court and not certified to it as required in the preceding part of the section. When the law directs that such an adjustment or payment "shall not be recognised" for the purposes of execution, it means that the adjustment or payment, as the case may be, should be treated as an invalid or void transaction, so far as the executing Court is concerned. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of s. 258 of the Code, enacts a special law for a special purpose, whereas s. 115, Evidence Act, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. Per *Chandavarkar, J.*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should dealt with under the criminal law. *Heaton, J.*—The purpose of s. 258 of the Code, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise, in this sense, that it, at the outset, assumes that what is not recorded as paid or adjusted, still remains unpaid or unadjusted. But it is still open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due, having been paid or adjusted; and it is still incumbent on the Court to go into the matter, if a contest on the point is raised. To state the result briefly, the final clause of s. 258 raises a presumption, but does not limit the jurisdiction of the Court. TRIMBACK RAMKRISHNA RANADE v. HARI LAXMAN RANADE, **12 Bom. L R. 686=7 Ind. Ca 940.**

(3266)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Assignment of bond in satisfaction of decree debt—Decree not certified—Validity of transfer.*—Where a hypothecation bond was assignedin consideration of a decree-debt and the adjustment of the decree was not reported to the Court, the assignment was neverthless valid. S. 258 of the Code had reference only to disputes in execution between parties to the decree. SUBRAMANIA CHETTI v. SATTAYA PATHAN, **10 M.L.J. 213.**

(3267)—*O. 21, r. 2 (=Civ Pro. Code, 1882, s. 258—Uncertified payments made out of Court—Evidence of payment if admissable—Plea of limitation by judgment-debtor.*—Under s. 258 of the Civ. Pro. Code, no time is fixed within which the decree-holder is bound to certify a

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payment made out of Court. He may, therefore, get such a payment certified at any time and no particular form has been prescribed by the Code for such a certificate. The section provides only that a payment not certified shall not be recognized by the Court *as a payment or adjustment of the decree*. So, where a judgment-debtor, denying his having made the payments certified by the plaintiff, pleads that the execution of the decree has become barred by time, it is quite open to the Court on such plea of limitation by the judgment-debtor to take evidence about the payments mentioned by the decree-holder in his *darkhast* for determining whether his application for execution has been barred by time or not. TUKARAM v. BABAJI, **21 B. 122.** [*F.*, 26 A. 36=A.W.N. 1903, 179.]

(3268)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Mortgage in adjustment of decree—Adjustment not certified—Suit not maintainable to recover instalments under mortgage-deed.*—Proper effect could be given to the intention of the Legislature in framing s. 258 of the Civ. Pro. Code, which, presumably, must be taken to have been to discourage private arrangements out of Court, as tending to embarass the execution of decree unless subsequently recorded in Court, only by holding that, upon the proper construction of the said section, no Court can recognise an uncertified adjustment as operating in satisfaction of a decree for any juridical purpose whatever. On the above construction of the section, a suit will not lie to enforce an uncertified agreement of adjustment, against the judgment-debtor, the consideration for which is that it should operate in satisfaction of the decree, as there is, in such a case, no consideration which the Court can recognise, and therefore no valid consideration for the judgment-debtor's agreement. In the present case, the consideration for the defendant's promise to pay the promised sum by monthly instalments, was clearly that it should operate in satisfaction of the decree, the mortgage to the plaintiff having been intended as a security for the performance of that promise; and, therefore, as the adjustment had not been certified, the Division Court was held to have been right in refusing the plaintiff's claim for arrears of instalments, and their realisation, in default of payment, by sale of the mortgaged property. HAJI ABDUL RAHIMAN v. KHOJA KHAKI ARUTH, **11 B. 6, F.B.** [*F.*, 11 M. 469; *Appr.*, 11 B. 724; *R.*, 12 B. 235, 13 B. 171, 20 C. 32, 21 C. 237, 21 B. 122, 31 C. 480=8 C.W.N. 395, 17 P.L.R. 60; *D.*, 15 C. 187.]

(3269)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1859, *s.* 206)—*Payments under pressure of process.*—Where a Judgment-debtor pays the amount decreed to the Court's officer under pressure of process, he is entitled to protection, the latter clause of s. 206, Act VIII of 1859, relating only to voluntary adjustments. BIDHOO BEE-BEE v. KESHUB CHUNDER BABOO, **9 W.R. 462.**

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(3270)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Decree-holder for giving judgment-debtor and certifying satisfaction—Right of creditor of decree-holder trying to attach the decree thus satisfied to prove the fraudulent nature of the transaction.*—There is nothing to prevent a judgment-creditor, at any time before any other persons have acquired a right, to realize the debt. Where a decree-holder, for whatever reason, forgives his judgment-debtor and certifies satisfaction, without receiving payment, a creditor of the decree-holder, who tries to attach the decree thus satisfied, should not be given an opportunity to prove that satisfaction was fraudulently made to defeat his rights. SUBBA PILLAI v. ALLIAR ROWTHER, **5 M.L.T. 72=2 Ind. Cas. 523.**

(3271)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Scope of—Applicability to foreclosure-decrees—Execution of decree.*—S. 258 cannot be confined in its operation to the adjustment of money-decrees alone. It is applicable to all decree alike, whether for money or for foreclosure (which was the case in this particular instance) or any other kind of decree. LACHU v. KISHEN LAL, **44 P.R. 1906=82 P.L.R. 1907.** (5 C. 786, 25 C. 718, *F.*; 22 M. 183 and 25 M. 412, *Diss.*)

(3272)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Appeal against ex parte order.*—**An** *ex parte* order certifying payment, on the application of the judgment-debtor, is governed by s. 258, Civ. Pro. Code, and can be set aside. An appeal lies from an order dismissing or rejecting an application for re-opening the case by cancelling the *ex parte* order. MA SHWE I v. SITAMPARAM CHETTY, **U B.R. 1897—1901, Vol. II, 254.** (10 B. 433, 11 B. 57, 11 M. 319, *R.*)

(3273)—*O.* 21, *r.* 2 (=*s.* 258 *of Code of* 1882)—*Suit to recover possession of house—Compromise—Adjustment of decree not certified to Court.*—H sued B to recover possession of a certain house. B answered that the house was his own; that H having fraudulently got possession of it, he, B, had filed a suit to recover possession that a decree was passed in his favour in the lower Court, which however, was reversed on appeal that, pending a special appeal, a compromise had been entered into between him and H, in pursuance of which he, B, was put in possession of the house. The terms of this compromise were not certified to the Court, under s. 206 of the Civ. Pro, Code. *Held* that this compromise, having been effected after the decree in favour of B had been reversed, did not come within the meaning of s. 206, and was, therefore, a good defence to the suit of H. HARI SADASHIV DIKSHIT v. BAPU BALVANT, **5 B.H.C. A.C. 78.**

(3274)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Manner and sufficiency of certifying payment.*—To certify a payment or an adjustment, within the meaning of s. 258, it is

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sufficient for the decree-holder to certify that money has been paid or that an adjustment has been arrived at without specifying the amount of the payment or mentioning the terms of the adjustment. TULSINGIRIYAPPA v. FAKIRAYYA, **2 Bom. L.R. 901.**

(3275)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882)—Determination of sufficiency of cause shown under s. 258 of Civ. Pro. Code—Duty of Court—Form of evidence in such proceeding—"To show cause," meaning of.*—In determining, under s. 258 of the Civ. Pro. Code, the question of the sufficiency of the cause shown by the decree-holder, it is incumbent upon the Court to investigate and decide any question of fact, upon which the parties may not be agreed, upon such materials as they may legally place before it. In investigating the matter, the evidence may be given either oraly or by affidavit. The term "to show cause" does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. RUNG LAL v. HEM NARAIN GIR, **11 C. 166.** (6 B. 663, *followed*, analogically.) [*Appr.*, 21 C. 213, F.B.]

(3276)—*O. 21, r. 2 (=s. 258 of 1882=s. 206, Civ. Pro. Code, 1859)—Judgment-creditor's petition certifying payment—Sufficient certificate of payment.*—A petition signed and filed in Court by a judgment-creditor certifying payment is a sufficient certificate of payment under the decree in the terms of s. 206, Civ. Pro. Code, 1859. SAADOOLLAH SHAIKH v. KALEE CHURN, **12 W.R. 338.**

(3277)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Uncertified payment of decree-amount made by surety out of Court—Suit by surety against principal debtor—Admissibility of evidence of payment.*—Plaintiff was surety for the defendant under a bond by the latter to one G. G obtained a decree on the bond and plaintiff had to satisfy him, which he did, by paying Rs. 38 out of Court in full satisfaction of the same. This payment was not certified to the Court. In this suit by the plaintiff to recover the said Rs. 38 from the defendant, the payment of it to G, the decree holder, was *held* to be provable by the evidence of G supported by his receipt, even though the payment had not been certified to the Court, the last clause of s. 258 of the Civ. Pro. Code, having no application to the case. BALAJI LAKSHMAN v. DADA JOTI, **12 B. 235.**

(3278)—*O. 21, r. 2 (=Civ. Pro Code, 1882, s. 258)—Contract to certify satisfaction of decree—Breach—Suit for damages.*—Where a payment made, or a new contract entered into, for the satisfaction of a decree has failed in its object owing to the decree-holder's failure or omission to certify it to the Court, whose duty it is to execute the decree, the person injured has still his remedy by a suit for damages for breach of the contract to certify. S. 258 does not bar such a suit. MALLAMMA v. VENKAPPA, **8 M. 277, F.B.** [*F.*, 12 M. 61, 13 A. 339; *R.*, 11 B. 6, **F.B.** 2 M.L.J. 221, 20 M. 369; *D.*, 10 B. 155, 11 M. 469, 18 M. 26.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3279)—*O. 21, r. 2 (=old s. 258)—Adjustment not between judgment-debtor and creditor—Effect of.*—The adjustment contemplated by this section is one between the decree-holder and the judgment-debtor and not between the judgment-debtor and a person claiming to be the decree-holder. MUSST. KISHEN DEVI v. MUSST. NIHALI, **137 P.R. 1888.**

(3280)—*O. 21, r. 2 (=s. 258, Civ Pro. Code, 1882)—Adjustment of decree—Part adjustment—Certificate, whether necessary.*—Where there is a money decree against two defendants, an agreement discharging one of them is an adjustment in part of the decree, and so requires to be certified. MAHOMED MAHOMED KHAN BAHADUR v. MAHOMED MUNAWAR SAHIB, **4 M.L.T. 229.** (22 B. 463, *Expl.*; 15 M.L.J. 370, *R.*)

(3281)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258) — Payment out of Court — Validity—Proof.*—When a decree directs that the decree-amount shall be paid in periodical instalments, and that, on default, the whole balance then due shall become payable at once, a payment made by the judgment-debtor out of Court may be recognised in proof of the decree-holder's waiver of the default, even though such payment has not been certified to the Court. RAJESWARA RAU v. HABI BARANDHU, **19 M. 162.**

(3282)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Adjustment of a decree by mortgage—Not certified—Invalid.*—In a suit by a Hindu to recover certain land, the defendant's plea that he held the land under a mortgage executed by the plaintiff's mother, as his guardian, in adjustment of a decree obtained against his deceased father, was held not maintainable, with reference to the terms of s. 258 of the Civ. Pro. Code, the adjustment not having been certified to the Court. THIRUMALAI v. SUNDARA, **14 M. 469.** (11 B. 6, *F.*, 8 M. 277, *D.*)

(3283)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Execution of decree—Contract superseding decree—Adjustment—Certification.*—An agreement between the parties to a decree by which arrangements are made, to enable the decree-holder, to collect monies due to the judgment-debtor and credit them towards his decree, and which provides for a temporary suspension of execution-proceedings, has not the effect of cancelling the decree and substituting a new contract (*Oldfield, J.*) Such an agreement amounts to a performance of the obligation created by the decree by the substitution of a new contract; but it cannot be regarded as such an adjustment of the decree as can be recognised under s. 258 of the Civ. Pro. Code; for, while the new contract is admitted, the decree

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is kept alive, and such certification, being defective, cannot be recognised by the Court executing the decree (*Mahmood, J.*). FATEH MUHAMMAD v. GOPAL DAS, **7 A. 424=A.W.N. 1885, 76.** [*R.*, 11 A. 228, L.B.R. 1893—1900, 639.]

(3284)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Right to execute decree on footing of subsequent arrangement.*—The parties to a decree have no right to execute it upon the footing of a subsequent arrangement which makes a substantial alteration in the terms of the decree, but must execute, if at all, the original decree itself. According to law, no Court has power to execute a decree upon the footing of a *kistbundi* making a substantial alteration in the terms of the decree. RAM RUNJUM CHUKERBUTTY v. RAJAH JOWHURUJUMAH KHAN, **23 W.R. 129.** [*F.*, 24 W.R. 254 ; *R.*, 24 W.R. 205.]

(3285)—*O. 21, r. 2—Lien property*—Kistbundee—*Extinguishment of debt—Instalment—Bond.*—A party who, having a lien on the judgment-debtor's property as well as a money-decree, enters into a *kistbundee* given up her right to execute the decree does not thereby extinguish the original debt, nor the lien. RAM CHURN LALL v. RUGHOBEER SINGH, **11 W.R. 481.** [*R.*, 23 W.R. 187.]

(3286)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Judgment-debtor's kistbundee if satisfies decree — Agreement not to execute decree.*—A decree is not satisfied by the taking of a *kistbundee* executed by the judgment-debtor, and the decree-holder's remedy under the decree continues, although he agrees, as long as he receives the instalments, not to execute the decree. BISHTO CHUNDER CHUCKERBUTTY v. WOOMANATH ROY CHOWDHRY, **15 W.R. 459.**

(3287)—*O. 21, r. 2 (=Civ. Pro. Code, 1859, s. 206)—Suing on a kistbundee—Adjustment through Court—S. 206, Act VIII of 1859 (Civ. Pro. Code).*—The suing on a *kistbundee* in Court does not necessarily make it the instrument of a public adjustment through the Court, such as is contemplated by s. 206, Act VIII of 1859. MUDDUN MOHUN MITTER v. BIBEE PEER BUKSHUN, **7 W.R. 485.**

(3288)—*O. 21, r. 2—Adjustment of decree out of Court.*—A letter given by a decree-holder to his vakil, directing him to put in an acknowledgment of having received the decretal amount, is an adjustment made out of Court. Where such adjustment has not been certified, as required by s. 206 of Act VIII of 1859, the Court cannot make further investigation into the matter. THAKOOR LALL MISSREE v. KANYE LAL TEWAREE, **7 W.R. 510.**

(3289)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Right of suit on agreement in adjustment of decree.*—A suit is maintainable when based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court. MT. CHUNNA BAI v. KAMARALI, **6 C.P.L.R. 133.** (15 B. 419, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3290)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Fraudulent execution of satisfied decree — Satisfaction not regarded — Penal Code, ss. 193, 210, 406, 191, 199, 511—Statement—Execution applicationcontaining false averments—Fraudulent execution of decree adjusted out of Court.*—The words "any Court," in the last paragraph of s. 258 of the Civ. Pro. Code have no application to a Criminal Court investigating a charge under s. 210, I.P.C. It is not the intention of the Legislature, by enacting s. 258, Civ. Pro. Code, to bar any criminal remedy which an injured judgment-debtor may have against a fraudulent decree-holder, whether by a prosecution under ss. 193, 210, 406, or any other section of the Penal Code. A decree-holder is bound by s. 235, Civ. Pro. Code, to make a declaration, in his verified application for execution of the decree, as to any adjustment made after the decree, that is, any matter not done through the Court, as well as any agreement through the Court. Intentional omission to state in the application any such adjustment is an offence punishable under s. 193, I.P.C., and not under s. 199, I.P.C. [*Appl.*, 11 B. 599 ; *R.*, 11 B. 6.] A statement is within the meaning of s. 193, whether made "verbally" or "otherwise." It is doubtful whether s. 199, I.P.C., applies to an execution application containing false averments, inasmuch as s. 193, already provides for such averment. Nor is there, apparently any express provision of law which binds or authorises the Court to receive a verified application as "evidence of any fact" although, for the purposes of ss. 191, 193, a false averment in such application is regarded as false evidence. In construing s. 210, I.P.C., it is necessary to attach to the word "satisfied" its ordinary meaning, and not to understand it as referring only to decrees the satisfaction of which has been certified. A wilful attempt, by means of false statements, to use the process of the Court to recover money twice over, is punishable under s. 210, read with s. 511, and under s. 193. QUEEN-EMPRESS v. BAPUJI DAYARAM, **10 B 288.** [*R.*, U.B.R. 1897—1901, Vol. I, 278.]

(3291) — *O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Construction.*—A contract, of which the consideration is in part an undertaking by the creditor not to execute a decree in his favour, is not void *pro tanto* by reason of the omission to certify satisfaction of the decree, since the section enacts only a rule of procedure and the words "any Court" have been held to mean any Court dealing with the question of the execution of the decree. SELLAMAYYAN v. MUTHAN, **12 M. 61.** (7 A. 124, 8 M. 277 and 11 C. 671, *F.* [*F.*, 16 C. 504, 13 A. 339, 17 M. 382 ; *R.*, 4 C.P.L.R. 148, 21 B. 808, 12 C.W.N. 674=7 C.L.J. 543=35 C. 870.]

(3292)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Act VII of 1888, s. 27—Adjustment of decree—Recognition.*—A decree was adjusted by making a small deduction and by providing for

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the payment of the balance as part of the entire amount of a bond. *Held* that, since the amendment made in s. 258 of the Code by s. 27 of Act VII of 1888, such adjustment may be recognised by a Civil Court except when executing the decree. GHANASHAM LAKSHMANDAS v. KASHIRAM NAROBA, **16 B. 389.** (15 B. 421, *R.*)

(3293)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Amending Act (VII of* 1888), *s.* 27—*Uncertified adjustment—Procedure, changes of law relating to—Retrospective effect—Practice.*—The change effected in the language of s. 258, Civ. Pro. Code, by s. 27 of the Amending Act (VII of 1888), by which uncertified adjustments can now be recognized by other Courts than the Court executing the decree, applies to adjustments previous to the amending Act. BALAKRISHNA PANDHARINATH v. BAPU YESAJI, **19 B. 204.**

(3294)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1859, *s.* 206)—*Adjustment of decree—Duty of Court*—*s.* 206, *Act VIII of* 1859 (*Civ. Pro Code.*)—Under s. 206, Act VIII of 1859 (Civ. Pro. Code), no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court, or be notified to the Court by the person in whose favour the decree has been made, or to whom it has been transferred BHYA ROOPNATH SAHEE v. KUNWAN, **17 W.R. 134.**

(3295)—*O.* 21, *r.* 2 (=*s.* 258, *Civ. Pro. Code*, 1882)—*Adjustment out of Court, unless certified, not a bar to execution.*—The Court is not bound to take account of an adjustment of a decree out of Court, by agreement to receive a smaller sum in entire satisfaction of the decree-amount, if such adjustment is not certified, under s. 258 of the Civ. Pro. Code. VEERAPPA CHETTIAR v. ARUMUGAM POOSARI, **17 M.L.J. 527.** (21 M. 409, 29 M. 312, *F.*; 21 M. 356, *Doubted.*) [*R.*, 12 C.L.J. 312=7 Ind. Cas. 55.]

(3296)—*O.* 21, *r* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Limitation Act*, 1877, *s.* 20—*Relevancy of uncertified payment in considering question of limitation.*—In deciding the question whether an application for execution was barred or not, it is competent to the Court to take into consideration an uncertified payment made out of Court in part satisfaction of a decree. ROSHAN SINGH v. MATADIN, **26 A. 36=A.W.N. 1903, 179.** (12 A. 569, *Overruled*; 17 A. 42, 21 B. 122, *F.*)

(3297)—*O.* 21, *r.* 2 (=Civ. *Pro. Code*, 1882, *s.* 258)—*Execution-application by assignee—Plea of payment to original decree-holder—Payment not certified to Court—Execution not to be refused.*—A Court cannot refuse to execute a decree assigned by the original decree-holder on the ground that it has been satisfied by a payment to the original decree-holder, where such payment has not been certified to the Court. DEOJI AND BRIJ LALL v. RANCHORDASS, **4 C.P.L.R. 132.**

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(3298)—*O.* 21, *r.* 2—*Limitation—Execution decree—Agreement to enlarge period of limitation—Agreement to alter decree—Relinquishment of attachment—Proceeding in execution*—A decree was passed in favour of K on the 17th September, 1853. It was kept alive and on the 30th December, 1864, an application was made for its execution. On the 6th February, 1865, the decree-holders and judgment-debtors came to an agreement, whereby the sum covered by the decree was to be paid by instalments, and filed a kistbandi to that effect; thereupon the Munsiff decided that the properties attached should be released, and on the 22nd February, 1865, struck the case off the file. The first instalment under the kistbandi became due on the 14th July, 1865. The decree-holder, on the 14th July, 1868, applied to recover the first six instalments which had fallen due. *Held* (*Mitter, J., dissenting*) that the execution of the decree was barred by time. Although the decree-holder may have bound himself not to issue execution before the 14th July, 1865, that circumstance did not give him three years from that date to apply for fresh execution, but he ought to have applied within three years from the 30th of December, 1864. The fact of his binding himself by kistbandi not to issue execution within a certain time does not affect the question of limitation any more than a voluntary abstaining from issuing execution would have done. A Court of execution has no power to alter a decree of the Court which passed it and the parties cannot alter the law or a decree of Court even by consent. A man may bind himself not to execute a decree of a Court, or not to execute it within a certain period, but he cannot, by binding himself not to execute the decree for a certain period, add to the time which the law allows him to execute. So, if a man binds himself not to execute a decree within a certain period, he must take care if he wish to execute the decree at all, not to bind himself not to execute the decree for a longer period than that within which the law would allow him to execute it. [*F.*, 13 W.R. 164, 17 W. R. 396; *Appl.*, 5 N.W.P. 100, 23. W.R. 129; *R.*, 24 W.R. 282, 1 A. 350, 2 A. 322, 2 A. 443; *R.*, 89 P.R. 1894; *D.*, 14 W.R. 414, 18 W.R. 497.] The relinquishment of an attachment of the judgment-debtor's property is not a proceeding to enforce a judgment and is therefore not a proceeding to keep a decree in force. KRISHNA KAMALA SINGH v. HIRU SIRDAR, **4 B.L.R. F.B. 101=13 W.R. F.B. 44.** [*R.*, 1 A. 350.]

(3299)—*O.* 21, *r.* 2 (=s. 258, *Civ. Pro. Code*, (1882)—*Execution of decree—Civ. Pro. Code*, *s.* 258, *application under—Evidence.*—Where an application by a judgment-debtor under s. 258, Civ. Pro. Code, was presented alleging payment out of Court, and the decree-holder denied it, *held* that the Court had acted rightly in going into evidence and deciding the point, though it was open to the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

judgment-debtor to bring a suit. TIKA RAM v. RAM CHAND, **A.W.N. 1888, 82.**

(3300)—*O. 21, r. 2 (=Civ. Pro. Code, s. 258—Execution of decree—Alleged payment out of Court—Decree holder to show cause.*—The appellants, judgment debtors, alleging that they had made a payment in part-satisfaction of the amount due under the decree which the decree-holder would not certify, applied to the Court executing the decree that "proceedings might be taken under s. 258 of the Civ. Pro. Code." Notice was accordingly sent to the judgment-creditor who, however, denied having received any money. *Held* that the mere denial of the decree-holder that payment has been made is not sufficient cause to refuse certification of payment. The decree-holder must satisfy the Court of the truth of his statement, and show that there are grounds for believing that no payment has been made. The question should be decided on evidence adduced by the parties. ARJAN SINGH v. HARCHARAN SINGH, **A.W.N. 1884, 40.**

(3301)—*O. 21, r. 2 (=Civ. Pro. Code, 1877, s. 258)—Execution of decree—Application by decree-holder for recording satisfaction.*—In the proceedings for execution taken by the respondent, the appellant made an application informing the Court of a payment which had just been made in satisfaction. *Held*, that the application should not have been refused consideration, merely because the applicant did not, in express words, ask that notice to the respondent should issue and a formal notice had not been served. The lower Court should determine on the merits whether the payment had been made. KHUSHAL SINGH v. MIDAI LAL, **A.W.N. 1881, 168.**

(3302)—*O. 21, r. 2 (Civ. Pro. Code, 1882, s. 258, para (2)—Payment of decree amount out of Court—Certificate of payment—Right of judgment-debtor—Necessity for waiting till failure of decree-holder to certify.*—Where a judgment-debtor pays the decree amount out of Court, he is not bound to wait till the decree-holder fails to apply for the payment being certified, but may apply himself as soon as he has paid the money. VALAMBAL v. LOGAMBAL AMMAL, **12 M.L.J. 94.**

(3303)—*O. 21, r. 2—Payment to decree-holder after notice of attachment of his right—Validity of payment.*—If a judgment-debtor, after receiving notice that the right, title, and interest of the decree-holders in the decree has been attached, pays the decree-holders that money due under the decree, the payment is not a valid payment, and the Court whose duty it is to execute the decree is competent to enter into that question, and to determine whether the alleged satisfaction is binding upon the auction-purchaser of the attached right, title, and interest abovementioned. BYJINATH SAHOO v. DOOLAR CHAND SAHOO, **24 W.R. 245.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3304)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Execution of decree—Payment to decree-holder—Objection to order for execution—Civ. Pro. Code.*—Where a judgment-debtor pleads payment to the decree-holder out of Court by way of objection to an application for execution of the decree, such objection cannot, strictly speaking, be considered as a proceeding in conformity with the second paragraph of s. 258 of the Civ. Pro. Code. In order to establish the fact of payment, or adjdstment out of Court, under the provisions of the above-named section, the judgment-debtor ought, of his own motion, to move the Court to call upon the decree-holder to show why such payment or adjustment made should not be certified. RADHA v. BECHA RAM, **A.W.N. 1891, 11.**

(3305)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882—Execution proceedings—Satisfaction of decree out of Court—Failure of judgment-creditor to certify satisfaction—Remedy by separate suit for damages.*—An uncertified adjustment of a decree cannot be pleaded in execution proceedings. The proper remedy is by a suit for damages. MAUNG MYAING v. MAUNG SHWE HMON, **L.B.R. 1893—1900, 621.**

(3306)—*O. 21, r. 2—Overpayments made in satisfaction of decree recoverable by separate suit—S. 206, Act VIII of 1859.*—A payment of money made but not endorsed on the decree is notwithstanding s. 206, Act VIII of 1859, recoverable by separate suit. *In the case of* MOOTEE LALL MOOKERJEE v. KANDHAI LALL, **1 N.W.P. 237.** [*R.*, 5 M. 397, F.B.]

(3307)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882)—Satisfaction of decree not certified—Pendency of proceedings in execution by decree-holder—Suit to declare that decree was satisfied and therefore non-executable—Maintainability—Revision.*—*Held* that a suit by a judgment-debtor to declare that the decree against him was satisfied by an uncertified adjustment out of Court, and that the decree can no longer be executed is maintainable, even during the pendency of execution-proceedings started in the face of the uncertified adjustment. (21 C. 437, *Not F.*; 23 B. 502, 3 A. 538, 21 M. 409, 18 M. 26, 26 P.R. 1908, F.B., *R.*) Where the lower Court held that such a suit was not maintainable and dismissed the suit, *held*, that the Chief Court can interfere in revision. DIWAN SINGH v. AMUR SINGH, **16 P.R. 1910 =18 P.W.R, 1910=5 Ind. Cas. 814=62 P.L. R. 1910.** (75 P.R. 1890, F.B., *F. & Expl.*)

(3308)—*O. 21, r. 2—Payment in satisfaction, of decree subsequently split up into shares—Payment through Court—Set off.*—Payment in satisfaction of a decree afterwards spilt up into shares, if made through the Court and while the decree is entire, ought to be set off as in satisfaction of the whole decree. BHYRUBNATH SHAHA v. KUNHYA LALL ROY, **20 W. R. 131.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3309)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882)—Uncertified payment—Subsequent execution of decree—Regular suit—Cause of action.*—Where a decree-holder, after accepting, in satisfaction of the amount of his money-decree, a part payment in cash and a lease of certain lands for five years rent-free, executed the decree, *held*, a suit by the judgment-debtor would lie for a declaration that the money-decree was satisfied, and for damages against the decree-holder. PROMONAND KASUABISH v. KHEPOO PARMANICK, **10 C. 354.** (5 B.L.R. 223, 5 M. 397, 6 M. 41, 3 A. 533, 3 A. 538 and 9 C. 738, *F.*, 6 B. 146, *Not F.*) [*D.*, 2 O.C. 315; *Cons.*, 21 C. 437; *R.*, 10 B. 288, 11 B. 6, F.B., 15 C. 187, 20 C. 32, 17 C.P.L.R. 60.]

(3310)—*O 21, r. 2—Decree against defendant, reversal of, on appeal—Payment by defendant towards decree before its reversal not certified to Court—Right of defendant to repayment.*—The lower appellate Court rejected the defendant's application for refund of the money paid by him towards the decree against him before its reversal on appeal, on the ground that it was debarred by s. 258 of the Civ. Pro. Code from recognising the alleged payment by the defendant which was not certified to the Court. The High Court, however, *held* that the decree having been reversed, the payment, whether certified or not, could only be regarded as made without consideration and entitling the defendant to have it restored. Though the Court is forbidden to recognise any payment or adjustment of the decree as such unless it has been certified, the mere fact of money having passed to the decree-holder it may recognise and deal with as resting on no consideration. VASUDEV GOVIND v. VISHNU VITHAL, **11 B. 724.**

(3311)—*O. 21, r. 2 (=Civ. Pro. Code, 1859, s. 206)—Right to recover money paid into Collectorate as revenue for decree-holder.—Where a* person, having an Act X of 1859, decree against him, pays money as revenue into the Collectorate on behalf of the decree-holder and the entire amount of the decree is notwithstanding recovered from him by execution, his right to recover the money paid into the Collectorate is not barred by s. 206 of Act VIII of 1859. MOHIMA CHUNDER GHOSE v. NOBIN CHUNDER ADHIKAREE, **8 W.R. 449.**

(3312)—*O. 21, r. 2 (=old s. 258)—Payment out of Court—Certificate to Court—Proof of payment—Limitation—S. 206, Civ Pro. Code,* 1859—Payments out of Court may be certified to the Court and proved by the decree-holder to avoid the law of limitation notwithstanding s. 206, Act VIII of 1859. JAGGUT MOHINEE DOSSEE v. MADHUB CHUNDER KUR, **15 W.R. 66.**

(3313)—*O. 21, r. 2 (=s. 258, Civ. Pro. Code, 1882)—Uncertified payment, not recognised under.*—An uncertified payment, which could not be recognised under s. 258, Civ. Pro. Code (XIV of 1882), might be proved, for the purpose of showing that the period of limitation did not begin to run in this case until the default made in respect of the second instalment; so, it was competent to the decree-holder to prove such payment for showing that the execution of the decree was not time-barred S. 206 of the old Code (Act VIII of 1859) does not appear to be on this point materially different from s. 258 of the present Code (Act XIV of 1882.). HURRY PERSHAD CHOWDHRY v. NASIB SINGH, **21 C. 542.** (4 B.L.R. F.B., 130, *R.*; **12 A.** 169, *D.*) [*F.*, 19 M. 162, 21 B. 122; *R.*, **17 A.** 42=14 A.W.N. 198.]

(3314)—*O. 21, r. 2 (Civ. Pro. Code, 1882, s. 258)—Payments towards decree not certified as required by, whether could save limitation for application to execute decree.*—One of the points for determination in this case was whether the execution of the decree was barred. It was argued that no effect towards saving limitation could be given to the payments made for the decree, inasmuch as such payments had not been certified as required by s 258 of the Civ. Pro. Code, but following 4 B.L.R. 130, F.B., it was *held* that a judgment-creditor seeking to enforce his decree, may avail himself of uncertified payments made by the judgment-debtor as an answer to the plea of limitation by the latter. PERMANAND DAS JIVANDAS v. VALLABDAS WALLJI, **11 B. 506.** [*R.*, 3 O.C. 32, 15 C.P.L.R. 69.]

(3315)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258—Execution of decree—Plea of limitation—Uncertified payment.*—A judgment-creditor seeking to enforce his decree, may avail himself of uncertified payments made to him out of Court as an answer to a plea of limitation raised by the judgment-debtor. There is nothing in s. 258 of the Civ. Pro. Code to prohibit him from proving such payments for the purpose of meeting the plea of limitation. The object of the prohibition in the last clause of that section is to compel the judgment-debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree if he desire that such payment should be recognised by the execution Court as against the decree-holder executing the decree. KISHAN SINGH v. AMAN SINGH, **17 A. 42=A. W.N. 1894, 198.** (1 B. 506, 4 A. 316, 7 A. 367, 21 C. 542, *R.*) [*F.*, 26 A. 36=23 A.W.N. 179.]

(3316)—*O. 21, r. 2 (=Civ. Pro. Code, 1882, s. 258)—Limitation Act, XI of 1877, sch. II art. 173-A—Transfer of Property Act, s. 57—Purchase of mortgaged property with consent of mortgagee—Agreement to pay mortgagee certain amount in full satisfaction of decree on mortgage—Payment into Court by purchaser—Record of adjustment.*—The mortgagee of certain property obtained a decree for sale upon the mortgage. Thereafter, the petitioner negotiated with the mortgagor for the purchase of the property The mortgagee having consented to obtain

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

certain sum in full satisfaction of the decree debt, the petitioner got from him a written undertaking to that effect. Thereupon the sale was completed. However, when the purchaser tendered the agreed sum, the mortgagee refused to receive it. Hence the present application by the petitioner under s. 57 of the Transfer of Property Act for permission to pay into Court the sum agreed to be paid, and for a declaration that the mortgaged property was free from the said encumbrance. *Held* that s. 57, T.P. Act, did not apply to the case, as it involved a question of the adjustment of a decree out of Court. *Held* also that as the decree was a decree for sale in case the money due was not paid, and not a decree for money s.258, Civ. Pro. Code, did not apply. Consequently, the petitioner was not precluded by limitation under art. 173-A, of the Limitation Act from proving the agreement set up by him under s. 244 (c), Civ. Pro. Code. The petitioner was entitled to the declaration asked for, on payment of the money into Court. MALLIKARJUNA SASTRI v. NARASIMHA ROW, **24 M. 412.** [*Overruled*, 28 M. 473=15 M.L.J. 126, F.B; *Diss.*, 44 P. R. 1906=82 P.L.R. 1907, 30 A. 248=5 A.L.J. 272=A.W.N. 1908, 103; *R.*, 29 M. 318, 9 Bom. L.R. 1380.]

(3317)—*O.* 21, *r.* 2 (=*Civ. Pro Code*, 1882, *s.* 258=*Civ. Pro. Code*, 1859, *s.* 206)—*Limitation—Fraud—Regulation VII of* 1799.—Where the holder of a decree under Reg. VII of 1799 sold his rights in the decree, and, after substituting the purchaser's name for his own as decree-holder, fraudulently received from the judgment-debtor moneys under that decree, *held* that limitation would run against the purchaser from the time he discovered the fraud. GOPAL CHANDRA DEY v PEMU BIBI, **1 B.L R.A.C. 76=10 W.R. 104.**

(3318)—*O.* 21, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 258)—*Adjustment of decree not certified—Suit to enforce adjustment or for damages*—Res judicata.—During the exoution of a decree for possession, an agreement was entered into between the decree-holder and the judgment-debtor dividing the lands, but the agreement was not certified under s. 258 of the Civil. Pro. Code, and the Court allowed the execution of the decree, though the uncertified agreement was set up as a bar. In a subsequent suit by the judgment-debtor for possession of lands awarded to him under the agreement or for damages for breach of contract, it was *held* that the first claim was *res judicata* by reason of the order allowing execution, but that the second claim was not barred. KRISHNASAWMY AYYANGAR v. RANGA AYYANGAR, **20 M. 369=7 M.L.J. 71,** [*Dist.*, 16 M.L.J.54.]

(3319)—*O.* 21, *r.* 2—*Suit by judgment-debtor to recover money paid out of Court—Fraud.*—A judgment-debtor who has paid money to his creditor who has refused to certify satisfaction, can sue upon equitable grounds independent of fraud to recover that amount. MAMU v. KALU MALL, **66 P.R. 1877.**

(3320)—*O.* 21, *r.* 2—*Payment by surety—Adjustment out of Court—Virtually certified to Court under s.* 206, *Act VIII of* 1859.—A Judgment-creditor gave a receipt to a surety, stating that the matter was settled as far as the surety was concerned. He then applied for execution of the decree against the surety for the full amount, stating that the receipt was given by him under duress, and that as the adjustment was made out of Court he should still be allowed to execute decree against surety. *Held* that the adjustment was virtually certified to the Court under s. 206, Act VIII of 1859. BHOWANI DASS v. KISHEN CHUND, **32 P.R. 1871.**

(3321)—*O* 21, *r.* 2 (=*Act VIII of* 1859, *s.* 206)—*Payment in satisfaction of a decree, out of Court, but not certified to Court—Court precluded from recognising such payments—Duty of defendant to see such payments certified.*—Plaintiff got a decree against defendants for possession of certain mortgage-lands, subject to the condition, that defendants were to continue in cultivation for three years, paying plaintiff the proprietor's share of the produce, out of which the plaintiff was to pay the Government revenue and apply the remainder towards the principal debt, and in the event of the principal not being paid off, he was to obtain cultivating possession. At the end of three years the plaintiff applied for possession under the decree while defendant alleged full satisfaction of the principal. *Held* that the Court executing the decree was precluded under s. 206 of Civ. Pro. Code from recognising payment made out of Court and which were not certified to Court. Even if it is intended that payment should be made out of Court the defendants should see that they are certified to Court. DULLA v. KARM, **26 P.R. 1878.**

(3322)—*O.* 21, *r.* 2—*Adjustment.*—Where an adjustment alleged by a judgment-debtor has not been certified under cls. (1) or (2) of O. XXI, r. 2 of the Code, the Court is expressly prohibited by cl. (3) from recognising it. The Court should treat the written statement of the judgment-debtor alleging adjustment as an application under r. 2, cl. 2, and dispose of it according to law. U PO THAING v. MAUNG BA U, **11 Ind. Cas 780=4 Bur. L.T. 162.**

(3323)—*O.* 21, *r.* 2—*Payment not certified if may be taken to extend limitation.*—Under O. XXI, r. 2 of the Civ. Pro Code, an adjustment or payment of a decree which is not duly certified cannot be recognised by the Court for any purpose whatever, *e.g.*, for extending the time of limitation. KUTABULLAH SARKAR v. DURGA CHARAN RUDRA, **16 C.W.N. 396.**

(3324)—*O.* 21, *r.* 2—*Certified payment—Objection by judgment-debtor that the certificate*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII, of 1861 and VIII of 1859)—*continued.*

as to payment was wrong—Burden of proof—Second appeal—Finding of fact.—A decree-holder realized a certain portion of the decree from one of the judgment-debtors and had it certified by the Court in accordance with law. Subsequently, one of the judgment-debtors challenged the correctness of this certificate: *Held*, that it was for the judgment-debtor, who so challenged the correctness of the certificate, to prove that it was wrong. Where a District Judge, in arriving at a certain finding, has been wrongly influenced by his view of the burden of proof, his finding is not a good finding in law and may be set aside in second appeal. MUSAMMAT SALTANAT JAHAN BEGAM v. THAKUR JASWANT SINGH. **12 Ind. Cas. 580.**

(3325)—*O. 21, r. 2 (=s. 258)—Transfer of decree—Assignee's representative applying for execution—Plea of assignment being intended for the benefit of judgment-debtor—Arrangement not certified—Effect—Scope of O. 21, r. 2.*—Where A applied for execution of a decree which he alleged had been assigned to his father by the original decree-holders, and objection was made by B, one of the judgment-debtors, on the ground that the assignment which was in the name of A's father was made under an arrangement that A's father should be a mere *benamidar* for the judgment-debtors, *held per Abdur Rahim, J.*, that the arrangement set up amounted to an 'adjustment' referred to in O. XXI, r. 2, and cannot be recognised as it was not certified or recorded as such. There is no reason why the meaning of the word 'adjustment' should be limited so as to refer only to an adjustment which purports to be one and not to one which has the effect of an adjustment. *Held*, also, *per Abdur Rahim, J.*, that if it cannot be pleaded as an adjustment, it cannot be relied on as showing want of title on the part of A. *Per Sundara Aiyar, J. contra. Held* that s. 258 (= O. XXI, r. 2) is no bar to proof of a contract that the assignee should obtain a transfer for the benefit of the judgment-debtor himself. O. XXI, r. 2, Civ. Pro. Code, does not prevent a party from proving that the assignment of a decree was not intended for the benefit of the assignee himself. The object of the clause is to provide that everything preventing the execution of a decree should be made a record of the Court, so as to give the Court complete control over its decree and execution thereof, and it is not part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the Court invalid, and the Court will give effect to such adjustments in proceedings other than the execution of the decree. It merely forbids effect being given to adjustments when they are set up as a defence to the execution of the decree by one entitled to do so. PONNUSAMI NADAR v. LETCHMANAN CHETTIAR, **10 M.L.T. 442.** (19 M. 230, 8 M. 455, 12 C.L.J. 312, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3326)—O. 21, r. 2—Order under, appealability of—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 16 A. 129=A.W.N. 1894, 6.

(3327)—O. 21, r. 2—*See* FRAUD—EFFECT OF FRAUD, 21 M. 356.

(3328)—O. 21, r. 2—Manager of a joint Hindu family certifying payment of a decree in favour of himself and minor members—Power of Court to demand security from manager—*See* HINDU LAW—JOINT FAMILY, 11 O.C. 246.

(3329)—O. 21, r. 2—*See* LIMITATION ACT, 1877, art. 161, A.W.N. 1888, 115.

(3330)—O. 21, r. 2—Applicability to mortgage-decree—*See* MORTGAGE—GENERAL, 12 C.L.J. 65=7 Ind. Cas. 258.

(3331)—O. 21, r. 2—Payment out of Court before and after order absolute—Duty of Court—*See* MORTGAGE—GENERAL, 7 Ind. Cas. 625.

(3332)—O. 21, r. 2—*See* RIGHT OF SUIT—MISCELLANEOUS, 47 P.R. 1881.

(3333)—O. 21, r. 2—Nature of application under s. 87 or s. 89, Transfer of Property Act—Applicability of s. 258, Civ. Pro. Code—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 87 and 89, 13 O.C. 157=6 Ind. Cas. 1000.

(3334)—O. 21, r. 2—Application for execution of mortgage-decree—Payment out of Court not certified, whether can be recognised—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, A.W.N. 1908, 103=5 A.L.J. 272=30 A. 248.

(3334-*a*)—O. 21, r. 2—*See* Nos. 354, 355, 569, 904, 954 to 971, 1277, 1710, 1904, 2718, 2719, 3020, 3137, 3238 to 3245, 3245-*a*, 3247 to 3254, *supra* and 3424, 3485, *infra*.

(3335)—*O. 21, r. 2, s. 47 (=ss. 258, 244, Civ. Pro. Code, 1882)—Satisfaction of decree not certified owing to decree-holder's fraud—Application after time to have certified.*—S. 258 of the Civ. Pro. Code, prevents an executing Court from taking cognizance of an uncertified adjustment of a decree. (8 C.W.N. 395=31 C. 480, *Expl.*; 20 C. 32, 15 M. 302, *F.*) Where, however, the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance till, within a month of their application, of the fact that the satisfaction of the decree had not been certified, *Held*—That the mater could be investigated under s. 244 of the Civ. Pro. Code. GADAHAR PANDA v. SHYAM CHURU NAIK, **12 C.W.N. 485.** (19 C. 683, *F.*) [*Rel.*, 4 Ind. Cas. 402=11 C.L. 91.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3335-*a*)—*O.* 21, *r.* 2, *s.* 47 (=*Civ. Pro. Code*, ss. 258, 244).—It is only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand, at the date of such transaction, in the relation of judgment-debtor and judgment-creditor to each other, that a Court executing the decree is prohibited from recognising such transaction, unless duly certified. If the former has entered into a contract, not with the latter, but with a third party, with reference to the satisfaction or adjustment of a decree, the judgment-creditor cannot make any application against such third party under s. 528, Civ. Pro. Code, and consequently, the latter cannot on principle be permitted to take advantage of the prohibition imposed by the concluding paragraph of the section as a penalty for the judgment-debtor's omission to apply to the Court under the previous paragraph, or for his failure to prove his case if he did apply. The circumstance, that the third party, subsequently to the contract, becomes the transferee of the decree which he contracted to satisfy, can have no retrospective effect, so as to deprive the judgment-debtor of his right to establish that the transferee is, by the anterior contract, precluded from realising the judgment-debt. RAMA AYYAN v. A SREENIVASA PATTAR, **19 M. 230=5 M.L J. 218.** [*D.*, 21 M. 409.]

(3336)—*O.* 21, *r.* 2, *O.* 23, *r.* 3 (=*Civ. Pro. Code*, 1882, ss. 258, 375)—*Certificate of adjustment of decree by decree-holder—Compromise of suit—Decree to be passed in accordance with.*—The provision of law contained in s. 258, cannot be evaded by the device of moving for an enquiry under s. 244, namely, to find out whether the decree had been satisfied or not, and if the Court found that the decree had been satisfied, to cancel the execution of it. In carrying out the provisions of s. 375, Civ. Pro. Code, the Court should ascertain the terms of the agreement and draw up the decree in accordance with it. MUNSHI RAM v. DERA MUL, **U.B.R. 1897—1901, Vol. II, 256.**

(3337)—*O.* 21, *r.* 2, *O.* 32, *r.* 7 (=ss. 258, 462, *Civ. Pro. Code*, 1882)—*Compromise by guardian after decree—Leave not obtained under* s. 462—*Adjustment of decree cannot be certified*, —On an application, under s. 258 of the Code, for certifying that a decree claim of a minor had been adjusted by a compromise after a decree, it appeared that the guardian of the minor had not applied for and secured leave, under s. 462 of the Code, to enter into the said compromise; *held*, the Court below was right in having declined to certify the above adjustment. ARUNACHELLAM CHETTY v. RAMANADHAN CHETTY AND ALAMELU ACHI, **29 M. 309.**

(3338)—O. 21, r. 2, O. 32, r. 7, O. 23, r. 3—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 2 O.C. 45.

(3339)—*O.* 21, *r.* 2, *sch. II, rr.* 15, 20, 21 (=ss. 258, 521, 525 *and* 526, *Civ. Pro. Code*, 1882)—

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Execution of decree—Arbitration out of Court—Decree according to award—Adjustment before award—Adjustment not certified—Power of execution Court to enquire into the factum of adjustment.—The provisions of s. 258, Act XIV of 1882, were never intended to apply to a case where the parties agreed between themselves that their debts were to be privately adjusted before any decree came into existence. Where disputes between a creditor and a debtor were settled by arbitration without the intervention of a Court, and the decree was obtained in the terms of the award under s. 526, Act XIV of 1882, notwithstanding that the debtor's objection that, in pursuance of the award, he had already assigned debts to the creditor in part satisfaction of the aggregate amount awarded to the latter by the arbitrator, and, upon the decree-holder subsequently, applying for execution of his decree in full, the judgment-debtor repeated the same objection, *held*, that the assignment was not an adjustment of a decree in whole or in part within the meaning of s. 258, and the execution Court was bound to consider that debts, if any, had been assigned, before directing execution as claimed by the creditor. *Per Banerji, J. (contra.)*—The alleged assignment of debt, if true, became an adjustment of the decree, as soon as the decree was made, and not having been certified in the manner provided by s. 258, could not be recognised by the Court executing the decree. GAURI SINGH v. GAJADHAR DAS, **6 A.L J. 403=2 Ind. Cas, 608.**

(3339-*a*)—*O.* 21, *rr.* 2, 15 (=ss. 258, 231, *Civ. Pro. Code*, 1882)—O. 41, *r.* 2, *corresponding to s. 258 of Act XIV of* 1882—*Executing Court cannot recognise an uncertified adjustment—Judgment-debtor's counter-petition cannot be treated as an application to compel the decree-holder to certify, when not put in within* 90 *days*—S. 231 *of Act XIV of* 1882—*Execution by one of two decree holders—Discretion of the Judge thereunder*,—S. 258, cl. 3, of the Civ. Pro. Code, is imperative that the executing Court cannot recognise an adjustment which has not been certified. The clause is certainly applicable where, in answer to an application for execution, an adjustment is set up by the judgment-debtor. (12 C.W.N. 485, *F.*) The judgment-debtor's counter-petition cannot be treated as an application to compel the judgment-creditors to certify the adjustment, when it is not put in within the time allowed by art. 174 of the Limitation Act, *i.e.*, within 90 days of the adjustment (21 M. 356, 29 M. 312, 17 M.L.J. 527, 21 M. 409, *R.*) The Court cannot enquire into an adjustment not certified to the Court according to law (12 C.W.N. 485; *D.*, 12 Bom. L.R. 686; *Cons.*). When the judgment of the lower Court does not show that the Judge, being aware of the discretion vested in him by s. 231, intended to exercise it in favour of the applicant, one of two joint decree-holders, after considering the circumstances of the case, ***held*, the judgment must be set aside, and the**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

case remanded for disposal according to law. ALATHOOR BADRUDEEN v. GULAM MOIDEEN, **10 M.L T. 396 = (1911) 2 M.W.N. 473.**

(3340)—O. 21, rr. 2, 15—*See* LIMITATION ACT, 1908, ss. 6, 8, 9 & art. 182, 13 M. 236.

(3341)—*O. 21, rr. 2, 22 (=ss. 206, 216, Civ. Pro. Code, 1859)—Decree for money payable by instalments—Payment—Certificate by plaintiff—Limitation.*—The plaintiff obtained a decree for a sum of money payable by instalments, the whole amount of the decree to be recovered if any one of the instalments, should not be paid as it became due. The earliest instalment was due more than three years before the application for execution, but the instalments which the plaintiff wished to levy under an execution fell due within three years. In his execution application, the plaintiff stated that the defendant had paid the earlier instalments which became due more than three years before the date of the application and that his application was not barred by time. *Held* that the plaintiff could, notwithstanding s. 206 of Act VIII of 1859, come into Court and certify to the Court and prove that the defendant had paid the earlier instalments and that he was not barred by limitation from applying for execution of the decree or the later instalments. FAKIR CHAND BOSE v. MADAN MOHAN GHOSE, **4 B.L.R. F.B. 130 = 13 W.R F.B. 40** (2 B.L.R.A.C. 320, *R.*) [*Not F.*, 569, 4 A. 316 = 2 A.W.N. 47, 7 A. 327 = 5 A.W.N. 16, 11 B. 506, 21 C. 542; *expl.*, 5 N.W.P. 100; *R.*, 10 B. 155, 11 B. 6, F.B.]

(3342)—*O. 21, rr. 2, 31, 32 (=old ss. 258, 259, 260)—Decree for specific moveables or value—Execution, capability of.*—A decree ordered the defendant to pay the plaintiff certain specific moveable property of the kinds enumerated in the decree in accordance with the plaint up to the value of Rs. 30,000, or to pay that amount. The defendant objected that the decree was incapable of execution as the moveable properties had not been ascertained. *Held* that the proper construction was that the defendant should deliver to the plaintiff all moveable properties of the kind described up to Rs. 30,000, and if he should fail to do so to pay Rs. 30,000 or such portion thereof as would be equal to the value of the property not delivered and that, though not under s. 259, Civ. Pro. Code, 1882, at least under s. 260, the decree was capable of execution. SARDAR RANDHEER SINGH v. SARDARNI DHARAM KAUR, **64 P.R. 1890.**

(3343)—*O. 21, rr. 2, 53 (=Civ. Pro. Code, Act XIV of 1882, ss. 258 and 273—Attachment of decree in favour of judgment-debtor after latter's death—Right of holder of attached decree to enter satisfaction of payment made before attachment—Procedure—Effect of attachment of decree on status of decree-holder—Decree for mesne profits—Liability of decree to attachment in execution of another decree.*—Where a decree is attached in execution of a money-decree, there is nothing to prevent the holder of the attached decree to enter satisfaction of his decree after the attachment if the payment or adjustment had been made *bona fide* before the attachment. On the death of the judgment-debtor, the decree-holder can attach a decree in favour of the judgment-debtor, provided his legal representatives have been brought on record. An attachment under s. 273 of the Code does not determine the status of the prior execution-creditor as such. It only suspends his right for the limited purpose of enabling his judgment-creditor to obtain satisfaction. A decree for mesne profits reserved to be ascertained in execution is a decree for money and can be attached under the provisions of s. 273 of the Code in execution of another decree. RAMASWAMI AIYAR v. RAMA AIYAR, **2 M.L.J. 288.**

(3344)—*O. 21, rr. 2, 63 (=ss. 258, 283, Civ. Pro. Code, 1882)—Execution of decree—Attachment—Previous transfer to satisfied decree of third party—Suit by transferee to establish right to attached property.*—Where a regular suit under s. 283 was brought by plaintiff to establish his right to certain attached property, on the ground that the property had been transferred to him by the judgment-debtor in satisfaction of a decree held by him, it was held that it was not necessary that such transfer should have been certified under s. 258. The prohibition to take cognizance of payments in execution of decrees is limited to the Court which has to deal with the execution of the decrees, and does not extend to Courts that have to try the allegations of the parties on the merits. KALYAN SINGH v. KAMTA PRASAD, **13 A. 339 = A.W.N. 1891, 100.** (7 A. 124, *R.*) [*D.*, 20 A. 254.]

——O. XXI, r. 3 (New).

(3344-*a*)—O. 21, r. 3—*See* NO. 3736, *infra*.

——O. XXI, r. 3 (New).

(3345)—O. 21, r. 3 (1)—*See* HINDU LAW—WIDOW, 23 C. 636.

——O. XXI, (4) r. =1882, s. 223 (5) = 1877 S. 223 (5).

(3345-*a*)—O. XXI, r. 4—*See* NOS. 160, 424, 497, 550, 553, 553-*a*, 553-*b*, 553-*c*, 554 to 576, 579, 1506, 1507, *supra*.

(3346)—*O. 21, rr. 4, 5, ss. 38, 39, 41, 136 (=Civ. Pro. Code, Act X of 1877, ss. 223, 648)—Court of Small Causes—Warrant of arrest.*—S. 648 of the Civ. Pro. Code does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate. S. 223 of the Code does not apply to Courts of Small Causes. Therefore, a Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859) – *continued.*

same district in which the Court is situate, but outside its local jurisdiction. CHUNILAL SOBHARAM v. PURBHUDAS KURSANDAS, **2 B. 560.**

——O. XXI, r. 5 (=1882 s. 223 (6)=1877, s. 223 (6).

(3346-*a*) O. 21, r. 5—*See* NOS. 160, 424, 497, 550, 553 *a*, 553-*b*, 553-*c*, 554 to 576, 579, 1506, 1507, 3346, *supra*.

——O. XXI, r. 6 (=1882 s. 224=1877, s. 224=1859 s. 286.

(3346-*b*)—O. 21, r. 6—*See* NOS. 108, 570, 571, *supra*.

(3347)—O. 21, r. 6, s. 144—*See* INTEREST—SPECIAL CASES, 9 M. 506.

(3347-*a*)—*O. 21, rr. 6, 7 (=Civ. Pro. Code, 1859, s. 286)—Act XI of 1865, ss. 19, 20—Transfer of execution proceedings.*—S. 19, Act XI of 1865, provides merely for cases in which the decree-holder wishes to have immediate execution, and makes an application for it either against the person or against the moveable property of the judgment-debtor. Notwithstanding ss. 19 and 20, Act XI of 1865, the provisions of s. 286, Act VIII of 1859, apply to Small Cause Courts. A decree of a Small Cause Court may be sent to another Court for execution, if no property is found within the jurisdiction of the Court passing the decree; and, if the Court to which the decree is sent be in another district, the decree must be sent to the principal Court of original jurisdiction in such district. ANONYMOUS, **B L.R Sup. Vol. 886 =9 W.R. 175.** [*F.*, 18 W.R. 123.]

(3348)—O. 21, rr. 6, 7—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 23 W.R. 225, 23 W.R. 233.

(3349 & 3350)—O. 21, rr. 6, 7—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 6 W.R. Mis. 125.

(3351)—*O. 21, rr. 6, 90 (=Civ. Pro. Code, Act XIV of 1882, ss. 224, 311)—Absence of certificate mere irregularity—Nature of fraud.*—Omission to send to the Court executing a decree the certificate required by s. 224 of the Civ. Pro. Code is a mere irregularity not entitling a party to have a sale in execution set aside after confirmation. It does not affect the jurisdiction of the executing Court to sell. To support an application to set aside a sale after confirmation on the ground of fraud, it must be proved that the purchaser, and not merely the decree-holder, was a party to the fraud, and that the judgment-debtor discovered it only after the confirmation of the sale. ABBUBAKER SAHEB v. MOHIDIN SAHEB, **20 M. 10.** [*Diss.*, 6 C.L.J. 111.]

——O. XXI, r. 7 (=1882, s. 225=1877, s. 225 =1859, s. 286

(3352)—*O. 21, r. 7 (=s. 225, Civ. Pro. Code, 882)—Decree—Execution—Court to which a decree is sent for execution—Court executing a decree—Jurisdiction of the first Court—Appeal.*—When a decree is sent to a Court for execution, that Court can, under s. 225 of the Civ. Pro. Code, go into the question of the jurisdiction of the Court passing the decree, if it sees reason to do so. If that Court comes to the conclusion that the first Court had no jurisdiction to pass a decree and declines to become the executing Court, the order so passed does not fall within the purview either of s. 244 or s. 588 of the Civ. Pro. Code, and cannot be appealed against. BHAGVANTAPPA v. VISHWANATH, **6 Bom. L.R. 342=28 B. 378.** [*D.*, 30 B. 101=7 Bom. L.R. 659.]

(3352-*a*)—O. 21, r. 7—*See* NOS. 3347-*a*, 3348, 3349, 3350, *supra*.

(3353)—O. 21, r. 7 and s. 54—*See* PARTITION—RIGHT TO PARTITION, 7 M. 382, F.B.

(3353-*a*)—*O. 21, rr. 7, 8 (=Civ. Pro. Code, 1859, s. 286)—Error of procedure—Effect.*—When a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may not be avoided merely by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. KALLY PRASANNO BOSE v. DINONATH MULLICK, **11 B.L.R. 56=19 W.R. 434.**

——O. 21, r. 8 (=1882, s. 226=1877, s. 226=1859, s. 287).

(3354)—*O. 21, r. 8 (=s. 226, Civ. Pro. Code, 1883)—Scope of section.*—The intention of the Legislature as expressed in s. 226, Civ. Pro. Code, seems to have been to give the Court of the District in which it was desired to execute a decree which was passed by the Court of another District, supreme authority in regard to the execution of that decree, and to provide that it is only by an order passed by the District Court that any subordinate Court in that District is empowered to proceed in such a matter. DEBI DIAL SAHU v. MOHARAJ SINGH, **22 C. 764.**

(3354-*a*)—O. 21, r. 8—*See* NOS. 572, 3353-*a*, *supra*.

——O. 21, r. 9 (=1882, s. 227 1877, s. 227).

(3355)—*O. 22, rr. 9 and 90—Auction-sale—Adjournment—Illegality or irregularity—Civil rules of practice, r. 152.*—A sale in execution, conducted from day to day for a period longer than seven days, is neither illegal nor irregular. To keep open the sale for such a long time is a very common practice, and having regard to local conditions, it cannot be said to be a non-beneficial one. R. 152 of the civil rules of practice is not opposed to such a practice. PIR MOHAMMAD v. MAYANDI CHETTIAR, **8 Ind. Cas. 864.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXI, r. 10 (=1882, s. 230 (1), 1877, s. 230 (1).

See LIMITATION ACT, 1908, art. 182.

(3356)—*O. 21, r. 10—See* NOS. 109, 150, 560, 573, 1109 to 1114, 1510, *supra*.

(3357)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1877)—Object.*—It was intended, by enacting s. 230 of the Code, that a decree-holder, seeking to execute a decree passed more than twelve years before, should have one opportunity to execute that decree, and that, if he should fail to satisfy it on that application, any further application becomes barred. SREENATH GOOHO v. YUSOOF KHAN, **7 C. 556=9 C L.R. 334.** [*F.*, 6 A. 189, F.B; *R.*, 8 A. 419, 132 P.L.R. 1904=76 P.R. 1904.]

(3358)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1877, s. 230)—Procedure, applicability of.*—The procedure laid down in s. 230 of the new Code applies only to applications under that section. The effect of the last clause is to preserve to decree-holders, for a definite period, the right in respect to recovery which they possessed under the old law. BYRADDI SUBBAREDDI v. DASAPPA RAU, **1 M. 403.** [*D.*, 6 C. 504.]

(3359)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Prior application for attachment—Subsequent one for sale—Continuation of former application—Effect of s. 230.*—An application for sale is a continuation of a former application for attachment. S. 230, Civ. Pro. Code, 1882, only bars fresh application after expiry of 12 years. SURAJA VENKATA NARASIMHA APPA ROW BAHADUR v. NANDURI VENKATASUBRAUYDU, **8 M.L.T. 367=7 Ind. Cas. 707.** (18 M.L.J. 46, 12 M. L.J. 24, *R.*)

(3360)—*O. 21, rr. 10, 21, and s. 48 (=Civ. Pro. Code, s. 230 of 1877)—Keeping decree in force.*—Under s. 230, Civ. Pro. Code, final clause, an application which, in substance, was to stay the sale, but to continue the attachment, was one to keep in force the decree. NUKANNA v. RAMASAMI, **2 M. 218** [*R.*, 19 B. 261., *D.*, 20 C. 255]

(3361)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Decree passed under Civ Pro Code, (Act VIII of 1859)—Twelve years' old decree—Execution—Applicability to such decrees.*—The proviso to s. 230 of Act XIV of 1882, allowing a further period of three years to enable decree-holders to execute their decrees, applies to those decrees which would be barred on the date of the Code (Act XIV of 1882) coming into force, and does not apply to those decrees which were not barred by the twelve years' rule and which could have been executed on the Code coming into force, by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230 of the Civ. Pro. Code, 1882. TUFAIL AHMAD v. SADHO SARAN SINGH, **A.W.N. 1885, 193.** [*Diss.*, 8 A. 419.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3362)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230)—Execution of decree of over twelve years—Application made and granted.*—This was an application for execution of a decree passed in 1870. An application had been made in June, 1882 and granted. The Civ. Pro. Code of 1882 was applicable and the present application in 1885, having been made more than twelve years after the date of the decree, was such as to be barred by s. 230 of the Code unless saved by its concluding clause. Following the view of the Calcutta High Court in 12 C. 599, the words "law in force immediately before the passing of the Code" were construed as including the "whole law on the subject" and not as confined to art. 179 of the Limitation Act, and it was held that, as a prior application had been made and granted in 1881, *i.e.*, under the Code of 1877, and twelve years would have elapsed before June, 1885, the present *dharkast* of 1885 was not saved from limitation by the concluding clause of s. 230 of the Code of 1882. MOTICHAND v. KRISHNARAV GANESH, **11 B. 524** [*D.*, 15 A. 198.]

(3363)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230) decree for sale of hypothecated property—"Decree for payment of money."*—A decree for sale of hypothecated property passed on a mortgage-bond is not a decree for the payment of money within the meaning of the third paragraph of s. 230 of the Civ. Pro. Code. The "decree for the payment of money" referred to in s. 210 of the Code has often been held to be what is ordinarily known as a money-decree in contra-distinction to a decree directing the sale of specific property, and the same construction must be given to the same words when found in different parts of a Code or Act. RAM CHARAN BHAGAT v. SHEOBARAT RAI, **16 A. 418=A.W.N. 1894, 142.** [*N.F.*, 121 P. L.R. 1908; *F.*, 25 C. 580=2 C.W.N. 118, 27 C. 285, 25 A. 541; *R.*, 18 A.W.N. 114, 28 A. 771=A.W.N. 1906, 237=3 A.L.J. 585=1 M.L.T. 247, 4 N.L.R. 78=8 Cr. L.J. 18; *D.*, 20 M. 107, L.B.R. 1893-1900, 588.]

(3364)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Consent-decree on mortgage—Decree for money.*—A consent-decree passed in a mortgage-suit, directing that the decretal money be recovered by sale, in the first instance of the mortgaged properties which have not been exempted, and afterwards from the persons and other properties of the mortgagors, is a money-decree. KARTICK NATH PANDEY v. JUGGERNATH RAM MARWARI, **27 C. 285.** (16 A. 418, 25 C. 580, *F.*; 20 M. 107, *Diss.*; 14 W.R. 209, *R.*; 24 W.R. 305.) [*R.*, 25 A. 541, 121 P.L.R. 1908; *Expl.*, 31 C. 792; *Diss.*; 28 M 224.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3365)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*Civ. Pro. Code*, 1882, *s* 230)—*Fraud.*—In order to bring a case within the proviso to s. 230, Civ. Pro. Code, two things have to be proved :—(1) that the judgment-debtor used stratagems designed to prevent the execution of the decree, and (2) that the execution of the decree was by such means prevented. It is obviously not enough to prove fraud at some time during the 12 years' period, because it is quite consistent with such fraud that the decree-holder may, at a latter period, have had full facility for executing his decree. It must be proved that the non-execution of the decree was brought about by the fraud complained of. Assuming that on application made before the expiration of the 12 years' period may, notwithstanding the provision contained in s. 230, Civ. Pro. Code, be granted after the lapse of 12 years from the date of the decree, there is no reason for holding that a decree-holder can, on account of the pending of a prior application for warrant of arrest, be allowed, after the lapse of the 12 years, to make another application for the attachment of immoveable property. SESACHALAM CHETTI v. RAJAM CHETTY, **8 M.L.J. 203.** [*Appr.*, 75 P.L.R. 1909=113 P.W.R. 1909.]

(3366)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*s.* 230, *Civ. Pro. Code*, 1877)—*Fictitious transfer—Fraud—Obstacle to execution.*—Where a judgment-debtor makes a fictitious alienation of his properties, so as to make them not available in execution of the decree against him, and the decree-holder brings a suit for obtaining a declaration that the alienation is fictitious, and succeeds in the suit, any further application made by decree-holder after 12 years from the date of the decree, is protected, by the terms of the proviso contained in s. 230, Civ. Pro. Code, as the act of the judgment-debtor is a fraud upon the decree-holder. VISALATCHI v. SIVASANKARA, **4 M. 292.**

(3367)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*Civ. Pro. Code*, 1882, *s.* 230)—*Fraud of judgment-debtor—Prevention of execution—Fresh period of limitation.*—A judgment-debtor, knowing that a warrant of attachment had been issued against his moveable property, locked up his house and thus prevented the execution of the decree. When the decree-holder again applied for execution, it was more than twelve years from the date of the decree. *Held* that the action of the judgment-debtor in locking up his house and keeping it locked until the warrant of attachment had been returned unexecuted, was a contrivance, stratagem or "fraud," within the meaning of s. 230, Civ. Pro Code. It was not necessary that the judgment-debtor's fraud should have continued to prevent the execution of the decree right up to the date of the last application for execution. Fraud or force gives a new starting point for the twelve years' limitation. The proviso was intended to prevent the twelve years' rule of limitation being an inducement to judgment-debtors to evade execution by fraud or force with a view to obtaining

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the benefit of the twelve years' rule. An application made within twelve years from the date of the fraud or force is not barred. VENKAYYA v. RAGHAVA CHARLU, **22 M. 320=8 M L.J. 79.**

(3368)—*O.* 21, *rr.* 10, 21 *and s.* 48 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Decree—Execution—Fraud.*—Where a judgment-debtor, by eluding the service of the warrant on several occasions, and by making applications which had the effect, for the time, of staying execution, has managed to delay it for more than twelve years, he is guilty of fraud under s. 230, Civ. Pro. Code, and is not entitled to the relief contemplated by that section. ANNAMALAI v. RANGASAMI, **6 M. 365.** [*F.* 9 B. 318 ; *R.*, 22 M. 320, 32 M. 443, 16 A. L. J. 401.]

(3369)—*O.* 21, *rr.* 10, 21, s. 48 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Previous applications for execution praying for attachment and sale of moveables—Subsequent application for attachment and sale of houses—Whether latter application is in continuation of the previous one—Prior application neither struck off nor disposed of otherwise on account of appeal by judgment-debtor—'Fraud or force' within the terms of* s 230—*Right to raise questions of fraud for the first time in appeal.*—*Held*, that applications for execution made on 10th March and 15th June, 1908, praying for the attachment and sale of houses belonging to the judgment-debtor, cannot be held to be in continuation of a prior execution application made on 11th May, 1906, praying for the attachment and sale of *moveables* belonging to the judgment-debtor, even when the moveables were attached and sold, but the money was not paid to the decree-holder in consequence of an appeal filed by the judgment-debtor, and the application had not been formally consigned to the record room or struck off the file. (18 A. 482, F.B., 45 P.R. 1909, 21 A. 155, 33 C. 689, *D.*; 27 P.R. 1905, *Expl.*) Where the judgment-debtor was justified in obtaining an adjudication from the Courts in respect of the very difficult question of his relations with his father, and where his appeal was thrown out merely on the ground of his failure to discharge the burden of proof that lay on him, he cannot be held to be guilty of frivolous or vexatious obstruction to the execution of decree, and his act did not constitute 'fraud' within the terms of the last sentence of s. 230, Civ. Pro. Code, 1882. (11 C.W.N. 440, 6 M. 365, *D.*) It is doubtful whether the decree-holder can raise questions of fraud and claim the benefit of the last sentence of s. 230, for the first time in appeal. HIRU AND OTHERS v. GARCHARU. **17 P.R. 1910=22 P.W.R. 1910 =20 P.L.R. 1910=5 Ind. Cas. 815.**

(3370)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Preventing execution of decree by force or fraud—Limitation.*—Under the last paragraph of s. 230, Civ. Pro. Code, 1882, if the judgment-debtor by force or fraud prevents the execution of decree against him at some time within twelve years immediately before the

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date of the application for execution, the application will not be barred under the preceding provisions of the section. (22 M. 320, *R.*) But to save limitation as aforesaid, there should be an express finding that there was either force or fraud. MEESLA RAMANNA v. AKKALABOTU CHINNA, **8 Ind. Cas. 805=9 M.L.T. 162.**

(3371)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, Act X of 1877, s. 230.—Meaning of—Date of passing of Act in—Date of Governor-General's assent to Act and not that of its coming into force.*—In this case, the High Court disagreed with the opinion of the lower appellate Court that the words "within three years after the passing of this Code," in the last paragraph of s. 230, "must be construed to mean within three years after the Code came into force, *i.e.*, within three years from the first day of October, 1877." The last paragraph of s. 230 names the terminus from which the period of three years therein mentioned was intended to begin to run, and that terminus was the passing of the Act, and, the Civ. Pro. Code, Act X of 1877, was finally passed on the day on which it received the assent of the Governor-General, *viz.*, the 30th March, 1877, although its coming into force was deferred until the 1st of October, 1877. DAMODARDAS HARIDAS v. UTTAMCHAND SAVIACHAND, **7 B 214.**

(3372)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1877, s. 230)—"Passing of the Act."*—The words "the passing of the Act" in s. 230, mean the day on which the Act received the assent of the Governor-General and not when the Act came into force. RADHA KISHUN v. BUDHA SINGH, **A.W.N. 1882, 2.**

(3373)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1877, s. 230)—"After the passing of the Code."—Held* that the expression "after the passing of the Code" in s. 230, Civ. Pro. Code, 1877, means the date the Code was passed, that is to say, the date the bill became law and received the assent of the Governor-General, and not the date the Act came into force. JUGAL KISHORE v. ZAMANIA BEGAM, **A.W.N. 1881, 58.** [*F.*, A.W.N. 1881, 74.] *See also*, TULSHI RAM v. CHOTEY LAL, **A.W.N. 1881, 118.**

(3374)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Decree—Application for execution — "Subsequent application"*— A decree-holder made an application for execution of his decree on 6-2-1879, which was rejected for default of prosecution. A subsequent application made on 6-2-1882 was granted. Afterwards, on the application of the debtor, execution proceedings were postponed by order of Court made on 7-4-1882 to enable the debtor to satsify the decree. The latter applied for further time on 7-4-1883, which was refused on 7-5-1883. Thereupon, the decree-holder applied to the Court on 7-7-1883 praying that the execution of his decree may be proceeded with. *Held* that this application (of 7-7-1883) was linked to that of 6-2-1882, and therefore not liable to the bar attaching to a "subsequent application" in the sense of para. 3 of s. 230, Civ. Pro. Code, 1882. BHAGWANTI PRASAD v. THE COLLECTOR OF BASTI, **A.W.N. 1885, 269.**

(3375)—*O. 21, rr. 10, 21, and s. 48 (=Civ. Pro. Code, 1882, s. 230)—Limitation—Decree for payment of money—Decree against representative limited to immoveable property of deceased debtor.*—The mere fact that a decree, passed against the representative of a deceased person as such, is limited as regards the liability of the judgment-debtor to the immoveable property of the deceased, which may come into the hands of the representative, will not make such a decree other than a decree for payment of money within the meaning of s. 230 of the Code of Civil Procedure. JANKI PRASAD v. SHEOGOPAL, **A.W.N. 1893, 114.** (A.W.N. 1893, 184 and 16 A. 418, *R.*)

(3376)—*O. 21, rr. 10 and 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Execution of decree—Limitation—Decree for money.*—A decree for recovery of money by sale of specific property is a decree for money within the meaning of s. 230 of the Civ. Pro Code. RAM GOPAL v. TEJA SINGH, **121 P.L.R. 1908.** (29 M. 224 & 473, *F.*, 16 A. 418 25 A. 541, 24 C. 473, 25 C. 580, 27 C. 285, *Not F.*)

(3377)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230)—Execution of decree, Limitation—Application twelve years from date of decree, previous application for execution having been granted.*—A decree-holder obtained a decree for money on the 30th of July, 1877. Application was made in May, 1878, under the terms of s. 230 of the Civ Pro, Code, for execution of this decree by sale of three houses belonging to the judgment debtor. Under that application, two out of the three houses were sold. The sale of the third house was postponed on the application of a party. On the 15th of December, 1878 the application of May 1878, was "struck off". On the 11th of November, 1889, the decree-holder applied in terms to revive the application of May, 1878, and to bring to sale the remaining house. *Held* that s. 230 of the Civ. Pro. Code, applied to the circumstances as above set forth and was a bar to the further execution of the decree. THE DELHI AND LONDON BANK, LD. v. MAJOR B.L. REILLY, **A.W.N. 1893, 124.** [*Overruled*, 18 A. 482= A.W.N. 1896, 142, F.B.]

(3378)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Execution of decree—Decree under s. 88 of Act IV of 1882 purporting also to grant relief under s. 90.—Held*, that s. 230 of the Civ. Pro. Code, did not apply to a decree which purported to be made under s. 88 of Act IV of 1882, but which in addition to the relief provided for by that section, granted also

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the relief provided for by s. 90 of the said Act. JOGUL KISHORE v. CHEDA LAL, **A.W.N. 1893, 184.** [*R.*, 25 A. 541, 28 A. 771, F.B.= 3 A.L.J. 585 = A.W.N. 1906, 237 = 1 M.L.T. 247.]

(3379)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882) — Subsequent application to execute the decree, what amounts to — Order on execution-application "proceedings closed," whether amounts to a dismissal* —A obtained a mortgage decree in his favour on the 6th of December, 1892, and made a series of applications for the execution of his decree, the order passed on an application put in by him in the year 1904, within 12 years from the date of decree, being "proceedings closed for the present." Several other applications were then made asking for the continuance of the proceedings, and A presented his last application on 2nd April, 1907, when it was contended the application was barred under s. 230, Civ. Pro. Code, 1882. *Held*, since the application of 1904 was within 12 years and that application was never dismissed, the order on it being merely "proceedings closed" the present application was not a subsequent application to execute the decree within the meaning of s. 230, Civ. Pro. Code, 1882, and was therefore not barred under that section. TADAPALLI BAPPAIYA v. PUTTI KOTTAYA, **6 M.L.T. 333.**

(3380)—*O. 21, rr. 10, 21, s. 48 (=s. 230 (b) of 1882)—Order directing payment of money at certain date.*— Where a judgment-debtor, on being arrested, put in a petition asking that he might have 15 days' time within which to pay up the amount of the decree, and that petition was consented to, and the order made on it was "let the petition be filed," *held*, that the petition contained no new promise to pay, and that the order did not amount to one directing the payment of money to be made at a particular date within the meaning of s. 230 (*b*) of the Code. JOGOBUNDHOO DASS v. HORI RAWOOF, **16 C. 16.** (4 A. 155, *F.*).

(3381)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Codes, 1882 and 1877, s. 230)—Execution of decree—Twelve year's old decree.*—Where a decree more than twelve years old was once given the benefit of the three years' grace under s. 230 of the Civ. Pro. Code, 1877, and then became dead or inexecutable, an application to execute under s. 230 of the Civ. Pro. Code, 1882, should be refused. There is nothing in s. 230 of the later Code to justify the conclusion that it was intended to revive decree which had become dead before it became law. BHAWANI DAS v. DAULAT RAM, **6 A. 388 = A.W.N. 1884, 134.** (6 A. 189, *D.*) [*R.*, 8 A. 419.]

(3382)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230) — Application for transferring decree for execution—Application for execution—Meaning of "granting" application.*— An application made to the Court passing a decree for a certificate to allow execution to be

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

taken out in another Court is not an application to execute the decree under s. 230 of the Code, [*F.*, 22 C. 921; *Expl.*, 22 C. 375; *D.*, 20 C. 29, 8 C.W.N. 575.] The "granting" of an application under s. 230 includes the issue of a process for execution of the decree. NILMONY SINGH DEO v. BIRESSUR BANERJEE, **16 C. 744.**

(3383)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Agreement under s. 257-A—Order sanctioning such agreement—Whether order is a fresh decree or old order for payment of money—Mistake of Law—Res judicata—Limitation.*—An order sanctioning a compromise cannot be said to be either a new decree, or an old order subsequent to decree directing the payment of money, within the meaning of s. 230 (*b*), Civ. Pro. Code. (14 M.L.J. 359, *R.*). Where an order proceeded on a mistake of law, such a mistake cannot operate as *res judicata* in a subsequent proceeding, which in no way affects the operation of the previous order. R.M.P.L. PALANIAPPA CHETTIAR v. RAJA VISVANATHA VIJAYA KUMARA BANGARU TIRUMALAI SVRAI NAIDOO, **4 M.L.T. 283.** (30 M. 461, 504, *R.*)

(3384)—*O. 21, rr. 10, 21 and s. 48 (=Civ. Pro. Code, 1882, s. 230) — Limitation Act, 1877.*—S. 230, Civ. Pro. Code, does not affect the period of limitation prescribed by art. 180, sch. II of the Limitation Act. GANAPATHI v. BALASUNDARA, **7 M. 340** [*Appr.*, 20 C. 551; *R.*, 26 A. 361 = A.W.N. 1904, 51 = 1 A.L.J. 80; *F.*, 36 C. 543 = 9 C.L.J. 271.]

(3385)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230)—Execution of decree—Limitation—Construction.*—The words "the law in force immediately before the passing of this Code" occurring in s. 230 of the Civ. Pro. Code of 1882, refer to and include Act X of 1877, as amended by Act XII of 1879. GOLUCK CHANDRA MYHEE v. HARAP RIAH DEBI, **12 C. 559.** (6 A. 189, F.B., *Diss.*) [*F.*, 9 M. 454, 11 B. 524; *R.*, 8 A. 419.]

(3386)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230) — Limitation—12 years' rule—"Law in force"—Act X of 1877.*—The expression "law in force," as used in Act XIV of 1882 (Code of Civil Procedure), includes Act X of 1877 as well as the general Act of limitation. Therefore, if a decree became incapable of execution under s. 230 of Act X of 1877, before Act XIV of 1882 came into force, s. 230, of the latter Code will not revive it. KOLLU SHETTATI v. MANJAYA, **9 M. 454.** (*R.*, 11 M. 132.)

(3387)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230)—Twelve years' rule of limitation under, scope of.*—After several infructuous executions of a decree dated 23rd February, 1881, the decree-holders applied for execution on the 2nd May, 1892. The Court, of its own motion, struck off this application professing to maintain an attachment which had been made.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

On the presentation of the next subsequent application on the 7th March, 1893, the judgment-debtors objected that it was barred by the twelve years' rule of limitation under s. 230 of the Civ. Pro. Code. Although the previous applications had failed, for some reason or other, to realise any money, some of them were 'granted' within the meaning of s. 230 of the Code, inasmuch as property had been attached under those applications in compliance with the prayers contained in them. It was, therefore, *held* that whether the last application was one in continuance of the next previous application, or a fresh application by itself, it was not competent to the Court to grant the same by reason of s. 230. The section does not prescribe that, no subsequent application shall be received after the expiration of 12 years; it forbids any application being granted. It is not competent to a Court to strike off an execution case whilst maintaining an attachment which has been made in that case. Such an order is a contradiction in terms and is not warranted by law. If there is no pending execution before the Court, there can be no subsisting attachment; and if there is reason for maintaining and attachment there can be no reason for striking off the application in execution which led to its being made. RAM NIWAZ v. RAM CHARAN, **18 A. 49=A.W.N. 1895, 155.** [*Diss.*, 11 C.W.N. 163=5 C.L.J. 30; *D.*, 18 A. 482, *R.*, 3 A.L.J. 654.]

(3388)—*O. 21, rr. 10, 21 and s. 48 (=Civ. Pro. Code, 1877, s. 230—Prohibition of subsequent execution application — Restricted to applications under the section.*—The prohibition, under s. 230 of the Civ. Pro. Code of 1877, of a subsequent application for execution of a decree for more than 12 years old, would apply only where the previous application has been under that section, and not when it has been made under the Code of 1859. ASHOOTOSH DUTT v. DOORGA CHURN CHATTERJEE, **6 C. 504=8 C.L.R. 23.** (1 M. 403, 2 A. 275, *R.*)

(3389)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Decree — Application for execution of—Limitation — Order passed on application after expiry of 12 years.*—If the last application for execution of a decree be made within 12 years from the date of decree or order, the order on the application may be made even after the expiry of 12 years. SIVASWAMY AIYAR v. SIVALINGAM PILLAY, **7 M.L.T. 363=5 Ind. Cas. 474.** (6 M. 359, *F.*)

(3390)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1877, s. 230)—Execution of decree—Limitation.*—In 1878, in execution of a decree passed in the year 1859, an arrangement was made whereby the decree-holder allowed the judgment-debtors to pay the decree by instalments, and on this arrangement being certified to the Court, the property of the judgment-debtors, then under attachment, was released, but it was not carried out by an order under s. 210, Civ. Pro. Code. *Held* that the decree could be executed as more than 12 years had elapsed from the passing of the decree. RADHEY LAL v. NATHU, **A.W.N. 1882, 5.**

(3391)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Subsequent application for execution.*—The holder of a decree, dated June 1873 made an application for execution in March 1884, asking that the decree be sent for execution to the District Court, with a certificate of non-satisfaction. The application was granted in July 1884, and the decree and the certificate under s. 224 of the Code were given to the applicant, who filed the same in the Court of the District Judge in November 1885, and the Judge, under the authority of s. 226, Civ. Pro Code, directed the decree to be forwarded for execution to the Court of the Subordinate Judge. The applicant then filed the application asking the Subordinate Judge to execute the decree. This last application was made in November 1885. *Held* that the last execution application was not barred by limitation though it was dated more than twelve years from the date of the decree, inasmuch as it was not a fresh application for execution, but only one asking the Court to give effect to that of March 1884 which was still pending, and as it was nothing more than asking the Courts to give directions in accordance with the order of March 1884. RAM SAHAI v. NANNI, **A.W.N. 1886, 137.**

(3392)—*O. 21, rr. 10, 21, s. 48 (=s. 230, Civ. Pro. Code, 1882)—Construction of decree—Decree for payment of money—Hypothecation decree.*—A decree had been passed on compromise, and was, in the first instance, a decree for the payment of certain sums of money by instalments; but it further contained a provision, *viz*, "The property hypothecated in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants, the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." The decree was passed on 5th March 1884. On 5th December, 1896, an application for execution was made, which proved infructuous and was struck off on 1st April, 1897. A subsequent application was made on 30th November, 1899, and was resisted on the ground that execution of the decree was barred by limitation, regard being had to s. 230, Civ. Pro. Code. *Held* that this was not a simple decree for the payment of money such as would fall within the purview of s. 230, Civ. Pro. Code. PAHALWAN SINGH v. NARAIN DAS, **22 A. 401=A.W.N. 1900, 131.** (3 A. 216, *D.*; 22 C. 813, 26 C. 166, *R.*)

(3398)—*O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1882, s. 230)—Twelve years' rule of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

limitation—Warrant of arrest issued but not executed, deemed to be subsisting.—An application for execution of a decree by arrest of the judgment-debtor was granted, but on the report of the peons entrusted with the warrant that the judgment-debtor had concealed himself, the Court struck off the application. A subsequent application made again for the arrest of the judgment debtor was also struck off, and on an appeal from the order striking off such application the difficulty was suggested that the decree could not be executed as it was impossible by reason of s. 230 of the Civ. Pro. Code, to grant the prayer for execution, owing to the fact that upwards of twelve years had elapsed since the date of the decree and that previous applications for execution had been granted; but it was held that the warrant issued on the former application for arrest, not having been carried out, was still subsisting and capable of being executed. The mere fact that a warrant was issued and came back unexecuted could not be taken to establish that the proceeding for execution in pursuance of which it issued was exhausted and thereby determined. JIT MAL v. JWALA PRASAD, **21 A. 155=A.W.N. 1899, 7.** (A.W.N. 1898, 137, *F.*) [*R.*, 27 P R. 1905=79 P.L R. 1905; *D.*, 11 O.C. 57, 17 P.R. 1910.]

(3394)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*Civ. Pro. Code*, 1882, *s.* 230)—*Decree become 12 years old, first application for execution of, within 3 years from Code of* 1882.—Under the provisions of s. 230 of the Civ. Pro. Code, 1882, the holder of a decree more than 12 years old should be allowed one opportunity to execute it under that section. The decree-holder, in this case, had put in two applications, under the Code of 1882, but both of them before the lapse of 12 years from the date of the decree. These were struck off and so could not be said to have been "granted" within the meaning of s. 230. The present application for execution, though the *third* one under the Code of 1882, was the first made after the decree had become 12 years old and was put in within 3 years of the passing of that Code, and was therefore not barred by reason of s. 230 of it. RAMADHAR v. RAM DAYAL, **8 A. 536=A.W.N. 1886, 168.** (6 A. 189, A.W.N. 1885, 193, 8 A. 419, *R.*) [*R.*, 12 A. 571, 15 A. 198=13 A.W.N. 93.]

(3395)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Proviso. Construction of—Twelve years' rule, in respect of old decrees.*—The decree in this case was passed on the 15th of June 1872, and calculating twelve years from that date, it was alive when the Code of 1882 came into operation. The present application for its execution was made more than twelve years after the decree, but within three years of the passing of the Code, and as the first application made after the decree became twelve years old, it was held to be not barred under s. 230 of the Code of 1882. If s. 230 of Act X of 1877 were to be applied, the application would be barred

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but that section has no application. The phrase "the law in force immediately before the passing of this Code" in the proviso to s. 230 of the Code of 1882 does not include the limitation provisions in the previous Code of 1877. JOKHU RAM v. RAM DIN, **8 A. 419=A.W.N. 1886, 162.** (6 A. 189, *F.*; 12 C. 559, 6 A. 388, 7 C. 556, *R.*; A.W.N. 1885, 193, *Disc.*) [*R.*, 8 A. 536.]

(3396)—*O.* 21, *rr.* 10, 21, *s.* 43 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Composite decree under ss.* 88 *and* 90, *Transfer of Property Act.*—A decree of a composite nature partaking both of the nature of decree for sale under s. 88, Transfer of Property Act and of that referred to in s. 90 of that Act, cannot be taken to be a "decree for the payment of money" to which the limitation under s. 230, Civ. Pro. Code, applies. JADU NATH PRASAD v. JAGMOHAN DAS, **25 A. 541=A W N. 1903, 98.** A.W N. (1893, 184, *F.*; 16 A. 418, 27 C. 285, *R.*) [*Diss.*, 31 C. 792, 121 P.L.R. 1908; *R.*, 3 A.L.J. 585=A.W.N. 1906, 237=1 M.L.T. 247=28 A. 771.]

(3397)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*Civ. Pro. Code*, 1877, *s.* 230)—*Application for execution to wrong Court—Limitation.*—On the 18th November, 1879, within three years from the passing of Act X of 1877, the appellant, who held a decree against the respondent, applied under s. 230, Civ. Pro. Code, for its execution. But he applied to the wrong Court, and was consequently referred to the proper Court to which he applied on the 15th May, 1880. *Held* that the proceedings taken by the appellant in the wrong Court were good and valid for the purposes of limitation, and as that application was not granted, the bar of the 3rd paragraph of s. 230 did not apply. MAHARAJA RADHA PRASAD SINGH v. INDRAS KUAR, **A.W.N. 1882, 91.**

(3398)—*O.* 21, *rr.* 10, 21 *and s.* 48 (=*s.* 230, *Civ. Pro. Code*, 1882)—*Decree—Execution—Limitation.*—An application for execution of a decree is within time, under s. 230, Civ. Pro. Code, if it was made within twelve years from the date of the decree, although the order passed on the application was after the date. VIRARAMA v. ANNASAMI, **6 M. 359.** [*R.*, 18 A. 482, 76 P.R. 1904=132 P.L.R. 1904, 11 O.C. 57, F.B.]

(3399)—*O.* 21, *rr.* 10, 21, *s.* 48 (=*s.* 230, *Civ. Pro. Code*, (1882)—*Judgment-debtor evading arrest—False objections to execution—Decree whether barred after* 12 *years.*—When a judgment-debtor keeps out of the way when warrants are issued for his arrest, and puts in false objections in bad faith and thereby dishonestly evades payment of money justly due he is not entitled to the benefit of s. 230, Civ. Pro. Code =O. XXI, r. 10. The judgment-debtor in this case always evaded arrest and more than once objected to execution being taken out, but his objections failed. The application for execution was presented more than 12 years after the date of the decree, but within 3 years of the last

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859) - *continued.*

application. *Held*, that the execution of the decree was not barred by s. 230, Civ. Pro. Code. BENI PRASAD v. KASHI NATH, **6 A.L.J. 401 = 2 Ind. Cas. 222.**

(3400)—*O* 21, *rr.* 10, 21 *and* s. 48 (= *Civ. Pro. Code*, 1882, *s.* 230,—*Decree twelve years old—"Granted"—Limitation Act* (*XV of* 1877), *s.* 14—*Execution of decree in Court not having jurisdiction.*—An application for the execution of a decree shall be deemed to have been "*granted*" within the meaning of s. 230 of the Civ. Pro. Code, when the Court executing such decree has attached land on the application of the decree-holder and applied to the Revenue authorities for sanction of sale. Where previous to the promulgation of 9 P.R. 1901 = 1 P.L.R. 1901 execution proceedings were held in a Court Subordinate to the District Court, not having jurisdiction in the matter, by order of the District Judge, held that the decree-holders were entitled to the benefit of s. 14, Limitation Act, BAHADUR KHAN v. SADHO SINGH, **132 P.L.R. 1904 = 76 P.R. 1904.**

(3401)—*O.* 21, *rr.* 10, 21, *s.* 48 (= *Civ. Pro. Code*, 1877, *s.* 230)—*Execution of decree—Limitation.*—A decree-holder applied for the execution of his decree on the 6th December, 1877. The application was struck off "for default of prosecution" on the 18th January, 1878. On the 5th December, 1878, he again applied for execution of the decree. On the 12th December, 1878, this application was rejected, with reference to the provisions of s. 230, Civ. Pro. Code, 1877, as they stood before they were amended by Act XII of 1879, on the ground that, on the last preceding application of the 6th December, 1877, the applicant had not used due diligence. On the 4th May, 1881, the decree-holder again applied for execution. *Held*, that the last application was barred by limitation as time could not be computed from the date of the application of the 5th December, 1878. KIRAT v. PAHLAD, **A.W.N. 1882, 97.**

(3402)—*O.* 21, *rr.* 10, 21, *s.* 48 (= *Civ. Pro. Code*, 1877, *s.* 230)—*Limitation—Execution of decree.*—A was the holder of a decree for possession of immoveable property and for the payment of mesne profits and costs, dated the 6th February, 1864. He made an application to enforce it in respect of the payment of mesne profits and costs on the 29th November, 1877. She made a similar application on the 17th January, 1881, *held* that the last application was barred under s. 230, Civ. Pro. Code. RAHSI v. SHEOBALAK TIWARI, **A.W.N. 1882, 111.**

(3403)—*O.* 21, *rr.* 10, 21, s. 48 (= *Civ. Pro. Code*, 1882, *s.* 230)—*Execution—Limitation.*—Where the holder of a decree dated 1878 applied in 1879 for the arrest of the judgment-debtor and had him produced in custody before the Court, but took no further steps, and subsequently in 1886 applied for execution of the same decree, the latter application was time barred under s. 230 of the Code of Civil Procedure. PATUMMA v. MUSE BEARI, **11 M. 132.**

(3404)—*O.* 21, *rr.* 10, 21, *s.* 48 (= *Civ. Pro. Code*, 1882, s. 230 (*b*))—*Limitation — Compromise—Striking off execution proceedings.*—In 1863, R obtained a decree against A. In execution of that decree in 1879, R and A entered into a compromise whereby the amount of the decree was to be paid by instalments and R was empowered to realize the amount when default was made in one instalment. The Court regarding the decree as fully satisfied by the arrangement struck off execution proceedings. R now applied to execute the decree. *Held* that the application was barred by the provisions of s. 230 of the Civ. Pro. Code. The order of the Court executing the decree made in 1879 was not an order which would come within (*b*) of s. 230, so as to allow the twelve years mentioned in that section to run from the date of that order. SABODRA KUAR v. MANOHAR DAS, **A.W.N. 1883, 147.**

(3405)—*O.* 21, *rr.* 10, 21, *s.* 48 (= *Civ. Pro. Code*, 1877, *s.* 230)—*Decree barred—Sale, validity of.*—The objection that the decree was barred, under s. 230, Civ. Pro. Code, cannot be taken after sale in execution of the decree and before confirmation. GANGATHARA v. RATHABAI, **6 M. 237.** [*R.*, 10 A. 506.]

(3406)—O. 21, rr. 10, 21, s. 48—*See* ABATEMENT OF APPEAL, 7 A.L.J. 58 = 32 A. 136 = 5 Ind. Cas. 473.

(3407)—O. 21, rr. 10, 21, s. 48—*See* BOM. ACT VI OF 1888, s. 31, cl. 2, 17 B. 289.

(3407-*a*)—O. 21, rr. 10, 21, s. 48—Decree for payment of money and in default for sale of property—Construction—*See* EXECUTION OF DECREE—GENERAL, 9 A.L.J. 79.

(3408)—O. 21, rr. 10 and 21, s. 48—Absolute prohibition imposed by section against granting of application after 12 years from certain dates—S. 19 of Limitation Act cannot affect such prohibition—*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 O.C. 220.

(3409)—O. 21, rr. 10, 21, s. 48—When decree-holder may have benefit of—Fraud—*See* EXECUTION OF DECREE—MISCELLANEOUS, 75 P.L.R. 1909 = 113 P.W.R. 1909 = 4 Ind. Cas. 958.

(3410)—O. 21, rr. 10, 21, s. 48—*See* EXECUTION OF DECREE—MISCELLANEOUS, 7 A. 373 = A.W.N. 1885, 60, 12 M.L.J. 24, 11 C.L.R. 17, 15 M.L.J. 243.

(3411)—O 21, rr. 10, 21, s. 48—*See* LIMITATION ACT, 1908, ss. 4 and 5, 29, cl. (1) (*b*), 18 C. 631.

(3412)—O. 21, rr. 10, 21, s. 48—Order modifying decree in accordance with agreement of parties—Paymen of money or delivery of property directed by order—When limitation provided by the section begins to run—*See* LIMITATION ACT, 1908, s. 22, 4 P.W.R. 1909 = 5 P.L.R. 1909 = 1 Ind. Cas. 48.

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(3413)—O. 21, rr. 10, 21, s. 48—*See* LIMITATION ACT, 1908, arts. 181, 182, L.B.R. 1893—1900, 588.

(3414)—O. 21, rr. 10, 21, s. 48—*See* LIMITATION ACT, 1908, art. 182—STEP-IN-AID OF EXECUTION, 19 B. 261.

(3415)—O. 21, rr. 10, 21, s. 48—*See* LIMITATION ACT, 1908, art. 183, 6 B. 258.

(3416)—O. 21, rr. 10, 21, s. 48—*See* STATUTES, CONSTRUCTION OF, 5 M. 141.

(3417)—O. 21, rr. 10, 21, s. 48—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 88, 90, 31 C. 792.

(3418)—O. 21, rr. 10, 21, ss. 48, 47—*See* LIMITATION ACT, 1908, arts. 122, 183, 24 C. 473.

(3419)—*O. 21, rr. 10, 21, ss. 48, 73 (=ss. 230 and 295, Civ. Pro. Code, 1882)—Mortgage-decree, direction in, to pay money—Decree for money—Application for attachment not an application for execution.*—Where a decree directs the defendants to pay the money to the plaintiff and, in default, the property mortgaged is to be sold and the balance is to be realised from the other properties of the defendants, *held*, that this was a 'decree for money' within the meaning of s. 230 of the Code. (20 M, 107, *F.*; 27 C. 285, *Differed from*). *Held*, also, that an application for attachment of certain property cannot be treated as an application to execute a decree, which directs the sale of that property. ABDULLA SAHIB v. DOCTOR OOSMAN SAHIB, **28 M. 224** (24 C. 473, *Appr.*) [*Diss.*, 28 A. 771=3 A.L.J. 585=A.W.N. 1906, 237=1 M. L.T. 247. F.B.; *F.*, 121 P.L.R. 1908; *Appr.*, 28 M. 473=15 M.L.J. 126.]

(3420)—*O. 21, rr. 10 and 21, ss. 48, 92 and 93 (=ss. 230, 539, Civ. Pro. Code, 1882)—Decree directing performance of* puja *and giving of honours to a deity "according to usage" of a religious institution—Nature and execution of the decree.*—A decree, so far as it directs performance of *puja* and the giving of honours to a deity, "according to the usage" of the religious institution in question, is merely a declaratory decree, and the Court cannot, in execution, undertake to see that the trustee (judgment-debtor) acts in accordance with the usage of the institution; for, the Court would then have to supervise religious matters, which are not within the province of Civil Court. (5 B. 80, 3 M.I.A. 359, P.C., *F.*) If the trustee fails to do his duty, it may be a reason for removing him by means of a suit properly framed for the purpose, in which case the enquiry into the religious usages of the temple would be ancillary to the determination of a question of civil right, *viz.*, the right to remove the trustee. JANAKIRAMA REDDI v. THIRUVENKADA RAMANUJA CHARI, **2 M.L.T. 94.** (23 M. 298, 18 C. 448, P.C., *F.*)

(3421)—*O. 21, rr. 10, 21, ss. 48, 113, O. 46, r. 1 (=Civ. Pro. Code, 1877, ss. 230, 617)—Decree—Application for execution—Limitation.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—On the 1st June, 1880, the decree-holders in this and nine other cases applied to the Court of the Second-class Subordinate Judge of Parner, for execution of their decrees. They had taken out of execution several times previously, the date of their last preceding applications being the 1st of June, 1877. The Subordinate Judge was of opinion that the present applications were barred under the last clause of s. 230, Civ. Pro. Code, 1877. He, however, referred the cases to the High Court under s. 617 of the Code. *Held* that the applications were not barred, because the previous applications for execution had not been made under s. 230 of the Code, that Code having come into force only on the 1st of October 1877. ANANDRAU CHIMUJI AVATI v. THAKARCHAND, **5 B. 245.** [*F.*, 9 C.L.R. 297.]

(3422)—*O. 21, rr. 10, 21, ss. 48, 115 (=ss. 230 and 622, Civ. Pro. Code, 1882)—Ordering execution on application more than three years after last application for execution—Limitation Act, art. 179, cl. 4.*—An application for execution of a decree was made after more than three years from the date of the next previous application. The Executing Court disallowed the objection of the judgment-debtor that the application was barred under art. 179, cl. 4 of the Limitation Act and ordered execution. *Held*, that the lower Court's order was passed on a misapprehension of the meaning of s. 230 of the Code and of its bearing on art. 179 of the Limitation Act, as clearly explained in U.B.R. (1897-1901), 11, 477, that, if the order was to be interpreted as meaning that s. 230 fixes a period of 12 years' limitation, it would be directly opposed to the ruling in that case; that, in ordering execution on an application put in more than three years from the last application in contravention of the plain provisions of art. 179, the lower Court acted illegally within the meaning of s. 622 of the Code and that the order, therefore, should be set aside on revision. NGA SHWE THIN v. NGA NYUN, **U.B.R. 1905, Civ. Pro. 26.** [*R.*, U.B.R. 1910, 2nd Qr., Civ. 14; *F.*, U.B.R. 1906, 2nd Qr. Civ. Pro. 42.]

(3423)—*O. 21, rr. 10 and 21, s. 48, O. 9, r. 13 (=ss. 230, 108, Civ. Pro. Code, 1882)—Money-decree — Application to execute after expiry of twelve years—Fraudulent conduct of judgment debtor delaying execution—Frivolous application under s. 108, Civ. Pro. Code—Discretion of Court.*—Where, pending execution of a money-decree, the judgment-debtor made a frivolous application to set it aside under s. 108, Civ. Pro. Code, with a view to delay the execution-proceedings, *held*, that the conduct of the judgment-debtor was fraudulent, within the meaning of the final clause of s. 230, Civ. Pro. Code. The Court, to which an application to execute a money-decree is made, more than twelve years after the date of the decree, should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

should find, on evidence, that the decree-holder had been diligent in proceeding with the execution, from the date that the decree was passed and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently or used force, the Court ought to allow execution. RAISHAM KISSEN v. DAMAR KUMARI DEBI, **11 C.W.N. 440**.

(3424)—*O. 21, rr. 10, 21, s. 48, O. 21, r. 2, s. 73 (=ss. 230, 258, 295, Civ. Pro. Code, 1882)—Decree on mortgage for sale of mortgage-property and realisation of balance from judgment-debtor personally, whether decree for money or decree for payment of money for purposes of s. 258.*—In execution of a decree, another decree obtained by the judgment-debtor on a mortgage was attached. The attached decree directed the sale of the property mortgaged, and, in case of deficiency, the property of the judgment-debtor other than that mortgaged was to be proceeded against. Since the attachment, the judgment-debtor under the attached decree pleaded that the decree had been satisfied under an uncertified adjustment. The point thus arising for decision was, whether the provisions of s. 258 of the Code were applicable to decrees based on mortgage. *Held*, by the Full Bench, that every decree, by virtue of which money is payable, is, to that extent, a decree for money and that s. 258 must be held to be applicable to decrees where not only is the mortgage property directed to be sold but also the judgment-debtor is made personally liable for the balance. (24 M. 412, *Overruled*). The section is also applicable to cases where there is no direction to pay personally at all but only an order for sale (11 C. 718, *Appr.*) ; for, in either case, payment of money would be a complete satisfaction of the real purpose of the decree. The words 'decree for money' and 'a decree for the payment of money,' in ss. 230 and 295 of the Code, include a decree based on a mortgage for the sale of the mortgaged property. (20 M. 107, *Appr.*) A receipt, by a usufructuary mortgagee, of the profits of the land he is in possession of is, no doubt, a payment to the mortgagee, within the meaning of s. 22 of the Limitation Act. But the special provision in the Limitation Act would not make the sums so received, payments within the meaning of s. 258 of the Code. VAIDHINATHASAMY IYER v. SOMASUNDRAM PILLAI, **15 M.L.J. 126, F.B. =28 M. 473**. [*F.*, 29 M. 318, 30 M. 255=17 M.L.J. 201=2 M.L.T. 167, 30 A. 248=5 A.L.J. 272=A.W.N. 1908, 103, 121 P.L.R. 1908 ; *R.*, 9 Bom. L.R. 1390=2 M.L.T. 167, 5 M.L.T. 278.]

(3425)—*O. 21, rr. 10, 21, s. 48, O. 21, r. 11, (2) (=Civ. Pro. Code, 1882, ss. 230, 235)—Subsequent application ancillary to previous substantive application, not within prohibition in s. 230.*—The application for execution referred to in s. 230 of the Civ. Pro. Code, is an initial application of the nature provided for in s. 235

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

upon which an order has to be made by the Court for granting or refusing execution. An application merely ancillary or incidental to an application already made for execution as under s. 235, cannot be regarded as the "application to execute" contemplated by s. 230, but only as an application to proceed with the previous execution application. Where the decree-holder has put in a regular application for execution, in accordance with s. 235, within twelve years from the date of the decree and in sufficient time to get an order from the Court to the effect that he may enforce it in terms of the application, it cannot be presumed that the Legislature intended him to suffer because, owing to causes for which the decree-holder is not responsible, the final completion of the proceedings under the prior application had not been obtained within the period limited by s. 230 of the Code. RAHIM ALI KHAN v. PHULCHAND, **18 A. 482, F.B. =A.W.N. 1896, 142** (A.W.N. 1893, 124, *Overruled.*) [*F.*, 2 A.L.J. 276, 30 A. 499=A.W.N. 1908, 39 =5 A.L.J. 616, A.W.N. 1908, 227 ; *R.*, 18 A. W.N. 137, 27 P.R. 1905=79 P.L.R. 1905, 76 P.R. 1904=132 P.L.R. 1904 ; *D.*, 112 P.L.R. 1902, 11 O.C. 57.]

(3426)—*O. 21, rr. 10, 21, s. 48, O. 21, r. 11 (2) (=ss. 230 and 235, Civ. Pro. Code, 1882)—Application for execution made within twelve years—Right to continue proceedings after expiry of twelve years—Limitation.*—If an application for execution of a decree is made in accordance with s. 235 of the Code, within twelve years provided for by s. 230 of the Code, and granted, the decree-holder may continue the proceedings even after the expiry of the twelve years ; the mere fact, that the proceedings terminate after the expiry of the twelve years, will not render the application one barred by limitation. BISHAN SINGH v. GANGA RAM, **27 P.R. 1905 =79 P.L.R. 1905**. (18 A. 482, 21 A. 155, *R.*) [*Diss.*, 17 P.R. 1910.]

(3427)—*O. 21, rr. 10, 21, s. 48, O. 21, r. 11, (2) (=ss. 230, 235, Civ. Pro. Code, 1882)—Execution of decree—Limitation—Subsequent application to execute the same decree—Application for execution previously struck off reinstated—Continuation of the previous application.*—A subsequent application to execute the same decree mentioned in s. 230 of the Code means a substantive application for execution in the form prescribed by s. 235 of the Code. Hence, where an application for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the

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proceedings in execution initiated by the application under s. 235 cannot be obtained within the period limited by s. 230. RAM SARUP v. DASRATH TIWARI, **8 A.L.J. 412, F.B.** (18 A. 482, *F.*)

(3428)—*O.* 21, rr. 10, 21, s. 48, O. XXI, r. 11 (2)—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1898, 137.

(3429)—*O.* 21, *rr.* 10, 21, *s.* 48, *O.* 21, *r.* 11 (2), *s.* 73, *O.* 38, *r.* 12 (=*ss.* 230, 235, 295, 490, *Civ. Pro Code*, 1882)—*Application for rateable distribution--Not conforming to requirements of s.* 235—*Whether amounts to execution application under s.* 295—*Attachment before judgment under s.* 490—*Whether presupposes an application for execution—Effect of the words "shall not be necessary to re-attach" in s.* 490.—A mere application for rateable distribution, which does not comply with the requirements of s. 235 in form or substance, cannot be treated as the sort of application falling within the scope of s. 295. (11 C.L.J. 69, *Rel. on.*) S. 230 provides for an application for execution and s. 235 specifies the form and contents of that application. S. 490, which gives validity and effect to the attachment before judgment even after decree for certain purposes, does not give rise to the implication that that attachment was made on a constructive application for execution of a decree that had not been passed. (31 M. 502, *Not F.*; 12 B. 400, 33 C. 639, *R.*) The section does not make the application to execute the decree a second application to execute it, because it says re-attachment is unnecessary. The subsisting attachment before judgment has its use in invalidating alienation by the judgment-debtor and dispensing with the need of a further attachment before sale, without necessitating the fiction, after a decree is passed, that there was a pre-existing application for execution. A.L.A.R. ARUNACHALLAM CHETTIAR v. P S.K. HAJI SHEIKH MEERA ROWTHER, **8 M.L T 226=7 Ind. Cas. 856.**

(3430)—*O. 21, rr.* 10, 21, *s.* 48, *O.* 21, *rr.* 11, (2), 17 (=*ss.* 230, 235, 245, *Civ. Pro. Code*, 1882)—*Execution of decree—Defective application, amendment of.*—In this case, a decree was passed on the 29th October, 1888. After several applications for execution were granted, the last written application for execution was presented on the 27th February, 1900, in which it was prayed "that the judgment-debtor be summoned and be ordered to pay the money due." On the 21st March, 1901, an oral application for attachment of the judgment-debtor's houses and ornaments was made. *Held*, that the application was barred by s. 230 of the Civ. Pro. Code, having been made more than 12 years after the decree was passed. *Held*, also, that the application, presented on the 27th February, 1900, was defective, as it did not comply with the requirements of s. 235 of the Civ. Pro. Code. *Held*, further, that an amendment could not be allowed under s. 245

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of an application which, when complete, would, even if dating from its original presentation, be barred by s. 230. KANHAYA LAL v. MAYA MAL, **112 P.L.R. 1902.**

(3431)—*O.* 21, *rr.* 10, 21, *s.* 48, *O.* 21, *r.* 16 (=*ss.* 230, 232, *Civ. Pro. Code*, 1877)—*Execution of decree—Due diligence.*—Under s. 230 of the Civ. Pro. Code, it is only when an application to execute a decree has been made under it *and granted*, that no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that due diligence was used in connection with the previous application. Therefore, when, during the pendency of an application for execution of a decree, made by the original decree-holder, the assignee of the decree applies to be allowed to execute it, and notice is ordered under s. 232 of the Civ. Pro. Code, but the process fee not having been paid, the application is dismissed, a subsequent application by the assignee to be allowed to execute the decree cannot be rejected, because his previous application had not been granted. SADIK ALI KHAN v. MUHAMMAD HUSAIN KHAN, **2 A. 384.**

(3432)—O. 21, rr. 10, 21, s. 48, O. 21, rr. 16, 22—Construction and object of—Substitution of legal representatives of decree-holders, if necessary, in execution—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168.

(3433)—*O.* 21, *rr.* 10, 21, *s.* 48; *O.* 21, *r.* 17 (1) (3) (4) (=*ss.* 230, 245, *Civ Pro. Code*, 1882)—*Execution of decree—Limitation—Application for execution in time but defective—Subsequent amendment after expiry of limitation—Effect of such amendment.*—Where an application to execute a decree was made by certain decree-holders within limitation, but the date of the decree of which execution was sought was erroneously entered therein, and where after notice to the judgment-debtors, the decree-holders were permitted by the Court, after the period of limitation in respect of such an application had expired, to amend their application by inserting the correct date of the decree, and such amendment was not at the time challenged by the judgment-debtors: *held*, that such amendment must be taken to relate back to the time when the application was originally made, and that it was not barred by limitation. AJUDHIA RAM v. MUHAMMAD MUNIR, **A.W.N. 1893, 112.** [*R.*, 20 A. 478, 2 A.L.J. 367.]

(3434)—*O* 21, *rr.* 10, 21, *s.* 48, *O.* 21, *r.* 17, *O* 1, *rr.* 8 (2), 10 (2), (3), (5), 11 (=*Civ. Pro. Code*, 1982, *ss.* 230, 245, 32—*Execution of decree—Presentation of unverified petition on last day of limitation—Return of petition for amendment within time fixed—Representation within time—Limitation — Death of party after hearing of appeal and before delivery of judgment—Representative of deceased not brought on record before delivery—Validity of judgment—Necessity for*

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representative—applying to be brought on record before preferring appeal.—The twelve years' period of limitation prescribed for the execution of a decree by s. 230 of the Code expired when the Court was closed. On behalf of the decree-holder, an unverified petition was presented for the execution of the decree on the first day on which the Court opened. The petitioner did not produce with his petition any evidence to show that he held a power of attorney entitling him to apply and did not produce his power of attorney. The Court returned the petition under s. 245 of the Code for amendment. The petitioner made the amendments required and represented the petition within the time allowed but after the lapse of the twelve years' period of limitation. *Held* that the Court ought to have rejected the application and not to have made an order allowing it to be amended. *Held* also that the petition as presented in the first instance could not save the operation of the statute of limitation. Where a party to an appeal died after the hearing of the appeal and before delivery of judgment, the judgment so delivered was not invalid by reason of the fact that the legal representative of the deceased was not brought on record before the delivery of the judgment. It is competent to such representative to prefer a second appeal from the decree passed by the appellate Court though he was not brought on record by that Court. It is not necessary for him to apply to that Court under s. 222 of the Code for being brought on record before filing the second appeal. He could apply to the second appellate Court for being brought on record and on being so brought, could prefer the second appeal. THATHACHARIAR v. VENKATESA TAWKER, **12 M.L.J. 438.**

(3435)—*O.* 21, *rr.* 10, 21, *s.* 48, *O.* 21, *r.* 22 (=*Civ. Pro. Code*, 1877, *ss* 230, 248)—*Limitation.*—An application for execution of a decree having been made on the 14th of December, 1877, and notice issued under s, 248, Civ. Pro. Code, a subsequent application made on 10th December, 1880, is not barred under the twelve years' rule of s. 230, as the previous application was not *granted* within the meaning of cl. (3) of s. 230. [*R.*, 15 A. 198.] The application is not barred as it was within three years from the last preceding application. CHENGAYA v. APPASAMI, **6 M. 172.**

(3436)—*O.* 21, *rr.* 10, 21, *s.* 48, *O.* 21, *r.* 30, **s. 73,** *III sch.* 2 (=*ss.* 230, 254, 295, 322, *Civ. Pro. Code*, 1882) — *Mortgage-decree — Money-decree.*—On a reference to ss. 254, 295 and 322, Civ. Pro. Code, it will be clearly seen, that the Civ. Pro. Code observes a distinction between a simple decree for the payment of money and a decree directing the realisation of money by the sale of mortgaged property . (16 A. 418, *F.*) So, a decree directing the realisation of a mortgage-debt by the sale of the mortgaged property is not a money-decree and therefore not within the scope of para. 3, s. 230, Civ. Pro. Code. FAZIL HOWLADAR v. KRISHNA BUNDHOO ROY, **25 C. 580=2 C.W.N. 118.**(11 C. 718, 24 C. 473, *R.*) [*F.*, 27 C. 285; *R.*, L.B.R. 1893-1900, 588, 26 C. 166, 31 C. 792, 31 B. 308 =9 Bom. L.R. 409; *Not F.*, 121 P.L.R. 1908.]

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(3437)—*O.* 21, *rr.* 10 *and* 21, *s.* 48, *O.* 21, *rr.* 43, 52, *s.* 73, *O.* 38, *rr.* 8, 11 *and* 12 (= *ss.* 230, 269, 272, 295, 486, 489, 490, *Civ. Pro. Code*, 1882)—*Attachment before judgment, effect of—Realisation in execution—Priority, s.* 490, *effect of.*—The object and effect of an attachment before judgment is simply to safeguard the property attached so as to enable the plaintiff to realise the amount of his decree, if he should get one. Though he has a security, he has no charge on the property, which remains that of the defendant, available for other decree-holders. Nor does a decree following such attachment constitute a plaintiff a secured creditor, but the latter must, as any other creditor, apply for execution, from which application he is not exempted, by s. 490 of the Civ. Pro. Code. In short, a plaintiff decree-holder, who has attached before judgment, has not, by reason of such attachment or process, incidental thereto any right to be treated preferentially to other judgment-creditors. There must be realisation in execution to give rights of priority. SEWDUT ROY v. SREE CANTO MAITY, **10 C. W N. 634=33 C. 639.** (12 B. 400, *R.*) [*R.*, 13 C.W.N. 1177.]

— **O. XXI, r. 11, para. (1) (=1882, s. 256= 1877, s. 236); and para (2) (=1882, s. 235=1877, s. 235=1859, s. 212).**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

(3437-*a*) O. 21, r. 11—See NOS. 153, 953-*a*, 971, 972, 1114, 1115, 1151, 1152, 3101, 3425, 3426, 3427, 3428, 3429, 3430, *supra* and NO. 3486, *infra*.

(3438)—O. 21, r. 11 (1)—*See* BEN. ACT VIII OF 1876, s. 10, 11 C.L.R. 540.

(3439)—*O.* 21, *r.* 11 (2) (=*Civ. Pro. Code*, 1882, s. 235)—*Verification of petition by general attorney of petitioner, whether proper.*—An execution application verified by the general attorney of the decree-holder who satisfies the Court that he is acquainted with the facts of the case, is properly verified within the meaning of s. 235 of the Civ. Pro. Code, though the principal may be residing within the jurisdiction of the Court. BAKAR SAJJAD v. UDIT NARAIN SINGH, **26 A. 154=A W.N. 1903, 1209.** (23 A. 499, *D.*)

(3439-*a*)—*O.* 21, *r.* 11 (2) (=*s.* 235, *Civ. Pro. Code*, 1882)—*Will—Executor—Legatee—Suit—Administration suit*—The plaintiff, a legatee under a will, brought a suit, against the executors of the will, to recover the sum bequeathed to him by the testator. The Court of first instance awarded his claim. The lower appellate Court was of opinion that the plaintiff

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should have brought an administration suit, making the other legatees under the will parties to it. The Court asked the plaintiff to amend the plaint and to add all the legatees as parties. This the plaintiff declined to do: at which the Court dismissed his suit as one not properly framed. On appeal to the High Court: *Held*, that the lower appellate Court was in error in holding that the plaintiff was not entitled to sue the executors for the legacy bequeathed to him. PURSHOTAM v. KALA, **3 Bom. L.R. 932=26 B. 301.** (*R.*, 9 Dom. L.R. 404.)

(3440—3445)—O. 21, r. 11 (2)—Acknowledgment under s. 19, Limitation Act—Requisites of valid acknowledgment—"Application in accordance with law," what amounts to—*See* LIMITATION ACT, 1908, s. 19, 5 N.L.R. 8=1 Ind. Cas. 240.

(3446)—O. 21, r. 11 (2)—*See* PRACTICE AND PROCEDURE, 16 W.R. 25.

(3447)—O. 21, r. 11 (2) (*j*)—Execution of rent decree below Rs. 500—*See* U.P. ACT XXII OF 1886, s. 145, 9 Ind. Cas. 240.

(3448)—*O. 21, rr. 11 (2), 13 (=Civ. Pro. Code, 1882, ss. 235, 237)—Non-specification of property to be attached—Effect.*—The fact that an application for execution did not give a sufficient description of the property of the judgment-debtor as required by s. 237, though it did state that a specification of the property sought to be attached existed in a previous execution case, is a defect, because it was not a strict compliance with the provisions of s. 237: but it does not follow that it was not an application at all under s. 235. HARRY CHARAN BOSE v. SOBAYDAR SHEIKH, **12 C. 161.** [*D.*, 14 C. 124; *R.*, 17 C. 631, F.B.]

(3449)—*O. 21, rr. 11 (2), 13, 17 (=ss 235, 237, 245, Civ. Pro. Code, 1882)—Execution of decree—Omission to describe property sought to be attached—Limitation.*—S. 237 says that, in addition to stating what property he wants to attach, the applicant shall describe it, and that is essential for the purpose of showing what property it is intended to attach; but sufficiency of description cannot be essential, where it is accompanied by a declaration that the creditor intends to take the whole. If however, s. 237 does apply, it is a mere defect of description, and that defect can be remedied under s. 245. Where, the application is afterwards amended by giving the particulars required by s. 237, on an application made at a later period, the two applications become an entire application, dating from the date the first application was presented. J. G. MAGGREGOR v. TARINI CHURN SIRCAR, **14 C. 124.** (12 C.L.R. 279, *F.*) [*Overruled*, 17 C. 631, F.B.]

(3450)—*O. 21, rr. 11 (2), 13, 66, 14 (=ss. 235, 237, 238, Civ. Pro. Code, 1882)—Execution of decree—Application for sale of immoveable property—Extract not filed—Application struck off at creditor's request—Final disposal—Fresh*

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application—Revival of old application—Construction—Limitation Act (IX of 1908), sch. I, art. 182 (5).—On the 19th January, 1905, an execution-creditor filed an application under s. 235, Civ. Pro. Code, 1882, for attachment and sale of certain immoveable property in execution of a mortgage-decree dated 16th January, 1903. Attachment and sale were ordered and execution was transferred to the Deputy Commissioner, who returned the papers pointing out that the application for execution referred to unsurveyed land, whereas the land which the execution-creditor required to be sold was surveyed. On the 14th January, 1907, the execution-creditor appeared in Court and stated that the application might be struck off and he would apply a second time with proper extracts of survey numbers owned by the judgment-debtor. The Court ordered the file to be struck off and allowed the creditor his costs. The judgment-creditor then filed the present application on the 12th April, 1908. *Held*, that the application was time-barred under art. 182 (5) of the Limitation Act. The order of the 14th January, 1907, was an order disposing of the application. The execution had been suspended by an act of the judgment-creditor, by his deliberate withdrawal. Therefore, on the 12th April, 1908, there was no execution pending under the first application; the attachment had been removed and all potentiality for active operation that the application had ever possessed had not only been suspended but terminated by the order of 14th January, 1907. The application of 1905 did not comply with the provisions of ss. 237, 238, Civ. Pro. Code. Consquently, the application of 1908 could not be considered as an application to restore or revive the old application. (27 A. 334, 1 C.L.J. 381, 15 M.L.J. 258, 9 C.W.N. 601, 2 A.L.J. 397, 7 Bom. L.R. 433, *D.*) There is no principle of law or equity which justifies a Court in construing an application as something essentially different from what it really is, in order to give relief to a party whose case seems to demand sympathetic treatment. JANUL v. HARUMAL, **11 Ind. Cas. 77.**

(3451)—*O. 21, rr. 11 (2), 17 (=ss. 235, 245, Civ. Pro. Code, 1882)*—In framing s. 235, the Legislature had apparently in view that the application should be such upon which the Court would be justified in taking action, and, therefore, s. 245 provides that the Court should, on receiving an application, ascertain whether the requirements of s. 235, etc., have been complied with. GOPAL SAH v. JANKI KOER, **23 C. 217.**

(3452)—*O. 21, rr. 11 (2) & 22 (=Civ. Pro. Code, 1882, ss. 235 and 248)—Issue of notice to judgment-debtor on defective application for execution — Saving of limitation.*— Where a notice is issued under s. 248 of the Code, its legal effect, as affording a new starting point for a fresh period of limitation, is not in any way affected by the fact that the application, with reference to which the Court acted, may

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have been irregular in form or defective in some of the particulars required by s. 235 of the Code. MUKUND RAM SUKAL v. HARNARAIN, **11 C.P.L.R. 157.** (1 A. 675, *F.*) [*R.*, 1 N.L.R. 61.]

(3453)—*O. 21, rr. 11 (2), 22 (=ss. 235 and 248, Civ. Pro. Code, 1882)—Addition of parties—Party appellant—Test—Guardian ad litem—Appointment, how long continues—Court of Wards Act (IX of 1879, B.C.), ss. 5, 35 and 51—Property not taken charge of—Court of Wards—Guardian.*—When a person applies to be added as a party-appellant, the test is whether he can urge any of the grounds, upon which the validity of the original Court's order is called in question. If he cannot, he ought not to be added as an appellant. Where a person is named as the guardian *ad litem* in an application for execution, and notice under s. 248 of the Civ. Pro. Code, is issued upon him as such guardian, it must be presumed that he has been appointed guardian by implication by the Court; his appointment subsists, so long as the *lis* is pending, and until it is formally revoked by the Court. When the manager under the Court of Wards has not taken possession of a certain property, the Court is not in charge of such property and cannot deal with it; and in a litigation with respect to such property, the manager of the Court of Wards need not necessarily be made the guardian or next friend of the ward. KRISHNA PERSHAD SINGH v. GOSTA BEHARI KUNDU, **5 C.L.J. 434.** (14 C. 204; 15 I.A. 195=16 C. 40, 20 I.A. 182=30 C. 1021, 24 A. 383, 28 A. 137, 14 A. 35, 22 M. 187, *R.*)

(3454)—*O. 21, rr. 11 (2), 32 (=ss. 235, 260, Civ. Pro. Code, 1882)—Decree, execution of—Application for execution, form of—Practice—Procedure.*—In a suit filed under s. 539, Civ. Pro. Code, a decree was passed appointing the defendants trustees to manage the temple property and laying down certain directions for their guidance in future. The plaintiffs filed a *darkhast* for execution of the decree praying that the defendants be ordered to act in the manner stated by the decree, and that if they failed to do so, steps be taken according to law. *Held* that the *darkhast* was not in accordance with s. 235, cl. (i) or s. 260, Civ. Pro. Code, 1882, as it did not state the mode in which the assistance of the Court was required, whether by arrest of the person of the judgment-debtor, or by attachment of his property, or otherwise. SHAKARMCHAND v. GHELABHAI, **19 B. 34.** [*R.*, 112 P.L.R. 1902, 116 P.R. 1907; *D.*, 33 C. 306=10 C.W.N. 297=3 C.L.J. 113.]

(3455)—*O. 21, rr. 11 (2), 53 (=Civ. Pro. Code, 1882, ss. 235, 273)—Execution of decree—Attachment of right to recover mesne profits by way of restitution—Decree for money—Mode of realization.*—A decree-holder attached a decree for mesne profits of certain land to which the judgment-debtors were entitled by way of restitution under a decree of the High Court reversing the decree of the lower Court awarding possession of the land to the plaintiff therein. The decree-holder then applied under s. 273, Civ. Pro. Code, for the realization of the mesne profits. *Held* that the right to recover mesne profits by way of restitution is not a decree for recovery within the meaning of s. 273, Civ. Pro. Code. The section applies only to cases where the right attached is a right expressly settled by the decree, and not a right arising from the decree by way of restitution. Consequently the decree-holder was not entitled to apply under s. 273 of the Code. His remedy was by suit or by summary process in execution under s. 583 of the Code. VASUDEVA RAVI VARMAN v. NARAYANA PATTAR, **24 M 341.**

(3456)—O. 21, rr. 11, (2), 66, 67, 69, 70—*See* SALE—SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES, 18 W.R. 55.

(3457)—*O. 21, rr. 11 (2), 19, 66, 70, 64 (=Civ. Pro. Code, 1882, ss. 235, 247, 287, 284)—Execution application for sale of the* darputni *tenure—Encumbrance, existence of—Notification—Omission to state existence of arrears of rent—Effect—Cross-claims under the same decree—Costs recoverable by judgment-debtor against decree-holder.*—Although there is no express provision in the Code casting on the decree-holder the duty of notifying encumbrances on any property sought to be brought to sale, the rules made by the High Court, under the provisions of s. 287 of the Code, cast on him the duty of notifying the existence of arrears due to him in respect of the property he seeks to bring to sale. An arrear of *darputni* rent due in respect of the property sought to be sold is to be regarded as one of the matters to be notified as being material for the purchaser to know in order to judge of the nature and value of the property, and the omission of the decree-holder to notify such arrear due to him at the date of the issue of the proclamation for the sale of the property has the effect of destroying the lien he has upon the property. (10 C. 609, 15 M. 412, *R. and F.*). [*R.*, 11 O.C. 206] Under s. 247, Civ. Pro. Code, what the decree-holder is entitled to enforce execution of, is the difference between the amount found recoverable by him and the amount which the judgment-holder is entitled to recover against him. SRIMATI GIRIBALA DEBIA v. SRIMATI RANI MINA KUMARI, **5 C.W.N. 497.**

(3458&3459)—O. 21, r. 11 (3)—Application for possession by mortgagor who has obtained a decree for redemption, form of—*See* MORTGAGE—REDEMPTION, 4 L.B.R. 83.

——O. XXI, r. 12 (=1882, s. 236=1877, s. 236=1859, s. 214).

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

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(3460)—*O. 21, r. 12 (=s. 236, Civ. Pro. Code, 1882)—Court-sale—Inaccurate description—Wrong date—No prejudice—Sale, valid—Tr. P. Act, 1882, s. 135 (old), s. 2 (d)—Execution sales—Non-applicability of s. 135 (old).*—Where, in a Court-sale the plaintiff purchased a part interest in a bond, the date of which was wrongly given by a clerical error, while all other particulars were correctly given and none were under a mistake as to what was sold. *Held*, that the sale passed a valid title in the bond. (30 C. 699, *D.*) S. 236, Civ. Pro. Code, 1882, only requires a reasonable accurate description. S. 135 (old), Tr. P. Act, 1882, has, by virtue of s. 2 (*d*) of the same Act, no application to sales in execution. PALANIAPPA THEVAN v. SHADOGOPA MUDALIAR, **9 M.L.T. 319=9 Ind. Cas. 729.**

(3461)—O. 21, r. 12—*See* ATTACHMENT—GENERAL, 2 B.L.R. F.B. 91=11 W.R. F.B. 8.

(3461-*a*)—O. 21, r. 12—*See* No. 5150, *infra*.

——O. XXI, r. 13 (=1882, s. 237=1877, s. 237 =1859, s. 213).

See EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURTS.

(3462)—O. 21, r. 13—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 15 M. 412.

(3463)—O. 21, r. 13—Specification of judgment-debtor's interest in property attached—*See* HINDU LAW—ALIENATION, 14 A. 190=A.W.N. 1892, 53.

(3464)—O. 21, r. 13—*See* Nos. 1114, 3448, 3449, 3570, *supra* and No. 4052, *infra*.

(3465)—*O. 21, r. 13, s. 99 (=ss. 237 and 578, Civ. Pro. Code, 1882)—Execution of decree—Application for attachment — Omission to verify inventory of property sought to be attached—Irregularity—Held*, that the omission, in an application in execution for attachment of immoveable property, to verify the inventory of the property sought to be attached in the manner prescribed by s. 237 of the Code of Civil Procedure, is an irregularity only and does not vitiate the application. NASIR-UN-NISSA v. GHAFUR-UD DIN, **A.W.N. 1905, 263=28 A. 244.** (22 A. 55, *F.*)

(3466)—*O. 21, rr. 13, 14 (=Civ. Pro. Code, 1859, s. 213)—Attachment.*—S. 213 of the Code laid down that the creditor who applied for an attachment of his judgment-debtor's property, was bound to specify the debtor's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same. ARDESIR NASARVANJI v. MUSE NATHA AMIJI, **1 B. 601.**

(3467)—*O. 21, rr. 13, 14 (=Civ. Pro. Code, 1859, s. 213)—Execution of decree—Duty of judgment-creditor.*—A judgment-creditor bringing the property of his judgment-debtor to sale in execution of his decree is bound, under s. 213 of the Civ. Pro. Code, 1859, to specify the judgment-debtor's interest in the property to the best of his belief.—AGARCHAND GUMAN CHAND v RAKHMA HANMANT, **12 B. 678.** [*R.*, 22 B. 686.]

(3468)—O. 21, rr. 13, 14—*See* ATTACHMENT—MODE OF ATTACHMENT, 18 W. R. 411, 11 W.R. 175.

(3469)—O. 21, rr. 13, 14—*See* ISSUES—FRAMING ISSUES, 8 W.R. 354.

(3470)—*O. 21, rr. 13, 54, s. 64 (=Civ. Pro. Code, 1877, ss. 237, 274, 276)—Attachment of immoveable property—Private alienation after attachment—Effect of material misdescription.*—Where there has been no regular attachment duly intimated and made known as required by s. 276, Civ. Pro. Code, the prohibition against alienation contained in that section cannot have any effect. When property intended to be attached, is wrongly described in material particulars, both in the application for attachment and in the order of attachment, it cannot be said that there is a valid attachment duly intimated and made known. And a private alienation of such property made to a *bona fide* purchaser after such attachment, cannot be set aside as void. GUMANI v. HARDWAR PANDY, **3 A. 693=A.W.N. 1881, 59.** [*Appr.*, 7 A. 702.]

(3471)—O. 21, rr. 13, 66, 70—*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 O.C. 206.

——O. XXI, r. 14 (=1882, s. 238=1877, s. 238=1859, s. 213).

(3471-*a*)—O. 21, r. 14—*See* NOS. 3450, 3466, to 3469, *supra*, and NO. 3628, 4052, *infra*.

——O. XXI, r. 15 (=1882, s. 231=1877, s. 231=1859, s. 207).

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

See LIMITATION ACT, 1908, art. 182.

(3472)—*O. 21, r. 15—Decree, execution of.*—S. 215, Act VIII of 1859, which has been practically re-enacted by s. 15 of Act XXIII of 1861, does not make it essential that the decree itself should be filed. Certain particulars specified in s. 212 of Act VIII of 1859 are required, and on them the Judge is empowered to pass orders for execution. SUFUR ALI v. MOHESH CHUNDER KAUG, **4 W.R. Mis. 15.**

(3473)—*O. 21, r. 15 (=s. 231, Civ. Pro. Code, 1882)—Application by joint decree-holder—Exercise of judicial discretion by Courts in dealing with applications under s. 231, Civ. Pro. Code.*—In dealing with an application under s. 231, Civ. Pro. Code, a Court is bound to exercise judicial discretion and to pass orders in accordance with law. The provisions of the

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second part of s. 231, Civ. Pro. Code, are imperative. S. 231, Civ. Pro. Code permits one of the several joint decree-holders to apply for the execution of the decree for the benefit of them all. It does not permit one of several joint decree-holders to apply for execution for the benefit of himself alone, as was done in this case. On receipt of such an application, the duty of the Court is to consider whether there is sufficient cause for allowing execution. Ordinarily, all the holders of a joint decree should join in the application for execution. The grant of execution to one of several joint decree-holders is exceptional and should be allowed only when there is sufficient cause. It is not clear in the present case that there was any sufficient cause for allowing execution to Maung Chet alone. MAUNG SUN v. MANUG CHET, **U.B.R. 1897—1901, Vol. II, 247.**

(3474)—*O. 21, r. 15 (=Civ. Pro. Code, 1882, s. 231 c)—One of several decree-holders applying for execution—Judgment-debtor cannot object.*—When a decree is passed in favour of two or more persons, any one of them may, under s. 231-c, Civ. Pro. Code, apply for execution subject to the rights of the other decree-holders being protected by order of the Court. Where one of the plaintiffs applies for execution of the decree and the others do not object to execution being granted to him, it is not for the judgment-debtors to object to the execution being granted. KRISHNAPPA HOLLA v. SAVITRI, **8 M.L.J. 91.**

(3475)—*O. 21, r. 15 (=Civ. Pro. Code, 1882, s. 231)—Right of one of several decree holders to certify satisfaction of whole decree—T.P. Act (IV of 1882), s. 89.*—One of two joint decree holders under s. 88 of the T.P. Act is not competent to certify satisfaction of the whole decree under s. 231 of the Civ. Pro. Code. The other decree-holder can, notwithstanding such certificate, apply for and get an order absolute for sale in respect of his share in the decretal amount and such share only. TAMMAN SINGH v. LACHMIN KUNWARI, **26 A. 318.** (4 C.L.R. 70, *F.*) [*F.*, 26 A. 334; *R.*, 28 A. 252=A.W.N. 1906, 16=3 A.L.J. 49.]

(3476)—*O. 21, r. 15 (=s. 231, Civ. Pro. Code, 1882)—Order—Appeal does not lie against such order.*—No appeal lies against an order passed under s. 231 of the Code of Civil Procedure. RATANLAL v. BAI GULAB, **1 Bom. L.R. 87=23 B, 623.**

(3477)—*O. 21, r. 15 (=s. 231, Civ. Pro. Code 1882)—Joint decree for money—Payment out of Court to one of the decree holders—Judgment-debtor discharged only if payment be for benefit of all, otherwise not.*—Where a payment is made, out of Court, to one of several joint decree-holders, such payment will discharge the judgment-debtor, if it is proved to be for the benefit of all and if it is certified to the Court. But, if the payment is not proved to be for the benefit of all the decree-holders, such payment will operate as a discharge to the extent only of the share of the decree-amount to which the payee is entitled. The Code of Civil Procedure regards the interest of joint decree holders as a tenancy-in-common, and the principle underlying s. 231 must govern payments made out of Court. SAMBHUSA v. GOPAL, **1 N.L.R. 24.** (9 C. 831, 15 M. 343, 18 M. 464, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3478)—O. XXI, r. 15—*See* LIMITATION ACT, 1908, ss. 6 and 8, 28 C. 465=5 C.W.N. 767.

(3479)—O. XXI, r. 15—Joint decree-holders—Decree barred against one if barred against both—Joint execution—Creditors—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, 25 M. 431, F.B. =12 M.L.J. 166.

(3480 & 3481)—O. XXI, r. 15—Discharge by one decree-holder under—Effect—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, art. 182, 12 Bom. L.R. 682=34 B. 672=7 Ind. Cas. 939.

(3482)—O. XXI, r. 15—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 92, A.W.N. 1906, 16=3 A.L.J. 49=28 A. 252.

(3483)—O. XXI, r. 15—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHTS TO, 7 C.L.R. 537.

(3483-*a*)—O. XXI, r. 15—*See* NOS. 973, 3339—a, 3340, *supra*, AND NO. 4042, *infra*.

(3484)—*O. 21, r. 15, s. 47 (=ss. 231 and 244 Civ. Pro. Code, 1882)—Applications under s. 231 treated under s. 244—Appealability.*—Where an order appealed from purported to decide questions to be dealt with under s. 244 of the Code, party against whom it is passed is entitled to an appeal therefrom. SRIMAT BHAYANKARAN RANGACHARLU v. SRIMAT BHAYANKARAN RANGANATHACHARLU, **2 M.L.T. 307.** (23 M. 517, 28 M. 127, *F.*)

(3485)—*O. 21, rr. 15, 2 (=Civ. Pro. Code, 1882, ss. 231, 258)—Power of one of two decree-holders to certify payment of whole decree.*—One of two or more decree-holders cannot, except with the consent of the others, certify satisfaction of the entire decree under s. 258 of the Civ. Pro. Code, by a payment made out of Court. MOTI RAM v. HANNU PRASAD, **26 A. 334=1 A.L.J. 40=A.W.N. 1904, 34.** (4 C.L.R. 70, 2 B.L.R. App. 43, 15 M. 343, 9 C. 831, 26 A. 318, 1 Agra Misc., App. 16, *R.*; 22 W.R. 77, *Diss.*) [*F.*, 4 P.R. 1906=93 P.L.R. 1906.]

(3486)—*O. 21, rr. 15, 11 (2) (=Civ. Pro. Code, 1882, ss. 231, 235)—Execution of decree in respect of part of the property decreed.*—Where an application for execution filed by the decree-holder is in accordance with the provisions of s. 235, Civ. Pro. Code, and within the term of limitation, there is nothing in the law (s. 131) to render it inadmissible, because the decree-holder seeks to execute the decree in respect of a part of the property decree. The doctrine that a decree can only be executed as

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a whole, and not partly by one of the plaintiffs, is an erroneous one and would lead to the consequence that a defendant could prevent execution by buying the interest of the plaintiff. Where a joint decree is passed in favour of four persons, and three of them have sold their interest to a stranger, who refuses to join the remaining decree-holder in executing the decree and is alleged to collude with the judgment-debtors, the remaining decree-holder is under those circumstances entitled to execute for a part. KUDHAI v. SHEO DAYAL. **A.W.N. 1886, 125.**

(3487 & 3488)—O. 21, rr. 15, 16, 21, s. 48 — *See* EXECUTION OF DECREE — JOINT DECREES, EXECUTION OF, 24 W.R. 245.

(3489)—*O. 21, rr. 15, 21, s. 48 (=Civ. Pro. Code, 1859, s. 207)—Execution of decree not made nor certified—Policy of s. 207.*—Where an execution of a decree might have been made, through the Court, but has not been so made, nor has been certified to by decree-holder, the policy of s. 207, Code of Civil Procedure, 1859, is to exclude the reception of evidence on the point, or any question arising out of evidence before the Court. DWARKANATH DOSS BISWAS v. UMODA CHURN DOSS, **8 W.R. 318.**

(3490)—O. 21, rr. 15, 21, s. 48—*See* APPEAL —DECREES AND EXECUTION OF DECREES. 17 W.R. 136, 17 W.R. 415.

(3491)—O. 21, rr. 15, 21, s. 48—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 21 W.R. 31.

(3492)—O. 21, rr. 15, 21, s. 48—*See* EXECUTION OF DECREE—JOINT DECREES, EXECUTION OF, 19 W.R. 302, 3 C.L.R. 513, 15 W.R. 159, 2 B.L.R. App. 47=11 W.R. 343, 2 Agra 183.

(3493)—O. 21, rr. 15, 21, s. 40—*See* LIMITATION ACT 1908, ART. 182—JOINT DECREES, 22 W.R. 468, 1 B.L.R. A.C. 62=10 W.R. 95.

(3494)—O. 21, rr. 15, 21, s. 48—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 15 B. 242.

(3495)—O. 21, rr. 15, 21, s. 48—*See* MUKHTEAR, 24 W.R. 233.

(3495-*a*)—O. 21, rr. 15, 21, 22, s. 48—*See* LIMITATION ACT, 1908, ART. 182—GENERAL, B.L.R. Sup. Vol. 492=6 W.R. Mis. 98=1 Ind. Jur. N.S. 421.

(3496)—*O. 21, rr. 15, 32 (=ss. 231 and 260, Civ. Pro. Code, 1882)—Execution of decree for perpetual injunction, application for —Notice to judgment-debtor, whether necessary—Execution by one of two decree holders without notice—Relief not prayed for, whether allowable*—In executing a decree for perpetual injunction against a judgment-debtor, who has deliberately disobeyed an order of Court, has tried to evade it by colourable transfers of the property and has had ample opportunities to contest the allegations of the decree-holder, the Court is not bound to issue any notice to the judgment-debtor before passing an order under s. 260 of the Code, nor is any notice necessary under s. 231 (8 C. 174, *R.*) The decree-holder is not necessarily limited to the relief asked for in his application, but may be granted other reliefs, which the law allows him. DURGADAS NUNDI v. DEWARAJ AGARWALLA, **3 C.L.J. 112=10 C.W.N. 297=33 C. 306.** (19 B. 34, *D.*; 26 B. 287, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—**O. XXI, r. 16 (=1882, s. 232=1877, s. 232=1859, s. 208.)**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

See LIMITATION ACT, 1902, art. 182.

(3497)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Assignment of decree by joint decree-holder.*—There is no prohibition in law against one of several decree-holders assigning his interest under the decree. Whether such an assignment ought to be recognized under s. 232, Civ. Pro. Code, and the assignee permitted to take out execution, must depend upon the circumstances of each case. MUTHUNARAYANA REDDI v. BALAKRISHNA REDDI, **19 M. 306=6 M.L.J. 17.**

(3498)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Transfer of portion of decree—Absence of legislative prohibition—Transferee allowed to carry on execution proceedings.*—There exists no legislative prohibition against the transfer of a portion of a decree and there can be no objection to the transferee of a portion of a decree carrying on execution-proceedings, provided that the whole decree is executed, and that in the execution-proceedings, if any interest in the decree is left in the original judgment-creditors, their interests are provided for. KISHORE CHAND BHAKAT v. GISBORNE AND CO., **17 C. 341.** [*F.*, 19 M. 306].

(3499)—*O. 21, r. 16 (=Civ. Pro. Code, s. 232)—Transfer of decree—Application for mere recognition—Application for execution.*—There is no provision of law which requires the Court to recognise the validity of the transfer of a decree before the transferee can apply under s. 232, Civ. Pro. Code, to execute the decree. The only application which a transferee who, according to the definition of the term decree-holder, is himself a decree-holder, can make is an application under s. 232, Civ. Pro. Code, for execution of the decree, and he cannot make an application to the Court merely for recognizing him as transferee of the decree. RAMACHANDRA AIYAR v. SUBRAMANIA CHETTIAR, **14 M.L.J. 393.** [*F.*, 2 M.L.T. 339; *R.*, 31 M. 234=18 M.L.J. 224=4 M.L.T. 72, 17 M.L.J. 300.]

(3500)—*O. 21, r. 16 (=s. 208, Civ. Pro. Code, 1859).*—S. 208 (Act VIII of 1859)=s. 232, Civ. Pro. Code, Act XIV of 1882) would not apply to cases when the applicant for execution

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is not a transferee of the decree, either by assignment or by operation of law; it would not apply to cases where the right to an equitable interest in a decree is in question. Proceedings under the above section not being liable to appeal, a regular suit calling such proceedings in question might lie. ABIDUNNISSA KHATOON v. AMIRUNNISSA KHATOON, **2 C. 327, P.C. = 4 I.A. 66 = 3 Sar. 677.** (*Confirming*, 20 W.R. 305).

(3501)—*O. 21, r. 16 (= Civ. Pro. Code, 1859, s 208) — Assignment of decree—Rights of assignee —S. 208, Act VIII of 1859.*—The effect of s. 208, Act VIII of 1859, is to put a party to whom a decree is transferred into the position of the original decree-holder, and entitle him to have the decree executed, as if an application were made by the original decree-holder. SHAMANUND SURMAH v. SHUMBOO CHUNDER DOSS, **7 W.R. 205.**

(3502)—*O. 21, r. 16 (s. 208, Civ. Pro. Code, 1859)—Execution of decree by representatives of decree-holder (deceased)—Certificate—S. 208, Act VIII of 1859 (Civ. Pro. Code).*—Under s. 208, Act VIII of 1859, it is not essential that a certificate should, in every instance, be obtained by a representative before he can be allowed to apply for execution. RAJAH GOPAL SINGH DEB v. GOPAL CHUNDER CHUCKERBUTTY, **7 W.R. 393.**

(3503)—*O. 21, r. 16 (= Civ. Pro. Code, 1882, s. 232, proviso (b), application of—Assignee—Refusal of permission to execute decree—Appeal*—Proviso (*b*) to s. 232 of the Civ. Pro Code refers to a decree for money personally due by two or more persons, and not to a case, in which nothing was due from the assignee of the mortgage-decree, personally, and he was made a defendant in a suit upon the mortgage, only by reason of his having become the owner of the mortgaged property, in execution of a money-decree against the mortgagor. Such assignee is therefore entitled to take out execution of the mortgage-decree against the mortgagor. [*R.*, 9 Bom. L.R. 409 = 31 B. 308]. An order refusing permission to execute a decree would be appealable, only if the assignee had been legally placed on the record as decree-holder. LALLA BEGUM PERSHAD v. HOLLOWAY, **11 C. 393.** [*Commented upon*, 15 C.P. L.R. 69].

(3504)—*O. 21, r. 16 (= s. 232, Act XIV of 1882, Civ. Pro. Code)—Discretion of Court to allow or to refuse execution to proceed—Transfer of decree (really or nominally) by assignment in writing—Execution application by benamidar*—Under s. 232, Civ. Pro. Code, the Court which executes a decree, after giving notice to and hearing the objections (if any) of the decree-holder and judgment-debtor, has an absolute discretion to allow or to refuse to allow the execution to proceed at the instance of the person to whom a decree has been transferred by an assignment in writing. When, therefore, a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes a decree with the permission of the Court, the proceedings taken and the application on which they are based, are in accordance with law as between him (transferee) and the judgment-debtor, although he may be merely a *benamidar* and this is all that is required to keep the decree alive. BALKISHEN DAS v. BEDMATI KOER, **20 C. 388.** (9 C. 633 & 16 C. 355, *D.*; 5 C.L.R. 253, *R.*; 4 B.L.R. App. 40 and 19 W.R. 255, *F.*)

(3505)—*O. 21, r. 16 (= s. 232, Civ. Pro. Code, 1882) — Recognition of transfer — Exercise of discretion—Appellate Court to interfere only when improperly exercised*—Benami *transfer—No resulting trust—Transfer not to be recognized.*—The Court, which passed a decree, has under s. 232 of the Code, a discretion to allow a transferee to execute the decree. The appellate Court will not interfere with the exercise of the discretion, unless it is shown that the discretion has been improperly exercised. *Held*, also, where a transfer has been obtained by a judgment-debtor in the name of another without any intention of benefiting him within the meaning of s. 82, Trusts Act, the Court should not recognise the transfer, as the transaction is a trust to recover the judgment-debt from the co-debtors in contravention of the provisions of s. 232. WAMAN RAO v. TEK CHAND, **2 C.P.L.R. 45.**

(3506)—*O. 21, r. 16 (= Civ. Pro. Code, 1882, s. 232)*—Benami *transfer of decree—Right of real transferee to execute.*—Where a decree has been transferred to one person as a *benamidar* for the real transferee, notwithstanding the form of the transaction, it is the latter, *i.e.*, the person beneficially entitled under the transaction, that has admittedly the right to apply under s. 232 of the Civ. Pro. Code, and is entitled to execute the decree. MANIKKAM v. TATAYYA, **21 M. 388 = 8 M.L.J. 48.** [*R.*, 25 M. 545 = 12 M.L.J. 280, 17 M.L.J. 391 = 2 M.L.T. 197, 10 O.C. 263.]

(3507)—*O. 21, r. 16 (= s. 208, Civ. Pro. Code, 1859)—Power of Court to determine representative—Decree transferred by operation of law.*—In a proceeding under s. 208, Act VIII of 1859, the Court has not the power to determine who is the representative of a decree transferred by operation of law, where there is a contest about it. ABEEDOONNISSA KHATOON v. AMEEROONNISSA KHATOON, **20 W.R. 305.** [*Affirm*, 2 C. 327, P.C.]

(3508)—*O. 21, r. 16 (= s. 232, Civ. Pro. Code, 1882 = s. 208, Civ. Pro. Code, 1859)—Execution of decree—Adjustment.*—Where a decree-holder, seeking to execute his decree, is opposed by the judgment-debtor on the ground of having become the purchaser of it at a sale in execution of a decree of the Deputy Collector's Court; *held* that these proceedings amount to an adjustment out of Court, and cannot be recognised unless certified to by the judgment-creditor. A Court charged with the execution of a decree has no other discretion with regard

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

to noticing a transfer thereof than that given by s. 208, Act VIII of 1859. BHARUT CHUNDER ROY v. NAWAB NUZIR ALI KHAN BAHADOOR, **0W.R. 354.**

3509)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Execution of decree—Transfer by operation of law.*—Where, on the revocation of probate of a will, the minor son of the testator succeeds to the estate, which, up to the date it fell into his hands, had been in possession of his mother as executrix under the will, then there is succession or transfer by *operation of law* within the meaning of s. 232 of the Code; and the minor is therefore entitled to execute a decree obtained by the mother as executrix. UMASOONDARY DASSY v. PROJONATH BHUTTACHARJEE, **16 C. 347.** [*Appr.*, 21 M. 353; *R.*, 1 N.L.R. 49; 7 O.C. 78.]

(3510)—*O. 21, r. 16 (=s. 232, Civ. Pro. Code, 1882)—Transfer of a decree, when complete—Attachment after assignment, if ground for refusing execution.*—The transfer of a decree is complete when there is an assignment of it in writing. It is not conditional on the Court permitting the transferee-decree holder to execute the decree. S. 232, Civ. Pro. Code, recognises that the completion of a transfer does not depend upon any sanction of the Court. If there is a complete assignment prior to the attachment, the fact of attachment is not in itself a ground for refusing to allow the transferee to execute the decree. SUBBA NAICKER v. SAMINATH IYER, **5 M L T.260=1 Ind. Cas. 353.**

(3511)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Execution of decree transferred.*—Under s. 232 of the Code, a decree transferred by assignment in writing, or by operation of law, may be executed in the same manner and subject to the same conditions, as if it had not been so transferred. SAMBHURAM MAYACHAND v. MT. KHULSAMBI, **14 C.P.L.R 35.**

(3512)—*O. 21, r. 16, (=s. 208 Civ. Pro. Code, 1859, s. 11, Act XXIII of 1861)—Assignee of decree.*—An assignee of a decree, whose application, under s. 208, Civ. Pro. Code, was granted becomes a party within the meaning of s. 11, Act XXIII of 1861, and his name should be brought on the record. BALIKISHOON v. MAHOMED TAZAM ALLEE, **4 N.W.P. 90.**

(3513)—*O. 21, r. 16 (=s. 232 of 1882)—Assignment of decree—Application for recognition of title—Court to which he should apply.*—An assignee of a decree seeking for recognition of his title must apply to the Court which pronounced the decree and for leave under s. 208 of the Civ. Pro. Code, 1859, to have his name substituted for that of the plaintiff. NAKODA ISMAIL *valad* AHMED BARUCHA v. KASAM *valad* AZAM DUPLI, **9 B.H.C. 46.** [*R.*, 27 C. 488.]

(3514)—*O. 21, r. 6 (=s. 232 of old Code)—Application under—Refusal—Effect.*—If the Court refuses to recognize the assignment of a decree, a cause of action against the judgment-debtors arises which could be enforced in a regular suit. JOWALA SAHAI v. RAM RAKHA. **78 P.R. 1896.** (75 P.R. 1890, F.B., *F.*)

(3515)—*O. 21, r. 16 (=s. 232, Civ. Pro. Code, 1882)—Oral assignment of decree—Execution—Rights of assignee—Assignment by writing—Civ. Pro. Code, 1882, s. 232—Discretion of Court—Transfer of decree—Execution by transferee—Validity of decree questioned by judgment-debtor—Fraud.*—An assignee of a decree under an oral assignment has, as such, no *locus standi* at all to apply for execution of a decree, but as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion whether to recognise such assignment or not under s. 232 of the Civ. Pro. Code, 1882. [R., 9 Bom. L.R. 728=31 B. 462.] It is not competent to a judgment-debtor to raise the plea that the decree obtained against him is a nullity on the ground of the same having been obtained by fraud, where execution of the decree is taken out by an assignee thereof. PARVATA v. DIGAMBAR, **15 B. 307.**

(3516)—*O. 21, r 16 (=old s. 232)—Execution of decree—Assignment of decree by decree holder's widow, validity of—Succession Certificate Act, 1889, s. 4, absence of certificate.*—An assignment, by the widow of a decree-holder, of the decree without herself obtaining a succession certificate under s. 4 of the Act of 1889, is not valid. Under the right vested in her by operation of law she must apply to the Court according to s. 232, Civ. Pro. Code, 1882, and her application will be granted only on the production of the certificate. LAL CHAND v. NAND LAL, **37 P.R. 1893.**

(3517)—*O. 21, r. 16 (=s. 232, Civ. Pro. Code, 1882) — Application by assignee of decree for transmission and for notice under s 232, how treated.*—An application by an assignee of a decree for transmission of the decree and for a notice to issue under s. 232, Civ. Pro. Code can only be treated as one for execution. NANDO LAL v. CHUTTERPUT SINGH, **29 C. 235.**

(3518)—*O. 21 r. 16 (=s. 232, Civ. Pro, Code, 1882)—Transfer of portion of maintenance decree, validity of.*—Where only a portion of a maintenance decree, *viz.*, that relating to the arrears of maintenance already accrued due, was transferred, and the question was whether such transfer ought to be recognised. *Held*, that such transfer of a portion of a decree can be recognised, if the Court thinks the case a proper one (17 C. 341, 19 M. 306 *F.*); and that the assignment of a maintenance decree in respect of arrears due was valid. VENCATARAMANIAH v. VENCATA CHINULU, **6 M.L.T. 242=6 M.L.T. 294=33 M. 80.**

(3519)—*O 21, r. 16 (=s. 232 (b), Civ. Pro. Code, 1882)—Decree for money—Assigment in*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

wri ng—Transfer to one of the judgment-debtors—Execution proceedings by the transferee—Contribution suit.—It was directed by a decree that N should pay Rs. 90 and Rs. 11-5-3 as costs, and A should pay Rs. 30 with Rs. 3 12-4 as costs. A afterwards took a transfer of the decree to him by an assignment in writing, and applied to execute it against N to the extent of the Rs 90 and Rs. 11-5-3. The application was rejected on the ground that it came within cl. (*b*) of s. 232 of the Civ. Pro. Code. *Held*, that the decree for money so far as it related to the Rs.90 and costs was not a decree against several persons but against one person, that is N, and so far as that part of the decree was concerned, the transfer did not fall within cl. (*b*) of s. 232 of the Civ. Pro. Code. The purpose of cl. (*b*) of s. 232 of the Civ. Pro. Code was not to deprive the transferee of a decree who might happen to be one of the judgment-debtors of all right, but to impose upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution. ANANT VINAYAK v. NAGAPPA SUBRAYA, **10 Bom. L.R. 89=32 B. 195.**

(3520)—*O.* 21, *r.* 16 (=s. 232, *Civ. Pro. Code*, 1882)—*Execution of decree—Assignment of decree—Execution by assignee — Notice to transferor and to judgment-debtor.*—No execution of a decree can proceed at the instance of an assignee from the judgment-creditor, unless notice has been served both upon the transferor and the judgment-debtor. The provision as to such notice in s. 232 is imperative and makes such service a condition precedent to the execution. It is not enough if notice has been served upon the judgment-debtor alone. SREENATH DAS v. ACHUTANANDA MAHANTI, **11 C.L.J. 354=6 Ind. Cas. 262.**

(3521)—*O.* 21, *r.* 16 (=*Civ. Pro. Code*, 1882, s. 232)—*Assignee—Right of party to enforce decree—Right of assignee—Permission of Court.*—A party to a suit may enforce any decree he may get, as a matter of right; but an assignee of such decree can only do so after obtaining the Court's permission. SHAMA PUDOO DUTT v. NOBIN CHUNDER BOSE, **15 W.R. 283.** [*R.* 10 C.L.J. 396.]

(3522)—*O.* 21, *r.* 16 (=s. 232, *Civ. Pro. Code*, 1882)—*Execution of decree—Assignment of decree—Question of validity of assignment—Jurisdiction of Court passing the decree.*—The question of the validity of an order, under s. 232 of the Code, allowing an assignment of the decree is a question to be determined by the Court that passed the decree, and not by the Court to which the decree has been transferred for execution. LALA GOPAL DAS v. PANDIT PREM NATH, **156 P L R 1905.** [5 C. 736, 21 B. 456, *Relied on*; 7 A. 73, *R.*]

(3523)—*O.* 21, *r.* 16—*Nature of order recognising assignment of decree—Order final—Appeal—Securing recognition of assignment, Procedure for—Court to which decree transmitted for execution cannot recognise.*—An appeal lies from an order of Court recognising a person as the assignee of a decree, as such order is final. An application for recognition of title as the assignee of a decree must not be made to the Court to which such decree has been transferred for execution, but to that which passed the decree. FRAMJI RUSTOMJI v. RATANSA PESTANJI AND ANOTHER, **9 B.H C. 49.**

(3524)—*O.* 21, *r.* 16 (=s. 232, *Civ. Pro. Code*, 1882)—*Order allowed to become final—Subsequent regular suit.*—*Held*, that no suit will lie to establish a right to execute a decree, when an order dismissing an application, under s. 232, has been allowed to become final. AMANAT-UL-LAH KHAN v. SARDAH PARSAD. **A.W.N. 1906, 133=3 A L J 428=28 A. 613.** (1 A.L.J. 61, *Appr*; 20 A. 539, *D.*)

(3525)—*O.* 21, *r.* 16 (=*Civ. Pro. Code*, 1882, s. 232)—*Transfer of decree—Ground for refusing execution.*—Where a decree against A and B was purchased by C, a creditor of A, who was interested in A and wanted to prevent A being adjudicated an insolvent, with the object of executing it, against B, who was solvent, the nature of the decree being such, that B could not claim contribution from A, execution of the decree could not be refused to C, on the ground of the benefit likely to be gained by A. AGRA BANK v. CRIPPS, **8 M. 455.**

(3526)—*O.* 21, *r.* 16 (=s. 232, *Civ. Pro. Code*, 1882)—*Sale of property, the subject of a decree—Right to execute the decree.*—The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily, carry with it the right to execute the decree. The vendor obtained a decree for possession of certain property. He sold portions of the property to the respondents who applied for execution of decree; *held* that no application could legally be made to execute the decree under s. 232 of the Civ. Pro. Code. HANSRAJ-PAL v. MUKHRAJI, **4 A.L.J. 759=A.W.N 1907 280=30 A. 28.**

(3527)—*O.* 21, *r.* 16, (=s. 232 *Civ. Pro. Code*, 1882)—*Decree—Execution—Transfer of decree by operation of law—Decree transferred to one of the persons against whom it is passed as the legal representative of a deceased and against the property of the deceased—Execution by the transferee—"A decree for money against several persons."*—A decree was passed against P, as the legal representative of his brother A (deceased) and against S, as the legal representative of her father-in-law, L (deceased) The decree directed that the plaintiff (decree holder) should recover Rs. 22, 748, and costs from the property of each of the two deceased abovementioned. After making other provisions the decree provided: "It will also be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit." The plaintiff died soon after obtaining the decree, which was transferred by operation of law to his heir P.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Subsequently P applied to execute the decree against S. The Court rejected the application for execution upon the ground that it was a decree for money against P and S "jointly as well as severally." *Held*, that there was nothing in the decree which saddled P and S with any personal liability to pay money, either jointly or severally : that question was expressly reserved by the decree for determination in the course of execution proceedings : that the amount of Rs. 22,748 and costs which was recoverable under the decree was made payable not by P and S personally but out of the property of the deceased A and L ; that no doubt by reason of the direction in the decree that the question of the personal liability of P and S should be determined in execution proceedings, there might subsequently be, when that liability had been determined, a decree for money against them ; but till then it was a mere contingency, which could not make the decree as it existed a decree for money against P and S ; that, therefore, s. 232 of the Civ. Prc. Code presented no bar to the decree of P being executed against the property of L in the hands of S. The expression "a decree for money against several persons" in s. 232 of the Civ. Pro. Code, 1882, means a personal decree for the payment of money by two or more defendants jointly. Cl. (*b*) of s. 232 does not extend to a decree which may become a decree for money against several persons on determination by the Court. It applies only where in the decree there is a distinct order upon the defendants personally to pay the money. PANACHAND v. SUNDRABAI, **9 Bom. L.R. 409=31 B. 808.**

(3528)—*O. 21, r. 16 (=s. 232, Civ. Pro. Code, 1882)—Limitation Act (XV of 1877), art. 179—Step-in-aid of execution—Civ. Pro. Code (Act XIV of 1882), s. 232—Decree holder—Transfer of decree by act of parties—Assignment in writing of the decree—The assignment can be produced at a late stage of execution proceeding by the transferee.*—While D and V, two brothers, lived together, a decree was obtained in the name of D, who made applications to execute the decree. The last of these was on the 18th April, 1905. The two brothers then separated. V, who became entitled to the decree on the partition but who had no assignment in writing of the decree from D, applied to execute the decree on the 3rd June and again on the 27th July, 1908. It was contended that V was not entitled to apply in execution, and that the applications were not steps-in-aid of execution. The Court granted time to V within which he was asked to produce an assignment in writing from D. *Held*, that the technical defect which existed in the application of the 3rd June, 1908 was cured by the subsequent production of the assignment in writing and that, therefore, the application, dated the 27th July, 1908, was in order. SALEKHAN v. VISHVANATH, **13 Bom. L.R 22.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3529)—*O. 21, r. 16 (=s. 232, Civ. Pro. Code, 1882)—Application by decree holder's representative to be recognised as decree-holder—Limitation Act, art. 179, cl. 4—Step in-aid of execution.*—An application made by the legal representative of a decree holder for recognising him as the decree-holder, is not prohibited by the Code. Such an application is, therefore, an application to take a step-in-aid of execution. SRINIVASA IYENGAR v. DHARNI MUDALI, **17 M.L.J. 475.** (26 A. 301, *R*)

(3529-*a*)—*O. 21, r. 16 (=s. 208, Civ. Pro. Code, 1859)—Joint decree holders—Assignment by one to the other—Payment by debtor to assignor before notice—Assignee prevented from executing against debtor.*—Two creditors obtained a joint decree against a debtor, their interests in the decree being clearly defined. One of the creditors assigned his interest to the other, and under s. 208 of Civ. Pro. Code the Court ordered execution in favour of the assignee solely. The assignor petitioned the Court and got an order cancelling the assignment and recognising him as one of the decree-holders. The assignee who appealed against the order got an injunction restraining the debtor from paying the assignor. The appellate Court declared that the decree belonged to the assignee solely. Before the injunction was served on the debtor, he paid the assignor, the amount of the decree. *Held* that the assignee could not execute against the debtor. BERTOLA v. JEEWUN RAM, **29 P.R. 1871.**

(3529-*b*)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Execution of a decree—Assignment of mortgage decree to one of the mortgagors—Validity—"A decree for money against several persons" meaning of.*—The expression "a decree for money against several persons" in s. 232 of the Civ. Pro Code, 1882, signifies a personal decree for the payment of money against two or more defendants jointly. Where a mortgage-decree calls upon all the judgment-debtors, consisting of mortgagors and transferees of equity of redemption, without distinction to pay up the decretal amount, and directs that, upon their failure to do so, the mortgaged properties will be sold, the decree is not a personal decree within the meaning of s. 232 of the Civ. Pro. Code. LALDHARI SINGH v. MANAGER, COURT OF WARDS, PHAPATPURA ESTATE, **14 C.L.J. 639.**

(3529-*c*)—*O. 21, r. 16 (=Civ. Pro. Code, 1882, s. 232)—Oral transfer of decree—Cannot be recognised—Transferee—No 'locus standi'—His application—A nullity—Not a step in aid of execution.*—S. 232, Civ. Pro. Code, 1882, means that the Court can recognise an assignment in writing or a transfer by operation of law, and cannot recognise any other mode of transfer, *e.g.*, an oral transfer. An assignee of a decree, under an oral transfer, has no *locus standi* to apply for execution. An application by such assignee is not in accordance with law ;

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

nor is it a step-in-aid of execution. The Court has no power to recognise such an application. The argument that the Code should be ignored in considering this question, because the Code was enacted after the Limitation Act came into force, is untenable. RAMANATHAN CHETTIAR v. SOKKANATHA GOWNDAN, **1911, 2 M.W.N. 389** (15 B. 207 *R.*; 19 C. 482, 16 A. 26, *D*; 20 C. 755, *Not F.*)

(3530)—O. 21, r. 16—*See* BEN ACT VIII OF 1885, s. 148, cl. (*h*), 1 C.W.N. 694.

(3531)—O 21, r. 16—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 4 B.L.R. A. C. 200=13 W.R. 224.

(3532)—O. 21, r. 16—*See* APPEAL—ORDERS, 12 M. 511.

(3533)—O. 21, r. 16—*See* CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 11 B. 368.

(3534)—O. 21, r. 16—*See* EXECUTION OF DECREE—JOINT DECREES, EXECUTION OF, 24 W.R. 11.

(3535)—O. 21, r. 16—Power of Courts to which decree was transferred to grant permission to continue execution proceedings begun upon the application of a decree-holder since deceased—*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 O.C. 112.

(3536)—O. 21, r. 16—*See* EXECUTION OF DECREE—MISCELLANEOUS, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.

(3537)—O. 21, r. 16—Insolvency—Composition with creditors—Assignment to surety of insolvent's estate—Adjudication set aside—Effect on previous decree—*See* INSOLVENCY—MISCELLANEOUS, 4 C.W.N. 785.

(3538 to 3541)—O. 21, r. 16—*See* JURISDICTION—QUESTION OF JURISDICTION, 11 B. 153.

(3542)—O. 21, r. 16—Proceedings subsequent to preliminary decrees for redemption and sale. —*See* MORTGAGE—REDEMPTION, 8 Ind. Cas. 986.

(3543)—O 21, r. 16—*See* MORTGAGE—MISCELLANEOUS, 13 C.L.R. 272.

(3544)—O. 21, r. 16—*See* PARTIES TO SUITS —MISCELLANEOUS, 1 N.W.P. 31.

(3545)—O. 21, r. 16—*See* SUCCESSION CERTIFICATE ACT, 1860, 1 A. 686.

(3545-*a*)—O. 21, r. 16—*See* NOS. 77, 110, 111, 581, 582, 3431, 3432, 3488, *supra* AND NO. 3771, *infra*.

(3546)—*O.* 21, *r.* 16, *ss.* 36, 37 (=*ss.* 232, 649, *Civ. Pro. Code*, 1882)—*Execution, application for, where, to be made—Transfer of jurisdiction "Court which passed the decree."*—The expression "the Court which passed the decree" in s. 232, Civ. Pro. Code, includes the Court which, by reason of a transfer of jurisdiction, has jurisdiction in respect of the subject-matter of the suit. S. 649, Civ. Pro. Code, should, if possible, be so construed as to make it convenient to parties to execute their decrees, the decree holders as well as the judgment-debtors. UDIT NARAIN CHOWDHURY v. MATHURA PERSHAD MAHATA, **12 C.W.N. 859=35 C. 974**.

(3547)—*O.* 21, *r.* 16, *s.* 47 (=*ss.* 232, 244-*c. Civ. Pro. Code*, 1882)—"*Transferee*"—"*Representative*," *meaning of*—A transferee of a decree from the decree holder under s. 232, Civ. Pro. Code, 1882, is a representative of the decree-holder. (16 A. 483, 26 C. 350, *F.*) The term "representative" also includes subsequent transferees from the transferee of the decree-holder. GANGA DAS SEAL v. YAKUB ALI DOBASHI, **27 C. 670.**

(3548)—*O.* 21, *r.* 16, *s.* 47 (=*Civ. Pro Code*, 1882, *ss.* 232, 244 (=*Assignment of property by trustees—Interest in decree vesting in assignee—Assignment resulting in transfer of decree by operation of law.*—The question was whether applicant was entitled to apply for the execution of the decree in question. He was not one of the plaintiffs on the record. The plaintiffs in the suit were trustees of the entire property of the applicant's uncle who by his Will left all his property to them as trustees for the applicant, his nephew, with directions that it should be assigned to him as soon as he came of age. The effect of the assignment made by the trustees accordingly was to vest in the applicant the whole interest in the decree in question, which was obtained in the suit pending at the time of the assignment. It was contended that the applicant was not a transferee of the decree under s. 232 of the Civ. Pro. Code, because the decree had not been transferred to him "by assignment in writing or by operation of law" and that, therefore, he was not entitled to apply for execution, but it was *held* that, under the circumstances, the decree had been transferred to the applicant "by operation of law." He was therefore entitled to sue out execution and was the representative of the original decree-holders within the meaning of cl. (c) of s. 244 of the Civ. Pro. Code. PURMANANDDAS JIWANDAS v. VALLABDAS WALLJI, **11 B. 506.** [*R.*, 3 O.C. 32, 15 C.P.L.R. 69.]

(3549)—*O.* 21, *r.* 16, *s.* 47 (=*ss.* 232, 244, *Civ. Pro. Code*, 1882)—*Transfer by decree-holder of property comprised in decree—Right of transferee to apply for execution of decree.*—Properties comprised in a decree for possession of some lands were acquired by appellants by virtue of two mortgages foreclosed in their favour. The appellants applied under s. 232, to permit them as transferees, by operation of law, to execute the decree, obtained by their mortgagors. *Held* that appellants were the representatives of the original decree-holders, within the meaning of s. 244, and that they were entitled to apply to be placed on the record and to be permitted to execute the decree obtained by their transferor,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

that on a transfer of property, the transferee acquires all the rights attaching to such property at the time of transfer including the right to execute decrees. RAI BAHADUR LALA ONKAR DAS v. SHAHBAZ KHAN, **1 N.L.R. 49.** (11 B. 368, 16 C. 347, 21 M. 353, 16 C. 284, *R.*)

(3550)—*O. 21, r. 16, s. 47 (=Civ. Pro. Code, 1882, ss. 232, 244)—Execution of decree—Application to be placed on record as transferee of decree—Suit to be declared such transferee.*—Where a person, alleging himself to be the transferee of a decree, had made an application, under s. 232, to be entered on the record as such transferee and that application had been rejected, but it did not appear that the application was rejected under such circumstances as would debar the applicant from making a fresh application to the same effect; it was held that the applicant was not debarred from bringing a suit to have his right as transferee of the decree declared. IMDAD HUSAIN v. LALTA PRASAD, **A.W.N. 1896, 201.**

(3551)—*O. 21, r. 16, s. 47 (=ss. 232, 244, Civ. Pro. Code, 1882) — Dismissal without enquiry of an application under s. 232, failure to appeal from—Separate suit for declaration, whether maintainable.*—Plaintiff had applied to be made a party to certain execution-proceedings, but the District Munsiff dismissed his petition, even without any inquiry into the question as to whether the plaintiff was the legal representative of the deceased judgment-creditor. It was open to the plaintiff to appeal against that order. (25 M. 548, *R.*) But, without doing so, he brought the present suit for declaration of his right to represent the judgment-creditor. *Held*, since his remedy was by way of appeal and he failed to take that remedy, he could not now bring a separate suit to obtain the same remedy. KUNHAMMAD v. AHMAD. **16 M.L.J. 27.**

(3552)—*O. 21, r. 16, s. 47 (=ss. 232, 244, Civ. Pro. Code, 1882 —Power of Court to stay execution discretionary and not obligatory.*—The appellant sought to enforce a decree on the ground that they were transferees thereof by operation of law. The transfer was disputed and the matter was *sub judice* in another suit. The application for execution was dismissed by the District Munsiff. *Held*, that the last clause of s. 244 of the Code does not make it obligatory on the Court either to stay execution until the right of the alleged transferee is determined by a separate suit or itself to determine the question. The Court has a discretion both under s. 232 and s. 244 of the Code either to stay execution or dismiss the petition. VAKULABHARANA v. RANGAIYAN CHETTY, **28 M. 357.**

(3553)—*O. 21, r. 16, s. 47 (=Civ. Pro. Code, 1882, ss. 232, 244)—Transfer of decree—Application for recognition of transfer—Objections—Registration Act, 1877, s. 28—Transfer of decree—Place of registration of transfer—Objection by judgment-debtor—Transfer of decree, substitution of assignee's name on record—Passing of title under assignment.*—The assignee of a decree transferred it to some other persons. These latter applied to be brought on record. Notice to the original assignee had not been given as required by s. 232, and, on his death, his legal representatives had not been cited as required by law. *Held* that the judgment-debtor could not be prejudiced by the order allowing the application and, the application being merely for a transfer of names, the objection that the transferor had not been cited was not a substantial one. *Held*, also, that the order allowing the application was appealable, as it involved questions arising between the parties to the decree or their legal representatives within the meaning of s. 244. [*F.*, 16 A. 483] Where the instrument transferring a mortgage decree was registered at a place where a small portion only of the mortgaged property was situate, the judgment-debtor could not object to the transfer, on the ground that the registration was not effected at a place where the substantial portion of the mortgaged property was situate, the matter being one between the transferor and the transferee. (7 A. 590, *Diss.*) Where a decree is transferred to another, the title of the assignor vests in the assignee, irrespective of the substitution of the assignee's name on the record in the place of that of the decree-holder. GULZARI LAL v. DAYA RAM, **9 A. 46.** [*F.*, 16 A. 483; *R.*, 5 M.L.T. 278.]

(3554)—*O. 21, r. 16, s. 47 (=ss. 232, 244, Civ. Pro. Code, 1882)—Execution of decree—Order for substitution of name of assignee in place of that of decree-holder—Appeal—Civ. Pro. Code, ss. 232 and 244.*—On an application for the substitution of the name of the assignee in the place of that of the original decree-holder, the following order was made:—"That the objections taken by the judgment debtor be disallowed with costs and the name of the purchaser of the decree be substituted in place of the original decree-holder, and that the case be struck off the miscellaneous file and a report be called for from the execution department." *Held* that the above order was an order coming within the provisions of s. 244 of the Civ. Pro. Code, and not merely an order preliminary to something to be done in the execution department, and being such, was appealable. PESCHE v. AULAD FATIMA, **A.W.N. 1891, 87.**

(3555)—*O. 21, r. 16, s. 47 (=Civ. Pro. Code, 1882, ss. 232, 244)—Appeal*—An order passed under s. 232, Civ. Pro. Code, refusing to recognize the transfer of a decree, may, for purposes of appeal, be regarded as an order passed under s. 244 and is therefore appealable. SUBBUTHAYAMMAL v. CHIDAMBARAM ASARI, **25 M. 383.** (25 M. 385, *Not F.*) [*R.*, 6 M.L.T. 273.]

(3556)—*O. 21, r. 16 47 =(Civ. Pro. Code, 1882, ss. 232, 244)—Amending Act VII of 1888,*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

s. 26—*Assignment of decree—Suit by assignee for declaration of validity of assignment—Effect of amending Act.*—A suit by an assignee of a decree for a declaration that he had obtained a valid assignment of the decree may properly be brought. The alteration of s. 244, Civ. Pro. Code, by the amending Act VII of 1888, s. 26, did not take away that right. The amendment was made in order to settle the conflict of decisions as to whether an appeal would lie against an order made under s. 232 of the Code. BOMMANAPATI VEERAPPA v. CHINTAKUNTA SRINIVASA RAU, **26 M. 264.** (14 M. 478, *R.*) [*R.*, 14 M.L.J. 401; *F.*, 28 M. 50.]

(3557)—*O. 21, r. 16, s 47 (=ss. 232 and 244, Civ. Pro. Code, 1882)—Hindu Law—Dayabhaga School—Mother's share on partition, if disposable by Will—Life-interest—Application for execution of decree by her executor—Refusal—Appeal.*— Under the Hindu Law, according to the Bengal School, when upon partition share is given to the mother, she gets it simply in lieu of, or as provision for her maintenance, and not because she is a coparcener in the estate, and the share reverts, upon her death, to her sons, out of whose portion it was taken. (13 C. 336, 15 C. 292, 16 C. 758, *F.*) When an application, by the executor to the estate of a Hindu lady, to execute a decree, which fell to her share, upon a partition of her husband's estate between herself and her sons was refused on the objection of the sons and the judgment-debtors, that the lady had only a life interest in the decree, and that it passed on her death to her sons, *held*, that appeal lay from the order under s. 244, Civ. Pro. Code, the question arising being a question between the legal representative of the lady and the judgment-debtors. HRIDOY KANT BATTACHARJEE v. BEHARI LAL MOOKERJEE, **11 C.W.N. 239.**

(3558)—*O. 21, r. 16, s. 47 (=Civ. Pro. Code, 1882, ss. 232, 244)—Refusal to execute decree assigned by original decree-holder — Second appeal.*—Where the Court passed an order under s. 232 refusing to execute a decree assigned by the original decree-holder, on the ground that the decree had been satisfied by payment to the original decree-holder, a second appeal lay from the order, as the order was one in reality passed under s. 244, inasmuch as it applied equally to the original decree-holder and the transferee. DEOJI AND BRIJ LALL v. RANCHORDASS, **4 C.P.L.R. 132.**

(3559)—*O. 21, r. 16, s. 47 (=ss. 232, 244, Civ. Pro. Code, 1882)—Acquisition, by transfer, of partial interest in decree—Right to be recognized as transferee—Separate suit to enforce the interest acquired by such assignee—Plaint in suit treated as application for execution.*—A decree was passed against defendant for possession of land and mesne profits and costs. The interest of the decree-holder, so far as it related to the land alone, having been purchased by the plaintiff in execution of a decree in another suit against the decree-holder, the plaintiff applied, under s. 232, to be recognized as transferee. That application was rejected, probably on the ground that he did not purchase all the interest of the decree-holder, he having purchased the interest so far as it concerned the land and not that which related to the mesne profits and costs. He brought the present suit for possession of the land, thus seeking to enforce the interest he purchased under the Court-sale. The defence was, that the suit was unsustainable, the matter being alleged to be one for adjudication under s. 244. *Held*, that, if the application of the plaintiff under s. 232 could not be granted on the ground that he had acquired only a partial interest in the subject-matter of the decree, he was entitled to enforce his right by a separate suit and the present suit was maintainable. (24 W.R. 11, *R.*). Assuming, however, that the application under s. 232 could be granted, the plaint in the suit could be treated, as an application for execution (22 C. 483, 22 A. 121, *R.*) and the same having been presented within the period of limitation, the plaintiff was entitled to the fruits of his purchase. In the result, the High Court dismissed the second appeal of the defendant. PASUPATHY AYYAR v. KOTHANDA RAM AYYAR, **28 M 64.** [*F.*, 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908; *R.*, 32 M. 425.]

(3560)—*O. 21, r. 16, s. 47 (=Civ. Pro. Code, 1882, ss. 232, 244)—Dismissal of execution application by beneficial holder of decree—Separate suit for declaration of right—Appeal.*—A person beneficially entitled under a decree, whose application under s. 232, Civ. Pro. Code, to execute the same has been rejected, may bring a separate suit for a declaration that he is the person entitled to execute the decree. (7 A. 457, 12 C. 105, *R.*). No appeal lies from such order of rejection and as such person cannot be deemed to be a decree-holder, s. 244, Civ. Pro. Code, does not bar a separate suit. SHEORAJ SINGH v. AMIN-UN-DIN KHAN, **20 A. 539=A.W.N. 1898, 145** (*R.*, 3 O.C. 32) *D.*, 28 A. 613=3 A.L.J. 418=A.W.N. 1906, 183.)

(3561)—*O. 21, r. 16, s. 47—See* APPEAL—DECREES AND EXECUTION OF DECREES, 16 A. 483=A.W.N. 1891, 184.

(3562)—*O. 21, r. 16, s. 49*—Sale of mortgaged property by transferee of money decree from the mortgagee—Validity—Applicability of s. 99 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882 ss. 67 and 99, 17 M.L.J. 503=3 M.L.T. 107=31 M. 33.

(3563)—*O. 21, r. 16, s. 50 (=Civ. Pro. Code, 1882, ss. 232, 234)—Assignment of decree—Right of assignee to execute—Death of judgment debtor—Extent of liability of judgment-debtor's representatives under decree.*—S. 232 of the Civ. Pro. Code, which lays down that notice must

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

be served on the judgment-debtor, provides also that notice shall be served on the "transferor." There is no express provision that the service may be made on the representative of the one any more than of the other. Still, it cannot be supposed that the Legislature intended the transferee's rights under a decree to be annulled by the death of the transferor, and the consequent impossibility of serving him with notice, and it is similarly most unlikely that the death of the judgment debtor was meant to prevent all execution of a transferred decree though not of one untransferred. In allowing the rights under a decree to be transferred, the Legislature must be supposed to have contemplated the transfer to be effectual, and to put the transferee (subject to a precaution against fraud) in the same position for getting execution as the judgment-creditor. Under s. 284 of the Civ. Pro. Code, a representative of a judgment-debtor, deceased, who has failed purposely or negligently to recover some debt due to the estate of the deceased, or some property belonging to it, is not liable in the same way as for "property of the deceased which has come to his hands." It has nowhere been provided that in an execution proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands, as for what actually has come to his hands. It may well be, that while the Legislature intended to bring the representative under the control of a summary inquiry where he had actually received property, it did not intend to make him, answerable in other cases, except through the medium of a suit for administration or other regular action. KHUSHROBHAI NASRVANJI v. HORMAZSHA PHIROZSHA, **11 B. 727.** [*R.*, 35 C. 1100=12 C.W.N. 614]

(3563-*a*)—*O.* 21, *r.* 16, s. 50 (=*Civ. Pro. Code*, 1882, ss 232, 244)—*Dismissal of application for execution by assignee-decree holder—Appeal.*—Where an application under s. 232, Civ. Pro. Code, by an assignee of a decree for execution of the decree is dismissed for default of appearance, the course open to the assignee decree-holder is to appeal against the order as being one which relates to the execution of a decree and as being between the parties to the decree or their representatives. A person, who, within the meaning of s. 232, is a transferee of a decree, is a representative of the decree-holder within the meaning s. 244, *qua* the decree. BUDHAN SINGH v. SALIG RAM, **1 A.L.J. 61.** (16 A. 483, *Appr.*) [*F.*, 28 A. 613=A.W.N. 1906, 133=3 A.L.J. 428.]

(3564)—*O.* 21, *r.* 16. ss. 3, 47 (=ss. 232, 295, 244, *Civ. Pro. Code*, 1882,—*Execution of decree—Application for rateable distribution by transferee to Court to which decree transferred*—Res judicata—*Court to which execution transferred — Application for execution order in—Appeal.*—The Court to which a decree is transferred for execution has no power to entertain the transferee's application for a rateable share in the assets, such application could only be entertained by the Court which passed the decree; an order passed by such executing Court will not operate a *res judicata* so as to prevent the judgment-debtors from questioning the right of the transferee to make an application for execution to that Court. [*R.*, 1 C.L.J. 315.] An order passed by the Court to which execution has been transferred, on an application by the transferee of a decree for rateable distribution, is appealable as an order under s. 244, Civ. Pro. Code. JAMESHAR PRASAD v. THAKUR PRASAD, **23 A. 443 =A.W.N. 1903, 99.** (16 A. 483, 27 C. 488, *R.*)

(3564-*a*)—*O.* 21, *r.* 16 *and ss.* 99, 151—*Decree—Assignment of decree—Execution of decree—Notice to judgment debtor—Attachment issued before hearing judgment-debtor's objections—Illegality—Irregularity — Practice.*—The assignee of a decree applied to the Court, under O. XXI, r. 16 of the Code of 1908, for notices to the transferor and the judgment-debtor, on the 18th June, 1910. He applied at the same time for attachment by seizure of the goods of the judgment-debtor in his shop. On the same day notices were issued by the Court and also a warrant of attachment. Before any objection had been heard on the part of the judgment-debtor, the property was attached in his shop by seizure on the 20th June 1910. The objections were heard on the 26th June, and on the 6th August, 1910 the Court *held* that the assignee was entitled to execution of the decree against the judgment-debtor. The lower Court held that the procedure adopted was a mere irregularity and the proceedings in attachment should not be set aside. *Held*, that the procedure adopted was unlawful and not merely irregular, inasmuch as the objections of the judgment-debtor had not been heard before the attachment, which was a step in the execution proceedings, had been ordered. KASSUM GOOLAM v. DAYABHAI, **13 Bom. L.R. 973.**

(3564-*b*)—*O.* 21, *rr.* 16, 29, (=*Civ. Pro. Code*, 1859, ss. 208, 209)—*Cross decree—Set-off—Assignment of decree—Question relating to execution—Procedure—Act VIII of* 1859 (*Civ. Pro. Code*), ss. 208, 209—*Act XXIII of* 1861, s. 11—*Suit, non-maintainability.*—The plaintiffs obtained a decree in the Subordinate Judge's Court against B for a sum of Rs. 700 by way of compensation for the loss of certain mesne profits. Some time after, B obtained a decree for Rs. 534 in the Munsif's Court against the plaintiffs. Shortly after this, the plaintiffs applied to the said Subordinate Court for an attachment of B's decree in the Munsif's Court. In the meanwhile, B assigned her decree to the defendant R. And it was not till two days after this assignment had been completed that B was served with notice of the plaintiff's application for attachment or the attachment itself was effected. R then applied to the Munsif for execution of his decree and in spite of the attachment of that decree

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effected by the plaintiffs and their attempt to get their decree set off against B's decree, the Munsiff ordered the execution of B's decree against the plaintiffs to its full extent. Thereupon, the plaintiffs brought this suit against the defendant R for a declaration of their right to have their decree set-off against B's decree. *Held*, (*a*) that the suit did not lie, because (i) the question whether the plaintiffs were entitled to have the benefit of a set-off of their decree against B was a question relating to the execution of the decree. (ii) It was a question which within the meaning of s. 11, Act XXIII of 1861, arose between the parties to the suit although R became a party to the suit as assignee of B and for the purpose of executing the decree. *Held*, also, (*b*) that when R applied to the Munsif under s. 208, Act VIII of 1859, the Munsif ought to have given notice of that application to the plaintiffs and he ought to have refrained from granting R's application and have left him to his remedy against the assignor. Even if he did think it right and proper to allow R to stand in the shoes of B for executing the decree, he ought even then to have given reasonable effect to the application on the plaintiffs to have the benefit of their decree in the shape of a set-off, by staying proceedings for a time sufficient to enable the plaintiffs to get a transfer of their decree from the Sub-Court to his own Court. RUGHU NUNDUN RAIN v. SUMESSAR PANDAY, **13 B L.R. 489=22 W.R. 235.**

(3565)—O. 21, r. 16, O. 22, r. 3 (1)—Abatement of suit on death of sole plaintiff after decree—*See* LIMITATION ACT, 1908, art. 171, **5 C.L.R. 108.**

(3566)—*O* 21, *r.* 16, *O.* 22, *r.* 4 (=*ss.* 232, 368, *Civ. Pro. Code*, 1882)—*Application by transferee of decree to bring in defendant's representative on record—Limitation Act, art* 179, *cl.* 4—*Step-in-aid of execution.*—There is nothing in s. 232 of the Code to prohibit the transferee of a decree, from applying for and obtaining an order, under s. 368 of the Code, to bring in the representatives of a defendant on record. Such an application is a step-in-aid of execution. MAHALINGA MOOPANAR v. KUPPANCHARIAR, **17 M.L.J. 485=3 M.L.T. 21=30 M. 541.**

(3567)—*O* 21, *r* 16, *O.* 22, *r.* 10 (=*ss.* 232 *and* 372, *Civ. Pro. Code*, 1882)—*Plaintiff assigning decree pending suit—Assignee's right to execute decree in plaintiff's favour.*—The words "decree-holders" in s. 232 must be construed as meaning decree-holder in fact, and not as including a party who, in equity, may afterwards become entitled to the rights of the actual decree-holder; and the words of the same section relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. So, where, during the pendency of a suit, the plaintiff assigned the decree to be passed in his favour, to a third person, who was not made a party to the suit, and the final decree was passed in favour of plaintiff alone, the assignee is not entitled to execute the decree under s. 232, as there was no decree in existence at the time of the assignment. BASROOR VITTAL BHANDARI v. RAMACHANDRA KAMTHI, **2 M.L.T. 197=17 M.L.J. 391.** (16 M. 429, *R.*; 21 M. 388, *D.*)

(3568)—O. 21, r. 16, O. 22, r. 12—Scope of—*See* EXECUTION OF DECREE—MISCELLANEOUS, 10 C.L.J. 396=3 Ind. Cas. 324=14 C. W.N. 752.

(3569)—*O*, 21, *r.* 16, *O.* 32, *r.* 7 (=*Civ. Pro. Code*, 1882, *ss.* 232, 462)—*Assignment of decree, refusal of Court to recognise—Right of assignee to restoration of value paid.*—Plaintiff took a transfer of a decree obtained in the name of the defendant as well as of another who was a minor. The Court refused to recognise the transfer, and, on the plaintiff instituting this suit for the purpose, the defendant was held bound to restore the money recived by him for the assignment. The defendant ought to have entered into the agreement on obtaining leave of the Court under s. 462, Civ. Pro, Code; the contract was, therefore, incomplete, and the defendant failed to make, in plaintiff's favour, a valid transaction. RAMASAMI v. BASAVAPPA. **16 M. 325.**

(3570 & 71)—*O.* 21, *rr.* 16, 17 (=*Civ. Pro. Code*, 1882, *ss.* 232 *and* 245)—*Death of decree-holder after hearing and before delivery of judgment—Application by legal representative to be brought on record—Validity of application presented to appellate Court—Presentation of unverified application for execution—Return for amendment—Representation within time fixed but after expiry of limitation.*—A decree-holder, who had preferred an appeal, died after the hearing of the appeal and before the delivery of judgment by the appellate Court. As the judgment was adverse to the decree-holder his son preferred an appeal to the High Court and there applied to be brought on the record in the place of his deceased father. *Held* that, the judgment of the lower appellate Court was to be read as from the date when the Court reserved judgment. Consequently, the decree-holder's son was not in competent to prefer the appeal by reason of the fact that he had not been brought on the record before the judgment of the lower appellate Court was delivered. *Held* also that it was not incumbent on him to have applied for execution to the Court which passed the decree. He adopted the proper procedure in applying to the High Court to be brought on the record, and an order having been made by the High Court bringing him on the record, he was competent to present the appeal. An application for execution of a decree was presented by a pleader without being signed or verified by the decree-holder. The Court returned the application under s. 245, Civ. Pro. Code for amendment. The application was re-presented within the time limited by the

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Court for amendment, but more than twelve years after the date of the decree. *Held* that though s. 245 of the Code contemplates that an unverified petition may be returned for an amendment, it does not follow that a petition which is not verified is an application which will prevent the operation of the statute of limitation. On the facts there was no application for execution, such as the law contemplates, made before the expiration of the period of limitation, and the application was therefore barred by limitation. RAGHUNATHA THATHACHARIAR v. VENKATESA TAWKER, **26 M. 101.**

(3572)—O. 21, rr. 16, 22—*See* LIMITATION ACT, 1908, art. 133, 30 C 979=7 C.W.N. 793.

(3573)—O. 21, rr. 16, 53—*See* EXECUTION OF DECREE—MISCELLANEOUS, 6 A.L.J. 564 =2 Ind. Cas. 626.

(3574)—*O.* 21, *rr.* 16, 53, *O.* 38, *rr.* 8, 9 (=*ss.* 232, 273, 486 *and* 487, *Civ. Pro. Code*, 1882)—*Decree — Assignment—When property passes under — Attachment before judgment—Application by assignee for execution—Dismissal —Proper course—Assignee's remedy—Repudiation of assignment—Suit by assignee on original debt — Maintainability* —The first defendant owed money to the plaintiff. To discharge the debt, the first defendant, on 28th January, 1904, transferred to the plaintiff, by an assignment in writing, two decrees which he had obtained in his favour in the Court of the District Munsif of V. On 22nd April, 1904, these two decrees were attached before judgment by the Subordinate Judge's Court of K, in a suit brought by a third party against the first defendant. The plaintiff applied in 1905 for execution of the decrees to the District Munsiff of V. The application was dismissed on the ground that the decrees had already been attached by the Sub-Court of K. Plaintiff thereupon repudiated the assignment and brought a suit to recover the original debt. *Held*, that the suit was not maintainable, because the District Munsiff dismissed the plaintiff's application, for execution, not on any ground affecting the validity of the decrees, but simply because he had no power at the time to allow execution. The District Munsiff was bound, in the circumstances of the case, under the second paragraph of s. 272, Civ. Pro. Code, 1882, to stay execution until the attachment was cancelled. Under s. 487, Civ. Pro. Code, 1882, it was open to the plaintiff to present a claim to the attaching Court to withdraw the attachment, and if he had done so, it would have been the duty of the attaching Court to withdraw the attachment, in which case it would have been open to the plaintiff to apply again under s. 232, Civ. Pro. Code, 1882, for execution of the decrees. By the assignment of the decree in writing, the property in the decrees passed to the plaintiff, so that they were no longer liable to be attached as the property of the first defendant. SADAGOPACHARIAR v. RAGHUNATHA CHARIAR, **6 M L.T. 273=33 M. 62=3 Ind. Cas. 938.** (20 M. 157, *Diss.*; 16 A. 483, 25 M. 383, *R.*)

——O. XXI, r. 17 (=1882, s. 245=1877, s. 245).

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

(3575)—*O.* 21, *r.* 17 (=*Civ. Pro. Code*, 1882, *s.* 245)—*Power to allow amendment under.*—The Court has power to allow an amendment under s. 245, although it may be that, at the time when the amendment is allowed, the decree is barred by limitation. HARRY CHARAN BOSE v. SOBAYDAR SHEIKH, **12 C. 161.**

(3576)—*O.* 21, *r.* 17—*Application for execution corresponding with decree— Correction of decree.*—Under s. 15, Act XXIII of 1861, an application for execution corresponding with the terms of the decree must be admitted. A decree may be corrected only by the Court which made it. BISHESHUR CHOWDRY v. BISHESHUR BOSE, **8 W.R. 277.**

(3577)—*O.* 21, *r.* 17 (=*s.* 245, *Civ. Pro Code*, 1882)—*Appeal—Execution of decree— Amendment.*—Where an appellate Court confirms the decree of a lower Court, it is the decree of the former Court that must be executed. So, where a decree-holder, in such a case, applies for execution of the lower Court's decree, the application must not be rejected but must be returned for its being amended in the manner provided by s. 245, Civ. Pro. Code, 1882, there being only a technical defect in the application. GANGA DIAL v. KHARSARAN, **A.W.N. 1885, 304.**

(3578)—*O.* 21, *r.* 17 (=*s.* 245, *Civ. Pro. Code*, 1882)—*Execution of decree—Over-statement in application by decree-holder for execution of amount due to him under decree.*—The mere fact that a decree-holder, in applying for execution of his decree, has overstated the amount due to him under the decree, will not prevent such decree holder from obtaining execution, if otherwise entitled to it, up to the amount due to him, nor will he be obliged to amend his application under the provisions of s. 245 of the Code of Civil Procedure. ZABARDAST KHAN v. KAMTA PRASAD, **A.W.N. 1895, 18.**

(3579)—O. 21, r. 17—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 8 C. 479=10 C.L.R. 519.

(3580)—O. 21, r. 17—*See* NOS. 974, 1114, 2764 *i*, 3430, 3433, 3434, 3449, 3451, 3571, *supra.*

(3581)—O. 21, *r.* 17, 23 (=*ss.* 245, 249, *Civ. Pro. Code*, 1882)—*Orders under—Appealability —Execution application—Prayer for sale—No*

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attachment—Neither prayer for attachment—Dismissal—Appeal—Amendment by insertion of prayer for attachment—Decree barred—Amendment improper.—An order under s. 249, Civ. Pro. Code, 1882, is appealable as if it were a decree, but not under s. 245. A applied, in execution of a money decree, for sale of certain properties, which were never attached, without praying for an attachment of the same. The District Munsif dismissed the application. On appeal the Sub-Judge allowed, at a time when the decree had become barred, the execution petition to be amended by inserting a prayer for attachment. *Held*, that the Subordinate Judge was not right in allowing the amendment to the prejudice of the judgment-debtor, so as to preclude him from pleading limitation. It would be unjust to the judgment-debtor to allow the judgment-creditor to alter the nature of the application after the decree has become barred. PATTAH VERRAN KUTTY v. KUNHI KANDI THAZATH VEETIL APPU, **9 M L.T. 347**. (17 M. 67, 16 M. 319, 18 M. 63, *F.*)

——O. XXI, r. 18 (=1882, s. 246=1877, s. 246).

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

(3582)—*O. 21, r. 18 (=s. 246, Civ. Pro. Code, 1882) — Cross decree—Set off—Decree against which set off claimed must be before Court*—S. 246 of the Civ. Pro. Code, clearly contemplates that when one decree is sought to be set-off against another, the decree against which the set-off is asked for must be before the Court for execution. CHAJMAL DAS v. LAL DHARAM SINGH, **24 A. 481=A.W.N. 1902, 126.** (13 I.A. 106 110, *R.*) [*F.*, 32 M. 336=5 M.L.T. 144=1 Ind. Cas. 247.]

(3583)—*O. 21, r. 18 (=s. 246, Civ. Pro. Code, 1882)—Execution of decrees—Cross-decrees—Set off, when allowed.*—*Held*, that, when set off is claimed in respect of cross-decrees, s. 246 requires that both the decrees should be before the Court, for execution. PONNUSAMI NADAN v. DURASAMY AIYAR, **5 M L.T. 144=32 M. 336=1 Ind. Cas. 247.** (24 A. 481, *F.*, 26 M. 428, *D.*)

(3584)—*O. 21, r. 18 (=Civ. Pro. Code, 1882, s. 246)—Cross decrees, set off allowed in case of.*—A judgment-debtor may set-off against the amount of a decree obtained against him singly by a decree-holder, the amount of a decree which has been obtained by him jointly against such decree-holder and certain others. So, where A has obtained a decree against B and several other persons jointly and B holds a decree against A solely, A can, under s. 246 of the Civ. Pro. Code, set up his rights in his joint-decree in answer to the execution of B's decree against him. There is nothing against this in illustration (*b*) to s. 246. It contemplates cases where there are judgment-creditors, and not cases where the sole judgment-debtor is the sole creditor under another decree. RAM SUKH DAS v. TOTA RAM, **14 A. 339=A.W.N. 1892. 12.**

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(3585)—*O. 21, r. 18 (=Civ. Pro. Code, 1877, s. 246)—Claim by third person over attached property allowed—Judgment-debtor not a party—Suit by Judgment-debtor — Limitation.*—Where a claim was made by a third person to property attached in execution of a decree and the Court found that the claim should be allowed, the judgment-debtor not being a party to such proceedings, the order was held not to be binding on the judgment-debtor and that he would not be barred from suing the person who claimed the property, after the expiry of one year from the date of the order. HUSAIN KHAN v. UMAR KHAN, **A.W.N. 1891, 24.**

(3586)—O. 21, r. 18—*See* SALE—SALE IN EXECUTION OF DECREE — PURCHASERS, RIGHTS OF, 14 C. 18=13 I.A. 106, P.C.

(3587)—O. 21, r. 18—*See* SET-OFF, 9 C. 479=13 C.L.R. 93, 3 M.L.J. 220.

(3588)—O. 21, r. 18—*See* TRANSFER OF DECREE, 3 M.L.J. 220.

(3588-*a*)—O. 21, r. 18—*See* NOS. 975, 1115-*a*) 1117, 1118, 1119, *supra*.

(3589)—*O. 21, rr. 18, 19 (=Civ. Pro. Code, 1882, ss. 246, 247)—Execution of decree—Cross decrees for mesne profits—Set off—Limitation.*—Two decrees were passed under which A was entitled to $\frac{2}{3}$ and B to $\frac{1}{3}$ of a certain immoveable property with proportionate mesne profits. Each obtained possession of the property in the proportion decreed. But B appealed against both the decrees to the Privy Council. Pending the appeals, A applied for an account of the mesne profits due to him, but the application was struck off as he did not comply with a condition requiring him to give security in case B should succeed in the appeals. B also applied for execution, and the Court found that $\frac{1}{3}$ of the mesne profits came up to Rs. 18,100, but on A's objection stayed execution till the disposal of the appeals to the Privy Council. The appeals were only dismissed, and now A applied for execution against B for $\frac{2}{3}$ of the mesne profits. B wanted to set off his item of Rs. 18,100. The Court held that the question of the amount due to A should be determined, and if this amount exceeded the Rs. 18,100 declared previously to be due to B, satisfaction of A's claim to that extent should be entered up and the balance recoved from B; and that this course, though not strictly in accordance with the letter, was in accordance with the spirit of ss. 246, 247 of the Code, and, under any circumstances, should be sanctioned on principle of natural equity. *Held* also that, until the amount of mesne profits due to A had been definitely ascertained by the executing Court, B's right to maintain his set-off did not arise; that the set-off was, therefore, not barred by limitation; that, when the executing Court finds the amount o

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A's mesne profits, the decision would become a decree, and that only then, could s. 246 of the Code be applied. MATADIN v. CHAND DIN, **10 A. 188 = A.W.N. 1888, 66.**

(3590)—O. XXI, rr. 18, 19—*See* PAUPER SUITS, 9 A. 64.

(3591)—O. XXI, rr. 18, 19—*See* SET-OFF, 5 A. 272.

(3592)—*O. 21, rr. 18, 19, 20—Setting off of decree for simple money against decree for recovery of money by enforcement of charge—Procedure salutary.*—A Court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge. The procedure of setting off of decrees in this way is a very salutary procedure. NAGAR MAL v. RAM CHAND, **7 A.L.J. 1179 = 8 Ind. Cas. 835.**

——O. XXI, r. 19 (=1882, s. 247=1877, s. 247.)

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

(3593)—*O. 21, r. 19 (=Civ. Pro. Code, 1882, s 247)—Execution by mortgagor for costs in redemption-decree—Right of mortgagee to set off costs against mortgage-amount—Sums due to different parties under same decree.*—Plaintiff obtained a decree that on his paying into Court the mortgage amount and the value of improvements, the defendants should surrender the mortgaged-property to him, and also that the costs incurred by him should be paid by the defendants. On his executing the decree against the defendants, for recovering the said costs, the defendants were held to have the right to claim, under s. 247 of the Civ. Pro. Code, that the sum due by them for costs ought to be set off against the amounts payable to them by the plaintiff under the same decree. SANKARA MENON v. GOPALA PATTAR, **23 M. 121.** (16 A. 395, *Appr.*) [*D.*, 16 C.P.L.R. 73.]

(3594)—*O. 21, r. 19 (=Civ. Pro. Code, 1882, s. 247)—Claims under same decree not enforceable in same manners—Claim for costs enforceable against property and similar claim enforeable personally—Cross claims under.*—There is nothing in s. 247, Civ. Pro. Code, which limits its application to a case in which the remedy of each party against the other is of precisely the same nature. The object of the section is to prevent each side executing a decree in respect of amounts due, whether for costs or otherwise, under the same decree, and it makes no difference that one of the parties to the decree is obliged to recover from the other the money due, by proceeding against the hypothecated property of that other, whilst his opponent is only entitled to recover the money decreed for costs, personally from the other side. BHGWAN SINGH v. RATAN, **16 A. 395 = A.W.N. 1894, 133.** (5 A. 272 *D.*) [*F.*, 23 M. 121; *R.*, 16 C.P.L.R. 73.]

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(3595)—*O. 21, r. 19 (Civ. Pro. Code, 1882, s. 247)—Foreclosure decree—Provision for payment of money to defendant—Right of defendant to execute his decree.*—Where a foreclosure decree provided for payment of money by plaintiff to defendant, s. 247 of the Code did not prevent the defendant, from executing the decree in his favour. CHHOGMAL v. GOVIND PRASAD GOURI SHANKAR, **16 C.P.L.R. 73.** (16 A. 395, *D.*)

(3595-*a*)—O. 21, r. 19—*See* NOS. 3225-*h*, 3457, 3589, 3590, 3591, 3592, *supra*.

——O. XXI, r. 20 (New).

(3596)—O. 21, r. 20—*See* INTERVENOR, 22 W.R. 384.

(3596-*a*)—O. 21, r. 20—*See* NO. 3592, *supra*.

——O. XXI, r. 21 (1882, s. 230 (2)=1877, s. 230 (2)=1859, s. 207.)

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

(3597)—*O. 21, r. 21 (=Civ. Pro. Code, 1877, s. 230 (b)—Execution of decree.*—Where the parties to a decree presented a petition to the Court executing the decree, to the effect that they had agreed that the amount of the decree should be paid by instalments, and the Court ordered the petition to be filed, *held* that such order did not amount to an order directing payment of money to be made on a certain date, so as to give a fresh period from which the limitation of twelve years for the execution of the decree would run under s. 230 (*b*). BAL CHAND v. RAGUNATH DAS, **4 A. 155 = A.W.N. 1881, 168.** [*F.*, 16 C. 16.]

(3597-*a*)—O. 21, r. 21—*See* NOS. 109, 150, 560, 573, 1109, 1110, 1111, 1112, 1113, 1114, 1510, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407 3407-*a*, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3495 *a*, *supra*.

——O. 21, r. 22 (=1882, s. 248=1877, s. 248=1859, s. 216.)

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.

See LIMITATION ACT, 1908, art. 182.

(3598)—*O. 21, r. 22 (=s. 248, Civ. Pro. Code, 1882)—Previous law.*—S. 248, Civ. Pro. Code, 1882 is analogous to s. 16 of Act VIII of 1859. FUTTAH NARAIN CHOWDHRY v. CHUNDRABATI CHOWDHRAIN, **20 C. 551.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877. XXIII of 1861 and VIII of 1859)—*continued.*

(3599)—*O.* 21, *r.* 22 (*Civ. Pro. Code*, 1882, *s* 248)—*Notice to legal representative—Joint Hindu family.*—Plaintiff and his brother were joint. Plaintiff's joint property was attached,but before sale plaintiff died. The attaching creditor issued notice under s. 248 of the Code to the widow and the brother of the deceased as legal representatives. *Held* that the plaintiff's widow and not his brother was the legal representative for this purpose, for, it must be as *quasi separate* property of the deceased plaintiff that the attaching creditor had a claim to it. If it were still joint undivided property, it would survive to the plaintiff's brother and he would take the whole. NANABHAI GANPAT RAO v. JANARDHAN VASUDEOJI, **16 B. 636.**

(3600)—*O.* 21, *r.* 22 (=*s.* 248, *Civ. Pro. Cods*, 1882)—*Execution of decree—Limitation—Objection by judgment debtor—Notice, service of, under s.* 248, *Civ. Pro. Code, effect of—Opportunity to contest validity of order—Estoppel.*—Mere service of notice upon a judgment-debtor under s. 248. Civ. Pro Code of 1882, is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice. (10 W.R. 8, F.B. 8 C L.J. 193, 14 C.W.N. 114, 3 Ind. Cas. 47, *Rel. on.*) Again, if an order for execution has been made without notice to the judgment-debtor, it is not sufficient to debar him from urging the objection of limitation. (5 Ind. Cas. 59, 11 C.L.J. 357, 14 C.W.N. 433, 7 Ind. Cas. 55, 12 C.L.J. 312, *Rel. on.*) The principle is that a party to an execution proceeding, who allows an order for execution to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of the order, cannot be permitted at a subsequent stage of the proceedings to re-open the whole matter in controversy. (8 C. 51, 11 C.L.R. 113, 8 I.A. 123, 6 A. 269, 7 A. 102, *R.*) Even though a notice may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent for him to appear and contend at that stage that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous. A notice under s. 248 is not required to be issued upon an application for transfer of a decree. It must be issued by the Court which has seizin of the application for execution. Consequently upon receipt of a notice under s. 248 irregularly issued, it was not only not the duty of the judgment-debtor to appear and urge the objection of limitation, but under the law it was impossible for him to take that step. The judgment-debtor is not debarred from urging his objections on the ground of limitation in a subsequent application for execution. SRIPATI CHARAN v. BELCHAMBERS, **8 Ind. Cas. 22.**

(3601)—*O.* 21, *r.* 22 (=*s.* 248, *Civ. Pro. Code*, 1882)—*Date of issuing notice.*—For the purposes of art. 179, cl. 5, Limitation Act, 1877, the date of issuing a notice under s. 248 of the Code of Civil Procedure means the date on which the order for the issue of the notice is passed and not the date on which the notice was actually prepared and issued by the proper authority of the Court. GOVIND v. DADU UDAJI, **6 Bom. L.R. 487=28 B. 416.**

(3602)—*O.* 21, *r.* 22 (=*s.* 248, *Civ. Pro. Code*, 1882)—*Mortgage-decree — Execution—Step-in-aid of execution—Assignment of mortgage—Application by assignee plaintiff to be brought on record—No prior application for order absolute—Transfer of Property Act* (IV *of* 1882), *s.* 89—*Civ. Pro. Code* (*Act XIV of* 1882), *s.* 248—*Application in accordance with law.*—An application by an assignee of a mortgagee decree-holder to be brought on the record, and for the issue of notice to the judgment-debtors under s. 248, Civ. Pro. Code, is a step-in-aid of execution, and is an application in accordance with the law, though there was no application for an order under s. 89, Transfer of Property Act. *Obiter*:—Applications praying for sale of property in execution of a mortgage-decree, though not proceeded by an application for an order under s. 89, Transfer of Property Act, may properly be regarded as applications impliedly asking for such an order. SREEKAKULAM VENKATASUBBIAH v. LAVAARU DADE SAHIB, **2 Ind. Cas. 433=8 M.L.T. 232.** (27 A. 625, *R.*)

(3603)—*O.* 21, *r.* 23 (=*s.* 248, *Civ. Pro. Code*, 1882)—*Decree—Execution—Step-in-aid—Limitation Act, Art.* 179 (5).—Where a notice to show cause why a decree should not be executed is issued under the provisions of s. 248 of the Civ. Pro. Code, 1882, the time provided for by Art. 179 (5) of the Limitation Act 1877, runs from the date of the order directing the same: actual service of the notice is not necessary. DAMODAR v. SONAJI, **5 Bom. L.R. 594=27 B. 622.**

(3604)—*O.* 21, *r.* 22 (=*s.* 248, *Civ. Pro. Code*, 1882)—*Issue of notice on a time-barred execution-application, effect of.*—The improper admission of an application for execution of a decree, which, at the date thereof, was clearly time barred, and the issue of a notice thereon under s. 248, Civ. Pro. Code, could not have the effect of reviving the decree. Nor could a second application for execution, within three years of the first, be of any avail. KAMMAL SINGH v. LARAITI, **2 A.L.J. 67.**

(3605)—*O.* 21, *r.* 22 (=*s.* 248, *Civ. Pro. Code*, 1882)—*Execution of decree against heirs of judgment-debtor—Waiver of objection against execution—Objection—Estoppel*—Res judicata.—A legal representative of a deceased judgment-debtor (who was the managing member of a joint Hindu family governed by the Mitakshara Law), who has allowed execution proceedings to proceed actively for nearly a year without the slightest objection, and has, obtaining time to pay the decretal debt, waived his right to ha

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

issue of a fresh proclamation, by paying a part of the decretal debt, cannot subsequently object that the properties attached were joint family properties, and that he was in possession of the same by right of survivorship and not as heir of the deceased : upon ordinary principles of estoppel, he cannot be permitted at this stage to say that the decree is incapable of execution against him. (2 I.A. 219, *R.*) [*F.*, 2 C.L.J. 499 ; *R.*, 27 P L R. 1905, 95 P.R. 1906=83 P.L.R. 1907.] *Held*, further, that the orders of the Court directing the issue of processes of attachment and sale proclamation were binding on the said legal representative on the principle of *res judicata*, and that he was precluded from questioning the validity of the said orders. COVENTRY v. TULSHI PERSHAD NARAYAN SINGH, **31 C. 822=8 C.W.N. 672.** (18 C. 51, P.C. 28 C. 122, 34 M. 669, 24 A. 282, *R.*)

(3605-*a*)—*O.* 21, *r.* 22 (=*Civ. Pro. Code*, 1882, s. 248)—*Estoppel—Execution proceedings, —Objection to execution—Service of notice—Transfer of decree, application for—Notice to judgment debtor if necessary.*—A mere service of notice upon a judgment-debtor under s. 248 of the Code is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice under s. 248. If, by reason of omission to serve a notice or by reason of a defective notice served upon the judgment-debtor, he has not the opportunity to contest the validity of the proceeding, he is not bound by the doctrine of estoppel. Where a notice under s. 248 of the Code, as required by law, was not issued upon the basis of the application for execution, any order for execution in the course of that proceeding cannot bind the judgment-debtor. Such an order cannot debar him from urging that the previous application for execution was barred by limitation. Even though a notice under s. 248 may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent to the judgment-debtor, at that stage to contend that the decree ought not to be transferred, because an application for execution is likely to prove infructuous. Whether a decree, in so far as it is still unexecuted, is capable of execution under the law, is a question for determination by the Court to which the decree is transferred, when a proper application for execution is presented to that Court. A notice under s. 248 is not required to be issued upon an application for transfer of a decree. Such notice must be issued by the Court which has *seizin* of the application for execution, whether it be the original Court which made the decree or is the Court to which the decree has been transferred for execution. SREEPATI CHARAN CHOWDHURY v. SHAMALDHONE DUTT, **15 C.L.J. 123.**

(3606)—O. 21, r. 22—*See* ARBITRATION—MISCELLANEOUS, **25 W.R. 11.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3607 to 3614)—O. 21, r. 22—*See* DAMAGES—DAMAGES, SUIT FOR, 3 W.R. 120.

(3615 to 3619)—O. 21, r. 22—Notice to show cause against enforcement of decree—Effect—*See* LIMITATION ACT, 1908, art. 164, 8 Ind. Cas. 663.

(3620)—O. 21, r. 22—Execution application made after lapse of one year from date of decree—Order for execution without issue of notice to judgment-debtor—*See* LIMITATION ACT, 1908, art. 183, 4 Ind. Cas. 306=7 M.L.T. 32=33 M. 187.

(3621)—O. 21, r. 22—Notice under—Whether process in exection—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 17, 7 M.L.T. 308=6 Ind. Cas. 400.

(3622)—O. 21, r. 22—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 24 A. 282=A.W.N. 1902, 63.

(3623)—O. 21, r. 22—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 2 W.R. 60.

(3624)—O. 21, r. 22—*See* TRANSFER OF PROPERTY ACT, s. 87, 27 M. 40.

(3625)—O. 21, r. 22—Effect of non-service of notice under—Order absolute for sale—*See* TRANSFER OF PROPERTY ACT, 1882, ss 88, 89, 2 A.L.J. 610=A.W.N. 1905, 241=28 A. 193.

(3625-*a*)—O. 21, r. 22—*See* NOS. 356, 357, 574, 976, 977, 978, 979, 1149, 1152, 1153, 1154, 1155, 1156, 3021, 3021-*a*, 3341, 3432, 3435, 3452, 3453, 3495-*a*, 3572, *supra*.

(3626)—O. 21, r. 22, s. 11—Issue of notice—No adjudication that application not barred—*See* EXECUTION OF DECREE—MISCELLANEOUS, 3 Ind. Cas. 47=14 C.W.N. 114.

(3627)—*O.* 21, *r.* 22, *ss.* 73, 115 (=*Civ. Pro. Code*, 1882, *ss.* 248, 295, 622)—*Execution—Rateable distribution—Further execution—Notice.*—No notice to the judgment-debtor is necessary under s. 248 of the Code of Civil Procedure, when a decree-holder applies for further execution one year after the date of his previous execution application, but before one year from the date when he applied for rateable distribution for the satisfaction of the same decree. And, when a District Judge erroneously rejects an application for further execution, and subsequently rejects an application by the same party for rateable distribution under s. 295, Code of Civil Procedure, because no execution application was pending at the time, the High Court cannot interfere under s. 622 and revise the order of the District Judge rejecting the application for rateable distribution. VENKATARAMAN v. MAHALINGAYYAN, **9 M. 308.** [*R.*, 65 P.R. 1905; *Cited*, 3 L.B.R. 275.]

(3628)—*O.* 21, *rr.* 22, 14 (=*ss.* 248, 238, *Civ. Pro. Code*, 1882)—*Transfer of Property Act (IV of* 1882), *s.* 104—*Rules made by High Court—Execution— Mortgage-decree — S.* 241

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not extended to execution of mortgage-decree.—After the issue by the High Court of the Rules under s. 104 of the Transfer of Property Act, the provisions of s. 238, Civ. Pro. Code. 1882, cannot be held to apply to proceedings in execution of mortgage-decrees, that section not having been extended to such proceedings. Therefore, a sale of the mortgaged property cannot be set aside on the ground that no notice, as required by s. 248, had been served on the judgment-debtors prior to the taking of proceedings in execution. KESHAB CHANDRA KAR v. RAJENDRA NATH GHOSE, **3 Ind. Cas. 101.** (25 C. 703, 2 C.W.N. 353, 12 C.W.N. 282, 3 M.L.T. 202, 7 C.L.J. 580, *Rel. on*; 8 C.W.N. 1102. 25 C. 133, 31 C. 373, *R.*)

(3629)—*O.* 21, *rr.* 22, 23 (=*Civ. Pro. Code.* 1882, *ss.* 248, 249)—*Notice — Objection of judgment-debtor—Duty of Court to entertain objections.*—When once a Court has issued notice under O. XXI, r. 22 of the Code of 1908, it has no alternative but to dispose of any objection that may have been raised on behalf of the judgment-debtor under O. 21, r. 23 of the Code, KALLIAN DAS v. BHAWANI SHANKAR, **5 Ind. Cas. 546.**

(3630)—O. 21, rr. 22, 90—*See* EXECUTION OF DECREE—MISCELLANEOUS, 3 A. 424.

——O. XXI, r. 23 (=1882, s. 249=1877, s. 249, =1859, s. 247).

(3631)—O. 21, r. 23—*See* LIMITATION ACT, 1908, Arts. 11, 12, 2 W.R. 263.

(3631-*a*)—O. 21, r. 23—*See* NOS. 564, 977, 1149, 3581, 3629, *supra* AND NOS. 3896, 3896-*a*, *infra.*

(3632)—*O.* 21, *rr.* 23, 25—*Order passed under wrong rule, effect of—Redemption, suit for—Regulation XVII of* 1806 *or Act IV of* 1882, *proceedings under, necessary, to extinguish title of mortgagor—Mortgagor, effect of expunging the name of—Mortgagee, adverse possession by.*—Where an order of remand was made virtually under Order XXI, rule 23, but by a clerical mistake rule 25 was quoted; *held*, that the order was appealable. Where no steps to foreclose a mortgage had been taken, either under Regulation XVII of 1806 or under Act IV of 1882, *held*, that a suit to redeem could not be held as barred merely on the ground that the Settlement Officer had expunged the name of the mortgagor from the *Khewat*. ANGE LAL v. JAGDISH SINGH, **9 Ind. Cas. 431.** (32 C. 296. 2 A.L.J. 71, 1 C.L.J. 584, 7 Bom. L.R. 1, 9 C.W.N. 201; *F.*; 8 O.C. 33, *D.*)

——O. XXI, r. 24, para. (1) (=1882, s. 250=1877, s. 250=1859, s. 221), and para. (2) (=1882, s. 251 (1)=1877, s. 251 (1)=1859, s. 222).

(3632-*a*)—O. 21, r. 24—*See* NO. 1155, *supra* AND NO. 3639, *infra.*

(3633)—*O.* 21, *r.* 24 (1) (=*Civ. Pro. Code*, 1859, s. 221)—*Discretion of Court—Act VIII of* 1859, *s.* 221.—In execution of a decree, a writ was issued against the defendant, who had no property within the jurisdiction of the High Court. The first writ was made returnable in a month. Another writ, similarly returnable, was issued, the first not being successful, but the defendants were not found. An application for a writ returnable in one year was refused. *Held*, on appeal, Per *Peacock, C.J.*, that, although the Judge had a discretion to refuse the writ under s. 221, Act VIII of 1859, yet, the fact that the plaintiff had not used the utmost possible diligence was not sufficient ground on which the writ should be refused. Per *Macpherson, J.*—The Court had a discretion under s. 221 and ought not to grant the writ where it is not satisfied that the parties have used every reasonable endeavour to execute former ones that have expired; as the former writs were returnable in so short a time however, in this case, the writ ought to be granted. NITTAI CHANDRA PAL v. THAKOORDAS BISWAS, **8 B.L.R. 258, Note.**

(3634)—*O.* 21, *r.* 24 (1) (=s. 250 *of Code of* 1882)—*O.* 21, *r.* 58 (=*old s.* 278)—*Objection—Official Assignee—Property of judgment debtor, Application for attachment of.*—Where a decree-holder applies to the Court for attaching the judgment-debtor's property, the Court is bound to issue process for attachment and cannot refuse to do so, except as under old s. 250, and it is incompetent for a judgment-debtor to object under s. 278 or any section of the Code, or to prefer a claim, or object under s. 278 in the interests of the Official Assignee. DHOLAN DAS v. RAHIM BAKHSH, **57 P.R. 1897.**

(3635)—*O.* 21, *rr.* 24 (2) (3), 25 (1) (=s. 251, *Civ. Pro. Code*, 1882)—*Authority given to Munsarim to sign warrants for execution of decrees should be in writing.*—All authority given to the Munsarim to sign warrants for execution of decrees, under s. 251, Civ. Pro. Code, should be in writing, and a record of such authority should be kept by the Court; the Munsarim has no authority to sign such warrants unless he has been actually appointed to do so by the Court. HULASI v. RAMDIN, **A.W.N. 1887, 42.**

(3636)—O. 21, rr. 24 (2), (3), 25 (1), s. 2—Arrest in execution of decree—Warrant initialled and not signed by proper officer—*See* WARRANT, 8 A. 293=A.W.N, 1886, 106.

(3637)—O. 21, rr, 24 (2), 25 (2), 38, 25 (1)—Warrant of attachment not signed by Judge but by Munsarim—Irregularity—Invalidity of sale—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 7 A. 506, P.C.

—— O. XXI, r. 25, para. (1) (=1882, ss. 343 and 251=1877, ss. 343 and 251=1859, s. 222); and para. (2) (=1882, s. 343=1877 s. 343—1859 s. 222).

(3638)—O. XXI, r. 25—Arrest in execution of decree—Practice—Delegation by Naib Nazir

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859—*continued.*

—Endorsement of particulars of arrest by Naib Nazir—*See* ARREST, 6 A. 385 = A.W.N. 1884, 133.

(3638-*a*)—O. 21, r. 25—*See* NOS. 1205, 3632, 3635, 3636, 3637, *supra*.

(3639)—*O. 21, rr. 25 (1), 24 (2), 3 = s. 251, Civ. Pro. Code, 1882)—Warrant for execution of decree—Obstruction to execution of time expired warrant*—Ss. 149, 353, *Penal Code*.—Under s. 251, Civ. Pro. Code, 1882, it is the duty of the Court to specify, in a warrant for execution of decree, whether it be a decree for delivery of possession or otherwise, the day on or before which the warrant must be executed. When a party in possession of land resists execution, an officer of Court has no authority to go upon the land to give possession under a time-expired warrant. Resistance offered to such execution would not amount to an offence under ss. 149 and 353, Penal Code. ABINASH CHANDRA ADITYA v. ANANDA CHANDRA PAL, **31 C. 424.**

——**O. XXI, r. 26, paras. (1) and (2) (=1882, s. 239=1877, s. 239=1859, s. 290, and para. 3=1882, s. 240=1877, s. 240=1859, s. 291.)**

See EXECUTION OF DECREE—STAY OF EXECUTION.

(3639-*a*)—O. XXI, r. 26—*See* NOS. 575, 583, 586, 2385, 2387, *supra*.

(3640)—O. XXI, r. 26 (1)—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 10 B. 65.

(3641)—O. 21, *r.* 26 (1) (2) (=*s.* 239, *Civ. Pro. Code*, 1882).—S. 239 does not deprive a Court to which a decree has been sent for execution, from exercising the same powers in executing the decree, as if it had been passed by itself as had been conferred by s. 228. CHHOTAY LAL v. PURAN MULL, **23 C. 39.**

(3642)—O. 21, *r.* 26 (1) (2) (=*Civ. Pro. Code*, 1882, *s.* 239).—The power of having recourse to the Court granting the decree given by s. 239 is limited to the judgment-debtor. GOKUL KRISTO CHUNDER v. AUKHIL CHUNDER CHATTERJEE, **16 C. 457.**

(3643)—O. 21, r. 26, (1), s. 47—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION — EXECUTION OUT OF COURT'S JURISDICTION, 7 B. 481.

——**O. XXI, r. 29 (=1882, s. 243=1877, s. 243=1859, s. 209).**

See EXECUTION OF DECREE—STAY OF EXECUTION.

(3644)—O. 21, *r.* 29 (=*Civ. Pro. Code*, 1882, s. 243)—*Execution of decree—Stay of execution pending suit filed by judgment-debtor against decree-holder.*—S. 243 of the Civ. Pro. Code requires, before any action can be taken on it, that the decree, the execution of which is sought to be stayed, should be the decree of the Court in which the suit is pending and that the plaintiff and defendant in the latter should be the judgment-debtor and the decree holder respectively in the former. The words "such Court" in the section include a Court to which a decree has been transmitted for execution and is not limited to a Court executing its own decree. If the Court, to which an application for a stay of execution is made, declines to stay execution, the Court of appeal can do so on appeal brought against the order refusing stay of execution. But when the suit has been dismissed and appeal is filed against the decree dismissing the suit, the appellate Court is not competent at the appellant's request to stay execution under s. 243. MR. W H. GUEST v. MRS. MECREGOR, **59 P.L.R. 1904.**

(3645)—*O.* 21, *r.* 29 (=*s.* 243, *Civ. Pro. Code*, 1882)—*Execution of decree—Suit between decree-holder and judgment-debtor — Competency of Court executing decree to stay execution pending suit*—A Court, to which a decree is transmitted for execution, has power to act under s. 243, Civ. Pro. Code, and has jurisdiction to stay proceedings under that section in execution of the former decree, until a suit pending in that Court between the judgment-debtor and decree-holder is decided. BHAGWAN KAUR v. GAJINDAR SINGH, **130 P.R. 1908.** (6 N. W. P. 181, 7 A. 73, 10 A. 389, *R.*) [*R.*, 82 P.R. 1910.]

(3646)—*O.* 21, *r.* 29 (=*old s.* 339—*Subsistance allowance—Prisons Act—Clothing, bedding, cooking utensils.*—It is incompetent for a civil Court executing a decree to require the decree-holder to supply anything but the judgment-debtor's subsistence allowance in money, which it is required to fix by this rule. It has nothing to do with the bedding, clothing or cooking utensils, or any other article which may be declared by the jail authorities necessary for the prisoner. The Prisons Act provides for the demand of costs of bedding and clothing supplied to the prisoner by the Jail Superintendent, but both the Code and the Act are silent as to cooking utensils. The Court has simply to require the decree-holder to provide for the prisoner's subsistence in money. SAWAN MAL v. NANDU, **43 P.R. 1893.**

(3647)—*O.* 21, *r.* 29 (=*s.* 209, *Civ. Pro. Code*, 1859) — *Cross-suits — Attachment of amount claimed before decree passed — Cross-decrees.*—Where there are cross-suits for money between two parties against each other, the attachment by a third party of what might be found due on the smaller claim, can have no operation or effect so as to prevent the decree (when it is passed) for the smaller amount from being absorbed in the one for the larger amount, and so as to prevent the decree-holder in the latter case from setting off the amount of

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the smaller decree under s. 209, Civ Pro. Code, 1859. BUJHAWAN LAL v. SUKHRAJ RAI, **2 A. 866.**

(3648)—*O. 21, r. 29 (=Civ. Pro. Code, 1882, s. 243)—Act VIII of 1859, ss. 209, 364—Stay of execution—Appeal.*—An order under the last clause of s. 209, Civ. Pro. Code, 1859, staying the execution of a decree cannot be appealed against, though the High Court will, if need be, question its judicial propriety. GAMBBINMAL v. CHEJMAL, **11 B H.C. 151.**

(3648-*a*)—*O. 21, r. 29 (=Civ. Pro. Code, 1859, s. 209)—Execution—Set off—Assignment of decree.*—Cross-decrees in the same Court may be set off one against the other, whether they are originally decrees of the same Court or are sent to the same Court to be executed. But decrees of different Courts cannot be set off one against the other, unless when they are both in the same Court for the purpose of being executed. *N B.*—Question referred to the Full Bench was not answered on the ground that it did not arise in the case. GIRISH CHANDRA LAHURY v FAKIR CHAND, **B.L.R. Sup Vol. 503=6 W.R. Mis 72.** [*F.*, 7 W.R. 480 ; *R.*, 7 W.R. 219 ; *Cons.*, 8 W.R. 428.]

(3649)—O. 21, r. 29—Award under the Arbitration Act — How enforceable — Stay of execution—*See* ACT IX OF 1899, s. 15, 12 Bom. L.R. 860=8 Ind. Cas. 179.

(3650)—O. 21, r. 29—*See* APPEAL—FORM OF APPEAL, 3 W.R. Act X, Rule 10.

(3651)—O. 21, r. 29—*See* CROSS-DECREES W.R. 1864, Mis. 1.

(3652)—O. 21, r. 29 —*See* DECREE — DECREE, CONSTRUCTION OF, 12 W.R. 308.

(3653)—O. 21, r. 29—*See* SET OFF, 16 W. R. 303, 9 W.R. 590, 6 B.L.R. App. 125=15 W.R. 127, 1 B.L.R. F.B. 23=10 W.R. F.B. 32, 17 W.R. 46, 8 W.R. 392.

(3654)—O. 21, r. 29 —*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS WHEN LIE AND WHEN NOT, 2 B L.R. A.C. 110=10 W.R. 450.

(3655)—O. 21, r. 29—*See* STAY OF EXECUTION, 11 W.R. 494.

(3655-*a*)—O. 21, r. 29—*See* NOS. 78, 1119, 2339, 3564-*b*, *supra*.

(3656)—*O. 21, r. 29, O. 41, r. 5 (=Civ. Pro. Code, 1882, ss. 243 and 545)—Restitution.*—There is no provision of law which empowers the Court passing a decree, to set aside the proceedings under which the decree-holder has already been placed in possession in execution of the decree. The provisions of s. 243 of the Civ. Pro. Code, are limited to staying execution of decrees, and have no reference to cases wherein execution had already been carried out, and the decree-holder placed in possession of the property decreed to him. GHAZIDIN v. FAKIR BAKHSH, **7 A. 73=A.W.N. 1884, 226.**

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3657)—O. 21, rr. 29, 58 to 64 Except 62—*See* SET OFF, 24 W.R. 299.

——O. XXI, r. 30 (=1882, s. 254=1877. s. 254=1859, s. 201.)

See EXECUTION OF DECREE—MODE OF EXECUTION.

(3658)—O. 21, r. 30—*See* ATTACHMENT OF PERSON, 8 W.R. 282.

(3659)—O. 21, r. 30—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 5 A. 86, F.B.=A.W.N. 1882, 186.

(3660)—O. 21, r. 30—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 W.R. 415.

(3660-*a*)—O. 21, r. 30—*See* NO. 3436, *supra*.

(3661)—O. 21, rr. 30, 32, ss. 36, 37—*See* ACT I OF 1894, ss. 32, 54, 2 C.L.J. 595=32 C. 921.

——O. XXI, r. 31 (=1882, s. 259—1877, s. 259=1859, s. 200).

See EXECUTION OF DECREE—MODE OF EXECUTION.

(3662)—*O. 21, r. 31 (=s. 259, Civ. Pro. Code, 1882)—Scope.*—S. 259, Civ. Pro. Code, 1882, provides for the delivery of specific moveable property in the possession of the judgment-debtor, and is therefore inapplicable to a case where the property sought to be attached is not in the possession of the judgment-debtor, but in the custody of a Bank. RAJA PUDMANUND SINGH v. CHANDI DAT JHA, **1 C.W.N. 170.** [*D.*, 60 P.W.R. 1908.]

(3663)—*O. 21, r. 31 (=s. 259, Civ. Pro. Code, 1882)—Sale certificate is title deed in the hands of the purchaser—Public document, a sale certificate is—Evidence Act, s. 65 (c) and (e)—Secondary evidence.*—A sale certificate granted under s. 259 of Act VIII of 1859, which Act declares that "such certificate shall be taken and deemed to be valid transfer of such right, title and interest," is a document of title. Such a sale certificate in the hands of the purchaser at an auction sale, is his title deed and he can, if he is so minded, refuse to produce it in the Court ; but in that case secondary evidence of the same will be admissible under s. 65, (*c*) of the Evidence Act. Per *Candy, J.*—A certificate of sale granted under the Civ. Pro. Code is a document of title, but is not a public document under the Evidence Act so as to allow secondary evidence of it to be given under s. 65, cl. (*e*) of the Act. YASANJI v. HARIBHA, **2 Bom. L.R. 533.**

(3663-*a*)—O. 21, r. 31—*See* NOS. 3205, 3342, *supra*.

(3664)—*O. 21, rr. 31, 32 (=Civ. Pro. Code, 1882, ss. 259, 260)—Suit to recover specific Company's Note.*—S. 7 of Act VIII of 1859, provides, that if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

so relinquished or omitted shall not, afterwards, be entertained. *Held*, on a construction of this section, first, that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit. A suit cannot be maintained to recover a specific Company's Note when the cause of action in a former suit was the misappropriation by the same defendant of similar Company's Notes, as such claim for the individual notes might have been included in the former suit. MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM, **8 W.R. 3, P.C. =11 M.I.A. 551.**

(3665)—*O. 24, rr. 31, 32—Imprisonment for disobedience of decree—Opportunity of obeying decree—Contumaciously disobeying decree.*—No order for enforcing a decree by imprisonment under s. 200 of the Code of Civil Procedure should be made until the defendant has had an opportunity of obeying the decree, or has contumaciously refused to obey it. UMED KIKA v. NAGINDAS NAROTAMDAS, **7 B H.C. O.C. 122.**

(3666)—*O. 21, rr. 31, 32 (=s. 200. Civ. Pro. Code, 1859)—Decree for performance of particular act—Execution of decree.*—When a decree directs the performance of, or abstinence from, a certain act, there must be clear evidence of disobedience by the person so directed, before the decree can be executed against him. When in a decree for restitution of conjugal rights, the plaintiff's mother-in-law, who had been impleaded as a defendant, was directed to refrain from preventing the plaintiff's wife from returning to him, *held* in an execution petition for attaching the property of the mother-in-law, that her action in permitting her daughter, who was of age, to reside in her home after decree, did not constitute such interference, on her part, with the return of her daughter, as would justify execution against her. AJNASI KUAR v. SURAJ PRASAD, **1 A. 501.**

(3667)—*O. 21, rr. 31, 32 (=ss. 259, 260. Civ. Pro. Code, 1882=s. 200, Civ. Pro. Code, 1859)—Decree for possession of wife—Enforcing execution of decree.*—Where there has been a decree in favour of an applicant for special possession of his wife, and application made for execution, the process under the ordinary sections will not be enforced. AKBARALLY v. HOOSSAIN ALLY, **1 Ind. Jur. N.S. 101=5 W. R. Mis. 29.**

(3667-*a*)—*O. 21, rr. 31, 32 (=Civ. Pro. Code, 1859, s. 200)—Decree for performance of particular act by judgment-debtor.*—A decree for the performance of a particular act (*e.g.*, the removal of certain obstructions in a pathway) can only be enforced under s. 200, Act VIII of 1859, by the imprisonment of the judgment-debtor, or the attachment of his property, or both. BHOOBUN MOHUN MONDUL v. NOBIN CHUNDER BULLUB, **10 B.L.R. App. 12=18 W.R. 282.** [*R.*, 33 C. 306=10 C.W.N. 287=3 C.L.J. 112.]

(3668)—O. 21, rr. 31, 32—*See* DECREE—DECREE, CONSTRUCTION OF, 19 W.R. 82.

(3669)—O. 21, rr. 31, 32—*See* MANAGER—MANAGER OF ATTACHED PROPERTY, 20 W.R. 78.

(3670)—O. 21, rr. 31, 32—*See* RESTITUTION OF CONJUGAL RIGHTS, 8 W.R. P.C. 3.

(3671)—*O. 21, rr. 31, 58 (=Civ. Pro. Code, 1882, ss. 259 and 278)—Scope of section not limited to attachment in order to sale.*—There is nothing in s 278 of the Code which limits it to cases of attachment in order to sale. It applies to seizures under s. 259 also. SAMRANDASS v. MAKUNDDASS, **7 C.P.L.R. 105.**

——O XXI. r. 32 (=1882, s. 260=1877, s. 260 =1859, s. 200).

See LIMITATION ACT, 1908, art. 182.

(3672)—*O. 21, r. 32 (=Civ. Pro. Code, 1882, s. 260)—Scope.*—The provisions of s. 260 supply a primitive means of punishing disobedience and are not intended to be a satisfaction of the decree so as to prevent a decree-holder in a possessory suit from taking further steps. Hence, if a successful decree-holder in a possessory suit has, under the provisions of that section, received some compensation for an injury done, he can still enforce a right to the possession of the property found under the decree to be his. AHMADI BEGAM v. AMANAT HUSSAIN, **1 A L.J. 431.**

(3673)—*O. 21, r. 32 (=s. 260, Civ. Pro. Code, 1882)—Applicability of—Breach of an injunction.*—Where the appellant was restrained by an injunction from taking water which the respondents carry through a *thodu*, but violated the injunction, and his property was consequently placed under attachment under s, 260, Civ. Pro. Code. *Held* that s. 260, Civ. Pro. Code, applies equally to cases where a party is directed to carry out something, as well to cases where he is directed to abstain from doing an act. The terms of the first clause clearly refer to cases where a party is restrained from doing an act, and the operation of that clause is not limited to cases contemplated by the second class. YELU MANIKARAN v. PAKARVOO MANAKAL JATAVEDAN NAMBUDRIPAD'S L.R. NARAYANA SOMAYAJIPID, **7 M.L.T. 227=6 Ind. Cas. 289=18 M.L.J. 465=M.W.N, 1910, 157.** (29 M. 314, *F.*)

(3674)—*O. 21. r. 32 (=Civ. Pro. Code, 1882, s. 260—Attachment—Sale—Conditions to be complied with.*—In cases under s. 260 of the Civ. Pro. Code of 1882, a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

penal one and must be construed strictly. Under it when a sale is ordered, the following conditions must exist :—(*a*) a valid original attachment; (*b*) application within one year of that attachment by decree-holder for sale, (*c*) lapse of one year from date of attachment. Therefore, where an order of attachment was made on 27th June, 1908 and was carried out on 20th July, 1908 and no application for sale was made by 20th July, 1909. *Held*, that the attachment ceased to exist, and the order for sale, therefore, was set aside. BADRI PERSHAD v. FAKIRA, **170 P.L.R. 1911.**

(3675)—*O.* 21, *r.* 32 (=1882, *Civ. Pro. Code*, s. 260)—*Execution—Decree for performance of particular act.*—Courts granting decrees for the specific performance of an act or acts should take care in preparing them to see that the particular thing or things to be done by the persons against whom they are passed are clearly expressed, as also that a time is given within which the order is to be obeyed. The application for execution of such decrees should be in accordance with the provisions of s. 260 of the Code. The decree-holder should ask either that the judgment debtor be called upon to show cause why, having wilfully failed to obey the decree, he should not be committed to prison, or have his property attached or both, or why, within a time specified, he should not perform the act required of him in the decree at the risk, in default, of the consequences abovementioned. GAYA PRASAD v. BIHARI, **A.W.N. 1883, 149**, [*R.*, A.W.N. 1883, 218].

(3676)—*O.* 21, *r* 32 (=s. 260, *Civ. Pro. Code*, 1882)—*Decree—Execution—Order directed to an officer of the Court.*—A Court, in executing a decree which enjoins a party to do a particular act *e.g.*, the removal of certain portions of his house whereby he obstructs ancient lights of the other party, has no power to pass an order empowering an officer of the Court to execute the decree by demolishing the objectionable superstructure, but it should pass an order in accordance with s. 260, Civ. Pro. Code. Where, however, a Court passes such an order, the *darkhast* need not be rejected on that ground alone ; but a Court of appeal can make such an order, in its stead, as the law permits. SAKARLAL v. PARVATIBAI, **4 Bom. L.R. 26=14 B 283.**

(3677)—*O.* 21, *r.* 32 (=*old* s. 260)—*Restoration of parnala.*—The execution of a decree directing that the *parnala* should be restored to its former place must be made under this section but not through the Nazir. NANUN MAL v. UTTAM CHAND, **107 P.R, 1889.**

(3678)—*O.* 21, *r.* 32 (=*Civ. Pro. Code*, 1877, s. 260)—*Disobedience to decree of Court--Attachment.*—A decree of Court directed that, instead of the defendant's sole name being used as previously in all papers connected with certain property the plaintiff and the defendant should jointly manage the property, and that the names of both should appear in all papers connected with such property as proprietors. The defendant, subsequent to the passing of the decree, opposed an application by the plaintiff to have his name registered in the Collectorate in respect of certain revenue-paying lands belonging to the estate. He also allowed the *amlahs* of the estate to continue to use his sole name. *Held* that, until the defendant had obeyed the decree by having the joint names of the parties inserted in all the books and the papers, the defendant's property could be attached. GOURI PROSAD MOITRA v. BHOLA NATH SANYAL **8 C.L.R. 487.**

(3679)—*O.* 21, *r* 32 (=s. 260, *Civ. Pro. Code*, 1882)—*Perpetual injunction, execution of a decree for, on each successive breach of decree—Limitation of three years from every breach—Executing Court, duty of, not to go behind the decree.*—On obtaining a decree for perpetual injunction, the holder of it may enforce the same, on each successive breach of the injunction, under s. 260 of the Code and an application to so enforce it must be made, under Art. 178, Sch. II of the Limitation Act, within three years of the date of the particular breach of it which is the occasion for the application. The decree-holder, however, is not obliged to take action in regard to every petty infringement of the injunction on pain of allowing the decree to become altogether inoperative after three years from the date of the first petty breach and depriving the decree-holder of the fruits of his decree if a serious infringement of it were afterwards made. *Held*, also, that it is not competent for an executing Court to go behind the decree, but such Court ought to give effect to the terms of the decree, without attempting to read into it limitations gathered from a reference to the records of the suit in which the decree was passed. VENKATACHALLAM CHETTY v. VEERAPPA PILLAI, **29 M. 314.**

(3680)—*O.* 21, *r.* 32 (=*Civ. Pro. Code*, 1882, s. 260)—*Court executing decree, powers of.*—When the decree as passed does not contain any direction to the defendant to do or refrain from doing any act, the Court executing the decree has no power to amplify its terms by calling in aid s. 260, Civ. Pro. Code. It is not within the province of an execution Court to modify and extend the decree which is under execution before it. ALLA BAKSH v. NISAR HUSAIN, **1 A.L.J. 541.**

(3681)—*O.* 12, *r.* 32—*Decree for possession of wife—Execution.*—In respect of the execution of a decree for the possession of a wife, the ordinary provisions relating to execution are not applied where the claim of the objector was not tried as a suit between him and the decree-holder. AKBUR ALI v HOSSEIN ALI, **1 Ind. Jur. N.S. 101=5 W.R. Mis. 29.**

(3682)—*O.* 12, *r.* 32—*Execution of decree for restitution of conjugal rights—Disobedience o order of Court—Civ. Pro. Code*, 1859, s. 200.—As

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to whether a wife's disobedience to the Court's order to retun to her husband could be dealt with by giving her over bodily into her husband's hands—which kind of disobedience would seem to be governed by s. 200, Civ. Pro. Code, 1859, and to be dealt with only by imprisonment, attachment of property or both. MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM, 8 W.R. P.C. 3.

(3683)—O. 21, r. 32—When enforced in a suit for account. *See* ACCOUNTS, SUIT FOR ACCOUNTS, A.W.N. 1905, 3=27 A. 374.

(3684)—O. 21, r. 32—S. 260—*See* ACT I OF 1894, ss. 32, 54, 2 C L.J. 595=32 C. 921.

(3685)—O. 21, r. 32—Decree against undivided father in Hindu joint family—Attachment of family property in execution—Son's share when bound by decree—*See* HINDU LAW—JOINT FAMILY, 11 B. 37.

(3685-*a*)—O. 21, r. 32—*See* NOS. 496-*b*, 980, 3342, 3454, 3496, 3661, 3664, 3665, 3666, 3667, 3667-*a*, 3668, 3669, 3670, *supra*.

—— O. XXI, r. 33 (New).

See EXECUTION OF DECREE—MODE OF EXECUTION.

(3686)—*O. 21, r. 33 (1) and (2)—Restitution of conjugal rights—Detention of wife in prison—Discretion of Court.*—In execution of a decree for restitution of conjugal rights a Court ought, in the exercise of its discretion under O. XXI, r. 33 (1), to decline to enforce the decree by the detention in prison of the wife, especially where the marriage was an unhappy one and the husband has charged the wife with adultery. KARAM ALLAHI v. MARIAM, **10 Ind. Cas. 177.**

—— O. XXI, r. 34 paras 1 to 4 (=1882, s. 261 =1877, s. 261=1859, s. 202); and para (5) (=1882, s. 262=1877, s. 262=1859, s. 202.)

See EXECUTION OF DECREE—MODE OF EXECUTION.

(3687)—O. 21, r. 34—*See* SET-OFF, 11 W.R. 144.

(3687-*a*)—O. 21, r. 34—*See* NO. 358, *supra*.

(3688)—*O. 21, r. 34 (1) to (4) (=s. 261, Civ. Pro. Code, 1882)—Decree for execution of conveyance—Execution of sale-deed in accordance with decree for same.*—The appellant obtained a decree against the respondent, by which the latter was to execute a sale-deed in favour of the former of an 8-annas share in a village in lieu of Rs. 3,000. The appellant applied to the Court to execute it by compelling the judgment-debtor to execute a sale-deed in terms of the decree. A draft sale-deed was produced by the decree-holder and its terms were agreed to by the judgment-debtor. It was then ordered that the draft should be copied on a paper bearing a sufficient stamp. When the proposed sale-deed was prepared, the judgment-debtor and the decree-holder's pleader agreed that the work "*hurk wagaira*," which occurred in it

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

should be struck out. They were accordingly struck out by the Court and the deed was then executed by the judgment-debtor who, in executing it, added that it constituted the decree-holder "superior proprietor." In appeal, the appellant contended that the first Court could not go beyond the decree or allow the judgment-debtor to suggest alterations in the draft prepared in accordance with the decree, and that it should have executed the sale-deed on behalf of the judgment-debtor. *Held*, that, if the application were considered one under s. 261, Civ. Pro. Code, as the Court did not execute the sale-deed, the application had not been complied with. If it were considered an application to compel the judgment-debtor to execute the sale-deed, no such application were entertainable by the Court. *Held*, further, that both the parties having considered the application as one under s. 261, Civ. Pro. Code, it had not been disposed of according to law. SWAMI DAYAL v. SHEORAJ BALI, **5 O.C. 370.**

—— O. XXI, r. 35 (=1882, s. 263=1877, s. 263 =1859, ss. 199 and 223).

See EXECUTION OF DECREE—MODE OF EXECUTION.

(3689)—*O. 21, r. 35 (=Civ. Pro. Code, 1882, s. 263)—Delivery of property under section—Dispossession of third party—Remedy of that party.*—Delivery of property under s. 263, Civ. Pro. Code, would amount to a dispossession, in the eye of law, of a third party if such delivery takes place in the presence of the third party, and he does not obstruct, or if the delivery takes place hostilely to him and the Nazir of the Court does all that has to be done for effecting delivery of possession. [*Cited*, 17 M.L.J. 598.] A person dispossessed in execution of a decree against another may not be bound to institute proceedings in Court under s. 230 of Act VIII of 1859, or even bring a regular suit for recovery of possession, but may, if he is able to do so, re-enter and take possession of land. KOCHERLAKOTA VENKATA-KRISTNA ROW v. VADREVU VENKAPPA, **27 M. 262.**

(3690)—*O. 21, r. 35 (=old s. 263)—Hindu co-sharers—Sale by one of his share of house—Right of vendee.*—Where a house is enjoyed by co-sharers only through receipt of rent, it is not open to one co-sharer to alienate to his vendee a right to interfere with the right of the other co-sharers, so as to deprive them of the enjoyment of their shares in the joint property. PETMAN v. RAMSAY, **16 P.R. 1898.**

(3691)—*O. 21, r. 35 (=s. 263, Civ. Pro. Code 1882)—Occupation by judgment-debtor after execution—Fresh cause of action.*—A defendant, who remains in actual occupation notwithstanding execution, must be regarded as a trespasser, who commits a fresh act of dispossession and thus gives a fresh cause of action. MAUNG LU GYI v. MAUNG NYUN BU, **8 Ind. Cas. 463=3 Bur. L.T. 83** (8 C.W.N. 49, *F.*).

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3692)—*O. 21, r. 35 (=s. 263, Civ. Pro. Code, 1882) —Decree for redemption, delivery of possession of land under, includes standing crops thereon—Appeal from order in execution of decree, whether appellate Court can alter effect of decree.*—Where a person obtained a decree, entitling him to redemption, and, in execution of such decree, possession of the land was delivered through Court to such person under s. 263 of the Code, the delivery must be deemed to have been made, not of the land alone, but of all things attached to it, including the crops growing thereon; consequently, the defendant, from whose possession the property had been taken and delivered, could not claim to re-enter the same in order to reap, gather and dispose of the crops he had cultivated thereon. *Held*, also, on appeal from an order in execution-proceedings, relating to the decree, it is not competent for the appellate Court to so alter the original decree as to allow the judgment-debtor to remove the crops or declare his rights to the same. AUNG BAW v. TUN GAUNG, **3 L.B.R. 129.**

(3692-*a*)—*O. 21, r. 35—Suit for recovery of joint possession—Form of decree—Practice.*—*Held*, that a plaintiff who has never been in possession, but is entitled to possession jointly with other persons, can be granted a decree for joint possession. There is no distinction on principle between the case of a person who was in joint possession but was subsequently dispossessed, and the case of a person who was entitled to joint possession but had not obtained such possession. JAGAN NATH OJAH v. RAM PHAL, **8 A.L.J. 1312.**

(3692-*b*)—*O. 21, r. 35 (=Civ. Pro. Code, 1859, s. 199)—Charter Act, s. 15—Act VIII of 1859, s. 199*—Ex parte *judgment.*—Act VIII of 1859, s. 119, gives no remedy to a defendant who has wilfully or carelessly failed to appear after due service of summons; and where a defendant failed to make out any right to a re-opening of the case under that section, he was not allowed the extraordinary remedy provided by s. 15 of the High Courts Act. *In the matter of the petition of* S. J. LESLIE, **10 B.L.R. 68 =18 W.R. 474.**

(3693)—O. XXI, r. 35—*See* APPEAL—DECREE AND EXECUTION OF DECREE, 16 W.R. 307.

(3694)—O. 21, r. 35—*See* MESNE PROFITS-RIGHT TO MESNE PROFITS, 11 W.R. 444.

(3695)—O. 21, r. 35—*See* POSSESSION—ADVERSE POSSESSION, 21 A. 98, 11 W.R. 63.

(3695-*a*)—O. 21, r. 35—*See* NOS. 306-*a*, 981, *supra.*

(3696)—*O. 21, rr. 35, 36, (=ss. 263, 264, Civ Pro. Code, 1882) Decree—Execution—Symbolical possession of immoveable property given in execution proceedings.*—A house belonging to B, a minor, and his brothers was sold in execution of a decree in 1881 and purchased by N. but it remained in the possession of B and his brothers. On the 12th of October, 1882, the interest of N in the house was sold to D. All the brothers of B passed rent-notes in favour of D in respect of the house, the last of which was dated, 4th February 1887. D sued to recover possession of the house, alleging that from 5th August, 1887, that is, after the expiration of the period mentioned in the last rent-note, B and his brothers continued in wrongful possession. An *ex parte* decree was passed on the 15th October, 1898, against all brothers except one who appeared and admitted D's claim. In execution of this decree by D's heir on the 8th January, 1902, no actual possession of the house was given to him. The plaintiffs, who were entitled to D's property filed a suit on the 6th of July, 1905, to recover the possession of the house. *Held*, that the suit was barred by limitation. In execution of decrees to recover possession of immoveable property, possession may be obtained in one of two ways: either in the manner prescribed in s. 263 of the Civ. Pro. Code of 1882, or in the manner prescribed in s. 264 of the Code. When symbolical possession is referred to as a possession recognized by law, it must have reference to possession under s. 164 of the Code. BHAICHAND GALACHAND v. BALA KHANDU TELI, **11 Bom. L.R. 1344 = 4 Ind. Cas. 834.**

(3697)—O. 11, rr. 35, 36—*See* POSSESSION—NATURE OF POSSESSION, 3 W.R. Mis. 2, 11 C. 93.

(3697-*a*)—*O. 21, rr. 35 (1), 36, 95, 96 (=Civ. Pro. Code, 1882, ss. 263, 264, 318, 319)—Decree—Execution—Delivery of property—Symbolical possession—Actual possession—Limitation.*—A mere formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor, where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same. Symbolical possession is not real possession nor is it equivalent to real possession under the Civ. Pro Code, except where the Code expressly or by implication provides that it shall have that effect. MAHADEV SAKHARAM PARKAR v. JANU NAMJI HATLEY, **14 Bom. L.R. 115 F. B.**

(3698)—O. 21, rr. 35, 100, 101, 103—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 20 B. 351, F.B.

——O. XXI, r. 36 (=1882, s. 264=1877, s. 264 =1859, s. 224).

(3699)—O. 21, r. 36—*See* HINDU LAW—PARTITION, 26 M. 78.

(3700)—O. 21, r. 36—*See* POSSESSION—NATURE OF POSSESSION, 7 B.L.R. App. 20= 15 W.R. 307, 15 W.R. 99, 9 W.R. 358.

(3701)—O. 21, r. 36—*See* POSSESSION—SUITS FOR POSSESSION, 3 M.L.J. 242.

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(3702)—O. 21. r. 36—*See* NOS. 981, 3696, 3697, 3697-*a*, *supra*.

(3703)—O. 21, rr. 36, 97, 99—*See* APPEAL—ORDERS, 16 M. 127.

(3704)—O. 21. rr. 36, 99—*See* RESISTANCE TO EXECUTION CF DECREE, 1 N.W.P. 218.

(3705)—*O. 21. rr. 3, 6, 100 (=Act VIII of 1859, ss. 224, 230)—Landlord's rights with reference to—s. 15, Charter Act—Superintendence of High Court.*—A landlord must be taken to be in possession of land occupied by tenants from whom he is recovering rent. If a bamboo be plucked and proclamation made to the occupants under s. 224, Act VIII of 1859, that the land had been adjudged to some other person, the landlord has a right to come in and ask for redress under s. 230. Whether or not an appeal lies from the decision of a lower Court rejecting an application by a party other than a defendant, under s. 230 of Act VIII of 1859, disputing the right of the decree-holder to dispossess him, the High Court may, under s. 15 of the Charter Act, compel the lower Court to exercise its jurisdiction. THE COLLECTOR OF BOGRA v. KRISHNA INDRA ROY, **2 B.L.R. A.C. 301=11 W.R. 191.** (1 W.R. 140, *R.*)

——O. 21, r. 37 (=1882, s. 245-B).

See ARREST.

(3706)—*O. 21, r. 37 (=s. 245-B, Civ. Pro. Code, 1882)—Insolvency Act (Stat. 11 and 12, Vic. c. 42, ss. 13 and 49)*—The provisions of of s. 49 of the Insolvency Act are not directory or imperative, but merely permissive; and even after a vesting order has been made and the schedule of the insolvent has been filed, the Court has power, under s. 245-B of the Civ. Pro. Code, to direct execution against the person of the defendant by his arrest and imprisonment in cases of fraud or misconduct although the amount of the judgment-debt is fully admitted by the insolvent in his schedule. BHASKER v. SHRIDHAR, **9 Bom. L.R. 898.**

(3706-*a*)—O. 21 r. 37—Revivor of decree—Issue of notice under s. 245-B—Effect—*See* LIMITATION ACT, 1908, sch. I, art. 183, 11 Ind. Cas. 216.

(3707)—O. 21, r. 37—*See* ST. 11 AND 12 VIC. c. 21, s. 49, 9 Bom. L.R. 898.

(3707-*a*)—O. 21, r. 37—*See* NO. 1223, *supra*.

——O. XXI, r. 38 (=1882 s. 337=1877, s. 337=1859 s. 222.)

(3707-*b*)—*O.* 21, r. 38—*See* NOS. 1205, 3637, *supra*.

——O. XXI, r. 39, para 1 (=1882, s. 339=1877, s. 339=1859 s. 276; para (5) (=1882 s. 340=1877, s. 340=1859, s. 279).

See ARREST.

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(3707-*c*)—O. 21, r. 39—*See* NO. 1205, *supra*.

(3708 & 3709)—*O.* 21, r. 39 (1)—*See* SUBSISTENCE MONEY, Bourke, O.C. 51.

(3710)—O. 21, r. 39 (1), s. 58—*See* SUBSISTENCE MONEY, Bourke, O.C. 59, Bourke, O.C. 52.

——O. XXI, r. 40 (=1882, s. 337-A.)

See ARREST.

(3711)—*O.* 21, *r.* 40 (=*Civ. Pro. Code*, 1882, *s.* 337-*A*)—*Evidence Act, ss.* 102, 106.—The language of s. 337-A. Civ. Pro. Code, implies apparently that the judgment-debtor has to satisfy the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause. The judgment-debtor is the party who has to show the Court his right to exemption from the provisions which the judgment-creditor has put in force against him. Ss. 102 and 106 of the Evidence Act imply the same thing. The presumption is that the judgment-debtor has not contracted his debts without the means of paying it, and, therefore, if no evidence at all were given on either side, the judgment-debtor would fail in his claim to exemption from the consequences of his own act. So too, the fact of the judgment-debtor's poverty must be especially within his own knowledge, and cannot be within the knowledge of the creditor except to a limited extent. BHAIMIA AHMED ISMALJEE v. KADIR SET, **U.B.R. 1897=1901, Vol. II, 279.**

(3712)—*O.* 21, *r.* 40 (=*s.* 337-*A*, *Civ. Pro. Code*, 1882)—*Surety—Execution of decree—Right of decree-holder to proceed against surety.* The petitioner became a surety under s. 337-A, and not under s. 336, though the judgment-debtor got leave during the proceedings to apply for insolvency, without the consent of the surety. *Held*, the surety did not thereby become party to the decree, and the decree cannot be summarily executed against him. HIRA LAL v. MANSA RAM, **30 P.L.R. 1905=50 P.R. 1905.** (24 M. 560, *R.*)

(3712-*a*)—*O.* 21, *r.* 40 (=*Civ Pro. Code*, 1882, *s.* 337-*A*)—*Lunacy of judgment-debtor—Cause for refusing to arrest in execution of decree—Discretion of Court in ordering arrest.*—There is no provision of the Civ. Pro. Code, expressly exempting lunatics as such from arrest, but the power to order an arrest at all under the Code is discretionary. S. 337-A provides that if the judgment-debtor is found to be unable from poverty or other sufficient cause to pay the amount of the decree, the Court may make an order disallowing the application for his arrest and imprisonment. In the present case, a notice was issued, the wife of the judgment-debtor appeared and showed the cause of her husband's lunacy for his inability to pay the decree-amount, and the Subordinate Judge had rightly accepted this cause and rejected the *darkhast* for execution, the lunacy of the judgment-debtor amounting

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to a good cause within the meaning of s. 337-A of the Code for disallowing an application for his arrest. BHANANBHAI v. CHOTABHAI, **22 B. 961.**

(3712-*b*)—O. 25, r. 40—*See* NOS. 1205, 1210, *supra*.

(3713)—O. 21, r. 40, s. 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 21 M. 29.

——O. XXI, r. 41 (=1882, s. 267=1877 s 267 =1859 s. 219).

See ATTACHMENT.

(3714)—*O. 21, r. 41 (=Civ. Pro. Code, 1882, Chap. XIX, s. 267)—High Court Rule No. 183—Order obtained by attorney against client for payment of cost—Satisfaction" "liable to be seized," meaning of—Property mortgaged by judgment-debtor.*—An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or an order to the execution of which the provisions of chapter XIX, Civ. Pro. Code, apply, and as s. 267 is a portion of that chapter, its provisions are also applicable to proceedings taken in the execution of such an order. The word "satisfaction" in s. 267, Civ. Pro. Code, causes the section to be applicable to all the property of the judgment-debtor out of which the decree can be satisfied, either by delivery in obedience to the decree or by sale. The words "liable to be seized" in s. 267, Civ. Pro. Code, do not point to any particular period of time at which the enquiries may be made, so as to confine the operation of the section to a period anterior to the issue of process, but are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree. Where the property in question is admittedly the property of the judgment debtor, it is *prima facie* liable to be seized in execution of a decree against him; and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt. *In re* PREMJI TRIKUMDAS, **17 B. 514.**

(3714-*a*)—O. 21, r. 41—*See* NO. 910, *supra*.

(3715)—O. 21, rr. 41, 46, O. 40, rr. 1 to 3.—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 11 B. 448.

——O. XXI, r. 42 (=1882, s. 255=1877, s. 255.)

(3715-*a*)—O. 21, r. 42—*See* NO. 347, *supra*.

——O. XXI, r. 43 (=1882, s. 269=1877, s. 269 =1859, s. 233.)

See ATTACHMENT.

(3716)—O. 21, r. 43—*See* LIMITATION ACT, 1908, arts. 29, 42, 27 M. 346.

(3716-*a*)—O. 21, r. 43—*See* NOS. 2314, 3437, *supra*.

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——O. XXI, r. 46 (=1882 s. 268=1877, s. 268 =1859, ss. 236, 239, 240.)

See ATTACHMENT.

(3717)—*O. 21 r. 46 (=s. 268 (a), Civ. Pro. Code, 1882)—Execution of decree—Attachment of debt—No bar to suit by creditor.*—The section does not intend that, while a debt is under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it, but prohibits only the recovery of the debt and the payment of it by the debtor to the creditor. SHIB SINGH v. SITA RAM, **13 A. 76=A.W.N. 1890, 194** [*F.*, 14 A. 162; *Appr.*, 17 A. 198; *R.*, 142 P.R. 1894.]

(3718)—*O. 21, r. 46 (=Civ. Pro. Code Act X of 1877, s. 268)—Attachment and sale of bonds—Court of Small Causes*—Under the provisions of s. 268, Civ. Pro. Code, bonds cannot be sold till the end of 6 months from the date of the attachment. A Court of Small Causes cannot appoint a receiver, and, therefore, any bonds on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt. NURSINGDAS RAGHUNATHDAS v. TULSIRAM *bin* DOULATRAM, **2 B. 558.**

(3719)—*O. 21, r. 46 (=s. 268, Civ. Pro. Code, 1882)—Debt secured by mortgage of immoveable property—Attchment of—Nature of such debt, moveable or immoveable property.—Held*, that, for the purposes of s. 268, Civ. Pro. Code, a mortgage-debt is not immoveable but moveable property. BANTU v. GANDA SINGH, **18 P.R. 1909=22 P.W.R. 1909=1 Ind Cas. 450.** (58 P.R. 1899, *R*; 9 M. 5, *Not F.*; 18 M. 457, 19 B. 121, 12 C. 546, 20 C. 805, 23 C. 450, 6 C.W.N. 5, *F.*)

(3720)—*O. 21, r. 46 (=Civ. Pro. Code, 1882, s. 268)—Sale of mortgage-debt attached in execution, validity of.*—The sale of a mortgage debt in pursuance of an attachment made under s. 268 of the Code is a legal and valid sale. BALWANT RAO v. MT. RATNA BAI, **14 C.P.L.R. 5.** (9 M. 5, 19 B. 121, 18 A. 469, 20 C. 805, *R.*)

(3721)—*O. 21, r. 46 (=s. 268, Civ. Pro Code, 1882) — Attachment of debt—Payment into Court*—Though, under s. 268, Civ. Pro. Code, 1882, a debtor of a judgment-debtor may pay a debt attached by a prohibitory order under that section into the attaching Court, such payment is optional with him and he is not bound and cannot be compelled by summary process to make such payment. LACHMAN SINGH v. RAM SAHAI, **98 P.R. 1886.**

(3722)—*O. 21, r. 46 (=old s. 268)—Prohibiting order—Suit to recover debt.*—A suit against a debtor to recover a debt will not be barred by the fact that the Court made a written order in execution of a decree under s. 268, Civ. Pro.

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Code, 1882, prohibiting a creditor from recovering such debt and the debtor from making payment thereof until further orders. NANDU v. SUNDAR, **142 P.R. 1894.** (13 A. 76, *R.*)

(3723)—*O. 21, r. 46. (=s. 268, Civ. Pro. Code, 1882)—Decree—Execution—Attachment of salary—Prohibitory order—Railway servants—Salaries—Small Cause Court—Jurisdiction.*—Where a Railway servant resides, works for gain and receives his salary within the local jurisdiction of the Court that passed the decree and the disbursing officer holds his office beyond the local jurisdiction of that Court, the Court cannot attach the salary that fell due and that was to fall due, by a prohibitory order, under s. 268 of the Civ. Pro Code issued to the disbursing officer. SAYADKHAN v. DAVIES, **5 Bom.L.R. 803=28 B. 198.**

(3723-*a*)—*O.21, r. 46 (=Civ.Pro.Code, 1859, ss. 236, 243, 246)—Suit by judgment-creditor to recover debt due to judgment-debtor—Not maintainable.*—A judgment-creditor attached, in execution of his decree, a debt due to the judgment-debtor by A B. The Court executing the decree directed the judgment-creditor to sue A B as he denied the debt. *Held (Lindsay, J. dissenting)* that the judgment-creditor could not sue as he was not the assignor of the debt, nor was he appointed manager to sue the debt under s. 243, and s. 246 did not apply as there could not be possession of a debt, such as was necessary to bring the case under that section. JOWRI MAL v. MAHOMED HOOSEIN, **24 P. R. 1874.**

(3724)—*O. 21, r. 46 (=s. 268, Civ. Pro. Code, 1882)—Compulsory deposits—Provident Funds Act (IX of 1897), s 4.*—A "compulsory deposit" made under s. 4 of the Provident Funds Act, 1897, is not liable to be attached under s. 268 of the Civ. Pro. Code, 1882. VEERCHAND v. B B. & C.I. RY., **6 Bom. L.R. 921=29 B. 259.**

(3724-*a*)—*O. 21, r. 46 (=Civ. Pro. Code, 1859, ss. 236, 243)—Appointment of plaintiff as manager—Debt disputed—Irregularity in attachment of debt.*—Plaintiff sued for a debt as manager appointed under s. 243, Civ. Pro. Code. He was appointed manager before attachment of the debt under s. 236, by prohibitory order, and though defendants were subsequently served with prohibitory orders, no such order was served on the defendant. The debt was disputed. *Held*, that plaintiff's suit as manager was maintainable though the debt was disputed. *Held*, also, that though the attachment did not precede the appointment yet his suit was maintainable, as it was not shown that defendants had been prejudiced by the irregularity. The attachment was not invalidated by the prohibitory order not being served on the judgment-debtor. NEBRAJ v. UTTAM CHAND, **67 P.R. 1877.**

(3725)—O. XXI, r. 46—*See* DEBT, **10 W.R. 149.**

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(3726)—O. 21, r. 46—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 3 C.L.R. 30.

(3727)—O. 21, r. 46—*See* LIMITATION ACT, 1908, s. 15, 13 A. 76=A.W.N. 1890, 194.

(3727-*a*)—O. 21, r. 46—*See* NOS. 1278, 1279, 1523, 2908-*a* 3715, *supra* AND NOS. 3783, 3784, *infra*.

(3728)—*O. 21, r. 46, s. 63, O. 38, r. 12 (=ss. 268, 285 and 490, Civ. Pro. Code, 1882)—Attachment before judgment of debt due to judgment-debtor—Decrees of Small Cause Court and original Court—Payment by debtor of judgment-debtor into Small Cause Court—Voluntary payment—Liability of debtor to pay again—Effect of s. 490 of the Code.*—A person had two decrees passed against him, one by Small Cause Court and the other by Munsiff's Court, both being preceded by attachment before judgment of a debt due to him. The debtor of the judgment-debtor paid the amount of the decree of the Small Cause Court, notwithstanding a notice issued by the Munsiff's Court, prior to attachment after decree in Small Cause Court, to pay the amount of its decree. *Held* that the payment into the Small Cause Court was a voluntary payment, at his own risk, in a Court of inferior jurisdiction, with a full knowledge of the attachment by the higher Court. There was therefore no 'realization' of the money paid by the debtor into the Small Cause Court, in the proper sense of the term, by that Court. He was therefore liable to pay the amount once again. The effect of s. 490, Civ. Pro. Code, is to put a person attaching before judgment in the same position as if he had attached, after decree, if decree is passed in his favour after attachment before judgment. RAMASAWMY UDAYAR v. CHAKRAPANY CHETTIAR, **17 M.L.J 488.**

(3728-*a*)—*O. 21, r. 46, s. 64 (=Civ. Pro. Code, 1859, s. 240—Alienation pending attachment.*—An alienation which is null and void because made whilst an attachment was subsisting, cannot be validated by the removal of the attachment. RAMCHARAN LAL v. JHATU SAHU, **12 B.L.R 413, Note=14 W.R. 25.** [*Not F.*, 24 W.R. 56.]

(3729)—O 21, r. 46, s. 64—*See* ATTACHMENT—ALIENATION BEFORE ATTACHMENT, 11 B H.C. 159. 9 W.R. 544, 6 N.W.P. 296, 9 W.R. 307, 1 N.W.P. 125, 1 N.W.P. **114.**

(3730)—*O. 21, r. 46, s. 73 (=ss. 268, 295, Civ. Pro. Code, 1882)—Attachment—Injunction ordered—Execution application struck off, whether pending—Claim for rateable distribution.*—Plaintiff applied in April, 1900, for attachment of 1st defendant's right to receive a monthly allowance and for an injunction directing the disburser of the allowance to pay it into Court as it fell due. The Court did not attach the right, but directed notice to issue as

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regards injunction and, on 4th May, 1900, made the order, as regards the injunction, absolute. Subsequently, payment not having been made, the Court struck off the plaintiff's execution application, on 18th July. *Held*, that the order of 4th May cannot be taken as an order effecting an attachment under s. 268, Civ. Pro. Code, 1882, and that the last order dated 18th July disposed of the application finally, and that consequently plaintiffs had no right to claim reteable distribution. T. RANGANATHA TAWKER v. T SEETHARAMA CHETTY, **7 M.L.T. 110=5 Ind. Cas. 820.** (4 M 483, *R.*)

(3731)—*O. 21, r. 46, s. 73 (=ss. 268, 295, Civ. Pro. Code, 1882)—Execution—Attachment—Rateable distribution.*—An allowance due to a judgment-debtor was attached in execution of a decree, and the disburser of the allowance was directed to pay the amount of allowance into Court. But the disburser having failed to comply with the direction of the Court, the execution was struck off. Subsequently the allowance was realized in execution of the decrees of other creditors of the judgment debtor, and the decree-holder, whose execution had been struck off, claimed reteable distribution. *Held*, that the direction of the Court to the disbureer to pay the allowance into Court did not amount to an attachment of the allowance under s. 268 of Act XIV of 1882, that as the execution application was finally struck off, there was no right to rateable distribution of assets realised at the instance of other creditors. SEENI ASAN USAN ROWTHEN v. KARUPPAN CHETTY, **5 Ind. Cas. 145.** (4 M. 383, *F.*)

(3732)—*O. 21, r. 46 and O. 38, rr. 5, 12 (=Civ Pro Code, 1882, ss. 268, 483, 490)—Attachment before judgment—Decree in favour of attaching creditor—Subsequent vesting of judgment debtor's estate in official assignee—Right of official assignee as against attaching creditor.*—A creditor obtained an order under s. 483, Civ Pro. Code, attaching before judgment a certain sum of money deposited by the defendant with another, and subsequently obtained a decree. Later on, the judgment-debtor having been declared an insolvent, his estate vested in the official assingee, who preferred a claim to the money under attachment. *Held* that s. 490 of the Code provided that when property was attached before judgment and a decree was given in favour of the plaintiff, it was not necessary to re-attach the property in execution of the decree. The order of attachment did not purport to deal with any question of title. It prevented alienation and did not confer title. It gave the judgment-creditor certain rights in execution. It did not operate, when these rights were not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevailed against that of the official assignee under a vesting order of insolvency made after the order of attachment. As, under the Code, an attaching creditor did not obtain a charge or lien on the attached property, there could be no question of the debtor's property vesting in the official assignee subject to an equity in favour of the attaching creditor. Consequently the official assinee was entitled to the money. KRISHNASWAMY MUDALIAR v. OFFICIAL ASSIGNEE OF MADRAS, **26 M. 673.** *F.*, 29 B. 405=7 Bom.L.R. 488; *R.*, 5 P W.R. 1909 =6 P.L.R. 1909; *D.*, 30 M. 413=17 M.L.J. 334=2 M.L.T. 365.]

(3733)—O. 21, r. 46. O. 38, r.6.—*See* LIMITATION ACT, 1908, s. 15, 17 A. 198, P.C.

(3734)—O. 21, r. 46, O, 40, rr. 1,2,3, O. 21, r. 83—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 3 B.L.R. A.C. 320=14 W.R. 406, note.

(3735)—O. , rr. 46, 48, s. 113—*See* ATTACHMENT—GENERAL, 30 C. 713=7 C. W.N. 821.

(3736)—*O. 21, rr. 46, 48, 3—Debt attachment of—Debt payable by non-resident outside jurisdiction—Executing Court, power of, to execute decree outside jurisdiction—Precept, object of.*—It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor by a non-resident, outside the jurisdiction. One of the exceptions recognized to the general rule that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction, is in cases of decrees for sale of mortgaged properties; others have been recognised by the new Civ. Pro. Code in cases of attachment of salaries of public officers under O. 21, r. 48, and of sale of an entire estate, situated within the local limits of the jurisdiction of more Courts than one, under. r. 3 of O. 21. *Obiter*:—The object of a precept is to enable a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. BEGG DUNLOP & CO. v. JAGANNATH MARWARI, **14 C L J. 228.**

(3737)—*O. 21, rr. 46, 52—Annuity not due, if garnishable—Anticipatory attachment of money expectant to reach the hands of public officer.*—A conveyance of all properties by a person in favour of his son for the payment of his debts provided that the purchaser would pay the vendor a monthly sum of Rs. 4,000 the first payment to be made on 1st October 1905, and the payment of every succeeding month, on the first day of the month following. The deed further provided that the vendor would not, by mortgage or otherwise, seek to change or alienate the allowance-payable to him; and that, on no account and under no circumstances, was the allowance to become payable

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to, or demandable by, any person other than the vendor or his duly constituted attorney. There was also a provision, that, so far as was consistent with the then subsisting mortgage executed by the vendor himself, the allowance payable was to be a first charge upon a specified share of the estate. A decree-holder of the vendor applied for recovery of the judgment-debt by attachment of the allowance of Rs. 4,000 from April 1910, up to the date of realisation, and also for rateable distribution of a sum of money, which had been already deposited in Court and represented a portion of the allowance due to the judgment-debtor from November 1909 to January, 1910. He further asked that the allowance for the months of February and March, 1910, which had already accrued due might be attached and made available for the satisfaction of their dues: *Held*, that an annuity, not yet due, was not garnishable under the provisions of the law, and that r. 46 of O. 21 of the Code was of no assistance to the decree-holder. (9 C.W.N. 703, *D.*) The term "debt" in O. 51, r. 46 of the Code is used in its legal sense of a debt either due or accruing due. R. 52 of O. 21 of the Code applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expectant to reach the hands of a public officer, and is restricted only to money actually in his hands. RAJA PADMANUND SINGH v. RAMA PRASAD MALVI, **14 C.L.J. 127.** (22 B. 39, *F.*)

(3738)—*O.* 21, *rr.* 46, 52, 58, 60, 63 (= *ss.* 268, 272, 278, 280 *and* 283, *Civ. Pro. Code*, 1882)—*Attachment by prohibitory order—Removal of attachment— Declaratory suit—Discretion of Court, when to be interfered with—Specific Relief Act* (*I of* 1877), *s.* 42.—S. 272 of the Code applies to the investigation of claims arising out of attachment by prohibitory order under s. 268, and, therefore, a party aggrieved by an order passed in the circumstances under s. 272 has a remedy under s. 283 of the Code. (27 M. 67, 13 M.L.J. 467, *Appr.*; 4 B. 323, *Dis. Appr.*) The only difference between a suit under s. 283 of the Code and s. 42 of the Specific Relief Act is that, in the former case the period of limitation is shorter. Where a Court has exercised its discretion and granted a declaratory decree, the appellate Court errs in interfering with the exercise of that discretion merely on the ground that the plaintiff had a remedy open to him other than the suit for a declaration. The appellate Court should not interfere with the exercise of that discretion, unless it is satisfied that the lower Court had not good grounds for exercising it. PITCHE PILLAY v. MAUNG PET, **8 Ind. Cas. 608=3 Bur. L T. 34.**

(3739)—*O.* 21, *rr.* 46, 54 (= *ss.* 268, 274, *Civ. Pro. Code*, 1882)—*Decree—Execution—Attachment—A purely usufructuary mortgage with possession—Money-decree against mortgagee—Attachment and sale of the mortgage-debt—Practice and procedure.*—A mortgage executed a purely usufructuary mortgage with possession of certain lands. A creditor of the mortgagee, having obtained a money-decree against him, attached the mortgage-debt under s. 268 of the Code of 1882 and at the Court-sale purchased it himself. The creditor then sued to recover the possession of the lands: *Held*, that, as the mortgage in question was purely usufructuary there was no debt due from the mortgagor which could be attached under s. 268 of the Code of 1882; and that, therefore, the attachment and sale gave the creditor no right to possession of the mortgaged land. *Held*, also, that, in the case of a purely usufructuary mortgage, where there was no debt payable by the mortgagor, the procedure by attachment under s. 263 was inapplicable: the procedure should be by attachment, under s. 274 of the interest in immoveable property and its sale in accordance with the provisions of the Code. MANILAL RANCHHOD v. MOTIBHAI HEMABHAI, **13 Bom. L.R. 233.**

(3739-*a*)—*O.* 21, *rr.* 46 *and* 54 (*ss.* 268, 274, *Civ. Pro. Code*, 1882,)—*Debt secured by a mortgage of immoveable property—Moveable property—Decree—Execution.*—A debt secured by a mortgage of immoveable property is, for the purposes of execution of a decree under the Code of Civil Procedure, to be regarded as moveable property; and can, in execution of such decree, be attached and sold in the manner provided for by s. 268 of the Code. BHOLANATHA v. BAI KASHI, **4 Bom. L.R. 18 =26 B. 305.**

(3740)—O. 21, rr. 46, 54—*See* BOND, 10 M. 169.

(3741)—O. 21, rr. 46, 54—*See* PROCESS, 10 W.R. 264.

(3742)—O. 21, rr. 46, 54—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 18 M. 437=5 M.L.J. 60.

(3743)—*O.* 21, *rr.* 46, 54, *s.* 64 (=*ss.* 268, 274, 276, *Civ. Pro. Code*, 1882)—*Attachment of mortgage-debt—Copy of order not affixed in Court-house—Subsequent assignment of mortgage-bond--Assignment* bonafide *and for valuable consideration—Priority of assignee.*—A mortgage-bond was attached in execution of a money decree, but a copy of the attachment order was not affixed in the Court-house as required by s. 268 of the Code. Four days after attachment, the present plaintiff took an assignment of the mortgage-bond. The plaintiff, thereafter, brought a claim case, which was, however, rejected. Hence the present suit. The question for decision was whether or not the plaintiff was entitled to priority over defendant, the attaching-creditor. *Held*, it was found by the lower Court that the assignment was made in good faith and for valuable consideration. It was also found that no copy of the attachment order was affixed in the Court-house.

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Consequently, under s. 276 of the Code, the attachment was ineffectual and the plaintiff's title must prevail. SATYA CHARAN MUKHERJEE v. MADHYB CHUNDER KARMOKAR, **9 C.W.N 693.**

(3744)—*O. 21, rr. 46, 54, s. 64 (=Civ. Pro. Code, 1859, ss. 235, 239, 240)—Attachment—Alienation service of process.*—Where an attachment of land is made by a written order under s. 239, Act VIII of 1859, the three conditions in s. 236 must be fulfilled, *viz.*, (1) the written order must be read aloud at some place on or adjacent to such land, (2) it must be fixed up in some conspicuous part of the Court-house and, (3) it must be fixed up in the office of the Collector of the Zilla in which the land is situated, in order to render any private alienation of the property attached null and void under s. 240. INDRA CHANDRA BABU v. THE AGRA AND MASTERMAN'S BANK, **1 B.L.R.S.N. 20 (a).** [*N.F.*, 83 P.R. 1898.]

(3745)—O. 21, rr. 46, 54, s. 64—*See* ATTACHMENT—ALIENATION DURING ATTACHMENT, 4 B.L.R.A.C. 24=12 W R. 491.

(3746)—O. 21, rr. 46,54, s. 64—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 2 B.L.R.A.C. 108=10 W.R. 447.

(3747)—*O. 21, rr. 46, 58 (Civ. Pro. Code, 1882, ss. 268, 278)—Attachment by prohibitory order—Objection to attachment.*—Where specific moveable property has been attached by a prohibitory order under s. 268 of the Code, an objection can be raised to the attachment under s. 278 thereof. KESHO RAO KUNBI v. MUKA TELI, **14 C.P.L.R. 124.** (24 M. 20, *R.*)

(3748)—*O. 21, rr. 46, 58, 59, 60, 61 (=Civ. Pro. Code, 1882, ss. 268, 278, 279, 280, 281)—"Possess" and "possession" include constructive possession—Attachment of debt not secured by negotiable instrument—Claim—Limitation Act (XV of 1877), sch. II, art. 11.*—When a debt not secured by a negotiable instrument is attached under s. 268, Civ. Pro. Code, a claim can be preferred by a third party and investigated under s. 278, Civ. Pro. Code; and an order disallowing the claim is subject to the operation of s. 283, Civ. Pro. Code, and art. 11, sch. II, Limitation Act. Ss. 278 to 281, Civ. Pro. Code, are not restricted to properties under attachment which are capable of tangible or physical possession. The words "possess" and "possession" in the claim sections of the Code include constructive possession, or possession in law, of debts and other intangible property. CHIDAMBARAM PATTAR v. RAMASAMY PATTAR, **27 M. 67, F B.** (24 M. 20, *Diss.*) [*R.*, 33 C. 487=3 C.L.J. 293, 4 L.B.R. 289.]

(3749)—*O. 21, rr. 46, 64, 66, 70, 79 (3) (=Civ. Pro. Code, 1882, ss. 268, 284, 287, 301).*—The Court has no power under s. 268, Code of Civil Procedure to call upon a person warned by the Court not to make payment to his creditor, to show cause why he should not pay his debts into Court, under s. 268 it is optional with the debtor to pay the amount of his debt into Court. If the Court is satisfied that there is a subsisting debt, the debt must be sold (s. 284), and delivery is to be made under s. 301. SIRIAH v. MUCKANACHARY, **10 M. 194.**

—— O. XXI, r. 48 (New).

(3749-*a*)—*O. 21, r. 48—Debt payable to judgment-debtor by non-resident outside jurisdiction, if may be attached—Execution.*—It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor by a non-resident outside the jurisdiction. BEGG, DUNLOP, AND CO. v. JGANNATH MARWARI, **1 6C.W.M. 402.**

(3749-*b*)—O. 21, r. 48—*See* NOS. 1280, 3735, 3736, *supra.*

—— O. XXI, r. 50 (New).

(3742-c)—O. 21, r. 50—*See* NO. 981-*a*, *supra.*

—— O. XXI, r. 51 (=1882, s. 277=1867, s. 270 =1859, s. 217.)

See ATTACHMENT.

(3749-*d*)—O. 21, r. 51—*See* NO. 1281, *supra.*

(3750)—*O. 21, rr. 51, 52 (=Civ. Pro. Code, 1859, s. 237), Act XXIII of 1861, s. 11—Rival decree-holders—Attachment—Appeal.*—A, a judgment-debtor, had funds in the hands of a public officer, which B, C and D, severally attached in execution of decrees obtained by them respectively in the same Court against A. B attached before C and D, and applied by petition that his decree might be first satisfied. C and D put in similar petitions. The Court below took up all the petitions together, and ordered that B, C, and D should each receive rateably a part of the fund in question. B, C and D appealed separately each making A, the judgment debtor, and the other decree-holders respondents. *Held*, that the decree-holders, B, C, and D had no right of appeal against the rival decree-holders; that the order of the lower Court, taking up all the cases together, practically made B, C, and D. parties to the hearing; and that having been made parties regularly they could not be struck off by the appellate Court on the ground that they should not have been made parties. *Held* by the majority (*Macpherson, J., dissentig*) that B, C. or D. had no right of appeal even against the judgment-debtor. *Macpherson, J.* Though no appeal would lie as regards the rival decree-holders, the appeal was maintainable as regards the judgment-debtor alone. DEEN DYAL SAHOO v. RADHAMUDDUN MOHUN DOSS, **B.L.R. Sup. Vol. 927=9 W.R. 223.**

(3750-*a*)—O. 21, rr. 51, 52—*See* COURT, 10 W.R. 43.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXI, r. 52 (=1882, s. 272=1877, s. 272 =1859, s. 237.)

See ATTACHMENT.

(3751)—*O.* 21, *r.* 52 (=*s.* 272, *Civ. Pro Code*, 1882)—*Scope of.*—S. 272 is applicable only to cases where the property is in the custody of a Court or public officer, and belongs to the judgment-debtor, and not where it has been declared to belong to the plaintiff. The remedy in such cases is to sue to recover possession. RAJA PADMANUND SINGH v. CHANDI DAT JHA, **1 C.W.N. 170.**

(3752)—*O.* 21, *r.* 52 (=*Civ. Pro. Code*, 1882, *s.* 272)—*Attachment of rent of land leased out by Collector — Mode of effecting attachment.*—Where the lands of a debtor are leased out by the Collector under the provisions of sch. III of the Code, an attachment of the rents of those lands can be effected only under this rule. JUGRAJ HEMRAJ v. KISSAN SINGH, **3 C.P.L.R. 147.**

(3753)—*O.* 21, *r.* 52 (=*old s.* 272)—*Application for money deposited in Court—Procedure.*—Where plaintiffs, obtaining a decree upon certain hoondees against K and P, apply for payment of certain moneys deposited in Court in a suit in which D was plaintiff, and which had been attached by them; the ground of the application being that D had recovered a decree on certain hoondees fraudulently transferred to him by K and P, *held* that the question of the title of the plaintiffs as against D to have their debt paid out of the money in deposit ought to have been decided in the Court in which it was in deposit, and a reference to a regular suit would be wrong. DEBEE PERSHAD v. GUJADHUR RAM. **20 W.R. 73.**

(3754)—*O.* 21, *r.* 52 (=*Civ. Pro. Code*, 1877 *s.* 272)—*Quaere — Order under—Finality.*—Whether an order by a Court made under the proviso to s. 272 of the Code is intended to be final. GOPEE NATH ACHARJEE v. ACHCHA BIBEE, **7 C. 553=9 C.L.R. 395.**

(3755) — O. 21, r. 52 — *See* OFFICIAL TRUSTEE, 12 M. 250.

(3756)—O. 21, r. 52—Suit to set aside an order contemplated by the proviso to—*See* RIGHT OF SUIT—ORDERS, SUITS TO SET ASIDE, 19 C. 286.

(3756-*a*)—O. 21, r. 52—*See* NOS. 1281, 3437, 3727, 3738, 3750, *supra.*

(3757)—O. 21. r. 52, s. 88—Running of interest stopped—*See* CONTRACT ACT, 1872, ss. 2 (*c*), 37, 38 and 67, 4 M.L.T. 335.

——O. XXI, r. 53(=1882, s. 273=1877, s. 273).

See ATTACHMENT.

(3758)—*O.* 21, *r.* 53 (=*s.* 273, *Civ. Pro. Code*, 1877)—*Penultimate clause of s.* 273 *applies to decrees other than money-decrees.*—The provisions of the first clause of s. 273 are applicable where two decrees for money are being executed by the same Court, though they may not have been passed by the same Court. SULTAN KUAR v. GULZARI LAL, **2 A. 290=4 Ind. Jur. 359.** [*R.*, 28 A. 771=3 A.L.J. 585=A.W.N. 1906, 237=1 M.L.T. 247.]

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 8161 and VIII of 1859)—*continued.*

(3758-*a*)—*O.* 21, *r.* 53—*Attachment already made—Applicability of O.* 21, *r.* 53.—O. 21, r. 53, cl. 6 applies also to cases where the attachment was already made. GORGALA VENKAYYA v. MUGUNTA LAKSHMIAH, **22 M.L.J. 394.**

(3759)—*O.* 21, *r.* 53 (=*s.* 273, *Civ. Pro. Code*, 1882)—*Decree for sale on mortgage attachable in execution.*—A decree for sale upon a mortgage is not a decree for money and can be attached and sold in execution of a money-decree under the penultimate clause of s. 273 of the Code. DELHI LONDON BANK LD. v. KUNWAR PARTAB SINGH, **3 A.L.J. 585, F.B.=A.W.N. 1906, 216=1 M.L.T. 247=28 A. 771.** (A.W.N. 1885, 123, *Overruled*; A.W.N. 1893, 184, **27 A.** 501, 4 C.W.N. S.N. 35, 6 C.W.N. 5, **26 A. 91,** *R*; 28 M. 244, *Not F*; 2 A. 290, *R.*)

(3760)—*O.* 21, *r.* 53 (=*s.* 273, *Civ. Pro. Code*, 1882)—*Assignment of decree—Attachment, effect of, on execution application by assignee.*—Where a decree of the District Court was transferred to A, and he applied for the execution of the same, but it was in the meanwhile attached under s. 273, Civ. Pro. Code, by a Munsiff's Court and the District Court consequently rejected the execution application on the ground that the decree could not be executed owing to the attachment. *Held*, that the order was right. The terms of the second para. of s. 273 are imperative, and the District Court had no alternative but to stay execution and refuse A's application. A's remedy was to prefer claim in the Munsiff's Court. CHITTALOOR YERRA MUSALA REDDI v. PATHANGI RAMAIYA AND OTERS, **7 M.L.T. 83.**

(3751)—*O.* 21, *r.* 53 (=*Civ. Pro. Code*, 1882, *s.* 273)—*Money-decree.*—A decree upon a mortgage is not a money-decree within the meaning of s. 273, Civ. Pro. Code. BAIJ NATH LOHEA v. BINOYENDRA NATH PALIT, **6 C.W.N. 5.** (4 C.W.N.S.N. 35, *F.*) [*F.*, 2 C.L.J. 499; *R.*, 3 A.L.J. 585, F.B.=A.W.N. 1906, 237=1 M.L.T. 247=28 A. 771.]

(3762)—*O.* 21, *r.* 53 (=*s.* 273, *Civ. Pro. Code*, 1882)—*"Decree for money"—Mortgage decree, if is a decree for money.*—An ordinary mortgage-decree is not a decree for money within s. 273 of the Code. MACNAGHTEN v. SURJA PRASAD, **11 C.L.J. 78=5 Ind. Cas. 302.**

(3673)—*O.* 21, *r.* 53 (=*s.* 273, *Civ. Pro. Code*, 1882)—*Decrees in a suit for dissolution of partnership—Money-decree—Attachment—Sale.*—A decree in a suit for dissolution of partnership is, for the purposes of execution, to be regarded as a money-decree. It can be attached but cannot be sold; and the only remedy respecting it, is the procedure under s. 273 of the Civ. Pro. Code, 1882. SIDLINGAYA v. SHANKARAPA, **5 Bom. L.R. 529=27 B. 556.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3764)—*O. 21, r. 53 (=s. 273, Civ. Pro. Code, 1882)—Execution of decree—Order attaching the decree—Effect of—Want of jurisdiction to proceed with execution—Sale without jurisdiction—Validity of such sale.*—The Subordinate Judge, before whom the present execution case was pending, received from a Munsiff's Court an order attaching the decree under s. 273 of the Code. Instead of giving effect to the attachment order, he returned it to the Munsiff on the ground that it did not state the amount of the decree, under which it was issued and proceeded with the execution, which resulted in the sale in question. *Held*, that the Court, on receiving the attachment order was bound to comply therewith. Under s. 273, the attachment of the decree has the effect of staying further execution and of debarring the Court from proceeding further until that bar has been removed in either of the ways specified in that section. The Subordinate Judge had no jurisdiction to proceed with the sale in question and the sale, therefore, was invalid. MANIK LAL SEAL v. BANMALI MUKERJEE, **32 C. 1104=10 C.W.N. 193=3 C.L.J. 27.**

(3765)—*O. 21, r. 53 (=Civ. Pro. Code, 1882, s. 273)—Decree — Execution—Attachment of decree.*—In order to realise his money due under his decree, a decree-holder cannot apply to the Court for sale of a decree in favour of his judgment-debtor, but must recover the money by proceeding under s. 273 of the Civ. Pro. Code, 1882. TAKIYA BEGAM v. SIRAJUDDAULA, **A.W.N. 1885, 123.** [*Overruled*, 28 A. 771=3 A.L.J. 585=1 M.L.T. 247=A.W.N. 1906, 237; *D.*, 21 A. 405.]

(3766)—*O. 21; r. 53 (=Civ. Pro. Code, 1882, s. 273)—Attachment of decree—Stay of execution of attachment decree—No permanent incapacity to execute.*—An attachment of a decree under s. 273 of the Code prevented the Court from proceeding with the execution of the decree attached, but did not render it incapable of execution by the decree-holder or destroy the decree-holder's interest in it. It merely delayed the realisation of his interest in it. There was nothing to prevent an execution application being filed by him. PATUMMA v. IDIVI BEARI, **13 M.L.J. 265.** [*R.*, 5 Ind. Cas. 56.]

(3767)—*O. 21, r. 53 (=Civ. Pro. Code, 1882, s. 273)—Attachment of foreclosure decree—Procedure to be adopted.*—On an attachment being made at the instance of a decree-holder, of the right and interest of a decree-holder, in a foreclosure decree, the procedure to be adopted is that laid down in the latter part of s. 173 of the Civ. Pro. Code, that is, to prevent the original decree-holder from executing or transferring the decree. It is not competent to the Court to substitute the attaching creditor's name and to allow him to pursue the execution. BARHMA DIN v. BAJI LAL, **26 A. 91=A.W.N. 1903, 206.** [*R.*, 28 A. 771, F.B=3 A.L.J. 585=A.W.N. 1906, 237=1 M.L.T. 247.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3767-*a*)—*O. 21. r. 53—Execution of the attached decree—Persons entitled to apply—Assignee-decree-holder.*—Under O. XXI, r. 53, Civ. Pro. Code, a Court receiving a notice of attachment of its decree from another Court is bound to stay execution of its decree, until the attaching Court cancels the notice or the holder of the attached decree applies for execution. Under that rule, the only two persons who can take out execution are the holder of the attached decree or the attaching creditor. The assignee from the holder of the attached decree cannot apply for execution of the attached decree. THIRVENGADAM PILLAI v. DOREDLA SUBBIAH, **1912, M.W.N. 176=11 M.L.T. 144.**

(3767-*b*)—*O. 21. r. 53—Mortgage-decree-holder—Execution against another decree for sale—In any lawful manner.*—O. 21, r. 53, Civ. Pro. Code, lays down that the holder of a decree sought to be executed by the attachment of another decree for sale, in enforcement of a mortgage or charge, shall, as the representative of the holder of the attached decree, be entitled to execute such attached decree in any manner lawful to the holder thereof. The mortgage interest under the decree includes the right to sell the property in default of payment, and no order for sale of that decree is necessary in order to enable the mortgage-decree-holder to sell it. KUPPUSAMI IYENGAR v. SUBBARAYA RAVUTHA MUNDA NAINAR, **1921, 1 M.W.N. 1.** (5 M.L.T. 278, 26 B. 305, 1910, M.W.N. 4, *R.*)

(3768)—O. XXI, r. 53—Attachment of decree—Rights of attaching creditor and original decree-holder—*See* EXECUTION OF DECREE—GENERAL, 9 M.L.T. 312=21 M.L.J. 577=9 Ind. Cas. 786.

(3769)—O. 21, r. 53—*See* PARTNERSHIP—MISCELLANEOUS, 5 Bom. L.R. 529, 27 B. 556.

(3770)—O. 21, r. 53—Right of pre-emptor to execute decree in favour of the vendee—*See* PRE-EMPTION—RIGHT TO PRE EMPT, 8 O.C. 186.

(3770-*a*)—O. 21. r. 53—*See* NOS. 357, 359, 982, 1152, 1282, 1283, 1340, 3343, 3455, 3573, 3574, *supra*.

(3770-*b*)—*O. 21, r. 53, s. 73 (=Civ. Pro. Code, 1882, ss. 273, 295)—Rateable distribution—'Assets realised by sale or otherwise'—Money paid out of Court by judgment debtor to one of the decree holders, if assets realised in execution—Appeal, maintainability of—Civ. Pro. Code. (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), sch. 2, cl. 26.*—Where, under s. 295, Civ. Pro. Code, 1882, the Court ordered rateable distribution of the assets that might be realised in execution, amongst several decree-holders, but the judgment-debtor paid some money out of Court to one of the decree-holders who had taken steps to execute the decree and who then intimated to the Court that his claim against the judgment-debtor had been

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satisfied out of Court : *Held*, that the money was not assets realised by sale or otherwise in execution of the decree and could not be rateably distributed amongst all the decree-holders. *Held*, also that an appeal lay to the High Court and was not barred under s. 102, Civ. Pro. Code 1908, as the suit was not cognizable in the Court of Small Causes by reason of cl. (26), sch. II of the Provincial Small Cause Courts Act, 1887. GOURI DUTT v. AMAR CHAND, **15 C.L.J. 49.**

(3771)—*O.* 21, *rr.* 53, 16, *s.* 60, *O.* 21, *r.* 64 (=*ss.* 273, 232, 266, 284, *Civ. Pro. Code*, 1882) —*Transfer of Property Act* (*IV of* 1882) *s.* 89—*Civil Rules of Practice, Rule* 184—*Mortgage-decree, sale of, in execution whether valid, and passes title to the purchaser—Mortgage-decree how far a money-decree—Transfer of Property Act, scope of Civ. Pro. Code, s.* 273, *scope of—Jurisdiction of Courts, in the absence of specific provisions.*—N mortgaged to C certain mortgage-decrees obtained against the appellants. C brought a suit upon the mortgage in his favour, obtained judgment, and brought the mortgaged mortgage-decrees in execution. C sought to execute the mortgage-decrees, on the strength of his purchase at the Court-sale. But it was contended that the sale did not pass any title to C, in respect of the mortgage-decrees, as they were money-decrees, and that the only way by which they can be made available to C would be by following the procedure laid down by s. 273, Civ. Pro. Code, and Rule 184, Civil Rules of Practice. The Sub-Judge allowed execution to issue. *Held*, on appeal, that the order of the lower Court was right. *Per Abdur Rahim, J.*—S. 273, Civ. Pro. Code, has no application to this case where no attachment of the decree is asked for. (25 M. 244, *Expl.*) In order to determine whether a particular section of the Civ. Pro. Code, is applicable or not, one must have regard to its language as well as to its scope. S. 273, Civ. Pro. Code, and Rule 184 of the Civil Rules of Practice, deal with cases where a decree is attached in execution, but such a process would be wholly unnecessary in enforcing an ordinary mortgage-decree ordering sale of the property. S. 273, Civ. Pro. Code, which merely enacts a rule of procedure, should not be accorded scope, which would indirectly affect an important question relating to the right of the decree-holder to deal with his right under the decree. On the other hand, s. 232, Civ. Pro. Code, the language of which is quite general, seems to recognise the validity of a pledge of decree as security, no less than the validity of its sale. If the pledge of a decree is valid, it must be within the competence of the Court, which is asked to enfore such a contract, to order the sale of the property pledged. The Transfer of Property Act is not exhaustive, and in cases not sperifically dealt with by that Act the Court acts upon its general power of enforcing contracts. The Courts are not agreed as to the meaning of the word "money-decree" (28 M. 473, 28 B. 630, 26 C. 839, 16 A. 259, *R.*) and whether a mortgage decree is to be

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regarded as a money-decree, depends upon the connection in which the question arises. Supposing s. 273, Civ. Pro. Code, applies, a decree for money which is sought to be attached in execution has been held to include a decree upon a mortgage, and the Courts have ruled that the effect of s. 273, Civ. Pro. Code, is to prohibit the sale of a decree for money which has been attached in execution. (2 A. 290, 6 M. 418, 20 C. 111, 16 B. 522, *R.*) Reading ss. 232, 266, 273 and 284, together, however, it cannot be said that the prohibition contained in s. 273, Civ. Pro. Code, is founded on reasons of public policy or is such, as to oust the jurisdiction of the Court to sell decree, so that a sale in spite of it is a nullity, and confers no right on the purchaser. It would be extending the application of s. 273, Civ. Pro. Code, beyond all reasonable limits to hold that it renders the sale of a money-decree in execution, altogether invalid and without jurisdiction. S. 273 and Rule 184 are mere rules of procedure, the Courts ought not to give them a scope which will interfere with the provisions of s 266, Civ. Pro. Code, or the substantive rights of the creditor recognised by it. Where no objection to such a sale is raised by the holder of the decree, or his creditor, it is not open to the judgment-debtor under that decree to raise any objection. SUBBARAYA RAWTHU MINDA NAINAR v. KUPPUSAWMY AIYANGAR, **5 M.L.T 278=1 Ind. Cas. 535.** (9 A. 46, 5 A. 142, P.C. 10 B., 444, *R.*; 6 M. 418, *D.*)

(3742)—*O.* 21, *rr.* 53, 54 (=*Civ. Pro. Code*, 1877, *ss.* 273, 274)—*Sale of decree for redemption, rule as to.*—S. 273 of the Civ. Pro. Code, 1877, expressly provides for the attachment of decrees, whether they be money-decrees or decrees creating any interest in land. In the face of this distinct provision, the procedure laid down in s. 274 for the attachment of immoveable property does not apply. NAIGAR TIMAPA v. BHASKAR PARMAYA, **10 B. 444.** [*R.*, 5 M.L.T. 278=1 Ind. Cas. 535.]

(3772-*a*)—*O.* 21, *rr.* 53, 54, 89—*Application to set aside sale—Decree on foot of a mortgage—Whether moveable or immoveable property.*—O. 21, rr 53 and 54 of the Civ. Pro. Code, make it quite clear that a decree for sale in enforcement of a mortgage is not to be regarded as immoveable property within the meaning of that order. SURBANI v. PURAN SINGH, **8 A L.J. 1327.**

——O. XXI, r 54 (=1882, s. 274=1877, s. 274 =1859, ss. 235, 239).

See ATTACHMENT.

(3773)—*O.* 21, *r.* 54 (=*old s.* 274)—*Property of judgment-debtor only referred to.*—Ss. 274 and 276 (=O. 21, r. 54) and s. 64 of 1908 Code empower a decree-holder to enforce his claim against the property of the judgment-debtor only. If the property does not belong to the judgment-debtor, the decree-holder has

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no claim over it and the rightful owner can sell it away. BURA MAL v. GHULAM NABI, **139 P.R. 1893.**

(3774)—*O. 21, r. 54 (=old s. 274)—Compliance with—Proclamation - Notice.*—For the purpose of old s. 274, Civ. Pro. Code, it is sufficient if the notice of the attachment of the property is given by beat of drum on the spot and by affixing a notice on the house of the judgment-debtor, situate on the spot. The rulings in 1 B.L.R S.N. 20 and 2 A. 58 should not be strictly applied in Punjab. SUNDER SINGH v. JIWAN RAM, **83 P.R. 1898.** (1 B.L.R. S.N. 20, 2 A. 58, *Appl.*)

(3775)—*O 21, r. 54 (=Civ. Pro Code, 1882, s. 274)—Attachment and sale of mortgage-bond as moveable property—Mere irregularity not vitiating sale.*—The fact that, in execution of a decree, a mortgage-bond of the judgment-debtor in the custody of a third person was attached and sold only as moveable property, and that no attachment had issued under s. 274, Civ. Pro. Code, is a mere irregularity, and could not vitiate the sale, especially when the sale was not opposed by the judgment-debtor and became final. ACHAMMA v. BASAPPA, **8 M.L.J. 1.** (18 M. 437, *F.*)

(3775-*a*)—*O. 21, r. 54—Attachment—Mortgaged debt—Moveable property.*—The provisions of O. 21, r. 54 of the Civ. Pro. Code do not apply to property of the nature of debt secured by a hypothecation bond. (15 A 134, *R.*) There are several difficulties of a practical nature in the way of holding mortgaged debts to be immoveable property for the purpose of attachment. (26 B. 305, *R.*) The preponderance of judicial opinion is in favour of the view that mortgaged debts are moveable properties. (12 C. 546, 20 C. 805, 6 C W.N. 5, 19 B. 121, *R.*) The opinion of the Madras High Court has been fluctuating, but the present view has the support of the views of the other High Courts. NATARAJA AIYAR v. THE SOUTH INDIAN BANK LTD., TINNEVELLY, **1911. 2 M.W.N 590=10 M.L.T. 503** (9 M. 5, 10 M. 169, 18 M. 437, 8 M.L.J. 1, *R.*)

(3776)—O 21, r. 54—*See* BEN. ACT VII OF 1880, ss. 5, 7, 9, 10, 5 C.W N. 86.

(3777)—O 21, r. 54—*See* EXECUTION OF DECREE— MODE OF EXECUTION, 12 B. 368.

(3777-*c*)—O 21, r. 54—*See* NOS. 983, 1284, 1340, 1523, 2908-*a*, 3447, 3470, 3739, 3739-a, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3772, **3772-*a*, *supra.***

(3777-*b*)—*O. 21, r. 54, s. 60 (=Civ. Pro. Code, 1859, ss. 235, 240)—Attachment—Alienation.*—The Privy Council affirmed the judgment of the majority of the Full Bench, by which it was held that a private alienation of propety, during the continuance of an attachment, was null and void only as respects the attaching

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creditor and those who claimed under or through the attachment. A mortgagee, obtained, under Act VIII of 1859, an attachment against his debtor's real estate. Before removal of the attachment of sale by A, the debtor made a *bona fide* sale for value of the estate so attached and, out of the proceeds, satisfied A's judgment-debt. B, another judgment-creditor, subsequently obtained another attachment against the same estate, and sold the estate; treating the former sale as null and void. *Held*, that the first sale made was valid under s. 240 of Act VIII of 1859, the object of which was to protect the interests of the creditor who obtained the attachment. ANUND LOLL DASS v. JULLODHUR SHAW, **10 B.L R. 184. P C =17 W.R. 313=14 M I A. 543** [*F.*, 11 B.H C. 159, 6 N.W.P. 217; *App.* 10 C.L.R. 281=7 C. 107=8 I.A. 65; *R.*, 7 A 702, 1 C.P. L.R. 49, 20 A. 421=18 A W.N. 98; *Cons.*, 6 N.W.P. 296; *D.*, 16 B. 91.]

(3778)—O. 21, r. 54, s. 64—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1889, 132.

(3779)—*O. 21, r. 54, ss. 64 and 73 (=Civ. Pro. Code, 1882, ss. 274, 276 and 295)—Execution of decree—Imperfect attachment of immoveable property—Private alienation subsequent to attachment.*—Where property attached in execution of a decree was privately sold by the judgment-debtor *bona fide* and for valuable consideration, and the amount of the decree paid into Court, the attachment could not be maintained so as to enforce the claims of other decree-holders who had, while the attachment was subsisting, applied under s. 295, Civ. Pro. Code, for rateable distribution of the proceeds of the sale of the property among themselves and the attaching creditor. For, as no attachment of the property had been made in favour of such creditors in the manner prescribed by s. 274 of the Civ. Pro. Code, their claims were not entitled to the protection afforded by s. 276 against private alienation of attached property; their claims could not be enforced under the attachment which had been made; and they could not question the validity of the sale. *Per Mahmood, J.*, s. 276, being a restriction upon private rights of alienation, must be strictly construed. A regularly perfected attachment is a condition precedent to such restriction; orders passed under s. 295 do not amount to such attachment, and even assuming them to be so, the attachment not being duly intimated and notified, the prohibition of s. 276 could not apply to the case. (5 A. 86, 14 M.I.A. 543, 4 B.L R.A C. 24, 10 W.R 264, 6 A. 33, 3 A. 698 and 8 W.R. 501, *R.*). While s. 295 of the Civ. Pro. Code, gives a special right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, that its result should appear in assets realised

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by the sale, and so, until the sale takes place, no such right can be enforced. GANGA DIN v. KHUSHALI, **7 A. 702=A.W.N. 1885, 179.** [*F.*, 15 C. 771, 25 A. 431, 137 P.L.R. 1905; *R.*, 23 A. 106, 28 B. 264, 4 N.L.R. 45, 81 P.R. 1908=148 P.W.R. 1908; *D.*, 16 B. 91.]

(3760)—O. 21, r. 54, s. 73—Execution proceedings—Attachment by different decree-holders—Attachment—*See* ATTACHMENT—MISCELLANEOUS, 81 P.R. 1908=148 P.W.R. 1908.

(3781)—O. 21, r. 54, O. 21, r. 78—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 1 A. 348.

(3782)—O. 21, r. 54, O. 40, rr. 1 to 3—Court's power to appoint receiver—*See* TRANSFER OF PROPERTY ACT, ss. 6 AND 67, 2 M.L.T. 167=17 M.L.J. 201=30 M. 255.

(3783)—*O. 21, rr. 54, 46 (=Civ. Pro. Code, 1859, ss. 239, 240)—Attachment of land—Private alienation after attachment.*—Under s. 240 of the Civ. Pro. Code, 1859, a private alienation of property, made after its attachment had been duly intimated and made known in the manner prescribed by the Act, is declared null and void. Where, therefore, the attachment is not so made known, a private alienation, made after such attachment, is not null and void. NURAHMAD v. ALTAF ALI, **2 A. 58.** (10 W.R. 264=1 B.L.R. SHORT NOTES 20, *F.*) [*F.*, 1 A.W.N. 65; *R.*, 83 P.R. 1898; 137 P.L.R. 1905, 1 C.L.J. 565.]

(3784)—O. 21, rr. 54, 46 and s. 64—*See* ATTACHMENT—ALIENATION DURING ATTACHMENT, 2 Agra 206.

(3785)—O. 21, rr. 54, 66, 67, 68, 70, 90—*See* PLAINT—VERIFICATION AND SIGNATURE, 21 C. 66 P.C.=20 I.A. 176.

(3786)—O, 21, *rr.* 54, 67 *(=Civ. Pro. Code,* 1882, *ss.* 274, 289)—*Sale in execution of decree—Omission of beat of drum, if material irregularity.*—The omission to have a drum beaten as required by ss. 274 and 289 of the Civ. Pro. Code, 1882, and the consequent attendance at the sale of only the judgment-creditor and his friends, was *held* a material irregularity vitiating the sale, and the sale was, therefore, ordered to be set aside. TRIMBAK RAVJI v. NANA, **10 B. 504.**

(3787)—O. 21, *rr.* 54, 67, 68 *and* 90 *(=Civ Pro. Code,* 1882, *ss.* 274, 289, 290, 311)—*Proclamation of sale affixed near place of property within thirty days of sale—Sale proclamation affixed to Court-house more than thirty days before sale—Validity of sale—Material irregularity, meaning of.*—The sale-proclamation in execution of a decree was affixed to the Court-house more than thirty days before sale, but on or near the property, it was affixed only before or within thirty days of the sale: *Held* that the sale was not contrary to the provisions of s. 290 of the Code, but was in violation of the rules contained in ss. 274 and 289. It was necessary that the proclamation of sale should be affixed at or near the property which was to be sold before being affixed to the Court-house. A violation of this rule was an irregularity. S. 311 of the Code permitted an application to set aside the sale on the ground of material irregularity. The sale was not null and void but could be set aside if there was substantial injury from the irregularity complained of. *Obiter.*—There could be no distinction between material irregularity and illegality in the mode of conducting a sale under the Code. If it had been the intention of the Legislature to make a distinction between illegality and irregularity and to dispense with proof of actual loss in the one and not in the other, they would have expressed that intention clearly in apt language. In one sense, whatever is irregular is also illegal, as irregularity connotes want of conformity to some recognized rule of procedure, and it was in this sense that the term was used in the Code. S. 311 could only have meant not being in conformity with some one of the rules provided by the Code to regulate execution sales. ARUNACHELAM v. KULANDASAMI, **5 M.L.J. 70.**

(3788)—*O. 21, rr. 54, 67, 68, 90 (=Civ. Pro. Code, 1877, ss. 274, 289, 290, 311—Execution of decree—Proclamation of sale—Sale before expiry of thirty days if natural irregularity.*—The fact that a sale of immoveable property in execution of a decree has taken place before the expiry of thirty days from the proclamation of sale being made on the property, does not constitute a material irregularity in the publication of the sale. RACHANDAR BAHADUR v. KAMTA PRASAD, **4 A. 300=A.W.N. 1882, 43.** (7 C. 34, *Diss.*).

(3789)—*O. 21, rr. 54, 68 and s. 73 (=ss. 274, 290, 295 of Civ. Pro Code, 1887) Sale-proclamation on the spot—Material proceeding—Execution sale of encumbered properties—Description in and irregularity of sale proclamation—Evidence—Report of officials of Court—Execution sale to satisfy non-attaching creditor.*—The proclamation of sale, in execution of a decree, to be made on the spot under s. 274 of the Civ. Pro. Code, is not a mere formal proceeding and must be made before the notices are posted in the Court-house under s. 290. [*F.*, 11 C.L.R. 303, *Not F.*; 4 A. 300; *R.*, 5 C.L.J. 687, 5 M.L.J. 70.] Where properties subject to a mortgage are sold in execution of a decree, not only the fact of incumbrance, but also the extent thereof should be specified in the proclamation, and an omission to give such details would be a material irregularity. Where the regularity of a sale-proclamation is in question, the Court ought not to decide upon the reports of the Court officials and to refuse to allow the judgment-debtor to adduce evidence to the contrary; and it is incumbent on the debtor to show that he has sustained material injury by reason of

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such irregularity. (3 W.R. Mis. 11, 4 W.R. Mis. 4, 10 W.R 3, *F.*). [*R.*, 11 A. 333=9 A. W.N. 115.] A judgment creditor is entitled, under s. 295 of the Civ. Pro. Code, to have his decree satisfied out of the properties not attached by him but attached by another creditor, and which it is not necessary for the latter to bring to sale for realising his decrees. MOHUNT MEGH LALL v. SHIB PERSHAD MADI, **7 C. 34 =8 C.L.R. 369.** [*Cons.*, 16 B. 91.]

(3790)—*O. 21, rr. 54, 92 (=ss. 274, 314, Civ. Pro. Code, 1882)—Sale-proclamation—Service, if should be in every part of the property—Value, Statement of, if material—"Property"*—The statement in the sale-proclamation of a value which proves to be inadequate is an irregularity but not a material irregularity. Such statements are made without much consideration and it is well-known that purchasers do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold. S. 274 of the Civ. Pro. Code, does not require that the sale-proclamation should be served in each of the villages comprised in the property to be sold. The word "property" in that section evidently refers to each "lot" to be sold separately from the rest. Though it is a sound rule to follow, *viz.*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another, that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, the fact, that the processes were not served in each does not necessarily constitute an infringement of the provisions of s. 274, Civ. Pro. Code. MOULVI ABDUL KASHEM v. BENODE LAL DHONE, **12 C W.N. 757.** (11 C. 74, 12 B. 368, *Commented on.*)

——O. XXI, r. 55 (=1882, s. 275=1877, s. 275 =1859, s. 245).

See ATTACHMENT.

(3791)—*O. 21, r. 55 (=s 275, Civ. Pro. Code, 1882=s. 245, Civ. Pro Code, 1859)—Tender of amount of decree—Stay of execution.*—Under s. 245, Act VIII of 1859, the mere tender of money before the Judge is not sufficient to entitle the judgment-debtor to have the sale of his property stayed, and the law contemplates that payments should be made in accordance with the rules and forms of Courts. HURONAUTH ROY v. INDOOBOOSHUN DEB ROY, **2 Hay, 302.**

(3792)—O. 21, r. 55.—*See* U.P. ACT XVII OF 1876, s. 74, 2 O.C. 359.

3793)—O. 21, r. 55.—*See* HINDU LAW—RELIGIOUS ENDOWMENTS, 21 W.R. 365.

(3794)—O. 21, r. 55—*See* SANCTION TO PROSECUTE, 4 Ind. Cas. 97=6 M.L.T. 376.

(3794-*a*)—O. 21, r. 55—*See* NOS. 922-*a*, 984, 1340, 1341, *supra*.

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——O. XXI, r. 56 (=1882 s. 277=1877, s. 277=1859, s. 242).

(3794-*b*)—O. 21, r. 56—*See* NO. 1340, *supra*.

——O. XXI, r. 57 (New).

See ATTACHMENT,

(3794-*c*)—*O. 21, rr. 57, 58—Execution proceedings — Effect of reversal — Application dismissed for default—Review—Private sale of property—Attachment, object of.*—A revival of execution proceeding does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. The reversal of judicial order leaves unaffected the rights of strangers, *bona fide* purchasers, whether under execution sale or under private sale, who have acquired title on the assumption that such orders were valid in the law. (11 C.L.J. 254, 37 C. 107, *R.*). The true object of attachment is to place the property in the custody of the Court so as to make it available for the realisation of the fruits of the decree. If, by reason of dismissal of the suit or of the default of the decree-holder, the Court dissolves the attachment, the property ceases to be in the custody of the Court. Upon reversal of the decree or upon cancellation of the order of dismissal for default, the decree-holder may ask the Court to take the property back into its custody, but in the absence of statutory provision to the contrary, the Court cannot do so with retrospective effect, so as to prejudice a title that may have been acquired in the interval by a stranger, when the property was admittedly not in the custody of the Court. PATRINGA KOER v. MADHAVANAND RAM, **14 C.L.J. 476.**

(3795)—*O. 21, rr. 57 and 66—"Default," meaning of—Attachment—Power of the Court to continue attachment after dismissing an application for execution—Court's error of Law, parties if must suffer for—Acquiescence.*—Omission to issue or serve a notice under O. XXI, r. 66, Civ. Pro. Code, upon the judgment-debtor is a "default" within the meaning of O. XXI, r. 57. There is no reason for giving a restricted meaning to the word "default" in O. XXI, r. 57 and confining it to default in appearance, in the payment of process fees, or in the production of documents. The words of O. XXI, r. 57, being explicit and imperative, upon the dismissal of an application for execution for default, attachment ceases, even though the Court and the parties intended that the attachement should subsist. NAMUNA BIBI v. ROSHAN MEA, **18 C.W.N. 428.**

—— O. XXI, r. 58 (=1882, s. 278=1877, s. 278=1859, s. 246).

See CLAIMS TO PROPERTY ATTACHED.

See LIMITATION ACT, 1908, ART. 182.

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(3796)—*O. 21, r. 58 = (s. 278, Civ. Pro. Code 1882)—Applicability of—Property directed to be sold under mortgage-decree, claim to—Executing Court, competency of, to vary a decree.*—It is a settled law that s. 278 is not applicable to claims preferred to properties directed to be sold under mortgage-decrees. (14 C. 631, 18 B. 98, 1 C.W.N. 701, 19 A. 480, *R.*) A Court executing a decree cannot take upon itself to alter or vary that decree. SUNOO MODI v. MT. LATKARI. **1 N.L.R. 142.**

(3797)—*O. 21, r. 58 (=s. 278, Civ. Pro. Code, 1882)—Attachment of property—Execution of money-decrees—Execution of mortgage decree*—Although s. 278, Civ. Pro. Code, is not applicable in a case where property has been declared liable to sale under a mortgage, yet it has been rightly applied in the present case. SAWMY VELLAU PILLAY v. O.M.M.R.M. MUTHIAH CHETTY, **L.B.R. 1893—1900. 509.** (14 C. 631, 18 B. 98, 17 M. 17, *D.*)

(3798)—*O. 21, r. 58 (=s. 278, Civ. Pro Code, 1882)—Puisne mortgage obtaining a decree for sale—Prior mortgagee not a party to suit—Sale of property in execution of decree—Objection to the sale by prior mortgagee, allowed—Executing Court, power of, to go behind the decree.*—The applicant, a puisne mortgagee, obtained a decree for sale on his mortgage without making the respondent, a prior mortgagee, a party to his suit. When the property was ordered to be sold in execution of his decree, the respondent raised an objection to the sale which was allowed. *Held*, that the order allowing the respondent's objection was passed without jurisdiction. S. 278 of the Code did not apply to this case, as the property, sought to be sold, was not attached in execution, but the decree had ordered its sale. *Held*, also, that the prior mortgagee could not legally intervene in execution-proceedings. The Court executing the decree was bound to give effect to the decree as it stood, and had no power to go behind the decree and investigate the existence or non-existence of a prior mortgage. HUKAM SINGH v. RAGUBIR SARAN, **A.W.N. 1903, 157 =27 A. 700.**

(3799)—*O. 21, r. 58 (=s. 278, Civ. Pro. Code, 1882)—Attachment in execution of decree—Executing Court* suo moto *refusing to attach property—Material irregularity—Mutation not conclusive proof of ownership.*—*Held*, that, where a decree-holder applies for attachment of certain property as belonging to his judgment-debtor, the Court executing the decree cannot *suo moto* refuse to attach it on the ground that it does not belong to the judgment-debtor, and that the proper procedure is to allow attachment and in the case an objection be filed by a claimant under s. 278, Civ. Pro. Code, to decide it in accordance with law. DIWAN CHAND v. MER KHAN, **18 P.W.R. 1907.**

(3800)—*O. 21, r. 58 (=s. 278, 1882)—Execution of decree by fractional co-sharer for arrears of rent—Attachment of tenure*—Ss. 170, 188, *Bengal Tenancy Act*—Where landlords are seeking to take the benefit of the Bengal Tenancy Act, they must act in concert, and where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country and independently of the Bengal Tenancy Act. So, an attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share, is not such an attachment as is contemplated by s. 170 of the Bengal Tenancy ACT. BERRI MADHUB ROY v. JOOD ALI SICRAR, **17 C. 390, F.B.** [*F.*, 19 C. 593, 26 C. 937; *R.*, 4 C.W.N. 508, 29 C. 54=5 C.W.N. 763, 29 C. 219, 1 C.L.J. 500, 10 C.L.J. 87, 18 C.W.N. 472, 9 C.W.N. 34, 4 C.L.J. 69=10 C.W.N. 176, 5 C.L.J. 235=2 M.L.T. 155, F.B.; *D.*, 26 C. 677, 7 C.W.N. 908.]

(3801)—*O. 21, r. 58 (=s. 278, Civ. Pro. Code, 1882)—Attachment—Investigation of claim—Order—Appeal*—No appeal lies from an order passed, under s. 278 of the Code of Civil Procedure, upon the application by a person not a party to the suit, or by a party to a suit applying in a different character to raise the attachment. DAYARAM v. GOVARDHANDAS, **6 Bom. L.R. 462=28 B. 458.**

(3802)—*O. 21, r. 58 (=s. 278, Civ. Pro. Code, 1882)—High Court—Ordinary original jurisdiction—Order in claim proceedings—Appeal against order*—Prima facie *evidence in favour of a party—Refusal of appellate Court to go into merits.*—In an appeal from an order of a Judge on the original side of the High Court, adjudging a claim brought under s. 278, Civ. Pro. Code, 1882, in favour of the claimant, the appellate Bench refused to enter into the merits of the case, on the ground that there was *prima facie* evidence in favour of the claimant, which was all that was necessary for an order in summary proceedings. The merits of the case could be agitated by the aggrived party in a suit under O. 21, r. 63 of Act V of 1908. VENKATA SUBBIAH CHETTY v. VENUGOPAL, **9 Ind. Cas. 260=9 M.L.T. 483.**

(3803)—O. 21, r. 58—Decree for arrears due on account of holding—Claim when not allowable—*See* BEN. ACT VIII OF 1885, ss. 148-A, 158-B, Sub-s. (2), 170, 8 Ind. Cas. 50.

(3804)—O. 21, r. 58—Claim under—Admissibility—*See* BEN. ACT, VIII OF 1885, s. 170, 13 C.W.N. 650=36 C. 765=3 Ind. Cas. 306.

(3805)—O. 21, r. 58—*See* BEN. ACT VIII OF 1885, s. 170, 28 C. 382, F.B=5 C.W.N. 474.

(3806)—O. 21, 58—*See* APPEAL—ORDERS, A.W.N. 1888, 77.

(3807)—O. 21, r. 58—Order for sale without attachment—Legality of proceedings—*See* **ATTACHMENT BEFORE JUDGMENT, 13 C.L.J. 243.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3808)—O. 21, r. 58—Claim to property under—Application for attachment and sale of property under mortgage decree—Common error of Courts—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 2 L.B.R. 138.

(3809)—O. 21, r. 58—Order dismissing application made under s. 278 of the Code for default—Order passed without an investigation—Applicability of art. 11 of the Limitation Act *See* LIMITATION ACT, 1908, arts. 11 and 11-A, 17 M.L.J. 554=3 M.L.T. 106=31 M. 5.

(3810)—O. 21, r. 58—Attachment of mortgaged property in execution of mortgage-decree—Application for removal of attachment, whether maintainable—*See* MORTGAGE—GENERAL, 4 L.B.R. 82=14 Bur. L.R. 201.

(3811)—O. 21, r. 58—Suit for declaration of title to attached property—No application for removal of attachment under s. 278, Civ. Pro. Code—Suit not barred—*See* SPECIFIC RELIEF ACT, 1877, s. 42 Proviso, 4 L.B.R. 263.

(3811-*a*)—O. 21, r. 58—*See* NOS. 290, 360, 361, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1002-*a*, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1147, 1148, 1175, 1175-*a*, 1176, 1340, 1342, 1512, 2667, 2910-*a*, 3657, 3671, 3738, 3747, 3748, 3794-*a supra*, AND NOS. 4537, 4538, 5110-*a* 5150, *infra*.

(3812)—*O. 21, r. 58, ss. 47, 115 (=Civ. Pro. Code, 1882, ss. 278, 244, 622)—Execution of decree—Attachment—Objection by judgment-debtor under s. 278, Civ. Pro. Code—Appeal*—In the execution of a decree, a certain plot of land, together with two temples, thereon, was attached. The applicant (a judgment-debtor) objected, citing s. 278, Civ. Pro. Code, in his application. The application was dismissed by the Court executing the decree, and, on appeal, by the District Judge. The applicant applied for revision of the Judge's order under s. 622, Civ. Pro. Code. *Held*, that the applicant's petition of objection fell under s. 278 and not under s. 244, Civ. Pro. Code, and was not appealable. The applicant's remedy, if any, was by regular suit. *Held*, that the order of the District Judge was substantially right and could not be revised under s. 622, Civ. Pro. Code. RAGHUBAR v. UMED, **10, C. Supp. 11,**

(3813)—O. 21, *r.* 58, *ss.* 50, 47 (=*Civ. Pro. Code*, 1882, *ss.* 278, 234, 244)—*Objector under s. 278—Representative of judgment-debtor.*—Where, in the course of the execution of a decree an objector under s. 278 happens to be impleaded as a legal representative of the judgment-debtor, the objection taken by him to the attachment of the property, on the ground that it was his own and not held by him as such representative, is a matter cognizable by the executing Court under s. 244, and cannot be made the subject of a separate suit by the party against whom any adverse order might be passed in the proceedings. Once a person happens to be made a representative of the deceased judgment-debtor, all questions between him and the other party relating to the execution of decree must be decided under s. 244, and none the less so, because such person, while a stranger to the execution, may have filed an objection under s. 278 of the Code. SHANKAR DAT DUBEE v. J. G. HARMAN & Co. **17 A. 245=A.W.N. 1895, 66.** [*R.*, 19 A. 332, 8 O.C. 405.]

(3814)—*O. 21, r. 58, ss. 68, 70 & 71 (=Civ. Pro. Code, 1882), ss. 278, 320)—Power of Collector to decide question of title.*—Under s. 320, a Collector is not empowered to adjudicate upon question of title under s. 278 of the Code. NATHOO RAM v. RAJA BIJAYA BAHADUR SINGH, **9 C.P.L.R. 113.** [*F.*, 3 N.L.R. 164.]

(3815)—*O. 21, r. 58, s. 115 (=ss. 278, 622, Civ. Pro. Code, 1882)—Attachment of decree—Claim by assignee of decree from judgment-debtor—Assignment not recognised by Court passing the decree—Rejection of claim petition owing to non-recognition of assignment—Failure to exercise jurisdiction—Illegality*—First respondent having attached a decree obtained by the 2nd respondent in the District Court of Nellore, in execution of his own decree against the 2nd respondent in the Munsiff's Court, Nellore, petitioner preferred a claim under s. 278, Civ. Pro. Code, XIV of 1882, praying that the 1st respondent's attachment may be raised, as, prior to the attachment, he had obtained as assignment of the 2nd respondent's decree in his favour. The District Munsif summarily dismissed the petition on the ground that the District Court had not recognized the assignment in petitioner's favour. *Held*, that the District Munsif was wrong in refusing petitioner's claim, and had failed in exercise a jurisdiction vested in him by law. CHILLAKORE VEERA MUSULA REDDY v. PATTANGI RAMAYYA, **4 Ind. Cas. 125.**

(3816)—O. 21, r. 58, O. 21, r. 61, O. 21, r. 63—Investigation of claim—Omission of claimant to adduce evidence—Effect of order—*See* LIMITATION ACT, 1908, Arts. 11 and 11-A, 32 C. 537.

(3817)—O. 21, rr. 58, 61, O. 38, r. 9—*See* INSOLVENCY—MISCELLANEOUS, 20 B. 403.

(3818)—*O. 21, rr. 58 and 59 (=ss. 278, 279, Civ. Pro. Code, 1882)—Nature of claims under*—Claims under s. 278, Civ. Pro. Code, are not solely claims for possession. They are claims to, or objections made to, the attachment of property which has been attached in execution of a decree; and under s. 279 of the Code the the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. AMRITA v. PANDHARI NATH, **2 Bom. L.R. 134.**

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(3819)—O. XXI, rr. 58, 59—*See* BURDEN OF PROOF—CLAIM TO PROPERTY ATTACHED, 18 A. 369=A.W.N. 1896, 106.

(3820)—*O.* 21, *rr.* 58, 59, 60, 61, 62, 63 (=*ss.* 278 *to* 283, *Civ. Pro. Code*, 1882)—*S.* 283, *suit under—Objections to attachment—Regular suit—Burden of proof.*—If a person intervenes unsuccessfully, under s. 278, Civ. Pro. Code, on the strengh of a document of title, and is obliged to bring a suit under s. 283, he must give *prima facie* evidence that the document represents a *bona fide* transaction, because he has to get rid of the order which has been passed against him. But the rule does not apply where the objection under s. 278, was not maintainable and there could not have been an inquiry under ss. 279 to 282 of the Code. REGHUBAR DAYAL v. MUSSAMMAT KANIZ HUSAIN, **12 O.C. 74=2 Ind. Cas. 238.** (18 A. 362, 30 A. 321, *R.*)

(3821)—*O.* 21, *rr.* 58 *to* 63 (=*ss.* 278 *to* 283, *Civ. Pro. Code*, 1882)—*Claim disallowed—Necessity for suit by unsuccessful claimant to establish his right—Conclusiveness of order disallowing claim where no such suit is instituted—Investigation in claim case, extent of—Object of provisions relating to claim case—Limitation Act, art.* 11, *applicability of.*—The suit was for a declaration of plaintiff's right to certain property and for possession thereof. The question for decision was whether or not the suit was barred by s. 283 of the Code and art. 11 of the Limitation Act. *Held*, the object of the suit, provided for by s. 283 of the Code and art. 11 of the Limitation Act, is not to have the order in the claim proceedings set aside but to have the right of a claimant in the property established. (18 B. 241, 31 C. 228, *Diss.*) If the party, defeated in the claim proceedings, fail to institute such a suit within the period prescribed by art. 11 of the Limitation Act, the order becomes conclusive as regards the rights of the parties to the proceeding and persons claiming title under them. (11 C.L.R. 181, *R.*; 18 B. 241, 31 C. 228, 13 B. 72, *D.*) [*R.*, 34 C. 491=11 C.W.N. 487, 6 C. L.J. 362.] The plaintiff contended in this case that there was no 'investigation' of her claim and that, therefore, the suit was not governed by art. 11 of the Limitation Act. It was found, however, that, on the date fixed for the hearing of the claim, the claimant did not instruct her pleader or appear in person; nor did she produce her evidence; but the records showed that the Court did hold some investigation and found that the claim was untenable. *Held*, the circumstance of the plaintiff not having chosen to produce the evidence or instruct her pleader could not to take the order out of ss. 280 and 283. The Code directs an investigation, but does not direct the extent to which the investigation ought to proceed. If the Court, having had jurisdiction to decide the matter, did decide it and pass an order, holding such investigation as it deemed fit to hold, the conditions of the claim-sections are satisfied. The plaintiff had an opportunity to produce her evidence. She did not avail herself of the opportunity. The non-production of evidence was due to her laches. The object of ss. 278 to 283 of the Code and art. 11 of the Limitation Act is to secure prompt and speedy determination of questions raised in execution cases and that object would be frustrated if a party, unsuccessful under s. 280 on account of his own laches or voluntary non-production of evidence, were allowed to plead that the order was a nullity, notwithstanding that the proceeding was contentious, until the day of hearing. Suit was barred. BIBI ALIMAN v. DHAKESHWER PERSHAD NARAIN SINGH, **1 C.L.J. 296.** (20 W.R. 345, 21 W.R. 409, 24 W.R. 411, 12 C.L.R. 43, *F.*)

(3822)—*O.* 21, *rr.* 58 *to* 63—*Mortgagee in possession—Claim of mortgagor—Effect—Release of mortgagor's interest.*—Rule 59 says: "The claimant must adduce evidence to show that, at the date of the attachment, he *had some interest in*, or was in possession." This shows that a claim may be made by a person who has an interest in the property, although he is not in possession. There is no doubt that a mortgagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest, and the property is not in his possession, "as his own property," but partly on his own account, *i.e.*, to the extent of his interest as a mortgagee in possession, and partly on account of the mortgagor, *i.e.*, to the extent of the mortgagor's interest, within the meaning of rule 60, and the Code contemplates and requires the Court to investigate the claim of a mortgagor in such a case, and, if it finds it established, to release the property, to the extent of the mortgagor's interest, from attachment. NGA TOK v. SUBROMONIAN CHETTY, **U.B.R. 1910, 4th Qr., 75.** (29 C. 543, 14 C. 617, 18 C. 290, 9 W.R. 187, 488, 18 W.R. 65, U.B.R. 1904—1906, Vol. II, 18, U.B.R, 1904—1906, Vol, II, Sub-mortgage 1, *R.*)

(3823)—*O* 21, *rr.* 58 *to* 63 (=*ss.* 278 *to* 283, *Civ. Pro. Code*, 1882)—*Judgment-debtor not a party to objection proceedings, effect of.*—At a sale in execution of a decree for money, defendant-respondent had purchased certain property. Previous to the sale, plaintiff-appellant had successfully applied to the executing Court to have the sale effected subject to a charge for her maintenance, which she had secured by means of a suit brought by her against the judgment-debtor, and the respondent, accordingly, had purchased the property only subject to the charge. The judgment-debtor was not a party to the objection-proceedings. In the present suit against the respondent, appellant sought to enforce this charge. The lower Courts held that the respondent is not debarred by s. 283 of the Code from disputing the existence of the alleged

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charge. The contention, raised, in second appeal, that the respondent as execution-purchaser is as much bound by the order upon the appellant's objection in execution as the decree-holder, was overruled and it was held that the purchaser was not precluded from contesting the charge, by reason of the above order in execution, on the grounds that, if the auction purchaser is to be bound at all by the order, it must be as representative of the decree-holder and the view that the auction-purchaser represents the decree-holder *quoad* the result of the objection in the execution proceedings involves the anomoly of allowing the former even to file a suit under s. 283 of the Code, a course which seems nowhere to have been contemplated. MR. DHOKA v. R.B. BEHARILAL KHAZANCHI, **1 N.L.R. 150.** (1 C.P.L.R. 3, 7 C.P.L.R. 73, *R.*)

(3824)—*O.* 21, rr. 58 to 63—Providing for the mode of investigation, etc., to be made under s. 272—*See* RIGHT OF SUIT—ORDERS, SUITS TO SET ASIDE, 19 C. 286.

(3825)—*O.* 21, *rr.* 58 *to* 64, *except* 62 (=*Civ. Pro. Code*, 1859, *s.* 246).—The provision of s. 246, Act VIII of 1859, are prospective, and do not apply to proceedings in execution under the old procedure. GOKOOL RAM DEB v. RAM SOONDUR SURMA, **9 W.R. 292.**

(3826)—*O.* 21, *rr.* 58 *to* 61, 63, 64 (=*Civ. Pro. Code*, 1859, *s.* 246), *scope of*.—S. 246 of Act VIII of 1859 (Civ. Pro. Code), is prospective and does not apply to past proceedings in execution. LOKUN SINGH v. DEO NARAIN SINGH, **3 W.R. 62.** [*F.*, 7 W.R. 138.]

(3827)—*O.* 21, *rr.* 58, 59, 60, 61, 62, 63, 64, (=*Civ. Pro. Code*, 1859, s. 246)—*Objection to validity of decree.*—The kind of suit meant in s. 246, Civ. Pro. Code, is clearly a suit to try any claim of proprietary or possessory right cognizable under the section which, if successful, would entitled the claimant to an order releasing the property from attachment, and the specific terms of the section relating to the questions of right for determination obviously exclude the cognizance of an objection to the validity of the decree. RAMANADA BUTT v. BITHEE, **4 M.H.C. 263.**

(3828)—*O.* 21, *rr.* 58 *to* 64, *except* 62 (=*Civ Pro. Code*, 1859, s. 246)—*Regular suit by defeated claimant.*—The effect of the last sentence of s. 246, Civ. Pro. Code, is to exclude a party to an investigation under that section from any other remedy than that expressly provided for him by that section, *viz.*, a regular suit to be brought within one year from the date of the order made against him, and that, consequently, such party cannot wait till the sale of the attached property has taken place and been confirmed, and then bring his suit within one year from the last date. SETTIAPPAN v. SARAT SINGH, **3 M.H.C. 220.** [*Not F.*, 11 C. 672; *F.*, 4 B. 611.]

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(3829)—*O.* 21, *rr.* 58 *to* 64, *except* 62 (=*Civ. Pro. Code*, 1859, *s.* 246)—*Order dismissing claim—Limitation—Suit by judgment-debtor.*— In a suit for redemption of an otti against V and others, by C, an alleged purchaser of the same and for recovery of land on which he had purchased a *kanom*, the defence was that the purchase was made by V's father and that C was constructively a mere trustee. It was found that the suit was brought one year after the release of the property from attachment in execution of two decrees for money against C; it also appeared that, in the proceedings which ended in releasing the property from attachment, no notice was issued to the judgment-debtor, C. *Held*, that the suit was not barred. The claimants in possession were not so according to any of the modes of derivation which s. 246, Civ. Pro. Code, enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, and assuming that the judgment-debtor was a party to the order made, the order so made could not be said to be against him, because his claim was one which could not have been determined by any order under s. 246. An order admitting a claim which must have been admitted whether the plaintiff's (judgment-debtor's) contention is well or ill founded, cannot be an order against him so as to put him to a period of limitation other than that to which the original action was subject. It might be otherwise if he had been present and promoting a contention of the decree-holder which, if well founded, would have justified the continuance of the attachment. ARAKEL KUNHI KUTTIYALI v. IMBICHI AMMAH, **6 M. H C 416** (4 M.H.C. 472, *D.*) *F.* 15 C. 674; *R.* 13 M. 366]

(3830)—*O.* 21, *rr.* 58, 59, 60, 61, 63, 64 (=s. 246, *Civ. Pro. Code*, 1859)—*Claim—Limitation—Defective order.*—Where a claim is preferred under s. 246, Act VIII of 1859, and the Court simply releases the attached property, without making any enquiry at all on the points specified in that section, its order cannot be regarded as an order under the section in question, and the rule of limitation there laid down does not apply to a regular suit subsequently brought by the decree-holder JAGGABANDHU BOSE v. SRIMATI SACHYI BIBI, **8 B L.R. Ap. 39=16 W.R. 22.** [*R.*, 1 C.W.N. 24; *D.*, 20 W.R. 345, 21 W.R 409].

(3831)—*O.* 21, *rr.* 58 *to* 64, *except* 62 (=*Civ. Pro. Code*, 1859, s. 246)—*Judgment-debtor, party to proceedings.*—Where T made a claim under s. 246, Civ. Pro. Code, to property attached in execution of a decree obtained against N, and the order of the Court directed the release of the property from attachment, *held*, in a suit brought by N against T, more than one year from the date of the order, to

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establish his right to the property (*Innes, J., doubting*), that N was a party against whom the order was "given" within the meaning of s. 246, Civ. Pro. Code, and that the suit was, therefore, barred by that section. NETIETOM PERENGARYPROM v. T. P. DAMODREN NAMBUDRY, **4 M H.C. 472.** [*Not F*, 11 B. 114, 15 C. 674; *Doubted*, 17 B. 629, 25 M. 721; *Appr.*, 14 B. 611; *Expl.*, 13 M. 366; *R.*, 13 M.L.J. 367; *D.*, 6 M.H.C. 416.]

(3832)—*O.* 21, *rr.* 58 *to* 64 *except* 62 (=*Civ. Pro. Code*, 1859, *s.* 246)—*Claim by judgment-debtor—Appeal—Third party.*—A decree-holder having attached certain property in execution of a decree, the judgment-debtor objected, under s. 246 of Act VIII of 1859, that that property should not be sold in execution of this decree, inasmuch as it was inherited by her from her father; that the original decree having been passed against the property of her mother and not against any part of her deceased father's estate, properties inherited from the mother were only liable to be sold in execution. This objection was not tried by the Munsif under s. 246, but he merely said that inasmuch as only the right, title and interest of the defendant's mother was put up for sale, such sale would in no way affect the rights of any other party and consequently there was no necessity of entering into any enquiry regarding the disposal of the objection. On appeal by the claimant to the Judge, the Judge reversed the Munsif's decision. On appeal to the High Court by the decree-holder *Held* that the Munsif was bound to decide the objection under s. 246. Though the Munsiff had not decided the case under s. 246, he had passed an order between parties, who were, legally speaking, not parties to the suit in which the decree was passed and the Judge had therefore no right to entertain the appeal. The decision of the Judge was set aside as having been passed without jurisdiction, and the decision of the Munsif also was set aside and he was directed to try the case under s. 246 of the Act. HARIS CHANDRA GUPTA v. SHRIMATI SHASHI MALA GUPTI. **6 B.L.R. 721=15 W.R. 163.** [*F.*, 2 A. 752; *R.*, 20 W.R. 280=12 B.L.R. 65.]

(3833)—*O.* 21, *rr.* 58 *to* 64 *except* 62 (=*Civ. Pro. Code*, 1859, s. 246)—*Appeal—Regular suit.*—An order on an application under s. 246 of the Civ. Pro. Code (Act VIII of 1859), can only be contested by a regular suit and no appeal lies from such order. KALI CHARAN GIR GOSSAIN v. BANJSHI MOHAN DAS SABOO, **6 B.L.R. 727 =15 W.R. 339.**

(3834)—*O.* 21, *rr.* 58, 59, 60, 61 63 and 64—*Effect of an order under s.* 246, *Civ. Pro. Code*, 1859.—When an enquiry has been duly held under s. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code (namely, by a suit brought within one year from the date of the order), it is as final and conclusive on all persons, who are parties to it, as any other final order or decree of a Court of Justice. Until it has been overruled in a regular suit, brought in virtue of the permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and enquire whether the Court which disallowed the objection had correctly appreciated the evidence as to possession, or had come to the conclusion as to possession erroneously. In other words, the effect of the order cannot be affected by the propriety or otherwise of the decision at which the Court, which investigated the claim, arrived as to the fact of possession. And as the Code declares that, in the suit brought to contest the order, the claimant must prove his *right*, it follows that the order, if not set aside, is conclusive as to the right. And lastly, such an order is binding on the successful party, whether he is a plaintiff or defendant in the suit; so that what he cannot assert as plaintiff he cannot plead as a defendant. BADRI PRASAD v. MUHAMMAD YUSUF, **1 A. 381, F.B.** [*F.*, 1 A. 541, 2 A. 455, 8 M. 506, 14 B. 372, 18 A. 413=1896, A.W.N. 129, 22 B. 640; *D.*, 1 C.W.N. 701; *R.*, 9 B. 35, 20 B. 270, 22 B. 875.]

(3835)—*O.* 21, *rr.* 58, 59, 60, 61, 63, 64 (=*Civ. Pro. Code, Act VIII of* 1859, s. 246)—*Period of limitation.*—The period of limitation contained in s. 246, Civ. Pro. Code, is applicable only to a case in which the procedure prescribed by that section has been adopted. VENKATANARU v. AKKAMMA, **3 M.H C. 139.** [*F.*, 21 W.R. 133; *Appr.*, 4 B. 21; *Appl.*, 16 W.R. 22; *R.*, 22 B. 875.]

(3836)—*O.* 21, *rr.* 58, 59, 60, 61, 63, 64 (=s. 246, *Civ. Pro. Code*, 1859)—*Investigation under—Judgment debtor, not necessary party—Absence of notice—Order not binding on him—Scope of* s. 246—*Demisee claiming* jenm *right—Acceptance by demisee—Denial of* jenm *right—Estoppel.*—A judgment-debtor cannot be taken to be necessarily a party to, and bound by, an order under s. 246 of Act VIII of 1859 made on a claim petition. (11 B. 114, 15 I.A. 123, 4 M.H C. 472, 6 M H.C. 416, 25 M. 721, 1 M. 391, 3 A. 233, *R.*) It must be shown that notice of claim was served on the judgment-debtor before he can be held to be bound by the order of Court. (25 M 721, 30 M. 335, 31 M. 163, M.W.N. 1910, 741, *R.*) The Court under s. 246 could only make an order releasing the property from attachment, or disallow the claim, which must be one objecting to the sale of the property in execution. (14 W.R. 52, 27 M. 67 *R.*) Under s. 246, the rights of any claimant to some interest in the property in the possession of the judgment-debtor (*e.g.*, the equity of redemption) could not be investigated. (14 W. R. 144, 116 W.R. 119, 6 M.H.C. 416, 11 B. 114, 4 B. 475, *R.*) Where a person accepts a demise from a person claiming to hold a *jenm* right in the property, no express admission of *jenm* right by the demise otherwise than by the acceptance of the demise, is necessary to

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estop the demisee from denying demisor's *jenm* right. KUNYIL PARKUN PUTTHUKAYI KOTTAYI KANARAN v. VARANAKOT ILLATH GANAPATI NAMBUDRI, **21 M.L.J. 550.**

(3837)—*O. 21, rr. 58, 59, 60, 61, 63, 64 (= Civ. Pro. Code, 1859, s. 246)—Penalties by Civil Courts.*—In suits under s. 246, Act VIII of 1859, the question to be tried is that of right or title, and not merely that of possession. Civil Courts in this country ought not to deprive parties of their just rights merely by way of penalty. S. 246, Act VIII of 1859, distinguished from s. 15. MATHURA PANDEY v. RAM RUCHA TEWARI, **3 B.L.R. A.C. 108 = 11 W.R. 482.**

(3838)—*O. 21, rr. 58 to 64, except 62 (= s. 246, Civ. Pro Code, 1859)—Limitation.*—Case pointing out the method of computation of the year mentioned in Act VIII of 1859, s. 246. KASHEENATH SHAHA v. JOGENDRA NATH BABOO, **22 W.R. 68.**

(3839)—*O. 21, rr. 58 to 64, except 62 (= s. 246, Civ. Pro. Code, 1859) Claim under section rejected for unreliable evidence—Nature.*—A claim under Act VIII of 1859, s. 246, rejected on account of unreliable evidence, is on the same footing as if there had been no evidence, and the order rejecting it is on the merits and not on default. GOOROO DOSS ROY v. SONA MONEE DOSSIA, **20 W.R. 346** [*Diss.*, 1 C.W.N. 24; *Appr.*, 21 W.R 409; *Con.*, 24 W.R. 411, 22 B. 875; *F.*, 1 C.L.J. 296; *R.*, 6 C.L.J. 362]

(3840)—*O. 21, rr. 58 to 64, except 62 (= Civ. Pro. Code, 1859, s. 246)—Order, when final—Limitation to set aside order.*—In execution of a decree, certain immoveable property was attached. The plaintiff in this case objected to the attachment, but his objection was disallowed as he did not tender any evidence in support of it. More than one year after, he filed the present suit for possession against the auction-purchaser. *Held* that, under the circumstances, the order disallowing the claim was final and conclusive against the plaintiff, he not having brought a suit within one year from its date to contest it. HIMAYAT ALI v. MANSUKH, **A.W.N. 1883, 19.**

(3841)—*O. 21, rr. 58, 59, 60, 61, 63, 64 (= Civ. Pro. Code, 1859, s. 246)—Execution-proceedings.*—In a suit for possession of a resumed mehal, where it is sought to make binding on plaintiff an order passed on a claim preferred by him against the sale of the property when attached by an execution creditor as the property of a judgment debtor, neither of whom is a defendant, *held* that, where, as in the proceedings under s. 246, Civ. Pro. Code, the Court does not go on to sell the property, there is no binding order between plaintiff and the execution creditor, and no order deciding any question of right between plaintiff and defendant. DURGARAM ROY v. RAJA NARSING DEB, **2 B.L.R. A.C. 264 = 11 W.R. 134.** [*Rel. on*, 16 W.R. 22.]

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(3842)—*O. 21, rr. 58, 59, 60, 61, 63, 64 (= Civ. Pro. Code, 1859, s. 246)—Execution of decree—Objection to attachment—Finality of order.*—Suit by the plaintiff for a declaration of proprietary title as to certain lands purchased by him in Court-auction in execution of his decree. The facts were these. The disputed property was first hypothecated to the plaintiff, and in execution of the decree on this hypothecation, one R objected to the sale of the property on the ground that it had been purchased by him in execution of a money decree against the mortgagor thereof. The lower Court *held* on this objection that R's possession was that of a representative of the mortgagor-judgment-debtor, and that he had no right to take objection to the plaintiff's mortgage-lien. The property was accordingly put up for auction-sale and purchased by the plaintiff himself. The present suit was thereupon instituted by the plaintiff. *Held* that the objection originally preferred by R was precisely the objection contemplated by s. 246 of Act VIII of 1859; that the procedure prescribed by that section was followed by the Court then engaged in executing the mortgage decree for sale; and that an order was made therein against the objector R, in the sense of the last sentence of s. 246 of the Act. The objector R submitted to it, and did not bring the suit provided as his only remedy by the section; and he must be held to be bound by the final order then made; and therefore, the plaintiff should obtain a declaration as prayed for in the present suit. RAM DAYAL v. DURGA DAI, **A.W.N. 1884, 25.**

(3843)—*O. 21, rr. 58, 59, 60, 61, 63, 64 (= s. 246, Civ. Pro. Code, 1859)—Execution of decree—Attachment of property—Suit to establish right.*—Where, in the course of execution proceedings, a claim to property attached therein, was preferred and investigated as between the claimant and the decree-holder (the judgment-debtor not being a party), and decided in favour of the claimant, and such decision is not questioned by means of a suit brought within one year, *held*, in a subsequent suit by another creditor of the same judgment-debtor to establish the liability of the same property in the possession of the claimant for *his* debt, that the suit was not barred under the provisions of s. 246. Though, in a sense, the order passed in the first claim was against the judgment-debtor, as diminishing his means of satisfying the first debt, it could not bind him, as he was not a party to the claim-proceedings. Nor was it incumbent on him to sue to establish his right, and any interest he may have had in the property cannot be said to have lapsed by reason of his failure to sue. It cannot therefore be said that the second creditor cannot come into Court and seek to establish a title which has lapsed and is extinguished. MANNU LAL v. HARSUKH DAS, **3 A. 233.** [*F.*, 15 C. 674; *Appr.*, 11 B. 114, 32 B. 875.]

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(3844)—*O. 21, rr. 58 to 64, except 62 (= Civ. Pro. Code, 1859, s. 246)—Claim by legal representative of judgment-debtor — Appeal.* —A decree-holder executed his decree as against the property of his judgment-debtor, R. On this, the son of R intervened and claimed the property as his own, stating that, it did not belong to the judgment-debtor, who happened to be his mother, but that he had held possession of it in his own right, and did not inherit it as any part of his mother's assets. The Munsif allowed the claim, but the Judge admitted an appeal against that order and reversed it. *Held*, that the Munsiff's order was under s 246 of Act VIII of 1859 and that the Judge was wrong in receiving the appeal and that therefore his order should be set aside. *In the matter of the petition of* J. B. RAINEY, **6 B L R 725, Note = 12 W.R. 333.** (6 W.R. Mis. 61, *F.*) [*F*, 2 A. 752, *Appl.*; 15 W.R 163 = 6 B L.R. 721; *R.*, 20 W. R. 280 = 12 B.L.R. 65.]

(3845)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 8 W.R. 304, 5 W.R, Mis. 28.

(3846)—O. 21, rr, 58 59, 60, 61, 63, 64—*See* APPEAL—ORDERS, 12 W.R. 333 and 354, 19 W.R. 97, 6 W.R, Mis. 464, 11 W.R. 204.

(3847)—O. 21, rr. 58 to 64 except 62—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 12 W.R. 33.

(3848)—O 21, rr. 58, 59, 60, 61 63, 64—*See* ATTACHMENT—STRIKING OFF EXECUTION PROCEEDINGS, 24 W.R. 36.

(3849)—O 21, rr. 58, 59, 60, 61, 63, 64—*See* BURDEN OF PROOF—CLAIMS TO PROPERTY ATTACHED, 7 N.W.P. 85, 2 B.L.R. F.B. 91 = 11 W.R. F B. 8, 3 B.L.R. A.C. 70 = 11 W. R. 422, 15 W.R. 155, 15 W.R. 202, 25 W.R. 79.

(3850)—O. 21, rr. 58 to 64 except 62—*See* CAUSE OF ACTION, 20 W.R. 456.

(3851)—O. 21, rr. 58 to 64 except 62—*See* CONTRIBUTION, SUITS FOR — VOLUNTARY PAYMENT, 22 W.R. 430.

(3852)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* COSTS—SPECIAL CASES, 3 M.H.C. 341.

(3853)—O. 21, rr. 58, 59, 60, 61, 62, 64—*See* COURT FEES, 4 B. 528, Note.

(3854)—O. 21, rr. 58 to 64 except 62—*See* COURT FEES ACT, 1870, sch. II, art. 17 (3), 19 W.R. 17.

(3855)—O. 21, rr. 58 to 64 except 62—*See* DECLARATORY DECREE, SUIT FOR — DECLARATION OF TITLE, 6 B.L.R. 320.

(3856)—O. 21, rr. 58, 59, 60, 61, 63. 64—*See* DECLARATORY DECREE, SUIT FOR—ENFORCING OR REMOVING LIEN OR ATTACHMENT, 4 B. 535, Note.

(3857)—O 21, rr. 58, 59, 60, 61, 63, 64—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 2 B.L.R. A.C. 212 = 11 W.R. 40.

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(3858)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 8 M. 506.

(3859)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 6 W.R. Mis. 61.

(3860)—O. 21, rr. 58 to 64 except 62—*See* HINDU LAW—JOINT FAMILY, 6 W.R. 69.

(3861)—O. 21, rr. 58, 59, 60, 61, 63 and 64—*See* INJUNCTION UNDER CIV. PRO. CODE, 24 W R. 70.

(3862)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* JURISDICTION—SUITS FOR LAND, 1 Hyde 136.

(3863)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1859, s. 22, 6 B.H.C. A.C.J. 39.

(3864)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, s. 1, 8 C.L.R. 54.

(3865)—O 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, s. 4 and art. 11, 8 W.R. 73.

(3866)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, s. 12, 10 B.H.C. 19 W.R. 1864, 321.

(3867)—O. 21, rr. 58 to 64 except 62—*See* LIMITATION ACT, 1908, s. 14, 22 W.R. 162.

(3868)—O. 21, rr 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, art. 11, 4 W R. 35, 7 B.L.R. 235 = 15 W R 311, 3 B L.R. App. 122 = 12 W.R. 221, 2 B L R. App. 49, 22 W.R. 39, 7 N.W.P. 113, 12 W R. 221, 14 W.R. 367, 14 W.R. 364, 1 M. 391, 7 B L.R, 238, note, 1 A. 541, 21 W.R. 133, 4 B. 23.

(3869)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 6 N. W.P. 185.

(3870)—O 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 11 C. L.R 352.

(3871)—O. 21, rr. 58 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, arts. 11, 13, 4 B. 21.

(3872)—O 21, rr. 58 to 64 except 62—*See* LIMITATION ACT, 1908, art. 11-A, 21 W.R. 409.

(3873)—O 21, rr. 58 to 64 except 62—*See* LIMITATION ACT, 1908, arts. 11 A and 12, 14 W.R. 192.

(3874)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, arts. 12, 11-A, 2 W. R. 55.

(3875)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, art. 13, 8 W.R. 93, A.W.N. 1885, 305, 4 B. 611.

(3876)—O. 21, rr. 58 to 64 except 62—*See* LIMITATION ACT, 1908, art. 14, W.R. 1864, 371.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3877)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* LIMITATION ACT, 1908, art. 85, W.R. 1864, 237.

(3878 to 3880)—O. 21, rr. 58, 59, 60, 61, 63, 64—Claim proceedings — Judgment-debtor not necessary party—No notice served—Not bound by order—*See* MORTGAGE—REDEMPTION, 9 M.L.T. 423.

(3881)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* MORTGAGE—REDEMPTION, 2 A. 455.

(3882)—O. 21, rr. 58 to 64 except 62—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 19 W.R. 289.

(3883)—O. 21, rr. 58 to 64 except 62—*See* MORTGAGE—MISCELLANEOUS, A.W.N. 1882. 104.

(3884)—O. 21, rr. 58, 59, 60, 61, 63, 64, Claim disallowed—Suit—Limitation—*See* POSSESSION—SUITS FOR POSSESSION, 11 C.L.R. 443.

(3885)—O 21, rr. 58 to 64 except 62—*See* PRODUCTION OF DOCUMENTS, 14 W.R. 95.

(3886)—O. 21, rr. 58, 59, 60, 61, 63 and 64—*See* SALE-SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 6 N.W.P. 168.

(3887)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, W.R. 1864, 163.

(3888)—O. 21, rr. 58 to 64 except 62—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 5 B.L.R. App. 73, Note=11 W.R. 528.

(3889)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 8 W.R. 362.

(3890)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 18 W.R. 337, 2 B. 365.

(3891)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 8 W.R. 422.

(3892)—O. 21, rr. 58, 59, 60, 61, 63, 64—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 18 W.R. 283.

(3893)—O. 21, rr. 58, to 64 except 62—*See* SUBORDINATE JUDGE, JURISDICTION OF, 21 W.R. 56.

(3894)—O. 21, rr. 58, 59, 60, 61, 63 and 64—*See* SUPERINTENDENCE OF HIGH COURT, 20 W.R. 202, 18 W.R. 402.

(3895)—O 21, rr. 58 to 64 except 62—*See* TITLE, 15 W.R. O.C. 7.

(3896)—*O. 21, rr. 58, 59, 60, 61, 63, 64, 23 (=Civ. Pro. Code, 1859, ss. 246, 247)—Claim to attached property—Refusal to order postponement of sale—Suit after one year—Limitation.*—Certain property was attached in execution of the decree obtained by the present defendant against the plaintiff's vendors whereupon the plaintiff intervened under s. 246, Civ. Pro. Code, 1859, and prayed for the release of the attachment on the ground of purchase prior to attachment. He prayed for time to put in the sale deed after having it registered. The Court refused and the property was sold in execution. More than one year after the Court's refusal, the plaintiff sued to establish his right to the property. *Held* that the suit was not barred under s. 246 as the order of refusal was not one under s. 546, but was a mere refusal to order a postponement under s. 247, Civ. Pro. Code. SAH MUKHUN LALL PANDAY v. SAH KOONDUN LAL, 15 B.L.R. 228, P.C.=24 W.R. 75=2 I.A. 210=3 Sar. 509. [*Appr.*, 4 B. 21.]

(3896-*a*)—O. 21, rr. 58, 59, 60, 61, 63, 64, 23—*See* ST. 11 AND 12, VIC. C. 21, 1 B.H.C.251.

(3897)—*O. 21, rr. 58, 59, 60, 63, (= Civ. Pro. Code, 1882, ss. 278, 279, 280, 283,—Claims to attached property.*—If, in an investigation under s. 278 as to moveable property, a Court finds that the claimant was in possession at the time of attachment, and it is not proved by the attaching creditor that the claimant was in possession in trust for the judgment-debtor, the Court should remove the attachment. In an investigation under s. 279 of the Code of Civil Procedure, if a claimant to property, which has been attached, proves that, at the date of attachment, he was possessed of the property, the burden of proof that he is not the owner, or that he holds in trust for the judgment-debtor, is on the decree-holder, and if he fails to discharge it, the Court should remove the attachment. In a suit under s. 283, the plaintiffs is entitled so succeed upon proof of possession by him at the time of attachment, if the decree-holder does not prove that he held in trust for the judgment-debtor, or that the attached property is the property of the judgment-debtor liable to present seizure and sale in execution of his decree. The words "in trust for" should be construed in the sense that the claimant held the property as servant or agent for or otherwise on behalf of the judgment-debtor, and that he had no right whatever to the possession of it on his own account if the judgment-debtor claimed it. (2 B.L.R. 91, 5 B.L.R. 708, 6 B. 215, 12 B. 270, 18 A. 369, 2 U.B.R. 1897—1901, 270, 21 W.R. 133, *R.*). Rights of hirers of cattle in Burma noticed. It would cause great inconvenience and injustice to the hirers if a judgment-creditor of an owner were at liberty to have the hired cattle seized and sold in execution of a decree against the owner during the period for which they have been hired out and Courts, allowing an attachment in such cases to continue and prevail, would be robbing hirers of an actual right to possession, although that right is only for a limited period. P.K.A.C.T. KADAPPA CHETTY v. MAUNG SHWE BO, 2 L.B.R. 152. [*F.*, 4 L.B.R. 289; *D.*, 4 L.B.R. 258; *Diss.* U.B.R. 1904, 4th Q r., Civil Procedure 8.]

(3898)—*O. 21, rr. 58, 59, 62, s. 104, O. 43, r. 1, s. 105 (=ss. 278, 279, 282, 588, 591, Civ. Pro. Code, 1882)—Order dismising a claim*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

founded on mortgage—"*Judgment*"—*Letters Patent*, s. 15—*Right of appeal*—*Restrictions on*—"*Some interest in property*"—Ss. 588, 591 Civ. Pro. Code do not restrict the right of appeal given by s. 15 of the Letters Patent. The order of a Judge sitting on the Original Side of the High Court disallowing a claim preferred under ss. 278, 282, Civ. Pro. Code by the mortgagees of immoveable property attached in execution of a decree, is a "judgment" within the meaning of s. 15 of Letters Patent, and so is subject to appeal. [*Appr.*, 13 M.L.J. 497, 29 M. 1; *R.*, 13 M.L.J. 362=27 M. 121.] A mortgage-bond was executed in the name of one R, but the amount of the bond was borrowed in several shares from four persons mentioned in the bond, and the respective amounts borrowed from each of the four persons were specified in the bond, which also contained an express provision that when a part payment was made to R, such amount should be distributed by him among all the four creditors according to their respective shares, and that R alone should conduct proceedings against the mortgagors for the purpose of recovering the mortgage-debts. R died leaving a Will appointing executors who did not take out probate. *Held* that the other mortgagees had "some interest in the property attached" within the meaning of s. 279, Civ. Pro. Code, entitling them to put in a claim petition asking that an attachment of the property by a judgment creditor of the mortgagor may be declared subject to their mortgage. A beneficial or equitable interest is as much an interest within the meaning of s. 279, Civ. Pro Code, as a legal interest in the property attached. SABHAPATHI CHETTI v. NARAYANASAMI CHETTI, **25 M. 355=11 M.L.J. 346.**

(3899)—*O.* 21, *rr.* 58, 60 (=*ss.* 278 *and* 280, *Civ. Pro. Code*, 1882)—*Execution of decree—Suit for declaration that property sought to be attached belongs to judgment-debtor—Procedure.*—Where a judgment-creditor, seeking execution against property alleged to be of the judgment-debtor, is met with a plea that the property in question is not the property of the judgment-debtor, the judgment-creditor is not obliged to take proceedings under s. 278 and wait until an adverse order is passed in those proceedings but may at once institute a regular suit for a declaration that the property sought to be taken in execution is the property of the judgment-debtor. MAKBUL FATIMA v. LALTA KUNWAR, **A.W.N. 1907, 207=4 A.L.J. 574.** (18 A. 410, 23 B. 266, *F.*; 16 A. 165, A.W.N. 1904, 190, *D.*

(3900)—*O.* 21, *rr.* 58, 60, 61, *s.* 115 (=*Civ. Pro. Code*, 1882, *ss.* 278, 280, 281, 622)—*Attached property—Enquiry into applications for removal of attachment—Remedy of objector or claimant against order—High Court—Revisional jurisdiction—Procedure—Practice.*—The questions, which have to be considered during the investigation under s. 278, Civ. Pro. Code, 1882, are comparatively simple and questions

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of legal rights and title are not relevant, except so far as they may affect the decision as to whether the possession is on account of, or in trust for, the judgment-debtor or some other person. In enquires into applications for the removal of attachment, where a Court wanders from the points necessary to be considered and does not make an investigation and pass an order such as the claimant is entitled to in accordance with the terms of ss. 278—281, the High Court will not refuse to grant the extraordinary remedy of revision, notwithstanding that the claimant or objector has open to him a remedy by way of suit under s. 283. SAN TUN PRU v. MI ANI ME, **1 L.B.R. 180.** (8 M. 484, 15 A. 405, *Dissented from.*) [*F.*, 4 L.B.R. 289.]

(3901)—O. 21, rr. 58, 60, 61—Claim to attached property—Questions for determination—Possession—Constructive possession—Meaning of "possessed" and "possession"—*See* EXECUTION OF DECREE—MISCELLANEOUS, 4 L.B.R. 289.

(3902)—*O.* 21, *rr.* 58, 60, 61, 62 (=*Civ. Pro. Code*, 1882, *ss.* 278, 280, 281, 282)—*Act IV of* 1882 (*Transfer of Property*), *s.* 83—*Execution of decree—Objection to attachment—Subsequent mortgagee paying into Court in his own name money due under a former decree against his mortgagors.*—A and others, being judgment-debtors under a certain instalment decree borrowed money to pay off the balance due under the decree, giving a mortgage on the property affoted thereby. The mortgagee paid the balance due under the abovementioned decree into Court, in his own name, but expressly on behalf of his mortgagors, and notice was issued to the decree-holder who drew out some of it. Subsequently, the decree-holder sought to appropriate some of the amount so paid into Court to the payment of debts other than that due under the decree and to obtain attachment and sale of the property affected by that decree, which was then in the possession of the representatives of the mortgagee. *Held* that, even if s. 278 of the Civ. Pro. Code, were exhaustive and the mortgagees were not entitled within the meaning of that section to object to the attachment of the property in question, they would still, as mortgagees in possession, be entitled to claim that the property should not be held liable to attachment under the former decree. MITTHU LAL v. MUHAMMAD AHMAD, **A.W.N. 1891, 220.**

(3903)—O. 21, rr. 58, 60, 61, 62, 63—*See* COURT FEES ACT, 1870, s. 7, Cls. (IV) and (c) and (viii), s. 12 (ii), art. 17, cl. (1) OF sch. II, U.B.R. 1897—1901, Vol. II, 355.

(3904)—*O.* 21, *rr.* 58, 60, 61, 63 (=*ss.* 278, 280, 281, 283, *Civ. Pro. Code*, 1882)—*Attachment—Claimant's application for removal of—Order for release of part of property—Omission to express judgment or opinion with regard to the rest of the property—*"*Any property comprised in the order*," *meaning of—Suit by part*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

affected under s. 283, *Civ. Pro. Code—Limitation Act, XV of* 1877, *sch.* II, *art.* 11—*Applicability.*—A decree-holder attached in execution of his decree certain properties belonging to G, the plaintiff respondent as being the property of his judgment-debtors. G put in an application under s. 278 for removal of attachment of her interest in all the properties attached. But the Court, labouring throughout under a misapprehension that a portion only of the attached properties were under attachment, ordered, on the 5th November, 1901, the release of G's interest in that portion from attachment, and its order was silent with regard to the rest of the attached property. Subsequently, the decree-holder again attached, all the properties that were formerly attached and G, having been unsuccessful in claim proceedings, brought the present suit under s. 283 of the Civ. Pro. Code, to have her rights declared. It was contended that G's suit had become barred under art. 11, sch. II of the Limitatation Act (XV of 1877), the suit having been brought more than one year after the order passed on the 5th November, 1901, releasing attachment on G's application. *Held*, that the Court that passed the order of the 5th November 1901, having acted on a misapprehension that only a portion of the properties were under attachment, meant to and did allow G's objection in full and directed the release of the entire property from attachment so far as G's interest was concerned, and that the order did not disallow, under s. 280 or s. 281, Civ. Pro. Code, any part of G's claim, nor was it against G with regard to "any property comprised in that order." *Held*, therefore, that art. 11, sch. II of the Limitation Act (XV of 1877) did not apply. BHAGWANTI v. GOMAN. **42 P.R. 1909 =88 P.L.R. 1909=52 P.W.R. 1909=1 Ind. Cas. 742.**

(3905)—O. 21, rr. 58, 61—*See* LIMITATION ACT OF 1908, arts. 11, 11-A, 18 M. 265.

(3906)—*O* 21, *rr.* 58, 61, 63 (=ss. 278, 281 *and* 283, *Civ. Pro. Code*, 1882)—*'Right which the plaintiff claims to the property in dispute,' meaning of.*—The words "the right which the plaintiff claims to the property in dispute" in s. 283 of the Code, mean the right which is claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. The three ss. 278, 281 and 283 must be read together (15 C. 674, 31 C. 228, *F.*). When, therefore, a claimant, being unsuccessful in a claim under s. 278, has got the property released from attachment by coming to terms with the decree-holders without notice to the judgment-debtors, a suit subsequently brought by him against the judgment-debtors for recovery of possession is not barred under s. 283 of the Code. MORSHIA BARAYAL v. ELAHI BUX KHAN, **3 C.L.J. 381.** [*R.*, 30 M. 335, F.B.=17 M.L.J. 95=2 M.L.T. 116.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3907)—*O.* 21, *rr.* 58, 61, 63 (=ss. 278, 281, 283, *Civ. Pro. Code*, 1882)—*Claim proceedings, order in—Suit by aggrieved party instituted after a year—Judgment-debtor not a party in claim proceedings—Limitation—Limitation Act (XV of 1877), sch. II, art.* 11.—Where the judgment-debtor was not a party to claim proceedings, the party aggrieved by the order therein can institute a suit to establish his right after the expiry of a year from the date of the order, and the suit will not be barred under art. 11, Limitation Act. SADAYA PILLAI v. AMURTHACHARI, **8 M.L.T. 417=8 Ind Cas. 157.** (15 C. 674, 3 C.L.J. 381, 15 C. 521, 15 I.A. 123, *R.*; 29 M. 225, 16 M.L.J. 136, 25 M. 721, 12 M.L.J. 411, *R. & Expl*; 4 M.H.C. 472, *D.*)

(3908)—*O.* 21, *rr.* 58, 61, 63 (=ss 278, 281, 283, *Civ. Pr. Code*, 1882)—*Claim by mortgagee—Adjudication in favour of claimant—Failure of unsuccessful party to file suit within one year—Suit by mortgagee—Impeachment of mortgage on grounds urged in claim proceedings and found against—Estoppel—Scope of order under s.* 283—*Adjudication as to right to physical possession—Title.*—A simple money decree-holder having got attached property subject to a mortgage in favour of plaintiff, the mortgagee put in a claim under s. 278, Civ. Pro. Code (Act XIV of 1882). The decree-holder impeached the mortgage on the ground that it was invalid for want of sanction under s. 257-A, Civ. Pro. Code, and that it was a sham transaction. These points were found against the decree-holder and the claim was allowed. To these proceedings the mortgagor was not a party. No suit was brought by the decree-holder against the said order. But he purchased the property at the Court-sale and then assigned his rights to the appellant. In a suit by the mortgagee to recover money due on his mortgage, *held*, that it was not open to the appellant to impeach the mortgage on grounds urged by his assignor in the claim proceedings; that the fact that the appellant's assignor became the representative of the judgment-debtor who was no party to the claim proceedings, did not override the estoppel or relieve against the disability imposed by s. 283, Civ. Pro. Code. (15 C. 521, 15 I.A. 123, 28 M. 87, 31 M. 177, 3 M.L.T. 306, 30 M. 335, 17 M.L.J. 95, 2 M.L.T. 116, F.B., 31 M. 163, 3 M.L.T. 256, 18 M.L.J. 26, *R. & Expl.*; 23 M. 227, 21 I.A. 17, 4 C.W.N. 227, 16 C. 682, 16 I.A. 107, *R.*); that an order in claim proceedings is not restricted to the determination of rights relative to physical possession, but can also determine question of title. RAMU AIYAR v. PALANIAPPA CHETTY, **8 M.L.T. 381.**

(3909)—*O.* 21, *rr.* 58, 61, 63 (=ss. 278, 281, 283, *Civ. Pro. Code*, 1882)—*'Investigation,' meaning of term—Order against claimants under s.* 281—*Payment of decree amount by a mortgagee beyond one year from the order, effect of.*—In this case, the Court of first instance held that the plaintiff's suit was barred

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

by art. 11 of the second schedule to the Limitation Act, the plaintiffs not having brought a suit to establish their right to the property in dispute within one year from the date of the order made against them, under s. 283, rejecting a claim previously preferred by them on the attachment of the property. The order against the plaintiffs was to this effect, *viz.*, "the sale seems to be collusive: claim rejected." The lower appellate Court was of opinion that there was no bar by limitation, inasmuch as there had been no 'investigation' of the plaintiff's claim within the meaning of that word as used in the Code. *Held*, that the judgment of the lower appellate Court could not be supported on the ground that there has been no 'investigation.' It is not possible to define the amount of inquiry, which constitutes an 'investigation.' If the order purports to deal with the claim on the merits, it must be taken that there has been an 'investigation' and a suit, therefore, by a person aggrieved thereby will be governed by art. 11 of the Limitation Act. *Held*, further, that, where after more than a year from the date of the said order, the attachment was raised on payment by one of the mortgagees (defendants in the suit) in possession of the property, such payment not having been made within one year after the date of the order, the order is conclusive as between the claimants (the plaintiffs) and the defendants. To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period, after the expiration of a year from the date of the order against him, liable to be revived at any moment by the payment off the amount of the decree, would lead to uncertainty of title and great inconvenience and would be inconsistent with the policy of the legislature in prescribing a short period of limitation for suits by parties, against whom an order has been made in claim proceedings. KAYYANA CHITTEMMA v. DOOSY GAVARAMMA, **16 M.L.J. 136=29 M. 225.** [*R.*, 17 M.L.J. 554=31 M. 5 =3 M.L.T. 106, 17 M.L.J. 95, F.B.=30 M. 335, 17 M.L.J. 250=30 M. 461.]

(3910)—O. 21, rr. 58, 61, 63—*See* LIMITATION ACT, 1908, arts. 11 and 11-A, 31 C. 228, 27 C. 714.

(3911)—O. 21, rr. 58, 62—Declaratory suit for release of property from attachment—Valuation—*See* JURISDICTION — GENERAL, 71 P.L.R. 1906=55 P.R. 1906.

(3912)—O. 21, rr. 58, 62, 63, 90—*See* MORTGAGE — GENERAL, 7 P.W.R. 1908=62 P.R. 1908.

(3913)—*O. 21, rr. 58, 63 (=ss. 278 to 283, Civ. Pro. Code, 1882), scope of.*—These sections contemplate the liability or non-liability of the property attached to the decree under execution, because it is the property of the judgment-debtor or liable to the decree passed against him as sued in a representative capacity so as to bind the parties who have objected to the execution. They do not contemplate a suit to establish the liability of third persons. RADHA PERSHAD SINGH BAHADUR v. RAM KHELAWAN SINGH, **23 C. 302.** (18 W.R. 458, 10 C. 924, 9 C. 888, *Diss.*)

(3914)—*O. 21, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 278, 283)—Claim—Order on claim petition—Finality*—The order made on a claim under s. 278, Civ. Pro. Code, is an order under s. 283, Civ. Pro. Code, and final as such, and therefore no appeal lies from such an order. NASIB-UN-NISSA v. NIAZ-UN-NISSA, **A.W.N. 1886, 39.**

(3915)—*O. 21, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 278, 283.—Property wrongfully seized in execution of decree—Special procedure laid down in s. 278, Civ Pro. Code, intended to provide a speedy and summary remedy and not to deprive a claimant of his remedy by way of suit.*—The special procedure laid down in s. 278 *et seq.*, is intended to provide a speedy and summary remedy and not to deprive a claimant of his remedy by way of suit. (23 B. 266, *F.*) A suit would lie whether there has been application under this rule or not, and it was immaterial whether the order of the Court had been or ought to have been one dismissing the application for default, or one deciding it on the merits that the attachment was to be withdrawn or maintained. DORAB ALLY v. MA THIT, **U.B.R. 1897—1901, Vol. II, 267.** (15 I.A. 1, 14 W.R. 340, 16 W.R. 59, 23 M. 220, U.B.R, 1897—1901, Vol. II, 262, 23 B. 266, *R.*)

(3916)—*O. 21, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 278, 283)—Investigation of claim to property attached in execution of decree—Points for enquiry—Duty of investigating Court.*—In the sections relating to objections to attachment in the Civ. Pro. Code, the Legislature has provided a special means of readily and expeditiously dealing with the questions which are liable to arise in the course of execution proceedings, and this it has no doubt done with the express object of preventing all unnecessary litigation. S. 278 gives the Court power to investigate the claim or objection of a person intervening in attachment proceedings in all respects as if he were a party to the suit and directs that the Court shall proceed to make the investigation accordingly, so that the Court is bound to make a full and thorough enquiry irrespective of what may happen in the future; and indeed it is obvious that, unless it does, it must leave an opening for that further litigation, which, according to the recognised maxim of law, it is the interest of the commonwealth should be avoided. MA MA v. MAUNG PO WIN, **U.B.R. 1897—1901 Vol. II, 262.** (14 C. 617, 18 C. 290, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 355, 267.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3917)—*O. 21, rr. 58, 63 (= Civ. Pro. Code, 1882, ss. 278 and 283)—Execution of decree—Attachment, Objection against—Suit to establish title and possession—Order passed without investigation.*—An order cannot be held to be an order under s. 283 of the Civ. Pro. Code, unless it is passed after investigation and an opinion expressed and judgment given on the merits. SAJAN RAM v. RAM RATTAN, **119 P.L.R. 1904 = 87 P.R. 1904.** (3 A. 501, 18 M. 265, 12 C. 108, 15 C. 521, P.C., 1 C.W.N. 24, *R.*)

(3918)—*O. 21, rr. 58, 63 (= ss. 278, 283, Civ. Pro. Code, 1882)—Objection dismissed for default, effect of.*—*Held* that an order disallowing a claim under s. 278, Civ. Pro. Code, for want of prosecution is conclusive, unless a suit is brought under s. 283 within one year from the date of the order. GAYADIN v. MUSAMMAT BAIJ NATHI, **11 O.C. 180.** (1 C. W.N. 24, *Not F.*; 15 C. 521, 20 W.R. 345, 21 W.R. 409, 24 W.R. 411, 32 C. 537, 19 A. 253, 22 B. 875, *R.*)

(3919)—*O. 21, rr. 58, 63 (= ss 278, 283, Civ. Pro. Code, 1882)—Attached property, claim to—Claimant in default—Disallowance of claim—Art. 11, Limitation Act, 1877 (Cf. arts. 11 and 11-A, present Code).*—When a Court disallows a claim to attached property by reason of the claimant not having given any evidence in support of the claim, there cannot be said to have been any *investigation* under s. 278, Civ. Pro. Code, 1882, and the order cannot be said to be one under s. 281. Art. 11, Limitation Act, 1877, therefore, is inapplicable to such a case. KALLAR SINGH v. TORIL MAHTON, **1 C.W.N. 24** (3 A. 504, 12 C. 108, *F.*; 15 I. A. 123, *Expl.*; 20 W.R. 345, 21 W.R. 409, 24 W.R. 411, 12 C.L.R. 43, *Diss.*) [*F.*, 87 P.R. 1904 = 119 P.L.R. 1904; *Appr.*, 31 M. 5 = 17 M.L.J. 551 = 3 M.L.T. 106; *Cons.*, 6 C. L.J. 362; *R.*, 11 O.C. 190; *D.*, 27 C. 714, 1 C.L.J. 550, 32 C. 537, 34 C. 491 = 11 C.W.N. 87.]

(3920)—*O. 21, rr. 58, 63 (= ss. 278, 283, Civ. Pro. Code, 1882)—Suit by unsuccessful objector for recovery of price of his property sold in execution of decree passed against third party—Summary dismissal of objections to attachment of property—Appeal—Small Cause Court, Jurisdiction of.*—The respondent No. 1 attached the crop of respondent No. 2 in the execution of a decree and the appellant filed an objection under s. 278, alleging that the crop was his and not the judgment-debtors. His objection was summarily dismissed without any investigation. He instituted a regular suit for recovery of the price realized by sale of the attached property. *Held*, that the suit was one such as is referred to in s. 283 and not being one triable by a Court of Small Causes and not having been tried as such, an appeal lay from the decision of the first Court. RAM SARAN SINGH v. RAJA PARTAB BAHADUR SINGH, **8 O.C. 281.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3921)—*O. 21, rr. 58, 63 (= ss. 278, 283 of 1882)—Wrongful attachment—Summary proceeding under s. 278, unsuccessful—Subsequent suit under s. 283—Right established—Effect of judgment.*—In order that a plaintiff, who, after being unsuccessful in the summary proceeding, taken by him under s. 278, for the purpose of getting the release of an attachment issued in a suit in which he was not a party, succeeded in a subsequent suit instituted under s. 283, Civ. Pro. Code, 1882, in establishing his right of property in the goods, might be entitled to full indemnity for the wrongful attachment, he was not bound to allege and prove that the defendants resisted his application under s. 278, maliciously and without probable cause. Where the dismissal of the plaintiff's claim under s. 278, was not brought under review in the proceedings before the High Court, the effect of the judgment of the High Court in the subsequent suit, under s. 283, was to supersede the order under s 278, and render it altogether inconclusive. KISSORI MOHUN ROY v. HARSUKH DAS, **17 C. 436 = 17 I.A. 17, P.C. = 5 Sar. 412.** [*R.*, 6 Bom. L.R. 704.]

(3922)—*O. 22, rr. 58, 63 (= ss. 278, 283, Civ. Pro Code, 1882,—Execution of decree—Attachment—Objection allowed—Suit by decreeholder decreed—Previous attachment whether subsisting—Lien of attaching creditor—Rights of purchaser during attachment.*—*Held*, that the lien of an attaching creditor over the property attached dated from the attachment and was not destroyed or affected by an order of release which was in effect set aside by a subsequent decree in a regular suit. *Semble*:—A person, purchasing property at a time when it was subject to an attachment order of a Civil Court, could hold no better or higher position than his vendor. ALI AHMAD KHAN v. BANSIDHAR, **6 A.L.J. 434 = 31 A. 367 = 1 Ind. Cas. 931.** (21 W.R. 435, 23 C. 829, 33 C. 1158, 10 B. 400, 17 A.W.N. 124, *R.* and *F.*)

(3923)—*O. 21, rr. 58, 63 (= Civ. Pro. Code, 1882, ss. 278, 283)—Claim to attached property rejected—Payment of decretal amount by judgment-debtor into Court and attachment raised—Property attached again in execution of another decree—Claim to property again rejected—Suit for establishing title—Limitation.*—The first defendant obtained a decree against one X in 1880. In execution of this decree, he attached the house in dispute. The plaintiff intervened under s. 278 of the Civ. Pro. Code, and sought to raise the attachment. But his claim was disallowed on the 14th January, 1881. A sale proclamation was issued in due course; but the judgment-debtor having paid the amount of the decree into Court, the attachment was withdrawn on the 23rd March, 1881. Subsequently, the first defendant placed a second attachment on the property in execution of another decree. The plaintiff again applied to have the attachment raised. His application was again rejected on the 9th June, 1883.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Within one year from this date, the plaintiff filed the present suit to establish his title to the house in dispute and to have it declared that it was not liable to be attached and sold in execution. The defendants raised the plea of limitation to the suit. *Held* that the suit was not barred by limitation. The attachment in respect of which the order of 14th January 1881 was passed against the plaintiff, was raised on the judgment-debtor having paid the decretal amount into Court. After the 23rd March, 1881 (the date on which the first attachment was raised), there was no right of action remaining to the plaintiff in respect of the order of the 14th January, 1881. The second attachment was a new and distinct act giving a new cause of action on which the plaintiff was entitled to a fresh enquiry and decision. IBRAHIMBHAI v. KABULABHAI, **13 B. 72.** [*F.*, 31 C. 228; *R.*, 18 B. 241, 1 C.L.J. 296; *D.*, 29 M. 225=16 M.L.J. 136.]

(3924)—*O. 21, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 278, 283)—Declaratory suit by claimant, when Court-fee leviable on as for two declarations.*—Where a person objecting under s. 278 of the Civ. Pro. Code, brings a suit and makes not only the execution creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of his (plaintiff's) title to the property under attachment as against the judgment-debtor and also for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of his decree, there are two substantial declarations asked for, and the suit cannot be entertained on payment of the Court-fees in respect of only one of such reliefs. When, however, the judgment-creditor is the sole defendant in the suit, the claim worded in either of these ways must be regarded as a claim for only one declaration. MOTI SINGH v. KAUNSILLA, **16 A. 308, F.B.=A.W.N. 1894, 109.** [*F.*, 18 M. 459; *R.*, 17 A. 69.]

(3925)—*O. 21, rr. 58, 63 (=Civ. Pro Code, 1882, ss. 278, 283,)—Ss. 278, 283—Burden of proof—Fraud—S. 110, Evidence Act.*—When a claimant under s. 278, or the plaintiff in a suit under s. 283, proves possession, s. 110, Evidence Act applies, and he is entitled to succeed, unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor. (U.B.R. 1897—1901, Vol. II, 270, L.B.R. 1903, 152, 12 B. 270, *R.*) There is nothing to prevent an owner from selling or any one from purchasing property before it is attached, even if the parties know that an attachment is impending, or their object is to defeat an anticipated attachment provided the transaction is *bona fide* and for full consideration or a consideration that is not grossly inadequate. (22 W.R. 473, 25 B. 202, U.B.R. 1902—1903, Civ. Pro. 15, *R.*) It is only when the circumstances are such as to raise a strong presumption of fraud that the burden, lies upon the person, who sets up the sale, of proving that it was *bona fide* and for adequate consideration. MAUNG TUN BYE v. MAUNG YON, **U.B.R. 1904, 4th Qr., Civ. Pro. 8.** (10 C. 616, U.B.R. 1892—96, Vol. II, 318, 15 W.R. 507, 24 W.R. 292, *R.*) [*F.*, U.B.R. 1905, 1st Qr., Civ. Pro. Code, 16.]

(3926-27)—*O. 21, rr. 58, 63(=ss. 278 and 283 Civ.Pro.Code, 1882)—Execution of decree—Suit against successful claimant or declaration that certain property belongs to the judgment debtor—Judgment-debtor not a necessary party.*—Where a decree-holder brings a suit against a successfull claimant to establish that certain property belongs to his judgment-debtor and that he is entitled to bring it to sale in execution of his decree, the only person against whom he claims relief is the successful claimant. To such a suit, the judgment-debtor is not a necessary party. GHASI RAM v. MANGAL CHAND, **A.W.N. 1905, 172=2 A.L.J. 491=28 A. 41.**

(3928)—*O. 21, rr. 58, 63 (=ss. 278, 283, Civ. Pro. Code, 1882)—Court to ascertain respective rights of intervenor and judgment-debtor and order sale of latter's rights only—Omission to do so, effect of—Limitation Act, art. 12.*—Where a claimant prefers a claim to property attached in execution, the Court should define the respective shares of the judgment debtor and the intervenor and sell the judgment-debtor's definite share only. If, without doing so, the Court simply orders the sale of the property subject to the claim of the claimant, the order would not be a valid one under ss. 280 and 283, and the one year's limitation applicable to a suit to set aside the order will not be applicable thereto. UDIT NARAIN SINGH v. MURTAZA KHAN, **A.W.N. 1905, 49=2 A.L.J. 178=27 A. 464.** (4 W.R. 35, *F.*)

(3929)—*O. 21, rr. 58, 63 (=Civ. Pro. Code, 1859, s. 246)—Suit to recover personal property cognisable by a Small Cause Court—Suit for a declaration not cognisable by a Small Cause Court.*—A suit to recover personal property or its value under the section is cognisable by Courts of Small Causes. JEEWA v. KULLOO **84 P.R. 1870.** (72 P.R. 1868, *Expl.*)

(3929-*a*)—*O. 21, rr. 58, 63 (Civ. Pro. Code, 1882, ss. 278, 283)—Claim to attached property disallowed — Remedy — Regular suit within twelve months.*—Where a summary declaration of want of title in the objector is made in answer to a claim made by him to property under attachment, and this order is not set aside by a regular suit *brought by him* within one year, it becomes equivalent to a final adjudication against him. The unsuccessful objector or intervenor cannot get rid of the effect of the order by *pleading his right as defendant* in the regular suit brought by the opposite party, and the only way open to him is to establish his right by a regular suit brought by him within twelve months, at the expiration of which period the order becomes conclusive

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as against him. By the provisions in s. 283 of the Civ. Pro. Code, 1882, the Legislature has intended to provide only one remedy, that of a regular suit, to set aside the otherwise conclusive effect of the miscellaneous order; and it cannot be open to the objector to adopt any other alternative to get rid of the adverse order. NEMAGAUDA v. PARESHA, **22 B. 640.** [*F.*, 27 C. 714; *Appr.*, 74 P.L.R. 1901; *R.*, 1 N.L.R. 150; *D.*, 1 A.L.J. 531.]

(3929-b)—O. 21, rr. 58,63—*See* DAMAGES—DAMAGES, SUITS FOR, 3 A. 504.

(3930)—O. 21, rr. 58, 63—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 17 M. 17.

(3931)—O. 21, rr. 58, 63—*See* LIMITATION ACT, 1908, arts. 11 & 11-A, 125, 122 P.L.R. 1904=32 P.R. 1904.

(3932)—O. 21, rr. 58, 63—*See* SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 26 C. 778=4 C.W.N. 590.

(3933)—*O. 21, rr.* 58, 63, *s.* 66 (=*ss.* 278, 283, 317, *Civ. Pro. Code*, 1882)—*Certified purchaser*—Benami *purchaser—Attachment*—Res judicata—*Objection by third persan, effect of allowing.*—*Held*, that s. 317 of the Code applies not only to a suit brought against the certified purchaser by the person claiming to be the real purchaser but also to a suit brought by third parties against a certified purchaser. Under this section, no suit can be brought by a third party against a certified purchaser on the ground that purchaser is not the real beneficiary owner. *Held*, further, that where a decree-holder attaches a particular property as that of his judgment-debtor and such property is released from attachment under s. 278 of the Code on the objection of a third person and no suit under s. 283 of the Code is brought by the decree-holder for a declaration that the property actually belongs to his judgment-debtor, the order releasing the property becomes conclusive and operates as *res judicata* between such third person and the decree-holder. The decree holder cannot, by a fresh attachment under another decree of his against the same judgment-debtor, re-open the question. The order passed in the first case so far as the decree-holder is concerned operates as *res judicata* against him in the second case as well. MUSAMMAT NIAMAT-UN-NISSA v. RAZA ALI, **8 O.C. 306.** (3 O.C. 229, 21 A. 29, 14 M.I.A. 496, 21 A. 238, 16 M. 290, 26 A. 282, *R.*)

(3934)—O. 21, rr. 58, 63, 90, s. 47—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 7 A. 583=A.W.N. 1885, 124.

(3935)—O. 21, r. 58, O. 21, r. 63, O. 46, r. 1, s. 113—Jurisdiction—Appeal—Declaratory suit by objector against the decree-holder and judgment-debtor—Valuation of suit for purposes of jurisdiction and course of appeal—*See* JURISDICTION—GENERAL, 74 P.W.R. 1908, F.B.=94 P.R. 1908, F.B.

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(3936)—*O.* 21, *r.* 58, *O.* 23, *r.* 1, *s.* 141 (=*ss.* 278, 373, 647, *Civ. Pro Code*, 1882)—*Application for removal of attachment Subsequent withdrawal without consent of Court—Suit for declaration, not barred.*—Where the plaintiff first put in a petition under s. 278 for removal of attachment of certain property, and then withdrew it without permission of the Court, *held* that s. 373 of the Code read with s. 647, is no bar to a fresh suit for a declaration of his right to the attached property. SUPAL PANDAY v. SUKKHU KOIRI, **4 L.B.R. 75.** [*R.*, 4 L.B.R. 263.]

(3937)—*O.* 21, *r.* 58, *O.* 39, *r.* 6 (=*ss.* 278, *and* 498, *Civ. Pro. Code*, 1882)—*Attachment of perishable property—Sale while proceedings for removal of attachment are pending—Disposal of sale proceeds*—Where moveable property under attachment is sold to prevent waste or deterioration, and where at the time there are pending proceedings for removal of attacment taken under s. 278, the sale proceeds should be kept in deposit and should be taken to represent the property that has been sold, and they should follow the result of the order passed in the removal of attachment proceedings. MA KYIN v. MUTU RAMAN CHETTI, **4 L.B.R. 16.**

(3938)—O. 21, rr. 58, 66, 70—*See* CLAIM TO PROPERTY ATTACHED, 18 B. 98.

(3939)—O. 21, rr. 58, 66, 70—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 14 B. 369.

(3940)—O. 21, rr. 58, 90, 92—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 7 A. 365=A.W.N. 1885, 52.

(3941)—*O.* 21, *rr.* 58, 91 (=*ss.* 278, 313, *Civ. Pro. Code*, 1882)—*Entertainment of claim petition after sale but before confirmation, legality of.*—On a question raised as to whether a Civil Court has jurisdiction to entertain an objection, under s. 278 of the Code, after the attached property had been sold, *held*, that it is competent for a Civil Court to entertain such an objection after the property had been sold but before the confirmation of the sale, because there is no reason for thinking that the Legislature intended to make the mere holding of a sale a bar to an objection under s. 278 and, further, though, under s. 313 of the Code, the auction-purchaser may himself apply to set aside the sale on the ground that the person, whose property purported to be sold had no saleable interest therein, yet it is distinctly to the auction-purchaser's advantage that a valid claim to the property should be established before he has paid away his money rather than afterwards. BHAGCHAND v. MT. JHUNIA, **1 N.L.R. 167.** (26 C. 727, *R.*)

(3942)—*O.* 21, *rr.* 58, 99 (=*Civ. Pro. Code*, 1882, *ss.* 278, 331)—*Application for delivery of possession under decree.*—On application by plaintiffs (appellants) for delivery of possession of certain lands in respect of which they had obtained a decree for possession, a third person

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filed an objection alleging that he held prior decree for possession of the land. The executing Court proceeding under s. 278 of the Code of Civil Procedure, allowed the objection with costs. The present suit thereon brought by the plaintiff was decreed by the first Court, but the lower appellate Court assuming that the first Court's proceedings on objection were proceedings under s. 331 of the Code, and applying, s. 13 of the Civ. Pro. Code, dismissed the suit. *Held* that the disposal of the appeal by the lower appellate Court on the preliminary point was erroneous. There were no elements in the case to have given the first Court jurisdiction to proceed or pass any order under s. 331 of the Code. The resistance or obstruction mentioned in s. 331 must be of the description contemplated by s. 328, *i.e.*, a resistance or an obstruction, in the execution of a decree for the possession of property, to the officer charged with the execution of the warrant for delivery of possession. In this case there was no resistance or obstruction to any officer, but such obstruction as there was, was by the defendant filing his objection in the Court. The order of the executing Court must therefore be taken as passed under s. 278 and, at any rate, could not operate as a bar to this suit relating to immoveable property. MAHABIR PRASAD v. PARMA, **14 A. 417=A.W.N. 1892, 51.** (1 B.L.R.A.C. 206, *R.*)

——O. XXI, r. 59 (=1882, s. 279=1877, s. 279 =1859, s. 246).

See CLAIMS TO PROPERTY ATTACHED.

(3942-*a*)—O. 21, r. 59—*See* NOS. 1003, 1004, 1005, 1175, 1175-*a*, 1176, 1340, 3657, 3748, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3896-*a*, 3897, 3898, *supra* AND NOS. 4537, 4538, 5110-*a* 5150, *infra*.

(3943)—*O.* 21, *rr.* 59, 60, 61 (=*ss.* 279, 280, 281, *Civ. Pro. Code*, 1882)—*Construction.*—To reconcile s. 279 with ss. 280 and 281 of the Civ. Pro. Code, the words "some interest" in s. 279, must be taken to imply such interest, as would make the possession of the judgment-debtor, possession not on his own account, but on account of or in trust for the claimant. The sections of the Civ. Pro. Code, relating to claims to attached property, contemplate a summary investigation into the question of possession and the question of title is to be gone into only to determine whether the person in possession holds such possession as agent of, or as trustee for, another. MOHUNT BHAGWAN RAMANUJ DASS v. KHETTER MONI DASSI, **1 C.W.N. 617.**

Civ. Pro. Code, Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXI, r. 60 (=1882, s. 280=1877, s. 280 =1859, s. 246.)

See CLAIMS TO PROPERTY ATTACHED.

(3944)—*O.* 21, *r.* 60 (=1882, *Civ. Pro. Code*, *s.* 280)—*Attachment—Objection—Costs—Appeal.*—A District Judge has no jurisdiction to entertain an appeal from an order made by a Subordinate Judge in connection with a proceeding held by him under s. 280 of the Code. RAGUNATH DAS v. BADRI PRASAD, **A.W.N. 1883, 178.**

(3945)—*O.* 21, *r.* 60 (=*s.* 280, *Civ. Pro. Code*, 1882)—*Appeal—Execution—Decree.*—An order declaring, at the instance of a third party, that the property sought to be attached by the decree-holder belongs not to the judgment-debtor but to some one else, falls under s. 280, Civ. Pro. Code, 1882, and is not appealable. SAKHARAM v. GADYA, **2 Bom. L.R. 241.**

(3946)—*O.* 21, *r.* 60 (=*Civ. Pro. Code, Act XIV of* 1882), *s.* 280—*Execution of rent decree—Claim—Tenure or holding—Homestead land let out for building purposes—Jurisdiction of Court to investigate claim—Bengal Tenancy Act (VIII of* 1885), *s.* 170.—When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is undoubtedly open to the Court to ascertain the true nature of the property. Therefore, where a claimant contended that the property attached in execution of a rent-decree was neither a tenure nor a holding within the meaning of s. 170 of the Bengal Tenancy Act, but a piece of homestead land let out for building purposes to which the provisions of the Act have no application: *Held* that the Court had jurisdiction to investigate the claim, as the claimant was, in no way, bound by the recital in the decree under execution to which he was not a party. SARBA SUNDARI DASI v. HARENDRA LAL ROY CHOWDHURY **7 Ind. Cas. 490=12 C.L.J. 549.**

(3947)—*O.* 21, *r.* 60 (=*s.* 280, *Civ. Pro Code*, 1882,— *Attachment— Release from attachment —Decree—Execution.*—A release from attachment under the provisions of the Civ. Pro. can only be made under s. 280 of the Code. The section indicates the conditions on which alone that release can be directed. So a Court before directing a release must hold those conditions established. CHIMANLAL v. MACLEOD, **8 Bom. L.R. 794.**

(3948)—O. 21, r. 60—*See* LIMITATION ACT, 1908, arts. 11, 11 (*a*), 24 C. 563, 12 C. 453.

(3948-*a*)—O. 21, r. 60—*See* NOS. 291, 425, 983, 1003, 1004, 1005, 1006, 1007, 1008, 1014, 1015, 1016, 1017, 1148, 1175, 1175-*a* 1176, 1340, 1343, 3657, 3738, 3748, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854,

Civ. Pro. Code, Acts V of 1908, XVI of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3896 *a*, 3897, 3899, 3900, 3901, 3902, 3903, 3904, 3943, *supra*, AND NOS. 4537, 4538, 5110-*a* 5150, 5617, *infra*.

(3949)—*O.* 21, *r.* 60, *s.* 115 (=*ss.* 280, 622, *Civ. Pro. Code*, 1882)—*High Court—Revisionary powers.*—As a general working rule of practice, the High Court does not interfere under s. 622, Civ. Pro. Code, 1882, when the applicant has, by suit or otherwise, another remedy open to him. PRANJIVANDAS LAKSHMIDAS v. BHAVANISHANKAR RAMSHANKAR, **11 Bom. L.R. 754=3 Ind. Cas. 780.**

(3950)—*O.* 21, *rr.* 60 *to* 63 (=*Civ. Pro. Code*, 1882, *ss.* 280 to 283—*Disposal of claim otherwise than on merits—Suit by defeated claimant for declaration of title—Burden of proof.*—Where a claim to attached property has been disposed of, not on the merits, but on the ground of the application having been made too late in a suit by the defeated claimant for a declaration of his title and cancelment of sale, the burden of proving *mala fides* and absence of consideration lies on those persons, who seek to resist the plaintiff's claim NAND. LAL BRAHMIN v. KRISHNAJI, **13 C.P.L R. 69.** (6 C P.L.R. 81, *D.*) [*R.*, 1 N.L.R. 150.]

(3951)—O. 21, rr. 60 to 63—*See* RIGHT OF SUIT—EXECUTION OF DECREE, 15 C. 674.

(3952)—*O.* 21, *rr.* 60, 61, 63 (=*Civ. Pro. Code*, 1882, *ss.* 280, 281, 283)—*Specific Relief Act (I of* 1877), *s.* 42—*Attachment of right to collect rent payable to defendant—Rejection of claim—Sale of right—Suit by defeated claimant to set aside attachment and sale.*—First defendant had obtained a decree against the second defendant. In execution, the first defendant attached the right to collect rent payable in respect of certain properties. The plaintiff, alleging that he was the manager of a *mutt* to which the properties belonged, put in a claim petition. On the claim being disallowed, he now sued for a declaration that the attachment and sale were invalid, inasmuch as the properties belonged to the *mutt* and not to the second defendant. No consequential relief was prayed for. *Held*, that what was attached was a debt in respect of which prohibitory orders were issued under s. 268, Civ. Pro. Code A right to receive a debt is not property capable of possession within the meaning of ss. 280 and 281 of the Code. The suit was not one instituted under s. 283 of the Code, and therefore not maintainable BASAVAYYA v. SYED ABBAS SAHEB, **24 M. 20** (22 W.R. Cr. 36, *R.*) [*Overruled*, 27 M. 67=13 M.L J. 467, F.B.; *R.*, 14 C.P.L R. 124.]

(3953)—*O.* 21, *rr.* 60, 63 (=*Civ. Pro. Code*, 1882, *ss.* 280, 283)—*No appeal from an order allowing claim.*—No appeal lay from an order

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passed under s. 280 of the Code, allowing the claim to and releasing certain property from attachment. GANGA SAHAI v. BAPU, **8 C.P. L.R. 67.** (4 B. 323, *D.*)

(3954)—*O.* 21, *rr.* 60, 63 (=*Civ. Pro. Code*, 1882, *ss.* 280, 283)—*Settlement—Attachment—Claim—Sale — Purchase of settlor's right—Right to set aside deed - Fraud—Suit on behalf of all creditors—Limitation Act (XV of* 1877), *art.* 95.—N executed a trust deed conveying his immoveable property to trustees in trust for his life or until he became insolvent and then for his wife and children. Subsequently, he filed a suit against H and it was dismissed with costs. In execution of the decree for costs, H attached a certain item of the trust property. The trustee claimed to have the attachment removed and the claim was dismissed. H brought the property to a sale and purchased the same. He took possession and enjoyed the same for six years. After H's death, his executors sued the trustees, and wife and children of N for a declaration that the defendants had no right in the property, that they (the plaintiffs) as executors of H were absolutely entitled to it and that the trust-deed was fraudulent and void against the plaintiffs and other creditors of N. The necessity for the suit arose from the difficulty experienced in finding a sale for the property owing to the claim put forward by the defendants. On the question of limitation, *held* that the suit was not barred. Art. 95 did not apply to the case. The main relief in the case was the declaration of plaintiffs' title to the property on the basis of the sale to H six years ago. The prayer in the plaint for a declaration that the settlement was fraudulent and void against the plaintiffs and other creditors of N, must be taken to be ancillary to the main relief. On the question of the effect on the order on the claim petition, it was *held* that the portion of s. 280, Civ. Pro. Code, relied on only applies where the property is in the possession of the judgment-debtor "partly on his own account and partly on account of some other person." In this case, the property was at the time of the attachment and had been for some months previously in the sole possession of the trustees, and neither wholly nor partly in the possession of the judgment-debtor. The conditions upon which the latter part of s. 280, Civ. Pro. Code, becomes applicable were not present in the case and the Judge was not called upon to make any declaration as to the precise limits of the interest in the property upon which he held the attachment to be maintainable. Therefore there was no such order passed against the interests represented by the wife and children of N as to come under the terms of s. 283, Civ. Pro. Code. *Held*, further, that H purchased only the right, title and interest of N and therefore the plaintiffs as executors of H were entitled only to an estate for the life of N. The Court having found that the trust-deed was fraudulent and void as against the creditors,

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held that the plaintiffs who claimed under a certificate of sale which vested in them the right, title and interest of N, were not *prima facie* entitled to claim the benefit of the right established in favour of N's creditors. The plaintiffs were not entitled to succeed as the suit was not filed by them on behalf of and for the benefit of all the creditors of N. The principal prayer of the plaintiffs was that they themselves should be declared absolutely entitled to the premises, the subject-matter of the suit. The other prayers, even that about the declaration of the invalidity of the deed as against creditors, were more or less ancillary to that prayer. BURJORJI DURABJI PATEL v. DHUNBAI, **16 B. 1.** [*R.*, 25 B. 202, 27 B. 322, 1 N.L.R. 150, 34 C. 999=6 C.L.J. 410=11 C. W.N. 889.]

(3955)—*O.* 21, *rr.* 60, 63 (=*old ss.* 280, 283), *O.* 9, *r.* 8 (=*old s.* 102)—*Objection-petition dismissed.*—The dismissal for default under this section of an objection petition to the attachment of the defendant's property by a decree-holder is not equivalent to an order under (s. 280)=O. 21, r. 61, Civ. Pro. Code, 1908, under which the defendant is compelled to bring a suit to establish his right. (See s. 283) RURA MAL v. KURIA, **62 P.R. 1894.** (12 C.L.R. 43, *D.*; 3 A. 504, *R.*) [*D.*, 97 *P.R.* 1907.]

(3956)—O. 21, rr. 60 and 63—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 12 B. 231.

(3957)—*O.* 21, *rr.* 60, 63, *O.* 41, *r.* 5 (=*ss.* 280, 283, 545, *Civ. Pro. Code*, 1877)—*Sale of property released from attachment pending appeal against decree declaring property attachable, validity of.*—S. 283, Civ. Pro. Code of 1877, is not intended as an exception to the procedure laid down in s. 545, Civ. Pro. Code. Where, property released from attachment, under s. 280, Civ. Pro. Code, is subsequently declared liable to be attached, in a suit against which an appeal is pending, a sale of such property, pending the result of the appeal, is not invalid by virtue of s. 283. FATHULA v. MUNYAPPA, **6 M. 98.**

——O. XXI, r. 61 (=1882, s. 281=1877, s. 281=1859, s. 246.)

See CLAIMS TO PROPERTY ATTACHED.

(3958)—*O.* 21, *r.* 61 (=*s.* 281, *Civ. Pro. Code*, 1882)—*Order against judgment-debtor conclusiveness of—Whether section can be availed of by person not a party to proceedings.*—An order, under s. 281, is not conclusive as against the judgment-debtor unless he is a party to the proceedings in which the order was passed, and cannot be availed of by a person who was not a party to the proceedings. VADAPPALLE NARSIMHAM v. DRONAMARAJ SEETHARAMAMURTHY, **18 M.L.J. 26=3 M.L.T. 256=31 M. 163.** (13 M. 366, 22 M. 721, 30 M. 35, F.B., *F.*;

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18 A. 413, *R.*) [*Diss.*, 19 M.L.J. 732=6 M.L.T. 289; *F.*, 6 A.L.J. 584=31 A. 514=3 Ind. Cas. 566; *Doubted*, 33 M. 260=7 M.L.T. 289=19 M.L.J. 732=4 Ind. Cas. 1080; *R.*, 7 Ind. Cas. 8=8 M.L.T. 230.]

(3958-*a*)—*O.* 21, *r.* 61 (=*Civ. Pro. Code*, 1882, *s.* 281)—*Revision.*—The High Court will not interfere in revision with an order passed under s. 281, Civ. Pro. Code, as the party has a remedy by suit. ITTIACHAN v. VELAPPAN, **8 M. 484.** [*F.*, 15 A. 405=13 A.W.N. 172; *D.*, 1 L.B.R. 180.]

(3959)—O. 21, r. 61—*See* LIMITATION ACT, 1908, arts. 11 and 11-A. 32 C. 537.

(3959-*a*)—O. 21, r. 61—*See* NOS. 425, 1003, 1004, 1005, 1016, 1175, 1175-*a*, 1176, 1340, 3657, 3748, 3816, 3817, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3970, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3896-*a*, 3900, 3901, 3902, 3903, 3904, 3905, 3906, 3907, 3908, 3909, 3910, 3943, 3950, 3951, 3952, *supra* AND NOS. 4537, 4538, 5110-*a*, 5150, *infra*.

(3960)—O. 21, rr. 61, 62, 63—*See* APPEAL—ORDERS, 6 A. 109=3 A.W.N. 230.

(3961)—*O.* 21, *rr.* 61, 63 (=*ss.* 281, 283, *Civ. Pro. Code*, 1882)—*Suit by defeated claimant—Burden of proof.*—In a suit brought by a defeated claimant under s. 283, Civ. Pro. Code, the burden rests upon the plaintiffs to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. TULSI RAI v. RAM DAS, **A.W.N. 1887, 71** [*R.*, 30 A. 321=A.W.N. 1908, 125=5 A.L.J. 601=5 A.L.J. 358.]

(3962)—*O.* 21, *rr.* 61, 63 (=*Civ. Pro. Code*, 1882, *ss.* 281, 283)—*Suit by unsuccessful claimant—Plaint containing prayer for possession, Court-fees payable on—Court Fees Act (VII of* 1870), *sch.* II, *art.* 17, *cl.* 1.—A suit brought under s. 283 of the Civ. Pro. Code, for setting aside a summary order of the Court passed under s. 281 of the Code, even though the plaintiff may pray in such a suit to be awarded possession of the property, is still to be treated as one falling under art. 17, cl. 1 of sch. II of Act VII of 1870, and chargeable only with a ten rupees stamp. DONDO SAKHARAM KULKARNI v. GOVIND BABAJI KULKARNI, **9 B. 20.** [*N.F.*, 13 C. 162, *F.*; 31 B. 73=8 Bom. L.R. 885, 35 C. 202, P.C.=35 I.A. 22=12 C. W.N. 169=7 C.L.J. 36=5 A.L.J. 10=17 M.L.J. 618=2 M.L.T. 506=10 Bom. L.R. 1; *Appr.*, 10 B. 610, F.B.; *R.*, 16 B. 608, 20 B. 736, 1 L.B.R. 1, 22 A. 384=20 A.W.N. 119, 31 C. 511.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3963)—*O.* 21, *rr.* 61, 63 (=ss. 281, 283, *Civ. Pro. Code*, 1882)—*Court of Small Causes, suit excepted from jurisdiction of — Objection to attachment, order disallowing—Jurisdiction—Act IX of* 1877—*Cl.* 20.—The defendant in execution of a decree which he had obtained against one G, attached four goats and four lambs. The plaintiff claimed the animals and objected to the attachment His claim was disallowed under s. 281 of the Code of Civil Procedure and the animals were sold in execution of the defendant's decree. The plaintiff subsequently brought a suit in which he claimed from the defendant the amount which the latter had realized by the sale of the animals. The Court which tried the case held that it was cognizable by the Court of Small Causes and decreed the claim. *Held* that the suit was one to establish the right which he claimed to the animals, that it was instituted under s. 283 of Civ. Pro. Code, that, as such, it was excepted from the cognizance of the Court of Small Causes. DILDAR ALI v. HIRU, **3 O.C. 190.**

(3963-*a*)—O. 21, rr. 61, 64—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF —GENERAL, 84 P.R. 1870.

(3964)—*O.* 21, *rr.* 61, 90, 92 (=*Civ. Pro. Code*, 1877, *ss.* 281, 311, 312)—*Acts of judgement-debtor preventing purchase by decree holder* —Where, at a sale of immoveable property the decree-holders, who had obtained permission to bid, sent their agents who were waylaid by the judgment-debtors and prevented from attending the sales, and it was found that the property for which the decree-holders were willing to pay Rs. 5,000 was sold only for Rs. 340, *held* that the lower Court was competent, under the circumstances, to set aside the sale. DAULAT SINGH v. PHULCHAND, **A.W.N. 1882, 39.**

——O. XXI, r. 62 (=1882, s. 282=1877, s. 282.)

See CLAIMS TO PROPERTY ATTACHED.

(3965)—*O.* 21, *r.* 62 (=s 282, *Civ. Pro. Code*, 1882)—*Claim proceedings—Attachment order—Its effect—Judgment-debtor, if party to investigation.*—A judgment-debtor cannot necessarily be regarded as having been a party to the investigation under s. 282, Civ. Pro. Code, against whom an order is made; whether he was a party or not must depend upon the facts of each case. AJIBAL NARASINHA HEDGE v. SHIREKOLI TIMAPA HEDGE, **17 B. 629.**

(3966)—*O.* 21, *r.* 62 (=s. 282, *Civ. Pro Code*, 1882)—*Lien, declaration of, effect on purchaser —Estoppel—Waiver — Mortgage, validity of, raised in defence without bringing a suit under* s. 283—*Fraud—Equitable claim* —A person, who purchases a property in execution of his own decree, apparently subject to a mortgage lien, as declared by the Court under s. 282 of the Code of Civil Procedure, without however acquiescing in the order made under s. 282 in favour of the mortgagee, is entitled to question the validity and *bona fides* of the mortgage if he does so, within a year of the order in the claim case, by way of defence in the suit brought against him by the mortgagee to enforce his mortgage lien, although he may not have instituted any suit, under s. 283 of the Civ. Pro. Code, to establish the right, which he claims in the property in dispute. There is no waiver or estoppel on the part of the purchaser, so far as the mortgagee is concerned, to raise the plea that the mortgage is invalid. A party, who has perpetrated a fraud, cannot be allowed to take advantage of it. A fraudulent and collusive mortgage cannot be enforced even as against a purchaser with a declaration as above under s. 282 of the Civ. Pro. Code, if impeached within the period allowed by the law. A fictitious mortgagee cannot set up and enforce any equitable claim for re-imbursement which the mortgagor may have as against the purchaser. SHAHZIA-UD DIN ABDUL HOSSEIN v. KAILASH CHANDRA SHAHA, **2 C.L.J. 599.** (27 A. 97, F B., *D.*) [*R.*, 7 A.L J, 199.]

(3967)—*O.* 21, *r.* 62 (=*Civ. Pro. Code*, 1882, s. 282)—*Execution of decree—Order notifying incumbrance on attached property* —An order, under s. 282 of the Code of Civil Procedure, must be an order passed on an adjudication on the claim asserted. Where an order, of the nature of an order under s. 282, showed on the face of it that the Court passing such order had declined to enter into the questions of the rights of the parties and had not adjudicated on the claim; it was held that such order could not be treated as an order under s. 282. SHEO RATAN RAI v. SARAH RAI, **A.W.N. 1894, 14.**

(3968)—*O.* 21, *r.* 62 (=*Civ. Pro Code*, 1882, s. 282)—*Sale subject to mortgage—Suit by mortgage to enforce mortgage -Necessity for mortgagee to prove claim.*—Where a property was sold in execution subject to a mortgage in a suit by the mortgagee, the purchaser is not precluded from resisting the claim on the ground that nothing is due on the mortgage and the mortgagee is bound to show that the amount claimed by him is really due. Notwithstanding that an order under s. 282 of the Code has been passed in his favour. LALCHAND HIRALAL MARWADI v. HASTO BAI, **7 C. P.L.R. 73.** [*R.*, 1 N L.R. 150.]

(3969)—*O.* 21, *r.* 62 (=s. 282, *Civ. Pro. Code*, 1882)—*Decree-debt part consideration for mortgage—No sanction of Court obtained—Mortgage not valid.*—Where the consideration for a mortgage was partly the satisfaction of a decree-debt and partly some cash advanced and the sanction of the Court was not obtained in respect of the decree-debt, the mortgage was void under the provisions of s. 257-A. But the mortgagee was not thereby prevented from suing to recover the cash advanced by him. DURGA v. DURGOO KACHI, **2 C.P.L.R. 243.**

(3970)—O 21, r. 62—*See* **COURT FEES ACT, 1820, sch. II, art. 17 (1), 12 P.L.R. 1902.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3970 *a*)—O.21, r. 62—*See* NOS, 425, 1003, 1004, 1005, 1018, 1340, 1512, 3820 to 3824, 3898, 3902, 3903, 3911, 3912, 3950, 3951, 3960, *supra.*

(3971)—O. 21, r. 62, s.73—*See* MORTGAGE—REDEMPTION, 6 C. 663=7 C.L R 201.

(3972)—*O.* 21, *rr.* 62, 63 (=*Civ. Pro. Code*, 1882, *ss.* 282, 283)—*Suit under* s. 283 *when maintainable* —A suit under s. 283, contesting an order passed under s. 282, is maintainable only when the attaching Court finds that the property is subject to a mortgage or lien in favour of some person not in possession. When there is no such finding s. 283 has no application, and the order embodying such finding does not become conclusive between the parties thereto within the meaning of s. 283, if it is not contested within the statutory period of limitation prescribed under s 283 DURGA PRASAD v. MANSA RAM, **1 A.L.J. 531.** (12 B. 231, 22 B. 640, *D.*)

(3973)—*O.* 21, *rr.* 62, 63, 66, 70 (=ss. 282, 283, 287, *Civ. Pro. Code*, 1882)—*Mortgage—Sale in execution of a simple money-decree of mortgaged property—Notification of mortgage—Purchaser not estopped from disputing the existence of the mortgage.*—In execution of a simple money-decree, the rights of a mortgagor in certain property ostensibly subject to a mortgage were put up to sale. The property was not sold subject to the mortgage, as contemplated by s. 282 of the Code, but the existence of the mortgage was notified in the proclamation sale for the benefit of intending purchasers. *Held*, on suit brought by the mortgagee for sale, that the auction-purchaser was not, under the circumstances, debarred from proving that the mortgage in suit was fictitious and without consideration. SHIB KUNWAR SINGH v. SHEO PRASAD SINGH, **A.W.N. 1906, 68=3 A.L.J. 200=28 A. 418.**

(3974)—*O.* 21, *rr.* 62, 66, 70 (=ss. 282, 287, *Civ. Pro. Code*, 1882)—*Decree-Execution—Attachment—Application to raise attachment—Attached property declared subject to lien—Sale of property — Auction-purchser —Intervenor suing the purchaser for the amount of the lien.*—G obtained a money decree against H, and in execution attached some property. U intervened and applied to have the attachment raised on the ground that he was the owner of the property. The claim was investigated under ss. 280 and 281 of the Code of 1882, and the Court held that H was the owner of the property, but that U was entitled to a lien on the property to the extent of Rs. 687-11-3. The property was sold at a Court-sale subject to the lien and purchased by N. U then sued N to recover the amount of the lien. N contended that the miscellaneous order did not bind him, and that he was entitled to question the existence of the lien: *Held*, that N was not bound by the miscellaneous order, for he could not be regarded as a party to it being not a representative either of the judgment-debtor or of the judgment-creditor. That the Court's order that the property be sold subject to U's lien was not one passed under s. 282, but under s. 287 of the Civ. Pro. Code of 1882, for U sought to raise the attachment upon the ground that the property belonged to him, and the question of lien was not directly raised by him but came in only incidentally. That N was, therefore, entitled to question the existence of lien. NARAYAN SADOBA HALVAI v. UMBAR ADAM MEMON, **13 Bom. L.R. 307.** (9 B. 285, 15 B. 290, *F.*)

(3975)—O. 21, rr. 62, 66, 70—*See* STAMP ACT, 1879, Arts. 16, 21, 18 B 175, F.B.

——O. XXI, r. 63 (=1882, s. 283=1877, s. 283 =1859, s. 246).

See CLAIMS TO PROPERTY ATTACHED.

(3976)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, *s.* 283)—*Suit under, nature of.*—A suit under s. 283 of the Civ. Pro Code, is, in substance, a suit brought to reverse the order passed on a claim in execution proceedings. ALEXANDER MITCHELL v. MATHURA DAS, **8 A. 6 P.C.=12 I.A. 130=4 Sar 663** (on appeal from **4 A. 206.**) [*Expl.*, 12 C 696.]

(3977)—*O.* 21, *r.* 63 (*Civ. Pro. Code*, 1882, *s.* 283)—*Suit by purchaser from unsuccessful claimant if tenable—T.P. Act of* 1882, *s.* 52.—The right of suit conferred by s. 283 of the Civ. Pro. Code, is not a personal right. Such a suit can be instituted by a purchaser of the property from the unsuccessful claimant. The transfer is not affected by s. 52 of the T P. Act. GANESH PRASAD v. KASHI NATH TIWARI, **26 A. 89=A.W.N. 1903, 209.**

(3978)—*O.* 21, *r.* 63 (=*old s.* 283)—*Property liable to attachment—Declaration suit—Specific Relief Act*, 1877, *s.* 42.—Where the object of a suit is to establish that the suit property which is mortgaged, is not redeemable and is liable to attachment in execution of the plaintiff's decree to the extent of the defendant's interest in the property, it must be treated as one falling under s. 283, Civ. Pro. Code. Where the right of the defendant in the land is an interest in the land and is property, a suit by the plaintiff, to declare his right to recover his decree debt from it, denied by the defendant, will lie under s. 42, Specific Relief Act, 1877. As the Civ. Pro. Code does not deal with the forms of suit, the substance and merits of the case should be kept in view and not merely the words in the plaint. Hence, the actual form of a suit is of little consequence. MIRAN BAKHSH v. ATRA, **111 P.R. 1900.** (51 P.R. 1897, *F.*; 11 P.R. 1891, 11 I.A. 149, *Rel. on.*)

(3979)—*O.* 21, r. 63, (=s. 283, *Civ.Pro.Code*, 1882)— *Scope of suit — Necessary parties — Claim case—Costs, order for refund of.*—The true issue in a case under s. 283, is an issue purely of fact. The Court has to determine

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

whether the property sought to be attached was, at the date of the attachment, in the possession of the judgment-debtor as his own property, or was in the possession of some other person in trust for him. If that be found against the judgment-debtor, the plaintiff, the original decree-holder, is entitled to the declaration which is sought. In such a suit, the other creditors of the judgment-debtor need not necessarily be added; and the attaching creditor, the judgment-debtor and the alleged transferee, are the only proper parties. But in such a suit, the Court has no power to set aside the order passed in the previous claim case with a refund of the costs, as the suit is not in any sense an appeal, but only one for declaration of the plaintiff's right. SURENDRA NATH SARKAR v. KIRAN MOYI DASI, **1 Ind. Cas. 428.**

(3980)—*O. 21, r. 63 (=s. 283, Civ. Pro. Code, 1882)—Suit for a declaratory decree—Right to establish title of judgment-debtor to property attached—Specific Relief Act, s 42.*—S 283, Civ. Pro. Code, gives a special permission to sue for the right claimed, and that is the title of the judgment-debtor to the property, following which is the right of the plaintiff to attach that property. The plaintiff here did not seek for possession of the property, and attachment would be made if the plaintiff desired it, under his original decree. Thus, even assuming that the second paragraph of s. 42, Specific Relief Act, applies to a suit of the nature specially provided for under s. 283, it is clear that the plaintiff in this case has a right to sue for a mere declaratory decree. C.S.R.M. SABAPADI CHETTY v. MAUNG IN, **L.B.R. 1893—1900, 481.**

(3981)—*O. 21, r. 63 (=s. 283, Civ. Pro. Code, 1882)—Suit under—Cause of action.*—Where a suit is brought under the provisions of s. 283, of the Civ. Pro. Code, the making of the order constitutes the cause of action. DORASAMY PILLAY v MUTHUSAMY MOOPPAN, **27 M. 34=13 M.L.J. 479.**

(3982)—*O. 21, r. 63 (=s. 283, Civ. Pro. Code, 1882)—Nature of suit under—Prayer to have lien or charge over attached property declared in such a suit—Maintainability.*—*Held*, that a suit under s. 283, Civ. Pro. Code, 1882, is one to set aside the order passed upon the claim to attached property and is a form of appeal therefrom, the passing of the order forming the plaintiff's cause of action and that, in such a suit, the plaintiff cannot ask for a declaration that he has a mortgage-lien or charge on such property. VEERA PANNADI v. KARUPPA PANNADI, **6 M L T. 154=2 Ind. Cas. 980.** (35 C. 202, P.C.=7 C.L.J. 36=12 C.W.N. 169=10 Bom. L.R. 1=5 A.L.J. 10=2 M.L.T. 506, *F.*)

(3983)—*O. 21, r. 63 (=s. 283, Civ. Pro. Code, 1882)—Suit to establish right to property, removal of attachment of which had been refused.*—The Code of Civil Procedure does not indicate the form in which a suit should be brought under s. 283, but the effect of such a suit is clear enough. Under s. 283 of the Code of Civil Procedure, the party, against whom an order under ss. 280, 281 or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. The language seems distinct enough. It implies that the execution order is subject to the result of the suit, or, in other words, is affected by the decree, whatever it may be, either by way of confirmation, modification or reversal. Consequently, the effect of a decree affirming the right of the intervenor to the property attached as that of the judgment-debtor has the effect of declaring the execution proceedings against such property to be null and void, and, as if they had never been so far as they have transferred possession of the property to any one else. The suit here was virtually of the nature of a suit for the return of moveable property, or for its value as compensation for wrongful conversion, and it was necessary to get over the preliminary obstacle of the existence of the order of attachment before the suit could succeed, and there seemed to be no reason why everything requisite should not be done in the same suit. O.K. ABDULA BROTHERS & CO. v CHOTALAL SUNDERJI & CO., **U.B.R. 1892-1896, Vol. II, 255.** (4 M. 131, 16 B. 608, 7 C. 608, *R.*) [*R.*, 2 U.B.R. 1897-1901, 355.]

(3984)—*O. 21, r. 63 (=Civ. Pro. Code, 1882, s. 283)—Scope—Declaration and consequential relief—Causes of action—Parties—Misjoinder—Election—Duty of Court.*—The plaintiff, first defendant and some other defendants were members of an undivided Hindu family. One of the creditors of the first defendant attached a part of the family property in execution of a decree obtained by him against that defendant. The plaintiff applied to have the attachment raised in so far as it affected his share and interest in the property attached. His application was disallowed in 1889. He, thereupon preferred a regular suit for the declaration of his right denied in execution proceedings and also for the partition of his share of the family property. He made all his co-parceners defendants in the suit, and also two other persons, one the purchaser at the sale which followed the attachment abovementioned, and the other a mortgagee of the share of the first defendant in the family property. *Held*, that: the suit was not bad either for misjoinder of parties or for misjoinder of causes of action. A purchaser or mortgagee of a co parcener's share in the joint property is a proper and a necessary party to a suit for partition. It is both good sense and established law that all parties interested in the property to be divided must be brought before the Court in one proceeding. A suit instituted in accordance with the provisions of s. 283 of the Code need not be limited to the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

purpose indicated in that section, namely, the establishment of the right denied in execution proceedings. The plaintiff is at liberty to pray in the same suit for consequential relief to which he may be entitled. [*R.*, 17 M. 389, U.B.R. 1892-1896, 255, 1 O C. 272, 23 B. 385, 2 Bom. L.R. 32, 10 O.C. 33, 5 N.L.R, 152, 81 P.R. 1909=132 P.W.R. 1909=3 Ind. Cas. 602.] Even if it could be held that the two prayers—declaration and partition—could not be joined in one suit, the proper course would be to leave the plaintiff to elect which of the two prayers he wished should be adjudicated upon by the Court. SADU *bin* RAGHU v. RAM *bin* GOVIND, **16 B. 608.**

(3985)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro. Code*, 1882)—*Suit under s.* 283, *Civ. Pro. Code, by defeated claimant for mere declaration—Prayer for further relief not necessary—Specific Relief Act, s.* 42, *inapplicability of, to such suit.*—When second defendant attached certain immoveables in execution of a decree for money, which she had obtained against first defendant, plaintiff presented a claim based on a mortgage alleged to have been made to him by defendant. The claim having been rejected, plaintiff sued under s. 283, for a declaration of his right as mortgagee to the attached property and for the cancellation of the order of rejection of his claim. On reference to the Full Bench of the question, whether the suit was sustainable with reference to s. 42 of the Specific Relief Act, *held* doubting the correctness of the decision in *Kunhiamma* v. *Kunhunni*, 16 M. 140. *Doubted* and following the law on the question as correctly laid down by *Muttusami Iyer, J.* in his judgment in *Ambu* v. *Kettilamma* (14 M. 23, *F.*) that the proviso to the said s. 42 of the Specific Relief Act does not operate so as to take away from a party, against whom an order has been made under ss. 280, 281 or 282 of the Code, the special right conferred by s. 283 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach and such a suit is, therefore, not liable to dismissal on account of the comission to pray for further relief obtainable. KRISHNAM SOORAYA v. PATHMA BEE, **29 M. 151.** [*R.*, 30 M. 335=17 M.L.J. 95=2 M.L.T. 116.]

(3986)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, *s.* 283)—*Execution of decree — Attachment——Unsuccessful objection — Costs.*—A suit to recover costs, incurred in unsuccessfully objecting to an attachment of property in execution of a decree, is maintainable, when it is shown, under s. 283, Civ. Pro. Code, 1882, that the defendant had no colourable justification for attaching the land or for defending the application for the removal of the attachment. PALNEAPPA CHETTY v. MAUNG SHWE GE, **U.B.R. 1904, 1st Qr., Civ. Pro. Code, 4.** [*R.*, 3 L.B.R. 120.]

(3987)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro.* Code, 1882)—*Suit under—Suit for declaration and injunction—Art.* 17, *sch. II, Court Fees Act (VII of* 1870).—A suit for declaration (under s. 283, Civ. Pro. Code, 1882), of plaintiff's right to property attached and for possession thereof, as also for a perpetual injunction restraining the sale thereof in execution, is maintainable. Such a suit is one in which consequential relief is prayed for and therefore is subject to an *ad valorem* Court-fee duty. FULKUMARI v. GHANSHYAM MISRA, **31 C. 511.** (22 W.R. 422, 13 C. 162, 15 C. 104, *F.*; 2 A. 720, *R.*) [*R.*, 11 C.W.N. 705=6 C.L.J. 427; *Cons.*, 2 N.L.R. 87.]

(3988)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro. Code*, 1882)—*Suit under—Attached property—Application to set aside—Declaratory decree without consequential relief—Court Fees Act, sch. II, art.* 17, *cl. iii.*—Where a claimant to property, attached in execution of a decree, intervenes but fails to get the order of attachment set aside, and brings a suit as provided in s. 283 of the Civ. Pro. Code, to establish the right which he claims, such suit, if a bare declaration of title is sought without consequential relief, comes under art. 17, cl. iii of sch. II to the Court Fees Act (VII of 1870), being a suit to obtain a declaratory decree where no consequential relief is prayed, and the Court-fee is Rs. 10. It is unnecessary to ask in such suit that the order of attachment be discharged. No Court other than a Court of appeal or a High Court, acting under s. 622, of Civ. Pro. Code, can discharge an order of attachment issued by another Court, where a claimant to property attached in execution of a decree intervenes, but fails to get the order of attachment set aside and is compelled to bring a suit to establish his right. The discharge of the order of the attachment cannot be properly asked for in such suit. The intervenor, having established his title by declaratory decree or otherwise, should then carry the decree to the Court by which the attachment was issued, and such Court is bound to recognise the adjudication and to govern itself accordingly. MAUNG PO KHAN v. MAUNG AUNG DUN, **L.B.R. 1893—1900, 139.** (4 M. 131, 4 B. 529, *R.*)

(3989)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882 *s.* 283)—*Suit under—Valuation of suit—Jurisdiction.*—A suit by a defeated claimant, under s. 283, for a declaration that the property attached belongs to him and not to the judgment-debtor ought, for purposes of jurisdiction, to be valued according to the value of the property, the subject-matter of the suit, and not according to the amount of the decree in execution of which the attachment was made, if the decree amount is larger than the value of the property. NARAYAN GANESH GHATATE v. BHIORAJ, **2 N.L.R. 87,** (15 C. 104, 31 C. 511, 17 A. 69, 27 A. 440, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(3990)—*O.* 21, *r.* 63 (=s. 283, *Civ. Pro. Code*, 1882)—*Valuation of suit under s.* 283—*Declaratory title without consequential relief—Suits Valuation Act*, s. 11—*Court Fees Act, sch. II, art.* 17.—The valuation of a suit under s. 283, Civ. Pro. Code, for the declaration of a right to attach certain property, the attachment on which had been removed, is for purposes of jurisdiction the value of the decree which it is desired to executive if that be less than the value of the property, or the value of the property if that be less than the amount of the decree. (15 C. 104, *F.*) Art. 17 of sch. II, Court Fees Act, applies to a suit brought under s. 283, Civ. Pro. Code, and the stamp required for the plaint is Rs. 10 only. (9 B. 20, 10 B. 610, *F.*; 2 A. 63, 11 A. 365, *R.*; 13 C. 162, *Diss.*) It is not necessary for a plaintiff bringing a suit under s. 283, Civ. Pro. Code, to ask for any further relief than a declaration of his right to attach the property in dispute. On such declaration being made, the order removing attachment would fall and the attachment should be restored. SEVARAMAN CHETTY v. MAUNG PO YIN, **1 L.B.R. 1.** (10 B. 610, *F.*) [*R.*, 4 L.B.R. 263, 5 L.B.R. 23.]

(3991)—*O.* 21, *r.* 63 (=s. 283, *Civ.Pro.Code*, 1882)—*Suit to establish right to attached property—Valuation of suit—Jurisdiction of Munsiff.*—A Munsiff has jurisdiction to try a suit brought under s. 283, Civ. Pro. Code, to test the question, whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over Rs. 1,000, but the amount of the debt being less than Rs. 1,000. The amount, which is to settle the jurisdiction of the Court, is the amount which is in dispute and the amount which is in dispute is the amount which the execution creditor will recover if he is successful, and the only amount which he would recover, if he is successful, would be the amount of his debt, and not the value of the property attached, unless the two amounts happen to be identical. MODHU SUDEN KOER v. RAKHAL CHUNDER ROY, **16 C. 104.** (2 A. 693, 2 A 799, 4 M. 339, 4 B 515, *Foll.*) [*F.*, 15 P.R. 1890, 1 L.B.R. 1, 42 P.R. 1901, 15 C.P.L.R. 161, 31 C. 511; *Cons.*, 2 N.L. R. 87, 94 P.R. 1908=71 P W.R. 1908, F.B.; *D.*, 17 A 69; *R.*, U.B.R 1897-1901, Vol. II, 355, U B.R. 1903, Civ. Pro. 19. 30 M. 335= 2 M.L.T. 116=17 M.L.J. 95 [F.B.]

(3992)—*O* 21, r. 63 (=*Civ Pro Code*, 1882, s. 283)—*Suit for personal property—Suit to establish right—Small Cause Court suit—Act II of* 1865, *s.* 6.—A suit by an unsuccessful claimant of moveable property attached in execution of a decree, for such property or for its value (the attachment still subsisting), is not one "for personal property or the value of such property," within the meaning of s. 6 of Act II of 1865. It is a suit for the establishment of plaintiff's right, in the sense of s. 283 of the Civ. Pro. Code, as the plaintiff cannot reach the property without clearing out of his way the order of attachment, which he could only do by establishing his right under s. 283. Such a suit cannot, therefore, lie in a Small Cause Court. GODHA v. NAIK RAM, **7 A. 152 F.B.=A.W.N. 1884, 349.** (5 M.H.C. 191, 8 M.H.C. 36, 3 B. 179, 4 B. 503, 505, N.W.P.H. C. 1871, 155, *Diss.*) [*F.*, 21 C. 430; *Appr.*, 7 A. 855; *D.*, 11 M. 264.]

(3993)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1877, s. 283)—*Suit under Civ. Pro. Code*, s. 283—*Declaration of right to property—Small Causes Court, Mofussil, Jurisdiction of.*—S. 283 of the Code, conferring a right of suit upon the party against whom an adverse order is made in execution proceedings, says nothing of the nature of the suit or the Court in which the suit is to be brought; this, therefore, depends upon the nature of the claim and the right sought to be enforced. If, in such a suit for the recovery of the property or its price, the value of the property is within the pecuniary jurisdiction of a Small Causes Court, the suit would be cognizable in such Court; but, if the party sues for a declaration of his right to the property, making the decree-holder and the judgment-debtor parties to the suit, the suit would not lie in a Small Cause Court. SHIBOO NARAIN SINGH v. MUDDEN ALLY, **7 C 608= 9 C.L R. 3.** [*Rel. on*, 21 C 430; *R.*, **7 A. 152,** 16 B. 608, 1 O.C. 272.]

(3994)—*O.* 21, *r.* 63 (=s. 283, *Civ Pro. Code*, 1882)—*Township Court—Jurisdiction.*—A Township Court has jurisdiction to try a suit brought under s. 283, Civ. Pro. Code, 1882, to assert the same right which a Sub-Divisional Court had disallowed under s. 281. In such a suit the jurisdiction of the Court is determined by the amount in dispute, and not by the amount of the decree in execution of which the property had been attached. RAM CHANDRA v. SHEUDUT ROY, **U B.R. 1902—1903, Vol. II, Civ. Pro. 19.**

(3995)—*O.* 21, *r.* 63 (=s 283, *Civ Pro. Code*, 1882)—*Suit under—Valuation of suit—Jurisdiction—S.* 12, *Madras Civil Courts Act*, 1873.—Where the suit is one for getting rid of the effect of the order disallowing the claim of the plaintiff to the property when it was attached in execution of the money-decree obtained by the defendants Nos 1 and 2 against the third defendants, and where, though the judgment-debtor is impleaded as a third defendant, the plaint contains no statement of any cause of action as against him for declaration as to the plaintiff's title to the property, the suit must be held to be one for declaration of the plaintiff's right rendered necessary by the order passed against him allowing the attachment at the instance of defendants Nos. 1 and 2; and the

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valuation of the subject-matter of the suit should, on principal, be taken to be the amount for which the attachment was made, if the same is less than the value of the property. (17 A. 69, *D.*) Where there is no allegation in the plaint that the judgment-debtor was, in fact, a party to the claim proceedings, he cannot, in point of law, be considered a party to it. KRISHNASAWMI NAIDU v. SOMASUNDARAM CHETTIAR, **17 M.L.J. 95, F.B.=2 M.L.T. 116=30 M. 335.** (25 M. 721, *R.*; 16 M.L.J. 136, *Commented upon.*) [*R.*, 31 M. 163=18 M.L.J. 26=3 M.L.T. 256; *D.*, 5 M.L.T. 70=19 M.L J. 236.]

(3996)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, *s.* 283)—*Claim by younger brother of judgment-debtor, rejected to the extent of half of the property—Satisfaction of decree—Judgment-debtor no party to order on the claim petition.*—In execution of a decree certain properties were attached as belonging to the judgment debtor, and the judgment-debtor's younger brother preferred a claim to the properties. On this, an order was passed to the effect that the judgment-debtor and the claimant were jointly entitled to the land, and the claim was rejected to the extent of a moiety. The property, however, was not sold owing to the satisfaction of the decree by the judgment-debtor. *Held*, that the judgment-debtor, in the absence of proof that he actually received notice of the claim proceedings cannot be considered as a party against whom an order was made under s. 283, Civ. Pro. Code, and that the order was not conclusive as against him. MOIDIN KUTTI v. KUNHI KUTTI ALI, **25 M. 721=12 M.L J. 411.** (4 M.H.C. 472, *Doubted*). [*F.*, 30 M. 335, F.B.=17 M.L.J. 95=2 M.L.T. 116; *R.*, 3 M. L.T. 256=18 M.L J. 26=31 M. 163.]

(3997)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro. Code*, 1882)—*Crops of insolvent debtor attached by decree-holder—Claim to crops allowed—Right of suit by decree-holder—Whether Official Assignee a necessary party*—Where the decree-holder has attached the property of an insolvent, but another person has successfully claimed the property, the decree-holder has a statutory right of suit to establish his right by instituting a suit under s. 283 of the Code. The Official Assignee is not a necessary party to such a suit. The decree-holder, however, after the judgment-debtor's insolvency, is not entitled to a decree declaring the property liable to be attached, but he is entitled to a decree declaring that the property is that of the judgment-debtor. ANNAPURNI AMMAL v. SUBBRAMANIAN CHETTIAR, **4 M.L.T. 197=31 M. 347.** (17 M.L.J. 618, *R.* & *F.*; 3 B. 438, *D.*)

(3998)—*O.* 21, *r.* 63 (=1882, *Civ. Pro. Code*, *s.* 283)—*Suit for declaration of ownership in property sought to be sold in execution—Parties to suit.—Semple*:—In a suit under s. 283 of the

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Code of Civil Procedure, the judgment-debtor is a necessary party. JIT BHAGAT v. SHEIK HUSAINI. **A.W.N. 1901, 14.**

(3999)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, *s.* 283)—*Mitakshara—Mortgage by father—Liability of sons not made parties.*—Where a money-decree against a Mitakshara father and his son, upon a mortgage executed by them, was attempted to be executed by a sale of the mortgaged property, but the objections of the other sons were allowed and the mortgagee was referred to a regular suit, *held*, a suit against all the sons to establish the mortgagee's lien on the mortgaged property was maintainable under s. 283 of the Civ. Pro. Code. (10 B. L.R. 200=18 W.R. 458, *D.*, *F.*, 7 M. 295 F.B.; *R.*, 8 M. 376, 32 A. 307; *Diss.*, 23 C. 302.] Where there are adult sons, the father of a joint family under the Mitakshara Law has no right, without the concurrence of these sons, to deal with the ancestral property, and the sons are not concluded by a transaction to which they are not parties, unless their assent to it, express or implied, is proved. SITANATH KOER v. LAND MORTGAGE BANK OF INDIA, **9 C.888=12 C.L.R. 574.**

(4000-4001)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, *s.* 283)—*Decree against one only of several heirs of debtor—Execution of decree—Transfer of common property by such heir—Contention open to transferee in suit under s* 283, *Civ. Pro. Code.*—A money-decree had been obtained by the plaintiff against one only of the heirs of his deceased debtor in possession of the debtor's estate. The other heirs entitled to the estate under the Muhammaden law were no parties to the decree, and plaintiff sought to execute the decree against certain immoveable propery formerly of the debtor, which, prior to the attachment, was made over by the judgment-debtor to the defendants in this case. At the date of the attachment brought about by the plaintiff, the present defendants were in possession derived from the judgment-debtor. Plaintiff sought to proceed against all the deceased's rights and interests in the property in the defendants' hands and not merely the rights and interests, in the property, of the judgment-debtor, but it was held that since, if the execution had been sought against property in the hands of the judgment-debtor himself, he could have objected to the attachment and sale of the rights and interest of the other heirs, it was equally open to the defendants, the transferees of the judgment-debtor, to do the same. That being so, the defendants were entitled to set up the *jus tertii* of the heirs of the deceased debtor other than the heir who was the judgment-debtor, and under the decree, the plaintiff could proceed against the interests of such judgment-debtor alone in the estate of the deceased. DALLU MAL v. HARI DAS, **23 A. 263=A.W.N. 1901, 75.** (7 A. 822, 7 A. 36, 12 A. 313, *R.*) [*R.*, 2 S.L.R. 76, 12 O.C. 146=2 Ind. Cas. 922.]

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(4002)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro. Code*, 1882)—*Suit under—Burden of proof.*—When an objection preferred under s. 278 of the Code of Civil Procedure is disallowed and the objector institutes a suit, he is bound to lay some evidence to satisfy the Court that the document under which he claims represents a *bona fide* and genuine transaction and the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. NANNHI JAN v. BHURI, **5 A.L.J. 358.** (A.W.N. 1887, 71, A.W.N. 1899, 223, 18 A. 369, 12 B. 270, 8 A. 178, *R.*)

(4003)—*O.* 21, *r.* 63 (=*s.* 283, *Civ. Pro. Code*, 1882)—*Suit for declaration of title by person whose objections to executions have been disallowed—Burden of proof.*—*Held* that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under s. 283 of the Code of Civil Procedure, must give *prima facie* evidence to establish the genuineness of the document upon which he relies. NANNHI JAN v. BHURI, **A.W.N. 1908, 123=30 A. 321=5 A.L.J. 601.** (A.W.N. 1887, 71, A.W.N. 1899, 220, 18 A. 369, 12 B. 270, *F.*; 8 A. 178, *Disc.*)

(4004)—*O* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)—*Suit by decree-holder to establish right to attach property in dispute*—Onus *of proof.*—In a suit under s. 283, Civ. Pro Code, by the decree-holder to establish his right to attach the property in dispute in execution of his decree, the plaintiff can succeed only if he proves that the property is that of the judgment-debtor. He can have no right to attach property, which is proved either never to have belonged to his judgment-debtor, or, having been his, to have passed out of his possession and ownership and become in law the property of others prior to the time at which attachment is sought. The *onus* of proving that the property is the judgment-debtor's must lie on the plaintiff and whether or not the defendant has a title, the plaintiff must prove his right to attach, *i.e.*, the title of his judgment-debtor. SHEKH ADAM ISUFBHAI v. JAMNADAS RANCHARDAS, **17 B. 94.** [*R.*, U B.R 1897—1901, Vol. II, 270, 25 B. 203.]

(4005)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)—*Burden of proof in a suit instituted by a defeated claimant.*—A suit is instituted against a Burman as the representative of his deceased father. In execution of the decree obtained in the suit, a house in the possession of the judgment-debtor, was attached. The latter preferred a claim on the ground that it was his own property and not that of his father. Being unsuccessful, he instituted the present suit to recover the house. The evidence in the case being meagre, it became important to see on

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whom the burden of proof lay. *Held*, that the plaintiff in a suit under s. 283 of the Code is neither in a better nor in a worse position than he was as a claimant in the summary proceeding. It is sufficient for him to adduce evidence of possession or title. If he shows that he is in possession, s. 110 of the Evidence Act throws the burden of proof on the defendant. Under the circumstances of the case, the plaintiff's statement on oath that the house was his own and that he bought the materials to build it with his own money should be accepted as true in the absence of any evidence that the money was his father's, or that he built the house under his fathers's orders. PALANIAPPA CHETTI v. MAUNG PO SANG, **U.B.R. 1905, Civ. Pro. Code, 16.**

(4006)—*O* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)—*Suit by defeated claimant to establish right to property attached—Burden of proving good faith and* bona fides *of transaction.*—Where an unsuccessful claimant sues to establish his right to the property attached, the burden of proving the good faith and *bona fides* of the transaction constituting his claim lies upon him. RAJA SETH GOKULDASS v. MT. JANKEE, **9 C.P.L.R. 142.** (6 C.P.L.R. 84, 15 W.R. 155, 22 W.R. 124, *R.*) [*R.*, 2 N.L.R. 87.]

(4007)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)—*Burden of proof—Possession—Judgment debtor—Judgment creditor—Attached-property.*—Where a suit is brought, under s. 283, Civ. Pro. Code, to recover possession of certain land which had been sold under the judgment-creditor's attachment as the property of the judgment-debtor, and the lower appellate Court held that, as plaintiffs were in possession of the land at the time of attachment, the burden of proof of the right to possession lay on the defendants, *held*, in second appeal, that the burden of proving not only that he was in possession but that he was not the judgment-debtor's trustee lay on the plaintiff. CHOKALINGUM CHETTY v. MAUNG YEIK, **U.B.R. 1897—1901, Vol. II, 270.** (13 A. 537, 4 B. 74, 6 B. 215, 8 B. 375, 12 B. 270, 17 B. 91, 17 C. 256, 20 C. 834, *R.*) [*R.*, U.B R. 1904, 4th Qr., C.P.C. 8; *Overruled*, D B.R. 1905, 1st Qr., C.P.C. 16; *Observed*, 2 L. B.R. 153.]

(1408)—*O.* 21, *r.* 63 (=*s.* 183, *Civ Pro Code*, 1882)—*Claim to attached property—Burden of proof.*—A decree-holder attached certain property of his judgment-debtor. The latter's daughter put in a claim in respect of the property, alleging a sale to her by the judgment-debtor. It was not proved by her, that she had been in possession at the time of the attachment. The sale also appeared to be collusive and fictitious. *Held*, the burden of proving that the sale was genuine, and supported by consideration, and that the property belonged to the plaintiff and that the same was in her

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possession at the time of the attachment, lay upon her. MA SEIN U. v. A.L.V.R.R.M LETCHMIANAN CHETTY, **4 L.B.R. 228.** (2 L. B.R. 152, *D.*; 12 B. 270, *F.*)

(4009)—*O.* 21, *r.* 63 (=s. 283, *Civ. Pro. Code*, 1877)—*Suit by vendee or mortgagee to establish right to attached property—Good consideration*—Bona fide *transaction—Burden of proof.*—In a suit by a vendee or a mortgagee under s. 283, Civ. Pro. Code, it is incumbent on the plaintiff to give *prima facie* proof that there has been a real and *bona fide* transaction. It is not sufficient merely to prove that there has been a registered deed of sale or mortgage. In a suit between a vendor and vendee, or between a mortgagor and a mortgagee, when the execution of the deed has been proved, there is a presumption that consideration has passed, and the burden lies on the vendee or mortgagee of proving that there was no consideration, or that the consideration was less than stated in the deed. When, however, the vendee or mortgagee has to prove the sale or mortgage against a third party, the presumption that consideration has passed does not arise upon mere proof of execution of the instrument of title; the plaintiff must prove that there has been good consideration for the conveyance. MUTU CURPAN CONAR v. N.S. YAGAPPA MAISTRY, **L.B.R. 1893—1900, 333.** (15 W.R. 155, *R.*)

(4010)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)—*Attachment—Claim—Failure to give evidence—Case struck off—Effect.*—A claim petition was put in by the plaintiff when certain property was attached in execution of a decree. The claimant was directed to adduce evidence but failed to do so, and the case was struck off. *Held*, that the order striking off the case must be taken as an order disallowing the claim and that the plaintiff was bound to bring his suit to establish his claim within one year from the date of the order. SADUT ALI v. RAM DHONE MISSER, **12 C.L.R. 43.** (20 W.R. 348, 21 W. R. 309, *F.*) [*Diss.*, 1 C.W.N. 24; *F.*, 1 C.L J. 296; *R.*, 19 A. 253, F.B., 6 C.L J. 362.]

(4011)—*O.* 21, *r.* 63 (=s. 283, *Civ. Pro. Code*, 1882)—*Order disallowing claim—Purchaser entitled to take benefit of order—Limitation for suit to set aside order.*—An order disallowing a claim to attached property is an order which should be made between the claimant on the one side and the judgment-debtor on the other. It establishes against the claimant that the property he claims is the judgment-debtor's and this order is for the benefit of the persons who purchase the judgment-debtor's interests at the execution. A suit to set aside the order must be brought within a year of the order. ADJOODHYA PRASAD v. SHEODASS MADAN GOPALL, **1 C.P.L.R. 3.** [*R.*, 1 N.L.R. 150.]

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(4012)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s. 283)=*Claim allowed on proof of possession—No adjudication on question of title—No proof as to service of notice of claim on judgment-debtor—Judgment-debtor whether bound to sue within one year.*—The question whether a judgment-debtor is a party or not to a claim proceeding must depend upon the facts of each case, *i.e.*, the circumstances in which the order is made and the terms of the order itself. In the course of a claim proceeding, the judgment-debtor attended the Court and gave evidence. The order allowing the claim did not recite that it was made in the presence of the defendant. It merely stated that the claimant was in possession and the defendant was not. It did not refer to the question of title. The question now was whether the judgment-debtor was bound to institute a suit whithin one year under s. 283 of the Code. There was no satisfactory evidence that the judgment-debtor had notice of the claim. *Held* that, having regard to the inconclusive character of the evidence as to service of notice on the judgment-debtor, to the fact that it did not appear on the face of the order that the judgment-debtor appeared as a party at the proceedings in which the order was made, and to the fact that the terms of the order were not necessarily inconsistent with the title being in the judgment-debtor, the order could not be said to have been made against the judgment-debtor within the meaning of s. 283 of the Code. The judgment-debtor was therefore not bound to sue within a year. MUTHUSAWMI MUDALI v. AYYALU BATHADU, **13 M.L J. 367.**

(4012-a)—*O.* 21, *r.* 63 (=*Civ. Pro. Code*, 1882, s 283)—*Order for removal of attachment, whether binds judgment debtor not a party to attachment proceedings—Order passed without deciding questions raised—Suit to set aside order releasing attachment—Limitation Act (XV of 1877), art.* 11.—Plaintiffs brought this suit in ejectment to recover possession of land alleged to have been let to A, the predecessor-in-title of defendants 2 to 6. Defendant No. 1 was a mortgagee of A and he contested the claim on the ground that his mortgagor A was not the tenant-at-will of the plaintiffs but a permanent tenant. The lower appellate Court was of opinion that the above contention of defendant No. 1 was *res judicata* by reason of the omission to file a suit, within a year of an order passed against him under s. 280 of the Civ. Pro. Code in certain execution proceedings in which he had asserted the permanent nature of A's tenancy. The execution Court had then decided in favour of the plaintiffs, leaving the first defendant to establish his case by a regular suit, and the first defendant not having brought the suit within the time allowed by law, the order removing the attachment had become conclusive against him under the operation of s. 283, and he was therefore estopped from

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raising the matter in his defence in the present suit. That order, however, could not bind the other defendants, the heirs and representatives of A, who were not parties to the proceedings in which that order was passed and were therefore not bound, as the first defendant was, to bring any suit to establish their title. Also the first defendant in possession could set up as *jus tertii* the title of those other defendants in support of his possession under the mortgage, the legality of which had not been questioned in the previous execution proceedings. The lower Courts were therefore held to be wrong in having disposed of the case on the preliminary point of *res judicata*, and their decrees were therefore reversed and the case remanded to the Court of first instance for trial on the merits raising an issue as to the title of the plaintiffs as against defendants. *Per Ranade, J.*—Where there has been no investigation in the attachment proceedings, the order passed therein cannot have a conclusive effect, and art. 11 of the Limitation Act (XV of 1877) cannot apply to such cases. In this case, the order in the previous execution proceedings expressly avoided deciding the question of the rights of A, and of the mortgage by him to the first defendant. It must therefore be held to have been passed without investigation, and in such view the omission of the first defendant to bring a regular suit within 12 months did not preclude him from raising his defence in the present suit. KARSAN v. GANPATRAM, **22 B. 875.** [*R.*, 11 O. C. 180, 28 P.R. 1910=19 P. W.R. 1910=5 Ind. Cas. 890, 63 P.L.R. 1910; *D.*, 90 P.R. 1902=20 P.L.R. 1903.]

(4013)—O. 21, r. 63—Suit under, finding sale to purchasers of mortgagees' right in certian land, inoperative—Purchasers, whether entitled to recover money paid for decree against mortgagee to save property from sale—*See* CONTRACT ACT, 1872, ss. 69, 70, A.W.N. 1903, 58 =5 A.L.J. 163=30 A. 167.

(4014)—O. 21, r. 63—*See* COURT-FEES, 4 B. 515, F.B.

(4015)—O. 21, r. 63—Suit under—Stamp on the plaint—*See* COURT FEES ACT, 1870, sch. II, art. 17, cl. (b), 7 C.L.J. 36, P.C.=12 C.W.N. 169=10 Bom. L.R. 1=5 A.L.J. 10=17 M.L.J. 618=2 M.L.T. 506=35 C. 202=14 Bur. L.R. 41=35 I.A. 22.

(4016)—O. 21, r. 63—*See* COURT FEES ACT, 1870, sch. II, Arts. 17 (1) (3), 51 P.R. 1897.

(4017)—O. 21, r. 63—*See* DECLARATORY DECREE, SUIT FOR — DECLARATION OF TITLE, 16 M. 140.

(4018)—O. 21, r. 63—*See* EXECUTION OF DECREE — MISCELLANEOUS, A.W.N. 1899, 220.

(4019)—O. 21, r. 63—*See* FRAUD—PLEADINGS AS TO FRAUD, 17 M. 389.

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(4020)—O. 21, r. 63—Decree against father alone—Partition prior to decree—Attachment of joint family property—Son's share released—Right of suit under s. 283—*See* HINDU LAW—DEBTS, 8 M.L.J. 349=8 Ind. Cas. 131.

(4021)—O. 21, r. 63—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 10 A. 194=A.W.N. 1888, 53.

(4022)—O. 21, r. 63—*See* LIMITATION ACT, 1908, s. 14, 1 O.C. 272.

(4023)—O. 21, r. 63—*See* LIMITATION ACT, 1908, art. 11, 7 C. 608=9 C.L.R. 8.

(4024)—O. 21, r. 63—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 18 M. 316=5 M.L.J. 148, 13 M. 366, 12 C. 453, 32 C. 537.

(4025)—O. 21, r. 63—Wrongful seizure of moveable property through Court by attachment—Sale and distribution of proceeds—Suit for refund of money paid—Suit barred—Limitation Act, arts. 29, 36, 49, 64 and 120—Time spent in litigating title under s. 283, Civ. Pro. Code, not made allowance for—*See* LIMITATION ACT, 1908, arts. 29, 36, 49, 64, 120, 4 M.L.T. 271.

(4026)—O. 21, r. 63—*See* LIMITATION ACT, 1908, art. 141) 20 B. 801.

(4027)—O. 21, 63—Suit under—Dispossession—Discontinuance of possession—Extinguishment of title—Decree for possession barred—Effect—*See* LIMITATION ACT, 1908, arts. 142 144, 12 Bom. L.R. 956=8 Ind. Cas. 639.

(4028)—O. 21, r. 63—Decree for sale on mortgage—Limitation—Execution—Objection to sale—Decree under—Declaring liability of property—*See* LIMITATION ACT, 1908, art. 181 19 A. 71=A.W.N. 1896, 188.

(4029)—O. 21, r. 63—Appeal from dismissal of suit under Civ. Pro. Code, 1882, s. 283—Purchase at sale in execution during pendency of appeal—*See* LIS PENDENS, 23 A. 60=A.W.N. 1900, 199.

(4030)—O. 21, r. 63—Wrongful attachment of crops—Objection to attachment disallowed without adjudication—Suit for recovery of price—Jurisdiction—*See* PROVL. S.C. COURTS ACT, 1887, s. 11, arts. 20, 35 *ff*, 8 A.L.J. 187 =9 Ind. Cas. 537.

(4031)—O. 21, r. 63—*See* RIGHT OF SUIT—ATTACHMENT PROCEEDINGS, SUITS CONCERNING, 10 A. 479=A.W.N. 1888, 189.

(4032)—O. 21, r. 63—Whether person claiming to be the owner of an attached property has a right of suit independent of s. 283, Civ. Pro. Code—*See* SALE—GENERAL, 14 Bur.L.R. 135 =4 L.B.R. 252.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4033)—O. 21, r. 63—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 A. 462.

(4034)—O. 21, r. 63—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 4 L.B.R. 88.

(4035)—O. 21, r. 63—Suit under, for declaration of attaching creditor's right to bring property to sale—*See* VALUATION OF SUITS, 2 A. L.J. 115=A.W.N. 1905, 37=27 A. 440.

(4036)—O. 21, r. 63—Declaratory suit by objector against decree-holder under, valuation of—For purposes of jurisdiction—*See* VALUATION OF SUITS, 5 L.B.R. 23=2 Ind. Cas. 621.

(4036-*a*)—O. 21, r. 63—*See* NOS. 290, 360, 361, 362, 425, 1003, 1004, 1005, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1016, 1017, 1019, 1148, 1175, 1175-*a*, 1176, 1340, 1343, 2193, 2509, 2668, 2668-*a*, 3344, 3657, 3738, 3816, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3934, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3345, 3846, 3847, 3848, 3819, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3852, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 8892, 3893, 3894, 3895, 3896, 3896-*a*, 3897, 3903, 3904, 3906, 3907, 3908, 3909, 3910, 2912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3921, 3922, 3923, 3924, 3925, 3926 3927, 3928, 3929, 3929-*a*, 3929-*b*, 3930, 3931, 3932, 3933, 3934, 3935, 3950, 3951, 3952, 3953, 3254, 3955, 3956, 3957, 3960, 3961, 3962, 3963, 3972, 3973, *supra*, AND NOS. 4537, 4538, 5110-*a*, 5150, *infra*.

(4037)—*O.* 21, *r.* 63, *s.* 11 (=*ss* 283, 13, *Civ. Pro. Code*, 1882)—*Civil Courts Act (XII of* 1887), *ss.* 19, 21—*Valuation for purposes of jurisdiction, suits under—Decisions of questions of title in suit under s.* 283, *when operate as* res judicata.—When the array of parties in a suit under s. 283 of the Civ. Pro. Code, is confined to the execution-creditor or his representative on one side and the claimant-objector or his representative on the other, the sole question to be decided would be whether the property is liable to attachment and sale in execution of the decree of the execution-creditor. But when, in such a suit, the claimant-objector makes the judgment-debtor or his representative a party, the property attached must be regarded as the subject-matter of the suit, and the value of the suit, within the meaning of s. 19 and s. 21 of Act XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of the property in execution of the decree. (2 A. 799, 9 A. 140, 4 M. 339, 15 C. 194, *D.*; 13 A. 320, 16 A. 286, *R.*) [*R*, 15 C.P L.R. 161, 27 A. 440=A.W.N. 1905, 37=2 A.L.J. 115=2 N.L.R. 87, 94 P.R. 1908 =212 P.L.R. 1908=74 P.W.R. 1908; *D.*, 30 M. 335=17 M.L.J. 95=2 M.L.T. 116, F.B.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Where in his suit under s 283 of the Code, the claimant objector claims both in form and substance, against the judgment-debtor, a declaration of his title to the whole of the property, the title to which is in issue in the suit, a decree in such suit declaring the liability or non-liability of the property to attachment and sale in execution of the creditor's decree, must necessarily, unless the suit be decided on a ground not involving the question of title, decide and determine all questions of title on which the parties to the suit could rely, so that such decision would operate in any future suit between the parties as *res judicata* on those questions of title, though such subsequent suit might relate to property not in question in the perior suit under s. 283 of the Code. DWARKA DAS v. KAMESHAR PRASAD, **17 A. 69=A.W. N. 1895, 3.** [*R.*, 57 P.R. 1907=66 P.W.R. 1907.]

(4038)—*O.* 21, *r.* 63, *O.* 1, *rr.* 8 (2), 10 (2), (3), (5), 11, *O.* 2, *r.* 2 (=*ss.* 283, 32, 43, *Civ. Pro. Code*, 1882)—*Suit to establish right to attached property—Joinder of party—Cause of action.*—In a suit brought by A under s. 283, Civ. Pro. Code, simply to establish a right to certain property, alleged to have been wrongfully attached by B, where C, in part satisfaction of a decree against B, drew out part of the money which had been deposited in Court by A on account of the attached property, *held*, that the Court had no power to join C as a defendant under s. 32, Civ. Pro. Code, because it was not the attachment, but the withdrawal of part of the money deposited which constituted the cause of action against C; the cause of action was separate and arose after the suit was instituted, and, moreover, as against C, the plaintiff would be bound to sue for recovery of the money drawn out by C, or his claim would be subsequently barred by s. 43, Civ. Pro. Code. K.M A.C.T. MOOTAPPA CHETTY v. K.M.S. SATAPPA CHETTY, **L B.R. 1891—1903, 409.**

(4039)—O. 21, r. 63, O. 7, r. 10—*See* SMALL CAUSE COURT, MOFUSSIL JURISDICTION OF—GENERAL, **3 B. 179.**

(4040)—O. 21, r. 63, O. 38, r. 9—*See* ATTACHMENT BEFORE JUDGMENT, 21 B. 273.

(4041)—*O.* 21, *r.* 63, *O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, *ss.* 283, 561)—*Defeating creditors.*—A deed of conveyance of property to one creditor, with the object of defeating another creditor, is not void, provided that it is *bona fide*, *i.e.*, if it is not a mere cloak for retaining a benefit to the grantor. A civil appeal should originally be fixed for hearing so as to allow at least an interval of a month between the date of serving the notice and the date of hearing the appeal. VALLEAPPA CHETTY v. MAUNG KE, **U.B.R. 1902—1903, Vol. II, Civ. Pro. 15.** [*Obs.*, U.B.R. 1904, 4th Qr., Civ. Pro. 8.]

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4042)—O. 21, rr. 63, 15, O. 22, r. 2—*See* ABATEMENT OF APPEALS 22 A. 222=A.W.N. 1900, 24.

—— O. XXI, r. 64 (=1882, s. 284=1877, s. 284 =1859, s. 246),

See SALE—SALE IN EXECUTION OF DECREE.

(4043)—O. 21, r. 64—Execution of compromise decree—*See* COMPROMISE—EFFECT OF, 6 C.L.J. 95=11 C.W.N. 879=34 C. 886.

(4043-*a*)—O. 21, r. 64—*See* NOS. 1175, 1175-*a*, 1176, 3457, 3657, 3749, 3771, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3142, 3843, 3844, 3845 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3877, 3879, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3896-*a*, 3936, 3963 *a*, *supra* AND NOS. 4538, 5110-*a*, 5150, *infra*.

(4044)—*O.* 21, *r.* 64, *s.* 63 (=*ss.* 284 *and* 285, *Civ. Pro. Code*, 1882)—*Execution of decree—Attachment by two Courts of different grades, —Sale by Court of lower grade, validity of—Statute, construction of—Jurisdiction.*—Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity, and a valid title passes to the purchaser. (12 C. 332, 12 C. 317, 19 C. 651, 25 C. 46, 22 B. 88, 22 M. 295, *R.*) S. 285, Civ. Pro. Code, is directory and deals with procedure. It is not intended by this section to take away the jurisdiction conferred by s. 284 of the Civ. Pro. Code. It must be shown by the clearest language that jurisdiction given by one section of the Act has been taken away by another and subsequent section. GOPI CHAND BOTHRA v. KASEMUNNESSA KHATUN, **6 C.L.J. 130=34 C. 886.**

(4045)—*O.* 21, *rr.* 64, 93, *s.* 73 (=*ss* 284, 295, 315 *of* 1882, *Civ. Pro. Code*)—*Execution sale—Payment out of proceeds before confirmation of sale.*—Though a decree-holder may take out the purchase money, before the date of confirmation of sale, as is impliedly provided in s. 315 of the Civ. Pro. Code, it cannot be laid down that the Court holding the sale has no discretion in refusing to pay to the decree-holder the purchase-money of the property sold, before the date of confirmation of the sale. JOGENDRO NATH SIRCAR v GOBIND CHUNDER ADDI, **12 C. 252.** (6 B. 16, *R.*) [*D. & Commented on*, 18 C. 242.]

(4046)—O. XXI, r. 64, O. XLIII, r. 1—*See* APPEAL—ORDERS, 4 C.L.R. 27.

—— O. XXI r. 65 (=1882, s. 286=1877, s. 286 =1859, s. 248).

See SALE — SALE IN EXECUTION OF DECREE.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4047)—*O.* 21, *rr.* 65, 76 (=*ss*, 286 and 296, *Civ. Pro. Code*, 1882=s. 248, *Civ. Pro. Code*, 1859 —*Construction.*—In s. 248, Civ. Pro. Code, 1859, the words 'whom the Court may appoint' apply also to the officers of the Court. In respect of the duties required by s. 248, Civ. Pro. Code, 1859, *held* that, in the absence of the subordinate Judge, the Judge cannot perform the duties because he is a superior officer. JUDOONATH ROY v. RAM BUKSH CHATTERJEE, **12 W.R. 238.**

(4048)—*O.* 21, *rr.* 65 and 76 (=*Act VIII of* 1859, *s.* 248—Khalisa Mahal *or Revenue paying land—Execution—Sale by Collector —Irregularities in publication of Court sale.* —Land granted "revenue free" for a few years, after which it would be "revenue paying," must, even when it is "revenue free," be considered as revenue paying land for the purposes of s. 240 of the Civ. Pro. Code. Execution sales of such lands should, therefore, be conducted by the Collector and not by the Civil Courts. Where it appeared that the place where the sale was to take place was not described with sufficient distinctness, and the proclamation was not made on the spot: *Held*, that these were irregularities that rendered the Court sale invalid. SHOWERS v. SETH GOBIND DASS, **1 A. 400.**

(4049)—O. XXI, rr. 65, 76—*See* APPEAL—OBJECTIONS BY RESPONDENTS, 21 W.R. 338.

(4050)—O. XXI, rr. 65 and 76—*See* CLAIM TO PROPERTY ATTACHED, 6 W.R. 164.

(4051)—*O.* 21, *rr.* 65, 90, 92 (=*Civ Pro. Code*, 1877, *ss.* 306, 311, 312)—*Sale in execution—Intimidation of intending purchasers—Irregularity in conduct of sale.*—Where, in an auction sale in execution of a decree the decree-holder deterred numerous persons who would have attended the sale, by threat and intimidation, and the bids of the few persons were made at the instigation of the decree-holder for the purpose of giving an appearance of good faith to the proceedings, *held* that, although there was no irregularity in the conduct of the sale, the sale was impeachable on the broad ground that no auction-sale, properly speaking, took place at all, and that the whole proceeding was, therefore, *de facto* void, and could not stand. BUL CHAND v. ZINATUNNISSA, **A.W.N. 1881, 106**

—— O. XXI, r. 66 (=1882, s. 287=1877, s. 287 =1859, s. 249).

See SALE—SALE IN EXECUTION OF DECREE.

(4051-*a*)—*O.* 21, *r.* 66—*Sale proclamation—No inquiry as to value of property—Second appeal, whether lies*—In a sale proclamation, both the values stated by the decree-holder and by the judgment-debtor were entered, and no enquiry was made as to whether either of these values was correct, or whether any other and intermediate value was correct. *Held*, that no

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

second appeal lay to the High Court as the order was not one which had determined any question judicially. SAKHI CHAND v. KALANAND SINGH, **11 Ind. Cas. 759.** (10 Ind. Cas. 371, 14 C.L.J. 35, *R.*)

(4051-*a*1)—O. XXI, r. 66—*See* NOS. 72, 78, 79, 192, 363, 1020 to 1023, 3447, 3449-*a*, 3450, 3456, 3457, 3471, 3479, 3785, 3795, 3938, 3939, 3973 to 3975, *supra.*

(4051-*b*)—*O.* 21, *rr.* 66, 67, 69, 70 (=*Civ. Pro. Code of* 1859, *s.* 249)—"*Part of an estate.*"—"Part of an estate" in s. 249, Act VIII of 1859, means an aliquot part of an estate. KALLY PRASANNO BOSE v. DINONATH MULLICK, **11 B.L.R. 56=19 W.R 434.**

(4052)—*O.* 21, *rr.* 66, 67, 69, 70, 13 *and* 14 (=*ss.* 249 *and* 213, *Civ. Pro. Code*, 1859)—*Description in notice of attachment Government revenue—Specification—Notice to whom to be given—Irregularity.*—Under s. 213, Civ. Pro. Code, 1859, the description in a notice of attachment should be sufficient to identify the property; and if an estate pays Government revenue, there should be a specification. The proclamation under s. 249, Civ. Pro. Code, 1859, is to give notice to intending purchasers, not to the judgment-debtor. An irregularity, unless it injures the judgment-debtor, does not vitiate a sale. LEAK RAM v. MOHESH DOSS, **12 W.R. 488.** [*R.*, 18 W.R. 411.]

(4052-*a*)—*O.* 21, *rr.* 66 (4), 67, 69, 70, 94, 96, 99 (=*Civ. Pro. Code*, 1859, *ss.* 249, 259, 264, 269(—*Act* 14 *of* 1859, *s.* 1, *cls.* 3, 12 (1)—*Sale in execution.*—A person who has been dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself, and has made no complaint to the Court which was executing the decree, is entitled to bring his suit for confirmation of his title, and to be restored to the possession of the property from which he was ousted, at any time within 12 years from the time of his dispossession. He is not bound to proceed under s. 269, Act VIII of 1859. PROTAB CHUNDER CHOWDHRY v. BROJOLOLL SHAHA, **B L.R. Sup. Vol. 638=7 W.R. 253.** [*F.*, 17 W.R 429; *R.*, 5 B.H.C. 139, 8 B.H.C. 219.]

(4052-*b*)—*O.* 21, *rr.* 66, 69, 70, 90 (=*ss.* 287, 291, 311, *Civ. Pro. Code*, 1882)—*Sale in execution of a decree—Proclamation—Irregularity—Substantial injury.*—In a proclamation, fixing the 13th July for the sale of certain land in execution of a mortgage-decree, it was notified that, in the absence of any order of postponement, the sale would be held at the monthly sale commencing on the 13th July; but owing to the absence of the Judge from the station from the 13th to the 16th July, the monthly sales did not actually begin until the 17th July and the sale was held on the 20th in the course of the monthly sale. The judgment-debtors resting their case on ss. 287 and 291, Civ. Pro. Code, 1882, applied under s. 311 of the Code to set aside the sale. *Held*, that the Judge did not act in contravention of the provisions of the Code in holding the sale on the 20th of July, and that, even assuming there was any irregularity in publishing the sale, no substantial injury had been caused thereby to the judgment-debtors. THAKUR RANG LAL SINGH v. MAHARAJA SIR RAVANESHWAR PERSHAD SINGH BAHADUR, **2 M.W.N. 1911, 108=10 M. L T. 161, P.C.**

(4053)—*O.* 21, *rr.* 66, 70 (=*s.* 287, *Civ. Pro. Code*, 1882)—*Notification of sale—Contents—Adjournment of sale—Necessity of fresh notification — Judgment-debtor's consent.*—Under s. 287, Civ. Pro. Code, the notification of sale should contain a detailed statement of the property to be sold, and where the property consists of several shares in different *patties*, it is not proper to lump the shares together. The notification should specify the number of shares to be sold in each *patti* and the revenue on such shares. When a Judge finds sufficient reasons for the postponement of a sale, he ought not to make it a condition that no further notification of sale should take place. The notification may be a matter of vital importance to the judgment-debtor, and may be a matter of very great importance to the creditor, because having no notification might limit the number of possible purchasers, and might affect even those persons who came to the sale, as they would have no proper *data* from which to estimate the value of the property and make their bids. When a sale is fixed to take place on one day, it cannot properly be held on another day, without the issue of fresh proclamation, unless the judgment-debtor consents to the sale. GANESH SINGH v. BANNO BIBI, **8 W. N. 1887, 50.**

(4054)—*O* 21, *rr.* 66, 70(=*Cl.* (*e*) *s.* 287, *Civ. Pro. Code*, 1882)—*Court executing decree function of—Application of judgment-debtor.*—S. 287 cl. (*e*), Civ. Pro. Code, 1882, does not require the Court executing the decree to make an elaborate investigation into the question of the value of the property to be sold, to record evidence, and to come to a decision on the point. If this were regarded as incumbent on an executing Court, it would be disastrous to decree-holders. KASHI PERSAD SINGH v. JAMUNA PERSHAD SAHU, **31 C. 922.** (20 A. 412, P.C., 23 M. 569, *D.*) [*Com. on*, 12 C.W.N. 542]

(4055)—*O.* 21, *rr.* 66, 70 (=*Civ. Pro. Code*, 1882, *s* 287)—*Proclamation of sale—Sale before hour fixed.*—Though there is no provision in the Code that the sale shall take place at the time and place advertised, yet such a provision must be implied, and consequently no sale can take place under the Code except at the time and place advertised under the Code. BASHARUTULLA v. UMACHURN DUTT, **16 C. 794.** [*Diss.* 4 L.B.R. 123.]

(4056)—*O.* 21, *rr.* 66, 70 (=*s.* 287, *Civ. Pro. Code*, 1882) — *Execution sale —Sale-proclamation—Statement of value — Inquiry as to approximate value when to be made.*—It cannot

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

be laid down generally that in no case should any inquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale proclamation. (31 C. 922, *Commented on.*) Where the decree-holder stated the value of the property to be Rs. 15,000 but the judgment-debtor objected that the value was Rs. 1,50,000 and the Court adopted the former valuation without any inquiry, *held*, that in the face of the discrepancy in the value as stated by the decree-holder on the one hand and the judgment-debtor on the other, an inquiry as to the approximate value of the property was obviously necessary and should be held. SAURENDRA MOHAN TAGORE v. HURRUK CHAND, **12 C.W.N. 542.** [*R. and Doubted*, 6 M.L.T. 252.]

(4057)—*O.* 21, *rr.* 66, 70 (=*Civ. Pro. Code*, 1882, *s.* 287)—*Proceedings under, no decree.*—None of the proceedings of a Court under s. 287, Civ. Pro. Code, and the rules framed thereunder in relation to the proclamation of sale, is an "order" within s. 244 and as such appealable as a "decree." (23 M 568, 30 C 617, *Diss.*) Proceedings under s. 287, Civ. Pro. Code, are of an administrative and not of a judicial character. SIVAGAMI ACHI v. SUBRAHMANIA AYYAR, **27 M. 259, F B.=14 M.L. J. 57.** [*Appr.*, 6 M.L.T. 252; *R.* 18 M.L J. 568 =4 M.L T. 352.]

(4058)—*O* 21, *rr.* 66, 70 (=*s.* 287, *Civ Pro. Code*, 1882)—*Execution-sale--Notice to judgment-debtor—Enquiry whether property ancestral or non-ancestral—* Ex parte *order—Application to set aside sale.*—Rule I of the rules regarding the sale of land published under Notification 671, dated 21st August, 1880, lays down that every Civil Court shall ascertain from the judgment-debtor whether the land to be sold or any portion of it is ancestral land, and, after hearing the objections of the decree-holder, shall come to a decision, and if it comes to a decision that the land or any portion of the land is ancestral, shall transfer the proceedings to the Collector of the District in which the property is situate In this case, upon the affidavit of the decree-holder, notice was served upon the judgment-debtor, and upon report from the Collector that the property to be sold was not ancestral, it was sold as such by the Civil Court. The judgment-debtor subsequently appeared and objected that the sale was void, the property being ancestral. The District Judge found that a portion of the property was ancestral, and set aside the sale. *Held*, that the sale was rightly set aside, as the Civil Court, in acting upon the affidavit of the decree holder, had reversed the order laid down in the rule. The object of the rules was to prevent the sale of ancestral land by any Court other than the Collector, and they contemplated and directed a full and proper enquiry. In carrying out the sale of ancestral property, the Civil Court grasped at a jurisdiction not vested in it. The mere fact of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

property or part of it being ancestral was sufficient *per se* to oust the jurisdiction of the Civil Court. BEHARI SINGH v. MUKAT SINGH, **2 A.L.J. 448=A.W.N. 1905, 183.** (4 A. 382, *F.*) [*Reversed*, 28 A. 272=3 A.L.J. 140=A.W.N. 1906, 3.]

(4059)—*O.* 21, *rr.* 66, 70 (=*s.* 287, *Civ. Pro. Code*, 1882)—*Purchase of property in execution of money-decree—Mortgage decree on same property - Suit to enforce lien—Notice.*—Where a creditor had two decrees against his debtor, one a mortgage-decree and the other a simple money decree, and where, in execution of the money decree, the property over which the creditor had a mortgage lien was sold to a third person, *held* that, in order that the creditor may succeed in a suit against the purchaser to enforce his mortgage lien on the property, it must be shown that the auction-purchaser purchased it with notice of the lien The fact of the judgment-creditor having informed the Court of the mortgage, at some time or other, for some purpose, would be no evidence of notice on the auction-purchaser. NURSING NARAIN SINGH v. ROGHOOBUR SINGH, **10 C. 609.** [*Expl.* 14 O.P.L R. 17; *F.* 5 C.W.N. 497; *Appl.* 15 M. 412, *R.* 11 O.C. 206]

(4060)—*O.* 21, *rr.* 66 *and* 70 (=*s* 287, *Civ. Pro. Code*, 1882—*Practice—Procedure—Decree-holder—Encumbrance—Sale --Suit to set aside encumbrance, form of—Slander of title.*—The plaintiff, as assignee of a decree-holder, attached certain property under the decree and asked for its sale. Defendant No. 1 set up and proved a mortgage then over the property; and the property was sold subject to the encumbrance and purchased by defendant No. 2. The plaintiff, then filed the present suit to have the sale set aside and a resale ordered of the property free from the alleged encumbrance. —*Held*, that the plaintiff was not entitled to the relief sought. The proper remedy for the plaintiff was to have brought a suit for a declaration that the alleged encumbrance was null and void, and to have stayed the sale till the determination of that suit. If the encumbrance was non-existent, the plaintiff would have a remedy against the encumbrancer in the form of an action for slander of title. A decree-holder cannot sell property twice over on his own application where there has been no irregularity in publishing or conducting it, and no default committed on the part of the purchaser. PARSHOTAM v. GANESH, **1 Bom. L R. 220= 23 B. 759.**

(4061)—*O.* 21, *rr.* 66, 70 (=*s.* 287, *Civ. Pro. Code*, 1882)—*Decree—Execution—Sale under the execution—Purchaser at the sale—Estoppels against him.*—P obtained a money decree against V and, in execution of the decree, attached V's immoveable property which was already mortgaged with possession to G. At the Court sale, P himself purchased the property which was sold subject to the mortgage claim of G. Before the sale was confirmed

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

by the Court and the decree was satisfied, P brought a suit against G for a declaration that G's mortgage was without consideration, and made with a view to defraud P. It was contended by the defendant G that P, whose decree was satisfied, was no longer a judgment-creditor but only a purchaser; and that what was attached and sold was an equity of redemption, and that the purchaser could not therefore claim more than he brought: *Held*, negativing the first contention, that the suit was brought by P before the sale had been confirmed, and before the decree had been satisfied and while P was still a judgment-creditor. *Held*, further, that what was attached and sold was the immoveable property believed to be unincumbered and not the equity of redemption. A purchaser at the Court sale of attached property believed to be incumbered (s. 287, Civ. Pro. Code), is not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee. GANESH MORESHWAR v. PURSHOTTAM BALKRISHNA RODE, **11 Bom. L.R. 26 = 5 M. L.T. 228 = 33 B. 311 = 1 Ind. Cas. 106.**

(4062)—*O.* 21, *rr.* 66, 70 (= *Civ. Pro. Code*, 1882, *s.* 287—*Execution of decree—Sale in execution—Duties of Court selling property by public auction.*—A Court executing a decree by sale of property is bound to do what it can to secure the accuracy of the information contained in the proclamation of sale and ought not to trust for such information to persons whose knowledge is obviously not at first hand. DIN DAYAL v. NAZIR-UDDIN-AHMAD, **A.W.N. 1901, 167.**

(4063)—O. 21, rr. 66, 70—*See* EXECUTION OF DECREE—MISCELLANEOUS, 2 Bom.L.R. 203, A.W.N. 1888, 151.

(4064)—*O.* 21, *rr.* 66 *and* 70, *s.* 73, *O.* 21, *rr.* 90, 91, *s.* 115 (= *Civ. Pro. Code*, 1882, *ss.* 287, 295 (*b*), 311, 313 *and* 622)—*Execution sale of mortgaged property—Mortgagee's right to have property sold free of mortgage—Discretion of Court—High Court's powers of interference under s.* 622.—Where property liable to be sold in execution is subject to a mortgage, the law gives no right to the mortgagee to have the property sold free of his mortgage, giving him the same rights against the sale proceeds as he has against the property. It is left to the discretion of the Court to make an order under cl. (*b*) of s. 295. If his mortgage is not inserted in the proclamation of sale, his interests are in no way affected. If his mortgage is a good one, the Court cannot affect his rights over the property, even if it sells the property as being unincumbered. This being so, the Chief Court should not exercise its revision powers on behalf of a mortgagee, even when there has been material irregularity in not setting forth in the sale proclamation anything about his mortgage.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Still-less should the Court interfere to order an enquiry, which a mortgagee cannot claim, or to order a Court to act under s. 295 (*b*). HLA BAW v. S.K.R. MUTHIAH CHETTY, **3 L.B.R. 275.** (2 L.B.R. 333, *R*; 4 M. 383, 13 C. 225, 9 M. 372, 6 B. 582, 584, *Cited*).

(4065)—*O.* 21, *rr.* 66, 70, *s.* 115 (= *ss.* 287, 622, *Civ. Pro. Code*, 1882)—*Appeal from order not appealable, treated as application for revision under s.* 622—*Order transgressing decree—Effect.*—Though an order is not appealable, an appeal from it can, in a proper case, be treated as an application for revision under s. 622, and the High Court can interfere with the same in such revision. A decree ordered all the property to be sold, and the question of the lots into which it was to be divided and the order in which they were to be sold was reserved for consideration when the proclamation should be settled. *Held*, that an order which purported to be under s. 287 and which directed the order in which the shares of the judgment-debtors were to be sold, was a judicial order not warranted by the section under which it purported to be made. It was one passed *ultra vires*. KRISHNASWAMIER v. SWAMINADHIAR, **4 M. L.T. 352.** (27 M. 259, *R.*)

(4066)—*O.* 21, *rr.* 66, 70, 68, 90 (= *Civ. Pro. Code*, 1882, *ss.* 287, 290, 311)—*Omission in sale proclamation of place of sale—Sale subsequent to notified date—Material irregularity, substantial injury inferrible from.*—The non-compliance with ss. 287 and 290 of the Code of Civil Procedure would amount to more than a mere irregularity. Some substantial injury must have resulted from omitting, from the notification, the name of the place of sale and by holding the sale on a date subsequent to the one advertised. *Quære*, whether the material irregularities of the above description were not in themselves sufficient, within the meaning of para. 1 of s. 311 of the Code, to justify a Court in setting aside a sale without inquiring whether such 'material irregularity' had resulted in substantial injury within the meaning of the second paragraph of the section. JASODA v. MATHURA DAS, **9 A. 511 = A.W.N. 1887, 145.** (7 A. 289, *R.*) [*N.F.* 14 M. 227; *R.*, 10 A. 506, 11 A. 333, 12 A. 440, 18 C. 422, 21 A. 140.]

(4067)—*O.* 21, *rr.* 66, 70, 69, 90 (= *Civ. Pro. Code*, 1882, *ss.* 287, 291, 311)—*Sale proclamation not affixed on property—Material irregularity—Successive short adjournment for more than seven days—Fresh proclamation, necessity of—Substantial injury—Paucity of bidders—Inference of the one from the other.*—Where the sale proclamation was not fixed upon the property which was afterwards sold but fixed to a school house upon the property not of the judgment-debtor, but of the decree-holder, at a distance of half-a-mile from the judgment-debtor's property, *held*, it was a material irregularity in the publication of the sale. Where there is a series of short postponements less than seven days which taken together in the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of (1859)—*continued.*

aggregate amount to more than seven days, a fresh proclamation of sale is necessary under s. 291, Civ Pro. Code, and the issue of a fresh proclamation is a material irregularity in the sense of s. 311, Civ. Pro. Code. (11 C. 658, *R.*) Where there were material irregularities in publishing the sale and the property fetched a very inadequate price and there were only a few bidders and other persons would have bid at the sale had they known when it was to be held and a very much higher price—a price very nearly approaching the asserted value—might have been fetched had the other persons known of the date of sale, it may be inferred as a matter of fact that the inadequacy of price was due to the paucity of bidders which was directly the result of the irregularities in publishing the sale. JAMINI MOHAN NUNDY v. CHANDRA KUMAR ROY, **6 C.W.N. 44.** [*R.*, 6 C.W.N. 48, 30 C. 1=6 C.W.N. 688, 31 C. 815=8 C W.N. 686.]

(4068)—*O.* 21, *rr.* 66, 70, 71 (=*Civ. Pro. Code*, 1882, ss. 287, 293)—*Nature of re-sale under* s. 293—*Decree holders right to recover deficiency of price between sale and re-sale—Change in vauls of property between sale and re-sale-rights of decree-holder—Regular suit.*—The re sale contemplated by s. 293 of the Civ. Pro. Code, must be a sale of the same property that was first sold, and under the same description, and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property, should disentitle the decree-holder to recover the deficiency of price under s. 293. *Semble.*—Even if the difference of description were due to the change in the value of the property, between the sale and the re-sale, owing to causes which are beyond the control of anybody, although the decree holder may, under certain circumstances, be entitled to recover damages from the defaulting purchaser, that must be by a regular suit and not by an application under s. 293. BAIJNATH SAHAI v. MOHEEP NARAIN SINGH, **16 C. 535**

(4069)—*O.* 21, *rr.* 66, 70, 90 (=*C.P.C.*, 1882, ss. 287, 311)—*Omisison to mention amount of Goveernment tax an irregularity within the meaning of* s. 311.—Paragraph (*c*) of s. 287, Civ. Pro. Code, expressly requires that a proclamation of an intended sale should state in its schedule the revenue assessed upon the land to be sold. Consequently, the omission so to state the amount of Government tax is a "materia irregularity" within the meaning of s. 311 of the Code entitling the judgment-debtor to claim an opportunity of proving that he has sustained substantial loss by reason of the irregularity. MADARASAH MARACAYAR v. PALANIAYAPPA CHETTI, **23 M. 628.**

(4070)—*O.* 21, *rr.* 66, 70 and 90 (=*ss.* 287, 311, *Civ. Pro. Code*, 1882)—*Under statement of value in sale proclamation, if material irregularity.*—Deliberate under-statement of value of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

property in a sale-proclamation is a material irregularity within the meaning of s. 311, Civ. Pro. Code, and a sale may be set aside on that ground. SIVADURGA DEBI v. RAJMOHAN PODDAR, **15 C.W.N. 577.** (20 A. 412=2 C.W. N. 550, *F.*)

(4071)—*O.* 21, *rr.* 66, 70, 90 (=*Civ. Pro. Code*, 1882, ss. 287, 311)—*Mis-statements as to value — Material irregularity.*—Mis-statement of the value of property calculated to mislead possible bidders, made by a Court in a sale-proclamation following the affidavit of the decree-holder, constituted such a "material irregularity in publishing and conducting" the sale as to bring the case within the special remedy provided by s. 311. SADATMAND KHAN v. MUSST PHUL KUAR, **2 C.W.N. 550, P C.= 20 A 412=25 I.A 146 : 7 Sar. 380.** [*F.*, 23 M. 568, 6 C.W.N. 836, 3 O.C 1; *R.*, 6 C.W.N. 48, 8 C.W.N. 257, 32 C. 542=9 C.W.N. 487; *D.*, 26 C. 324, 31 C. 922=8 C.W.N. 264.

(4072)—*O.* 21, *rr.* 66, 70, 90 (=ss. 287 *and* 311, *Civ. Pro. Code*, 1882)—*Sale proclamation, place for sale fixed in—The conducting of the sale elsewhere a material irregularity.*—In this case, contrary to the express order of the Court to sell the property in question at the premises, the sale proclamation advertised the sale to take place at the Court-house and the sale was in fact conducted at the premises of some of the buildings advertised for the sale. *Held*, this was a serious irregularity, which may well be presumed to cause substantial injury by keeping away bidders and an irregularity empowering the Court to set aside the sale under s. 311 of the Code, under which proof of substantial loss was not essential; and further, the mistake in the sale proclamation in question, as regards the place of sale, would, in the ordinary course of events, result in causing injury to the person, whose property was advertised for sale. DUNI CHAND v. ATMA SINGH, **132 P.R. 1906=11 P.L.R. 1907.** (22 A. 140, 23 M. 227, P.C., 24 C. 291, 33 C.), 32 C. 542, 20 A. 412 and 30 P.R. 1899, *R.*)

(4073)—*O.* 21, *rr.* 66, 70, 90 (=ss. 287, 311, *Civ. Pro. Code*, 1882)—*Sale published or conducted with material irregularity—The nature of property omitted to be mentioned.*—A sale proclamation was issued under s. 287. It stated only the *khasra* numbers of the property, but omitted to specify the properties, *viz.*, a tea garden and the buildings attached thereto. There was no indication in the proclamation that any houses and buildings were intended to be sold; hence there were no bidders *Held*, that such a proceeding was a material irregularty; that the proclamation was faulty and was calculated to mislead intending purchasers and prejudice the sale and did actually prejudice it. Sale set aside and re-sale ordered. PEACHEY v. JAMNA DAS, **47 P.R. 1905= P.L.R. 1905.** [*R.*, 52 P.R. 1909.]

(4074)—*O.* 21, *rr.* 66, 70, 90 (=*Civ. Pro. Code*, 1882, ss. 287, 311)—*Sale proclamation*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Contents of—Non-specification of incumbrances—Under-valuation—Irregularity—Inadequacy of price—Substantial injury—Inadequacy of price, result of irregularity—Proof.—The absence of specification, in the sale proclamation, of the incumbrances to which property advertised for sale is subject and which are required by cl. (*c*) of s. 287, Civ. Pro. Code, to be specified, coupled with the fact that the value of the property as stated in the sale proclamation was much below the proper price, amounts to a material misrepresentation which must be treated as a material irregularity in publishing the sale, within the meaning of s. 311. (2 C.W.N. 550=25 I.A. 146, *Relied on.*) Where a property subject to incumbrances was worth at least ninety thousand rupees, and was sold only for forty thousand, the judgment-debtor must be held to have sustained substantial injury. The fact that the inadequacy of price was the result of irregularity in publishing the sale, may either be established by direct evidence or be inferred from the circumstances of the case. MOTI LAUL ROY v. BHAWANI KUMARI DEBI, **6 C.W.N. 836.** (20 C. 599, 24 C. 291, *Rel. on.*)

(4075)—*O.* 21, *rr.* 66, 70, 90 (=*ss.* 287, 311, *Civ. Pro. Code*, 1882)—*Misrepresentation of value of property in sale proclamation—Decree holder bidding through* benamidar—*Substantial injury—Fraud—Setting aside sale.*—*Held*, that the conduct on the part of the decree-holder, who has obtained leave to bid at the auction, in offering bids through a *benamidar*, considerably in excess of the value which he deliberately stated in the sale proclamation, is calculated to mislead and is consequently fraudulent. NANDA KUMAR SAHA v. GOBIND MOHAN DAS, **6 Ind. Cas. 135.**

(4076)—*O.* 21, *rr.* 66, 70, 90 (=*Civ. Pro. Code*, 1882, *ss.* 287, 311)—*Misdescription in sale proclamation—Proof of substantial injury.*—A judgment-debtor who must have known, what description of the property had been given in the sale proclamation, should not lie by, allow the sale to proceed, and then come forward to get the sale set aside, alleging that the descriptions in the proclamation did not satisfy the requirements of s. 287 of the Code, and, in order to come in under s. 311 he must prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. ARUNACHELLAM v. ARUNACHELLAM, **12 M. 19, P.C.=18 I A. 171=3 Sar. 265.** (9 C. 656=10 I.A. 25, *R. & F.*) [*F.*, 21 C. 66, *P.C.* 18 A. 141; *Appr.*, 13 A. 561; *Expl.*, 6 C.W.N, 42; *R.*, 5 M L.J. 70, 24 C. 291, 1 O.C. 186, P.L R. 1900, 161, 4 O.C. 331, 8 C.W.N. 257, 4 O.C. 379, 6 O.C. 61, 8 C.W.N. 686=31 C. 815, 1 C.L.J. 91=9 C.W.N. 348=34 C. 509. 9 C.W.N. 487=32 C. 542, 3 A.L.J. 140=1906, A.W.N. 3=28 A. 273, U.B.R. 1907, 2nd Qr., C.P.C. 311, 96 C.L.J. 62=11 C.W.N. 848; *D.*, 6 C.W.N. 48.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4077)—*O.* 21, *rr.* 66, 70, 90 (=*ss.* 287 *and* 311, *Civ. Pro. Code* 1882)—*Profits—Execution of decree—Finality of order—Sale, Objection to validity of—Sale proclamation, specification in, of profits of land to be sold.*—Before the sale in execution of a decree took place, the question arose as to whether the profits of the share were correctly stated in the sale proclamation, and the Court executing the decree found that they were. In objecting to the sale under s. 311, Civ. Pro. Code, the same question was raised. *Held*, that the decision was final between the parties. *Held*, also, that, under s. 287, Civ. Pro. Code, the profits of land to be sold should be stated in the sale proclamation, as it provides that the property to be sold shall be specified as fairly and accurately as possible, and that every other thing, besides those mentioned in the section, which the Court considers material for the purchaser to know in order to judge of the nature and value of the property, shall also be specified. KAZI SAIYAD MOHAMMAD AKBAR v. PANDIT MANO HAR NATH, **4 O.C. 329.**

(4078)—O. 21, rr. 66, 70, 90—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 20 A. 412, P.C.=25 I.A. 146=2 C.W.N. 550.

(4079,—*O.* 21, *rr.* 66, 70, 95, 96 (=*Civ. Pro. Code*, 1882, *ss.* 287, 318, 319)—*Execution of decree—Delivery of possession of property not specified in sale proclamation or sale certificate—Power of High Court to interfere in revision.*—Certain decree-holders purchased property which was described in the sale proclamation only by the extent which it covered, but, in subsequently applying for delivery of possession, inserted in their application what had not been set out either in the sale proclamation or sale-certificates, namely, the specific shares of property held by the several judgment-debtors over which they prayed for possession. The executing Court directed that possession should be delivered as prayed for and specified the particular shares of each particular judgment-debtor over which possession was to be so delivered. The Court was, under the circumstances, *held* to have acted without jurisdiction and illegally, so that, even though the matter which it had wrongly decided in execution was one in respect of which, a separate suit was maintainable, yet the High Court had, under the special circumstances of the case, power to interfere by way of revision and to direct the Subordinate Court to take up the proceedings at the point where it went wrong and to deliver possession to the purchaser strictly in accord with, and only over the property set out in, the sale-certificates. GHULAM SHABBIR v. DWARAKA PRASAD, **18 A. 163=A.W.N. 1896, 18.** (15 A. 405, 11 A. 383, 19 C. 683, *R.*) [*R.*, 80 P.L.R. 1901.]

(4079-*a*)—*O.*21, *rr.* 66, 90—*Auction sale, setting aside of—Notice to judgment-debtor, object of—Judgment-debtor not objecting, effect of—Hour*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of sale, non mention of, in sale proclamation—Material irregularity.—Where the under statement of value in the sale proclamation was calculated to mislead bidders, and to prevent them from offering adequate prices or from bidding at all, and the sale has resulted in an altogether inadequate price it is liable to be set aside. (20 A. 412, 25 I.A. 146, *F.*, 12 C.W.N. 757, *Diss.*) Notice to the judgment-debtor under O. XXI, r. 66 Sub-Rule (2) of the Code only enables him to put his case before the Court, but if the decree-holder insists that a much smaller valuation should be inserted in the sale proclamation and the Court accepts his view of the matter, the decree-holder proceeds to the sale at his risk and its validity may be subsequently challenged by the judgment-debtor. If the judgment-debtor, with notice of the proceedings, does not object to the entry in the sale proclamation at that stage, a subsequent objection by him on the ground of inaccuracy or insufficiency of description, is not likely to be entertained by the Court. The enquiry under O. XXI, r. 66 of the Code is intended to be of a summary character. The validity of judicial sales, properly conducted, should be supported and should not be allowed to be assailed on technical grounds. At the same time, the purity of judicial proceedings in connection with execution sales should be secured to at least a reasonable extent. *Obiter* :—When a sale is adjourned under s. 291 of the Code of 1882, it is necessary to mention the hour of sale and its non-specification is a material irregularity. PRAN-SINGH v. JANARDAN SINGH, **14 C.L.J. 541.** (6 C.W.N. 48, *R.*)

——O. XXI. r. 67 (=1882, s. 289=1877, s 289 1859, s. 249).

See SALE—SALE IN EXECUTION OF DECREE.

(4080)—O. 21, r. 67—Payment of decretal money and costs for procuring stay of sale—*See* TRANSFER OF PROPERTY ACT, 1882, s. 89 A.W.N. 1905, 161=28 A. 28.

(4080 *a*)—O. 21, r. 67—*See* NOS. 3456, 3785, 3786, 3787, 3788, 4051-*b*, 4052, 4052-*a*, *supra*.

(4081)—*O.* 21, *rr.* 67, 90 (=*Civ. Pro. Code*, 1877, *ss.* 289, 311)—*Irregularity in proclamation of sale.*—Where the judgment-debtor applied to have a sale in execution of a decree set aside on the ground that, as required by s. 289, Civ. Pro Code, the sale had not been proclaimed on the spot where the property was attached, *held* that the irregularity in question was a grave one; such irregularity coupled with the fact that the same property was purchased by the judgment-debtor 20 years previously in Court auction for about double the amount it had now realised, vitiated the sale. GUR PRASAD v. DEBI PEASAD, **A.W.N. 1882, 53.**

(4082)—*O* 21, *rr.* 67, 90 (=*ss.* 289, 311, *Civ. Pro. Code*, 1882) — *Execution sale of separate properties under single decree—Sale*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

proclamation, service of—Execution sale, setting aside of—Irregularity and injury, necessary connection between.—Where several separate properties are attached under one proceeding, or order in one execution case, the attachment is separate and distinct as regards each; the words "on the spot where the property is attached" in s. 289 must refer to each property attached, and not to the whole in a lump. So that, when distinct properties are proclaimed for sale in one execution, the omission to affix copies of the proclamation in *all* of such properties would be an irregularity in the publication. [*D.* 96 P.L.R. 1902; *commented upon*, 12 C.W.N. 757.] In the absence of evidence to connect an injury with an irregularity (under s. 311 of the Civ. Pro. Code), the one must, to justify the setting aside of an execution sale, at least flow reasonably and naturally from the other and be attributable to it alone. TRIRPURA SUNDARI v. DURGA CHURN PAL, **11 C. 74.** [*R.*, 11 C. 658, 11 A. 333=9 A.W.N. 115.]

(4083)—*O. rr.* 21, 67, 90, 93 (=*ss.* 289, 311, 312, *Civ Pro. Code*, 1882)—*Execution of decree—Proclamation of sale—Appellate Court's order confirming sale—Order not subject to second appeal.*—A sale of revenue-paying land is not *ipso facto* void, by reason of a copy of the sale proclamation not having been fixed up in the Collector's Office, as required by s. 289 of the Code of Civil Procedure, for, there is nothing in the Code, which renders that formality a necessary preliminary to the validity of the sale. An omission so to fix up a copy of the sale proclamation in the Collector's office, in neglect of the provisions of s. 289 of the Code, is an irregularity, the remedy for which can only be by an application under s. 311 [*F.* & *R.*, 22 C. 802, P.L.R. 1900, 157.] Where an appellate Court passes an order under s. 312 confirming a sale, *held* that such an order cannot be the subject-matter of a second appeal. NANA KUMAR ROY v GOLAM CHUNDER DEY, **18 C 422.** [*F.*, 19 M. 29, 28 C. 4=5 C.W.N. 124, P.L.R. 1900, 157, 6 C.L.J. 102.]

—— O. XXI, r. 68 (1882, s. 290=1877, s. 290).

See SALE — SALE IN EXECUTION OF DECREE.

(4084)—*O.* 21, *r.* 68 (=*s.* 290, *Civ. Pro Code*, 1882)—*Non compliance with — Limitation.*—Non compliance with the provision of s. 290, Civ. Pro. Code, 1882, in conducting a sale, does not by itself make the sale a nullity. KOKIL SINGH v. EDAL SINGH, **31 C 385.** (31 C. 70, 66, *R.*) [*R.*, 35 C. 61, F.B.=6 C.L.J. 320=11 C.W.N. 1111, F.B.]

(4085)—*O.* 21, *r.* 68 (=*Civ. Pro. Code*, 1882, *s.* 290)—*Effect of, upon sale*—The infringement of s. 290, Civ. Pro. Code, is not a mere irregularity, but vitiates the sale. SADHUSARAN SINGH v. PANCH DEO LAL **14 C. 1.** (7 A. 289, *R.*) [*F.*, 5 C.L.J. 687; *R.*, 18 C. 496.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4086)—*O.* 21, *r.* 69 (=*Civ. Pro. Code*, 1877, s. 290)—*Application by judgment-debtor on date of sale for sale of part only of property—Fresh proclamation.*—An application by the judgment-debtor on the day of sale, that a portion only of the advertised property may be sold would not amount to a "consent," under s. 290 of the Civ. Pro. Code (of 1877) so as to dispense with the necessity of a fresh proclamation therefor. HARBUNS SAHAI v. BHAIRO PERSHAD SINGH, **5 C. 259=4 C.L.R. 23.**

(4087)—*O.* 21, *r.* 68 (=*s.* 290, *Civ. Pro. Code*, 1882)—*Sale in execution of decree—Conduct of sale before expiry of time mentioned in—Irregularity—Setting aside of sale.*—The conduct of a sale of immoveable property by a Court before the expiry of the time mentioned in s. 290 of the Civ. Pro. Code, 1882, and without the consent of the judgment-debtor, constitutes an irregularity, and the sale would be set aside where such irregularity causes substantial injury to the judgment-debtor. NATHU v. HARBHUG, **A.W.N. 1885, 304.** [*R.*, **11 A. 333.**]

(4087-*a*)—O. 21, *r.* 68—*See* NOS. 3785, 3787, 3788, 3789, 4066, *supra.*

(4088)—*O.* 21, *r.* 69, *s.* 115 (=*ss.* 290, 622, *Civ. Pro Code*, 1877)—*Summary powers of High Court—Setting aside an invalid Court-sale—Charter Act, s.* 15.—Assuming that the requirements of s. 290 of the Civ. Pro. Code (regarding the interval between a Court-sale and the proclamation) are essential to the validity of the sale, the High Court can, under proper circumstances, set aside a sale, effected not in accordance with such requirements notwithstanding an appellate order by a Judicial Commissioner confirming such sale. (*Note.*)—In this case the Full Bench did not answer the question whether the High Court could set aside the order of the Judicial Commissioner under s. 15 of the Charter Act or s. 622 of the Civ. Pro. Code. BHEKRAJ KOERI v. GENDH LAL TEWARI, **5 C. 878, F.B.**

—— O. XXI, r. 69 (=1882, s. 291=1877, s 291 =1859, s. 249).

See SALE — SALE IN EXECUTION OF DECREE.

(4089)—*O.* 21, *r.* 69 (=*Civ. Pro. Code*, 1882, *s.* 291)—*Transfer of Property Act (IV of* 1882), *s.* 89—*Execution of decree—Stay of sale upon payment into Court of amount decreed and costs.*—S. 291, Civ. Pro. Code, must be taken to have modified s. 89 of Act IV of 1882 when the debt and costs (including the costs of the sale) or tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs had been paid into the Court that order the sale. HARJAS RAI v. RAMESHAR, **20 A. 354=A.W.N. 1898,**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

70. (19 A. 205, *F.*) [*F.*, 28 A. 28=A.W.N. 1905, 168]

(4090-91)—*O.* 21, *r.* 69 (=s. 291, *Civ. Pro. Code*, 1882)—*S.* 89, *Tr. P. Act—Stay of sale—Effect of order absolute for sale—Adjournment of sale—Jurisdiction of Court.*—S. 291 of the Code is not necessarily and in all cases inconsistent with the provisions of s. 89, Tr. P. Act. It only provides, that before the lot is knocked down, if the debts and costs are paid to the Court Officer, the sale shall be stopped. After an order absolute for sale has been made under s. 89, Tr. P. Act, the Court has no power to adjourn the sale of the mortgaged property, with a view to give time to the mortgagor to raise money to pay off the decree. It could adjourn the sale to a future date in order to have a better sale, in the event of want of bidders, or for any other similar reason. (25 C. 703, *D.*; 21 B. 300, *Diss.*) The order absolute does not extinguish the judgment-debtor's ownership in the property until the sale actually takes place. *Obiter.*—When a sale is adjourned by the Court, as a matter of indulgence to the judgment-debtor, terms must be imposed upon him. SHYAM KISHEN v. SUNDER KOER, **31 C. 373.** [*F.*, 31 C. 863=8 C.W.N. 684, 12 C. W.N. 282=7 C.L.J. 581.]

(4092)—*O.* 21, *r.* 69 (=s. 291, *Civ. Pro. Code*, 1882)—*Stay of proceedings—Fresh proclamation necessary after each stay.*—Under s. 291 of the Code of Civil Procedure when the stay of proceedings is removed, a fresh proclamation ought to be issued in complaince with the terms of that section. When such a proclamation has not been issued, the judgment-debtor's remedy is to object to the confirmation of the sale and not to impeach the sale by regular suit. GUJRAJMATI v. SAIYID, **9 Bom. L.R. 83.**

(4093)—*O.* 21, *r.* 69 (=s. 291, *Civ. Pro. Code*, 1882)—*Power of Court to adjourn sale—Application by guardian of minor judgment-debtor—Guardian acting in good faith, whether has power to consent to waive fresh proclamation—Transfer of Property Act (IV of* 1882), *s.* 89—*Conflict with s.* 299, *Civ. Pro Code—Estoppel—Party obtaining benefit of order not to ask same to be disregarded.*—There is nothing to prevent the guardian *ad litem* of a minor judgment-debtor, acting in good faith, from giving the consent contemplated by s. 291, Civ. Pro. Code, 1882, so as to bind the minor thereby; that is, the guardian acting in good faith has the power to waive a fresh proclamation and have the sale adjourned. There is no conflict between s. 89 of the Transfer of Property Act and s. 291, Civ. Pro. Code, 1882. It is not ordinarily open to a party, who has obtained and enjoyed the benefit of an erroneous order, afterwards to turn round and ask that the order should be treated as a nullity and disregarded. BEPIN BEHARY MITTER v. JOTIN-

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

DAR NATH GHOSH, **6 Ind. Cas. 813=14 C. W. N. 1019.**

(4094)—*O 21, r. 69, Civ. Pro. Code*, 1882, s. 291)—*Adjournment of sale—Procedure.*—Adjournments of sales should be to a specified day and hour. The exact provisions of the Code should be followed in these matters. VENKATASUBBARAYA CHETTI v. ZAMINDAR OF KARVETNAGAR, **20 M. 199.** [*Appr.*, 6 C. W.N. 48 ; *R.*, 31 C. 815=8 C.W.N. 686.]

(4095)—O. 21, r. 69—*See* TRANSFER OF PROPERTY ACT, 1882, s. 89, 31 C. 863=8 C. W.N. 684.

(4095-*a*)—O. 21, r. 69—*See* NOS. 80, 1024 1025, 1026, 1027, 3456, 4051-*b*, 4052, 4052-*a*, 4052-*b*, 4067, *supra*.

(4096)—O. 21, r. 69, s. 47—*See* SALE—SALE IN EXECUTION OF DECREE—STAY OF SALE, **10 A. 1=A.W.N. 1887, 238.**

(4097)—O. 21, rr. 69, 72, 84, 85, 86, 90, 92—Date of auction sale for purposes of art. 166, Limitation Act—Sale where 25 per cent. not deposited, effect of—*See* LIMITATION ACT, 1908, art. 166, 1 P.W.R. 1909=1 Ind. Cas. 12.

(4098)—O. 21, rr. 69, 89—*See* TRANSFER OF PROPERTY ACT, 1882, s. 89, 19 A. 205=A. W.N. 1897, 47.

(4099)—*O. 21, rr. 69, 90 (=Civ. Pro. Code, 1882, ss. 291, 311)—Sale not taking place on date published for sale — Irregularity.*—The sale of certain properties was fixed for a certain day. The sale did not take place on that day or on the following day, for the reason that the first day was a Sunday and the next day was a holiday also on account of a well-known Muhammadan festival. On the next day after that, the sale took place without any fresh publication and the property was knocked down to the first bidder at a low price. The decree-holder thereupon applied to the Court to set the sale aside on the ground of grave irregularity in publishing the sale, and depreciation in the price in consequence of such irregularity. *Held* that there could not be a much graver irregularity than to fix and publish a date on which the sale of the property could not be held, that there were no proceedings on the first or second day (Sunday or Monday) such as are contemplated by s. 291, Civ. Pro. Code, and that consequently the sale on the 3rd day (Tuesday) was irregular and illegal and that there was a strong presumption that the price realized must have been affected by the irregularity. BRIJ NANDAN DAS v. DAL DAPAT SINGH, **A.W.N. 1886, 127.**

(4100)—*O. 21, rr. 69, 90 (=ss. 291, 311, Civ. Pro. Code, 1882)—Failure to comply with requirements of s. 291—Paucity of bidders—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Material irregularity — Substantial injury—Setting aside of execution sale—"Direct evidence."—The omission to fix the hour for execution-sale, as required by s. 291, Civ. Pro. Code, may amount to a material irregularity. The failure to comply with the requirements of s. 291, together with a paucity of bidders on the date of sale, owing to which the sale fetched an inadequate price for the property sold, were sufficient grounds for setting aside the sale. (21 C. 66, P.C., *Expl.*) [*F.*, 4 L.B.R. 123 ; *Appr.*, 6 C.W.N. 44 ; *R.*, 6 C.W.N. 48, 96 P. L.R. 1902, 9 Bom. L.R. 651=6 C.L.J. 11=11 C.W.N. 739, P.C., 14 Bur.L.R. 96=U.B.R. 1907, 2nd Qr., C.P.C., 311, 9.] There need be no *direct evidence* to show that substantial injury is the direct result of the material irregularity. It is enough, under s. 311, if there is *evidence* showing that substantial injury is the necessary result of irregularity complained of. SURMO MOYEE DEBI v. DAKINA RAJAN SANYAL, **24 C. 291.** (9 C. 656, P.C., 12 M. 19, P.C. *Expl* ; 20 C. 599, *R.*) [*R.*, 6 O.C. 61, 30 C. 1, 31 C. 815=8 C.W.N. 686, 132 P.R. 1906=11 P.L.R. 1907 ; *Rel. on*, 6 C.W.N. 936.]

(4101)—*O. 21, rr. 69, 90 (=Civ. Pro. Code, 1882, ss. 291, 311)—Adjournment of sale—Specification of hour—Omission to specify hour of sale—Material irregularity—Inadequacy of price—Direct evidence, necessity for.*—A Court must specify the date and hour of sale in the case of an adjournment, notwithstanding it is due to the application of the judgment-debtor. [*On appeal*, 34 C. 709, P.C.=11 C.W.N. 739=6 C.L.J. 11=9 Bom. L.R. 651=17 M.L.J. 353.] Omission to notify the hour of sale or the adjournment hour of sale is a material irregularity. (24 C. 291, 6 C.W.N. 48, 20 M. 159, *R.*) The law relating to irregularity in the publication of sale and inadequacy of price consequent thereto, discussed. For setting aside a sale, there must be evidence of circumstances which will warrant the necessary, or at least reasonable, inference that the inadequacy of price at the sale is the result of the irregularity, although there may not be direct evidence connecting an alleged material irregularity in the publication or conduct of a sale, with the inadequacy of price at such a sale, as cause and effect. MAHABIR PERSHAD SINGH v. DHANUK DHARI SINGH, **31 C. 815=8 C.W.N. 686.** (10 I.A. 25, 15 I.A. 171, 20 I.A. 176, 18 A. 37, 20 C. 599, 24 C. 291, 6 C.W.N. 44, 48, 688, 20 M. 159, *R.*)

(4102)—*O. 21, rr. 69, 90 (=Civ. Pro. Code, 1882, ss. 291, 311)—Sale in Court's precincts—Adjournment of sale without order of Court—Sale for less than actual value—Irregularity—Sale liable to be set aside.*—A sale in execution which was being conducted in the precincts of the Court-house was adjourned to another date without any order from the Court. The property was sold for far less than it is value.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Held that under s. 291, an order from the Court adjourning the sale was necessary. It was a fair inference that the sale of the property for less than its actual value was due to the irregularity in adjourning the sale. The sale was therefore liable to be set aside. ALAYAKKAMMAL v. ARUNACHALA CHETTY, **12 M.L.J. 97.**

(4103)—*O.* 21, *rr.* 69, 90 (=*Civ. Pro. Code*, 1882, *ss.* 291, 311)—*Hour of sale, non-specification of—Material irregularity—Adjournment of sale at the instance of judgment-debtor—Waiver of irregularities.*—When a sale is adjourned under s. 291, Civ. Pro. Code, it is necessary to mention the *hour* of sale and its non-specification is a material irregularity within the meaning of s. 311, Civ. Pro. Code. (24 C. 291, 6 C.W.N. 44, 20 M. 159, *R.*) [*R.*, 9 Bom. L.R. 651, P.C.=6 C.L.J. 11=11 C.W.N. 739, P.C., U.B.R. 1907, 2nd Qr., Civ. Pro. Code, 311.] The fact that the judgment-debtor consents that the sale should be held without the issue of a fresh proclamation does not indicate that he waives the non-specification of the hour of the day to which the sale is adjourned, inasmuch as he has no control over the form of the order of the Court. BHIKARI MISRA v. RANI SURJA MONI PAT MAHA DAI, **6 C.W.N. 48.**

(4104)—*O.* 21, *rr.* 69, 90 (=*Civ. Pro. Code*, 1882, *ss.* 291, 311)—*Material irregularity—Waiver—Adjournment of sale on application of judgment-debtor — Fresh sale proclamation—Estoppel.*—An application by a judgment-debtor for an adjournment of the sale "without issue of fresh proclamation and beat of drum" does not amount to a waiver preventing him to apply to set aside the sale held on the day adjourned on the ground that proclamation of sale was not served on each of the properties and consequently the sale fetched a low price, provided that when he presented his petition for adjournment he was ignorant of the fact that the proclamation had not been properly posted up on the various properties according to law; and such a waiver does not amount to a waiver of any fraud practised upon the judgment-debtor. PREO LALL PAUL CHOWDHURY v. RADHIKA PROSAD PAUL CHOWDHRY, **6 C.W.N. 42.** (3 I.A. 230, 15 I.A. 171, *R.*) [*Appr.*, 6 C.L.J. 62=11 C.W.N. 848; *R.*, 6 C.L.J. 111; *D.*, 2 C. L.J. 584.]

(4105)—*O.* 21, *rr.* 69, 90 (=*Civ. Pro. Code*, 1882, *ss* 291, 311—*Execution sale—Disparaging remarks by bystanders or purchasers other than decree-holder — Sale in execution of decree, practice regarding — Adjournment* — Disparaging remarks made by bystanders or by purchasers at an execution sale, other than the decree-holder, could not constitute such an irregularity as would render the sale liable to be set aside under s. 311, Civ. Pro. Code. (12 C.L.R. 404, *F.*; 7 C. 346 and 5 C. 308, *D.*) The practice of

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the Courts, under the Rules of the High Court, which have the force of law, is to place, on a list, all properties intended for sale in execution of a decree; and the sales commence on the day fixed, which must go on from day to day till the list is cleared. Each property is taken up in its turn. So, an adjournment of the sale of a particular property, owing to such procedure, is no adjournment within the meaning of s. 291. LAL MOHUN CHOWDHURI v. NUNU MOHAMED TALUKDAR, **17 C. 152.**

— O. XXI, r. 70 (=1882, s. 287 last para=1877 s. 287 last para=1859 s. 248).

(4105-*a*)—O. 21, r. 70—See NOS. 73, 363, 1020, 1021, 1022, 1023, 3447, 3456, 3457, 3471, 3479, 3785, 3938, 3939, 3973, 3974, 3975, 4051-*b*, 4052, 4052-*a*, 4052-*b*, 4053 to 4079, *supra*.

— O. XXI, r. 71=1882, s. 293 (=1877, s. 293 =1859, s. 254).

See SALE — SALE IN EXECUTION OF DECREE.

(4106)—*O.* 21, *r.* 71 (=s. 293, *Civ. Pro. Code*, 1882)—*Suit to set aside order—Recovery of deficiency on re-sale of property in execution —Absence of certificate from selling officer.*—S. 293 of the Civ. Pro. Code, contemplates that the officer holding the sale shall simply calculate what deficiency of price has taken place and what the expenses attending the re-sale were. The officer draws up the certificate and the Court thereon proceeds to order recovery of the amount of the deficiency on re-sale. Such order is in effect an administrative and not a judicial order, and there are no enactments or rulings against the maintainability of a sepacate suit to question such an order and the jurisdiction of the Court to try the same. The certificate, mentioned in s. 293 of the Code, as having to be issued by the officer conducting the sale, is not so essential a preliminary that without it a Civil Court cannot, at the instance of the judgment-creditor or judgment-debtor, order a recovery from the defaulter. Two things are provided for by that section. The first is that the deficiency of price and expenses attending the re-sale shall be entered in a certificate to be drawn up by the officer holding the sale. The second is that the deficiency in those expenses shall be recoverable from the defaulter in the manner set out. The first is n forth as a condition precedent to other, but each provision is independent of the other. TAPESRI LAL v. DEOKI NANDAN RAI, **19 A. 22=A.W.N. 1896, 168.**

(4107)—*O.* 21, *r.* 71 (=*Civ. Pro. Code*, 1877, s. 293)—*Setting aside execution sale—Irregularity.*—The fact that, without getting the defaulting purchaser of properties at an execution sale

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to make good the difference in price obtained at a re-sale, other properties of the judgment-debtor were put up and sold, would be no sufficient ground for setting aside the latter sale, where the debtor acquiesced in the cancelment of the re-sale and did not apply under the second part of s. 293 of the Code to have the difference recovered from the defaulter. GOUR CHUNDER BISWAS v. CHUNDER COOMAR ROY, **8 C. 291 = 10 C.L.R. 236.**

(4108)—*O.* 21, *r.* 71 (=*s.* 293, *Civ. Pro. Code*, 1882)—*Execution-sale—Substantial injury—Irregularity.*—Where, on an immediate re-sale of property which was first knocked down for Rs. 260, it fetched only Rs. 50, *held*, there was substantial injury to justify a setting aside of the re-sale, though the judgment-debtor could, under s. 293 of the Code, have recovered the difference in price from the defaulting purchaser at the first sale. BEEPIN CHUNDER SHICKDAR v. PURRESHNATH BISWAS, **9 C. 98.**

(4109)—O. 21, r. 71—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 25 C. 99 =2 C.W.N. 408, 16 C. 535.

(4109-*a*)—O 21, r. 71—*See* NOS. 74, 89, 1028, 1029, 4068, *supra* and NO. 4163, *infra.*

(4110)—O. 21, r. 71, s. 104, O. 43, r. 1—*See* APPEAL—MISCELLANEOUS, 14 A. 201, F.B. =A.W.N. 1892, 74, F.B.

(4111)—*O.* 21, *rr.* 71, 72, 84 (=*Civ Pro. Code*, 1877, *ss.* 293, 294, 305)—*Court-sale—Failure of purchaser to pay deposit—Re sale, liability for loss on—Execution sale—Purchase by decree holder without permission—Validity of sale.*—Where property is re-sold by reason of the first purchaser at Court sale making default in payment of the deposit required to be paid at the time of the sale by s. 306 of the Civ. Pro. Code, the first purchaser will be held liable to make up the deficiency of price which may occur at the re sale, and to pay the expenses of putting the property to a re-sale as provided by s. 293 of the Code. [*R.*, 12 M. 464, 3 L.B.R. 225.] If the decree-holder himself, or some other person on his behalf, purchases the property sold in execution of his decree, without previously obtaining the permission of the Court for making such purchase, the sale is not to be treated as void *ipso facto.* It will be a good sale so long as it is not set aside by the Court under the provisions of s. 294 of the Civ. Pro. Code, 1877. JAVHERBAI v. HARIBHAI, **3 B. 578.** [*R.*, 10 C. 757, 11 B. 586, 21 C. 554, 22 B. 634, 32 M. 242 = 5 M.L.T. 248 = 1 Ind. Cas. 211.]

(4112)—*O.* 21, *rr.* 71, 77, 84, 86 (=*Civ. Pro. Code*, 1877, *ss.* 293, 297, 306, 308)—*Auction-sale—Defaulting purchaser, liability of.*—The provision (s. 293 of the Civ. Pro. Code) for

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making a defaulting purchaser at a sale liable for deficiency on re-sale, now extends to all sales, whether of moveable or immoveable property, and also, to re-sale held under ss. 297, 306, or 308 of the Code. *Quære.*—Whether the case comes under s 244 of the Code. RAM DHANI SAHAI v. RAJRANI KOOER, **7 C. 337 = 9 C.L.R. 23.** [*F.*, 12 M. 454; *Appr.*, 2 C.W.N. 411; *Cited*, 3 L.B.R. 225; *Cons.*, 16 C. 535.]

(4113)—O. 21, rr. 71, 84—*See* APPEAL—DECREES AND EXECUTION OF DECREES, **12 M. 454.**

(4114)—*O.* 21, *rr.* 71, 84, 86 (=*ss.* 293, 306 *and* 308, *Civ. Pro. Code*, 1882)—*Re-sale—High Court General Rules and Circular Orders Civil, Ch. V, Rules 5 and 6—Poundage fee.*—A decree-holder bid for the property at an auction-sale and it was knocked down to him for Rs. 1,113. He failed to pay the poundage fee as laid down in rules 5 and 6 of the High Court's Rules and Circular Orders, and the property was put up for sale again, when he again purchased it for Rs. 700. *Held*, s. 293 of the Code applied, and not ss. 306 and 308, and the difference was caused by the purchaser's default. MADHU SUDAN DAS v. PURNA CHANDRA CHOWDHURI **9 C.L.J. 115 = 3 Ind. Cas. 286.**

(4115)—*O.* 21, *rr.* 71, 84, 86, 87 (=*ss.* 293, 306, 308, 309, *Civ. Pro. Code*, 1882)—"*Re-sold*" *and* "*put up to sale.*"—S. 293, Civ. Pro. Code, extends to re-sales held under ss. 306 and 308, and there is no substantial difference between the words "re-sold" and "re sale", which occur in ss. 308 and 309, and the words "put up again and sold" which occur in s. 306 (7 C. 337, *Rel on.*) S. 309, Civ. Pro. Code, does not apply to a case in which the property is put up again and sold forthwith under the provisions of s. 306, Civ. Pro. Code. RAJENDRA NATH ROY v. RAM CHARAN SINNA, **2 C.W.N. 411.**

(4116)—O. 21, *rr.* 71, 85, 86 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 254)—*Default of purchaser at execution sale—Remedy of judgment-creditor.*—Where the purchaser at an execution sale made default in paying the purchase-money, *held* that the judgment-creditor was not bound by s. 254, Civ Pro. Code, to proceed against the defaulting purchaser, but that he was entitled to recover the balance of his debt from his judgment-debtors, who may perhaps, have their remedy against the defaulting purchaser. ANANDARAV BAPUJI v. SHEKH BABA, **2 B. 562.** (7 W.R. 110, *D.*) *R.*, 24 M. 307.]

(4117)—O. 21, rr. 71, 85, 86—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 1 A. 181, F.B.

——O. XXI, r. 72 (=1882, s. 294=1877, s. 294.)

See SALE—SALE IN EXECUTION OF DECREE.

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(4118)—*O. 21, r. 72 (=s. 294, Civ. Pro. Code, 1882) — Decree — Execution — Auction sale—Decree-holder bidding for property with permission of Court—Right to set off.*—The first paragraph of s. 294 of the Civ. Pro. Code (Act XIV of 1882) requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off; in such a case, no set off can be allowed. HAZARIMAL FAKIRCHAND v NAMDEV RAKHMAJI, **10 Bom. L.R. 296=32 B. 379.**

(4119)—*O. 21, r. 72 (=Civ. Pro. Code, 1882, s. 294)—Set off of purchase-money against decretal amount—Rateable distribution of assets—Principle of distribution.*—The power given, in s. 294 of the Civ. Pro. Code, to the Court, to sanction, in a proper case in order to prevent trouble and inconvenience, a set-off, instead of a paymens in followed by a payment out, is not intended to alter the substantial nature of the transaction, and would not justify a purchaser, that has obtained this indulgence, to take advantage of it, so as to alter the substance of the transaction and alter the rights of other creditors, by rendering the purchase-money less applicable to the satisfaction of their debts. [*F.*, 11 M. 356; *R.*, 16 B. 91, U.B.R. 1904, 4th Qr., Limitation, sch. II, 13, 1 (3)]. Where certain creditors brought the whole of the property of their debtor to sale, in execution of their decree upon a mortgage of only a share therein, and themselves purchased it, and were allowed a set-off of a part of the purchase-money against their debt, *held*, in a suit for rateable distribution of the assets by another creditor, that the creditors were not entitled to deduct the sum, which was paid by them subsequently to clear off a mortgage held by the plaintiff in a share of the property, from the amount of the purchase-money, before the Court could determine the amount rateably distributable among the parties concerned. *Quære.* — Whether the creditors (defendants) could even reckon the sum so paid by them for paying off the plaintiff's mortgage as one of the claims for rateable distribution. TAPONIDI HORDANUND BHARATI v. MATHURA LALL BHAGAT, **12 C. 499.**

(4120)—*O. 21, r. 72 (=Civ. Pro. Code, 1877, s. 294)—Decree-holder purchasing property in execution-sale without Court's permission—Effect—Only voidable—Valid against trespasser.*—*Held* that s. 294 of Act X of 1877, did not render absolutely void a purchase by a decree-holder without the express permission of the Court executing the decree, but only voidable on the application of the judgment-debtor. Such a sale would be valid as against a trespasser, and the purchaser would be entitled to maintain a suit against him. SURAJMAN DEBI v. CHARAN. **A.W.N. 1882. 26.**

(4121)—*O. 21, r. 72 (=Civ. Pro. Code 1882, s. 294)—Auction purchaser, no decree-holder within meaning of—Assignee of decree by oral assignment—No status—No leave to bid necessary—Mortgage-decree—Leave to bid granted to mortgagee—Disability, cessation of*—The auction-purchaser is not a decree-holder within the meaning of s. 294, Civ. Pro. Code. An assignee of a decree by an oral assignment has no *locus standi* at all to apply for its execution, and it is not necessary for such an assignee to obtain leave to bid at the sale held in execution of such decree. Leave to bid at a sale held in execution of a mortgage-decree puts an end to the disability of mortgagee and places him in the same position as any other purchaser. DAKSHINA MOHAN ROY v. SRIMATI BASUMATI DEBI, **4 C.W.N. 474.** (16 I.A. 107, *F.*)

(4122)—*O. 21, r. 72 (=Civ. Pro. Code, 1877, s. 294)—Purchase by decree-holder without permission.*—The want of permission to bid under the Code of 1877 by the decree-holder purchaser does not invalidate the sale. PARAMASIVA v. KRISHNA. **14 M. 498=1 M.L.J 752.** [*Appr.*, 5 M L T. 248; *R.*, 22 B 624, 32 M. 242.]

(4123)—*O. 21, r. 72 (=Civ. Pro. Code, 1882, s. 294)—Decree-holder bidding without Court's permission-Sale voidable, not void.*—A purchase by the decree-holder, without permission of the Court, is not *ipso facto* void, but is valid until set aside under s. 294 of the Code. MOTI LAL ADHIKARI v RAMDOYAL DAS. **1 Ind. Cas. 645.** (10 C. 757, *D.*)

(4124)—*O. 21, r. 72 (=s. 294, Civ. Pro. Code, 1877)—Purchase of property by decree holder—Permission of Court.*—An execution sale of property to the decree-holder himself, without the express sanction of the Court is invalid, whether the objection is taken and pressed or not. RUKHINEE BULLUBH v. BROJONATH SIRCAR. **5 C. 308.** [*Appl.*, 10 C. 757; *R.*, 21 C. 554.]

(4124-*a*)—O 21, r. 72—*See* BOM. ACT V OF 1879, s. 182, 22 B. 271.

(4125)—O. 21, r. 72—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 13 C. 174.

(4126)—O. 21, r. 72—Judgment-creditor refused leave to bid at execution sale—Purchase by him *benami*, invalidity of—*See* BENAMI TRANSACTION—GENERAL, 10 C. 757.

(4127)—O. 21, r. 72—Before amendment by Act XII of 1879—*See* HINDU LAW—JOINT FAMILY, 5 B. 130.

(4127-*a*)—O. 21, r. 72—*See* MORTGAGE—REDEMPTION, 22 B. 624.

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(4128)—O 21, r. 72—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 19 C. 4.

(4129)—O. 21, r. 72—*See* MORTGAGE—MISCELLANEOUS, 7 O.C. 307.

(4130)—*O. 21, r. 72, s. 73 (=Civ. Pro. Code, 1877, ss 294, 295)—Rateable distribution of assets—Decree-holder for unascertained mesne profits.*—The holder of a decree for mesne profits (which is a decree for money) who has applied to the Court for ascertaining their amount, and for the attachment of immoveable property under s. 255, Civ. Pro. Code, comes within the purview of s. 295. S. 294 is to be read with s. 295, and to give effect to both, it must be held that the receipt given by the creditor-purchaser at the Court sale, can only be accepted for so much of the judgment debt as the assets applicable to its discharge may suffice to satisfy. VIRA RAGAVA v. VARADA, 5 M. 123. [*R.*, 11 M. 356, 16 B. 91, 2 M L.J. 288.]

(4131)—*O. 21, r. 72, s. 73 (Civ. Pro. Code, Act X of 1877, ss. 294, 295)—Applications for execution by competing decree-holders, effect of, on rights of purchasing decree-holder with permission of Court.*—A decree-holder cannot be deprived of the ordinary rights conferred upon him by s. 295 of the Civ Pro. Code merely because another decree-holder has been permitted to bid at the sale; for, while s. 294 of the Code is applicable as between the purchasing decree-holder and the judgment-debtor, and, for convenience, allows the former ordinarily to set off the purchase money against his decree, instead of paying the money into Court and drawing it out again the section must be taken as subject to the provisions of s. 295 in cases in which there are competing decree-holders who have applied for execution. SHRINIVAS v. RADHABAI AND MANJAPA, 6 B. 570. [*R.*, 16 B. 91]

(4132)—*O. 21, r. 72, s. 73 (=Civ. Pro. Code, 1882, ss. 294, 295)—Re-sale or rateable distribution*—Both M and C got decrees against a judgment-debtor and took out executions. C purchased the debtor's immoveable property himself with permission under s. 294 and set off the purchase money against his decree. M claimed rateable distribution and wanted C to elect a re-sale or deposit the proportionate sum in Court. *Held*, M's claim was good and summary process would do to help M. The Court can also refer him to a regular suit. MADDEN v, CHAPPANI, 11 M. 386. [*Exp.*, 5 M.L.T. 125; *R.*, 16 B. 91.]

(4133)—*O. 21, r. 72, s 73, O. 21, r. 92, s. 115 (=Civ. Pro. Code, Act XIV of 1882, ss. 294, 295, 312, 314, 622)—Scope of s. 294—Purchase by decree-holder without permission—Application by judgment-debtor's sons (not parties to suit) to set aside sale—Right of persons entitled to rateable distribution to apply under s. 294—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Effect of setting aside sale—Right of bona fide purchaser for value from purchaser at Court auction—Confirmation of sale before thirty days—Setting aside sale on application presented after expiry of thirty days—Power of High Court to intervene.—In cases in which, under s. 294 of the Code, a sale was liable to be set aside on the ground that the decree-holder himself made the purchase, directly or through another, the section only contemplated the setting aside of the sale *in toto* and did not warrant its being set aside in part. Under the section, an application could be made by the judgment-debtor or any other person interested in the sale. Persons entitled under s. 295 to rateable distribution in the assets realized by the sale, and as such interested in the sale, were entitled under s. 294 to apply for setting aside the sale. But the sons of the judgment-debtor who were not parties to the suit could not come in under the section as they are neither judgment-debtors, nor persons interested in the sale. The effect of setting aside a sale under s. 294 was that the judgment debtor who had been benefited by satisfaction of the decree, either in whole or in part, by reason of the sale, had to make restitution by the re-opening of the decree (the purchase money if paid being refunded to the decree-holder purchaser) and the decree-holder was responsible for any deficiency in the price on re-sale and for the expenses incidental thereto. As a purchase by the decree-holder without the permission of the Court (whether made by himself or through another person) was under s. 294 only voidable and not void, it could not be avoided against a transferee in good faith for valuable consideration. [*F.*, 30 M. 295=17 M.L.J. 165=2 M.L.T. 186.] Under ss. 312 and 314, no sale could be confirmed and become absolute before the expiration of thirty days reckoned from the date of the sale. Where a sale held in contravention of s. 294 of the Code was set aside on an application being made long after the expiry of the period of limitation prescribed therefor the High Court could intervene under s. 622 of the Code when the matter comes to its notice in a suit between the sons of the judgment-debtor and the purchaser, and set aside the order setting aside the sale on the ground that the lower Court had acted illegally and with material irregularity. MARIMUTHU UDAIYAN v. SUBBURAYA PILLAI, 13 M.L.J. 281.

(4134)—*O. 21, r. 72, s. 101, O. 43, r. 1 (=ss. 294 and 588, Civ. Pro. Code, 1882)—Appeal.*—An order under s. 294, Civ. Pro. Code, which is made appealable by s 588 (16), is an order setting aside a sale. No appeal lies from an order allowing a decree-holder to bid at the sale in execution of his decree. BACHNI KUAR v. CHARU CHANDER, A.W.N. 1883, 104.

(4135)—*O. 21, rr. 72, 84, 85, 86 (=Civ. Pro. Code, 1877, ss 294, 306, 307, 308)—Deposit by purchaser of immoveable property—Option to set off, when exercised—Waiver of cash deposit.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—The requirements of s. 396, Civ. Pro. Code, applying to all cases of sale of immoveable property under Ch. XIX, a decree-holder buying with permission under s. 294, and desiring to set off his purchase-money against the amount of the decree, is not exempt from the necessity of making, at the time of sale, a deposit of 25 per cent. on the amount of such purchase-money, and such deposit must be made in cash. The option so to set-off the purchase-money cannot be exercised by the purchaser until the confirmation and payment of expenses of the sale. Where, however, all parties interested in the amount to be deposited have waived their right to have that amount deposited in cash, the sale ought not to be set aside on the ground that the cash deposit has not been made. GOPAL SINGH v. ROY BUNWAREE LALL SAHOO, **5 C.L.R. 181.**

(4136)—*O.* 21, *rr.* 72, 85 (=*Civ. Pro. Code*, 1882, *ss.* 294, 307)—*Sale in execution of decree—Decree-holder—Purchase money, deposit of balance of—Decree-holder application by, to have balance of purchase money set-off against amount of decree—Forfeiture of deposit not made within* 15 *days.*—A decree-holder obtained permission to purchase property attached in execution of his decree, purchased it and deposited 25 per cent. of the price but failed to pay the balance of the price within 15 days as required by s. 307 of the Civ. Pro. Code. Later on, he applied that the balance of the purchase-money might be set off against the amount due under s. 294, Civ. Pro. Code. The application not having been presented within 15 days from the date of sale, the Court set aside the sale and directed that the 25 per cent. of the purchase-money, which had been paid, should be forfeited. *Held*, that it was not necessary that the application under s. 294, Civ. Pro. Code, should be made within 15 days from the date of sale and the reason for the provision in s. 307 of the Code does not exist in cases where the decree-holders are the purchasers. *Held* therefore, that, as the decree-holder applied to have the balance of the purchase-money set-off against the amount due under his decree, the application should have been allowed and the deposit should not have been forfeited. BADAMO v. SARJU PARSHAD, **3 O.C. 240.**

(4137)—*O* 21, rr. 72, 92, 91—*See* APPEAL—MISCELLANEOUS, 10 C. 368.

(4138)—O. 21, *r.* 72, *sch.* iii, *r.* 2 (=*Civ. Pro. Code*, 1882, *ss.* 294, 322)—*Executons conducted by Collector—"Person interested."*—The rule laid down in s. 294, Civ. Pro. Code, which falls under department G of Ch. XIX which governs the execution of all decrees, is of general application, and applies no less to a Collector acting under s. 322, *et seq.* of the Code, than to the Civil Court that transferred the execution to such Collector. It would lead to absurd conclusions to hold that, while no decree-holder could without permission bid at a sale held by a Deputy Collector under precepts of a Civil Court, he may bid without permission at a similar sale held under the orders of the Collector. A person who has got a decree against the judgment-debtor and whose decree is awaiting execution at the hands of the Collector against the judgment-debtor is "a person interested in the sale" within the meaning of s. 294, Civ. Pro. Code. RAKMINI v. MUNNI LAL, **A.W.N. 1887, 214.**

——O. XXI, r. 73 (=1882, s. 292=1877, s. 292.)

See SALE — SALE IN EXECUTION OF DECREE.

(4139)—*O.* 21, *r.* 73 (=*Civ. Pro. Code*, 1882, s. 292)—*Auction-sale—Vakil purchaser.*—S. 292 of the Code of Civil Procedure does not prohibit vakils of parties to a suit from purchasing property sold in execution of the decree. ALAGIRISAMI v. RAMANATHAN, **10 M. 111.** [*D.*, 15 M. 389.]

——O. XXI, r. 74 (New).

See SALE — SALE IN EXECUTION OF DECREE.

(4140)—O. 21, r. 74, s. 66—*See* BENAMI TRANSACTION—CERTIFIED PURCHASERS, 10 W.R. 167.

——O. XXI, r. 76 (=1882 s. 296=1877, s. 296 =1859, s 248).

(4140-*a*)—O. 21, r. 76—*See* NOS. 4047 to 4050—*supra*.

—— O. XXI, r. 77, para. (1) (=1882, s. 297= 1877, s. 297=1859, s. 251; and para. 3 (New).

See SALE — SALE IN EXECUTION OF DECREE.

(4141)—O. 21, r. 77 (1)—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE. 15 W.R. 368.

(4141-*a*)—O. 21, r. 77—*See* NO. 4112, *supra*.

——O. XXI, r 78 (=1882, s 298=1877, s. 298 =1859, s. 252).

See SALE — SALE IN EXECUTION OF DECREE.

(4142)—O. 21, r. 78—*See* DAMAGES—DAMAGES, SUITS FOR, 2 W.R. 60.

(4143)—O. 21, r. 78—*See* LIMITATION ACT, 1908, arts. 11-A, 12, 2 Agra 375.

(4143-*a*)—O. 21, r. 78—*See* NOS, 1157, 3781, *supra*, and NO. 5617, *infra*.

(4144)—*O.* 21, *r.* 78, *and s.* 47 (=ss. 298, 244, *Civ. Pro. Code*, 1882)—*Irregularity in conducting sale of moveable property—Injury—Suit for compensation—Questions for executing Court.*—Though s. 98, Civ. Pro. Code, 1882, allows a judgment-debtor to sue for compensation for

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injury caused to him on account of an irregularity in publishing or conducting the sale of moveable property, that section must be read with s. 244 (s. 47) which bars a separate suit regarding any question arising between the parties in execution. ATMA RAM v. GULAB, **14 P.R. 1886**. [*R.*, 2 P.R. 1899. Rev.; *Cons.*, 162 P.R. 1889.]

——O. XXI, r. 79 (=1882, s. 299=1877 s. 299 =1859 s. 261 & 266.

(4144-*a*)—O. 21, r. 79—*See* NO. 3749, *supra*.

——O. XXI, r. 80 (=1882, s. 302=1877, s. 302 =1857, s. 267).

See SALE—SALE IN EXECUTION OF DECREE.

(4145)—O. 21, r. 80—*See* MANDAMUS, Bourke O.C. 395=1 Ind. Jur. N.S. 258.

(4146)—O. 21, rr. 80, 81—Promissory note—Purchaser in Court-auction—Right to sue—Vesting order—*See* NEGOTIABLE INSTRUMENT—PROMISSORY NOTES—GENTRAL, 8 Ind. Cas. 17=8 M.L.T. 448.

——O. XXI, r. 82 (1882, s. 304=1877. s. 304.)

See SALE—SALE IN EXECUTION OF DECREE.

(4147)—O. 21, rr. 82, 90—*See* SUMMONS, 21 W.R. 242.

——O. XXI, r. 83 (=1882, s. 305=1877, s. 305=1859, s. 243.)

See SALE—SALE IN EXECUTION OF DECREE.

(4148)—*O.* 21, *r.* 83 (=*Civ. Pro Code*, 1882, *s.* 305)—*No application to mortgage-decrees.*—S. 305, Civ. Pro. Code, does not apply to cases in which the decree is founded on a mortgage and declares that the property is to be sold in execution thereof. NARASIMHA CHARLU v. PEDDA RAMAYYA, **6 M L.J. 187**. (1 C L.R. 295, *F.*)

(4149)—*O* 21, *r.* 83 (=*Civ. Pro Code*, 1877, s. 305, *Proviso*)—*Private sale by judgment-debtor with Court's permission—Confirmation of sale—Right of purchaser.*—A private sale, by a judgment-debtor who had obtained permission of the Court under s. 305, Civ. Pro. Code, which had not been confirmed by the Court, did not convey to the vendor such title in the property as to entitle him to maintain a suit for possession of property against another similar vendee. SRI LAL v. BALLABH SHANKAR, **A.W.N. 1882. 243.**

(4150)—*O.* 21, *r.* 83 (=*s.* 305, *Civ. Pro. Code*, 1882)—*Decree—Execution—Private sale—Co-judgment-debtor — One judgment-debtor satisfying the decree by sale of the mortgaged*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

property—Lien upon the property in the hands of the other judgment-debtor.—Where one of the judgment-debtor satisfies a mortgage-decree, he obtains a lien on his co-sharer's property to the extent of their share of the decretal liability. In authorizing a sale under s. 305, Code of Civil Procedure, a Court cannot empower a judgment debtor to transfer any higher interest than he has and bind the interest of others in the property. DANAPPA v YAMNAPPA, **4 Bom. L.R. 61=26 B. 379.**

(4151)—O 21, r. 83—Alienation by guardian—Sufficiency of permission obtained from executing Court under—*See* GUARDIANS AND WARDS ACT. 1890, s. 29. 6 A.L.J 491=31 A. 378=2 Ind. Cas. 356.

(4151-*a*)—O. 21, r. 83—*See* NOS. 1035 to 1037, 1285, 1344, 1345, 3734. *supra*, and NOS. 5142 to 5146, 5162, 5169, *infra*.

(4152)—*O* 21, *r.* 83. *O.* 40. *rr.* 1, 2, 3 (= *s.* 243, *Civ. Pro. Code*, 1859)—*Appointment of manager.*—S. 243 of Act VIII of 1859 (Civ. Pro. Code) gave no power to Court to appoint a manager for the judgment-debtor's estate pending execution proceedings. *Quære.*—Whether the Civil Courts in the mofussil have the powers possessed by the Court of Chancery in England and by the High Court of Calcutta of managing the property of parties to a cause pending suit or administration. MORAN v. MITTU BIBEE, **2 C. 58.**

(4153)—O. 21, r. 83, O. 40, rr. 1, 2, 3—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 1 W.R Mis. 11.

(4154)—O. 21, r. 83, O. 40, rr. 1, 2, 3—*See* APPEAL—ORDERS 2 W R. Mis. 49.

(4155)—O. 21, r. 83, O. 40, rr. 1, 2, 3—*See* MANAGER—MANAGER OF ATTACHED PROPERTY, 1 W.R Mis. 15, 23 W.R. 287.

(4156)—*O.* 21, *rr.* 83, 89, 90, 92 (=ss. 305, 310-*A*, 311 *and* 312, *Civ. Pro. Code*, 1882)—*Sale in execution of money-decree—Time given to the judgment-debtor to raise money by private alienation—Validity—Revision—S 70, cl. (a) of Punjab Courts Act.*—Where, after auction-sale of immoveable property in execution of a money-decree, the judgment-debtor applied for time, under s. 305 of the Code, to enable him to raise the amount of the decree by mortgage of the property sold by auction, *held* that the executing Court had no power to grant the application under that section. The executing Court was bound, under the imperative provisions of s. 313, to pass an order confirming the sale, if the sale is not set aside before the expiry of the period of limitation prescribed for applications under ss. 310-A and 311 of the Code. Where the lower appellate Court, in upsetting the order of execution of the lower Court, had acted upon a complete misapprehension of the powers of an executing Court, and

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wholly disregarded the imperative provisions of law, *held* that the irregularity warranted the interference of the Chief Court on revision, under s. 70, cl. (*a*) of the Punjab Courts Act. GIRDHARI LAL v. BHAGO, **92 P.R. 1907.** (24 C. 682, 31 C. 1011, *R.*)

(4157)—*O.* 21, *rr.* 83 *and* 89, *and O.* 43, *r.* (1) (*j*)—*Appeal—Order refusing to set aside sale.*—*Held*, that a judgment-debtor has no right to appeal under O. XLIII, r. (1) (*j*), from an order of the executing Court refusing to set aside sale in execution of decree, if his application can neither come within the purview of r. 83 of O. XXI, which can only be resorted to before sale, nor of r. 89 of the said Order when he fails to deposit the several sums specified in cl. (*a*) and (*b*) of its sub-rule (1). *Obiter*;—*Held*, also that an order passed on an appeal under O. XLIII, r. (1) (*j*), is final. GHANIA LAL, v. POHLO MAL, **105 P.W.R. 1910=72 P.R.1910 = 7 Ind. Cas. 718=143 P.L.R. 1910.**

(4158)—*O.* 21, *rr.* 83, 90, 92 (=*Civ. Pro. Code*, 1882, *ss.* 305, 311, 314)—*Sale of immoveabl preoperty—Inadequacy of price—Material irregularity.*—Where immoveable property has been sold by the Court to the highest bidder, the mere inadequacy of price would not constitute a "material irregularity in publishing or conducting" the sale, within the meaning of s. 311 of the Civ. Pro. Code. Nor can a decree-holder or a judgment-debtor apply to set aside a sale on the ground of the price realised being too low, the Code containing no provision for setting aside a sale on such a ground. Also the fact of a sale having been effected at a low price would not afford ground for the Court refusing, upon or without application, to confirm the sale, or, in other words, setting it aside. LAKSHMI v. KRISHNABHAT, **8 B. 424.** [*R.*, 14 M. 227.]

——O. XXI, r. 84 (=1882, s. 306=1877, s. 306=1859, s. 253.)

See SALE—SALE IN EXECUTION OF DECREE.

(4159)—*O.* 21, *r.* 84 (=s. 306, *Civ. Pro. Code*, 1882)—*Sale in execution of decree—Failure to deposit portion of purchase-money.*—Where the person declared to be the purchaser of property put up for sale in execution of a decree does not fulfil the indispensable conditions of law required by s. 306, Civ. Pro. Code, by depositing, immediately after such declaration, 25 per. cent. of the purchase-money, the result is, not that the sale is irregular, but that there is no sale and therefore, there could not be a confirmation of such a sale. INTIZAN ALI KHAN v NARAIN SINGH, **5 A. 316=A.W.N. 1883, 38.** [*Diss.*, 16 C. 33; *Declared obsolete*, 28 A. 238=A.W.N. 1905, 263; *F.*, 30 A. 273=A.W.N. 1908, 107=5 A.L.J. 336; *R.*, 3 L.B.R. 225, 132 P.R. 1906=11 P.L.R. 1907; *D.*, 12 M. 454.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

(4160)—*O.* 21, *r.* 84 (=*s.* 306, *Civ. Pro. Code, of* 1882)—*Failure to make deposit under s.* 306, *Civ. Pro. Code—Material irregularity—Suit to set aside sale.*—The execution purchaser's failure to make, and the failure of the officer conducting the sale to receive the deposit of 25% on the amount of the purchase-money under s. 307, Civ. Pro. Code, is a material irregularity in conducting the sale which must be enquired into upon an application under s. 311 of the Code, and a separate suit will not, therefore, lie to set aside a sale on such a ground. BHIM SINGH v. SARWAN SINGH, **16 C. 33.** (5 A. 316, *Diss.*) [*Cited*, 3 B.L.R. 225; *R.*, 132 P.R. 1906=11 P.L.R. 1907; *D.*, 12 M. 454.]

(4161)—*O.* 21, *r.* 84 (=*s.* 306, *Civ. Pro. Code*, 1882)—*Failure to deposit purchase-money under, effect of, on the sale in execution.*—Failure to make the immediate deposit required by s. 306 of the Code is not an indispensable condition for the validity of the sale but constitutes a mere irregularity in the conduct of it. The section itself distinctly refers to the purchaser as the person who should make the deposit, and reference to him as purchaser implies that there has been a sale. If, however, the officer conducting the sale neglects to demand the deposit immediately and the purchaser does not pay it, and if the property is not put up again for sale, it ought to be held that there has nevertheless been a valid sale in execution of the decree, the failure to pay the deposit amounting only to an irregularity in conducting the sale. RAMAN CHETTY v. S.M.R.M. OLAGAPPA CHETTY, **3 L.B.R. 225.** (5 A. 316, 16 C. 33, 14 M. 227, 7 C. 337, 5 B. 575, 12 M. 454, *R.*)

(4162)—*O.* 21, *r.* 84 (=*Civ. Pro Code*, 1882, *s.* 306)—*Material irregularity—Sale in execution of decree.*—The commencement of a sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by s. 306, or the adjournment of the sale from time to time without sufficient ground, is a mere irregularity. VENKATA v. SAMA, **14 M. 227.** [*F.*, 3 L.B.R. 225; *R.*, 132 P.R. 1906=11 *P.* L.R. 1907.]

(4162-*a*)—*O.* 21, *r.* 84—*See* NOS. 1029, 4097, 4111, 4112, 4113, 4114, 4115, 4135, *supra.*

(4163)—*O.* 21, *rr.* 84, 71 (=*ss.* 306, 293, *Civ. Pro. Code*, 1882)—*Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by auction-purchaser for difference of price on re sale.*—Certain immoveable property was put upon to auction in execution of a decree purchased by A.B, but the purchaser did not at once make the deposit required by s. 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put in again to auction and sold for a considerably less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all, and that the second purchaser was not

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

against the purchaser entitled to claim first under s. 293 of the Code, compensation for the loss resulting on the second sale. AMIR BEGAM v. THE BANK OF UPPER INDIA, LIMITED, **A.W.N. 1908, 107=5 A.L.J. 336=30 A. 273.** (5 A. 316, *F.*)

(4164)—*O. 21, rr. 84 to 88, 90 to 94, ss. 65, 66 (=ss. 306 to 317, Civ. Pro. Code, 1882)—Auction-sale vitiated by fraud and misrepresentation—Suit by certified purchaser to set aside sale—Maintainability—Rights of benamidar—Limitation Act (1877), arts. 12, 95, 120—Acceptance of bid by Court-officer—Effect.*—Where the description of property in the sale-proclamation is false and misleading and was deliberately so given with a view to obtain a much greater price for the property than what it could have fetched if the true nature of the judgment-debtor's tenure was disclosed, this may amount to fraud and misrepresentation vitiating the sale. A benami transaction does not vest any title to an immoveable property, the subject of such a transaction, in the benamidar, and therefore such a person cannot maintain a suit which is based on title, such as a suit in ejectment. (16 C. 364, 35 C. 551, 34 C. 717, 30 M. 245, 20 M. 495, 30 C. 265, *R.*) A benamidar properly so-called is not a trustee, for he is not the owner of the legal estate, although he holds the property for the benefit of the real owner; nor can a trustee, in whom the legal estate is vested, properly be called a benamidar. Similarly it would be a misnomer to call an agent, who has entered into a contract but without disclosing the fact that he is an agent, benamidar of his principal, in the sense of (35 C. 551, 30 M. 245, *R.*). Though the sale is *in invitum*, there is no reason why the acceptance of the bid by the officer of the Court should not have the effect of a contract with such officer, simply because the rights and liabilities arising under it are regulated in many respects by the special provisions of the Civ. Pro. Code. The policy underlying ss. 306 to 317 of the Code of 1882 is to recognise the certified purchaser as the proper person to seek to set aside a fraudulent sale. (22 B. 672, 12 B. 594, *R.*) A suit by the certified purchaser to set aside a fraudulent sale is governed by art. 95, Limitation Act. VENKATA SURYANARAYANA JAGAPATHIRAJU v. GOLUGURI BAPIRAJU, **8 M.L.T. 154.** (5 C.L.J. 385, *Appr.*)

(4165)—O. 21, rr. 84, 85, 92—*See* PRE EMPTION—RIGHT TO PRE EMPT, **6 N.W.P. 272.**

(4166)—*O. 21, rr. 84, 89—Code of Civil Procedure (Act XIV of 1882), s. 308—Forfeiture of deposit—Auction-purchaser—Refund of purchase-money.*—The Code of 1908 gives a discretion the Court whether to forfeit the deposit made by an auction purchaser, which the Code of 1882 did not. So where an auction-purchaser applied to get a refund of the purchase-money deposited in Court as required by O. XXI, r. 84, upon the sale having been set aside

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

upon an application made by the judgment-debtor under O. 21, r. 89, the balance due by him not having been paid, and the Court below refused the application on ground that the deposit had been forfeited to Government in consequence of the auction-purchaser's default, *held* that, in this case, it would have been a proper exercise of discretion by the lower Court to have refunded the deposit. MATHURA PRASAD PANDE v. GAURI SHANKAR DAS, **7 A.L.J. 325=6 Ind. Cas. 564=32 A. 380.**

(4167)—*O. 21, rr. 84, 90 (=ss. 306, 311, Civ. Pro. Code, 1882)—Execution of decree—Sale in execution—Non-payment of required portion of purchase money at date of sale—Irregularity—Held*, that the fact that an auction-purchaser at a sale held in execution of a decree did not pay the 25 *per cent.* of the purchase-money required by s. 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity, which would not affect the validity of the sale, unless it could be shown that substantial injury was thereby caused to the judgment-debtor. AHMAD BAKHSH v. LALTA PRASAD, **A.W.N. 1905, 263=28 A. 238.**

(4168)—*O. 21, rr. 84, 90, s. 47 (=ss. 306, 311, 244, Civ. Pro. Code, 1882)—Sale in execution—Default in making deposit by purchaser—Whether irregularity or illegality*—A sale is no sale unless the price has been paid. The fact that, on a sale of immoveable property in execution, the deposit under s. 306 of the Civ. Pro. Code, 1882, was not paid immediately, but was paid afterwards, may amount to only an irregularity in conducting the sale, which can be enquired into only upon an application under ss. 311 and 244. But where the deposit was never paid at all, the sale was no sale under the Code, because the Court has no power to sell a property to a person who does not pay for it. MAHOMED ALI MIA v. KIBERIA KHATUN, **9 Ind. Cas. 66.** (28 A. 238, A.W.N. 1905, 263, 16 C. 33, *D.*; 5 A. 316, 30 A. 273, A.W.N. 1908, 107, 5 A.L.J. 386, *Rel. on.*)

— O. XXI, r. 85 (=1882, s. 307=1877, s. 307=1859, s. 254.)

See SALE—SALE IN EXECUTION OF DECREE.

(4169)—*O. 21, r. 85 (=s. 307, Civ. Pro. Code, 1882—Default by purchaser at Court-sale to deposit balance of purchase-money in time—Parties interested in getting re-sale not for it—Effect.*—The words of s. 307, Civ. Pro. Code, are clear and imperative, and must be given effect to. On default by the purchaser at a Court-sale to deposit the purchase-money within 15 days of the sale, the deposit to the Government made on the date of sale must be forfeited, notwithstanding that the decree-holder and the judgment-debtor do not ask for a re-sale but consent to the original sale being allowed to stand. SAMBASIVA AIYYAR v. VYDINADASAMI, **25 M. 535.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4170)—*O. 21, r. 85 (=Civ. Pro. Code, 1882, s. 307)—Payment of purchase-money for property bought at Court-sale—Closure of Court for vacation—Holiday.*—The time during which a Court is closed for the vacation is not a holiday within the meaning of s. 307 of the Civ. Pro. Code, 1882. Days on which the office is open, and the purchase money could have been paid, are office days. MOTIRAM v. BHIVRAJ, **20 B. 746.** [*R.*, 2 Bom. L.R. 1901.]

(4170-*a*)—O. 21, r. 85—*See* Nos. 4097, 4116, 4117, 4135, 4136, 4164, 4165, *supra.*

—— O. XXI, r. 86 (=1882, s. 308=1877, s. 308 =1859, s. 254.

See SALE — SALE IN EXECUTION OF DECREE.

(4171)—*O. 21, r. 86 (=s. 308, Civ. Pro. Code, 1882)—Execution—Sale*—S. 308 of the Code of Civil Procedure is imperative in its terms. Its provisions are intended to prevent the delay and waste of labour which may arise from persons thoughtlessly entering into, or wantonly abandoning, contracts of sale formally conducted by the public servants, and the only cases in which relief from the liabilities incurred in such formal proceedings can be accorded under the Code are cases in which, owing to the circumstances beyond the control of the purchaser, the sale has been set aside by the Court or proved entirely infructuous. Hence, a mere abandonment of a sale in execution proceedings without due reason given is no ground for dispensing with the enforcement of penalty which attaches under s. 308 of the Code, not on the holding of a second sale, but as a deterrent to prevent a defaultwhich renders nugatory the formal proceedings already held. TULSI GIRIYAPPA v. FAKIRAYYA, **2 Bom L.R. 901.**

(4171-*a*)—*O. 21, r. 86 (=old s. 308)—Forfeiture of deposit—Appeal.*—There is no appeal from an order of forfeiture of the deposit of 25 per cent. when there is a default in depositing the full amount of the purchase-money within 15 days after the sale as required by O. XXI, r. 86. SAWAN RAM v. MAYA DAS, **120 P.R. 1891.**

(4172)—O. 21, r. 86—*See* PAYMENT INTO COURT, 7 M. 211.

(4172-*a*)—O. 21, r. 86—*See* Nos. 4097, 4112, 4114 to 4117, 4135, 4164, *supra.*

—— O. XXI, r. 87 (=1882, s. 309=1877, s. 309 =1859 s. 255.)

(4172 *b*)—O. 21, r. 87—*See* Nos. 4115, 4164, *supra.*

—— O. XXI, r. 88 (=1882, s. 310=1877, s. 310).

See SALE—SALE IN EXECUTION OF DECREE.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4173)—*O. 21, r. 88 (=s. 310, Civ. Pro. Code, 1882)—Suit for pre-emption—Sale of property in Court-auction.*—In a suit for pre-emption in respect of property sold in Court auction, plaintiff based his right on s. 310 of the Civ. Pro. Code. The plaintiff's highest bid was for only Rs. 500 and it was not till after the property had been knocked down in favour of defendant for Rs. 800 that plaintiff offered to pay a like sum for the property. *Held*, that the provisions of s. 310 should be strictly complied with before such a right of pre-emption can be claimed and that the requirements of the section are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down and offering to pay a sum equal to that bid by the highest bidder and that the section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. SRI KRISHEN v. DEBI RAM, **A W N. 1888, 208.**

(4174)—O. 21, r. 89—*See* APPEAL—ORDERS, 3 A. 674=A.W.N. 1881, 45.

(4175)—O. 21, r. 88—*See* PRE-EMPTION—RIGHT TO PRE EMPT, A.W.N. 1898, 115.

(4176)—O. 21, r. 88—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 3 A. 15.

(4176-a)—O. 21, r. 69—*See* NOS. 220, 984, 2911, 4164, *supra.*

(4177)—*O. 21, rr. 88, 90 (=ss. 310, 311, Civ. Pro. Code, 1877)*—Locus standi *of pre-emptor in execution-proceedings—Party to execution proceedings*—Locus standi *for pre-emptor to move High Court for revision—Civ. Pro. Code*, 1877, s. 622.—A co-sharer claiming a right of pre-emption in respect of property sold in execution of decree, not being one of the persons who could avail themselves of the provisions of s. 311 of the Civ. Pro. Code, has no *locus standi* to object to the confirmation of such sale in favour of the auction-purchaser. Where, under the above circumstances, such a co-sharer is allowed to object to the confirmation of sale and treated as a party to the proceedings, it is competent to him to move the High Court to revise the order of the Court disallowing his objection to the confirmation of sale, as he is not one of the persons who could appeal under s. 588 from an order passed under s. 311. BISHESHAR KUAR v. HARI SINGH, **5 A. 42=A.W.N. 1882, 146.** [*R.*, 23 B. 450.]

—— O. XXI, r. 89 (=1882, s. 310-A.)

See SALE—SALE IN EXECUTION OF DECREE.

(4178)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Meaning of certain words.*—The words "he shall not be entitled to make an application under this section" in the proviso of s. 310-A cannot mean merely "he shall not be entitled to *present* an application" under the section, but the word "*make*" must mean

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"carry on" or "prosecute." When an application under s. 310-A is not disposed of and another application is filed on the next day under s. 311, the applicant is not entitled to obtain the benefit of the former section. RAJENDRA NATH HALDAR v. NILRATAN MITTER, **23 C. 958.** [*Appr.*, 5 O.C. 137; *R.*, 13 C.W.N. 591=1 Ind. Cas. 304.]

(4179)—*O. 21, r. 89 (=Civ Pro Code, 1882, s. 310-A). Applicability to sales in execution of mortgage-decrees—Purchase by decree-holder—Payment of 5 per cent.*—S. 310-A of the Civ Pro. Code, applies to sales in execution of mortgage-decrees. [*F.*, 10 M.L.J. 229=25 M. 244, F.B.; *Appr.*, 25 B. 104; *R.*, 3 O.C. 42.] Even when the decree-holder is himself the purchaser, an application under s. 310-A should be accompanied by the deposit of 5 per cent. on the purchase-money required by the section. But where the non-payment of it is due to misdirection of the Court, further time may be granted to comply with the provision. TIRUMAL RAO v. SYED DASTAGHIRI MIYAH, **22 M. 286.**

(4180)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Execution-sale for arrears of rent—Application under the order—Allegation by applicant challenged.*—S. 320-A applies to the sale of a tenure in execution of a rent-decree for its own arrears. If an application be made by a person under s. 320-A, on the allegation that he has an interest in the property sold, and if such allegation is challenged either by the decree-holder or by the auction-purchaser, the question must be determined by the Court on evidence. JANARDHAN GANGALI v. KALI KRISTO THAKUR, **23 C. 393.** [*F.*, 1 C.W.N. 114, 8 C.W.N. 55, 8 C.L.J. 305: *R.*, 5 C.W.N. 63, 5 C.W.N. 821, F.B.=29 C. 1, 32 C. 107, 6 C.L.J. 601, 13 C.W.N. 224=5 M.L.T. 348=4 Ind. Cas. 474.]

(4181)—*O. 21, r. 89 (=s. 310 A, Civ. Pro. Code, 1882 and 1894)—Mortgage-decree—Sale in execution—S. 104, T.P. Act, 1882.*—S. 310-A, Civ. Pro. Code, does not apply to sale of mortgaged property under the T.P. Act. (23 C. 682, *Overruled*; 19 A. 205, *Diss*). The rules framed by the High Court under s. 104, T.P. Act, do not make s. 310 A, so applicable. A rule by the High Court under s. 101, T.P. Act, making s. 310 A so applicable would be *ultra vires*—*Per Maclean, C.J.* KEDAR NATH RAUT v. KALI CHURN RAM, **25 C. 703, F.B.=2 C.W.N. 353** (*Relied on*, 8 C.W.N. 102; *R.*, 28 C. 73, 3 O.C. 42, 7 C.L.J. 1; *Commented upon*, 25 M. 214, F.B.; *Expl.*, 4 C.W.N. 474; *N.F.*, 23 M. 286, 7 C.L.J. 581=11 C.W.N. 282=3 M.L.T. 202; *Diss.*, 25 B. 104; *D.*, 31 C. 373.]

(4182)—*O. 21, r. 89 (=s. 310 A, Civ. Pro. Code, 1882)—Date of sale, meaning of—Limitation.*—The phrase "date of sale" in s. 310-A. Civ. Pro. Code, does not mean the date on which the sale is confirmed. It means the actual date on which the property is put up for sale and knocked down to the highest bidder. (23 C. 775, P.C. *D.*) An application for setting aside a sale under s. 310-A ought to be made within 30 days from the actual sale. It would not be within time, if presented within 30 days from the date of a first appellate Court's order reversing an order setting aside the sale or of the second appellate Court confirming such order of the lower appellate Court. CHOWDHRY KESRI SAHAY v. GIANI ROY, **29 C. 626=6 C.W.N. 776.** (26 C. 449, *F.*)

(4183)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Landlord and Tenant Act (X of 1859), s. 110—Sale.*—S. 310-A of the Code of Civil Procedure, 1882, does not apply to sales under Act X of 1859, as the Code applies *up* to the sale and does *not* apply *after* it. HARISH CHANDRA GHOSE v. ANANTA CHARAN PATA, **2 C.W.N. 127.**

(4184)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882 and Amendment Act, 1894)—Officer—Court incorrectly calculating amount payable of Bengal Act VIII of 1885, s. 174.*—When a certain amount payable by a judgment-debtor under s. 310-A has been calculated and settled by an officer of the Court, on the payment of such amount in Court, an order to set aside the sale must be made by the Court as a matter of right. (18 C. 255, *Appl.*) [*Appr.*, 22 M. 286; *R.*, 1 O.C. 193; *D.*, 26 C. 449=3 C.W.N. 283.] The wording of s. 174, Act VIII of 1885 is very similar to s. 310-A, Civ. Pro. Code. MAKBOOL AHMED CHOWDHRY v. BAZLE SABBAN CHOWDHRY, **25 C. 609.** [*R.*, 1 O.C. 193.]

(4185)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Decree—Sale in execution—Application to set aside the sale.*—Under s. 310-A of the Civ. Pro. Code, the essential upon which the action of the Court is to depend is the deposit within 30 days and not the fact of the application being made within that period. The requirements in the section as to the deposit in Court must necessarily be construed so as to cover deposit with any ministerial officer of the Court apparently authorized to receive it. MATHUJI v. KONDAJI, **7 Bom. L.R. 263.**

(4186)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—General Clauses Act (X of 1897, s. 10)—Deposit of money by mortgagee more than thirty days after sale of property in execution of decree—Money tendered on first day after opening of Court after vacation—Limitation.*—An application under s. 310-A of the Code, by a mortgagee of certain property which had been sold on September 20th, 1905, was made a few days after in the same month. The Court was closed all through October on account of the vacation. On the 1st November, the applicant tendered Rs. 477-8-0. The tender was retained by the Court officials till the next day, November 2nd, when it was returned to the applicant because he had offered too much, the amount due being only Rs. 345-5-0, and because he had given an incorrect number of the suit and had

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not entered the date fixed for hearing, which was not provided for in the from of tender. The Court refused to grant the application on the ground that the money had not been deposited within thirty days of the date of sale and that the provisions of ss. 5 and 6 of the Limitation Act did not apply. *Held*, that, having regard to the provisions of s. 10 of the General Clauses Act (X of 1897), the money was tendered within time. RADHE LAL v. SHEO PRASAD, **9 O.C. 214 B.** (19 A. 140, *R.*)

(4187)—*O.* 21, *r.* 89 (=s. 310-*A*, *Civ. Pro. Code*, 1882)—*Payment to decree-holder—Payment into Court.*—To satisfy the requirements of s. 310-A of the Civ Pro. Code, the money paid under the section must be actually received by the decree-holder and a mere payment into the Court is not sufficient. A Court has no power to set aside a sale unless the judgment-debtor has strictly complied with the provisions of that section. TRIMBAK v. RAMCHANDRA. **1 Bom. L.R. 215=23 B. 723.**

(4188)—*O.* 21, *r.* 89 (=*s.* 310-*A*, *Civ. Pro. Code*, 1882)—*Execution of decree—Application to set aside sale in execution—Non-payment of percentage on purchase-money.*—Where a person, whose property has been sold in execution of a decree, applies under s. 310-A of the Code of Civil Procedure to have the sale set aside, the fact that the auction purchaser is also the decree-holder will not relieve the applicant from paying the percentage required by cl. (*a*) of the above-mentioned section. MENDAI LAL v. BHUJJA SINGH, **A.W.N. 1895 140.** [*R.*, A.W.N. (1904) 237 = 27 A. 263.]

(4189)—*O.* 21, *r.* 89—*Deposit by judgment-debtor to have sale set aside—Deposit short—Mistake of judgment-debtor, attributable to act of Court—Sum calculated by execution clerk and assured to be correct by* sheristadar.—A judgment-debtor deposited, under O. 21, r. 89 of the Code, in Court, within the prescribed period, a sum calculated by the execution clerk and assured by the *sheristadar* to be correct as the sum to be deposited to have a sale set aside. Subsequently, it was found that the amount was short by Rs. 80 which the judgment-debtor promptly paid, but the prescribed period had expired a few days before the payment was made : *Held*, that the judgment-debtor made a *bona fide* mistake which was attributable to an act of the Court, and that the sale should be set aside. PALTURAM SINGH v. KAMINI MANI DASSI, **7 Ind. Cas. 52.** (26 C. 449, F.B., 3 C.W.N. 283, *R.*)

(4190)—*O.* 21, r. 89 (=*s.* 310-*A. Civ. Pro. Code*, 1882)—*Sale, setting aside of—Notice necessary or not—Auction-purchaser, entitled to notice.*—A sale in execution of a decree ought not to be set aside under s. 310-A, Civ. Pro. Code, 1882, without notice to the auction-purchaser and an opportunity afforded to him to contest the validity of the application, KRIPALI SINGH v. PAIROO RAUT, **11 C.L.J. 86=5 Ind. Cas. 305.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4191)—*O.* 21, *r.* 89—"*Person owning such property*"—*Meaning of—Judgment-debtor who has sold the property after the date of the Court sale cannot apply to set aside.*—Under O. 21, r. 89, the only person, in whose favour a sale can be set aside, is a person who owned the property or an interest therein by virtue of a title acquired before the sale. It cannot be set aside at the instance of a judgment-debtor who has sold the property after the date of the Court-sale. DEBI PROSAD PANDIT v. MUHAMMAD UNIS ARABI, **14 O.C. 83.**

(4192)—*O.* 21, *r.* 89 (=*Civ. Pro. Code*, 1882, *s.* 310-*A*)—*Sale of land—Application by donee to set aside sale—Gift prior to attachment—Right of donee to apply.*—An application was made under s. 310-A, Civ. Pro. Code, to have a sale set aside. The applicant alleged that the property sold was given to him prior to the date of attachment. The question was whether he could apply under s. 310-A. *Held* that though a person may be no party to a suit or decree, yet, if the sale will bind his interest in the property, he can apply under s. 310-A to set aside the sale. In the present case, if the petitioner had been the donee of the property from the judgment-debtor while the property was under attachment, the sale would have bound him under s. 276 of the Code, and in that case he could apply under s. 310-A. But it was alleged that the gift was perior to attachment. If so, the subsequent attachment and sale could not affect him, if the gift was valid, and he could not seek to set aside the sale under s. 310-A. ERODE MANNIKOTH KRISHNAH NAIR v. PUTHIEDETH CHUMBARKOSERI KRISHNAN NAIR, **26 M. 365.** [*F.*, 8 O.C. 189, 30 M. 214=17 M.L.J. 127, 30 M. 507=17 M. L.J. 291=2 M.L.T. 347; *R.*, 24 T.L.R. 41; *D.*, 8 C.L.J. 305.]

(4193)—*O.* 21, *r* 89 (=*Civ. Pro Code*, 1882, *s.* 310-*A*), *Mortgagee of land sold in execution whether could put in application under—Order against such applicant whether appealable,*—Where a defendant in a suit who applied, under s 310-A of the Civ. Pro. Code, for setting aside a sale of land in execution of the decree in the suit happened to be a mortgagee, he was *held* to be an "owner of the immoveable property" who would be affected by the sale within the meaning of s. 310-A. He was, therefore, a person entitled to ask for cancellation of the sale under the section. The contention in this case that no appeal lay from the lower Court's orders adverse to the mortgagee was overruled on the ground that the question of setting aside the sale in the case was one which arose in relation to the execution of the decree between the purchaser at the sale who was the decree-holder himself and the applicant who was also a party to the suit, and that the order must therefore

be treated as one falling under s, 244, and, therefore open to appeal. SRINIVASA AYYANGAR v. AYYATHORAI PILLAI, **21 M. 416 = 8 M. L.J. 54.** [*F.*, 30 M. 507 = 17 M L.J. 291 = 2 M. L.T. 347; *Appr.*, 22 M. 286, 25 B 104, 29 C. 1 = 5 C.W N. 821; *R* 25 M. 244, F.B., 5 O.C. 377; *D.*, 30 C. 425, 5 C.L.J. 204.]

(4194)—*O.* 21, *r.* 89—*Simple money decree—Sale in execution—Decree-holder also mortgagee of property sold—Whether competent to apply to set aside sale—Person "holding an interest" in property.*—A person held two mortgages on certain property and obtained a decree for sale. He also held a simple money-decree against the mortgagor and in execution of this decree brought the hypothecated property to sale. The property was purchased by a stranger. The decree-holder then applied to have the sale set aside under O. 21, r. 89. Civ. Pro. Code. *Held*, that, ordinarily a mortgagee of the property sold is a person who has an interest by virtue of which he is competent to make an application under r. 89 aforesaid. *Held*, further, that in this particular case, the decree holder was not competent to make the application, for, the property was sold either as free from the mortgages or as subject to them, and in neither case he was a person having an interest in the property sold. If the property was sold free from mortgages, he must be deemed to have abandoned them; if it was sold subject to them, the sale only related to the interest of the mortgagor, that is, his equity of redemption, and in this the mortgagee had no interest. MUHAMED AHMEDULLAM KHAN v. AHMAD SAID KHAN, **8 A L.J. 356.**

(4195)—*O.* 21, *r.* 89 (=*s.* 310-*A*, *Civ. Pro. Code*, 1882)—*Mortgagee of tenure or holding—Execution sale for arrears of rent—Mortgagee's right to set aside sale under s.* 310-*A.*—A mortgagee of a tenure or holding, sold in execution of a decree for arrears of rent due in respect of it, is entitled to make an application under s. 310 A, Civ. Pro. Code, as being a "person whose immoveable property has been sold," within the meaning of that section. PARESH NATH SINGHA v. NAGOGOPAL CHATTOPADHYA, **29 C. 1, F.B. = 5 C.W.N. 821.** (2 C.W.N. colviii, *Appr.*; 5 C.W.N 63, *Overruled*) [*F.*, 11 C.W.N. 742, 13 C.W.N. 224 = 5 M.L.T. 348; *R.*, 29 C. 459, 29 C. 548, 30 C. 425, 1 C.L.J. 454 = 9 C.W.N. 722, Note, 32 C. 107, 30 A. 192 = 5 A.L.J. 253 = 1908, A.W.N. 77.]

(4196)—*O.* 21, *r.* 89 (=*s.* 310-*A*, *Civ. Pro. Code*, 1882)—*Bengal Tenancy Act VIII of* 1885), *s.* 174—*Makarari tenure, sale of—Durmokararidar, right of, to have sale set aside.*—A *mokarari* tenure was sold in execution of a rent-decree, and a *durmokararidar* deposited the decretal amount with compensation and applied under s. 310-A, Civ. Pro. Code, to have the sale set aside. *Held*, he is a 'person whose immovable property has been sold' within the meaning of s. 310-A and as such, entitled to have the sale set aside, on the ground that he has an interest in the holding, which he is entitled to protect. NARAIN MANDAL v. SOURINDRA MOHAN TAGORE, **32 C. 107.** (29 C. 1, 8 C.W.N. 55, 8 C.W.N. 232, 23 C. 393, 29 C 459, R.; 5 C.W.N. Notes cxxxii, Not *F.*) [*F.*, 11 C.W.N. 742; *R.*, 2 C.L.J. 369.]

(4197)—*O.* 21, *r.* 89 (=*Civ. Pro Code*, 1882, *s.* 310-*A*)—*Purchaser of share of occupancy holding—Bengal Tenancy Act, (VIII of* 1885), *s.* 88.—The purchaser of a share of what has been found to be an occupancy holding transferable by custom, can apply under s. 310-A for setting aside a sale in execution of a decree for arrears of rent due in respect of the holding. From s. 88 of the Bengal Tenancy Act which makes the sub-division of a holding not binding on the landlord, it does not necessarily follow that the purchaser of a share has no interest in the property for the purposes of s. 310-A, Civ. Pro. Code. BENODINI DASSI v. PEARY MOHAN HALDAR, **8 C.W.N. 55.** [*F.*, 32 C. 107; *R.*, 9 C.W.N. 134, 11 C.W.N. 742, 7 C. L.J. 282, 8 C.L.J. 161, 13 C.W.N. 224 = 5 M. L.T. 348.]

(4198)—*O.* 21, *r.* 89 (=*Civ. Pro Code*, 1882, *s.* 310-*A*)—*Purchaser of share of occupancy holding.*—A purchaser of a portion of an occupancy holding has such an interest in it as would entitle him to apply under s. 310-A of the Civ. Pro. Code to have the execution sale of the holding set aside. It is unnecessary in such an application to determine whether that interest was a valid one or not against the landlord. KUNJA BEHARI MONDAL v. SAMBHU CHUNDRA, ROY, **8 C.W.N. 232.**

(4199)—*O.* 21, *r.* 89 (=*s.* 310-*A. Civ. Pro. Code*, 1882)—*Civ. Pro. Code (Act V of* 1908), *O.* 21, *r.* 89—*Sale of occupancy holding—Possession of tenant of portion of holding—Rent decree against purchaser—Sale of holding—Right of old tenant to save by deposit of decretal amount.*— The purchaser of an occupancy holding, in execution of a rent decree, succeeded in getting possession of only a portion of the holding, the other portion continuing to be occupied by the old tenant. In execution of another rent decree against the purchaser, the holding was again sold: *Held*, that the old tenant, who retained a portion of the holding in his possession, is entitled to make a deposit under s. 310-A, Civ. Pro Code, 1882 and to have the sale set aside. JANOKI NATH CHAKRAVARTI v. KALI KUMAR CHAKRAVARTI, **5 Ind. Cas. 561.** (8 C.W.N. 232, *R.*)

(4200)—*O.* 21, *r.* 89 (=*s.* 310-*A*, *Civ. Pro. Code*, 1882)—*Sale in execution—Deposit to set aside—"Person whose immoveable property has been sold"—An under-raiyat under the judgment-debtor*—Locus standi.—An under-raiyat can apply under s. 310-A, Civ. Pro. Code, as being a person, whose immoveable property has been sold in execution of a decree for arrears of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

rent due in respect of the superior holding. CHANDRA KUMAR NATH v. KAMINI KUMAR GHOSE, **11 C.W.N. 742.** (32 C. 107, 29 C. 1, F.B., 8 C.W.N. 55, 8 C.W.N. 232, *F*; 29 C. 459, *Diss.*)

(4201)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Beneficial owner, if entitled to apply—'Person whose property has been sold.'*—A beneficial owner is entitled to apply under s. 310-A for the setting aside of a sale in execution of a decree for money against the *benamidar*. He is a person whose property has been sold under the decree. BABURAM MANDAR v. RAM SAHAI SAHOO, **8 C.L.J. 305.** (23 B. 450, 7 C.W.N. 243, 26 M. 365, 20 C. 418, *D.*; 1 C.W.N. 135, *F.*)

(4202)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Deposit by* benamidar, *good deposit.*—A *benamidar* of a person, whose immoveable property is sold, has a right to apply to have the sale set aside under s. 310-A, Civ Pro. Code, 1882. BASI PODDAR v. RAM KRISHNA PODDAR, **1 C W N. 135.** [*F*, 8 C L J. 305; *Appl.*, 29 C. 1, F.B.=5 C.W.N. 821.]

(4203)—*O. 21, r. 89 (=s 310-A, Civ. Pro. Code, 1882)—Attachment of judgment-debtor's property—Sale by judgment-debtor of attached proyerta subsequent to attachment—Petition by purchaser to set aside Court-sale—Purchaser whether a person, whose immoveable property has been sold.*—A judgment-debtor, after the attachment of his property in execution of a decree against him, sold it to a third person. The purchaser subsequently applied to the Court under s. 310-A of the Code, to set aside the Court-sale. The question for decision was, whether the purchaser was a person 'whose immoveable property was sold' within the meaning of s. 310-A. *Held*, the sale to the purchaser from the judgment-debtor was subsequent to the attachment. The purchaser was, therefore, bound by the Court-sale. As between the purchaser and the judgment-debtor, the property sold must be regarded as the property of the purchaser. Consequently, it was the purchaser's property which was sold in Court-sale. Hence the purchaser was competent to apply to have the sale set aside under s. 310-A of the Code. SHEIKH ABDUL RAHIM v. MATHURA PRESHAD, **8 O C. 189.** (26 M. 365, *F.*)

(4204)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Decree—Transfer of Property Act (IV of 1882).*—The provisions of s. 310-A of the Code of Civil Procedure are applicable to a sale in execution of a decree, on a mortgage bond, which is governed by the Transfer of Property Act, 1882. KRISHNAJI v. MAHADEV, **2 Bom. L.R. 635=25 B. 104.**

(4205)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Sale held in pursuance of a decree under s. 89 of the Transfer of Property Act*—The appellant obtained a decree absolute under s. 89 of the Transfer of Property Act and, after the expiry of the period of grace allowed to the judgment-debtor, put the property to sale and purchased it himself. The judgment-debtor made an application under s. 310-A of the Code of Civil Procedure for setting aside the sale. His application was allowed by both the Courts below. *Held*, that, in the absence of special rules framed by the Allahabad High Court for carrying out a sale in pursuance of a decree under Ch. IV of Act IV of 1882, the provision laid down in Ch. XIX of the Code of Civil Procedure did apply, and the application made by the judgment-debtor was an application under s. 310-A. THAN CHAND v. JAGANNATH, **6 A.L.J. 513=5 M.L.T. 386=31 A. 346=2 Ind. Cas. 400.**

(4206)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Attachment - Private sale—Court-sale—Application to set aside Court-sale.*—S. 310-A of the Civ. Pro. Code is applicable to a purchaser subsequent to attachment and prior to sale under that attachment. Where there has been a subsequent sale following on the attachment a person answering this description is one whose immoveable property has been sold under Ch. XIX of the Code. MULCHAND v. GOVIND, **8 Bom. L.R. 578=30 B. 573.**

(4207)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Application to set aside rent-sale—Bengal Tenancy Amendment) Act (I of 1907), s. 54—Bengal General Clauses Act (I of 1899), s. 8, cl. (c)—Right accrued previous to, but application after, repeal.*—A raiyati holding having been sold on the 7th May, 1907, in execution of a rent-decree, an under raiyat applied to have the sale set aside under s. 320 A, Civ. Pro. Code, on the 23rd May following. *Held*, that the application could not be entertained. The Bengal Tenancy (Amendment) Act I of 1907 having come into operation on the 22nd May, 1907. S. 54 of the amending Act, by enacting that s. 310-A, Civ. Pro. Code, shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of sub-s. (c) of s. 8 of the Bengal General Clauses Act. ASIRUDDI MONDOL v. MUKHODAMOYEE DASSI, **12 C.W.N. 434=35 C 543.** [*R.*, 13 C.W.N. 224 =3 M.L.T. 318.]

(4208)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Under-raiyat not entitled to make application.*—An under-raiyat cannot come in under s. 310-A, for setting aside a sale held in execution of a decree for rent obtained against the raiyat. ABED MOLLAH v. DIJAN MOLLAH, **29 C. 459.** (29 C. 1, F.B., *D.*; 6 C.W.N. 336, *R.*) [*R.*, 32 C. 107; *Diss.*, 11 C.W.N. 742.]

(4209)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Rent-sale, if may be set aside on deposit.*—In a case from Chittagong (East-Bengal), *held*, that s. 310-A, Civ. Pro. Code, applied to

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a sale under the Bengal Tenancy Act. Where a sale under the Bengal Tenancy Act was set aside under s. 310-A, Civ. Pro. Code, at the instance of a private purchaser who had purchased the holding before the sale. *Held*, that, having regard to the current rulings, the order of the lower Court setting aside the sale should not be set aside. ALI MIAH v. RAMJAN KHAN, **13 C.W.N 224=5 M.L.T. 348=4 Ind. Cas. 474.** (5 C.W.N. 821=29 C. 1, *F*; 12 C.W.N. 434=35 C. 513, *R.*)

(4210)—*O. 21, r. 89 (=Civ Pro. Code, 1882, s. 310-A.—Suit by under-tenant to recover money paid for his lessor under s. 310-A, Civ Pro. Code, 1882—Non-agricultural lands—Transfer of Property (Act IV of 1882), s 108 (q).*—A suit does not lie by an under-tenant of non agricultural land to recover from the tenant, his lessor, money which had been paid by him under s. 310-A, Civ. Pro Code, to set aside a sale of his lessor's interest under a decree passed against the lessor. BEPIN BEHARI SARNOKAR v. KALEDAS CHATTERJEE, **6 C.W.N. 336.**

(4211)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Execution-sale—Right of cotsharer to deposit.*—A person claiming under the Muhammadan Law a share in immoveable property, which has been sold in execution of a decree against his co-sharers, cannot apply under s. 310-A, to have the sale set aside, he not being entitled to make a deposit under that section. ABDUL RAHAMAN v. MATIYAR RAHAMAN, **30 C. 426.** (23 B. 450, 29 C. 1, *R.*; 21 M. 416, *D.*)

(4212)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—"Whose immoveable property has been sold," meaning of—Simple mortgagee, right of—No notice to auction-purchaser, effect of—Execution sale for arrears of rent.*—A simple mortgagee is not a person who can come under the provisions of s. 310-A, Civ. Pro. Code, and apply to have a sale set aside on the ground that he is a person whose immoveable property has been sold. (2 C.W.N Short notes cclviii, 13 C. 346, *D.*) [*Overruled*, 5 C.W.N. 821=29 C. 1, F.B.; *R.*, 1 C.L.J. 454=9 C.W.N. 725, Foot Note.] An auction-purchaser is entitled to notice before an order under s. 310-A, Civ. Pro. Code, for the setting aside of the sale is made. If there be no notice, the proceedings would be bad. (23 C. 393, 1 C.W.N. 114, *R.*) S. 310-A, Civ. Pro. Code, applies to the sale of a tenure in execution of a decree for its own arrears. NITYA NANDA PATRA v. HIRA LAL KARMAKAR, **3 C.W.N. 63.** (23 C. 393, *F.*)

(4213)—*O. 21, r. 89 (=Civ. Pro. Code, 1882, s. 310-A)—Sale in execution of decree on first mortgage—Second mortgagee not party to suit on first mortgage—Right of second mortgagee to apply to have sale set aside.*—In a suit by the first mortgagee on his mortgage, the second mortgagee was not made a party. In execution of the decree obtained by the first mortgagee, the mortgaged property was sold. The second mortgagee paid into Court the amount due to the first mortgagee and applied to have the sale set aside. *Held* that as the second mortgagee was not a party to the suit his interest in the mortgaged property could not pass under the sale. His right to redeem the prior mortgage continued notwithstanding the decree and the sale thereunder. Consequently, he was not a person whose immoveable property had been sold within the meaning of s. 310-A. He had therefore no *locus standi* to apply under the section. MALLIKARJUNADU SETTI v. LINGA MURTI PANTULU, **26 M. 332=12 M.L.J. 279.** [*R.*, 12 C.W.N. 107=6 C.L.J. 612.]

(4214)—*O. 21, r. 89 (=s. 310-A; Civ. Pro. Code, 1882)—Unsuccessful claimant—Right to apply under s 310 A, Civ. Pro. Code, 1882.*—A person who has purchased the property from the judgment-debtor before attachment and who, after an unsuccessful claim after attachment, has brought a regular suit to establish his title, cannot be considered as a person whose immoveable property has been sold within the meaning of s. 310-A, Civ. Pro. Code. ARJAN MOLLAH v. JADUNATH ROY CHOWDHRY, **7 C.W.N. 243.** [*D.*, 8 C.L.J. 305.]

(4215)—*O. 21, r. 89 (=Civ. Pro. Code, 1882, s. 310-A)—Sale in pursuance of mortgage-decree—Sale-proceeds to go first to prior charges—Sale set aside—Result.*—Plaintiff sued upon a mortgage bond executed by first defendant. Second defendant who was a subsequent mortgagee of part of the hypotheca, and third and fourth defendants who were subsequent purchasers of a part, proved that they had cleared off mortgages which were prior to the mortgage executed by first defendant, and the Court therefore allowed to second, third, and fourth defendants a prior charge. The decree directed that the mortgaged property be sold and that the sale-proceeds go to clear off the prior charges of second, third, and fourth defendants before any payment to plaintiff. The property was sold and plaintiff was permitted to bid, and he purchased the mortgaged lands for Rs. 1,379 which he paid into Court. Meanwhile, second defendant had filed a suit in the Court on his subsequent mortgage, had obtained a decree, and had brought to sale and purchased his hypotheca subject to the prior mortgage held by plaintiff. The second defendant paid into Court Rs. 8,263-11-0 which comprised the decree amount and five per cent. on the purchase-money, and got the sale set aside under s. 310-A. Plaintiff thereupon applied for a refund of his purchase-money and also for the whole of the decree amount. *Held* that he was entitled to a refund of his purchase-money and also to the whole of his decree-amount without any deduction being made on account of the prior charges, that the second, third and fourth defendants were entitled to the payment of the amounts adjudged to them only out of the sale-proceeds, and that there were no sale-proceeds in this case inasmuch as the sale was set aside under the provisions of s. 310-A, Civ. Pro. Code

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by payment, so far as this case was concerned, of the amount due to the decree-holder who was, therefore, entitled to the whole of the amount. CHIDAMBARAM CHETTIAR v. RAMA ROW, **8 M.L.J. 135.**

(4216)—*O. 21, r. 89 (=Civ. Pro. Code, 1882, s. 310-A)—Several attachments of same property—Sale in execution of one decree—Sale set aside on payment of decree amount by judgment-debtor—Effect of sale on other attachments.*—Where property of the judgment-debtor was attached in execution of several decrees against him and a sale of the property in execution of one of such decrees was set aside on payment of the decree-amount by the judgment-debtor, such sale did not put an end to the other attachments made at the instance of the other decree-holders. MAHOMADSHA KHAN SAHIB v. SRINIVASULU, **13 M.L.J. 221.**

(4217)—*O. 21, r. 89 (=s. 310-A, Civ. Pro. Code, 1882)—Decree attached by two persons—Sale by one attaching creditor—Deposit to set aside sale—Title to deposit.*—Defendant No. 1 obtained two decrees against defendant No. 2; plaintiffs also obtained a decree against defendant No. 2 who had obtained a decree against a third person; defendant No. 1 attached that decree and was substituted for defendant No. 2 on the 16th July 1904; plaintiffs also attached that decree and were substituted in place of defendant No. 2 on the 18th November 1904. Then at the instance of defendant No. 1 (in execution of the attached decree) properties were sold and the sale was set aside by a deposit under s. 310-A, Civ. Pro. Code. *Held* that upon the terms of s. 310-A, Civ. Pro. Code, both plaintiffs and defendant No. 1 were entitled to the money deposited. UPENDRA NATH SAHU v. HARI DAS MUKHERJEE, **12 C.W.N. 800.**

(4218)—*O. 21, r. 89 (=s. 310-A, Civ, Pro. Code, 1882)—Sale of the immoveable property in execution—Deposit by stranger in the name of judgment-debtor, to set asid sale—Order setting aside sale reversed on appeal—Right of decree-holder to attach the deposit money.*—Where, property belonging to the defendant No. 2 having been sold in execution of a decree, he entered into an agreement with defendant No. 1 under which the latter deposited the decretal amount under s. 310-A. of the Code in the name of defendant No. 2 the latter agreeing that, if the sale was set aside, he should sell the property to defendant No. 1; and the sale was set aside and the sale by defendant No. 2 to defendant No. 1 was also effected as agreed. *Held*, that, on the appellate Court setting aside the order under s. 310-A and confirming the sale, it was not open to the decree-holder to attach the money deposited as defendant No. 2's money, and defendant No. 1 was entitled to withdraw the same from Court. SOBHA RAM DASS v. MOHESHWAR SARMA, **13 C.W.N.100=4 Ind. Cas. 327.**

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(4219)—*O. 21, r. 89 (=s. 310-A. Civ. Pro. Code. 1882)—Order under—Refusing to accept a deposit—Appeal.*—An order under s. 310-A of the Civ. Pro. Code, refusing to accept a deposit, is an order in execution of the decree, within the meaning of s. 244 (c) of the Code, and an appeal lies from such an order. IMTIAZ BEGAM v. DHUMAN BEGAM, **4 A.L.J. 135=A.W.N. 1907, 64=29 A. 173** (19 A. 140, *Not F.* 26 A. 447 and 28 C. 73, *R.*) [*Diss*; 30 A. 379 =A.W.N. 1908, 157=5 A.L.J. 557; *R.*, 5 L.B.R. 85.]

(4220)—*O. 21, r. 89, (=s. 310-A, Civ. Pro. Code, 1882)—Sale in favour of decree-holder—Order setting aisde the sale under, appealability of.*—On an application by a judgment-debtor, under s. 310-A, Civ. Pro. Code, the Court of first instance set aside a sale in favour of the decree-holder. On appeal by the decree-holder, the District Judge reversed the order of the first Court. *Held*, that no appeal lay from an order under s. 310-A. The fact that the decree-holder was the purchaser, did not make any difference. Decree of District Court set aside. KUBER SINGH v. SHIB LAL, **27 A. 263=A.W.N. 1904, 237.** (1895 A.W.N. 140, *R.*) [*R.*, 30 A. 379=5 A.L.J. 557=A.W.N. 1908, 157.]

(4221)—*O. 21, r. 89 (Civ. Pro. Code, 1882, s. 310-A)—Execution of decree—Sale of superstructure of a house—Immoveable property—Tender made by judgment-debtor—Jurisdiction.*—The judgment-debtor was the owner of a house together with the land on which that house stood. The decree-holder applied merely to sell the superstructure of the materials of the house. The Deputy Collector refused to accept a tender made by the judgment-debtor under s. 310-A of the Civ. Pro. Code, *Held*, that the superstructure of the house was immoveable property, within the meaning s. 310-A of the Code of Civil Procedure, and that the Deputy Collector, in refusing to accept the deposit made by the judgment-debtor, failed to exercise a jurisdiction vested in him under the aforesaid section. MUMTAZ ALI v. ABBAS ALI, **3 O.C. 236.**

(4221-*a*)—*O. 21, r. 89, (=Civ. Pro. Code, 1882, s. 310-A)—Sale in execution—Order refusing to set aside—Stranger-purchaser—Appeal—Right of, exists.*—An appeal lies against an order refusing to set aside a sale under s. 310-A, Civ. Pro Code, 1882, although the purchaser happens to be a stanger. VEDALA LAKSHMINARASIMHA CHARYULU v. PACHA LAKSHMIAMMA, **11 M.L.T. 380.** (9 M.L.T. 165, *F.*)

(4221-*b*)—*O. 21, r. 89 (=Civ. Pro. Code, 1882, s. 310-A)—Order refusing to set aside a sale—Appeal, whether lies against—Agreement of discharge, effect of.*—An appeal lies against an order refusing to set aside a sale under s. 310-A of the Civ. Pro. Code, 1882, even though the purchaser is not the decree-holder but a stranger. An agreement between the decree-holder and the judgment-debtor, whereby the former agrees to treat a portion of the

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decree-debt as discharged, in consideration of certain services rendered by the judgment-debtor, is tantamount to a receipt of the amount LAKSHMINARASIMHACHARYULU v. LAKSHMAMMA, **12 Ind. Cas. 169.** (9 M.L.J. 258, 23 M 37, *F.*)

(4221 *c*)—*O.* 21, *r.* 89—*Property sold to judgment-debtor to a third person after execution sale—Right to apply.*—A judgment-debtor, whose property has been sold in execution of a decree, has a substantial interest in the property sold until the confirmation of sale, and can either get the sale set aside on the ground of irregularity or under O. 21, r. 89, Civ. Pro. Code. R. 89 in O. XXI of the Civ Pro. Code, is a special indulgence to a judgment-debtor or any person holding an interest in the property at the date of the sale. It gives them a last chance of saving the property "for themselves." It was never intended that the property should be saved for persons to whom the property might be sold privately after the auction-sale had taken place ISHAR DAS v. ASAF ALI KHAN, **9 A.L.J. 19.** (14 O.C. 33, *F.*)

(4221-*d*)—*O.* 21, *r* 89—*Application to set aside sale—Who may apply—Application verbal or written.*—An application under O. XXI, r 89 of the Civ. Pro. Code, need not be in writing; but the application, whether oral or in writing, must be in time. Deposit of money alone is not sufficient. *Held*, therefore, that a tender by a person who was neither an attorney, general or special, nor a Vakil or *Mukhtar*, for the owner of the immoveable property sold, does not comply with the provisions of O. XXI, r. 89, and is consequently invalid. SARVI BEGUM v. HAIDER SHAH, **9 A L.J. 12.**

(4221-*e*)—*O.* 21, *r.* 89—*Deposit—Last day—Court leaving earlier—Deposit next day, whether valid—Act of Court not to prejudice party—Conditional deposit—Withdrawal of condition—Deposit by person whose title is not affected by sale, if legal.*—An act of the Court cannot prejudice any party. Therefore, where, on the last day for making a deposit under O. XXI, r. 89 of the Code, the deposit could not be made as the presiding officer had left the Court earlier than usual, and the deposit was made the next day: *Held*, that the deposit was valid and in time. (13 C.L.J. 467, 10 Ind. Cas. 51, *R.*) The petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court; but as soon as objection was taken by the decree-holder, the petitioner withdrew the objection: *Held* that the deposit was valid. (1 C.W.N. 132, 8 C.W.N. 355, *R.*) A person, whose title cannot be affected by the sale sought to be reversed, is not entitled to make a deposit under O. XXI, r. 89 of the Code. Therefore, where the petitioner has carried back her title to a date so far anterior to the sale that she could not possibly be affected thereby; *Held*, that she had no *locus standi* to make an application for reversal of the sale, which according to her own case does not concern her in the least. DULHIN MOTHURA KOER v. BANSI DHAR SINGH, **10 Ind Cas. 880.**

(4221-*f*)—*O.* 21, *r.* 89 (=*Civ. Pro. Code*, 1882, *s* 310 *A*)—*Contract for sale of land subject to mortgage—Decree on mortgage—Sale of mortgaged property in execution—Right of person contracting to purchase to set aside sale.*—Where the petitioner had contracted to purchase certain property which was previously subject to a mortgage and had also paid a small sum as earnest money when entering into the contract, and the mortgaged property was sold in execution by the mortgagee, *held* that he was not entitled to set aside the sale under s. 310-A of the Civ. Pro. Code, 1882, as not being either the owner of the property or a person holding an interest therein within the meaning of the section. MAHADEO v. VASUDEV J. KIRTIKAR, **23 B. 181.** [*R*, 13 C.P.L.R. 163]

(4221 *g*)—*O.* 21, *r.* 89 (=*Civ. Pro. Code*, 1882, *s.* 310-*A*)—"*Person whose immoveable property has been sold,*" *meaning of—Prior private purchaser of property from judgment-debtor.*—A prior private purchaser from a person of property which is subsequently sold in execution of a decree obtained against the vendor, is not a person who comes within the purview of s. 310-A of the Civ. Pro. Code, 1882, as being entitled to set aside the sale. RAMACHANDRA v. RAKHMABAI, **23 B 450.** [*F.* 7 C.W.N. 243; *Appl.*, 30 C. 425; *Expl.*, 8 C. L.J. 305]

(4222)—O. 21, r. 89—Applicability—*See* BEN. ACT X OF 1859, ss. 109, 110, 151, 15 C.W.N. 863.

(4223)—O. 21, r. 89—Withdrawal by landlord of money deposited by transferee of holding—Effect—*See* BEN. ACT. VIII OF 1885, ss. 170, cl. (4), 171, 9 Ind. Cas. 619.

(4224)—O. 21, r. 89—Nature of right under—*See* APPEAL—GENERAL, 9 M L.T. 259=21 M.L.J. 631.

(4225)—O. 21, r. 89—Order refusing to accept deposit under, not appealable—*See* APPEAL—ORDERS, 19 A. 140=A.W.N. 1897, 7.

(4226)—O. 21, r. 89—Deposit by co-tenant—Sale set aside—Liability of other co-tenants to contribution—*See* CONTRACT ACT, 1872, ss. 43, 70, 14 C.W.N. 945=6 Ind. Cas. 810=12 C.L.J. 566.

(4227)—O. 21, r. 89—*See* CONTRACT ACT, 1872, s. 69, 6 C.W.N. 336.

(4228)—O. 21, r. 89—Deposit made by a co-judgment-debtor after sale Decree satisfied by deposit—Right to contribution—*See* CONTRACT ACT, 1872, s. 69, 8 A.L.J. 622.

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(4229)—O. 21, r. 89—Right to recover money erroneously deposited under s. 310-A—Voluntary payment—*See* CONTRACT ACT, 1872, s. 72, **12 C.W.N. 151.**

(4230)—O. 21, r. 89—*See* EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 18 M. 477, 31 C. 940, F.B.

(4231)—O. 21, r, 89—U.P. Land Revenue Act (III of 1901), ss. 39, 210 and 211—Agra Tenancy Act (II of 1901), s. 159—Appeal—Jurisdiction—*See* JURISDICTION OF REVENUE COURTS, 6 A.L.J. 164=31 A. 279=2 Ind. Cas. 32.

(4232)—O. 21, r. 89—Order setting aside sale—Purchaser's right to sue for possession more than a year after the order—*See* LIMITATION ACT, 1908, s. 2, arts. 13, 14, 7 A.L.J. 937=7 Ind. Cas. 503.

(4233)—O. 21, r. 89—Deposit of money by judgment-debtor within 30 days—Application to set aside sale beyond time—Effect—*See* LIMITATION ACT, 1908, art. 166, 9 Ind. Cas. 33.

(4234)—O. 21, r. 89—*See* MORTGAGE—GENERAL, 1 O.C. 193.

(4235)—O. 21, r. 89—*See* MORTGAGE—MISCELLANEOUS, 31 C. 975.

(4236)—O. 21, r. 89—*See* SALE—SALE FOR ARREARS OF RENT—DEPOSIT OF MONEY AND STAYING SALE, 29 C. 459.

(4236-*a*)—O. 21, r. 89—*See* NOS. 920, 925, 929, 984, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1525, 1526, 1527, 1866, 2194, 2195, 3022, 4093, 4156, 4157, 4166, *supra*.

(4237)—*O. 21, r. 89, s. 47 (=ss. 310-A, Civ. Pro. Code, 1882) — Applicability — Representative of judgment-debtor—Civ. Pro. Code, 1882, s. 244, Order under*—S. 310-A, Civ. Pro. Code, 1882, applies to the sale of a tenure in execution of a decree for its own arrears; an auction-purchaser is entitled to a notice before an order is made under the section. (23 C. 393, *F.*) [*Appr.*, 9 C.W.N. 134; *R.*, 29 C. 1, F.B.=5 C.W.N. 821] A person who had acquired an interest in property sold in execution of a decree, before the judgment-debtor became liable under the decree, is not a representative of the judgment-debtor within the meaning of s. 244 of the Civ. Pro. Code, 1882. [*R.*, 5 C.W.N. 63.] Where an order under s. 310-A, Civ. Pro. Code, 1882, does not decide a question between the parties to the decree or their representatives, although it is an order relating to the execution of a decree, it does not come within the provisions of s. 244, Civ. Pro. Code, 1882, and, therefore, no appeal lies from such order. BUNGSHIDHAR HALDAR v. KEDAR NATH MONDAL, **1 C.W.N. 114.** [*F.*, 6 C.W.N. 57; *R.*, 5 O.C. 377; *D.*, 13 C.W.N. 591.]

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(4238)—*O. 21, r. 89, s. 47 (=ss. 310-A, 244, Civ. Pro. Code, 1882)—Order dismissing application to set aside sale—Appeal.*—An application under s. 310-A, Civ. Pro. Code, 1882, to set aside a sale, raises a question relating to the satisfaction of the decree within the meaning of s. 244, and an order dismissing such an application is appealable. NALLAMUTHU PILLAY v. SUBBA PILLAY, **8 Ind. Cas. 855=9 M.L.T. 165.**

(4239)—*O. 21, r. 89, s 47—Auction sale, setting aside of—Money deposited not in time through Court's action*—"Actus curiae neminem gravabit"—*Second appeal—Decree holder, auction purchaser — Revision-petition treated as memorandum of appeal.*—Judgment-debtors made an application under r. 89 of O. XXI of the Civ. Pro Code to have the execution sale, in which the decree-holder was the purchaser, set aside, on the thirtieth day from the date of sale. Their agent was present in Court with money and was ready to deposit it; for that purpose a *challan* was duly filled up and placed in the hands of the proper officer for signature of the presiding officer; and he was informed latter on in the day, that as the Presiding officer had left the Court, his signature could not be obtained on that day. The result was that the *challan* was signed on the following day, and the money received on the authority thereof by the treasury officer. *Held*—That the sale should be set aside. A mere presentation of an application without deposit of money within 30 days, under r. 92 of O. XXI of the Civ. Pro. Code, is not sufficient compliance with the law. When a party litigant has found it impossible to comply with the requirements of the statute, not because of his own fault, but by reason of the action or inaction of the Court, the principle applicable to such a contingency is expressed by the maxim "*Actus Curiæ neminem gravabit.*" (An act of Court prejudices no man). As the order is passed under r. 92 of the Civ. Pro. Code, in proceedings between the decree-holder and the judgment-debtor, a second appeal lies under s. 47 of the said Code. The true nature of an order under r. 89 of O. XXI of the Civ. Pro. Code must be examined and the character of the parties affected thereby ascertained, before it can be determined whether the order does or does not fall within the scope of s. 47. An application for revision presented to Court within the time allowed for the presentation of an appeal, may be treated as a memorandum of appeal. MAHOMED AKBAR ZAMAN KHAN v. SUKHDEO PANDE, **13 C.L.J. 467.**

(4240)—*O. 21, r. 89, s. 47 (=ss. 310-A, 244, Civ. Pro Code, 1882)—Deposit to set aside a sale—Purchaser of a portion of an occupancy holding, right of, to make the deposit—Sale of the holding for its own arrears—Transferability of the holding—Appeal, if lies against an order reversing an order setting aside a sale.*—The purchaser of a portion of an occupancy holding

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whether it is transferable by custom or not, is entitled to make a deposit under s. 310-A of the Civ. Pro. Code to set aside a sale, (8 C.W.N. 55, 232, *F.*) The question whether the purchaser of a portion of an occupancy holding is entitled to come in under s. 310-A of the Civ. Pro. Code to make a deposit and to have a sale held for its own arrears set aside is one that comes under cl. (*c*) of s 244 of the Code and an appeal and a second appeal lie in the case. OMAR ALI MAJHI v. MOONSHI BASIRUDEEN AHMAD, **7 C.L.J. 282.** (28 C. 73, 9 C.W.N. 134, *R.*)

(4241)—*O.* 21, *r.* 89, s. 47 (=ss. 310-*A*, 244, *Civ. Pro. Code*, 1882)—*Deposit—Appeal—Sale.*—Where property was sold separately in nine lots, and the judgment-debtor prayed to set aside the sale of one of the properties by tendering the balance due under the decree, after deducting the amounts bid by the decree-holder for some of the properties and the amounts deposited by the other purchasers, s. 310-A, Civ. Pro. Code, 1882, was held not to apply and there was no deposit within the terms of that section. [*D.*, 14 Bur L. R. 176.] There is an appeal under s. 244 of the Civ. Pro. Code, against the order under s. 310 A, as the parties stood in the position of decree-holder and judgment-debtor, and the order was made on an application to set aside the sale. KRIPA NATH PAL v. RAM LAKSMI DASYA, **1 C.W.N. 703.** [*R.*, 13 C.W.N. 591; *D.*, 5 C.L.J. 204, 5 L.B. R. 85.]

(4242)—*O.* 21, *r.* 89, ss. 47, 104, *O.* 43, *r.* 1 (=ss. 310-*A*, 244, 588, *Civ. Pro. Code*, 1882)—*Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction-purchaser representative of judgment-debtor not of decree-holder.*—A purchaser at an auction-sale in execution of a decree is the representative of the judgment debtor, not of the decree-holder (30 M. 507, *Diss.*). Where, therefore, a judgment-debtor's application under s. 310-A of the Code of Civil Procedure had been allowed, it was *held* that no appeal by the auction-purchaser, would lie, inasmuch as no appeal was given by s. 588, nor did the case fall within the purview of s. 244 of the Code. ANANDI KUNWAR v. AJUDHR NATH, **A.W.N. 1908, 157=5 A L. J. 557=30 A. 379.** (19 A. 140, *F.*; 27 A. 263, 26 A. 447, 25 B. 631, 7 A. 681, *F.*; 29 A. 275, *Diss.*)

(4243)—*O.* 21, *r.* 89, ss. 68, 70, 71 (=ss. 310-*A*, 320, *Civ. Pro Code*, 1882)—*Applicability of s. 310-A to execution proceedings by Collector.*—The general provisions of the Civ. Pro. Code and, among them, of s 310 A, do not apply to proceedings held by the Collector in execution of a decree under s. 320 of the Code. SHEO PRASAD v. MUHAMMAD MOHSIN KHAN, **25 A 167=A.W.N. 1902, 225.** [*R.*, 31 B. 207=9 Bom. L.R. 15.]

(4244)—*O.* 21, *r.* 89, ss. 68, 70, 71 (=*Civ. Pro. Code*, 1882, ss. 310-*A* and 320)—*Order by*

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Collector setting aside sale held by him in execution on payment of decree amount—Right of purchaser to set aside order.—Where a Collector, in exercise of the authority conferred on him under s. 320 of the Code, passed an order under s. 310-A setting aside a sale, a suit cannot be brought in the Civil Court to set aside the order of the Collector. MANAK CHAND v. SUNDER LALL, **11 C P.L R. 33.** (18 C. 481, 19 B. 216, 18 A. 437, *R.*) [*F.*, 5 N.L.R. 121.]

(4245)—*O.* 21, *r.* 89, *s.* 115 (=*ss.* 310-*A*, 622, *Civ. Pro Code*, 1882)—*Attaching creditor, application by*—Locus standi—*Order under s* 310-*A, Civ. Pro. Code appealable or not—Revision—S* 310-*A, Civ. Pro. Code applied to a case to which it is not appli able—Order erroneous or without jurisdiction*—An attaching creditor is not a "person whose immoveable property is sold" within the meaning of s. 310-A, Civ. Pro. Code, and he is not entitled to make an application to set aside the sale under that section. (4 C.W.N. 542, *R.*) Whether an order under s. 310-A, Civ. Pro. Code, is subject to appeal or revision under s 622, Civ. Pro. Code, depends upon the circumstances of each particular case. Where the purchaser is thedecree-holder himself and the question arises between him and the judgment-debtor an appeal lies. (26 C. 449, *F.*) Where the auction-purchaser is a stranger, s. 622, Civ. Pro. Code, is applicable. (22 C. 767, 1 C.W.N. 114, *F.*) [*Rel.*, 13 C.W.N. 591; *R.*, 5 O.C. 377, 5 C L.J. 204.] Where the lower Court set aside a sale under s. 310-A, Civ. Pro. Code, in a case to which the section is not applicable the High Court can interfere under s. 622, Civ, Pro. Code, as the order is not merely an erroneous order but is made without jurisdiction. KEDAR NATH SEN v. UMA CHARAN *alias* GOPAL GUPTA, **6 C.W.N 57.** [*Not. F.*, 11 O C. 238.]

(4246)—*O.* 21, *r.* 89, *s* 115 (=ss. 310-A, 622, *Civ. Pro. Code*, 1882)—*Execution of decree—Application to set aside sale—Who have a right to apply—Revision.*—A mortgage sued for sale on his mortgage impleading besides the mortgagee, two persons, who claimed a title to the mortgaged property adverse to the mortgagee. In that suit, it was decided that the property, the subject of the mortgage in suit, belonged to the mortgagor and not to the other defendants. The plaintiff, mortgagee, obtained a decree for sale and caused the mortgaged property to be sold by auction. The defendants, other than the mortgagor, applied to have this sale set aside, under s. 310-A of the Code of Civil Procedure, but their application was rejected, and they then sought, in revision, to get this order reversed. *Held*, by *Banerji, J.*—That the defendants, applicants, were not entitled to make an application under s. 310-A of the Code, they not being judgment-debtors whose property had been sold. Per *Richards, J.*—Whether or not the applicants were entitled to make the application which they did make (and they possibly were so entitled) the Court below did not fail to

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exercise a jurisdiction vested in it by law nor did it act in the exercise of that jurisdiction illegally. Its order was, therefore, not open to revision. RAM SINGH v. SALIG RAM, **A.W.N. 1903, 193=2 A.L.J. 711=28 A. 84.** (11 I.A. 237, *R.*)

(4247)—*O.* 21, *r.* 89, s. 115 (=*Civ. Pro. Code*, 1882, ss. 310-*A*, 622)—*Sale, application by judgment-debtors to set aside, on deposit of debt—Deposit of debt by judgment-debtor when decree adjusted in whole—Limitation—General Clauses Act of* 1877, *s.* 7—*Mistake or fault of Court, effect of, upon suitors—Revision.*—The immoveable property of a judgment-debtor was sold in execution of a decree on the 20th September, 1901. The period of thirty days, within which the judgment-debtor could apply under s. 310-A, Civ. Pro Code, to have the sale set aside, expired when the Court executing the decree was closed. The Court re-opened on the 18th November, 1901. On that date, the judgment-debtor applied under s. 310-A to have the sale set aside. Before the property was sold, the decree was adjusted in whole to the satisfaction of the decree-holder, but such adjustment was not certified by the decree-holder to the Court executing the decree until after the sale. In his application the judgment-debtor alleged that nothing was due to the decree holder. On the 19th November, 1901, the judgment-debtor deposited the required amount in the Government Treasury for payment to the purchaser. It was found that he was prevented from depositing the money payable to the purchaser in the Government Treasury on the 18th November, because, on that date, the tender was not returned to him by the office of the Subordinate Judge, until after the Government Treasury was closed. *Held*, that the decree-having been adjusted in whole since the date of the sale-proclamation and the decree-holder having certified such adjustment on the 18th November, the day on which the judgment-debtor applied to have the sale set aside, it was not necessary to deposit the amount specified in the sale-proclamation as due under the decree. *Held*, further, that under s. 7, General Clauses Act, 1887, the judgment-debtor was entitled to make his application and to deposit the money required on the day on which the Court re-opened, the period prescribed by s. 310-A, Civ. Pro. Code, having expired while the Court was closed. *Held*, also, that, if it was the fault of the officials of the Court and not of the judgment-debtor that the money was not deposited in the Government Treasury on the 18th November, the deposit of the money on the 19th November should be considered as having been made in due time, on the principal that "an act of Court shall prejudice no man." RAM NATH v. MURLI DHAR, **6 O.C. 68.**

(4248)—*O.* 21, *rr.* 89, 90 (=*Civ. Pro. Code*, 1882, ss. 310 *A*, 311)—*Applicability to sales in execution of mortgage-decrees.*—Ss. 310-A and 311, Civ. Pro. Code, apply to sales of mortgaged property which have taken place in execution of mortgage-decrees. MALIKARJUNADU SETTI v. LINGAMURTI PANTULU **25 M. 244, F.B.=12 M.L.J. 279** (25 C. 703, *Commented on*; 19 A, 205, 25 B. 104, 22 M. 286, *Appr.*) [*F.*, 31 C. 863=8 C.W.N 684, 31 M. 354=18 M.L.J. 259 =3 M.L.T. 281; *R.*, 28 M. 473=15 M.L.J. 126, 2 N.L.R. 137, 7 C.L.J. 1, 5 M.L.T. 278.]

(4249)—*O.* 21, *rr.* 89, 90 (=*Civ. Pro. Code*, 1882, ss. 310-*A*, 311)—*Petition under s.* 311, *pending when one under s.* 310-*A was put in—Judgment-debtor entitled at the hearing to withdraw former petition and proceed with latter.*—Where a judgment-debtor first applies under s. 311, Civ. Pro. Code, to set aside the sale and, when that petition is pending, puts in another petition within thirty days from the date of sale under s. 310-A, he is entitled, when the petitions are first called on for hearing, to withdraw the former and to proceed with the latter petition; under such circumstances, the matter must be treated as if no application under s. 311 has been made. The policy of the section is to prevent a person who determines to impeach a sale under s. 311 from at the same time obtaining the benefit of the concession granted under s. 310-A. It was not intended that a party who withdraws all objections under s. 311 (without having done more than merely file a petition under the section) should be debarred from claiming relief under s. 310-A. VENKATA KRISHNAYYA v. NARASIMHAM, **8 M.L.J. 56.**

(4250)—*O.* 21, *rr.* 89, 90 (=*ss.* 310-*A and* 311, *Civ. Pro. Code*, 1882)—*Application under s.* 310-*A—Limitation Act, s.* 7, *applicability of.*—The 30 days' period of limitation prescribed by s. 310-A, Civ. Pro. Code, as it is fixed by that section, and not by the second schedule of the Limitation Act (XV of 1877), cannot be read as though subject to the provisions of s. 7, Limitation Act (1877), in favour of a minor judgment-debtor. A distinction can well be drawn between an application under s. 311, Civ. Pro. Code, which asks redress for a wrong, and one which asks the benefit of the concession allowed to judgment-debtors by s. 310-A, and much inconvenience would be caused by allowing a minor judgment-debtor to come in under the latter section years after a perfectly regular sale. HIRASA v. JODHRAJ, **5 N.L.R. 1=1 Ind. Cas. 178.** (9 A. 411, 3 A. 247, *D*; 5 M. 171, 2 C. 468, 4 C. 708, *R.*)

(4251)—*O* 21, *rr.* 89, 90 (=*ss.* 310-*A and* 311, *Civ. Pro. Code*, 1882)—"*Applies,*" *meaning of—Presentation of an application to the Munsarim—Withdrawal of application before order passed—Making of application when deemed to be complete.*—*Held* that, where an applicant presented an application under s. 311, Civ. Pro. Code, to the Munsarim of the Court, and, before the Court passed an order on it, he applied to withdraw the application and the application was consequently withdrawn, the

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applicant should be held to have withdrawn his application before the making of it was complete, should not be considered to have applied under s. 311, and should be held to be entitled to make an application under s. 310-A. RAJA MOHAMMAD SARDAR HUSAIN KHAN v. SAJJAD MIRZA, **10 O.C. 141.** (5 O.C. 137, *Appr.*

(4251-*a*)—*O.* 21, *rr.* 89, 90—*Sale (—Application to set aside—Civ. Pro. Code, Act XIV of* 1882, *ss.* 310-A, 311— R. 89 (2) of O. 21, Civ. Pro. Code, prevents a person, who has preferred an application under r. 90, from making or prosecuting and application under r. 89, until he has withdrawn his application under r. 90; but the converse is not provided for in the Code, and there is no express prohibition against an application being made under r. 90 where an application under r. 89 has been made and has been withdrawn or dismissed. Rs. 89 and 90 permit of applications by persons who could not have applied under ss. 310-A and 311 of the Code of 1882. BASIR-UD-DIN v. FAIMULLA, **11 Ind. Cas. 196.**

(4552)—O. XXI, rr. 89, 90—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 25 M. 244, F.B. = 12 M.L.J. 279.

(4253)—O. XXI, rr. 89, 90—*See* PRE-EMPTION—GENERAL, 10 O.C. 273.

(4254)—*O.* 21, *rr.* 89, 90, 92 (=ss. 310-*A*, 311, 312, *Civ. Pro. Code*, 1882)—*Execution sale under mortgage-decree not setaside—Application by purchaser of sale property in execution of money-decree - Order setting aside prior sale —Effect.*—A sale under a mortgage-decree not having been set aside either under s. 311 or s. 310-A, an order setting it aside, passed on an application by a purchaser of the same property in execution of a money-decree on his offering to pay the mortgage-money with interest and costs to the purchaser under the mortgage-decree, *held*, to be without jurisdiction. KHETTER NATH BISWAS v. FAZUDDIN ALI, **24 C. 682.** (20 C. 8, *R.*) [*R.* 92 P.R. 1907.]

(4255)—O. 21 rr. 89, 90, 92, s. 148—Agreement between judgment-debtor and decree-holder setting aside sale, before confirmation—Auction-purchaser if bound—Right to object—Right of appeal—Power to extend time for depositing decretal money—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 15 C.W.N. 685 = 13 C.L.J. 535.

(4255-*a*)—*O.* 21, *rr.* 89, 92, *O.* 43, *r.* 2 (*j*)—*Auction-sale—Mortgagee's right to pay amount of decree and costs in order to release the house from attachment*—*Held* that:—A mortgagee of immoveable property is entitled to pay the amount of decree and costs, in order to get the property released from attachment, even after it is sold to the highest bidder and even if the mortgage has taken place after attachment. (30 B. 575, *F*; 92 P.R. 1907 = 152 P.W.R. 1907, *D.*) Under O. XXI, r. 92, and O. XLIII.

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r. 2 (*j*), appeal lies against the order of the executing Court refusing to receive the amount of decree and costs from such a mortgagee as is mentioned above. In such a case, the course of appeal and revision depends on the jurisdictional value of the suit in which the decree has been passed. An order of the above description as was passed by the District Judge should not be interfered with on revision, even if it may be open to some doubt on a question of law of some difficulty. THAKAR SINGH v. GURDIT SINGH, **178 P.W.R. 1911.**

(4256)—*O.* 21, *rr*, 89, 94, *s.* 65 (=ss. 310-*A* and 316, *Civ. Pro. Code*, 1882)—*Scope of s. 310-A "Person whose immoveable property has been sold"—Sale by judgment-debtor after auction-sale but before confirmation.*—Under s. 316, Civ. Pro. Code, title does not pass to the purchaser until the sale in execution of a decree is confirmed, and, until confirmation, it is open to the judgment-debtor to transfer his interest so as to entitle the party, to whom the interest is transferred, to apply under s. 310-A. The words "person whose immoveable property has been sold" in s. 310-A, includes cases where a person purchases immoveable property from the judgment-debtor, after the auction sale, but before the expiration of 30 days and before confirmation. APPAYA CHETTI v. KANHAL, BEARI **17 M.L.J. 127 = 30 M. 214.** (26 M. 365; *F.*; 1 C.W.N. 279, *Diss.*)

—— O. XXI, r. 90 (=1882, s. 311=1877, s. 311 —1859, s. 256).

See SALE—SALE IN EXECUTION OF DECREE.

(4257)—*O.* 21, *r.* 90 (=s. 311, *Civ. Pro. Code*, 1882)—*Scope of the section—Application to set aside execution sale — Proof of substantial damage to petitioner—Objection that minor defendant was not properly represented in execution, whether falls under* s. 311.—To sustain an application under s. 311, it must be shown that there was material irregularity in the publication or conduct of the sale and substantial loss resulting to the petitioner as a consequence of that irregularity. If one of the ingredients is found to be absent, there is no scope for an application under s. 311. An objection that the minor defendant was not properly represented in execution, does not fall under s. 311. KOLLI NAGIAH v. VAPPUBURI GOPALA KRISHNIAH, **9 Ind. Cas. 252 = 9 M. L.T. 260.**

(4258)—*O.* 21, *r.* 90—*Application to set aside an execution sale—Bidders dissuaded by decree holder from bidding, whether a ground for cancellation of sale—Whether sale can be set aside on grounds other than those set forth by applicant*—The fact that a decree-holder-purchaser dissuaded others from bidding at a Court sale and thus caused the property to be sold at a low price is not a sufficient ground for setting aside the sale. (23 M. 227, P.C. = 27 I. A. 17, *F.*) An application under O. XXI

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r. 90, Civ. Pro. Code, to set aside an execution sale, is limited to the grounds set forth in that rule. Such a sale cannot be set aside upon grounds not pleaded by the applicant. UTTAM CHAND v. DHANPUT RAI, **102 P.L.R. 1911.** (21 A. 140, *Rel on.*)

(4259)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*Sale, setting aside of—Material irregularity—Under statement of the value of the property—Waiver, mixed question of fact and law—Agreement to waive, when valid—Sale proclamation, if to be published in each village.*—If an under-statement of the value of the property to be sold has been made in the sale proclamation, which is calculated to mislead bidders, and to prevent them from offering adequate prices or from bidding at all, and the sale has thus resulted in a price altogether inadequate, such mis-statement must be treated as a material irregularity in publishing or conducting the sale, and the special remedy provided in s. 311 becomes applicable. (20 A. 412, *F.*) There need not be separate proclamation in each village, unless proper notice of the sale could not otherwise be given. A question of waiver is a mixed question of fact and law. An agreement to waive any objections to the sale entered into by parties is valid and operative, only when sanctioned by the Court; where the Court withholds its assent, and declines to pass an order on the basis of the agreement of the parties, the matter is set free, and the judgment debtor cannot be regarded as bound by the offer which he has made. (9 C.L.J. 251, 36 C. 432, *F.*) *Quære*:—Whether an agreement to waive all the rights of a person to seek the protection of a Court of Justice, against fraud upon the process of the Court itself would at all be enforced? BASSANTA KUMARI GUHAN v. RAMKANAI SEN PODDAR, **13 C L J. 192=9 Ind. Cas. 698.**

(4260)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*Interpretation.*—The words "any person whose immoveable property has been sold" in s. 311 of the Civ. Pro. Code, are sufficiently wide to include a person, who alleges that the property sold in execution is his, but is neither the decree holder, nor the judgment-debtor, nor the auction-purchaser. ABDUL HUQ MOZOOMDAR v. MOHINI MOHUN SHAHA, **14 C. 240.** [*Overruled*, 15 C. 488, F.B., *F.*; 12 A. 440, F.B. =10 A.W.N. 103; *R.*, 19 M. 167, 23 B. 450]

(4261)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, s. 311)—*Attaching creditor*—"*Decree-holder.*"—An attaching creditor is not "a person whose immoveable property is sold" within the meaning of s. 311, Civ. Pro. Code, nor does he come within the words "decree-holder" which appear in the section. Those words do not mean any decree-holder, but only the decree-holder who brings the property to sale. MATUNGINI DASSI v. MONMOTHA NATH BOSE, **4 C.W.N. 542.** (15 C. 488, *R.*; 10 M. 57, 15 A. 318, 16 B. 91, *Diss.*; 20 C. 673, 21 C. 200, 2 C.W.N. 126, *D.*) [*Appr.*, 6 C.W.N. 57; *Cons.*, 29 C. 548.]

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(4262)—*O.* 21, *r.* 90 (=*Civ. Pro Code, Act X of* 1877, *s.* 311)—*Interpretation.*—The words "any person whose immoveable property has been sold" in s. 311 of the Civ. Pro. Code refer to property *de facto* and not to property *de jure*, and do not include a person that has purchased the same property at a prior execution sale, when such sale has not been confirmed. BHAGABUTTI CHURN BHUTTACHARJEE CHOWDHRY v. BISHESHWAR SEN, **8 C. 367=10 C.L.R. 441.** [*R.*, 10 C. 497, 13 C. 346, 23 B. 181, 23 B. 450.]

(4263)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, *s.* 311)—Locus standi *of stranger to decree.*—The test of whether a petitioner under s. 311, Civ. Pro. Code, has a *locus standi* or not is to consider whether he would be entitled to bring a suit to contest the sale or to recover the property. TIMMANNA BANTA v. MAHABALA BHATTA, **19 M. 167=6 M.L.J. 24.** [*R.*, 23 B. 450.]

(4264)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*Receiver—Sale—Realize—Interpretation.*—The provisions of s. 311 of the Civ. Pro. Code, 1882, apply to sales made by the receiver appointed by the Court. Under an order of the Court, the receiver had "power to get in and realize" the estate of a deceased person: *Held*, that the word "realize" in the order must be construed so as to include the power of sale. FATMABAI v. ABDOOL SUCCOOR, **6 Bom. L R 1140.**

(4265)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, s. 311), *matters to be proved by applicant under—Plea of want of jurisdiction in executing Court not raisable by the applicant.*—S 311 of the Civ, Pro. Code, provides that the person applying to have sale in execution set aside on the ground of material irregularity in publishing and conducting the sale cannot succeed unless he proves that he had sustained substantial injury by reason of such irregularity. (15 I.A, 171, 21 C. 66, *R.*) An applicant under s. 311 cannot be allowed in his application under the section to allege that the sale was null and void by reason of want of jurisdiction in the Court by which the sale was held. On such an application the applicant cannot obtain a declaration that, by reason of the want of jurisdiction to sell in the execution Court, the sale in null and void. An order setting aside the sale to which such an applicant may be entitled is entirely different from a declaration that the sale is null and void *ab initio*. The words 'set aside' occurring in the section are inapplicable to the case of a sale which is null and void. SHIRIN BEGAM v. AGHA ALI KHAN, **18 A. 141=A.W.N. 1896, 9.** [*F.*, 28 A. 273=3 A.L.J. 140=A.W.N. 1906, 3; *R.*, 1 O.C. 186, 21 A. 140, 6 O.C. 61.]

(4266)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1877, s. 311)—*Sale in execution of decree—Power to set aside without application.*—A Court is not

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competent to set aside a sale in execution of a decree, without being moved so to do either by the decree-holder or judgment-debtor, by application made under s.311, Civ. Pro. Code, 1877. RAM NARAIN v. BISHAMBER NATH, **A.W.N. 1882, 1.**

(4267)—*O.* 21, *r.* 90 (=s. 311, *Civ. Pro. Code*, 1882)—*Sale in execution of decree, application to set aside—Material irregularities in publishing and conducting sale—Substantial injury, evidence of—Evidence that substantial injury was due to material irregularity.*—In a proceeding under s. 311 of the Code of Civil Procedure, the judgment-debtors proved that there had been material irregularities in publishing and conducting the sale and that the property had fetched much less than its market value. There was no direct evidence connecting the irregularities with the lowness of the price, but the Subordinate Judge had inferred that the latter had been caused by the former. *Held*, that such an inference might be drawn and that in a case under s. 311, Civ. Pro. Code, it is not necessary to produce a witness or a document to prove that people were in fact deterred from bidding by the irregularity complained of. The Court must find that there has been substantial injury to the person concerned and that such injury was caused by the material irregularity complained of, but these are facts which must be determined according to the ordinary rules of evidence. There is no special rule applicable to cases under this section. ZAKI HASAN v. SAMBHU DAYAL, **6 O.C. 61.**

(4268)—*O.* 21, *r.* 90 (=1882, *Civ. Pro. Code*, s. 311)—*Execution sale, validity of—Substantial damage, proof of.*—An objection to the validity of an execution-sale of land, on the ground of the omission to state the amount of the revenue on it in the sale proclamation, though it would have been properly taken in the first Court, would not of itself be sufficient to invalidate the sale; under s. 311 of Civ. Pro. Code, substantial damage must be proved as a direct consequence of the non-statement of the revenue. [*R.* 21 C. 66, P.C.; *Appr.*, 11 Bom. L. R. 380.] Irregularity alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. The Court cannot, without evidence, and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to bid at the sale. MACNAUGHTEN v. MAHAPIR PERSHAD SINGH, **9 C. 656=11 C.L.R. 494=10 I.A. 23, P.C.** [*F.*, 12 M. 19 P.C. *Discussed*, 11 C. 658; *R.*, 11 C. 74, 8 B. 424, 11 C. 200, F.B., 11 A. 333, 20 C. 599, 21 C. 799=12 C.W.N 757, 24 C. 291, 30 C. 1, 6 O.C. 61, 31 C. 815=8 C.W.N. 686, 1 C.L.J. 91=9 C.W.N. 348=32 C. 509, 9 C.W.N. 487=32 C. 543, U.B.R. 1907, Civ. Pro. 311, 6 C.L.J. 163.]

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(4269)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, s. 311)—*Estimate by Court of value of property whether abwab should be included in—"Injury" what is.*—*Abwabs* that used to be realised from tenants are illegal cesses and are irrecoverable, and the recovery of *abwabs* is made punishable if the tenant from whom they are taken institutes a suit; and so a Court of justice in a proceeding arising out of an application under s. 311, Civ. Pro. Code, should not take *abwabs* into account in fixing the value of the property. Injury means loss which is wrongful, and when a person losses what he has been in the habit of wrongfully gaining, it is no substantial injury or injury of any sort or kind. SHOSI BHUSAN SADHU v. AHMED HOSSAIN, **7 C.W.N. 439.**

(4270)—*O.* 21, *r.* 90 (=*old s.* 311)—*Auction-sale—Substantial injury.*—A sale proclamation could not be said to have caused substantial injury to the mortgagors within the meaning of this section by reason of the words "*Koi dariaft nahin hua.*" It is not necessary to set out in the sale proclamation a charge to which the property would not be subject in the hands of a purchaser after sale. Unless it is proved that a possible bidder was prevented from bidding, the procedure cannot be said to be prejudicial to the interests of the mortgagors. MUSST. SARSUTI v. ISHRI PERSHAD, **30 P.R. 1899.** [*R.*, 132 P.R. 1906.]

(4271)—*O.* 21, *r.* 90 (=s. 311, *Civ. Pro. Code*, 1882)—*Material irregularity in conducting sale—Substantial injury.*—In execution of a decree, certain zemindari shares, with certain encumbrances, were proclaimed for sale. A day before the sale, the Court executing the decree intimated to the officer conducting the sale, that a portion of the shares was not to be sold, and that the revised amount of the encumbrances was to be notified at the time of the sale. No fresh proclamation was issued. The judgment-debtor objected to the sales being confirmed on the ground of material irregularity inasmuch as a fresh proclamation was not issued, nor was the revised amount of encumbrances notified at the time of sale: *Held*, that assuming that there were material irregularities, the sale could not be set aside without proof of substantial injury to the judgment debtor by reason of such irregularities. *Semble*—If inadequacy of price were established, it might perhaps be inferred that the injury was caused by these irregularities. SAJID ALI v. BINDRABAN, **1 O.C. 14.** [*R.*, 6 O.C. 61.]

(4272)—*O.* 21, *r.* 90 (=s. 311, *Civ. Pro. Code*, 1882)—*Relation between proved material irregularity and inadequacy of price, how established.*—The relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. The notification of an encumbrance which did not

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really exist, is an irregularity that may cause inadequacy of the price. GURU BUKSH LAL v. JAWAHIR SINGH, **20 C. 599.** (9 C. 656, 11 C. 200, *R.*) [*Rel. on*, 6 C.W.N. 836; *R.*; 21 C. 799, 19 M. 219, 24 C. 291, 22 M. 440=9 M.L.J. 190, 30 C. 1, 31 C. 815=8 C.W.N. 686.

(4273)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, *s.* 311)—*Setting aside execution sale—Irregularity and injury, connection between.*—Upon an application to set aside an execution-sale on the ground of irregularity, in the absence of evidence to show that the injury is the result of the irregularity, it is not to be presumed, from the proved existence of irregularity and injury, that the latter has occurred by reason of the former. SATISH CHUNDER RAI CHOWDHRI v. THOMAS, **11 C. 658.** (9 C. 656=10 I.A. 25, *Expld*; 11 C. 74 and 11 C. 200, *R.*) [*F.*, 18 C. 486; *R.*, 6 C.W.N. 44.]

(4274)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*'Sale'—Sale of property in lots—Sale separate as regards each lot—Misdescription as regards one lot—Applicability of s.* 311, *to each lot.*—Where a property is sold in lots, the 'sale' referred to in s. 311, should not be confined to the sale of all plots, but it applies to each sale. In such a case, there are in fact separate sales to each purchaser, though all the sales might have taken place under one proclamation of sale. The fact that one person happened to buy all the lots can make no difference in this respect. The sale of a particular plot alone may be set aside under s. 311, Civ. Pro. Code, on the ground of misdescription. M.S. RAMACHENDRA AIYAR v. PRIMATHI AMMAL, **9 M.L.T. 250.**

(4275)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro Code*, 1882)—*Auction sale—Fraud—Irregularity and fraud in conducting sale in execution of decree—Proof of fraud to be clear and specific—Onus of proof—Inadequacy of price fetched no proof of fraud—Arrangement between persons not to bid against each other no "fraud"—Incompetency of Division Bench to re-open questions decided by a Single Bench in the order of reference to a Division Bench.*—Certain property of J was attached and sold in execution of a decree passed against him in favour of M, and purchased by S in auction. J applied for cancellation of the sale on two grounds. (1) Irregularities in connection with the proclamation and conduct of the sale. (2) Collusion between the purchaser S who was a relation of the Nazir, the Nazir and the decree-holder M, as a consequence of which two causes it was alleged the property which was not less than Rs. 18,000 in value was knocked down to S for only Rs. 1,500. The District Judge found against J as to ground (1) and dismissed the application. On appeal to the Chief Court, *Chatterji, J.* concurred in this finding, but remanded the case for enquiry as to ground No. (2) relating to the alleged fraud. The

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District Judge in his return found:—That the Nazir was really ill on the day of the sale. That the Nazir and the auction-purchaser S were connections by marriage, and that the allegation that there was enmity between the Nazir and the objector was false. That the intrinsic value of the property was about Rs. 18,000 at the time of sale, though it was knocked down for Rs. 1,500 only. That there were reasons why this property should have been sold at a sum which *prima facie* appears to be very inadequate. That, dispite all these facts, there is no proof of the fraud alleged. On the return coming up again before *Chatterji, J.*, the learned Judge referred the case to a Division Bench. *Held*, by the Division Bench—That it had no power to re-open the question of the alleged irregularities upon which *Chatterji, J.* had given his decision sitting as Single Bench. The *onus* of proving fraud rests upon the party alleging it, and that in every case a plea of fraud must precise and definite in its particulars. Fraud is not to be lightly presumed, but must be established by clear and definite evidence. And in the present case, though it is impossible to deny circumstances which suggest collusion and fraud on the part of the auction-purchaser, the decree-holder and the District Nazir, still positive proof of such fraud is wanting. That there were many reasons why bidders should not have been forthcoming at the sale, and therefore the price fetched (Rs. 1,500) could not be considered as an inadequate price. Assuming for the sake of agrument that M, the decree-holder, and S. the auction-purchaser actually conspired together not to bid agrinst each other (a fact which is by no means established on the evidence), fraud would not thereby be established. In such cases all that can be required of purchasers is that they should abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. PT. SEWA DAT PERSHAD v. GHULAM NABI, **150 P.W.R. 1909.** (23 M. 233, P.C. *F.*)

(4276)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*Application under s.* 311. *Civ Pro. Code—S.* 18, *art.* 166, *Limitation Act* (XV *of* 1877).—An application under s. 311, Civ. Pro. Code, on the ground of fraud, may be made within the same time after the knowledge of the fraud, within which an ordinary application may be made under s. 311, Civ. Pro. Code, if the application raise a question, (between parties to the suit), falling under s. 244, Civ. Pro. Code. The period of limitation, for such an application by a judgment-debtor, will be computed from the time when the fraud first became known to him and it is immaterial that the sale was confirmed. MOHENDRO NARAIN CHATURAJ v. GOPAL MONDUL, **17 C. 769.** (14 C. 679, *Diss.*) [*R.*, 21 A. 140.]

(4277)—*O.* 21, *r.* 90 (=*old s.* 311)—*Application to set aside sale—Auction-purchaser not a party—Effect.*—This section does not state that

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an application made under it shall not be received, unless the auction-purchaser is made a party. SEWAK RAM v. KUNDAN LAL, **3 P.R. 1897.**

(4278)—*O. 21, r. 90 (=Civ. Pro. Code, 1882, s. 311)—Judgment-debtor, application by, to set aside sale on ground of irregularity—Burden of proof.*—When a sale has taken place in execution of a decree, in due course of law, under the order of the Court having the execution of that decree, it must be *prima facie* presumed to be a legal sale, and any one who seeks to set it aside must establish that it is open to such objections, either in law or in fact, as would entitle him to set it aside. So, when a judgment-debtor has applied under s. 311, Civ. Pro. Code, to set aside an execution-sale on the ground of irregularity, the burden of proof is upon the judgment-debtor to substantiate his objections to the sale. JODHA SINGH v. BHUP SINGH, **A.W.N. 1887, 117.**

(4279)—*O. 21, r. 90 (=s. 311, Civ. Pro. Code, 1877)—"Material irregularity" invalidating a Court-sale under s. 311 of the Civ. Pro. Code, instance of.*—Where a intending bidder at a Court-sale (*i.e.*, the decree-holder) uses language in disparagement of property for deterring by-standers from bidding for it, it is a "material irregularity" rendering the sale invalid. RUKHINEE BULLUBH v. BROJONATH SIRCAR, **5 C. 308.** [*D.*, 17 C. 152.]

(4280)—*O. 21, r. 90 (=Civ. Pro. Code, 1877, s. 311)—Execution sale—Failure to affix copy of sale proclamation—Material irregularity—Execution sale—Inadequacy of price—Presumption.*—The omission to affix a copy of the sale proclamation to some conspicuous part of the attached property is a material irregularity within the meaning of s. 311 of the Code. [*Appr.*, 11 C. 74; *R.*, 11 A. 333=9 A.W.N. 115, 19 M. 219.] On proof of the great inadequacy of the price obtained at an execution sale of property, and of the fact of a material irregularity in publishing or conducting the sale, there arises a presumption that the inadequacy in price was caused by the irregularity. KALYTARA CHOWDHRAIN v. RAM COOMAR GOOPTA, **7 C. 466=9 C.L.R. 114.** [*R.*, 1 O.C. 186.]

(4281)—*O. 21, r. 90 (=s. 311, Civ. Pro. Code, 1882)—Execution of decree—Contribution suit—Decree passed severally against debtors—Sale of joint property of debtors in execution—Irregularity*—In execution of a decree passed against several persons severally, a property held by them jointly was sold: *Held*, that this was a material irregularity and, if substantial loss was the result of it, the sale ought to be set aside. SURENDRA NATH PAL v. AKHOY KUMAR PAL, **5 Ind. Cas. 647.**

(4282)—*O. 21, r. 90 (=s. 311, Civ. Pro. Code, 1882)—Irregularity—Property to be dealt with by Collector, sold away by Court.*—Where property which was sold under a decree is

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property which had been granted to the judgment-debtor for good services and in consequently such as should have been sold by the execution being transferred to the Revenue Court (which was not done) but all the orders were passed and issued by the Munsif, the proceeding is more than an irregularity and the sale ought to be set aside. BANKE LAL v. MUHAMMAD HUSAIN KHAN. **A.W.N. 1887, 32.** [*R.*, 11 A. 333, 18 A. 141.]

(4283)—*O. 21, r. 90 (=Civ. Pro. Code, 1882, s. 311)—Material irregularity—Sale advertised for 12 Noon, taking place at 5 P.M.—Delay—Low price.*—In an application by the judgment-debtors to set aside a Court-sale under s. 311, Civ. Pro. Code, on the ground of material irregularity in conducting it, where it appeared that the sale was advertised for 12 O'clock and did not take place until 5 P.M., and no notice was given to the intending purchasers present at noon that the sale would take place at 5 P.M. and the property was estimated at the value of Rs. 5,000 and was sold for the sum of Rs. 30, and only two bidders were present, one of whom was the decree holder, *held* that there was a material irregularity in conducting the sale within the meaning of s. 311, Civ. Pro. Code, and that the sale should be set aside. Under ordinary circumstances, it is an irregularity to delay a sale for hours. When such a delay takes place, the cause for such delay must be explained, and it must be shown that no damage had been occasioned by such delay. KALLU v. BUBDAYYA, **A.W.N. 1887, 129.**

(4284)—*O. 21, r. 90 (=old s. 311)—Omission to get sanction of Financial Commissioner—Irregularity.*—The omission to get the sanction of the Financial Commissioner (*Vide* Notification No. 1297, 10th Sep., 1885) is a material irregularity in the publishing or conducting of the sale within the meaning of s. 311 and the sale can be set aside on that ground. HAZURA SINGH v. BALDEO DAS, **3 P.R. 1888.** (6 P.R. 1882, *R.*)

(4285)—*O. 21, r. 90 (=Civ. Pro. Code, 1882, s. 311)—Adjournment of sale without fresh proclamation with consent of judgment-debtor—Objection to sale by another attaching creditor for want of proclamation.*—Certain property attached in execution of a decree was brought to sale in execution of another decree against the same judgment-debtor. The sale was postponed from the proclaimed date to another day, the judgment-debtor agreeing that no further proclamation was necessary. The sale accordingly took place on the adjourned date without a fresh proclamation and the property was purchased by the decree-holder's clerk. The other attaching creditor applied to have the sale set aside on the ground that it was irregular and that in consequence it fetched a low price. *Held* that because s. 291, Civ. Pro. Code, allows a sale to take place after an adjournment without a proclamation, if the judgment-debtor

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

waives his right to the same, it does not follow that it is not competent under any circumstances for a judgment-creditor to object to the sale taking place without a fresh proclamation, or to impeach the regularity of the sale on the ground that there has been no fresh proclamation. If a judgment-creditor desires a fresh proclamtion to issue notwithstanding the waiver of the judgment-debtor, and the Court declines to allow it to issue, that would be a good ground on which the regularity of the sale could be impeached by the judgment creditor. CHAKRAPANI CHETTIAR v. DHANJI SETTU, **24 M. 311.**

(4286)—*O. 21, r. 90 (Civ. Pro. Code, 1882, s. 311)—Conducting a sale before time advertised in the proclamation—Material irregularity.*—Conducting a sale in execution of a decree before time advertised in the proclamation for sale—the hour advertised being 10 A.M., and the hour at which the sale took place being 8 A.M.—is a material irregularity in the conduct of the sale, within the meaning of s. 311, Civ. Pro. Code. SIT PWAN v. NGWE THAIN, **4 L. B.R. 123.** (16 C. 794, *Diss*; 24 C. 291, *F.*)

(4287)—*O. 21, r. 90 (=s. 311, Civ. Pro. Code, 1882)—Execution sale—Holding the sale at an earlier hour than that mentioned in proclamation—Material irregularity—Onus of proof.*—An execution-sale held at an earlier hour than that notified in the proclamation of sale is not void, but is only a material irregularity. The person affected by such sale may apply, under s. 311 of the Code, to set aside the sale. But in order to succeed in his application, he must prove that substantial injury resulted from the irregularity. KAR THAN CHETTI v. PALANEAPPA CHETTI, **U B.R. 1907, Civ. Pro. 9.** (7 A. 289, 676, 21 C. 66, 24 C. 291, 20 M. 159, 14 W.R. 320, 15 W.R. 318, 10 I.A. 25 P.C., 15 I.A. 171, P.C.=11 M. 19, 27 I.A. 216, P.C.=23 B. 337 and 6 C.W.N. 48, *R.*)

(4288)—*O. 21, r. 90 (=Civ. Pro. Code, 1877, s. 311)—Sale in execution—Material irregularity in publication.*—The irragularity of fixing up of the notice of the intended execution sale of one *patti* of a *mahal* at the *chaupal* of a different *patti* of the same *mahal*, was not a material irregularity in the terms of s. 311, Civ. Pro. Code. MAWASHI KHAN v. RUP RAM, **A.W.N. 1881, 166.**

(4289)—*O. 21, r. 90 (=s. 311, Civ Pro. Code, 1877)—Sale in execution on a holiday.*—The sale of immoveable property by an *amin* of the Court on a close holiday, is not illegal, nor is it an irregularity or illegality, in publishing or conducting the sale, such as would vitiate it. BISRAM MAHTON v. SAHIB UN-NISSA, **3 A. 333.** [*F.*, A.W.N. 1882, 169; *R.*, 9 A. 366.]

(4290)—*O. 21, r. 90 (=Civ. Pro. Code, 1882, s. 311)—Purchase by decree-holder on leave to bid—Application for cancellation of sale—Dissuasion of bidders by decree-holder, effect of.*—A decree-holder having obtained leave to bid is in a position in no way different from that of any other bidder. S. 311, Civ. Pro. Code, requires material irregularity with its resulting loss to be shown for setting aside his purchase, just as in the case of any other purchaser. The fact that, on the date of the sale, an agreement was entered into between such decree-holder and a third person, the former undertaking to sell away the property, when purchased, to the latter for a particular amount, the agreement constituting a concert between the two to dissuade intending purchasers from bidding at the auction, was held not to be a sufficient ground for setting aside the sale on an application under s. 311 of the Code. Also, even if the above agreement had been entered into before the application for leave to bid, there was no obligation on the part of decree-holder to have disclosed such agreement to the Court so that his omission to disclose the same to the Court could not render the leave to bid granted ineffectual, in the absence of any allegation or proof of fraud upon the Court that executed the decree. One who seeks to set aside a purchase completed under the sanction of the Court, should state the grounds on which he claims to impeach it, and should not be allowed after the trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall not be condemned in Court on allegations which turn on evidence and which he has not been led to rebut by evidence. It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties came to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of appeal, and so deciding without due investigation. MAHOMED v. SAVVASI, **2 Bom. L.R. 640.** MAHOMED MIRA RAVUTHAR v. SAVASI VIJAYA RAGHUNADHAGOPALAR, **23 M. 227=27 I. A. 17=4 C.W N. 228=10 M L.J. 1 P.C =2 Bom. L.R. 640=7 Sar. 661,** (7 C. 346, *R.*) [*Expl*, 6 C.L.J. 111; *R.*, 25 M. 244, F.B. 1 C.L.J. 85, 36 C 226=13 C.W.N. 18=9 C.L.J. 244=4 M.L.T. 421, 150 P.W.R. 1909.]

(4291—92)—*O. 21, r. 90 (=s. 311, Civ. Pro. Code, 1882)—Sale in execution—Interim stay by appellate Court—Sale completed before stay order communicated—Effect.*—In an application to set aside a sale under s. 311, Civ. Pro. Code; the appellate Court ordered stay of the sale on petitioner depositing Rs. 75,000 within a month. Before the order of stay of sale was communicated to the lower Court, the sale was completed. On objection being taken that the power of the lower Court was suspended on the High Court passing the order, *held*, that the order only become effective when communicated to the lower Court and that the sale was valid

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

and not liable to be set aside. MUTHU KUMARASAMY v. KUPPUSAMY, **6 M.L T. 159=3 Ind. Cas 82=33 M. 74.** (1 C.W.N. 226, *F.*; 33 C. 927, *D.*)

(4293)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro. Code*, 1882)—*Sale proclamation—Under-statement of value of property by decee-holder—Fraud—Dissuading possible purchasers—Setting aside sale.*—Where property has been sold at auction for its fair value, although there was in the sale proclamation an under-statement of the value of the property on the part of the decree-holder, the sale cannot be set aside, on the ground that there was such gross understatement as itself amounted to fraud and dissuaded possible purchasers from bidding for the property owing to some defect in its title, because the under-statement has not resulted in the property being sold at a loss. TARUBALA DASI v. MONI LAL DAS. **1 Ind. Cas. 246,** (2 C. W.N. 550=20 A. 412=25 I.A. 146, 13 C.W N. 249=9 C.L J. 165, P.C.=6 A.L.J. 34=5 M.L. T. 126=11 Bom. L.R 227=1 Ind. Cas. 122, *D.*).

(4294)—*O.* 21, *r.* 90 (=*s.* 311 *Civ. Pro. Code*, 1882)—*S.* 14, *Limitation Act.*—Certain lands belonging to the appellant were sold in execution proceedings on the 8th May, 1897. On the 17th May, 1897, the applicant applied to the Collector to set aside the sale as the property was sold at an under-value. He, again, applied on the 6th August, 1897, to the Civil Court to have the sale set aside. *Held*, that the second application was time-barred; that the Collector having had no jurisdiction to entertain the application made to him, the first application could not save limitation under s. 14 of the Limitation Act; and that the second application could not be considered to have been made under s. 311 of the Civ. Pro. Code, as it was based on other grounds and contained additional prayers for relief. NARAYAN v. RUSULKHAN, **1 Bom. L.R. 33=23 B. 531.**

(4295)—*O.* 21, *r.* 90 (=*Civ. Pro. Code*, 1882, s. 311)—*Sale sought to be set aside on claim adverse to judgment-debtor—Regular suit, not application, the proper remedy.*—A sale of certain property had taken place in execution of a decree making the widow of the deceased judgment-debtor a party to the proceedings in execution. A brother of the judgment-debtor applied, without making the purchaser a party to his application, for the sale being set aside, stating that he was the undivided brother of the judgment-debtor, and the property was that of their joint family, and also alleging material irregularity. The Court of first instance dismissed the application. The lower Court made the purchaser a party, but erroneously proceeded to decide upon the evidence recorded when the purchaser was no party. The proper course for the applicant was held to be a regular suit and not his present application. If the property attached and sold was joint as stated

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

therein, it must have survived to the applicant on the death of his brother and thereby become his exclusive property, and when a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment, his proper remedy, as observed in 15 C. 488, is a regular suit and not a proceeding under s. 311. SUBBARAYUDU v. PEDDA SUBBARAZU, **16 M. 476.** [*Appr.*, 23 B. 450; *R.*, 19 M. 167; *Dist.*, 22 M. 68.]

(4296)—*O.* 21, *r.* 90 (=*s.* 311 *Civ. Pro. Code*, 1882)—*Application to set aside sale—Dismissal for default—Appeal—Adjournment—Illness.*—An order dismissing an application under s. 311, Civ. Pro. Code, on the ground of the non-appearance of the applicant, is appealable. Where the parties were ready with their witnesses, but the case was adjourned for want of time, and, on the date fixed for hearing, the applicant wanted time on the ground of illness supported by a medical certificate from a Civil Hospital Assistant, but the Court refused the application. *Held*—That, in the circumstances of the case, the order was bad, and the case was remanded. BROJA SUNDAR ROY CHOWDHURY v. MOTI LAL MOZUMDAR, **14 C W N. 573=5 Ind. Cas. 493.**

(4297)—*O.* 21, *r.* 90 (=*s.* 311, *Civ. Pro Code*, 1882)—*Application to set aside sale—Second appeal to High Court against appellate order dismissing application.*—No second appeal lies to the High Court against an appellate order confirming the order of a Court of first instance, dismissing an application to set aside a sale under s. 311, Civ. Pro. Code, 1882, DORAIRAJA PILLAY v. VEERANAN AMBALAM, **8 Ind. Cas. 83=9 M.L.T. 171.** (19 M. 29, *F.*)

(4297-*a*)—*O.* 21, *r.* 90—*Execution of decree—Sale—Application to set aside—Material irregularity in publishing or conducting sale.*—*Held*, that a sale held by a Court in execution of a decree is not liable to be set aside, when no material irregularity in publishing or conducting the same is proved. MUSSAMMAT NUR JAHAN BEGAM v. RAI GIRDHARI LAL, **222 P.L.R. 1911.**

(4298)—O. 21, r. 90—Sale of mortgaged property in execution of rent-decree—Purchase by landlord—Application by mortgagee to set aside the sale, maintainability of—*See* BEN. ACT VIII OF 1885, s. 153, 1 C.L.J. 454.

(4299)—O. 21, r. 90—*See* BEN. ACT VIII OF 1885, s. 153, 9 C.W.N. 731=1 C.L.J. 476=32 C. 957, F.B.

(4300)—O. 21, r. 90—Applications under s. 311, Civ. Pro. Code, and s. 174, Bengal Tenancy Act—Withdrawal of former application—Effect—*See* BEN. ACT VIII OF 1885, s. 174, 13 C.W.N. 591=1 Ind. Cas. 304.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4301)—O. 21, r. 90—*See* APPEAL-DECREES AND EXECUTION OF DECREES, 21 M. 417=8 M.L.J. 77.

(4302)—O. 21, r. 90—*See* EXECUTION OF DECREE—EXECUTION BY COLLECTOR, 25 A. 355=A.W.N. 1903, 69.

(4303)—O. 21, r. 90—Formalities to be observed preliminary to sale, non-compliance with—Effect—Error in warrant of attachment, effect of—Application to set aside sale on the ground of irregularity—Limitation—*See* EXECUTION OF DECREE—MISCELLANEOUS, 40 P.R. 1910=63 P.W.R. 1910=6 Ind. Cas. 713=211 P.L.R. 1910.

(4304)—*O.* 21, r. 90—*See* INJURY, 7 C.W.N. 439.

(4305)—O. 21, r. 90—Application to set aside sale—Effect of minority—*See* LIMITATION ACT, 1908, ss. 6, 8, art. 166, 5 P.L.R. 1910=6 Ind. Cas. 488=118 P.W.R. 1910.

(4306)—O. 21, r. 90—Application to set aside execution sale after period of limitation—*See* LIMITATION ACT, 1908, s. 18. 14 C. 679.

(4307)—O. 21, r. 90—*See* LIMITATION ACT, 1908, s. 18, art. 166, 1 C.W.N. 67.

(4308)—O. 21, r. 90—*See* LIMITATION ACT, 1908, art. 12 (*a*), 2 Bom. L.R. 927=25 B. 337.

(4309)—O. 21, r. 90—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 10 C. 496.

(4310)—O. 21, r. 90—*See* SALE—GENERAL, 7 C. 163.

(4311)—O. 21, r. 90—*See* SALE—SALE FOR ARREARS OF RENT—MISCELLANEOUS, 7 C. 723.

(4312)—O. 21, r. 90—Irregularity in publishing sale to be dealt with under—*See* TRANSFER OF PROPERTY ACT, 1882, s. 99, A.W.N. 1908, 49=5 A.L.J. 121=30 A. 146.

(4312-*a*)—O. 21, r. 90—*See* NOS. 71-*a*, 192, 913, 946, 977, 978, 979, 984, 1023, 1027, 1033, 1037, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1060-*a*, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1156, 1158, 1286, 1528, 1529, 1530, 1531, 1532, 2195 2196, 2197, 2198, 2246, 2740, 2883, 2912, 2913, 3000, 3023, 3023 *a*, 3351, 3355, 3458, 3630, 3785, 3787, 3788, 3912, 3934, 3940, 3964, 4051, 4052 b, 4064, 4066, 4067, 4069, 4070, 4071, 4072, 4073, 4074, 4075, 4076, 4077, 4078, 4079-*a*, 4081, 4082, 4083, 4097, 4099, 4100, 4101, 4102, 4103, 4104, 4105, 4147, 4156, 4158, 4164, 4167, 4168, 4177, 4248, 4249, 4250, 4251, 4252, 4053, 4254, 4255, *supra*.

Civ. Pro. Code (Acts of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4313)—O. 21, r. 90, s. 50—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 1 O.C. 155.

(4314)—*O.* 21, *r.* 90, *s.* 68 (=*Civ. Pro. Code*, 1877. *ss.* 311. 320)—*Sale of ancestral estates—Sale by Collector—Rule XII of Rules made by Local Government under s.* 320, *under Notification No.* 671 *of* 1880, *dated* 30*th August*, 1880. —By Rule XII, it is intended that Collectors should apply to applications of judgment-debtors whose immoveable property has been sold under the Rules, the practice and procedure that have always been applied by the Civil Courts in such cases. Collectors are expected to hear evidence on issues duly framed out of the objections preferred to them, and determine the question before them judicially. CHANDAN KUAR v. BHIMA SINGH, A.W.N. 1882, 61.

(4315)—O 21, r. 90, ss. 68, 70, 71—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1885, 319.

(4316)—O. 21, r. 90, ss. 68, 70, 71—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 4 A. 382=A.WN. 1882, 77.

(4317)—O. 21, r. 90, s. 104, O. 43, r. 1—*See* APPEAL—MISCELLANEOUS, 27 C. 414.

(4318)—O. 21, r. 90, s. 104, O. 43, r. 1, O. 9, r. 9—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 11 M. 319.

(4319)—*O.* 21, *r.* 90, *ss.* 144 (1), 141 (=*ss.* 311, 583 *and* 647, *Civ. Pro. Code*, 1882)—*Restitution of possession of property taken in execution of decree—Order of appellate Court setting aside dismissal of objection to sale, restitution of possession of property by Court under—Execution of decree.*—The property of the respondents was brought to sale in execution of a mortgage and was purchased by the appellant (decree-holder). The respondents' objections under s. 311, Civ. Pro. Code, were disallowed by the Subordinate Judge; on appeal, the Court of the Judicial Commissioner held that he ought to have enquired into the question whether a certain mistake in the proclamation had deceived intending bidders, set aside the order, and directed the Subordinate Judge to restore the application under s. 311 to the pending file and dispose of it according to law. In the meantime, the Subordinate Judge had passed an order confirming the sale, had given the appellant a certificate of sale and had placed him in possession of the property. The respondents, on the strength of the order of the Judicial Commissioner's Court applied to the Subordinate Judge to put them back into possession of the property. *Held* that s. 583 read with s. 647 of the Civ. Pro. Code, provided for restitution of possession under orders passed in appeal, which did not amount to decrees, that the Subordinate Judge

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

had power to restore the respondents to possession; and that the effect of the order of the Judicial Commissioner's Court, setting aside the dismissal of the respondents' objections, being to put the parties back to the stage at which the objections were disallowed, the Subordinate Judge was right in doing so. RAJA RAMPAL SINGH v. LAL RAMESH SINGH, **9 O C. 101.**

(4320)—O. 21, r. 90, O. 43, r. 1—*See* APPEAL—MISCELLANEOUS, 2 A. 396.

(4321)—O. 21, r. 90, O. 47, rr. 4, 7, 9—*See* APPEAL—MISCELLANEOUS, 3 A. 316.

(4322)—*O. 21, rr. 90 to 92 (=ss. 311 to 313, Civ. Pro. Code, 1882)—Court sale—Mistake as to extent of property sold—Remedy of auction-purchaser.*—A purchaser at Court-sale, bringing a suit complaining that he was led into a mistake as to the extent of the property sold, not having a remedy under the Civ. Pro. Code, which provides only for the particular cases named therein (in ss. 311 to 313), still has the right to have the sale set aside, if it be true that he has been induced by fraud to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived. The remedy in such a case, is not by way of an application under s. 313. Civ. Pro. Code, but by a separate suit. BIRJ MOHUN THAKUR v. RAI UMA NATH CHOWDHRY, 20 **C. 8=19 I.A. 154, P.C.=6 Sar. 245.** [*F.*, 24 C. 682, 1 C.W.N. 652; *Appl.*, 27 C. 264; *R.*, 12 C.P.L.R. 49, 25 M. 244, 10 C.L.J. 492.]

(4323)—O. 21, rr. 90, 91, sch. III, rr. 4, 5, 6—*See* COLLECTOR, 11 A. 94, F.B.=A.W.N. 1889, 10.

(4324)—*O. 21, rr. 90, 92 (=Civ. Pro. Code, 1882, ss. 311, 312)—Civ. Pro. Code, ss. 311, 312, limitation for application under applicability of s. 7 of the Limitation Act to—Confirmation of sale before expiry of time for objection—Appeal.*—Objections to a sale, filed under s. 311 of the Civ. Pro. Code, by the mother of a minor judgment-debtor, were rejected on the ground that she did not legally represent the minor. A similar fresh application filed on the next day was also rejected by the Court, on the ground that it was precluded from entertaining the application after its order of confirmation of the sale. On appeal, it was held, that the application was one which the judgment-debtor-appellant was entitled to make, and having been within time by reason of the provisions of s. 7 of the Limitation Act, it was the duty of the Court to have entertained and dealt with it, before it proceeded to confirm the sale or grant a sale certificate. Also, notwithstanding that s. 312 of the Civ. Pro. Code, contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, where the precipitate action of a Court has led to the confirmation of a sale before the time allowed for filing objections to it has expired, whether or not the lower Court could itself entertain such objection afresh after it had confirmed the sale, the appellate Court, when the matter comes on before it in appeal, is bound to interfere and to see that objections which, by the law, the party is empowered to make, are heard and determined before a sale of his property shall be confirmed or become absolute. BALDEO SINGH v. KISHON LAL, **9 A. 411=A.W.N. 1887, 58.** (1 C. 226, *R.*) [*D.*, 5 N.L.R. 1.]

(4325)—*O. 21, rr. 90, 92 (=ss. 311, 312, Civ. Pro. Code, 1882)—Application to confirm sale, not a step-in-aid of execution.*—As the Court is bound to confirm a sale after thirty days, as provided in the Indian Limitation Act, even in the event of no application under s. 311, Civ. Pro. Code, being made, an application to confirm the sale cannot be regarded as one in aid of execution, even though it is made by the decree-holder as purchaser. UMESH CHANDRA DASS v. SHIB NARAIN MANDAL, **31 C. 1011=9 C.W.N. 193.** [*R.*, 92 P.R. 1907.]

(4326)—*O 21, rr. 90, 92 (=Civ. Pro. Code, 1877, ss. 311, 312)—Sale of immoveable property in execution of two decrees—One sale—Validity*—Where the same property had been notified to sale in execution of two decrees, it is quite proper and regular to hold one sale in respect for both decrees. BAHWANI DAS v. RUP RAM, **A.W.N. 1881, 89.**

(4327)—*O. 21, rr. 90, 92 (=ss 311, 312, Civ. Pro. Code, 1882)—Sale — Confirmation of sale — Suit to set aside the sale.*—Where an order is passed under s. 312, Civ. Pro. Code, confirming a sale, it is an order against the judgment-debtor, though no application has been made under s. 311 of the Code. Hence, under the last para. of s. 312, no suit will lie of the kind there described. DAMODAR v. TRIMBAK, 3 **Bom.L.R. 463=26 B. 40.**

(4328)—*O. 21, rr. 90, 92 (=Civ. Pro. Code, 1877, ss. 311, 312)—Sale in execution—Irregularity.*—Where the judgment-debtor did not furnish the security on furnishing which the High Court had directed the stay of execution, but upon the day of the sale offered a hypothecation bond, unregistered and unauthenticated, as security, which was rejected by the officer conducting the sale, *held* that the sale could not be set aside on the ground put forward by the lower Court, *viz.*, that there was an impression abroad that the sale had been postponed, and consequently very few persons assembled at the sale, and the property fetched an inadequate price. SHEO SAHAI v. BHAGWAN PRASAD, **A.W.N. 1881, 104.**

(4329)—O. 21, rr. 90, 92—*See* BEN. ACT XI OF 1859, s. 33. 14 C. 1.

(4330)—O 21, rr. 90, 92—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 2 Hay, 111.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4331)—O. 21, rr. 90, 92—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1891, 41.

(4332)—O. 21, rr. 90, 92—*See* RIGHT OF SUIT—ORDERS, SUITS TO SET ASIDE, 7 N.W.P. 183.

(4333)—O. 21, rr. 90, 92—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 3 A. 206, F.B., 3 Agra 89.

(4334)—*O. 21, rr. 90 and 92, s. 47 (=Civ. Pro. Code, 1882, ss. 311, 312, 244)—Execution of decree—Material irregularity—"Publishing or conducting" sale—Objection that property was not legally saleable.*—An objection by a judgment-debtor to a sale in execution of a decree, that the property sold was not legally saleable, is not one which can be entertained under s. 311, Civ. Pro. Code, the non-saleability not being an irregularity in publishing or conducting the sale, and a sale cannot be set aside under that section on such grounds (6 A. 448 and 6 A. 393, *D.*) *Per Mahmood, J.*—S. 244 of the Civ. Pro. Code, is confined to questions between the decree-holder and the judgment-debtor relating to the execution, etc., of the decree. The execution of a decree being complete after a sale, questions arising subsequent to the sale are not strictly speaking, questions relating to the execution, etc., of the decree. The expression "conducting the sale" in s. 311 of the Civ. Pro. Code, relates to the action of the officer conducting the sale, and not to anything done before the sale or any proceedings unconnected with the actual carrying out of the sale. RAMCHHIABAR MISR v. BECHU BHAGAT, **7 A. 641=A.W.N. 1885, 190.** (10 I.A. 25, *R.*) [*F.*, 29 A. 612=A.W.N. 1907, 193=4 A.L.J. 519; *R.*, 13 B. 34, 16 C., 33, 15 B. 290; *D.*, 24 A. 291.]

(4335)—*O. 21, rr. 90, 92, s. 104, O. 43, r. 1 (=ss. 311, 312, 588, Civ. Pro. Code, 1882)—Application for setting aside sale on ground of fraud—Second appeal.*—An application to set aside a sale on the ground of fraud comes under s. 244, Civ. Pro. Code, 1882. A second appeal lies to the High Court against an order passed by the first Court setting aside the sale on the above ground, even though the lower appellate Court found the element of fraud to be absent. KOKIL SINGH v. EDAL SINGH, **31 C. 385.** (26 C. 324, 539, *F.*; 28 C. 4, *D.*) [*R.*, 35 C. 61, F.B.=6 C.L.J. 320=11 C.W.N. 1011, F.B.]

(4336)—*O 21, rr. 90, 92, 91 (=ss. 311, 312, and 313, Civ. Pro. Code, 1882)—Execution of decree—Sale in execution—Objection subsequently taken by the judgment-debtor that the property sold was not legally saleable—Estoppel.*—*Held* that a judgment-debtor, who might have raised objections to a sale in execution of a decree against him, but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable. UMED v. JAS RAM. **A.W.N. 1907, 193=4 A.L.J. 519=29 A. 612.** (7 A. 641, 26 C. 727, *F.*)

(4336-*a*)—O. 21, rr. 90, 92, 91—Sale in execution of a certificate under Act I of 1895 [(B.C.) Public Demands Recovery]—*See* JURISDICTION OF CIVIL COURTS, 3 C.L.J. 235=10 C.W.N. 347=33 C. 451.

(4337)—*O 21, rr. 90, 92. O. 43, r. 1, s. 104 (=ss. 311, 312, 588, Civ. Pro. Code, 1882)—Application of judgment-debtor for re-sale dismissed for default—Further application for review, dismissal of—Right of appeal—Order in re-sale without fresh proclamation, validity of.*—Where, in execution of a decree, an auction sale was confirmed under s. 312 in the absence of objection under s. 311, and an application made *thereafter* to set aside the sale was dismissed for default and, thereupon, another application was made on behalf of the judgment-debtor asking (*a*) that the dismissed application be restored or (*b*) that this be treated as a fresh application to set aside the sale or (*c*) that this be treated as an application for review, but was also rejected, no appeal lies against either of the orders of dismissal, inasmuch as they do not come either under s. 588 (16) or under s. 312. The action of the Court in setting aside the sale under a decree and then proceeding to sell the property without fresh proclamation is illegal. BISHAMBAR DAS v. UDHO RAM, **25 P.R. 1907=21 P.W.R. 1908=104 P.L.R. 1907.**

(4338)—*O. 21, r. 90 and O. 43, r. 1, s. 104 (=Civ. Pro. Code, 1882, ss. 311 and 588)—Appeal from an order dismissing the application in default.*—*Held*, that no appeal lies from an order dismissing for default an application to set aside a sale under s. 312, Civ. Pro. Code. SRIPAL SINGH v. PANDIT RATEN LAL AND MAIKU LAL. **10 O.C. 171.** (5 O.C. 29, *F.*; 20 M. 270, *R.*).

— O. XXI, r. 91 (=1882, s. 313=1877, s. 313).

See SALE—SALE IN EXECUTION OF DECREE.

(4339)—*O. 21, r. 91 (=Civ. Pro. Code, 1882, s. 313)—When not applicable.*—S. 313 of the Civ. Pro. Code does not apply to cases where a judgment-debtor has no saleable interest in a portion only of the property. RAM COOMAR DEY v. SHUSHEE BHOOSHUN GHOSE, **9 C. 626.** [*F.*, 10 C. 368; *R.*, 10 C.L.J. 492.]

(4340)—*O. 21, r. 91 (=Civ. Pro. Code, 1877, s. 313)—Sale in execution.*—A person who purchases immoveable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable interest therein, is not entitled to the benefit of the provisions of s. 313 of the Civ. Pro. Code, which were presumably designed for the protection of persons

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

who innocently and ignorantly purchase valueless property. MAHABIR PRASAD v. DHUMAN DAS, **3 A. 527 = A.W.N. 1881, 19.**

(4341)—*O. 21, r. 91 (= Civ. Pro. Code, Act X of 1877, s. 313)—Representative of deceased judgment debtor, necessity of notice to, before setting aside sale.*—Before setting aside a sale under s. 313 of the Civ. Pro. Code, the Court is bound to see that notice has been given to the judgment-debtor or his representative. Though "judgment-debtor" is not here so defined as to include a representative, yet the representative should be given the same opportunity of guarding his interest, as the judgment-debtor himself. S. 313, however, does not prescribe that the notice is to be served before the application, and art. 172 of Act XV of 1877 only requires that the application shall be made, not that notice shall be served, within sixty days from the sale. BALA KADAR v. GULAM MOHIDIN, **7 B. 424.**

(4342)—*O. 21, r. 91 (= s. 313, Civ. Pro. Code, 1882)—Construction—Fraudulent misrepresentation in sale notification.*—If a purchaser under an execution sale buys a property, which turns out to have *no existence at all*, or to be of *no saleable value whatever*, the Court may then set aside the sale under s. 313 of the Code. But any misrepresentation or concealment in the sale notification, which induces a purchaser to buy a property for much more than it is really worth, (although that misrepresentation or concealment may be fraudulent) would be no ground for setting aside the sale under the section. DURGA SUNDARI DEVI v. GOVINDA CHANDRA ADDY, **10 C. 368.**

(4343)—*O. 21, r. 91 (= s. 313, Civ. Pro. Code, 1882)—Application to set aside sale—Saleable interest of the judgment debtor—Limitation Act, art. 172.*—Although default has been made in the payment of revenue, ownership of the property continues in the defaulter until a revenue sale takes place. Purchaser of an estate in execution of a decree, after default has been made in paying revenue for it, cannot, in the event of a subsequent revenue-sale, seek to set aside the sale, under which he had made the purchase, on the ground that the judgment debtor had no saleable interest in the property at the date of sale. (31 I.A. 176, *R.*) As the application to set aside the sale had been made more than sixty days after the date of sale, it was barred under the Limitation Act, art. 172. HARI CHARN BOSE v. HARIDAS ROY, **2 C.L.J. 506.**

(4344)—O. 21, r. 91—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 3 A. 568.

(4344-*a*) O. 11, r. 91—*See* NOS. 1068, 3914 4064, 4137, 4164, 4311, 4313, 4336, 4336-*a*, *supra* AND NO. 4399, *infra*.

(4345)—O. 21, r. 91, ss. 68, 70, 71—Sale by Collector—Application to set aside sale—Jurisdiction—*See* COLLECTOR, 9 A. 43.

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4346)—*O. 21, rr. 91, 92 (= Civ. Pro. Code, 1882, ss. 313, 314)-Decree for forcelosure—Sale in execution of decree—Refund of purchase money*—A decree for foreclosure of certain mortgaged property allowed the morigagor up to 20th July, 1883, to redeem. On the 30th June 1883, the property was put up for sale in execution of a decree against the mortgagor held by the respondent in this case and was purchased by the appellant. Before the date on which the sale could be confirmed, the time allowed by the foreclosure decree expired without the mortgage-money being deposited. The purchaser subsequently objected to the confirmation of the sale, and asked for the refund of the purchase-money on the ground that, when he purchased the property, the judgment-debtor had not, under the circumstances, any saleable interest in the property, within the meaning of s. 313 of the Civ. Pro. Code, 1882, *Held* that, in the present case the existence of the foreclosure decree against the property, in itself, could not extinguish the judgment-debtor's right before foreclosure, and that at the date of the sale he had such an interest in the property as could be sold in execution of a decree. It is true that, under s. 314 of the Civ. Pro. Code, an auction-sale in execution of a decree does not become absolute until it has been confirmed by the Court, but the appellant purchased the rights and interests of the judgment-debtor existing and saleable when the auction-sale of the 30th June took place, and it cannot therefore be held that his case falls under the purview of s. 313 of the Code. JANKI DAS v. MAYA RAM, **A.W.N. 1884 318.**

(4347)—*O. 21, rr. 91, 93 (= ss. 313 and 315, Civ. Pro. Code, 1882)*—Under s. 313, Civi. Pro. Code, the purchaser may resist and so prevent the confirmation of sale, while under s. 315, Civ. Pro. Code, he may apply after the confirmation of sale for the refund of the purchase-money on the ground that nothing passed by the sale. SIVARAMA v. RAMA, **8 M. 99.** [*F.*, 9 M. 437.]

(4348)—*O. 21, rr. 91, 93 (= ss. 313 and 315, Civ. Pro. Code, 1882)—Sale of mortgaged property in execution of mortgage-decree—Interest of judgment-debtor, a fractional share only in the property sold—Suit by auction purchaser for contribution as against the remainder of the mortgaged property, maintainability of Applicability of Rule of* caveat emptor.—In execution of a mortgage-decree, one of the houses mortgaged was sold and purchased by the plaintiff. Certain persons, who were not parties to the mortgage-suit, claiming three-fifths of the house sold, as representing their interest, successfully sued the plaintiff for possession of their shares, on the ground that they were joint owners of the house. The plaintiff instituted this suit, against the mortgagee and the representatives of the mortgagor, for contribution as against the remainder of the mortgaged property. *Held*, that an auction-

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by ss. 313 and 315 of the Code; that, in the absence of fraud, his only remedy is to recover back his purchase-money, where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot, by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest. That, in this case, the judgment-debtor has admittedly an interest in the house, and, therefore, ss. 313 and 315 are inapplicable. Under the circumstances, the rule of *caveat emptor* applied, and the fact that the plaintiff (the auction-purchaser) had been deprived of a portion of the property purchased by him, does not entitle him to contribution against the owners of the other portions of the property, which were subject to the mortgage under which the property was sold to him. MUHAMMAD RAHMAT ULLAH v. BACHCHO, **A.W.N. 1905, 99=2 A.L.J. 244=27 A. 537.** (23 A. 335, *R.*)

(4349)—*O.* 21, *rr.* 91, 93 (=ss. 313, 315, *Civ. Pro. Code*, 1882)—*Sale set aside, judgment-debtor having no saleable interest—Suit for refund of purchase money—Maintainability—Doctrine of* caveat emptor—*Limitation—Limitation Act* (*XV of* 1877), *sch. II, art* 62.—When a sale of immoveable property in execution of a decree is set aside on the ground that the judgment-debtor had no saleable interest in the property sold, a suit by the puchaser to recover the purchase-money is maintaintable, 12 W.R. F.B., Rul. 8 and 3 C. 805 have no application to cases arising under the Civ. Pro. Code of 1882. S. 315 of the Code of 1882 is no bar to a suit by the purchaser to recover his purchase-money. (5 C.W.N. 240, 7 C.W.N. 105, *F.*; 17 M. 228, *Not F.*) Such a suit would be governed by art. 62, sch. II, Limitation Act (1877). RAM KUMAR SHAHA PODDAR v. RAM GOUR SAHA CHOWDHURY, **13 C.W.N. 1080 =2 Ind. Cas. 559=10 C.L.J. 553=37 C. 67.** (19 C. 123, *Rel. on*)

(4350)—O. 21, rr. 91, 93—*See* HINDU LAW—JOINT FAMILY, 23 A. 355=A.W.N. 1901, 101.

(4351)—O. 21, rr. 91, 93, s. 102—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 11 M. 269.

——O. XXI, r. 92 (=1882, ss. 312, 314=1877, ss. 312, 314=1859, ss. 257, 256.)

See SALE—SALE IN EXECUTION OF DECREE.

(4352)—*O.* 21, *r.* 92 (=*s.* 257, *Civ. Pro. Code*, 1859)—*Execution of decree—Sale—Suit to set aside—Applicability.—Held* that s. 257, Act VIII of 1859, applies only to sales held after that Act came into operation. SHEIKH ABDOOL HYE v. LALLAH NOWAH ROY, **1 W.R. 204.**

(4353)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1882, *s.* 312)—*Sale in execution of decree—Decree reversed in appeal—Confirmation of sale cannot be granted afterwards.*—The Civ. Pro. Code, contemplates that, before a sale shall become absolute for the purpose of laying the foundation for the grant of a sale certificate, it must be confirmed, *i.e.*, the Court executing the decree must be satisfied, before confirming, not only that the sale was good (s. 311 of the Code), but that there was before it a subsisting decree with the execution of which it ought to proceed by granting confirmation. A Court executing a decree, having had direct notice that the decree in execution of which a sale had taken place had been set aside on appeal, ought not to make an order confirming the sale. MULCHAND v. MUKTA PRASAD, **10 A. 83. A.W.N. 1887, 287.** (2 B. 540, *R.*)

(4354-55)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1859, *s.* 257)—*Remedy by separate suit.*—The limitation of the remedy by separate suit contained in Act VIII of 1859, s. 257, applies to cases where a Court acts wrongly within its jurisdiction and not to cases where a Court has gone wholly out of its jurisdiction. UNNOCOOL CHUNDER CHOWDHRY v. HURRY NATH KOONDOO, **2 C.L.R. 234.** (19 W.R., 434, 11 B. L.R. 56, 23 W.R. 233, *Cons.*)

(4356)—*O.* 21, *r.* 92 (=*s.* 312, *Civ. Pro. Code*, 1882)—*Execution of decree—Sale by Collector—Sale set aside by him—Suit to set aside order—Maintainability of suit.*—A suit to set aside an order of a Collector by which he set aside a sale made by him in execution of a decree transferred to him, and to have the sale confirmed, is maintainable whether or not the order of the Collector was by a "Court" within the meaning of s. 312 of the Civ. Pro. Code, BANNO BIBI v. JASODA KUAR, **A.W.N. 1888, 248.**

(4357)—*O.* 21, *r.* 92 (=*s.* 257, *Civ. Pro. Code*, 1859,—*Right of purchasers in execution sale — Representative of judgment-debtor — Ground—Intervenor.*—S. 257, Act VIII of 1859, is no bar to a suit by the representative of a judgment-debtor to set aside an execution-sale, except on the score of the sale having been irregularly conducted. If attached property be the sole property of the intervenor, it should be at once released and the decree-holder referred to a regular suit. JUMMAL ALI v. TIRBHEE LALL DOSS, **12 W.R. 41.**

(4358)—*O.* 21, *r.* 92 (=*ss.* 256, 257, *Civ. Pro. Code*, 1859)—*Rival decree-holders.*—Act VIII of 1859, ss. 256 and 257, do not apply to third parties. MUSSAMUT MAINA KOER v. LUCHMUN BHUGGUT, **1 C.L.R. 250.** (2 W.R.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Mis. 13. *F* ; 11 B.H.C. 15, *Diss.*) [*Appr.*, 15 C. 488, F.B.; *R* , 20 C. 418, 29 C. 548.]

(4359)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1859, *ss.* 256, 257)—*Appeal.*—S. 257, Civ. Pro. Code, obviously retricts the jurisdiction to make an order setting aside a sale to the cases of irregularity specified in s. 256, and shows that it is to orders made in such cases, and to those alone, that the provisions of finality applies. ANNAMALI CHETTI v. MUTHULINGA PILLAI, **6 M.H.C. 360.**

(4360)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1882, s. 312).—"Disallowed" in s. 312 of the Civ. Pro. Code, has no reference to an appellate order, but only to the disallowance of the objection by the Court, before which the proceedings under s. 311 are taken. MAHOMED HOSSEIN v. PURUNDUR MAHTO, **11 C. 287.**

(4361)—*O* 21, *r.* 92 (=*Civ. Pro. Code*, 1859, *s.* 257)—*Suit to have sale in execution confirmed.*—Certain property was sold in execution of a decree. On the application of the judgment-debtor, the sale was set aside in part, the Subordinate Judge stating that there was no meterial irregularity in publishing or conduoting the sale, and no consequent substantial injury. The suit was instituted to have the sale so set aside, confirmed. *Held* that, as there was no irregularity in publishing or conduoting the sale, the same could not have been legally set aside under s. 257, Act VIII of 1859. The suit was, therefore, properly instituted. DAULAT BIBI v. QUTUB HUSAIN, **A.W.N. 1881, 35.**

(4362)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1882, *s.* 312)—*Execution sale—Irregularity—Suit to set it aside.*—A suit by a judgment-debtor to set aside a sale of immoveable property in execution of a decree against him, on the ground of irregularity in the publication of the sale, is not maintainable with reference to s. 312 of the Code, when an application by him for the same purpose has been disallowed. ALIMUDDIN HUSAIN v. NAUBAT RAI, **A.W.N. 1883, 264.** (A.W.N. 1882, 5, *D.*)

(4363)—*O.* 21, *r.* 92 (=*Civ. Pro. Code*, 1859, *ss.* 256, 257)—*Allegation of absence of process and notice prior to sale—Duty of Court to inquire into allegation.*—An application under Act VIII of 1859, ss. 256 and 257, alleging that certain properties belonging to the judgment-debtor had been sold in execution, without the process of attachment and notice of sale having been duly issued and published, the Judge rejected it simply on the strength of a petition put in two days previously by an agent of the judgment-debtor, which was silent in the matter of the above allegation. *Held* that the Judge is wrong in holding the petition to be conclusive, and is bound to enquire into the allegations of the parties and take evidence.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

KALEE SAHAY v. MAKOOND LALL, **24 W.R. 216.**

(4364)—*O.* 21, *r.* 92 (=*s.* 257, *Civ. Pro. Code*, 1859)—*Reversal of sale of immoveable property under s.* 257, *Civ. Pro Code*, 1859—*Order of Judge when final.*—Where a Judge ordered in appeal, under s. 257, that a sale should be set aside on the ground of material injury to the judgment debtor in consequence of a material irregularity in issuing the sale proclamation, *held* that the order was final, unless, under s. 35, Act XXIII of 1861, it could be shown that the Judge acted without jurisdiction. KOOLDEP SINGH *alias* LOOLOO SINGH v. JUGGURNATH SINGH, **2 W R Mis 19.**

(4364-*a*)—*O.* 21, *r.* 92 (=*Civ Pro. Code*, 1859, s. 257)—*Act* VIII *of* 1859, *s.* 257, *order under*—*Special appeal.*—No special appeal will lie against an order of the Judge on appeal, setting aside a sale for irregularity under s 257 of the Civ. Pro. Code. *Jackson, J., contra* KOOLDEEP NARAIN SINGH v. LUCKHUN SINGH, **B L.R. Sup Vol. 917=9 W.R 218.** [*F.*, 5 M.H.C. 213 ; *R* , 18 W.R. 385.]

(4365)—O. 21, r. 92—*See* U.P. ACT II OF 1901, 2 A.L.J. 130=A.W.N. 1905, 55.

(4366)—O 21, r. 92 — *See* APPEAL—DECREES AND EXECUTION OF DECREES, 2 W.R. Mis. 29.

(4367)—O 21, r. 92 — *See* APPEAL—MISCELLANEOUS, 16 C. 429.

(4368)—O. 21, r. 92 — *See* LETTERS PATENT, HIGH COURT, 1865, CALCUTTA, ss. 15, 36, 4 B.L.R. A.C. 181=13 W.R. 209.

(4369)—O 21, r. 92=*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 3 A. 112, 11 W.R. 297.

(4370)—O. 21, r. 92—*See* RULES OF HIGH COURTS AND SUPREME COURTS—MADRAS, 15 M.L.J. 406.

(4371)—*O.* 21, *r.* 92—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS, WHEN LIE AND WHEN NOT, 5 M.H.C. 213, 6 W.R. Mis. 119.

(4372)—O. 21, r. 92—*See* SUPERINTENDENCE OF HIGH COURT, 13 W.R. 250.

(4372-*a*)—O. 21, r. 92—See Nos. 71*a*, 128, 192, 913, 935, 926, 984, 1023, 1065, 1066, 1067, 1069, 1070, 1071, 1286, 1532, 2198, 2913, 3790, 3940, 3964, 4051, 4083, 4097, 4133, 4137, 4156, 4158, 4164, 4165, 4254, 4255, 4255*a*, 4322, 4324, 4325, 4326, 4327, 4328, 4329, 4330, 4331, 4332, 4333, 4334, 4335, 4336, 4336*a*, 4337, 4346, *supra*.

(4373)—*O.* 21, *r.* 92, ss. 68, 70, 71 (=*Civ. Pro. Code*, 1881, ss. 312, 320)—*'The Court' Meaning of.*—The words, 'the Court' in the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

penultimate paragraph of s. 320, refer to the Court alluded to in the previous portion of the section., *viz.*, the Court to which application was made for the execution of the decree and which, as such Court, transmitted the decree to the Collector for execution. So, the penultimate paragraphs of the section does not take away the jurisdiction of any Court other than the Court rererred to in it. The last paragraph of s. 312 is not happily worded. An order under that section must be either an order confirming the sale or an order setting aside the sale. An order of the latter description cannot be sought to be set aside on the ground of irregularity, *i.e.*, of the existence of irregularity in publishing or conducting the sale. The suit which is forbidden by the last para. of the section cannot, therefore, be a suit to set aside any order passed under the section, but must be a suit to set aside an order passed under the first para. of the section only. Consequently there is no prohibition against the institution of a suit to set aside an order refusing to confirm a sale. SHIAM BEHARI LAL v. RUP KISHORE, **20 A. 379, F.B. = A.W.N. 1898, 81.**

(4374)—*O. 21, r. 92, ss. 68, 70, 71 (= Civ. Pro. Code, 1882, ss. 312, 320)—Execution of decree transferred to Collector—Court sale—Collector's order setting aside sale—Suit by auction-purchaser to set aside Collector's order and to have purchase confirmed.*—The plaintiff in a case brought his suit to have it declared that the auction-sale at which he had brought certain property was improperly set aside by the Collector, to whom the execution had been transferred by the Civil Court under ss. 320, 326 of the Code, and to have his auction-purchase confirmed. The Collector set aside the sale, before the date of confirmation solely on the ground that the judgment-debtor had made full payment of the sum decreed. *Held*, that the suit was maintainable. With ss. 311, 312, Civ. Pro. Code, must be read, and when so read the last clause of s. 312, Civ. Pro. Code, creates no bar to the suit, neither does s. 588, cl. 16; that the restriction created by the rules framed by Government under s. 320, Civ. Pro. Code, has reference to the powers of the Civil Court to interfere with the procedure of the execution of decrees transferred to the Collector. It could not come in the way of the right of the party to bring a Civil Court to establish his purchase; and that the Collector had no power under s. 311, Civ. Pro. Code, to set aside the sale and receive payment from the judgment-debtor. MATHURIDAS v. PANHALAL, **19 B. 216.** [*R.*, 11 C.P.L.R. 33.]

(4375)—O. 21, r. 92, ss. 68, 70, 71—*See* JURISDICTION OF CIVIL COURTS, 18 A. 437 = A.W.N. 1896, 135.

(4376)—*O. 21, r. 92, O. 43, r. 1 (= Civ. Pro. Code, 1877, ss 312, 588 (m)—Order made under Act VIII of 1859—Repeal of Act—Jurisdiction—Execution of decree—Sale set aside—Act VIII of 1859, s. 257.*—On the 16th of June, 1877, certain property was sold in execution of decree, and on the 29th of June, 1877, the judgment-debtor, the owner of the property, applied to the Court to set aside the sale, and the sale was set aside by the Subordinate Judge on the 24th of January, 1878. The decree-holder, who was the purchaser of the property, appealed to the Court of the District Judge, who reversed the order of the Subordinate Judge. *Held* that the Judge had no jurisdiction to do so, as the proceedings must be taken to be governed by Act VIII of 1859, and not by Act X of 1877. BURKUT HOSSEIN v. MAJIDOONISSA, **3 C. L.R. 208.** (2 C.L.R. 391, *F.*).

(4377)—*O. 21, r. 92, O. 43, r. 1 (= Civ. Pro. Code, 1877, ss. 312, 588 (16))—Sale in execution—Order confirming sale—Appeal.*—Certain immoveable property was sold in execution of a decree. The decree-holder objected to the sale, but his objection was disallowed on the 23rd January, 1882, by an order which directed "that the objections be rejected." On the 23rd February, 1882, the Court executing the decree made an order confirming sale. The decree-holder appealed to the High Court from the order of the 23rd January, 1882. *Held* that the order of the 23rd January, 1882, was not appealable, as it was not passed in accordance with the terms of the first paragraph of s. 312, Civ. Pro. Code, but the order of the 23rd February was appealable under s. 588 (16), Civ. Pro. Code. LALMAN v. RASSU LAL, **A. W N. 1882, 117.** [*Diss.*, 7 A. 255, F.B. = A. W. N. 1885, 17.]

(4378)—*O. 21, r. 92, O. 48, r. 3 (= ss. 312, 644, Civ. Pro Code, 1882)—Act XII of 1879, Form 149—Confirmation of sale before sixty days, effect of.*—The 149th form, as it stood under the Act of 1879, cannot be construed to render inoperative or postpone the effect of a sale in execution of a decree, confirmation of which was made after thirty, but before sixty, days had elapsed. HAJI v. ATHARAMAN, **7 M. 512.**

(4379)—*O. 21, rr. 92, 94 (= Civ. Pro. Code, 1859, ss. 257, 259)—Purchaser at execution sale—Suit for possession of property—Sale certificate whether necessary.*—Under the Civ. Pro. Code, 1859, a purchaser at an execution-sale, confirmed in his favour under that Act, could maintain a suit for possession of the property without producing a sale-certificate; he could prove his purchase by evidence *aliunde*. The confirmation of the sale in his favour is *prima facie* evidence of his title to the property, and is sufficient to pass such title to him, of which, a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed. JAGAN NATH v. BALDEO, **5 A. 305, F B. = A.W N. 1883, 48.** (7 C. 207, *R.*) [*F.*, A.W.N. 1895, 54; *Appr.*, 12 C. 169, 11 M. 296.]

(4379-*a*)—O. 21, rr. 92, 94—*See* LIMITATION ACT, 1908, art. 181, 5 B. 202.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4380)—*O.* 21, *rr.* 92, 94, *s.* 65 (=*Civ. Pro. Code*, 1882, *ss.* 314, 316)—*Execution of decree—Suit to recover property purchased at auction-sals—Sale certificate.*—A purchaser at an auction-sale held by a Court, which sale has been duly confirmed, is not precluded from suing to recover the property so purchased, merely because he has neglected to obtain a sale certificate. HET RAM v. BALDEO, **A.W.N. 1894, 54.** (5 A. 305, 17 B. 375, *F.*) [*R.*, 19 A. 188, 7 C.L.J. 1.]

(4381)—*O.* 21, *rr.* 92, 94, *s.* 65(=*ss.* 312, 316, *Civ. Pro. Code*, 1882)—*Sale in execution—Confirmation—Title, when it accrues—Purchaser—Mortgage-debts, if extinguished by judgment*—Although an auction-purchaser does not acquire a full title till the confirmation of the sale, yet, upon general principles, he may have equitable rights, arising out of his purchase, before the date of confirmation of the sale. (17 B. 375, 19 A. 188, A.W.N. 1894, 54, 10 B. 453, 2 C.W.N. 489, 11 C.W.N. 158, *R.*) Scope of s. 316 of the Civ. Pro. Code examined. Although the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest, of the judgment-debtor, as they stand on that date. If he has purchased in execution of a money decree, he takes the property as it stood on the date of the attachment and is not affected by any subsequent dealings therewith on the part on the judgment-debtor. If he has purchased in execution of a decree on a mortgage, he takes the property as it stood on the date of the creation of the mortgage and persons who have subsequently become interested in different fragments of the equity of redemption cannot claim a superior title. The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Satute of Limitations. BHAWANI KOER v. MATHURA PRASAD, **7 C.L.J. 1.** (2 C.L.J. 202, *R.*) [*D.*, 10 C.L.J. 590.]

(4381-*a*)—*O.* 21, *rr.* 92, 99, *s.* 100 (=*Civ. Pro. Code*, 1859, *ss.* 257, 269, 372)—*Act XXIII of 1861, ss. 11, 44—Special appeal—Order in execution.*—Under s. 11, Act XXIII of 1861, a special appeal will lie from a decision passed in appeal from an order relating to the execution of a decree. A special appeal will not lie from an order under s. 257, Civ. Pro. Code, 1859, confirming a sale in execution of a decree. MAHOMED HOSSEIN v. SHEIKH AFZUL ALI, **B.L.R. Sup. Vol. App. 1=W.R. F.B. 83=Marsh 296.** [*F.*, 6 W.R. Mis. 119, 6 B.H.C. A.C. 205, 5 M.H.C. 213; *Appr.*, B.L.R. Sup. Vol. 917=9 W.R. 218.]

(4382)—*O.* 21, rr. 92, 99, s. 100—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS, WHEN LIE AND WHEN NOT, B.L.R. Sup. Vol. Ap. 1=Marsh 296, W.R. F.B. 83=2 Hay 293.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXI, r. 93 (=1882, s. 315=1877, s. 315=1859, s. 258.)

See SALE—SALE IN EXECUTION OF DECREE.

(4383)—*O.* 21, *r.* 93 (=*Civ. Pro. Code*, 1882, s. 315)—*Failure of saleable interest in judgment-debtor.*—The words in s. 315 of the Civ. Pro. Code, "when it is found tha tthe judgment-debtor had no saleable interest in the property" must be taken to mean 'when it is so found in some proceeding by which the judgment-creditor is bound.' To compel the judgment-creditor to refund the purchase-money of property brought to sale in execution, merely because in some proceedings between other parties, a Court has decided that the judgment-debtor had no saleable interest in the property, would be contrary to law and justice. NILAKANTA v. IMAM SAHIB, **16 M. 361=3 M.L.J. 364.** [*R.* 24 B. 591=2 Bom. L.R. 386.]

(4384)—*O.* 21, *r.* 93 (=*old s.* 315)—*Scope of—Applicability.*—This section will apply only to cases where the sale had been set aside under ss. 310-A, 312 or 313, or when the judgment-debtor is found to have no saleable interest in the property, but not to cases where the title of the judgment-debtor to part only of the property sold is defective. BANSI MAL v. IBRAHIM, **42 P.R. 1896.** (9 M. 437, *F.*)

(4385)—*O.* 21, *r.* 93 (=s. 315, *Civ. Pro. Code*, 1882)—*Right of suit—Parties.*—S. 315, Civ. Pro. Code, is only an enabling section and not prohibitive of an independent action in a Civil Court. A suit was brought by an auction-purchaser for the recovery of purchase-money from the decree-holder, who had received it, on the ground that the judgment-debtor had no title to the property sold. *Held*, that the suit was not barred by the provisions of s. 315, Civ. Pro. Code. That the judgment-debtor was not a necessary party. SURENDRA NATH GHOSE v. BENI MADHAB MISRA, **10 C.W.N. 274.** (32 C. 332, *R.*)

(4386)—*O.* 21, *r.* 93 (=*Civ. Pro. Code*, 1882, s. 315)—*Refund of purchase-money.*—Where it is found that the judgment-debtor had no saleable interest in the property put up for sale, the purchaser is entitled to a refund of the money paid to the decree-holder, even though the purchaser largely contributed to the loss he sustained. KUNHI MOIDIN v. YARAIL MOIDIN, **18 M. 101.** [*R.*, 13 A. 383.]

(4387)—*O.* 21, *r.* 93 (=*Civ. Pro. Code*, 1877, s. 315)—*Application by purchaser for refund—Appeal.*—A sale in execution of a decree having been set aside on the ground that the judgment-debtor had no interest in the property sold, the purchaser applied, under s. 315 of the Civ. Pro. Code, 1877, for a refund of the purchase-money. The Court of first instance executing the decree refused the application. *Held* that, as the order cannot fall under any of the clauses of s. 244 of the Civ. Pro. Code,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

it cannot be dealt with as a decree for purposes of appeal; nor was the order appealable under s. 588 of the Code. DEBI DAS v. SUJAN SINGH, **A.W.N. 1884, 178.**

(4388)—*O. 21, r. 93 (=Civ. Pro. Code, 1882, s. 315)—Auction-purchaser's sale set aside—Application under section dismissed on ground of limitation—Subsequent suit to recover purchase-money not barred.*—When an auction-purchaser, whose sale has been set aside, first makes an application under s. 315, Civ. Pro. Code, which is dismissed as being barred by limitation, he may bring a subsequent suit to recover his purchase-money. The right to sue cannot be affected by the circumstance that a prior application has been made, unless in that application the matter has been made *res judicata*. CHANGA RAM v. NARAYANI AMMAL, **8 M.L.J. 194.**

(4389)—*O. 21, r. 93 (=Civ. Pro. Code, 1882, s. 315)—Purchaser at execution sale—Suit on the ground that judgment-debtor's interest was not saleable—Cause of action, when arises.*—A purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money when it has been found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315, Civ. Pro. Code. (5 A. 577, *F.*) It need not be shown, to afford the purchaser a good cause of action for the suit, that before the institution of the suit he had been deprived of the property purchased by him. NITYANUND ROY v. JUGGAT CHANDRA GUHA, **7 C.W.N. 105.** [*F.*, 13 C.W.N. 1030.]

(4390)—*O. 21, r. 93 (=s. 315, Civ. Pro. Code, 1882) — Jurisdiction of Small Cause Court—Maintainability of suit by auction-purchaser for refund of purchase money.*—In a suit by the auction-purchaser, against the decree-holder, for refund of purchase-money proportionate to a share in the purchased property, of which he has been deprived on a suit by a third party, there is no contract between the plaintiff-auction-purchaser and the decree-holder, and therefore there is no question of rescission or specific performance of contract. The Small Cause Court has therefore jurisdiction to entertain the suit. *Held* also that in addition to the summary remedy provided by s. 315, Civ. Pro. Code, 1882, a regular suit is maintainable under the circumstances and conditions prescribed in the section. GURDIT SINGH v. GHANYA LAL, **114 P.R. 1908.**

(4391)—*O. 21, r. 93 (=s. 315, Civ Pro. Code, 1882)—Suit for refund of purchase-money—Sale in execution—Warranty of title—Failure of consideration—Suit after confirmation of sale, maintainability of.*—If a party purchases, at a sale in execution, with full knowledge of the true state of things, and knowing that the title offered is defective, a claim to be relieved from

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the consequence of his purchase cannot be listened to. (5 I.A. 116, *R.*) *A fortiori* where a purchaser had allowed a sale, by the Court to him, to be confirmed and the purchase-money to be paid over to the judgment-creditor, he cannot be allowed to succeed in a suit for the recovery of that purchase-money. Before a suit for the refund of purchase-money can be maintained, two events must occur—first, it must have been found that the judgment-debtor had no saleable interest and, secondly, the purchaser must be deprived of the property. (22 B. 783, *R.*) A suit for the return of purchase-money will be maintainable, where there has been a total failure of consideration. The procedure under s. 315 of the Code is by summary application within a limited time and not by suit. So, where a purchaser, at a Court sale held in execution of a decree, purchased the property and the sale was confirmed, but he subsequently succeeded in establishing his title to the property, in a suit under s. 283 of the Code, and then sued for the refund of his purchase money, *held*, that the suit could not be maintained. There is no warranty of title in sales under a decree of Court. SUMER CHAND v. WAHID HUSAIN KHAN, **3 A.L.J. 819=A.W.N. 1906, 310.**

(4392)—*O. 21, r. 93 (=Civ Pro. Code, 1882, s. 315)—Sale by Receiver of insolvent's interest in a hak—No saleable interests to insolvent in hak—Right of purchaser to recover purchase-money.*—The sale of an insolvent's property by a Receiver appointed under Ch. XX of the Code is not a judicial sale. The principles, which govern such sales, are those applicable to sales by private persons. Consequently, where the right, title and interest of the insolvent in a *hak* was sold by the Receiver and it afterwards turned out that the insolvent had no saleable interest in the *hak*, the purchaser was not entitled to recover the purchase-money from the person to whom it was paid by the Receiver. SURAJ BHAM PATEL v. GOVINDA, **1 C.P.L.R. 26.** (3 C. 813, *R.*)

(4393)—O. 21, r. 93—*See* APPEAL—MISCELLANEOUS, 12 A. 397=A.W.N. 1890, 135.

(4394)—O. 21, r. 93—*See* CAUSE OF ACTION, 7 P.R. 1897.

(4395)—O. 21, r. 93—Decree-holder not bound to re-pay purchase-money, when sale is set aside, until called upon by purchaser to do so—*See* LIMITATION ACT, 1908, art. 181, 17 M.L.J. 194=30 M. 209.

(4396)—O. 21, r. 93—*See* LIMITATION ACT, 1908, art. 181, 11 A. 372=A.W.N. 1889, 113.

(4379)—O. 21, r. 93—Suit brought under the section is cognizable by the Small Causes Court—*See* PROVINCIAL SMALL CAUSE COURT ACT, 1887, art. 11, 8 Bom. L.R. 369.

(4397-*a*)—O. 21, r. 93—*See* NOS. 193, 1335, 1534, 4015, 4161, 4347, 4348, 4349, 4350, 4351, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4398)—*O. 21, r. 93, s. 115 (=Civ. Pro. Code, 1882, ss. 315, 622).*—Where the judgment-debtor has some saleable interest in the property sold, a District Munsiff has no jurisdiction to make an order, under s. 315 of the Civ. Pro. Code, for refund of the purchase-money or any part thereof to the purchaser at the execution sale. Against such an order, no appeal lies to the High Court, but it may be set aside in revision under s. 622, Civ. Pro. Code. KUNHAMED v. CHATHU, **9 M. 437.** [*F.*, 42 P.R. 1896; *R.*, 17 M. 228.]

(4399)—O. 21, rr. 93, 91, 94, s. 65—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHTS OF PURCHASERS ON SETTING ASIDE SALE, 17 M. 228=3 M.L.J. 293.

—— O. XXI, r. 94 (=1882, s. 316=1877, s. 316=1859, s. 259.)

See SALE—SALE IN EXECUTION OF DECREE.

(4400)—*O. 21, r. 94 (=s. 259, Civ. Pro. Code, 1859)—Sale-certificate.*—The words of s. 259 do not contemplate that nothing would pass to a purchaser unless a certificate were issued; the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate, which might afterwards be obtained by him, would be merely evidence that the property so passed. DOORGA NARAIN SEN v. BANEY MADHUB MOZOOMDAR, **7 C. 199.** [*F.*, 9 C. 842; *R.*, 5 A. 305, 11 M. 296, 7 C.L.J. 384.]

(4401)—*O. 21, r. 94 (=Civ. Pro. Code, 1877, s. 316)—Certificate of sale not essential to complete title of auction-purchaser*—Under s. 316 of the Civ. Pro. Code, 1877, the title of an auction-purchaser at an execution sale becomes complete upon his payment of the purchase money and the confirmation of the sale by the Court. And when the sale is admitted, the production of a sale certificate is not necessary to prove that fact. NAIGAR TIMAPPA v. BHASKAR PARMAYA, **10 B. 444.** [*Rel. on*, 7 A.L.J. 893.]

(4402)—*O. 21, r. 94 (=Civ. Pro. Code, 1877) s. 316)—Sale certificate—Copy sent to Registrar—Registered document—Registration Act (III of 1877), ss. 50, 89.*—A sale certificate granted by a Court under s. 316, Civ. Pro. Code, 1877, of which a copy has been forwarded to the Registering Officer under s. 89 of Act III of 1877, is not a registered document within the meaning of s. 50 of the Registration Act. SRAJUNNISSA v. JAN MUHAMMAD, **A.W.N. 1882, 51.**

(4403)—*O. 21, r. 94 (=Civ. Pro. Code, 1859, s. 259)—Sale certificate—Instrument declaring interest in property—Registration—Act VIII of 1871, s. 17.*—Sale certificates under s. 259 of the Civ. Pro. Code, are instruments declaring an interest in property, and if the value of the interest, so declared, be one of hundred rupees, or upwards, the registration of these instruments is compulsory under s. 17 of Act VIII of 1871. PROCEEDINGS, 18TH NOVEMBER, **1871, 6 M.H.C. App. 39.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4404)—O. 21, r. 94—*See* BENAMI TRANSACTION—CERTIFIED PURCHASERS, 25 W.R. 493.

(4405)—O. 2, r. 94—*See* CERTIFICATE OF SALE, 9 C. 82, F.B.=12 C.L.R. 1, 3 M. 37, F.B., 23 W.R. 301.

(4406)—O. 21, r. 94—*See* DECREE—DECREE, CONSTRUCTION OF, 7 C. 91=9 C. L.R. 53.

(4407)—O. 21, r. 94—*See* EVIDENCE ACT, 1872, s. 65, cl. (*e*), 2 Bom. L.R. 533.

(4408)—O. 21, r. 94—Sale certificate granted under—Copy of sale-certificate registered under s. 89, Registration Act—Sale-certificate not registered document, under art. 10, Limitation Act, 1877—*See* LIMITATION ACT, 1908, Art. 10, 142 P.R. 1908, F.B.

(4409)—O. 21, r. 94—*See* LIMITATION ACT, 1908, art. 181, 4 M. 172.

(4410)—O. 21, r. 94—*See* REGISTRATION ACT, 1908, ss. 23, 24, 60, 87, 89, 5 A. 84=A. W.N. 1882, 183.

(4411)—O. 21, r. 94—*See* BEN. REG. VIII OF 1819, cl. 1, s. 15, 5 C. 226.

(4413)—O. 21, r. 94—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—PROCEEDS OF SALE, RIGHT TO, 6 A. 112=A.W. N. 1883, 240.

(4412-*a*)—O. 21, r. 94—*See* Nos. 149, 193, 912, 917, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 4052b, 4164, 4256, 4379, 4379*a*, 4380, 4381, 4399, *supra*.

(4413)—O. 21, r. 94, s. 66—*See* BENAMI TRANSACTION—CERTIFIED PURCHASERS, 3 B.L.R. F.B. 15=11 W.R. F.B. 16.

(4414)—O. 21, r. 94, s. 66—*See* BENAMI TRANSACTION—CERTIFIED PURCHASERS, 9 W. R. 438.

(4415)—O. 21, rr. 94, 95—*See* APPEAL—ORDERS, 2 W.R. Mis. 9.

—— O. XXI, r. 95 (=1882, s. 318=1877, s. 318 =1859, s. 263.)

See SALE—SALE IN EXECUTION OF DECREE.

(4416)—*O. 21, r. 95 (=Civ. Pro. Code, 1882, s. 318)—Right of purchaser to apply for possession.*—The right of a purchaser to apply for possession under s. 318, Civ. Pro. Code, accrues to him when the certificate "has been granted," that is to say, when it has been issued to him. KASHINATH TRIMBAK JOSHI v. DUMING ZURAN, **17 B. 228.** (P.J. 1886, 46, *R.*) [*Diss.*, 30 A. 390=A.W.N. 1908, 162=5 A.L.J. 516; *Appr.*, 19 M.L.J. 224=32 M. 136=4 M.L.T. 350.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4417)—*O.* 21, *r.* 95 (=*Civ. Pro. Code*, 1882, *s.* 318)—*Suit for possession by auction-purchaser, when maintainable.*—An auction-purchaser can bring a suit to obtain possession of land, the subject matter of his purchase, when it is shown that an unsuccessful attempt was made to obtain possession in execution proceedings. In 10 C L.R. 258, the Court did not intend to lay down that no such suit could be under any circumstances maintainable, but that, so long as the means provided by s. 318 are open to a purchaser, he is bound to have recourse to that section, rather than bring a fresh suit. ISWAR PERSHAD GURGO v. JAI NARAIN GIRI, **12 C. 169.** [*Cons.*, 14 C. 644.]

(4418)—*O.* 21, *r.* 95 (=*old s.* 318)—*Sale certificate, not registered—Admissibility in evidence—Right to sue.*—An unregistered certificate of sale granted in 1880 was held to be admissible in evidence, if tendered in 1891, under s. 17 (*o*) of Registration Act, 1877. A suit for possession can lie, even though the purchaser at an auction who is not a party to suit has not applied under s. 318, the remedy by suit and the remedy under this section being concurrent. MUSST. HARDEVI v. RAM JIWAN, **14 P.R. 1893.** (58 P.R. 1888, *Not F.*)

(4419)—*O.* 21, *r.* 95 (=*old s.* 318)—*Omission to apply under—Regular suit not barred.*—An auction-purchaser failing to apply for and get delivery of possession under s. 318, he not being a party to the suit, will not, for this reason merely be barred from bringing a regular suit for possession. THAN SINGH v. KAZIM ALI, **92 P.R. 1893** [*R.*, 146 P.R. 1907, 45 P.R. 1902=42 P.L.R. 1902; *Cited*, 9 P.R. 1903=36 P.L.R. 1903, 45 P.R. 1902=42 P.L.R. 1902.]

(4420)—*O.* 21, *r.* 95 (=*Civ Pro. Code*, 1882, *s.* 318)—*Objection to sale by judgment-debtor—Sale set aside—Sale upheld on revision—Suit by auction purchaser for damages by way of mesne profits.*—A decree-holder purchased the property of the judgment-debtor himself in execution of his decree. Then the judgment-debtor raised certain objections to the sale. The sale was set aside by the original Court and on revision to the High Court the order of the original Court was set aside and the sale was upheld and a certificate of sale was granted to the decree-holder purchaser, who then brought the present suit against the judgment-debtor for damages by way of mesne profits, inasmuch as the later, by his objections to the sale which finally failed, prevented the plaintiff from being in possession of the property purchased up to a certain time. *Held* that the plaintiff, as auction-purchaser, had no title to the property before the sale was confirmed and that he could not therefore sue for the recovery of the mesne profits thereof in the nature of damages; that, further, it was not shown that the defendant, in objecting to the sale and claiming the property for himself, was not actuated by any such malice, fraud, or deception, as would in itself operate as affording a cause of action to the plaintiff, and that there was nothing to show that, in claiming the property which had been sold, the defendant was acting otherwise than *bona fide*. GOBIND RAM v. TULSI RAM, **A.W.N. 1887, 217.** [*F.*, 24 A. 475=A.W.N. 1902, 195; *R.*, 7 A.L.J. 893=33 A. 45=7 Ind. Cas. 409.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4421)—*O.* 21, *r.* 95 (=*s.* 318, *Civ. Pro. Code*, 1882)—*Auction purchaser—Obstruction of counter-petitioners—Claiming under judgment-debtor—Right of purchaser.*—In this case the counter-petitioners, who obstructed delivery of property to the auction-purchaser, derived their title from the judgment-debtor subsequently to the attachment, under which the sale was held. *Held* that the Court is bound to order delivery to the purchaser. SUBRAMANIA AIYAR v. SRINIVASA AIYAR, **8 M.L.T. 376=8 Ind. Cas. 368.**

(4422)—*O.* 21, *r.* 95 (=*s.* 318, *Civ. Pro. Code*, 1882)—*Act XV of* 1877 (*Indian Limitation*), *sch. II, art.* 178—*Execution of decree—Limitation.*—Terminus a quo.—Although the grant of a certificate is a necessary preliminary to an application under s. 318 of the Code of Civil Procedure, such application will be barred under art. 178 of the second schedule to the Indian Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. RANJIT SINGH v. BALDEO SINGH, **A.W.N. 1908, 162=5 A.L.J. 516=30 A. 390.** (3 B. 433, 17 B. 228, *Diss.*; A.W.N. 1883, 262, *R.*)

(4423)—O 21, r. 95—*See* BENAMI TRANSACTION—CERTIFIED PURCHASERS, 10 B.H.C. 344.

(4424)—O. 21, r. 95—Application under, made by auction-purchaser rejected as made beyond time, no bar to suit for possession of property purchased — *See* EXECUTION OF DECREE. MISCELLANEOUS, A.W.N. 1907, 131 =4 A.L.J. 434=29 A. 463.

(4425)—O. 21, r. 95—Application by decree-holder holding sale-certificate, for delivery of possession under s. 318—Arts. 178, 179, Limitation Act—*See* LIMITATION ACT, 1908, arts. 181, 182, 4 M.L.T. 350=32 M. 136=19 M.L.J. 224=1 Ind. Cas. 998.

(4426)—O. 21, r. 95—*See* PENAL CODE, s. 447, 1 C.L.J. 104.

(4426-*a*)—O. 21, r. 95—*See* NOS. 149, 1034, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 2702, 3691-*a*, 4079, 4415, *supra*.

(4427)—O. 21, r. 95, s. 9—*See* RIGHT OF SUIT—POSSESSION, SUIT FOR, 14 C. 644.

(4428)—*O.* 21, *r.* 95, *s.* 47 (=*ss.* 318, 244, *Civ. Pro. Code*, 1882)—*Purchaser at Court-sale of share of an undivided co-parcener, right of, to institute suit for partition—S.* 244 *no bar to*

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

such suit.—The only right acquired by the purchaser, at a Court sale, of the share of one member of an undivided Hindu family is a right to effectuate the sale by a suit for partition of the entire joint property of the family and the delivery over to him (the purchaser) of what might be allotted to the share of the said member at the partition. In such cases, it is not competent for the Court on a mere application for execution by the purchaser, to enforce his right by an order for partition. No orders, therefore, of the kind contemplated by s. 318 of the Code can be passed on such applications. Nor is s. 244 a bar to the purchaser maintaining a separate suit enforcing partition and delivery of the share purchased in execution. YELUMALAI CHEYTI v. SRINIVASA CHETTI, **29 M. 294.**

(4429)—*O. 21, rr. 95 and 96 (=Civ. Pro. Code, 1882, ss. 318, 319)—Appeal.*— No appeal will lie from an order made under s. 318 or s. 319 the Civ. Pro. Code. DHUNDA v. DURGA, **A.W.N. 1891, 122.**

(4430)—O. 21, rr. 95, 96—*See* LIMITATION ACT, 1908, art. 144, 19 A. 499=A.W.N. 1897, 127.

(4431)—O. 21, rr. 95, 96—Delivery of possession of immoveable property —Auction-purchaser dispossessing judgment-debtor's tenant —Dispossession not in due course of law, s. 319, Civ. Pro. Code, not being followed—Suit under s. 9, Specific Relief Act, maintainable—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 12 C.W.N. 694.

(4432)—*O. 21, rr. 95, 97, 98 (ss. 318, 328, 334, Civ. Pro. Code, 1882).*—There is nothing to prevent the decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased (as the case may be) from making a fresh application for delivery without making any complaint under ss. 328, 334, of the Civ. Pro. Code. MUTTIA v. APPASAMI, **13 M. 504.** [*F.*, 8 M.L.J. 193; *D.*, 26 A. 365=A.W.N. 1906, 46.]

(4433)—*O. 21, rr. 95, 97, 99, 103 (=Civ. Pro. Code, 1882, ss. 318, 335)—Obstruction by third person to delivery of possession to purchaser—Fresh application, without application under s. 334—Limitation Act, art. 167.*—Certain purchasers of immoveable property at a sale held in execution of a decree for money applied under s. 318, Civ. Pro. Code, for an order for delivery of possession. Resistance having been offered to the Amin by a person other than the judgment-debtor, the purchasers without applying for an enquiry into the matter of resistance under s. 334, applied again after expiry of the time prescribed for the application under s. 335, to be put into possession. *Held* that such an application should be rejected and that the purchasers' remedy was a civil suit against the person resisting them. *Per Aikman, J.* (13 M. 504, *D.*; 11 B. 473 and 18 A. 233, *R.*) *Per Knox, J., contra, following* 13 M. 504. There is nothing to prevent a purchaser from making a fresh application for delivery without making any complaint under s. 334, Civ. Pro. Code. An application for delivery of possession under s. 318 is substantially an application for execution of a decree by ordering delivery of possession of the property purchased. KESRI NARAIN v. ABDUL HASAN. **26 A. 165=A.W.N. 1904, 46=1 A.L.J. 86.** [*Doubted*, 6 A. L.J. 71=5 M.L.J. 185=31 A. 82=1 Ind. Cas. 416.]

(4434)—*O. 21, rr. 95, 97, 99, 103 (=Civ. Pro. Code, 1882, ss. 318, 335)—Suit to recover possession of property sold in execution of decree.*—When an auction-purchaser accepts symbolical delivery of possession of the land sold to him, when he could have got actual physical delivery of possession, he is not precluded by any special provisions contained in the Civ. Pro. Code, for putting an auction-purchaser in possession in execution-proceedings, from suing for the recovery of possession of the land. SEVU v. MUTTUSAMI. **10 M. 53.** [*Appl.*, 24 C. 715; *D.*, 9 M.L.J. 131.]

——O. XXI, r. 96 (=1882, s. 319=1877, s. 319 =1859, s. 264).

See SALE—SALE IN EXECUTION OF DECREE.

(4435)—*O. 21, r. 96 (=Civ. Pro. Code, 1882, s. 319)—Delivery of formal possession in execution of decree, effect of, as against third person in possession.*—Where the judgment-debtor has continued in possession, the delivery of formal possession, whether under s. 318 or 319 of the Civ. Pro. Code, would amount to an ouster of the judgment-debtor and an entry into possession by the purchaser, so that if the judgment-debtor remains in possession subsequent to such delivery, his possession would amount to an ouster of the purchaser, and would be adverse possession from the date of such ouster; but in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession as against the judgment-debtor alone, cannot amount to an ouster of the person in possession. NARAIN DAS v. LALTA PRASAD, **21 A. 269=A.W.N. 1899, 56.** (19 A. 499, *R.*) [*F.*, 7 C.L.J. 640; *Appr.*, 6 C.L.J. 472; *R.*, 16 C.P.L.R. 107.]

(4436)—O. 21, r. 96—*See* APPEAL—ORDERS, 17 W.R. 395.

(4437)—O. 21, r. 96—Symbolical delivery under s. 319, Civ. Pro. Code, 1882—Suit for mere declaration *See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 18 M. 405.

(4438)—O. 21, r. 96—Application for delivery of possession under, if step-in-aid of execution —*See* EXECUTION OF DECREE—MISCELLANEOUS, 13 C.W.N. 694=1 Ind. Cas. 430.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4438-*a*)—O. 21, r. 96—*See* NOS. 1054, 1078, 1079, 3697-*a*, 4052-*a*, 4079, 4429, 4430, 4431, *supra*.

(4439)—O. 21, r. 96, s. 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 18 A. 36=A.W.N. 1895, 149.

(4440)—*O.* 21, *rr.* 96, 97, 99, 103 (=*ss.* 319, 335, *Civ. Pro. Code*, 1882)—*Land in the occupancy of a raiyat—Symtolical possession.*—Where a person is in possession of any land by receipt of rent from tenants, and delivery of possession of such land is given to the purchaser at an execution-sale, such delivery does not cause dispossession to the person named so as to entitle him to apply under s. 335, Civ. Pro. Code, 1882. KISORI LAL GOSWAMI v. LALA SHIB LALL, **1 C.W.N. 343.** [*D.*, 33 C. 487=3 C.L.J. 293.]

(4441)—O 21, rr. 96, 99—*See* RESISTANCE TO EXECUTION OF DECREE, 13 W.R. 418.

(4442)—O. 21, rr. 96, 99—*See* SUPERINTENDENCE OF HIGH COURT, 18 W.R. 87.

(4443)—*O.* 21, *rr.* 96, 100 (=*ss.* 264, 230, *Civ. Pro. Code*, 1859)—*Applicant not limited to any particular method of getting possession.*—Act VIII of 1859, s. 230 does not limit the applicant to any particular manner of obtaining possession; and s. 264 contains nothing to prevent the purchaser at an execution-sale from obtaining possession, if he can, without the assistance of the Court. OBHOYA CHURN DEY v. RAJENDRO COOMAR GHOSE, **22 W.R. 406.**

——O XXI, r. 97 (=1882, ss. 128, 314=1877, ss. 128, 334=1859, ss. 226, 268.)

See RESISTANCE TO EXECUTION OF DECREE.

(4444)—*O.* 21, *r.* 97 (=*s.* 328, *Civ Pro. Code*, 1882 — *Decree—Execution—Obstruction to execution of decree—Application by decree-holder for removal of obstruction—Rejection of application—Appeal—High Court—Revisional jurisdiction.*—A decree-holder made a complaint under s. 328 of the Civ. Pro. Code, to the Judge who, holding that the matter came under s. 331 of the Code, without registering the claim as a suit and without making any inquiry, rejected the complaint: *Held* that the order was not appealable, but it was one which could be dealt with by the High Court under the powers conferred upon it by s. 622 of the Code. VISHNU v. RAMACHANDRA, **9 Bom. L.R. 936.**

(4445)—*O.* 21, *r.* 97 (=*Civ. Pro. Code*, 1882, *s.* 328)—*Limitation for proceedings.*—The provision regarding limitation in s. 328 of the Civ. Pro. Code, applies only to the particular cause of action arising out of a particular resistance or obstruction. So far as such resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under the section, must do so within one month of it. The bar of limitation imposed by the section, however, does not extend to, and hold good so as to bar, complaints against subsequent acts of obstruction made upon fresh proceedings taken by the decree-holder. NARAIN DAS v. HAZARI LAL, **18 A. 233=A.W.N. 1896, 84.** (5 M. 113, *F.*; 8 B. 602, 11 B. 473, *D.*) [*R.*, 13 C.W.N. 724; *D.*, 26 A. 365=A.W.N. 1904, 46.]

(4446)—O. 21, r. 97—*See* LIMITATION ACT, 1908, art. 167, 5 M. 113.

(4446-*a*)—O. 21, r. 97—*See* NOS. 1080, 1082, 2340, 3703, 4432, 4433, 4434, 4440 *supra* and NOS. 4481, 4509, 4510, 4548, *infra*.

(4447)—O. 21. rr. 97, 98—*See* REMAND. 12 W.R. 98.

(4448)—*O.* 21, *rr.* 97, 98, 99—*Resistance or obstruction to possession—Remedy of decree-holder—Duty of Court.*—Where, in execution of a decree for possession of immoveable property, a person other than the judgment-debtor not bound by the decree is found in its possession and refuses to obey the warrant, it amounts to resistance within the meaning of r. 87 of O. XXI, Civ. Pro. Code, 1908; and it is then the business of the decree-holder to apply under the said rule, to enable the Court to proceed under rr. 98, 99. But pending such action, fresh warrant cannot be issued. GAULAM MAHAMMAD v. HASSAN DIN, **6 Ind. Cas. 649=45 P.W.R. 1910.**

(4449)—O. 21, rr. 97, 98, 99—*See* EXECUTION OF DECREE—MISCELLANEOUS. A.W.N. 1891, 131.

(4450)—*O* 21, *rr.* 97, 98, 99, *O* 23, *r.* 1 (=*ss* 328, 331 *and* 373, *Civ. Pro Code*, 1882)—*Execution of decree—Obstruction—Complaint after one month—Registration as a suit and dismissal—Legality*—Where an application was presented complaining of an obstruction to execution, more than one month after the obstruction, and the Judge registered the same as a suit, and dismissed it as barred by limitation. *Held* that the application can be entertained and registered as a suit, only if it is presented within one month. As it was not presented within one month, it should not have been registered as a suit, as it is manifestly unfair to the applicant-decree-holder that his application should be wrongly registered as a suit, and then dismissed so as to make it a bar to a fresh suit, while if his application had been originally dismissed, such dismissal would not have barred a subsequent suit. When a suit is barred by limitation, it is not open to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit, if the fresh suit is one which would be barred by the decision in the earlier suit. VALLIAMMAL v. RAJAH SHUNMUGAM PILLAI, **7 M.L.T. 223=6 Ind. Cas. 285.**

(4451)—*O.* 21, *rr.* 97, 99 (=*Civ. Pro. Code*, 1882, *ss.* 328, 331)—*Complaint of obstruction to*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859 —*continued*.

delivery of possession in execution—Order admitting application beyond a month, not appealable—Objection as to limitation raisable on appeal from final order.—Against an order admitting and numbering and registering as a suit, a complaint made to the Court under s. 328 of the Civ. Pro. Code, 1882 more than a month from the time of the obstruction, no appeal may lie as such. But such order of erroneous admission of the application beyond time could be objected to in appeal against the final order under s. 331 which is appealable as having the force of a decree. Such objection the appellate Court is bound to entertain, and it is equally bound to dismiss the application if it is found to have been wrongly admitted by the lower Court. LALA v. NARAYAN, **21 B. 392.**

(4452)—O. 21, rr. 97, 99—*See* LIMITATION ACT, 1908, art. 11, 5 B. 440.

(4453)—*O.* 21, *r.* 97, 99, *s.* 115, (=*Civ. Pro. Code*, 1877, *ss.* 328, 331, 622)—*Application complaining of resistance to execution—Order rejecting application—Appeal — Revision.* — Where the decree-holder applied to the Munsiff that a person resisted the execution of a decree, but that Court found that the latter asserted a *bona fide* claim, but did not treat the question between them as a suit, under the provisions of s. 331, Civ. Pro. Code, 1877, but dismissed the application, *held* that the Munsiff's order was equivalent to the rejection of a plaint and was, therefore, appealable as a decree. JAGANNATH v. PARBATI, **A.W.N. 1882, 125.**

(4454)—*O.* 21, *rr.* 97, 99, 100, 101 *and* 103 (=ss. 328, 331, 332, *Civ. Pro. Code*, 1882)—*Possession of tenant is possession of landlord.*—*Tyabji, J.*—The word "possession" in ss. 328 and 331 of the Civ. Pro. Code, has the wider general meaning and it includes constructive and symbolical possession quite as much as actual physical possession. There is nothing in these sections to limit the word "possession" to actual physical possession. Possession of immoveable property is not the less real or actual, because it is enjoyed through tenants, servants, or member or members of one's family. *Candy, J.*—The words "claiming to be in possession on his own account or on account of some person other than the judgment-debtor" in s. 331 of the Civ. Pro. Code may be taken as including a person who is not in personal occupation of the land, but who claims to be in possession through the person who is in actual possession. Possession by a gardener or a servant is the possession of the owner. But possession by a tenant is different: where the alleged tenant is a third party and not the judgment-debtor, and where he is said to be in possession as the tenant of a landlord, who is also not a party to the suit, then the obstruction to the Court's officer would naturally and probably be made by the tenant who is on the spot and he would then be the person who would be summoned under s. 328, and who would be the claimant under s. 331 claiming to be in possession on account of his landlord who is other than the judgment-debtor. When such a claim is registered as a suit the person alleged to be the landlord will naturally be joined as a party, and the dispute will then be thoroughly investigated. But where the tenant is the judgment-debtor, and is thus debarred from making a claim under s. 331, and the third party who claims to be the landlord of the tenant in possession actually obstructs the Court's officer, then that third party is entitled to intervene under s. 341. *Quære.*—Having regard to the Explanation to s 647, Code of Civil Procedure, it is questionable whether s. 575 of the Code is applicable when an application is made to the High Court under s. 622, Civ. Pro. Code. *Whitsworth, J., dissentiente.*—The word "possession" in s. 331, Civ. Pro. Code, is limited to actual physical possession and does not extend to the possession of a landlord through his tenants. MANCHARAM v. FAKIRCHAND, **3 Bom. L.R. 55=25 B. 478.**

(4455)—*O.* 21, *rr.* 97, 99, 103 (=s. 335, *Civ. Pro. Code*, 1882)—*Judgement debtor—Obstruction—Suit to remove the obstruction.*—S. 335 of the Civ. Pro. Code, simply enacts that a party against whom an order on a summary proceeding is passed may institute a suit to establish the right he claims to present possession. A suit so instituted would not be a continuation of the summary application, but an independent proceeding governed by the relevant provisions of the Code: and it would lie in the Court within the local limits of whose jurisdiction the property in dispute is situate. DAMUL v. SHRIPAT, **6 Bom. L.R. 301.**

(4456)—*O.* 21, *rr.* 97, 99 *and* 103 (=s. 335, *Civ. Pro. Code*—1882)—*Finality—No judicial determination—Limitation Act (XV of 1877), sch, II, art.* 11—*Test—Manager of joint Hindu family decree against, binding character of.*—Under s. 335 of the Code, the only order, upon which the character of finality is impressed, is an order made upon enquiry. Where the matter of the obstruction, about which the purchaser had complained to the Court, was not investigated at all, and where there was no judicial determination as to whether the obstruction did, as a matter of fact, exist or whether the obstruction was justifiable, and the Court, without any enquiry, dismissed the application for default and the proceeding was withdrawn, the order is not of the description contemplated by s. 335 of the Code, and art. 11, sch. II of the Limitation Act, has no application. (34 C. 491, *Appr.*; 1 C.W.N. 24, *Commented on.*) The test to be applied in each case is, whether the order, which is relied upon as a bar, has been made after enquiry or without any investigation. (15 I.A. 123=15 C. 521, *Expl.*) Merely because the complainant does not adduce evidence or is absent, it does not follow that there are no materials before the Court to

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enable it to enquire into the matter. If the Court does enquire into it and dismiss the application, the order is made upon investigation. (32 C. 537, *Doubted.*) If a decree is passed against the *Karta* or manager of a joint Hindu family, in respect of liability properly incurred for the necessities of the family, the binding character of this decree upon the interest of other members depends, not upon their having or not having been parties to the suit, but on the authority of the manager to incur the liability. KUNJ BEHARI LAL v. KANDH PRASHAD NARAIN SINGH, **6 C.L.J. 362.** (14 B. 597, 23 B. 372, 29 C. 583 9 C.W.N. 879, *R.*) [*Rel. on*, 14 C.W.N. 346 ; *R.*, 11 C.L.J. 61=14 C.W.N. 298.]

(4457)—*O.* 21, *rr.* 97, 99, 103 (=s. 335, *Civ. Pro. Code*, 1882)—*Auction-purchaser—Resistance to his taking possession—Enquiry—Application dismissed for default—Regular suit—Limitation — Limitation Act* (XV *of* 1877), *sch. II, art.* 11.—Where an application under s. 335, Civ. Pro. Code, came on for hearing the applicant asked to withdraw his application for want of evidence, and the opposite party being present, the Court directed the application to be dismissed " for default of prosecution " with costs. *Held*, that, no enquiry having been held within the meaning of s. 335, Civ. Pro. Code, the applicant was not precluded from bringing a regular suit to establish his claim, more than a year after the date of the order. It is a condition precedent to passing an order under s. 335, Civ. Pro. Code, so as to make it conclusive, unless a suit is brought within a year, that the Court shall enquire into the matter of resistance, etc. SARAT CHOWDRA BISU v. TARINI PROSAD PAL CHANDRY, **11 C. W N. 487= 34 C. 491** (1 C.L.J. 296, 1 C.W.N 24, 32 C. 537, *D.*) [*F.*; 6 C.L J. 362, 31 M. 5 =3 M.L.T. 106=17 M.L.J. 554.]

(4458)—*O.* 21, *rr.* 97, 99, 103—*Execution—Resistance of third party—Procedure to be followed by executing Court—Difference in procedure between the old and the new Codes pointed out.*—Where a third party is found in possession of the property decreed and resists delivery of possession, the proper course is for the executing Court to make a summary enquiry under O. 21, rr. 97 and 99, Civ. Pro. Code, 1908, into the claim of the third party, that he is in possession in 'good faith,' and pronounce a decision, leaving the aggrieved party to his remedy by suit under r. 103. Difference in procedure between s. 331, Civ. Pro. Code, 1881, which required the claim to be tried as a suit, and O. 21, rr. 97 and 99, Civ. Pro. Code, 1908, pointed out. HAR NIHAL v. SHAMJI **14 P.R. 1910=21 P.W.R. 1910=5 Ind. Cas 809=64 L. R. 1910.**

(4459)—*O.* 21, *rr.* 97, 99, 103 (=*Civ. Pro. Code*, 1882, *ss.* 331 *and* 335)—*Court-sale—application by third person disputing right of auction-purchaser to dispossess him.*—An application by a third person claiming the property sold in a Court-sale as his and disputing the right of the auction-purchaser to dispossess him of the same is not governed by s. 331, but by s. 335 of the Code. MOJI LAL v. MARDAN PARWAR, **15 C.P.L.R. 49.**

(4460)—*O.* 21, *rr* 97, 99, 103 (=*s* 335, *Civ. Pro Code*, 1882)—*Symbolical possession, not dispossession.*—Symbolical possession does not amount to " dispossession, " within the meaning of s. 335, Civ. Pro. Code, 1882. IBRAHIM MULLICK v. RAM JADU RAKSHIT, **30 C. 710** [*R.*, 16 C.P.L.R. 107, 27 M. 67, F.B., ; *Expl., and D.*, 33 C. 487=3 C.L.J. 293.]

(4461)—*O.* 21, *rr.* 97, 99, 103(=*ss.* 331, 335, *Civ. Pro. Code*, 1882)—*Order under s.* 335—*Decree—Purchaser—Dispossession.*— An order under s. 335, Civ. Pro. Code, 1882, is not a decree. A person in whose favour such an order is made is not entitled to claim the benefit of s. 331, Civ. Pro. Code, 1882 Where a purchaser of immoveable property at an execution sale obtains delivery from Court and is subsequently dispossessed, he cannot claim the benefit of s. 335, Civ. Pro. Code, 1882, as such purchaser. SRINATH GHOSH v. ANNODA PROSAD ROY, **1 C.W.N. 192.**

(4462)—*O.* 21, *rr*, 97, 99, 103 (=*Civ. Pro. Code*, 1882, s.335)—*Application by auction-purchaser to remove obstruction—Competency of Court to reject application on perusing documents and hearing arguments—Limitation Act*, 1877, *art.* 11.—Where an auction-purchaser applied under s. 335 of the Code for the removal of obstruction caused by a third person, it was competent to the Court, on perusing the documentary evidence adduced and hearing the arguments of both sides, to reject the application and refer the petitioner to a regular suit. Where the Court rejected an application under s. 335, Civ. Pro. Code, and referred the petitioner to a regular suit, a suit, by the petitioner to recover possession of property was governed by art. 11 of the Limitation Act, XV of 1877. KAMALATTANNI v. RENGA AIYANGAR, **7 M. L.J. 310.**

(4463)—*O.* 21, *rr.* 97, 99, 103 (=s. 335. *Civ. Pro. Code*, 1882)—*Limitation—Order passed under s.* 335, *Civ. Pro. Code*, 1882—*Suit within one year from the date of—Whether barred—Party subsequently added—Right to raise plea of limitation—Art* 11, *Limitation Act*, XV *of* 1877, *sch. II.*—A suit brought within a year of the date of an order passed under s. 335, Civ. Pro. Code, 1882, is not barred by limitation. A person subsequently added as a party can raise the plea of limitation' GURUVAPPA CHETTY v. SRINIVASA ROW, **7 M.L.T. 306=6 Ind. Cas. 680.**

(4464)—*O.* 21, *rr.* 97, 99 *and* 103 (=*Civ. Pro. Code* 1882,) *s.* 335)—*Order declining to deliver decision—Suit brought more than a year from date of order, not barred.*—As in cases

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arising under s. 283, Civ. Pro. Code, so, in cases falling under s. 335, Civ. Pro. Code, if an order is passed after investigation, the fact that the investigation was not as complete as it might have been under the circumstances would not prevent the order, unless it is set aside within the time limited, from operating as conclusive against the party affected by it. But to render an order under either of the sections referred to so operative, it is essential that the Court passing it should have arrived at a definite conclusion as to the matter to be decided under the particular portion of the law under which the Court is acting. Where the Court, in investigating a claim under s. 335, Civ. Pro. Code, for some reason or other, declined to give a decision on the matter on which it had to decide under that section, then, a suit by the claimant to establish his title would not be barred even if brought more than a year from the date of the order. ALWAR IYENGAR v. ZELLEVEGER, **9 M.L.J. 175.** (18 M. 265, *R.*)

(4465)—*O. 21, rr. 37, 99, 103 (=s. 335. Civ. Pro. Code, 1882)—Decree—Execution—Resistance to possession—Obstruction by manager of a joint Hindu family—Minor coparceners not bound by manager's acts after partition*—V, as manager of a joint Hindu family, offered obstruction to defendants in taking possession of certain lands in execution of a decree. Sometime after this, the minor step-brothers of V having separated from V and the lands to which the obstruction was offered having been allotted to the minor's share, V took no further part in the miscellaneous proceeding that followed the obstruction, and on the 6th August 1898, the Court passed an order under s. 335 of the Civ. Pro. Code, 1882, in favour of defendants. The minors brought a suit on the 11th November, 1903, to establish their title to the lands. Both lower Courts dismissed the suit on the ground that it was barred under art. 11 of the Limitation Act, inasmuch as it was instituted more than a year after the order passed under s. 335 of the Civ. Pro. Code. *Held*, that the order was no bar to plaintiff's suit, since V did not represent the minors when the order under s. 335 of the Civ. Pro. Code was made. SHIDAPPA RAYAPPA v. VENKAJI KRISHNA, **10 Bom. L.R. 550=32 B. 494.**

(4466)—*O. 21, rr. 97, 99, 103 (=s. 335, Civ. Pro. Code, 1882).*—An appeal does not lie from an order under s. 335, Civ. Pro. Code. RAM NARAIN SAHOO v. BANDI PERSHAD, **31 C. 737.** [*R.*, 17 M.L.J. 321.]

(4467)—O. 21, rr. 97, 99, 103—*See* COURT FEES ACT, 1870, s. 7, cl. 1Ve, 22 A. 384=A. W.N. 1900, 119.

(4468)—O. 21, rr. 97, 99, 103—*See* EJECTMENT, SUIT, 13 C.L.J. 479.

(4469)—O. 21, rr. 97, 99, 103—*See* EXECUTION OF DECREE—MISCELLANEOUS. 18 B. 522.

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(4470)—O. 21, rr. 97, 99, 103—Application to be restored to possession dismissed for non-production of evidence—Suit for possession brought more than a year after the order, barred—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 8 A.L.J. 626.

(4471)—O. 21, rr. 97, 99, 103—Limitation for a suit to set aside an order passed under—*See* LIMITATION ACT, 1908, art. 11 and 11-A, 3 Bom. L.R. 594=26 B. 146.

(4472)—O. 21, rr. 97, 99, 103—Suit by *benamidar* within one year of adverse order under—Limitation—Right of suit—*See* LIMITATION ACT, 1908, arts. 11 and 11-A, 8 M.L.T. 377=8 Ind. Cas. 264.

(4473)—O. 21, rr. 97, 99, 103—Order under—Court declining to pass order—*See* LIMITATION ACT, 1908, arts. 11 and 11-A, 27 M. 25.

(4474)—O. 21, rr. 97, 99, 103—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 29 C. 25, A.W.N. 1886, 68.

(4475)—O. 21, rr. 97, 99, 103 *See* POSSESSION—NATURE OF POSSESSION, 30 C. 710.

(4476)—*O. 21, rr. 97, 99, 103, s. 47 (=Civ. Pro. Code, 1882, ss. 335, 244)—Purchaser in execution of decree—Representative—Usufructuary mortgagee ejected by purchaser, a person other than a judgment-debtor under s. 335.*—On an auction-purchaser who was also the assignee of the decree having obtained possession as purchaser, a usufructuary mortgagee, who had been in possession, applied to the executing Court to put him again in possession, dispossessing the above purchaser. The order of the Court reinstating such mortgagee in possession was held not to be one passed under s. 244, Civ. Pro. Code, since an execution purchaser is not, as such, a representative of a party to the suit in which the decree was passed. Moreover, the mortgagee was not a party against whom a decree or order had been passed, and consequently did not come within the provisions of s. 244 of the Code, but within the description of 'party other than judgment-debtor' in s. 335. The order being thus one under s. 335, and so not open to appeal, it could form the subject of revision by the High Court. SABHAJIT v. SRI GOPAL **17 A. 223, F.B.=A.W.N. 1895, 64.** [*Not F.*, 26 A. 447=A.W.N. 1904, 61; *F.*, 18 A. 36, 22 A. 450; *R.*, A.W.N. 1900 42, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185, 12 O.C. 109.]

(4477)—*O. 21, rr. 97, 99, 103 and s. 115 (=Civ. Pro. Code 1882, ss. 335, 622)—Resistance to execution of decree—Revision.*—An order under s. 335, is subject to revisional interference by the High Court under s. 622 of the Civ. Pro. Code. SHEORAJ SINGH v. BANWARI DAS, **6 A. 172=A.W.N. 1884, 16.** (7 B. 341, F.B., *F.*)

(4478)—*O. 21, rr. 97, 99, 103, O. 41, r. 23, s. 115 (=ss. 328, 331, 335, 562, 622, Civ. Pro. Code, 1882)—Resistance to execution—Limitation—Appeal.*—**A decree-holder, who is resisted**

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in the execution of a decree for ejectment, may apply for possession again, and, if again resisted, may complain against the second resistance. Where an application under s. 328, Civ. Pro. Code, was registered, and the opposite party put in a written statement, and the application was ultimately dismissed on the preliminary ground of limitation. *Held*, that the order cannot be considered merely as an order refusing to register a plaint, but has the same force as a decree and is subject to the same conditions as to appeal or otherwise as a decree, and an order by the District Judge on appeal, reversing the order of the first Court on the preliminary point and remanding the application for trial on the merits, is an order under s. 552, Civ. Pro. Code, and an appeal lies to the High Court against such an order BARNAGORE JUTE FACTORY CO., LD. v. RAJ KUMAR RAJ, **13 C.W.N. 724 =1 Ind. Cas. 785.**

— O XXI, r. 98 (=1882, ss. 329, 330=1877, ss. 329, 130=3859, ss. 227, 228).

See RESISTANCE TO EXECUTION OF DECREE.

(4479)—*O. 21, r. 98 (=s. 329, Civ. Pro. Code, 1882)—Re-sale to judgment-debtor—Resistance by judgment-debtor to possession—'Just cause.'*—A re-sale by the decree-holder purchaser to the judgment-debtor is 'just cause' within the meaning of s. 329 of the Civ. Pro. Code, for resistance by the judment-debtor-purchaser to obtain possession in execution of the decree. RUDRAMMA v. NAGI, **8 M.L.T. 388=8 Ind. Cas. 133.**

(4479-*a*)—O. 21, r. 98—*See* NOS. 2340, 4342, 4447 to 4450, *supra*, and NO. 4509, *infra*.

(4480)—*O. 21, rr. 98, 99 (=Civ. Pro. Code, ss. 329, 331 of 1877)—Execution—Obstruction by stranger.*—In construing the words "as the Court shall see fit," in s. 329, regard should be had to the circumstances in respect of which the power is to be exercised. An order under that section should be the result of the fact that the defendant in the suit, who is precluded by the decree from disputing plaintiff's right, unjustly instigates a third party, who has no real interest in the property, to prevent the plaintiff from getting the benefit of his execution. The Court has no power, under s. 329, to decide important questions, whose merits are wholly apart from, and unaffected by, the fact of obstruction caused at defendant's instigation. The Court should, under s. 331, number and register, as a suit, an application by the obstructor, who claims in good faith, to be, on his own account, in possession of property, against which execution has been taken out. GOVINDA NAIR v. KESAVA, **3 M. 81.** [*Appr.*, 25 B. 478=3 Bom. L.R. 58; *R.*, 14 B. 627.]

(4481)—*O 21, rr. 98, 99, 97, 100 (=Civ. Pro. Code, 1882, ss. 329, 330, 331, 334, 335)—Claim by judgment-debtor, if mantainable—Claim by person in constructive possession through tenants—"Possession" and "dispossession" meaning and scope of—Enquiry, scope of.*—S. 335 of the Code has to be read with s. 334. The judgment-debtor is not competent to make an application under s. 335 of the Code, which refers to resistance or obstruction by, or the dispossession of, a person other than the judgment-debtor. The term 'possession' in s. 336, as in other similar sections of the Code, is not used in a restricted sense, as relating to a mere tangible or physical possession, but includes constructive possession, or possession in law, by receipt of rent or otherwise. (11 W. R. 191, 15 W.R. 70, 20 W.R. 373, 22 W.R. 123, 18 W R. 87, 25 B. 478, 27 M. 67 *R. & F.*, 1 C.W.N. 343, 30 C. 710, *Expl. & D.*) The Court has the same jurisdiction in a case of dispossession, whether the person deprived of possession was in physical occupation or symbolical possession, as it has in a case of resistance or obstruction by a person either in actual or constructive possession; and a person who alleges that he was in possession through his tenant, who had been ousted as the judgment-debtor from the land by the delivery of possession to the purchaser, is entitled to make an application under s. 335 of the Code, as to that extent his own possession has been interfered with and he himself has been dispossessed within the meaning of the section; but, although he may not be incompetent to apply under s. 335 of the Code, merely by reason of the fact that the claims to have been in constructive and not actual possession, he cannot get any relief under that section inasmuch as he cannot be placed in actual possession, which, according to his own allegation, he never enjoyed before, and, on the other hand, he cannot be restored to possession through the person whom he alleges to be his tenant, as in that case, it would be practically restoring the judgment-debtor of possession in contravention of the pryvisions of ss. 334 and 335 of the Code. BRAJABALA DEBI v. GURUDAS MANDAL, **3 C.L.J. 293=33 C. 487.**

(4482)—*O. 21, rr. 98, 99, 101, 103—Revision—Practice—Preliminary order not contested till final orders passed in the case—Final order itself not contested—Preliminary order, whether can be revised.*—The Chief Court will not interfere on the revision side with a preliminary order of a lower Court, which is allowed to stand unchallenged at the time it is passed, and which is contested only at a late hour and after the inquiry has been made in accordance therewith and a final order (which itself is really not contested,) passed by the lower Court. A party against whom an order is made under O. XXI, rr. 98, 99 or 101 of the Code, has the right to proceed under O. XXI, r. 103 and, therefore, cannot be allowed to have the order rectified in revision. MATHU MAL v. MUSSAMMAT AMBO, **129 P.L.R. 1911.**

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—— O XXI, r. 99 (=1882 of. ss. 331, 335=1877, ss. 331, 335=1839, ss. 229, 269.)

See LIMITATION ACT, 1908, art. 182.

See RESISTANCE TO EXECUTION OF DECREE.

(4483)—*O.* 21, *r.* 99 (=*s.* 331, *Civ. Pro. Code*, 1882)—*Power of Court to try question of title.*—S. 331 directs that the Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Ch. V. It further provides that the order of the Court shall have the same force as a decree and shall be subject to the same conditions as to appeal. It is thus manifest that a Court, trying a suit under s. 331, must try it as a suit for the property and determine the question of title also. MAHIP RAI v. DWARKA RAI, **A.W.N. 1905, 50=2 A.L.J. 132=27 A. 453.**

(4484)—*O.* 21, *r.* 99 (=*s.* 331, *C.P.C.*, 1882)—*Execution of decree—Claim by person other than judgment debtor—Inquiry.*—S. 331 of the Code is in imperative terms, and in all cases in which its provisions are applicable they must be given effect to. In execution of a decree for possession of immoveable property, a person other than the judgment-debtor in possession of property objected to the execution, alleging, in good faith, some title to the property. Meanwhile, execution was stayed pending a suit by the mortgagee of the judgment-debtor. Therefore the Court did not pass any order on this petition. The order staying the execution being withdrawn, the District Judge before whom the petition was pending ordered the execution of the decree, on the ground, that the petitioner was no longer in possession of the property, he having been temporarily absent. *Held*, on revision by the Chief Court, that the petitioner's objection having been preferred in good faith, should have been made the subject of proper inquiry under s. 331. His temporary absence could not affect his claim. SUNDAR DOSS v. RAJA BALDEO SINGH, **118 P.R. 1907.**

(4485)—*O.* 21, *r.* 99 (=*Civ. Pro. Code*, 1882, s. 331)—*Madras Civil Courts Act* 1873, *s.* 12—*Jurisdiction—Claim below ordinary pecuniary limit.*—S. 331 of the Civ. Pro. Code, confers on the Court, executing a decree, a special jurisdiction to try a claim, even though the value of the subject-matter of the claim may fall below the pecuniary limit of its ordinary jurisdiction. SITHALAKSHMI v. VYTHLINGA, **8 M. 548 F.B.** [*R.*, 13 M. 510, 14 B. 627, 6 Bom.L.R. 30.]

(4486)—*O.* 21, *r.* 99 =(*s.* 331, *Civ. Pro. Code*, 1882)—*Resistance by Government to decree-holder's attempt to get possession under his decree—Registry as a suit—Judgment debtor holding under* pattah *from Government and paying* jenmabgoham *in addition to assessment—Right of Government to intervene — Possession.*—

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S. 331 of the Civ. Pro. Code of 1882, only applies where the resistance or obstruction has been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor. Where the decree-holder in attempting to execute her decree for possession from defendants, was obstructed by Government officials, the only claim of Government being that, in the *pattah* granted to second defendant's father, a charge was made for *jenmabhogam* in addition to assessment, and the first Court registered the objection as suit under s. 331, Civ.Pro.Code. *Held*, that the Government was not entitled to intervene under s. 331 of the Civ. Pro. Code, or any other claim section of the Code, and that the claim should not have been numbered and registered as a suit but should have been rejected. KARUNAKARA MENON v. SECRETARY OF STATE FOR INDIA, **8 Ind.Cas. 857=9 M L T. 166=21 M. L.J. 407.** (28 M. 505, 15 M.L.J. 416, *R.*)

(4487)—*O.* 21, *r.* 99 (=*s.* 229, *Act VIII of* 1859, *Civ. Pro. Code*)—*Claim under—Registered as a suit, what.*—A claim under s. 229 of Act VIII of 1859 (Civ. Pro. Code), registered as a suit is a fresh suit and not a continuation of the original suit. MUTHAMMAL v. CHINNANA GOUNDAN. **4 M. 220.** [*Appr.*, 8 M. 548; *Cons.*, 13 M. 520.]

(4488)—*O.* 21, *r.* 99 (=*s.* 331, *Civ. Pro. Code*, 1882)—*Civil Courts Act (Madras Act III of* 1873), *s.* 13—*Appeal—Jurisdiction.*—There is no reason why any special character should attach to the suit instituted under s. 331 of the Civ. Pro. Code, after it has once been disposed of and a decree has been passed in it. When the subject-matter in that suit is less than Rs. 5,000 in value and the suit has been tried by a Subordinate Judge, an appeal lies only to the District Court, although the value of the subject-matter in the original suit may have exceeded Rs. 5,000. KALIMA v. NAINAN KUTPI, **13 M. 520.** [*R.*, 22 C. 830.]

(4489)—*O.* 21, *r.* 99 (=*s.* 331, *Civ. Pro. Code*, 1882)—*Application against claimant resisting execution, how treated—Order under the section, nature of—Appeal.*—An application against a claimant resisting execution is one under s. 331 of the Civ. Pro. Code and ought to be treated as a plaint. [*Appl.*, 16 M. 127; *Diss.*, 9 Bom.L.R. 936.] An order rejecting an application such as is mentioned above is of the same effect as the refusal to register a plaint and is appealable. FUNINDRO DEB RAIKUT v. RANI JUGODISHWARI DEBI, **14 C. 234.** [*Appl.*, 16 M. 127; *Diss.*, 9 Bom.L.R. 936; *R*, 13 C.W.N. 724.]

(4490)—*O.* 21, *r.* 99 (=*Civ. Pro. Code, Act VIII of* 1859, *s.* 269)—*Effect of possession under.*—Where a defendant is in possession by virtue of an order under s. 269 of Act VIII of 1859,

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the plaintiff can only succeed on the strength of his own title. KALLAPA *bin* GIRMALLAPPA v. VENKATESH VINAYAK, **2 B. 676.**

(4491)—*O. 21, r. 99 (=Civ. Pro. Code, 1882, s. 331)—Foreclosure decree—Absence of direction for delivery of possession — Application for delivery, applicability of.*—A foreclosure decree absolute, containing no direction for delivery of possession, cannot be made the basis of proceedings under s. 331 of the Code. RAMACHANDRA BANIA v. BALKRISHNA GANPAT RAO DESHPANDE, **17 C.P.L.R. 62.**

(4492)—*O. 21, r. 99 (=Civ. Pro. Code, 1859, s. 269)—Summary proceedings—Failure to set aside order in such proceedings within one year—Suit to establish title to property subsequently, if barred.*—Where a purchaser at auction-sale instituted proceedings under s. 269 of Act VIII of 1859, against the defendant who resisted his taking possession of the property, and the proceedings were dismissed on the ground that the property belonged to the defendant, and no suit was instituted within one year of this order of dismissal *held* that a subsequent suit to establish the title was held barred. BAI JAMNA v. BAI ICHHA, **10 B. 604.**

(4493)—*O. 21. r. 99 (=s. 331, Civ. Pro. Code, 1882)—Decree—Execution — Obstruction —Suit to remove obstruction.*—In a suit under s. 331 of the Civ. Pro. Code, the proper issue to be determined is whether the person obstructing is in possession on his own account or on account of some person other than the judgment-debtor. No question of title between a plaintiff and his judgment-debtors requiring the decree against them to be re-opened, can possibly be adjudicated upon in such a proceeding. MAHOMED v. BASHETAPA, **5 Bom. L.R. 211=27 B. 302.**

(4494)—*O. 21, r. 99 (=Civ. Pro. Code, 1877, s. 335)—Resistance to purchaser in Court-auction—Complaint to executing Court—Dismissal as barred by limitation—Appeal.*—Where a purchaser in Court-auction of certain property was resisted in obtaining possession by a person who claimed to be in possession as mortgagee, and the purchaser's complaint to the Court executing the decree was dismissed on the ground that it was barred by limitation. *Held* that, as the order appeared to have been passed under s. 335, Civ. Pro. Code, it was final. Even if that was not the case, no provision of law could be found making an order of this kind appealable. MAKUND RAM v. THAN SINGH, **A.W.N. 1882, 16.**

(4495)—*O. 21. r. 99 (=s. 331, Civ. Pro. Code, 1882)—Resistance or obstruction—Decree for partition—Decree for possession—Partition Act (IV of 1893), s 4*—Where a person is held entitled to the possession of a share in certain property after partition, and a commissioner is appointed to partition the property and put him in possession of his share, resistance to such

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commissioner is "resistance or obstruction," within the meaning of s. 331, Civ Pro. Code, to a decree for possession. It is only when the suit is for partition, that a member of the joint family may buy out the plaintiff, under s. 4 of the Partition Act. He is not entitled to do so when the suit has been decreed and the decree for possession is being executed. KALI KUMAR MUKERJI v. BRAHMANANDA MUKERJI, **7 C.L.J. 98.** (16 M. 127, *F.*)

(4496)—*O. 21, r. 99 (=s. 331, Civ. Pro. Code, 1882)—Order to plaintiff to take steps under s. 331, Civ. Pro Code—Not proper disposal of execution petition*—Where a Judge made an order in the following terms:—"Let the plaintiff take steps under s. 331, Civ. Pro. Code," it was held that such an order was not a proper disposal of the petition for execution. Where such an order was passed behind the plaintiff's back and without notice to him, it was held that it must be set aside. MAITY SUBRAYADU SAHUKAR v. RAHIM MISSA BEGAM SAHEBA, **8 M.L.T. 295.**

(4496-*a*)—*O. 21, r. 99 (=Civ. Pro. Code, 1882, s. 331)—Execution-proceedings—Obstruction by third persons—Obstructors whether competent to impeach decree-holder's title setting up* jus tertii.—Onus *of proof on obstructors.*—Plaintiff obtained a decree for possession against a tenant of his and, on proceeding to execute it, he was obstructed by the present defendants. He accordingly filed a claim against them, which was registered as a suit under s. 331 of the Civ. Pro. Code, to remove the obstruction and to recover possession. In answer to the claim, defendants objected that the land belonged to a third person from whom they derived title. It was *held* on second appeal, that in such a suit, when possession is shown to have been with the plaintiff, the defendants have not without showing title in themselves, that liberty to impeach the plaintiff's title, or to set up a *jus tertii*; under such circumstances the only successful defence would be that the defendants were themselves the owners of the land and the *onus* of proving a better title than the plaintiff's will rest upon them. BAPUJIRAO v. FATESING, **22 B 967.** [*F.*, 27 A. 417 =2 A.L.J. 26=A.W.N. 1905, 20; *Appr.*, 25 B. 478.]

(4497)—O. 21, r. 99—Proceedings under s. 331, Civ. Pro Code, 1882, open to appeal—S. 9 Act I of 1877 (Specific Relief)—*See* APPEAL—ORDERS, 22 C. 830.

(4498)—O. 21, r. 99—*See* APPEAL—ORDERS, 5 W.R. Mis. 51.

(4499)—O. 21, r. 99—*See* BURDEN OF PROOF—MISCELLANEOUS, 10 C. 50.

(4500)—O. 21, r. 99—*See* COURT FEES ACT, 1870, sch. I, art. 1, 10 B. 238.

(4501)—O. 21, r. 99—Costs—Payment of costs of summary order—Act XXIII of 1861, s. 11—*See* DECREE—DECREE, CONSTRUCTION OF, 2 C.L.R. 504.

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(4502)—O. XXI, r. 99—*See* ESTOPPEL—STATEMENTS AND PLEADINGS, 8 W.R. 95.

(4503)—O. XXI, r. 99—*See* INJUNCTION UNDER CIV. PRO. CODE, 6 B.L.R. 571.

(4504)—O. XXI, r. 99—*See* LIMITATION ACT, 1908, art. 11, 9 W.R 474.

(4505)—O. XXI, r. 99—*See* POSSESSION—MISCELLANEOUS, 6 O.C. 110.

(4506)—O XXI, r. 99—*See* NOS. 291, 292, 364, 1080, 1081, 1082, 2340, 3703, 3704, 3942, 4052-*a*, 4381, 4382, 4433, 4434, 4440, 4441, 4442, 4448, 4449, 4450, 4451, 4452, 4453, 4454, 4455, 4456, 4457, 4458, 4459, 4460, 4461, 4462, 4463, 4464, 4465 4466, 4467, 4468, 4469, 4470, 4471, 4472, 4473, 4474, 4475, 4476, 4477, 4478, 4480, 4481, 4482, *supra* and NO. 4548, *infra*.

(4507)—*O.* 21, *r.* 99, *s.* 47 (=*ss.* 331 *and* 244, *Civ. Pro. Code*, 1882)—*Obstruction, to execution of decree, by a person other than a judgment-debtor—S.* 244— *Applicability of.*—A person, against whom no decree was passed, is not a judgment-debtor. And, when obstruction to the execution of a decree is caused by any person other than the judgment-debtor, the decree-holder's application to remove the obstruction should be registered as a suit under s. 331. S. 244 does not apply to such a case. JATHAVEDAN NAMBUDRI v. KUNJU ACHAN, **16 M.L.J. 431=2 M.L.T. 14=10 M. 72.** (22 M. 161, *Not F.*; 24 M. 391, *D.*) [*R.*, 9 M.L.T 160=8 Ind. Cas. 860.]

(4508)—*O.* 21, *r.* 99, *O.* 23, *r.* 1 (=*ss.* 331, 373, *Civ. Pro. Code*, 1882)—*Withdrawal of suit against some defendants—Absence of leave to institute fresh suit—Execution against defendants against whom suit decreed—Obstruction by defendants against whom suit withdrawn—Suit under s.* 331—*Bar of suit by s.* 373.—Plaintiff, in a suit for recovery of property, obtained a *razi* decree against defendants Nos. 1 and 2, and withdrew suit against defendants Nos. 3 to 8 without obtaining leave to institute a fresh suit. In execution of his decree against defendants Nos. 1 and 2, he was obstructed by defendants Nos. 4 to 8. The plaintiff's application to remove the obstruction was registered as a suit under s. 331, Civ. Pro. Code. *Held*, that the suit was barred by s. 373, Civ. Pro. Code BIRAM BEVI AMMAL v. SHUMSUDDIN, **8 Ind. Cas. 860=9 M.L.T 160 =21 M.L.J. 404.** (30 M. 72, 2 M.L.T. 34, 16 M.L.J. 433, 12 C.W.N. 15, 3 C. 516, *R.*)

(4509)—O. 21, rr. 99, 97, 98—*See* LIMITATION ACT, 1908, arts. 144, 138 and s. 3, 18 B. 37.

(4510)—*O.* 21, *rr.* 99, 97, 103, *s.* 99 (=*Civ. Pro. Code*, 1882, *ss.* 331, 335 *and* 578)—*Execution of decree—Obstruction to execution—Court proceeding under wrong section—Error affecting merits.*—Where a Court, executing a decree on complaint made by the decree-holder, took action under s. 331 of the Code of Civil Procedure instead of under s. 335 which was the section applicable to the facts of the case, it was *held* that the action of the Court would not be covered by s. 578 of the Code. JHAMMAN LAL v. HAIDAR BAKHSH, **A.W.N. 1898, 79.**

(4511)—*O.* 21, *rr.* 99, 100 (=*Civ. Pro Code*, 1877, *ss.* 331 *and* 332)—Res judicata.—The investigation, under s. 331 of Civ. Pro. Code before its amendment, was to proceed as in a suit under s. 9 of the Specific Relief Act; only there was an appeal from the decree under s. 332. The question tried in such a suit was only one of possession and notwithstanding the decree, the parties may proceed to try the title in a subsequent suit. CHINNASAMI PILLAI v. KRISHNA PILLAI, **3 M. 104.** [*R.*, 14 B. 627.]

(4512)—*O.* 21, *rr.* 99, 100 (=*Civ. Pro. Code*, 1877, *ss.* 331, 332, 335)—*Resistance to execution of decree—Resistance to auction-purchaser—Appeal.*—Where the purchaser of immoveable property in Court-auction sought delivery and was met by an application, purporting to be under s. 331, Civ. Pro. Code, 1877, made by the respondent, asserting that one of the properties of which the appellant wished to take possession had not belonged to the judgment-debtor, but belonged to the respondent's father, which was decided in favour of the respondent, *held* that s. 335 clearly applied to the facts of the case and procedure before the lower Court, and consequently the order of the lower Court was not appealable. MANWAR ALI v. MADHO, **A.W.N. 1881, 98.**

(4513)—O. 21, rr. 99, 100—*See* EXECUTION OF DECREE—MISCELLANEOUS, 6 B.L.R. App. 55=14 W.R. 358.

(4514)—*O.* 21, *rr.* 99, 100, 101, 103 (=ss. 331 *and Civ. Pro. Code*, 1882)—*Decree for delivery of possession of the immoveable property—Obstruction to delivery by third party in good faith—His remedy.*—S. 331 of the Code contemplates an application by the decree-holder; and a third party resisting the delivery of possesion of property to a decree-holder cannot apply for the investigation of his claim under this section, but may do so under s. 332 of the Code after he has been dispossessed. SUKHAN SINGH v. BAIJ NATH GOENKA, **12 C.W.N. 115.**

(4515)—O. 21, rr. 99, 101, 103—*See* LIMITATION ACT, 1908, art. 13, 8 M. 134.

(4516)—*O* 21, *rr.* 99, 102—*Decree for possession—Resistance in execution*—Bona fide *claim of right.*—Where a decree-holder, in attempting to execute a decree for possession, is resisted by a third party, who is found by Court to be in possession in good faith on his own account, the case is covered by r. 99 and not by r. 102 of O. XXI of the Civ. Pro. Code, *R.* 102 of O XXI applies to cases where the judgment-debtor has transferred his right or his possession to the party resisting. REV. V. C. L. NEILSON v. SADANANDA SWAMIAR, **8 Ind. Cas. 805=9 M.L.T. 186.**

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——O. XXI, r. 100 (=1882, s. 332=1877, s. 332=1859, s. 230).

See LIMITATION ACT, 1908, art. 182.

See RESISTANCE TO EXECUTION OF DECREE.

(4517)—*O* 21, *r.* 100 (=*Civ. Pro. Code*, 1859, s. 230)—*Application under section registered—Effect—Civil suit—Title, question of.*—An application under s. 230, Act VIII of 1859, once registered, is to be treated as an ordinary civil suit, and the question of title may be gone into. AJOO KHAN v. KRISTO PERSHAD LAHOORY, **8 W.R. 477.**

(4518)—*O.* 21, *r.* 100 (=*s.* 230. *Civ. Pro. Code*, 1859)—*Suit under section when can be tried as regular suit—Ouster.*—A suit initiated under Act VIII of 1859, s. 230, cannot be tried as a regular suit without a proper plaint and stamp, unless the plaintiffs or petitioners complain of actual ouster. RUTTUN KOOER v. SYUD TESSUDUCK HOSSEIN, **22 W.R. 103.**

(4519)—*O.* 21, r. 100—*Rejection of stranger's claim in execution—Remedy of claimant.*—Where a claim made by a third party in the course of an execution proceeding is rejected, the claimants' proper remedy is a regular suit or to wait till dispossessed, and then proceed under Act VIII of 1859, s. 230. F. J. FERGUSSON v. NIL KOMUL LAHIREE, **23 W.R. 270.**

(4520)—*O.* 21, *r.* 100 (=*s.* 230, *Civ. Pro. Code*, 1859)—*Dispossession by decree-holder under colour and in execution of decree.*—A Judge need not go into the question, whether petitioner is entitled to relief under s. 230, Act VIII of 1859 when the parties are agreed that the defendant has dispossessed the plaintiff under colour of a decree which he has obtained. JUDOO KAPALEE v. ISSUR CHUNDER ROY, **17 W R. 375.**

(4521)—*O.* 21, *r.* 100 (=*s.* 230 *of the Civ. Pro. Code of* 1859), *claim under—Proof of possession and title.*—Although it is sufficient for a plaintiff in a claim, registered as a suit under s. 230 of the old Code=s. 331 of the present Code, to prove only possession in the first instance, without proof of title, it is open to the defendant to show that, although the plaintiff has possession with him, he has no good title to the property and that he (defendant) has a better title to it ; and the Court ought not to shut him out from doing this. DIL BASEE KOONWAREE MOTHEE v. GUNGA PERSHAD, **5 C. 278.** (5 B.L.R. 708, F.B., *R.*)

(4522)—*O.* 21, *r.* 100—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 278—*Claim to attached property, dismissal of—Regular suit, dismissal of—Hindu law—Mitakshara joint family—Father, decree against — Execution sale.*—When, in execution of a money decree against the father of a joint Mitakshara family, property has been sold after a claim by the son has been

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dismissed for non-prosecution, an application by the son against the auction-purchaser under O. XXI, r. 100, Civ. Pro. Code, objecting to delivery of possession of the entire property, cannot be entertained. *Quære* :—Whether any member of a joint Mitakshara family can predicate that he is in possession, on his own account, of a specific share of the family property, and maintain an application under O. XXI, r. 100 in respect of such alleged share. SANKAR NATH PANDIT v. MADAN MOHAN DAS, **11 C.L.J. 61=14 C.W.N. 298=5 Ind. Cas. 298.** (1 B. 718, 3 M. 81, *R.*)

(4522-*a*)—*O.* 21, *r.* 100 (=*Civ. Pro. Code*, 1859, *s.* 230)—*Applicant—Burden of proof.*—Under s. 230, Civ. Pro. Code, the applicant is not bound to do more than prove that he was really and *bona fide* in possession ; he is not bound to start his case by proving his title. The matter in dispute is the right of the decree-holder to dispossess the applicant, and the decree-holder is at liberty to give evidence of his title, and prove that the property really belongs to him. Unless the decree-holder can show a better title than the applicant, the latter ought to be restored to possession. BRINDABUN CHUNDER ROY v. TARACHAND BUNDOPADHAYA, **11 B.L.R. 237=20 W.R. 114** [*R.*, 1 B. 286, 3 C. 224, 9 B. 198, 22 A. 204, 24 A. 157, 6 C.L.J. 621.]

(4523)—O. 21, r. 100 — *See* APPEAL—DECREES AND EXECUTION OF DECREES, 8 W.R. 114.

(4524)—O. 21, r. 100 — *See* APPEAL—ORDERS, 13 W.R. 264, W.R. 1864, Mis. 24.

(4525)—O. 21, r. 100 —*See* BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 3 B.L.R. App. 90, 8 W.R. 8.

(4526)—O. 21, r. 100—*See* EXECUTION OF DECREE — STAY OF EXECUTION, Marsh 478.

(4527)—O. 21, r. 100—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 B.L.R. 708=13 W.R. F.B. 80.

(4528)—O. 21, r. 100—*See* HINDU LAW—JOINT FAMILY, 3 B.L.R. A.C. 124=11 W.R. 499.

(4529)—O. 21, r. 100—*See* INTERVENOR, 12 W.R 475.

(4530)—O. 21, r. 100—*See* LIMITATION ACT, 1908, s. 4, 11 W.R. 259.

(4531 &32)—O. 21, r. 100—*See* LIMITATION ACT, 1908, art. 12, W.R. 1864, 61.

(4533)—O. 21, r. 100— *See* POSSESSION—SUITS FOR POSSESSION, 2 A. 94.

(4534)—O. 21, r. 100—*See* REGISTRATION ACT, 1908, s. 50, 2 B.H.C. 209.

(4535)—O. 21, r. 100—*See* REMAND, 10 W. R. 438, 18 W.R. 395.

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(4536)—O. 21, r. 100—*See* SUPERINTENDENCE OF HIGH COURT; 11 W.R. 197.

(4536-*a*)—O. 2, r. 100—*See* Nos. 1081, 1082, 3698, 3705, 4454, 4511, 4512, 4513, 4514, *supra*.

(4537)—O. 21, rr. 100, 58, 59, 60, 61, 63—*See* BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 6 B, 215, F.B.

(4538)—O. 21, rr. 100, 64, 61, 63, 59, 58 and 60—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHT TO 11 W.R. 54=2 B.L.R. A.C. 217.

(4539)—O. 21, rr. 100, 101—*See* LIMITATION ACT, 1908, s. 22, 26 A. 528.

(4540)—*O.* 21, *rr.* 100 *and* 101, 103 (=*old* s. 332)—*Order under—Suit against—Limitation.*—Neither art. 11, nor art. 13 of 2nd sch. of Act XV of 1877 applies to suits brought by a person, against whom an order had been passed under this section, to establish his right, no special period of limitation being prescribed for such suits. NIHALA MAL v. KHAIRA, **125 P.R. 1894.**

(4541)—*O.* 21, *rr.* 100, 101, 103 (=*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 332)—*Dispossession in execution of decree—Claim by person dispossessed allowed—Suit by decree-holder to declare his right to possession—Decree in favour of plaintiff—Subsequent application by claimant to recover costs of claim petition—Maintainability.* --The person dispossessed in execution of a decree preferred a claim under s. 332, Civ. Pro. Code. The petition having been allowed with costs, the decree-holder instituted a suit to set aside the summary order and for a declaration of his right to the property. A decree was passed in favour of the plaintiff. Thereupon, the claimant applied for execution of the order for costs in the claim case. *Held* that, as the decree expressly declared that the order had no effect, the execution for costs could not proceed, even though the decree did not specifically refer to costs incurred in the petition. D. SESHAGIRI IYER v. MARAKATHAMMAL, **5 M. L.J. 252.**

(4542)—*O.* 21, *rr.* 100, 101 *and* 103 (=*s.* 332, *Civ. Pro. Code*, 1882)—*Decree — Execution—* Khatedar—*Non-payment of Government assessment—Forfeiture — Re-letting — Person other than the judgment-debtor.*—S obtained a decree for possession against his tenant P. P thereafter made default in payment of the Government assessment. The lands were consequently forfeited by Government; and were again let to P under a *kabulayat*. S then, in execution of his decree, recovered possession of the lands from P. P applied, under s. 332 of the Civ. Pro. Code, to get back the lands. The lower Court granted P's application: *Held*, that it was erroneous to speak of P as a person other than the judgment-debtor: he was the judgment-debtor and none the less so because

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he might have acquired an interest subsequent to the date of the decree passed against him. *Held*, further, that P could not rely on his new title as an answer to S's claim for possession, for P had by availing himself of his position as *khatedar* gained an advantage in derogation of the rights of S. SHRIPATI v. PIRAJI, **9 Bom. L.R. 1018.**

(4543)—O. 21, rr. 100, 101, 103—*See* LIMITATION ACT, 1908, arts. 11, 11-A, 13, 8 M. 82.

(4544)—O. 21, rr. 100, 101, 103—*See* MAMLATDAR, JURISDICTION OF, 20 B. 351.

(4545)—O. 21, rr. 100, 101, 103—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 14 C.W.N. 403=5 Ind. Cas. 793.

(4546)—*O.* 21, *rr.* 100, 101, 103, *s.* 115 (=*ss.* 332 *and* 622, *Civ. Pro. Code*, 1882)—*Rivisional jurisdiction when exercised—Ejectment of one not a party to suit.*—Where, in an application, under s. 332 of the Code by one who has been ejected from property of which he was in possession, the Court does not confine itself to the question whether or no applicant was a party to the suit, under the decree in execution of which he was dispossessed, but goes into and decides the question whether the applicant could show a good title to the property, the High Court will interfere in revision, although the person aggrieved may have another remedy by regular suit. The High Court will interfere in revision in such a case, because the lower Court "infringed the extrinsic conditions of its legal authority." PERIASAWMY PILLAY v. HYDER HOSSAIN, **8 Ind Cas. 613.**

(4547)—O. 21, rr. 100, 101 and 103. O. 22, r. 10—Assignment *pendente lite*—Addition of assignee as co-defendant after the period of limitation—*See* LIMITATION ACT, 1908, s. 22, 3 P.R. 1907=42 P.W.R. 1907=3 P.L.R. 1908.

(4548)—O. 21, rr. 100, 101, 103, 97, 99—Order under, made without investigation—Effect—*See* ACT XV OF 1856, 14 C.W.N. 346=5 Ind. Cas. 710.

——O. XXI, r. 101 (=1882, ss. 332, 335.)

(4548-*a*) O. 21, r. 101—*See* NOS. 1081, 1082, 3698, 4454, 4482, 4514, 4515, 4539, 4540, 4541, 4542, 4543, 4544, 4545, 4546, 4547, 4548, *supra*.

——O. XXI, r. 102 (=1882, s. 333=1877, s 333).

(4548-*b*)—O. 21, r. 102—*See* NO. 4516, *supra*.

——O. XXI, r. 103 (=1882, ss. 332 and 335.)

(4548-*c*)—O. 21, r. 103—*See* NOS. 1080, 1081, 1082, 2253, 3698, 4433, 4434, 4440 4454, 4455, 4456, 4457, 4458, 4459, 4460, 4461, 4462, 4463, 4464, 4465, 4466, 4467, 4468, 4469, 4470, 4471, 4472, 4473, 4474, 4475, 4476, 4477, 4478, 4481, 4482, 4510, 4511, 4515, 4540, 4541, 4542, 4543, 4544, 4545, 4546, 4547, 4548, *supra*.

——O. XXI, r. 103 (—1882, s. 332, 335.)

(4549)—O. 22, application of—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.L.J. 331.

Civ. Pro. Code, Acts V of 1908, XVI of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXII, r. 1 (=1882, s. 361=1877, s. 361 =1859, s. 99.)

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4550)—*O. 22, r. 1 (=s. 361, Civ. Pro. Code, 1882)—"Cause of action"—S. 361, object of.*—The language of ss. 361 and 371 seems clearly to indicate that the cause of action in the original and revived suit must be the same, and that no fresh cause of action can be imported into a revived suit. SHAM CHAND GIRI v. BHAYARAM PANDAY, 22 C. 92.

(4551)—*O. 22, r. 1—"Right to sue"—Meaning of—Application for probate by executor—Death of executor—Right of legal representative of executor to continue proceedings and obtain letters of administration—Abatement of suit.*—S, the sole executor as well as the residuary legatee under the will of A, deceased, applied for probate of the said will. On a *caveat* entered by N. the cause was set down as contentious and pending the hearing, S. died, and P., his sole widow and heiress, applied that her name, as his sole widow and heiress, might be substituted for his name, and that the petition for probate might be amended by substituting a prayer for letters of administration with copy of the will annexed instead of a prayer for probate. *Held*, that the right to sue did not survive to the widow of the executor and that the suit abated. The right to sue, in O. 22, means the right to bring a suit, asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, and that a right to obtain probate of a will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate. SARAT CHANDRA BANERJEE v. NANI MOHAN BANERJEE, 36 C. 799=3 Ind. Cas. 995.

(4552)—O. 21, *r.* 1 (=*s.* 361, *Civ. Pro. Code*, 1882)—*Party to a suit—Death—Right to sue—Abatement.*—By the terms of a consent decree it was provided that any right, title and interest which the plaintiff's grandmother, father and uncle had in certain family properties should be released and conveyed to defendant 1, their mortgagee: and a conveyance accordingly was passed in terms of the decree. The plaintiff, who was a minor then, was not made a party to the consent decree or the conveyance. He subsequently brought a suit to have his rights declared against defendant 1. While this suit was pending the plaintiff died leaving a widow and daughter. Defendant 1 contended that the suit abated by reason of plaintiff's death as plaintiff's right had passed to him:—*Held*, that the right to sue survived as it was an interest in property. DHARAMSI v. NAROTAM, 5, **Bom. L.R. 1041.**

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(4553)—*O. 22, r. 1 (=s. 361, Civ. Pro. Code, 1882)—Right to sue—Appeal—Death of Appallant—Action for libel—Legal representative.*—The words "right to sue," in s. 361 of the Civ. Pro. Code, must be interpreted in their ordinary meaning, namely, the right to obtain relief by means of legal procedure. It does not follow that the right to appear against a decree partakes of the nature of the original decree. Plaintiff sued to recover damages on acoount of a libel: and obtained a decree for damages against defendant. Defendant paid the amount of the decree and filed an appeal in the High Court after which he died: his son was then brought on the record as his heir and legal representative. To this it was objected that at defendent's death, the appeal abated and his son had no right to continue the same. *Held* by *Fulton & Crowe, JJ. (Candy, J., dissentient)* that the appeal did not abate. Where the claim has been perfected by judgment the nature of the relief claimed on appeal stands on a different footing and there can be no abatement. GOPAL v. RAMCHANDRA, **4 Bom. L.R. 325=26 B. 597.**

(4554)—*O. 22, r. 1 (=s. 361, Civ Pro. Code, 1882)—Suit by agent of undisclosed principal—Devolution of right to continue suit after agent's death—Rights of principal.*—The mere recital of a firm's "*vilasom*" before the name of the agent in the plaint without its appearing in the cause title does not suffice to make the suit one by the firm or by the agent on behalf of the firm. Where a suit is one properly brought by a person as agent of an undisclosed principal, it should, after the death of the agent, be continued, if at all, by his representatives, and not by the principal. The principal's right to sue, when it exists independently of that of the agent and does not devolve upon him or revert to him as a consequence of the agent's death. PERIANNAN CHETTIAR v. RENGACHI REDDY, **17 M.L.J. 116.** (22 B. 672, *D.*)

(4554-*a*)—O 21, r. 1—*See* NO. 4579, *infra*.

(4555)—*O. 22, r. 1, s. 107 (2), O. 22, r. 11 (=ss. 361, 582, Civ pro Code 1882)—Suit for injunction—Dismissal—Defendant's death pending appeal—Abatement—Whether right of action as regards costs survives to representative*—A brought a suit against S, for an injunction restraining him from standing at a particular place in temple at S. The suit was dismissed both in the Court of first instance and in that of first appeal, and a second appeal was filed in the High Court. Pending second appeal S died, and his widow K was brought on record as his legal representative. *Held*, that the second appeal could not be prosecuted as regards the injunction against the legal representative K, and that it abated. If the appellant cannot prosecute his appeal for the injunction, he cannot be allowed to show that the decree refusing the injunction was wrong, for the mere

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purpose of getting rid of the direction as to costs. JOSIAM THIRUVENGADACHARIAR v. SAMI IYENGAR *alias* VENKATACHARIAR, **7 M L.T 195=5 Ind. Cas. 937=20 M.L.J. 761.** (26 B. 597, 9 A. 131, 31 C. 406, *R.*)

(4556)—*O. 22, rr. 1, 2, 3 (1), O. 41, r. 4, s. 107 (2), O. 22, r. 11 (=ss. 361 to 363, 544, 582, Civ. Pro. Code 1882)—Death of one of several appellants—Effect on other appellants—Suit for partition.*—Where several plaintiffs or defendants jointly appeal against a decree to which s. 544 of the Civ. Pro. Code, applies, the death of one of the appellants, even if his legal representative is not brought on the record within time, does not cause the whole appeal to abate. The fact that the decree was one for partition and that the appellants are the defendants, does not affect the applicability of s. 544. RAM SEWAK v. LAMBAR PANDE, **25 A. 27=A W.N. 1902, 171** (22 A. 232 *Overruled*; 28 B. 718, *R.*; 16 A. 211, *Expl.*) [*F.*, 5 Ind. Cas. 325; *R.*, 5 C.L.J. 393.]

(4557)—*O. 22, rr. 1, 3 (1), 5, sch. II, r. 17 (=Civ Pro. Code, 1882, ss. 361 365, 367, 523) — Reference to arbitration — Revocation of authority or arbitrator—Submission made rule of Court—Death of a party—Abatement.*—As regards the revocation of the authority of an arbitartor to whom the matter in a suit has been referred, the policy of the Indian Legislature has always been different from that in England, and the English Common Law Rule has not been followed. According to the law in India, the submission of an existing dispute once made is not, without just and sufficient cause, revocable even in the case of a submission which has not been made a rule of Court, while, with reference to a submission which has been made a rule of Court and consequently, where the matter has become the subject of a suit, the submission can be revoked only with the leave of the Court for good cause shown. (8 M H.C. 46, 12 M.I.A. 112, *R.*) Contracts to refer to arbitration should not be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature. The question whether a legal representative of deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative. So, where the submission has been made a rule of Court and the right is one which survives to the legal representative, the proceedings do not abate, under s. 361, Civ. Pro. Code, by reason of the death of a party. PERUMALLA SATYANARAYANA v. PERUMALLA VENKATA RANGAYYA, **27 M. 112.** [*F.*, 10 O.C. 132; *R.*, 2 N.L.R. 7, 5 A.L.J. 658 =A.W.N. 1908, 228=30 A. 505.]

(4558)—O. 22, rr. 1, 3 (1), 5 and sch. II, r. 17—Reference to arbitration without intervention of Court—Death of party—Effect—Procedure—*See* ARBITRATION—REVOCATION OF REFERENCE TO ARBITRATION, 13 M.L.J. 311.

(4559)—O. 22, r. 1, O. 22, r. 5—Suit by son contesting alienation by father—Abatement of suit—Right of reversioners to continue suit on death of son, plaintiff—*See* CUSTOM—PUNJAB—ALIENATION, 59 P.L.R. 1905=58 P.R. 1905.

——O. XXII, r. 2 (=1882, s. 362=1877, s. 362=1859, s. 100)

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4560)—*O. 22, r. 2 (=s. 362, Civ. Pro. Code, 1882)—Appeal—Death of appellant—All heirs not brought upon the record—Duty of the heirs—Abatement.*—A Mahomedan appellant having died, his sons applied to be brought upon the record in his place. The respondents applied that his daughters may also be added as parties. This application was not granted. *Held* that it was the duty of the sons to bring their sisters upon the record along with themselves, and they not having done so the appeal abated. HAIDAR HUSAIN v. ABDUL AHAD, **5 A.L.J. 62=A.W.N. 1908, 41=3 M.L.T. 207=30 A. 117.** (16 A. 611, *F.*)

(4561)—O. 22, r. 2—*See* CAUSE OF ACTION, 1 B.L.R. O.C. 42.

(4561-*a*)—O. 22, r. 2—*See* NOS. 4042, 4556, *supra* and No. 4579 *infra*.

(4562)—*O. 22, rr. 2, 3 (1), 4, 11, s. 107 (=ss. 362, 363, 368 and 582, Civ. Pro Code, 1882)—Suit, right of—Substitution application for.*—A, B. and C, members of a joint Hindu Mitakshara family, applied for registration of their names under the Land Registration Act. The application was opposed and refused in 1883. In 1894, they sued for declaration of title and obtained a decree. During the pendency of the appeal against such decree, A died, and more than six months after, the appellant applied to have B and C noted as legal representatives, who had taken the estate by survivorship. *Held*, that the application for substitution was governed by s. 362, Civ. Pro. Code, and not s. 368. S. 362 is not limited in its application to cases, in which the right of suit survives against the surviving defendants, by reason of some circumstance antecedent to the suit. SHYAMANAND DAS v. RAJ NARAIN DAS, **4 C. L.J. 568=11 C W.N. 186**

——O. XXII, r. 3, para. (1) (=1882, ss. 363 365=1877, ss. 363, 365=1859, ss. 101, 102); para (2) (=1882, s. 366=1877 s 366=1859, s. 102).

(4563)—*O. 22, r. 3 (=s. 365, Civ. Pro. Code, 1882)—Abatement of appeal—Legal representative—Right to sue.*—Unless the person applying

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to be considered the "legal representative" can show that he is the person to whom "the right to sue" involved in the case descends or survives by law, he is not, *qua* that right, "the legal representative" within the meaning of this section. HARNAM SINGH v. BACHATAR SINGH, **23 P.R. 1889**.

(4564)—*O.* 22, *r.* 3 (=*s.* 365, *Civ. Pro. Code*, 1882—*Death of plaintiff-widow—Heirs of widows—Husband brought on record.*—On the death of the widow of one H, who had instituted a suit against the collaterals of H, the right to appeal survives to the heirs of H, whoever they might be. MUSST. LACHMI v. AMIN CHAND, **97 P.R. 1893.** [*Cited & F.*, 58 P. R. 1905=59 P.L.R. 1905.]

(4565)—*O.* 22, *r.* 3 (=*s.* 365, *Civ. Pro Code*, 1882)—*Death of sole appellant—Effect of decree—Remedy.*—The sole appellant before the Divisional Court died during the pendency of the appeal. The application made by his sons to be made parties was rejected for default. No objection was raised by either party when the appeal was heard. *Held* that the proper order to pass was to set aside the decree of the Divisional Judge as nullity, leaving either party to make any application with a view to re-opening the case. CHAUNNI LAL v. FARIDA, **78 P.R. 1891.** [*R.*, 20 P.R. 1898.]

(4566)—*O.* 22, *r.* 3=s. 365, *Civ Pro. Code*, 1882)—*Decree in favour of or against dead person—Effect*—A decree passed in favour of or against a person in spite of his death, though not a nullity, can be set aside, if it is shown that such a disregard of the provisions of the Civ. Pro. Code had materially prejudiced the other party. BATES v. PRESTAGE, **20 P.R 1898.** (21 B. 314, 6 M. 180, 15 M. 399, 17 A. 478, 31 P.R. 1836, 7 P.R. 1889, 78 P.R. 1891, *R.*)

(4567)—*O.* 22, *r.* 3 (=*old s.* 375)—*Irregularity—Revision-Power of pleader to compromise.*—(1) A Judge commits material irregularity in procedure (*a*) if the decree is not made with reference to any material allegation of fact or proposition of law relating to the subject-matter of the suit affirmed by one side and admitted by the other (*b*) if it does not enquire into the objections of this defendant. (2) A pleader has no power to compromise a suit without express authority from his client. MUSST. WAZIR BEGAM v. MUSST. PIYARI BEGAM, **50 P.R. 1898.**

(4567-*a*)—*O.* 22, *r.* 3—*One legal representative—Application in time—Rest not barred to apply.*—When, after the death of a party, one of his legal representatives had applied in time to be made a party, which application was granted, there is no bar to the other representatives being brought on the record subsequently. ADUSUPALLI VENKATA ROW v. MARIKRUTHU AMMAL. **1912, 1 M.W.N. 9.** (12 B. 48, *F.*)

Civ. Pro. Code, Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4568)—*O.* 22, *r.* 3 (1) (=*Civ. Pro. Code of* 1877, *ss.* 363, 365)—*Decree—Appeal by representative of plaintiff—Limitation.*—Ss. 363 and 365 of Civ. Pro. Code, do not apply to the case of the death of a plaintiff after decree, and of his representative wishing to appeal. The representative has the same period to make his appeal as the plaintiff himself would have had. RAMANADA SASTRI v. MINACHI AMMAL, **3 M. 236.**

(4569)—*O.* 22, *r.* 3 (1) (=*s.* 366 *of old Code*) —*Wrong legal representatives brought on record—If suit abates.*—On the death of one of the defendants, his father and brothers were brought on as his legal representatives, whereas his legal representative was his mother, who was not brought on. The application was made *bona fide* after consulting the vakil, and was granted by the Court. *Held* that, in the circumstances, it cannot be said that there was no application to the Court within the meaning of s. 366 of the old Code or O. 22, r. 3 (1) of the new Code, so as to cause the suit to abate. MALLAPRAJADU v. LINGAM VEERARAGHAVA ROW, **7 M L T. 43=5 Ind. Cas. 514=20 M L J. 398.** (23 M. 125, *Appl.*; 26 M. 230, 27 B. 162, *R.*)

(4570)—*O.* 22, *r.* 3 (1) (=*Civ. Pro. Code*, 1877, *s.* 365)—*Death of plaintiff—Appeal by legal representative.*—The plaintiff's suit was dismissed on the 21st March, 1891. He died on the 4th April, and his widow and legal representative preferred an appeal on the 21st April, following. The lower appellate Court ordered the appeal to be shelved on the ground that the widow was not competent to prefer it until she had obtained a certificate under Act XXVII of 1860, and the time for appeal had expired. *Held* that the appeal was within time, and the appellant, in preferring it, substantially, if not in set terms, made the application required by s. 365, Civ. Pro. Code. RADHA RANI v. SARU, **A.W.N. 1882, 73.**

(4571)=*O.* 22, *r.* 3 (1)(=*Civ. Pro Code*, 1882, *s.* 365)—*Hindu Law—Widow—Succession—Legal representative*—A reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow, provided that there was a fair trial in which the decree was passed. Consequently, the widow's right to sue survives to and devolves on the heirs of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of s. 365, Civ. Pro. Code. The cause of action of the widow as against the defendant to the suit is not a cause of action personal to herself, and, therefore, the heir of the husband and not her personal heir, is the person entitled to prosecute the suit. TRIBUWAN SUNDAR KUAR v. SRI NARAIN SINGH, **20 A. 341=A.W.N. 1898, 65.** (21 C. 8, 23 C. 636, 9 M.I.A. 543, *R.*) [*R.*, 23 M. 125, 2 C L J. 602, 8 C.W.N. 843, 34 C 643=11 C.W.N. 593=5 C.L.J. 491=2 M.L. T. 207.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4572)—*O. 21, r. 3 (1) (=Civ. Pro. Code, 1882, s. 365)—Death of plaintiff—Substitution of plaintiff's representative—Trial of suit in part—Objection by defendant at late stage—Procedure.*—Pending a suit for money, the plaintiff died issueless and within two months and a half of his death, his widow as his legal representative, had her name entered on the record, and the trial of the suit proceeded for several days. Thereafter, defendants presented a petition under ss. 365 and 367, Civ. Pro. Code, stating that in the course of the trial it became evident that the deceased plaintiff had left an undivided brother, and praying for the determination of the question as to who was the legal representative of the deceased plaintiff. The District Munsiff, without making any elaborate inquiry, *held* that the widow was the proper heir and directed in order to prevent disputes, that the undivided brother who was willing to be joined as a party should be brought on the record along with the widow. He was accordingly made a co-plaintiff. Defendants preferred an appeal and the District Judge directed that an elaborate enquiry be held to determine who was the legal representative of the deceased plaintiff. On holding such an enquiry, the District Munsiff came to the conclusion that the undivided brother was the proper legal representative of the deceased plaintiff and struck off the widow's name from the record. He then passed judgment holding that the suit abated and passed a decree dismissing the suit. The widow preferred appeals both from the decree and from the order striking off her name from the record. The District Judge concurring with the District Munsiff dismissed both the appeals. Thereupon, the widow appealed to the High Court and presented a Civil Revision petition also against the order holding that she was not the legal representative. *Held* that as an appeal lay, the Civil Revision petition presented in the alternative was not necessary. *Held*, also that the right, if any, to take objections, accrued on the death of the plaintiff, and the defendants were bound to use all reasonable diligence in acquainting themselves with the state of the family of the deceased in view to ascertain whether the widow was entitled to prosecute the suit as the legal representative of her deceased husband, and they were bound to take the objection at the earliest opportunity, if they meant to insist upon their right, if any, to raise the objection. After having allowed the widow to proceed with the prosecution of the suit till it almost reached its conclusion, they were precluded from raising such objection at a late stage of the suit. As the widow had produced a succession certificate which presumably contained the plaint debt, her right to recover the debt was conclusive under s. 16 of the Succession Certificate Act. MEENATCHI ACHI v. ANANTHANARAYANA AYYAR, **26 M. 224=12 M.L.J. 380.** (17 M. 209, 18 M. 496, *D.*)

(4573)—*O. 22, r. 3 (1) (=s. 365, Civ. Pro. Code, 1882)—Appeal—Death of appellant—Representative not brought upon record—Decree.*—Where an appellant dies before the hearing of the appeal and his representative is not placed on the record, the decree passed by the appellate Court is a nullity: and if his legal representative applies within the prescribed period to have his name entered on the record, the Court is bound, under s. 365 of the Civ. Pro. Code, to enter his name. JANARDHAN v. RAMCHANDRA, **4 Bom. L.R. 23=26 B. 317.**

(4574)—*O. 22, r. 3 (1) (=s. 365, Civ. Pro. Code, 1882)—Execution proceedings — Mesne profits, assessment of—Continuation of original suit—Death of decree-holder—Substitution—Limitation.*—An application for the assessment of mesne profits is not a proceeding in execution of the decree, but merely a continuation of the original suit. (19 C. 132, F.B., *F.*) Therefore, s. 365, Civ. Pro. Code, 1882, is applicable to such an application; and consequently, if no proceedings in order to substitute the representatives of the deceased decree-holder, or to have the mesne profits assessed, be taken within six months from the date of the death of the original decree-holder, an application for the purpose will be barred. DEBENDRA NATH GOSWAMI v. KHIRODE CHAUNDRA BANDOPADYA, **5 Ind. Cas. 272.**

(4575)—*O. 22, r. 3 (1) (=Civ. Pro. Code, 1882, s. 365)—Right of legal representative of deceased plaintiff or appellant to be brought on record in place of deceased.*—When the legal representative of a deceased plaintiff or appellant applied under s. 365 within the period allowed by law, the Court shall place him in exactly the same position (suppposing of course that the right to sue or to appeal survives) as the deceased plaintiff or appellants held at the time of his death, in respect of the suit under litigation. BHOPATSING v. GAYARAM, **4 C. P.L.R. 183.**

(4576)=*O. 22, r. 3 (1) (=s. 355, Civ. Pro. Code, 1882)—Muhammadan Law—Suit by a Muhammadan female for partition and delivery of her share—Application by defendants to continue suit as plaintiff's representatives on plaintiff's death—Abatement of suit—Civ. Pro Code (Act V of 1908) s. 115—Material irregularity—Revision.*—On the death of plaintiff, a Muhammadan female, suing for ascertainment and delivery of her share by partition as heir of one A, the defendants, *i.e.*, other sharers, prayed to be brought on record as plaintiff's representatives and to continue the suit. *Held*, that s. 365 of the Civ. Pro. Code, did not apply to the case and that defendants could not be allowed to continue the suit as plaintiff's representatives, that the dismissal of this suit by abatement did not preclude the defendants from bringing a separate suit for their augmented share occasioned by the plaintiff's death (25 B. 606, *R.*) that the High Court could not interfere in revision under s. 115 of Act V of

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1908, even if the lower Court was wrong in dismissing the suit. KHATIJA BI v. BABU SAHIB, **8 Ind. Cas. 859=9 M.L.T. 161.**

(4576-*a*)—*O.* 22, *r.* 3 (1) (2) (=*Civ. Pro. Code*, 1859, *s.* 102)—*Act XX of* 1866, *ss*, 2, 53—*Specially registered bond*—Res judicata—*Money-decree — Mortgagee's lien.*—Taking a money-decree on a specially registered bond under s. 53, Act XX of 1866, does not extinguish the mortgagee's lien on the property mortgaged by the bond. (14 B.L.R. 422, N=12 W.R. 522, *F.*) There is no substantial difference between the effect of an ordinary money-decree on the bond, and a decree on the bond for the sale of the mortgaged property; so that the remedy of the mortgagee is the same, so far as the parties to the suit are concerned, whether the decree be made under s. 53 or in a regular suit. A proceeding under s. 53 is a suit of a civil nature within the meaning of s. 1, Act VIII of 1859, independently of any pecularities in the special procedure to be adopted. A creditor who has resorted to the summary procedure provided by Act XX of 1866, s. 53 and has recovered a portion of his claim in execution of the decree so obtained, is not at liberty to bring a regular suit against the same parties for the enforcement of his remedies under the bond. Of course, there may be right of suit remaining against third persons not parties to the first proceedings. SYUD EMAM MOMTAZOODDEEN MAHOMED v. RAJCOOMAR DASS, **14 B.L.R. 408, F.B.=23 W.R.187.** [*Diss.*, 1 A. 240; *Not F.*, 29 C. 537; *F.*, 23 W.R. 344, 23 W.R. 460, 24 W.R. 94, 24 W.R. 210, 3 C. 363=1 C.L.R. 446, 4 C. 29, 4 B. 57, 6 C. 317 =7 C.L.R. 293, 5 B. 673, 7 C. 78, 7 C. 677= 9 C.L.R. 233, 9 C.L.R. 369, 10 C. 299, 567, 27 C. 724=4 C.W.N. 701; *Appr.*, 4 C. 817, 2 M. 108, 5 C. 928=6 C.L.R. 370; *R.*, 5 B. 614, 6 B. 54, 8 C. 517=10 C.L.R. 489, 9 A. 23, 14 C. 464, 32 C. 891=1 C.L.J. 371=9 C.W.N. 728, 35 C. 61, F.B.=11 C.W.N. 1011=6 C.L.J. 320; *D.*, 1 A. 236, 5 C.L.R. 243, 9 C. 651.]

(4576-*b*)—O. 22. r, 3 (1)—*See* SUCCESSION CERTIFICATE ACT, 1860, 3 B.L.R.A.C. 404= 12 W.R. 307.

(4577)—O. 22, r. 3—*See* NOS. 96, 112, 113, 1593, 1776, 2482-*a*, 3565, 4556, 4557, 4558, 4562, *supra* and NOS. 4579, 4673, *infra.*

(4577-*a*)—*O.* 22, *rr.* 3 (2), 4, *O.* 41, *r.* 4 (=*Civ. Pro. Code*, 1882, *ss.* 366, 368, 544)—*Death of some of several appellants—Right of others to proceed with appeal not affected—Death of respondent during pendency of appeal—Procedure.*—This suit for possession had been properly framed, and all the parties interested in the subject-matter were before the Court. Decree was passed against the defendants and it was open to any one of them to appeal against it, any plaintiff or defendant having a right to appeal without the concurrence of any of the other parties to the suit. The defendants appealed, but before the hearing of the appeal, one of the appellants and one of the respondents happened to die. Applications put in for having the names of their heirs entered as representative parties were rejected as time barred. The lower appellate Court dismissed the appeal on the ground that it was defective for want of parties, but the High Court held that that Court was wrong in having, under the circumstances, dismissed the appeal. The mere fact of the death of one of the several appellants cannot affect the right of the other appellants to proceed with the appeal. The proper course for the lower appellate Court would have been to have treated the appeal as having abated as regards the deceased appellant only. It should have proceeded with the hearing of the appeal so far as regards the remaining appellants. So far as the death of one of the respondents was concerned, the lower Court ought to have proceeded under the provisions of s. 368 of the Civ. Pro. Code, and to have either declared that the appeal had abated as to the deceased respondent and proceeded as against the rest of the respondents, under s. 544 of the Civ. Pro. Code, or else to have passed orders placing the legal representatives of the deceased respondent on the record. CHANDARSANG v. KHIMABHAI, **22 B. 718.** [*F.*, 26 B. 203=3 Bom. L.R. 736, 34 C. 1020=11 C.W.N. 1100=6 C.L.J. 715; *R.*, 22 A. 420=20 A.W.N. 136, 23 A. 22=20 A.W.N. 163, 25 A. 27=22 A.W.N. 171, 27 B. 284, 11 C.W.N. 504=5 C.L.J. 393, 1 S.L.R 145, 2 L.B.R. 168.]

(4578)— *O.*22, *rr* 3 (1), (5)(=*ss.* 365, 367, *Civ. Pro. Code*, 1882)—*Representative of a deceased plaintiff.*—S. 365, Civ. Pro. Code, pre-supposes that a party claiming to represent a deceased plaintiff is his legal representative, but, if the representative character is denied, or when two or more claimants claim that character, the procedure prescribed by s. 367, Civ. Pro. Code, should be followed. OULA v. BEEPATHEE, **17 M. 209=3 M.L.J. 287.** [*F.*, 10 O.C. 121; *R.*, 27 B. 162; *D.*, 26 M. 224=12 M.L.J. 380.]

(4579)—O. 22, rr. 3 (1), O. 22, rr. 9, 1, 2,3—*See* EXECUTION OF DECREE—MISCELLANEOUS, 39 P.R. 1903.

(4580)—*O.* 22, *rr.* 3 (1), 10 (=*ss.* 365, 372, *Civ. Pro. Code*, 1882)—*Mortgage-suit—Application for substitution, by legal representative of the decree-holder after order absolute for sale but before actual sale.*—A mortgage-suit does not end until the sale actually takes place, though an order absolute might have been passed. It is a pending suit up to the time of sale. (23 A. 331, *R.*) An application, therefore, by the legal representatives of a deceased decree-holder, for substitution in the place of the deceased, after decree and after an order absolute for sale, but before the actual sale, would be governed by s. 372 and not by s. 232 or s. 365 of the Civ. Pro. Code. S. 365 refers to applications before decree, while s. 372 refers to

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those after decree. BHUGWAN DAS KHETTRY v. NILKANTA GANGULI, **9 C.W.N. 171.** [*F.*, 2 C.L.J. 288; *Appl.*, 13 C.W.N. 787; *R.*, 2 N.L.R. 178; *D.*, 3 N.L.R. 60.]

(4581)—*O.* 22, r. 3 (1), *O.* 33, rr. 2, 5, 8, 15 (=ss. 365, 403, 407, 410, 413, *Civ. Pro. Code*, 1882)—*Pauper right to be declared, whether personal—Death of the applicant—Substitution Right of the heir.*—The right to obtain permission to sue as a pauper is only a personal right. So on the death of an applicant praying for such permission, his legal representative cannot come in as such and ask to be substituted in his place. There is a marked distinction between a right to sue and a right to make an application for permission to sue as a pauper, and this distinction is clearly indicated in s. 413 of the Code. The right to make such an application is obviously a personal right and cannot survive in the legal representative who may or may not be a pauper himself. LALIT MOHAN MANDAL v. SATISH CHANDRA DAS, **4 C.L.J. 234=38 C. 1163.**

(4582)—O. 22, r. 3 (1), O. 41, r. 25—Representative of deceased appellant, jurisdiction of Court to which a case has been remanded, to bring on record—*See* REMAND, 7 O.C. 17.

(4583)—O. 22, r. 3 (1), last para, O. 22, r. 11, O. 42, r. 1 and s. 108—*See* LIMITATION ACT, 1908, art. 171, 3 C.L.R. 440.

(4584)—*O.* 22, *r.* 3 (1 *and* 2) (=*Civ. Pro Code*, 1882, *ss* 365, 366)—*Execution of decree—Permission to bid—Appeal—Death of judgment-debtor—Appeal by legal representatives.*—In execution of a mortgage decree the Court granted to the decree-holder leave to bid at the auction-sale, notwithstanding the objection raised by the judgment debtor. On the 6th June, 1882, the decree-holder purchased the property. On the 3rd July, the judgment-debtor filed objections to the confirmation of the sale, and two days after lodged an appeal against the order granting leave to bid. On the 9th August, the judgment-debtor died. On the 29th August, the Munsiff rejected the application as the legal representatives were not brought on record. On 14th October, the Judge disposed of the appeal-by dismissing it. On the 20th December, the sale of the 6th June was confirmed. The widow of the judgment-debtor appealed to the High Court against all the three orders, dated the 29th August, the 14th October, and the 20th December. As regards the first appeal, the Court remarked that if, under s. 647 of the Code, s. 365 could be applied to execution proceedings and the judgment-debtor regarded as in the position of a deceased plaintiff, the Munsiff's order would be premature, as sixty days should be allowed from the date of the judgment-debtor's death, for his legal representative to apply to have his name entered in place of that of the deceased. As regards the second appeal, the Court *held* that the Judge should have held that the suit had abated, which would have still left the legal representative to apply under the second paragraph of s. 371 to set aside such abatement. The widow cannot, for the first time in the second appeal, apply to be substituted. As regards the third appeal also, it was *held* that she had no *locus standi*. DURGA KUAR v. HAR SAHAI, **A.W.N. 1883. 134.**

(4585)—O. 22, r. 3 (1 and 2)—*See* APPEAL—COSTS, 18 W.R. 293,

(4586)—O. 22, rr. 3 (1), 3 (2)—*See* RIGHT OF APPEAL, 8 W.R. 84.

(4587)—O. 22, r. 3 (1) (2) —*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 3 A. 759=A.W.N. 1881, 57.

(4588)—*O.* 22, *r.* 3 (1), (2), s. 107 (2), 22, *r.* 11 (=*Civ Pro. Code*, 1882, *ss.* 365, 366, 582)—*Limitation Act*, 1877, *sch. II*, *art.* 171—*Abatement of appeal.*—Where the plaintiff-appellant died, and for more than a year after his death, no application was made by any one claiming to be the appellant's legal representative to be brought on the record under s. 365, Civ. Pro. Code, *held*, that the appeal abated. *Per Mahmood, J.—Obiter*, just as it is the duty of a defendant against whom a decree is passed, when filing his appeal, to implead the plaintiff as respondent, so it is his duty to implead the representatives, of the plaintiff who dies before the appeal is instituted. GREGOR GRANT v. THE OUDH AND ROHILKHAND RAILWAY COMPANY, **A.W.N. 1886, 80.**

(4589)—O. 22, rr. 3 (1), (3), 5—*See* APPEAL—DECREES AND EXECUTION OF DECREES, W.R. 1864, 121.

(4590)—*O.* 22, *rr.* 3 (1), 2, 9 (1) (2) (=*ss.* 365 366, 371, *Civ. Pro. Code*, 1882)—*No step taken for revival of suit for six months after death of sole plaintiff—Limitation—Applications for revival and abatement set down for hearing together—Sufficient cause for suit not being revived—Abatement and revival both ordered.*—A sole plaintiff in a suit died, and, for more than six months after the death, no step was taken for revival of the suit. Two petitions were presented to the Court, one by the defendant for abatement of the suit and the other by the plaintiff's representative for the revival thereof; and both petitions were set down for hearing together. The Court was satisfied, from the circumstances of the case, that the legal representative of the deceased plaintiff was prevented by sufficient cause from continuing the suit. Under the circumstances, the Court ordered the abatement of the suit and at once set aside the order of abatement under s. 371. RAM PROTAB CHOWDHRY v. LAL CHAND, **9 C.W.N 369.**

(4591)—O. 22, r. 3 (2), s. 104, O. 43, r. 1—*See* APPEAL—ORDERS, 17 A. 172=A.W.N. 1895, 42.

(4592)—*O.* 22, *rr.* 3 (2), 5 *and* s. 104, *O.* 43, *r.* 1 (= ss. 366, 367 *and* 588, *cl.* (18), *Civ. Pro.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Code, 1882)—*Abatement of suit—Appeal, right of, from an order declaring a person not to be the legal representative—Joint Hindu family*, Karta *in a, must be with the consent of the adult members*.--Right of descendants of a *karta* to carry on a suit brought by himfor recovery of a property against the trespasser for the benefit of the whole family. One B N., brought a suit as *karta* of a joint Hindu family to recover possession of certain properties against a trespasser for the benefit of the whole family. During the pendency of the suit, B.N. died and his sons applied to be brought on record as legal representatives of the deceased. The defendant-trespasser opposed the application, on the ground that the sons of the deceased alone could not carry on the suit, as they could not be considered as legal representatives of B.N. as *karta*. The Court below held that the sons of B.N., were not the legal representatives of the deceased in his capacity as *karta* and ordered that the suit should be dismissed as having abated under s 366, Civ. Pro. Code. The sons of B.N. appealed against this order. It was contended that no appeal lay against an order passed under s. 366. *Held* that, although the order passed in the case by the Court below purported to have been passed under the first paragraph of s. 366, it ought to be treated as an order under s. 367. and was appealable under s. 588, cl. (18) (*a*). *Held*, further, that none of the sons of the deceased could claim to carry on the suit as *karta*, inasmuch as no member of a joint family could arrogate to himself the position of *karta* against the wishes of the other adult members. *Held* also that, if the other members of the family did not or could not join with the sons of the deceased B.N., in carrying on the suit, they were entitled to carry it on themselves for the benefit of the whole family, by making other members of the family parties to the suit. PANDIT IKBAL NARAIN v. PANDIT RATAN LAL, **10 O. C. 121.** (10 C B.220, 27 B 162, 18 M. 496, 2 N. L.R. 7, 17 A. 172, 17 M. 209, 27 M. 112, *R.*, 9 O.C. 354, *F.*)

—— O. XXII, r. 4 (=1882, s. 368=1877, s. 368 =1859, s. 101).

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4593)—*O.* 22, *r.* 4 (=*Civ. Pro. Code*, 1882, *s.* 368)—*Death of defendant—One of several representatives brought on record—Validity of decree passed.*—A person whom a plaintiff alleges to be the legal representative of the deceased defendant in his suit and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit, and in the absence of any fraud or collusion, the decree passed in such suit will bind such estate. It will, however, be open to any person who is or claims to be the legal representative or one of the legal representatives of the deceased defendant to apply to have his name also entered on the record as a legal representative. KADIR MOHIDEEN MARAKKAYAR v. MUTHUKRISHNA AYYAR, **26 M. 230=12 M.L.J. 368.** [*R.*, 7 M.L.T. 43, 19 M. L.J. 671; *D.*, 6 M.L.T. 269.]

(4594)—*O.* 22, *r.* 4 (=*s.* 368, *Civ. Pro. Code*, 1882)—*Death of defendant—Application for substituting legal representatives — Delay — Sufficient cause.*—Ignorance of a defendant's death is often a sufficient cause to prevent a suit from abating by reason of the plaintiff not applying for the substitution of legal representatives in the place of the deceased defendant within the period prescribed therefor. (42 P.R. 1887, 43 P.R. 1889, *R.*) Where the defendants live in a different village from the plaintiff and are numerous, *held* that these are extenuating circumstances in, and sufficient cause for, the delay in bringing the legal representatives on record in the place of the deceased. DADU v. KADU, **113 P.R. 1907.**

(4595)—*O.* 22, *r.* 4 (=*Civ. Pro Code*, 1882, *s.* 368)—*Decree passed by mistake against a deceased defendant—Decree declared incapable of execution—Remedy open to plaintiff.*—When a decree is allowed by a plaintiff to pass *ex parte* against a sole defendant who is not alive at the time of the passing of such decree, but of whose death the plaintiff had at the time no knowledge, it is competent to the plaintiff, on the decree so obtained being declared incapable of execution, to apply under s. 368 of the Code of Civil Procedure to have the case re-opened after bringing upon the record the legal representatives of the deceased defendant. QUTUB ALI v. DWARKA DAS, **A.W.N. 1904, 44.**

(4596)—*O.* 22, *r.* 4 (=*s.* 368, *Civ. Pro. Code*, 1882)—*Legal representative, meaning of—"Subdivision"—Pre-emption.*—The term "legal representative" does not necessarily mean "legal heirs." It is not intended by this section to enquire elaborately into nice questions arising as to exactly who, under particular rules of law, is the legal representative. The term "subdivision" in s. 11 of the Punjab Laws Act means a main division, a recognised and well-known division or quarter. Generally "mohallas" and "Katrus" are sub-divisions. But in Peshawar where there are recognised sub-divisions each of which contains "mahallas" such recognised sub-divisions and not the "mohallas" are the subdivisions contemplated by s. 11 of the Punjab Laws Act. CHARANJIT MAL v. MUSSAT. MITHO, **29 P.R. 1883.** [*R.*, 42 P.R. 1903=89 P.L.R. 1903, 52 P.R. 1903=169 P.L.R. 1903.]

(4597)—*O.* 22, *r.* 4 (=*s.* 368, *Civ. Pro. Code*, 1882)—*Ignorance of law whether sufficient cause.*—The plea that the appellant is not aware of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the necessity to file an application under this section is not necessarily an insufficient excuse for the delay. AMIR BAKSH v. DULA AND GHULAM SHAH v. MALAK MUZAFFAR KHAN, **43 P.R. 1889, Note.** (81 P.R. 1886, F.B., *R.*) [*R.*, 95 P.R. 1908, 113 P.R. 1907; *F.*, 184 P.R. 1889, F B.]

(4598)—*O. 22, r. 4 (=s. 368, Civ. Pro. Code, 1882)—Application—Limitation—Excuse.*—Art. 171-B of the Limitation Act applies to applications made under this section. The ignorance of an appellant of the fact of the respondent's death is a sufficient excuse for not applying, within 60 days within the meaning of the last clause of this section. GAMAN v. BAKSHA, **42 P.R. 1887.** (133 P.R. 1884, 133 P.R. 1886, *F.*,) [*R.* 113 P.R. 1907.]

(4599)—*O. 22, r. 4 (=Civ. Pro. Code, 1882, s. 368)—Death of defendant—Cause of action surviving to legal representatives—Adjournment of trial to a day within six months—Dismissal of suit for omission to bring in representatives of deceased—Legality.*—On the death of a defendant, the Court has no power to adjourn the suit for trial to a day within six months, if the cause of action does not survive against the surviving defendants alone and if the legal representatives of the deceased defendant are not already on record. It is not competent to the Court to dismiss the suit on the adjourned date for plaintiff's omission to bring in the legal representatives. The Court must deal with the suit under s. 368 of the Code. PURUSHOTTAMA PATNAIK v. CHOITANA NAIKO, **12 M.L J. 188.**

(4600)—*O. 22, r. 4 (=Civ. Pro. Code, 1882, s. 368)—Suit for possession—Death of two of the respondents—Interest of one vesting in the surviving respondents—Another respondent not a necessary party—Survival of cause of action.*—One B died bequeathing by his will certain portions of his property to plaintiff, and defendants 4, 5, 6, respectively. Plaintiff sued on the will for the recovery of the possession of her share from defendants 1, 2 and 3, who were alleged to be in possession of the property in suit improperly. Defendants 4, 5, 6, refused to join plaintiff, so they were made defendants, but they did not appear either at the hearing in the Court of first instance or an appeal. Defendants 1, 2, 3, joint brothers, and related to B as cousins, opposed. The suit was dismissed. An appeal against it was admitted and adjourned *sine die*; at the hearing after nearly two years, it was found that defendants respondents Nos. 2 and 5, had died in the interval, and no steps had been taken to bring their legal representatives on the record. It was alleged that defendants-respondents Nos. 1, 2, 3 were joint and the interest of respondent No. 2 merged into those of 1 and 3, and that respondent No. 5 was not a necessary party. The appeal was still ordered to abate. *Held*, that it could abate only as regards defendants-respondents Nos. 2 and 5, and should proceed against the rest, on the merits. BAI FULL ADESANG, **3 Bom. L.R. 736=26 B. 203.**

(4601)—*O. 22, r. 4 (s. 368, Civ. Pro. Code, 1882)—Death of party—Duty of Court—Effect of non application by party.*—On the death of a party to a suit, the Court cannot of itself bring the legal representatives on the record. It is the duty of the other party to do so, and if he omits to bring them on record, he will bear the consequences, as the proceedings will not bind the true heir. KUTBA v. MUSST. UMRI, **5 P. R. 1890.** [*D.*, 66 P.R. 1894.]

(4602)—*O. 22, r. 4 (=s. 368, Civ. Pro. Code, 1882)—Deceased defendant's representatives not brought on record—Decree against defendant who was dead and others—Decree indivisible—Abatement of entire suit.*—During the pendency in the High Court of an appeal in a pre-emption suit, one of the respondents died, and his repretentatives were not brought on the record within limitation. Judgment was passed against the respondents in ignorance of his death. Execution was applied for by the successful appellant and was allowed as agains the surviving respondents: *Held*, that the decree being one for pre-emption, in which possession of the entire property might have been taken in execution, and the representatives of one respondent not having been brought on the record, the cause of action did not survive as against the remaining respondents. IMAM UDDIN v. SADARAT RAI, **7 A.L J. 228=5 Ind. Cas. 797 =32 A. 301.** (3 C. 487, P.C., *Rel. on*; 17 A. 478, *D.*)

(4603)—*O. 22, r. 4 (=Civ. Pro. Code, 1882, s. 368)—Death of one of two respondents alleged by appellants to be members of a joint Hindu family—Application by widow of deceased respondent to declare the appeal to have abated, and by appellants to bring the widow on to the record—Widow added by the Court.*—The plaintiffs sued two defendants, alleging them to be members of a joint Hindu family. Their suit having been unsuccessful, the plaintiffs appealed, and during the pendency of the appeal one of the respondents died. After the lapse of more than six months the widow of the deceased respondent applied to the Court to have it declared that the appeal had abated. The appellants contested this application; but at the same time themselves asked that the widow might be brought on to the record if the Court thought it necessary that she should be a party. The Court accordingly ordered that the widow should be made a respondent. *Held* that, under the peculiar circumstances of the case, the plaintiffs-appellants having pleaded that the respondents were joint, whilst the Court of first instance had held that they were separate, the plaintiffs were excusable in not having applied to have the widow made a party to the appeal, and the appellate Court had used a proper discretion in joining her. SHER SINGH v. HARI SINGH, **A.W.N. 1902, 152.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4604)—*O.* 22, *r.* 4 (=s. 368 *Civ. Pro. Code*, 1882)—*Legal representative—Dispute as to—Court's procedure.*—Where a dispute arises as to who is the right legal representative among several applicants, the Court has the power of deciding it by an interlocutary order for the purpose of proceeding with the case or appeal. HAR NARAIN v. TULSI RAM. **66 P.R. 1894.** (9 B. 151, 10 A. 223, *R.*; 5 P.R. 1890, *D.*)

(4605)—*O.* 22, *r.* 4 (=s. 368, *Civ. Pro. Code*, 1882)—*Scope—Contract Act, ss.* 42, 43—*Death of one defendant—No application to bring representative on appellate record—Abatement of appeal.*—In an appeal from the decree in a suit against the representatives of a widow where only a portion of the claim was allowed and where the defendants had also filed cross-objections against the decree, one of the respondents died six months before the hearing of the appeal and no steps had been taken to put his representatives on the record. *Held* that the appeal had abated against the other respondents, as the obligation of the widow had devolved, under s. 42 of the Contract Act, on her representatives jointly ; and as the heirs of the representatives were also liable under it, s. 368, Civ. Pro. Code, 1882, applied to the suit though founded an a contract, and it could not be avoided by any act of the plaintiff, who cannot defeat the provisions of s. 368, Civ. Pro. Code, 1882, by resorting to his right under s. 43, Contract Act, after expiry of the period laid down for bringing the representative on the record. *Held* also that it was too late to amend the appeal at that stage and that the cross-objections also abated. RAO GHULAM MUHAMMAD KHAN v. NAHAR ALI, **53 P.R. 1896.** [*R.*, 81 P.R. 1905=116 P.L.R. 1905.]

(4606)—*O.* 22, *r.* 4 (=s. 368, *Civ. Pro. Code*, 1882)—*Art.* 178, *Limitation Act (XV of 1877)—Application in pending suit for substitution.*—An application in a pending suit to have the heirs of a deceased defendant substituted on the record is not governed by art. 178, Limitation Act, 1877. The right is one that accrues *de die in dien.* S. 368, Civ. Pro. Code, 1882, cannot apply to a suit like this. SURENDRA KESHUB ROY v. KHETTER KRISTO MITTER, **30 C. 609, F.B.=7 C.W.N. 517.** (8 C. 420, 3 C.W.N. 756, *R.*)

(4607)—*O.* 22, *r.* 4 (=*old* s. 368)—*Suit for damages for malicious prosecution.*—During the pendency of the appeal in a suit for damages or malicious prosecution, the defendant died. *Held* that the appeal did not abate and his sons could be brought on record, and that a discharge after full enquiry is better proof of the innocence of an accused person than an acquittal. BHAGWAN SINGH v. PANDIT JOTI, **4 P.R. 1897.** [*Cited*, 112 P.R. 1901=176 P.L.R. 1901.]

(4608)—*O.* 22, *r.* 4 (=s. 368, *Civ. Pro. Code*, 1882)—*Ejectment suit against several trespassers*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—Death of one of the defendants—Abatement of suit—Withdrawal of suit with consent of surviving defendants—Subsequent suit against representatives of deceased defendant—Whether barred.—In an action for ejectment against several trespassers, the death of one of the defendants, whose legal representatives were not brought on record within the time allowed by law, does not cause the suit to abate against the surviving defendants. The right to sue survives against them so far as their interests are concerned. (33 C. 580, 34 C. 1020, 11 C.W.N. 1100, 6 C.L.J. 715; *F.*, 31 C. 487, 8 C.W.N. 442, 31 I.A. 71, *D.*) Where, after the death of one of the defendants, the suit was withdrawn with the consent of the remaining defendants, and the Court granted leave to plaintiff to bring a fresh suit : *Held*, that the leave was not *non est* by reason of the second defendant's representatives not having consented to the withdrawal, but was operative till set aside on review or revision. PERUMAL v. PICHAN, **8 Ind. Cas. 268.**

(4609)—*O.* 22, *r.* 4 (=s. 368, *Civ. Pro. Code*, 1882)—*Dispute as to who is legal representative—Execution proceedings against person afterwards found not to be legal representative—Interest identical with that of true legal representative — Validity of proceedings.*—A creditor must be permitted to apply for execution against that one of the rival claimants, whom he honestly and reasonably believes to be the legal representative ; and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceedings are identical with those of his rivals and if he acts without fraud or collusion, it is hard to see why his representation should not be held sufficient. The proposition that substantial injury is the necessary result, to the true legal representative, of a sale of his propetry behind his back, is not universally true, and does not apply to a case, where a person, perfectly competent and *prima facie* anxious to protect the interests of the legal representative, was a party to the proceedings. S. R. M. A. R. RAMASAWMI CHETTIAR v. OPPLIAMANI CHETTI, **6 M.L.T. 269=33 M. 6 =19 M.L.J. 671=4 Ind. Cas 1059.** (14 M. 454, 26 M. 230, 30 C. 1044, 15 M. 399, *R.*; 32 C. 296 P.C., *Expl.*; 17 M. 186, 28 M. 361, *D.*)

(4610)—*O.* 22, *r.* 4 (=s. 368, *Civ. Pro. Code*, 1882)—*Death of defendant — Dismissal of suit without giving time for joining the representatives of the deceased defendant—Appeal.*—Where, during pendency of a suit, the defendant died and the Court, without giving sufficient time to the plaintiff for bringing in the representatives of the deceased defendant, dismisses the suit, the proceedings of the Court dismissing the suit amounted to a decree and an appeal lay to the District Judge. It was

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

not an order under s. 368 of the Code or any other section. MUTHU ALAGAPPA CHETTY v. SELLA PILLAI, **3 M.L.T. 327.** (18 M. 496, *F.*)

(4611)—*O. 22, r. 4 (= s. 368, Civ. Pro. Code, 1882) — Application to bring on record the representative of a deceased defendant—Death of the defendant before the presentation of the plaint — Jurisdiction of Courts to substitute his legal representatives.*—Although the rule, that, on the death of the defendant, the action abated and the Court lost jurisdiction over it, was abolished in England by the Common Law Procedure Act, it is still retained in a modified form in the Civ Pro. Code, which provides in s.368, that unless, the plaintiff applies within the prescribed time to substitute the representatives of the deceased defendant, the suit shall abate. Not only there is then nothing in the Code to authorize the institution of a suit against a dead man as distinct from a suit against his legal representatives, but the death of the defendant puts an end to the suit, unless steps are taken, within a prescribed period, for bringing in the legal representative. Consequently, when a plaint is presented by a plaintiff for the purpose of instituting a suit against a defendant, in accordance with the provisions of the Code, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed against them. VEERAPPA CHETTY v. PONNAN, **17 M.L.J. 551=3 M.L T. 12=31 M. 86.** (12 W.R. 45, *F.*; 16 M. 319, *Expl.*)

(4612)—*O. 22, r. 4 (= s. 368, Civ. Pro. Code, 1882)—Application.*—S 368 can only be applied, where the applicant is the legal representative, and not when he is merely a person alleging himself to be such representative. YEMULUPATI POLAMRAZU v. UGGUMADI SUBBARAMA REDDY, **4 M.L.T. 227=19 M.L J. 33=2 Ind. Cas. 479.** (8 M. 306, *Cors.*)

(4613)—*O 22, r. 4 (= s. 368, Civ Pro. Code, 1882)—Appeal by majors and minor's—Abatement of appeal on the death of respondent—Application by minors to proceed with appeal—Limitation Act, ss. 7 and 368, Civ. Pro. Code, applicability of*—An appeal was preferred, jointly, by two majors and by the guardian of two minors, all of whose interests were joint. The sole respondent died after the appeal was filed. As no application was made to bring in the legal representatives of the deceased respondent, the appeal was declared to have abated. Subsequently, the minors, through another guardian, applied that the order might be set aside and the appeal be restored to file and proceeded with. *Held (per Davies, J.)*:—The abatement provided for in the penultimate clause of s. 368 is absolute. Further, the minor's claim to the benefit of s. 7 of the Limitation Act treating the present application as one under s. 368 of the Code could not be entertained, for there was no appeal pending, in which an application under s. 368, could be made. Besides, as there were others joined with the minors, who were not under disability at the time, s. 7 of the Limitation Act could not apply. *Per Subrahamnia Aiyar, J.*—The death of the respondent did not vest the right to have his representative made respondent in his stead severally in each of the appellants but vested jointly in all of them. Consequently, the minor appellants were not entitled to the benefit of the provisions of s. 7 of the Limitation Act. (25 M. 431, *F.*) Petition dismissed. PARU v. VARIANGATTIL RAMAN MENON, **28 M. 359.** [*R*, 9 O.C. 269.)

(4614)—*O. 22, r. 4 (= Civ Pro. Code, 1882, s. 368)—"Defendant" includes "respondent."*—Looking at the express provisions of s. 3 of the Civ. Pro. Code of 1882, the term "Code" in art. 171-B of the Limitation Act, 1877, must apply to the Code of 1882; and hence s. 368 must be read with s. 582, and the word "defendant" in the former section includes a "respondent." SOSHI BHUSAN CHAND v. GRISH CHUNDRR TALUKDAR, **11 C. 694.**

(4615)—*O. 22, r. 4 (= s. 368, Civ. Pro. Code, 1882).*—Under s. 368 of the Code of Civil Procedure, a summons must, on the death of a defendant, be issued to his representative to appear and defend the suit. CHANDRABATI KOERI v. HARRINGTON, **18 C. 349, P. C. = 18 I. A. 27 = 5 Sar. 481.**

(4616)—O. 22, r. 4—Applicability—*See* EXECUTION OF DECREE—MISCELLANEOUS, 174 P.L.R. 1911.

(4616-*a*)—*O. 22, r 4—See* NOS. 1159, 1300, 1776, 1916, 2398, 2483, 2483-*a*, 2504, 3001, 3566, 4562, 4577-*a*, *supra*.

(4617)—*O. 22, r. 4, s. 104, O. 43, r. 1 (= ss. 368, 588, Civ Pro. Code, 1882)—Abatement of suit—Appealability—Suit on mortgage—Surety made party—Effect on suit of death of surety.*—An order under the penultimate clause of s. 368 of the Civ. Pro. Code, declaring a suit to have abated, is appealable under s. 588 (18) Where a person was made party to a suit on a mortgage as being personally liable as a surety for the payment of the debt, and on the death of such person, his legal representative was not brought on the record, *held* that the suit did not abate as the effect was only an abandonment of the plaintiff's right to enforce the personal covenant of suretyship. MEHDI HUSAIN v. SUGHRA BEGAM, **25 A. 206 = A.W. N. 1903, 15.**

(4618)—*O. 22, r. 4, s. 108 (= 368, 587, Civ. Pro Code. 1882)—Limitation Act, art. 175 (e), applicability of, to second appeals—Art. 178*—In this second appeal, objection was taken that the appeal abated as no steps had been taken to bring on to the record the legal representatives of the deceased first respondent

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859;—*continued.*

within six months of his death as required by art. 175 (*e*) of the Limitation Act and, on behalf of the appellant, it was contended that art. 175 (*e*) confines the period prescribed by it to applications under ss. 368 and 582 of the Code and cannot be applied to cases of respondents in second appeal, coming within s. 587 of the Code and the article governing such applications in second appeal is art. 178 of the Limitation Act. The above contention of the appellants was overruled and it was held that s. 587 merely makes the provisions of s. 582, among others, applicable to second appeals and an application, in a second appeal, to bring in representatives of a respondent does not cease to be an application, under ss. 368 & 582, simply because it is an application that is authorised to be made under them by s. 587 and for the purposes of limitation such an application falls under art. 175 (*e*) and not under art. 178. VAKKALAGADDA NARASIMHAM v. VAHIZULLA SAHIB, **28 M. 498=15 M. L.J. 404.** [*F.*, 29 A. 535=4 A.L.J. 397=A.W.N. 1907, 155, 34 C. 1022=6 C.L.J. 715=11 C.W.N. 1100; *Overruled*, 29 M. 529=16 M.L.J. 475=1 M.L.T. 348.]

(4619)—*O. 22, rr. 4, 10 (=Civ. Pro. Code, 1882, ss. 368, 372)—Death of one of the defendants—Substitution of heirs—Limitation Act, XV of 1877, art. 175-C..*—S. 368 of the Code is intended to apply to cases in which the death only of the defendant has occurred, and s. 372 to cases where there has been a devolution in some other way. That being so, the six months' rule under art. 175-C of the Limitation Act, and not the three years' rule, under art. 178, is applicable to the plaintiff's application to join the heirs of the deceased defendants. JAMNADAS CHHABILDAS v. SORABJI KHARSEDJI, **16 B. 27** (9 B. 152, *F.*)

(4620)—O. 22, rr. 4, 10—*See* LIMITATION ACT, 1908, art. 181, 8 C. 837.

(4621)—*O. 22, rr. 4, 11, s. 107 (2) (=ss. 368 and 582, Civ. Pro. Code, 1882)—Death of one of the defendants in mortgage suit pending appeal—Effect of omission to bring his legal representative on record.*—Where one of the defendants in a mortgage suit has died pending the appeal, and no application has been made to bring on his representative as a party to the appeal, the appeal does not necessarily abate. The ruling in 31 I.A. 71 (P.C.) is intended to be confined to cases, in which the litigation cannot proceed to a final adjudication, without the representative of the deceased party. RANGA SRINIVASACHARI v. GNANAPRAKASA MUDALIAR, **2 M.L.T. 36=10 M. 67.**

(4622)—*O. 22, rr, 4, 11 and s. 107 (2) (=1882, Civ. Pro. Code, ss. 368, 582)—Death of sole respondent—Application by person not the sole heir of the respondent to be substituted—No application made by appellants—Appeal within six months from death of respondent.*—The sole respondent to an appeal pending in the Court of a Subordinate Judge died, leaving surviving him a son and two grandsons. The son applied to the Court to have his name substituted in the record of the appeal for that of his deceased father and his application was granted. The appellants filed no application to have any one substituted in place of the deceased respondent. The Court proceeded to a decision and decreed the appeal. The respondent appealed on the ground that the appeal in the Court below ought to have been held to have abated. *Held* that inasmuch as the appeal in the Court below was decided before the expiry of six months from the date of the sole respondent's death it could not be held to have abated, and the appeal was remanded to the lower appellate Court. INAYAT ULLAH v. GOPAL NARAIN LAL, **A.W.N. 1901, 187.**

(4623)—*O. 22. r. 4, O. 22, r. 11, s. 107 (2) (=Civ. Pro. Code, 1882, ss. 368 and 582)—Death of appellant prior to respondent—Calculation of period, six months.*—Where the appellant predeceased the respondent, the period of six months has to be computed from the time when there has been a legal representative of the deceased appellant capable of making an application under ss. 368 and 582 of the Code, *i.e.*, from the time when the name of the said legal representative has been entered on the record. NILKANTH TALATULEY v. GOVINDRAO DESHMUKH, **16 C.P.L.R. 78.**

(4624)—*O. 22, rr. 4, 11, s. 107 (2) (=ss. 368, and 582, Civ. Pro. Code, 1882)—Substitution—Delay—Abatement—Suit by joint owners to set aside revenue sale—Death of some of plaintiffs—respondents, during pendency of appeal—Necessary party.*—During the pendency of an appeal against a decree setting aside the sale of a joint estate for arrears of revenue, two of the plaintiffs-respondents, died and there was no application for substitution of the heirs of the deceased respondents, the right to sue not surviving against the other respondents. *Held*, that the appeal should abate, inasmuch as the decree could not be reversed without the representatives of the deceased being placed on the record; that, under no circumstances, could the decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of the other joint share holders. DHARANJIT NARAYAN SINGH v. CHANDESHWAR PROSAD NARAYAN SINGH, **11 C.W.N. 804=5 C.L.J 393.**

(4625)—*O. 22, rr. 4, 11, s. 107 (2) (=ss. 368, 582, Civ. Pro. Code, 1882)—Suit for account—Abatement of appeal—Art. 175 (c), Limitation Act, 1877 (cf. 176, 177, Act IX of 1908)—Omission to apply for bringing on record the legal representative of deceased respondent.*—An appeal would abate under ss. 368, 582, Civ. Pro. Code, 1882, and art. 175-C, Act XV of 1877, if pending the appeal, a respondent to whom a certain sum of money is due under the decree of the first Court dies and no application

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to bring in his representative as a party is made within six months, when the nature of the case is such that the cause of action does not survive against the remaining respondents alone. RAJ CHUNDER SEN v. GANGA DAS SEAL AND RAMGATI DHUR v. RAJ CHUNDER SEN, **31 C. 487, P.C = 31 I.A. 71 = 8 C.W.N. 442 = 1 A.L.J. 145 = 14 M.L.J. 147 = 8 Sar. 623.** [*Expl.*, 30 M. 67 = 2 M.L.T. 36; *R.*, 11 C.W.N. 698 = 5 C.L.J. 310, 5 C.L.J. 393.]

(4626)—*O. 22, rr. 4, 11, ss. 107 (2), 105 (= ss. 368, 582, 591, Civ. Pro. Code, 1882)—Abatement of appeal—Second appeal—Order of lower Court as to abatement of appeal embodied in judgment and decree.*—In a suit by four plaintiffs to recover possession of certain property to which they claimed to be jointly entitled, a decree was made in their favour, and the defendants preferred an appeal therefrom. During the pendency of the appeal, one of the respondents died, and no application was made within six months to bring his legal representative on the record. But, in the application that was thereafter made for that purpose, a wrong person was named as the legal representative. *Held* that the appeal was one in which the right of appeal did not survive against the surviving respondents alone, but against them and the representatives of the deceased respondent; and, therefore, under the circumstances, s. 369 read with s. 582, Civ. Pro. Code, applied and the appeal abated altogether. (18 A. 19, A.W.N. 1900, 109 A.W.N. 1899, 136, 14 A. 221, 22 B. 718, *R.*) [*R.*, 3 L.B.R. 168, 11 C.W.N. 504 = 5 C.L.J. 293; *D.*, 33 C. 580.] Where the order of the lower Court as to abatement of an appeal was embodied in the judgment and decree, objection might properly be taken thereto by way of second appeal against the decree. HEM KUNWAR v. AMBA PRASAD, **22 A. 430 = A.W.N. 1900, 136.**

(4627)—*O. 22, rr. 4, 11, s. 107 (2), and s. 108 (= ss. 368, 582 and 587, Civ. Pro. Code, 1882)—When application to be made in appeals from appellate decrees—Limitation Act (XV of 1877), sch II, arts. 175 (c) and 178.*—An application made to bring the representatives of a deceased respondent on the record, whether that appeal is an appeal from an original or an appellate decree, is an application made under s. 368 of the Code, the provisions of which have been extended in the one case by s. 582, and in the other by s. 587. Art. 175 (*c*), Limitation Act, sch. II, applies to an application for substitution of names, whether made in an appeal from an original or an appellate decree. MADHUBAN DAS v. NARAIN DAS, **4 A.L.J. 397 = A.W.N. 1907, 155 = 29 A. 535.** (28 M. 498, *F.*; 29 M. 529, *Not F.*) [*F.* 34 C. 1020 = 11 C.W.N. 1100 = 6 C.L.J. 715.]

(4628)—O. 22, r. 4, O. 41, r. 11—*See* LIMITATION ACT, 1908, ss. 4, 5, 3 O.C. 13.

(4629)—*O. 22, r. 4, sub-r. (3) and r. 9, sub-r. (2)—Abatement of appeal—Application to set aside abatement—"Sufficient cause"—Negligence of agent.*—The negligence or forgetfulness on the part of the agent, specially appointed by an appellant to look after the appeal and to receive notices and information from the appellant's Vakil, is not a "sufficient cause" within the meaning of r. 9, O. XXII. A, respondent died in October, 1909. In February, 1910, his Vakil informed the Vakil for the appellant that the respondent was dead. Thereupon the Vakil for the appellant sent information to the agent of the appellant, but the agent did not intimate the matter to his master till April, 1910. The appellant immediately took steps to make an application to the Court, but the application was presented after the appeal had abated. *Held* that there was no sufficient cause for setting aside the abatement. TARNI KUMAR DUTT v. GOPESWAR PAL CHOWDHURY, **7 Ind. Cas. 391 = 12 C.L.J. 615.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—— O. XXII, r. 5 (= 1882, s. 367 = 1877, s. 167 1859, s 303).

See ABATEMENT OF APPEAL.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4630)—*O. 22, r. 5 (= s. 367, Civ. Pro. Code, 1882)—Plaintiff—Legal representative of deceased plaintiff—Objection to the legal representative—Nearest heir to the deceased—Appeal—Practice—Procedure.*—M brought a suit on the 30th November, 1897 to recover certain property from defendants. Before, however, the written statement was filed, M died on the 27th February, 1899; and on the 5th June, 1899, B was brought on record, under s. 365 of the Civ. Pro. Code, as his legal representative; of this, the defendant had no notice or knowledge. On the 12th July, 1899, defendant objected that B should not be allowed to prosecute the suit in *forma pauperis*; but he did not object then to B's right to come on the record as his legal representative. The defendant put in his written statement on the 8th August, 1899, wherein for the first time, he disputed B's right to represent M. The case was adjourned to the 16th August, 1899, for raising issues: on that day, the issues in the case were raised, the first of which related to B's right to represent M in the suit. Evidence was then gone into on all the issues. The Court of first instance found the first issue in B's favour and on merits decreed the suit in favour of B. On appeal, the lower appellate Court went into the question as to the representative character of B and rejected the suit on finding that B did not hold that character. B applied to the High Court: *Held, by Chandavarkar and Batty, JJ. (Aston, J., dissenting)* that the lower appellate Court committed an error in law in reversing the decree passed by the Court of first instance and in dismissing the suit on the sole ground that B

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was not the legal representative of M. Per *Chandavarkar, J.*—The Court of first instance, in deciding the issue about B's right to represent M, must be taken to have acted under s. 367 of the Civ. Pro. Code: and the circumstance that the Subordinate Judge did not decide the question, is only an error of procedure. So far as the Subordinate Judge decided the issue under s. 367 of the Civ. Pro. Code, the decision was an order appealable only under s. 588 (18) of the Code. The defendant cannot be allowed to question the validity of the order, passed under s. 367 of the Civ. Pro. Code, in an appeal which he preferred in the lower appellate Court against the whole case. When a plaintiff dies, the suit cannot proceed because there is none suing. The legislature provides that his legal representative can come in *his* place; when he is allowed to come the defect is made up; there is a suit to proceed. The suit is then a suit on the merits. A Court has no jusrisdiction after that stage has been reached to go back and enquire into the right of the legal representative to proceed with the suit side by side with an enquiry into the merits. Per *Batty, J.*—The dismissal of a suit solely on the ground of a doubt as to the heirship of a person whose only claim is to proceed with it as the representative of a deceased plaintiff is an error in law and unsustainable. Where the legal representative of a deceased plaintiff applies to have his name substituted, the Court must enter his name under s. 365 of the Civ. Pro. Code, and proceed with the suit. If no application be made within the prescribed period, there are two courses open; *viz*, either (1) to pass an order that suit shall abate, or on defendant applying in this behalf; (2) to pass an order for bringing in the legal representative and proceeding with the suit. If the suit abates, s. 371 may thereafter come into operation, but the suit is not liable to dismissal. If any dispute arise as to who is a legal representative, s. 367 applies And when such a dispute does arise, it is not the province of the Court to decide who is the rightful heir, or to reject the suit altogether on failure by the person claiming to be representative, to establish affirmatively his right as *heir*. The Court has again two courses open—*viz.*, either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit, not whether the person claiming is the heir, but only as to "*who shall be admitted to be such legal representative for the purpose of prosecuting the suit*" No decision is required or can be passed in such a case on the right of heirship; nor can the suit be dismissed on the ground that such right of heirship has not been established against all possible comers. A decision on that point would not be binding if passed in such a case, even between the rival claimants, and all that is needed and all that can be done in the suit is to decide who shall proceed with it, without in any way affecting the ultimate liability or right of the persons in favour of whom or against whom the order is passed. Per *Aston, J.*—It was vital to the success of the suit prosecuted by B that B should be adjudicated the *nearest* heir of M. Where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party, and any dispute raised *inter partes* as to that substituted plaintiff's right of representation (not inheritance) so as to have such substituted plaintiff struck out comes properly under s. 32 and not under s. 367 of the Civ. Pro. Code. If s. 367 be read with s. 588 (18) of the Civ. Pro. Code it becomes clear that the dispute contemplated in s. 367 is *not* an issue on the merits framed and recorded between a plaintiff and defendant. BALABAI v. GANESH, **4 Bom. L.R. 980=27 B. 162.**

(4631)—*O. 22, r. 5 (=Civ. Pro. Code, 1882, s. 367)—Suit to set aside gift—Death of plaintiff—Suit if abates—Legal representative of deceased plaintiff, disputes re.*—Where the plaintiff, the *Mahant* of a certain temple, made a gift of it to the defendant who subsequently became incompetent to hold the office of *Mahant* and the plaintiff thereupon instituted a suit for setting aside the gift and subsequently died, and the question was raised as to whether the suit abated, *held* that, looking to the character of the claim and the relief sought, the cause of action survived. In such cases, the person who claims himself to be the legal representative of the deceased plaintiff must substantiate his claim, and the Court should proceed under s. 367, Civ. Pro. Code, 1882, either to stay the suit until the question as to who was the legal representative of the deceased is decided in another suit instituted for the purpose, or should itself decide the question. BALLABH DAS v. NARAIN DAS, **A.W.N. 1885, 7.**

(4632)—*O. 22, r. 5 (=s. 367, Civ. Pro. Code, 1882)—Death of plaintiff—Suit for declaration of right of legal representative—Suit confined to property in suit—Maintainability—Appeal in suit by deceased plaintiff—Right of legal representative to represent—Decision in his suit—Civ. Pro. Code, 1908, O. 22, r. 5—Res judicata in the appeal.*—Where a plaintiff sued for a delaration that he was the legal representative, as regards the property claimed in that suit, of one P, the deceased plaintiff in a former suit *held*, that he was not bound to sue for a declaration that he was the legal representative in respect of all the properties left by the deceased, and that s. 367, Civ. Pro. Code, 1882, entitled him to sue for a declaration of his right as P's legal representative in respect of the property claimed in that suit. Even assuming that the declaration prayed for in this suit, if granted, would still have to be decided under O. 22, r. 5 by the Court deciding the appeal from P's suit, yet the decision in this suit would operate as *res judicata*, as regards the plaintiff's right to represent

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

P in the appeal. SWABAGIATHATCHI v. MUTHUKUMARA PILLAI, **9 M.L.T. 408.**

(4633)—*O. 22, r. 5 (=s. 367, Civ Pro. Code, 1882)—Dispute as to who is the legal representative of a deceased plaintiff—Order admitting a person to be legal representative for the purpose of prosecuting the suit—Effect of such order.*—S. 367 empowers the Court, in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit, and particularly (as, for example, in a suit for partition of family property) such a vital issue as whether the deceased plaintiff was joint with, or separate from, the rest of his family. PARSOTAM RAO v. JANKI BAI, **A.W.N. 1906, 206=28 A. 109.**

(4634)—*O. 22, r. 5 (=Civ. Pro. Code, 1882, s. 367)—Death of plaintiff appellant—Rival applicants for substitution—Court substituting one of them—No appeal from such order—Decree against substituted representative—Appeal by unsuccessful applicant against decree, if maintainable.*—Where an order under the group of sections in the Civ. Pro. Code relating to representatives has been made exoluding a person from the record, that person must seek his or her remedy, by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands. A plaintiff appellant having died during the pendency of the appeal, and two persons having separately applied to be substituted as the deceased's representatives, the Court substituted one of them, and eventually decided the appeal against him. Meanwhile, the unsuccessful applicant without preferring any appeal from the order whereby he was excluded, established by a separate suit his claim to be the legal representative of the deceased; and then sought to prefer a second appeal from the decree of the lower appellate Court dismissing the appeal. It was *held* that no such appeal lay, as he was not a party to the decree of the lower appellate Court; and that s. 591, Civ. Pro. Code, was not applicable to the case. SANKALI v. MURLIDHAR, **12 A. 200.** (9 A. 447, *D.*)

(4634 *a*)—O. 22, r. 5—*See* NOS. 4557, 4558, 4559, 4578, 4589, 4592 *supra*.

(4635)—*O. 22, r. 5, O. 43, r. 1, s. 104 (=ss. 367, 588, Civ. Pro. Code, 1882)—Dispute as to who is the legal representative of a deceased appellant—Appeal*—*Held*, on a construction of s. 367 of the Code of Civil Procedure, that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. HANSANT SINGH v. RAM GOPAL SINGH, **A.W.N. 1908, 139=5 A.L.J. 363=30 A. 148.** (18 M. 496, *F.*)

——O. XXII, r. 6 (New).

See ABATEMENT OF APPEALS.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4636)—*O. 22, r. 6 — Death of plaintiff—Case adjoured for arguments — Arguments heard without plaintiff's heirs as parties—Decree passed therein is a nullity.*—After evidence on both sides in a case was adduced, the case was adjourned for hearing arguments. Between these two dates, the plaintiff died. The arguments in the case, however, were heard without making the heirs of the plaintiff parties to the suit, and the suit proceeded to judgment and decree. The defendant appealed against the decree but the appeal was subsequently withdrawn. When the decree was sought to be executed against him, the defendant contended that the decree was a nulity and therefore incapabe of execution. *Held*, that the decree was passed without jurisdiction, and, therefore, a nullity, that the withdrawal of appeal by defendant did not in any way validate the decree. VISVANATH DNYANOBA v. LALLU KABLA, **11 Bom L.R. 1070=4 Ind. Cas 137.**

——O. XXI, r. 7 (=1882, s. 359=1877, s. 359 =1859 s. 281),

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4637)—*O. 22, r. 7 (=Act VIII of 1859, s. 281)—"Bad faith."*—The words "bad faith" in s. 281 of Act VIII of 1859 mean bad faith in respect of the application and do not refer to bad faith on previous occasions. *In re* GURU DAS BOSE, **7 B L.R Ap. 23.** [*D.*, 17 A, 218.]

(4638)—O. 22, rr. 7 and 8—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, Cor. 123, 3 B.L.R. App. 14 (*b*), 5 B.L.R. App. 22.

——O. XXII, r. 8 (=1882, s. 370=1877, s. 370=1859, s. 106).

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts, 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4639)—O. 22, r. 8—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, **16 B. 404.**

(4639-*a*)—O. 22, r. 8—*See* Nos. 2890, 4638, *supra*.

——O. XXII, r. 9 (=1882, s. 371=1877, s. 371) and para (3)=1892, s. 372-A).

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4640)—O. 22, r. 9—*See* RES JUDICATA—ADJUDICATIONS, 10 C.L.R. 229.

(4640-*a*)—O. 22, r. 9,—*See* NOS. 4579, 4590, 4629, *supra*.

(4641)—*O. 22, r. 9, 1, (2), Civ. Pro. Code*, 1908 (=*s. 371, Civ. Pro. Code*, 1882)—*Decree in previous suit passed after plaintiff's death—Subsequent suit by plaintiff's legal representative on the same cause of action—Maintainability—Proper remedy—Intention of legislature—Judgment rendered against party after his death—Effect.*—R brought a suit against A. R died in the morning of the day when the suit was posted for hearing. The suit was taken up, heard and disposed of that day after R's death. R's legal representative, alleging that the decree passed after R's death was a nullity and could not operate as a bar to a subsequent suit, now sued the legal representative of the defendant in the prior suit, on the same cause of action and for the same relief. *Held*, that the suit abated on the death of the plaintiff, and that, after the abatement of a suit, it is not open to his representative to bring a fresh suit on the same cause of action. (S. 371, Civ. Pro. Code, 1882, and O. 22, r. 9, Civ. Pro. Code, 1908). (19 B. 807, 21 B. 314, *R.*) His only remedy under the same provision of law is to apply for an order to set aside the abatement, and it shall be set aside, only if it is proved that he was prevented by any sufficient cause from continuing the suit. The intention of the Legislature is clear that no fresh suit on the same cause of action is to be permitted, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending. *Held*, also, that, where the Court has acquired jurisdiction of the subject-matter and the persons during the lifetime of party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack. GADA COOPOORAMIER v. M. SOONDARAMMALL, **6 M.L.T. 271=33 M. 167.** (17 A. 478, 26 B. 317, *D.*)

(4642)—*O. 22, r. 9 (1, 2) (=Civ. Pro. Code*, 1882, *s. 371)*—Res judicata—*Abatement of suit.*—The abatement of a suit under s. 371 of the Civ. Pro. Code, has no other effect than that of preventing the plaintiff or those claiming under him from suing again on the same cause of action. The section does not say that the title of the plaintiff or those claiming under him is extinguished by such abatement, and that in any suit, brought not by but against him, the plaintiff cannot defend his possession or rights by relying upon his true title. The abatement of a suit under s. 371 has not the same effect as *res judicata* under s. 13 of the Civ. Pro. Code. JAYASING v. GOPAL, **6 Bom. L.R. 638.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4643)—*O. 22, r. 9 (1) (2), 11 and s. 107 (2) (=ss. 371 and 582, Civ. Pro. Code*, 1882)—*Death of one defendant—Withdrawal of suit against surviving defendant, pending appeal by him—Restoration of appeal upon application by heirs of deceased defendant* — Where two defendants, who were jointly interested in a suit, preferred an appeal to the District Judge, and, the appeal being dismissed, one preferred a second appeal, the other having died, and, on remand by the High Court, the plaintiff withdrew the suit as against the surviving appellant by arrangement with him, and the appeal was dismissed ; *held*, that an application by the heirs of the deceased defendant for restoration of the appeal ought to be allowed, inasmuch as it was not necessary for them to prosecute the appeal so long as the other defendant was prosecuting it. CHANDRA KUMAR MAJHI v. SANDHYAMONI, **13 C.W.N. 338=36 C. 418=2 Ind. Cas. 412.**

(4644)—O. 22, r. 9 (1, 2) O. 41, r. 4, s. 11—Meaning of "Cause of action" in s. 371—*See* PARTITION—GENERAL, 5 Ind. Cas. 325.

—O. XXII, r. 10 (=1882, s. 372=1877, s. 372).

See ABATEMENT OF APPEAL.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175.

See PARTIES TO SUITS — SUBSTITUTION OF PARTIES TO SUITS.

(4644-*a*)—*O. 22, r. 4 (3)—Death of respondent—No application to bring in legal representatives on record made within 6 months—Abatement—Ignorance of death till after expiry of 6 months.*—Where one of the two respondents, appointed under O. I, r. 8, Civ. Pro. Code, to represent a body of numerous respondents, died, and where no application to bring on record his legal representatives was made within 6 months from the date of his death. *Held*, that the appeal abated. Ignorance of his death until after the expiry of the period of limitation is not such a ground that would justify a departure from the rule laid down in O. XXII, r. 4 (3), which is imperative in its terms. SAYAD MIR NAWAB v. HARDEO, **60 P.R. 1911.**

(4644-*b*)—O. 22, r. 5—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 1 W.R. Mis. 10.

(4644-*c*)—*O. 22, r. 7 (=Civ. Pro. Code*, 1859, *s. 281) —Application for discharge—"Bad faith."*—In an application for discharge under s. 281, Act VIII of 1859, the "bad faith" must be bad faith in respect of the application. BUTLER v. LLOYD, **12 B.L.R. App. 12.**

(4645)—*O. 22, r. 10 (=s. 372, Civ. Pro. Code*, 1882)—*Application—Decree directing account—"Pending suit."*—The words "pending suit" apply to a suit wherein directions to

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take an account have been given. Such a suit continues to be a "pending suit" until the final order on the taking of the account is made. (5 C. 726, *Rel. on.*) The admissibility of applications depends not upon the questions whether a decree directs a partition or a taking of accounts, but upon whether there is a "pending suit." SURENDRA KESHUB ROY v. KHETTER KRISTO MITTER, **30 C. 609=7 C. W.N. 517.**

(4646)—*O. 22, r. 10 (=old s. 372, Civ. Pro. Code, 1882)—Notice—Registration—Verbal mortgage.*—A registered purchaser with notice of a verbal mortgage takes subject to the latter. NAJMUDDIN v. AKBAR DIN, **143 P.R. 1889.**

(4647)—*O. 22, r. 10 (=old s. 372, Civ. Pro. Code, 1882)—Joinder of parties—Devolution of interest.*—Where the suit of a plaintiff claiming a right of pre-emption involved a claim for the possession of the property sold as against the vendor, and, during the pendency of this suit, the vendor's interest devolved under another decree in a previous suit upon three other persons claiming a right of pre-emption, *held* they were properly joined as co-defendants in the suit. LAKHA RAM v. JHINDU, **29 P.R. 1887.**

(4648)—*O. 22, r. 10 (=s. 372, Civ. Pro. Code, 1882)—Discharge of an encumbered estate, substitution of proprietors, after—Chota Nagpore Encumbered Estates Act (VI of 1876)—"Devolution of interest," meaning of.*—The words "devolution of interest" in s. 372, Civ. Pro. Code, are not used in a technical sense. From the use of word "come" in the latter part of the section, it would appear that those words in the first part of the section do not mean only devolution by death. They also apply to a case wherein, pending a suit instituted by the manager of an encumbered estate, the estate is released and restored to the owner, by reason of his attaining majority. So, in such a case, the proprietor of the estate is entitled to be substituted on the record after the discharge of the manager whose interest devolves on him within the meaning of s. 372. SOURINDRA MOHUN TAGORE v. SIROMONI DEBI, **28 C. 171=5 C.W.N. 307,** [*Appr.*, 30 B. 250 =6 Bom. L.R. 995; *D.*, 7 O C. 78.]

(4649)—*O. 22, r. 10 (=s. 372 Civ. Pro. Code, 1882)—Substitution, as plaintiff, of assignee in place of assignor—Limitation—"New plaintiff."*—When a person, who has not been on the record, is substituted as a plaintiff, in the place of the original plaintiff, under s. 372 of the Civ. Pro. Code, the person so substituted must be taken to be brought on the record, subject to the law of limitation applicable to the case. There is nothing in that section to exclude the operation of s. 32 of the Limitation Act. SHEIKH ABDUL RAHMAN v. SHEIKH AMIR ALI, **11 C.W.N. 521, F.B.=5 C.L.J. 486 =34 C. 612=2 M.L.T. 312.** (25 C. 409, *Appr.* 5 C. 720, *Disappr. and D.*) [*Appl.*, 9 C.L.J. 523, *D.*, 35 C. 1065=8 C.L.J. 286=13 C.W.N. 186 =5 M.L.T. 91; *F.*, 5 Ind. Cas. 115.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4650)—*O. 22, r. 10 (=s. 372, Civ. Pro. Code, 1882)—Appeal against order allowing objections under—Mortgage suit whether pending until conditional decree is made absolute.*—No appeal lies against an order *allowing* objections under s. 372. A mortgage suit is pending within the meaning of s. 372, until the conditional decree is made absolute. FANA v. TETKA, **2 N.L.R. 178.** (9 C.W.N. 171, 23 A. 331, *R.*) [*F.*, 4 N.L.R. 158; *R.*, 4 N.L.R. 54; *Diss.*, 3 N.L. R. 55.]

(4651)—O. 22, *r.* 10 (=*Civ. Pro. Code*, 1882, s. 372)—*Assignee of decree before presentation of appeal—Application to bring assignee in as respondent.*—Where the devolution of the rights under the decree on the assignee sought to be substituted as respondent in the place of an original respondent in an appeal, took place not after the commencement of the appeal, but before the presentation of the memorandum of appeal to the Court, his name could not be brought to the record where he objects to the substitution. The addition of such an assignee's name on to the record cannot be taken as authorized by s. 372 of the Civ. Pro. Code. Although, under certain circumstances, the term 'suit' includes not only the proceedings in the first Court, but the proceedings in the appeal and up to final execution, it is doubtful whether the words "pending the suit" in s. 372 can be construed to mean at any time from the commencement of the suit until its final determination on appeal, if there be one. THE COLLECTOR OF MUZAFFARNAGAR v. HUSAINI BEGAM, **18 A. 86=A.W.N. 1895, 232.** [*D.*, 22 A. 231=A.W.N. 1900, 79.]

(4652)—*O. 22, r. 10 (=s. 372, Civ. Pro. Code, 1882)—Meaning of the words, 'other cases,'*—The words "other cases" in—mean cases of death, &c., other than those specifically provided for in the preceding sections of the Chap. XXI, and do not mean cases other than death, marriage, and insolvency. BHUGWAN DAS KHETTRY v. NILKANTA GANGULI, **9 C.W.N. 171.**

(4653)—*O. 22, r. 10 (=s. 372, Civ. Pro. Code, 1877)—Compromise—Assignment pending suit*—The cases of "assignment, creation or devolution" of any interest during the pendency of a suit, contemplated by s. 372 of the Civ. Pro. Code, are those in which "the person to whom such interest has come" must be arrayed on the same side in the suit as the person from whom it has passed." Therefore, a deed of compromise between the plaintiff and one of the defendants, filed during the pendency of a suit is not an "assignment of an interest" which could lead to the amendment of the plaint or the addition or substitution of parties. RADHA PRASAD SINGH v. RAJENDRA KISHORE SINGH, **5 A. 209.**

(4654)—*O. 22, r. 10 (=Civ. Pro. Code, 1882, s. 372)—Order under s. 372, whether a decree*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*S. 2, Civ. Pro. Code*, 1882.—An order disallowing an application under s. 372, Civ. Pro. Code, to be made party defendant as assignee of defendant, is not a decree within the meaning of s. 2, Civ. Pro. Code, and no appeal lies against such an order. LALIT MOHUN ROY v. SHEBOOK CHAND CHOWDHRY, **4 C.W.N. 403.** (9 A. 412, *D. & Expl.*) [*F.*, 24 A. 532, F.B.; *R*, 24 A, 342.]

(4655)—*O.* 22, *r.* 10 (=*Civ. Pro. Code*, 1882, *s.* 372—"*Devolution of interest*"—*Interpretation*.—The phrase "devolution of interest" in s. 372 of the Civ. Pro. Code is not confined in its meaning to devolution by death. The Legislature intended by this section to provide for all cases not falling within the foregoing sections as to devolution by assignment, marriage or death, MACLEOD v. KISSON, **6 Bom.L.R. 995=30 B. 250.**

(4656)—O. 22, r. 10—*See* ASSIGNMENT, A. W.N. 1885, 242.

(4656-*a*)—O. 22, r. 10—*See* NOS. 96, 97, 1083, 1084, 1160, 1161, 1161-*a*, 1339, 1593, 2483-*a*, 2484, 2485, 3032, 3267, 4547, 4580, 4619, 4620, *supra*.

(4657)—*O.* 22, *r.* 10, *s.* 104, *O.* 22, *r.* 11 (=*Civ. Pro. Code*, 1882, *ss.* 373, 582)—*Devolution of interest pending appeal*.—By virtue of the first portion of s. 582, Civ. Pro. Code, s. 372 of the Code applies to appeals in cases of assignment, creation of devolution of any interest pending the appeal, otherwise than by death, marriage or insolvency. *In the matter of the petition of* DURGA PRASAD, **22 A. 231=A.W.N. 1900, 79.** (9 B. 151, 20 B. 167, 18 A. 285, *R.*; 18 A. 86, *D.*)

(4658)—*O.* 22, *r.* 10, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 372 *and* 588 (21)—*Appeal against order disallowing application*.—An order passed under s. 372 of the Civ. Pro. Code, disallowing an application of the appellant to be substituted in place of the original plaintiff, is not appealable under s. 588 (21), which only allows an appeal from an order disallowing objections to an application under s. 372. MUSSAMMAT SAHIB NUR v. MUHAMMADJI, **126 P.LR. 1903=57 P.R. 1903.** (19 A. 142, 22 A. 380, 24 M. 252, *R.*)

(4659)—*O.* 22, *r.* 10, *s.* 104, *O.* 43, *r.* 1 (=*ss.* 372, 588) *Civ. Pro. Code*, 1882)—*Assignment pending suit—Assignee not brought on record—Application by assignees to appeal against decree—Order rejecting application, appeal from, if maintainable*.—Pending the suit, a defendant assigned his interest therein to another, but neither he nor the assignee applied to be brought on record, and a decree was passed, injurious to the assignee. The assignee, thereupon, put in a memo of appeal, claiming distinctly that he was entitled to file an appeal under the circumstances set forth in the memo. The Court treating it as an application under s. 372, Civ. Pro. Code, dismissed it on the ground that the application was after the decree. *Held*, that, as the suit was pending when the assignment took place, s. 372, Civ. Pro. Code, was applicable, even though no application to have the assignee brought on the record was made till after the decree. Where the application for leave to appeal mentioned in this case was dismissed, *held* that an appeal lay under s. 588, Civ. Pro. Code, against such order of dismissal as from a decree. MOTI RAM v. KUNDAN LAL, **22 A. 380=A.W.N. 1900, 125.** (19 A. 142, *R.*) [*Overruled*, 24 A. 532=12 A.W.N. 112; R., 57 P.R. 1903=126 P.L.R. 1903; D., 24 A. 342=22 A.W.N. 84.]

(4660)—*O.* 22, *r.* 10, *s.* 107 (2), *O.* 22, *r.* 11 (=*Civ. Pro. Code*, 1882, *ss.* 372, 582)—*Person obtaining interest during pendency of appeal, competency of, to be made a party*.—A Court of original jurisdiction has the power, under s. 372 of the Civ. Pro. Code, to make a person a party to a suit on whom an interest in the subject-matter of the suit has devolved pending the suit otherwise than by death, marriage, bankruptcy or insolvency. The same power is conferred by s. 582 of the Code on an appellate Court in respect of appeals. The last portion of the first paragraph of that section which is confined to "proceedings arising out of death, marriage or insolvency of parties to an appeal," does not limit the scope of the first portion of that paragraph, and render the provisions of s. 372 inapplicable to appeals. Moreover, a person may, under s. 372, be added or substituted as a party, as well on his own application as on the application of one of the parties to the record, because, where a devolution of interest has taken place pending a suit or appeal, it would be prejudicial to the person on whom such interest has devolved or to some of the parties to the suit if he could not be brought on the record otherwise than on the application of the plaintiff or the appellant as the case may be. So, where the official receiver that represented a respondent and continued to have interest in the subject-matter of the appeal obtained an order for his dismissal from the array of parties, on misrepresenting certain facts, it was *held* to be competent to the Court to set aside such order of dismissal, on application made by the respondent, treating his application as one made for review of judgment. *In the matter of the petition of* SARAT CHANDRA SINGH, **18 A. 285=A.W.N. 1896, 45,** [*F.*, 22 A. 231=A.W.N. 1900, 279.]

(4661)—*O.* 22. *r.* 10, *s.* 141 (=*Civ. Pro. Code*, 1882, *ss.* 372, 647)—*Appelatility to execution proceedings—Assignment of subject-matter of suit after High Court's decree in assignor's favour—Decree reversed in appeal — Assignee cannot be made party in execution of appellate decree*.—S. 647 cannot make s. 372 of the Code applicable to execution proceedings, because the words used in the latter section are "assignment, etc., pending *suit*," *i.e.*, during the progress of the suit, and before the passing

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of the decree. [*Cons.*, 2 A.L.J. 516.] Where in a suit concerning certain shares in a Company, the High Court passed a decree in favour of one party, and also refused leave to the other party to appeal to the Privy Council, but the Privy Council, on application to itself direct, admitting the appeal, reversed the decree of the High Court; and where some of the shares had been assigned to a third party after the High Court's decree but before admission of the appeal by the Privy Council: *held* that the Court executing the Privy Council's decree had no jurisdiction under s. 372, Civ. Pro. Code, to make the assignee a party to the decree in the character of a judgment-debtor GOODALL v. THE MUSSORIE BANK, LIMITED, 10 A. 97 = A.W.N. 1887, 288, (5 C. 726 = 5 C.L.R. 108, *R.*)

(4662)—O. 22, rr. 10, 11—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 20 A. 38, F.B. = A.W.N. 1897, 194.

(4663)—O 22, r. 10 (1) — *See* PUN. ACT XVIII OF 1884, s. 70 (*a*), (*b*), 12 P.L.R 1904.

(4664)—O. 22, r. 10 (1) — *See* LETTERS PATENT, HIGH COURT, 1865—MADRAS, art. 15, 24 M. 252.

(4665)—O. 22, r. 10 1)—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 3 C.W.N. 754.

(4666)—O. 22, r. 10 (1)—*See* ST. 11 AND 12 VIC. c. 21, s. 23, 25 M. 406 = 12 M.L.J. 282.

(4667)—O. 22, r. 10 (1)—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, 23 A. 331.

—O. XXII, r. 11 (= 1882, s. 582, last para = 1877, s. 582 last para.)

See ABATEMENT OF APPEALS.

See ABATEMENT OF SUITS.

See LIMITATION ACT, 1908, arts. 171, 175,

See PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS.

(4667-*a*)—O. 22, r. 11—*See* NOS. 58, 101, 105, 498, 545, 1938, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1946, 2312, 2386, 2398, 2479, 2944, 2766, 2767, 2768, 2774, 2779, 2792, 4555, 4556, 4562, 4563, 4588, 4621, 4622, 4623, 4624, 4625, 4626, 4627, 4643, 4657, 4660, 4662, *supra* and NOS. 4727, 4728, 4750, 5260, 5571, 5850, 5851, *infra*.

(4668)—O. 22, r. 11, ss. 47, 108—Second appeal—Death of respondent—Application by appellant for substitution of heirs—*See* LIMITATION ACT, 1908, art. 175, 11 C.W.N. 1100 = 6 C.L.J. 715 = 34 C. 1020.

(4669)—O. 22, r. 11, ss. 104, 2—*See* AWARD, 12 C. 173.

(4670)—O. 22, r. 11 and s. 107 = Power and duties of an appellate Court under the section same as are conferred and imposed on the Court of original jurisdiction—*See* GUARDIAN AND WARDS ACT, 1890, ss. 4, 7, 12, 47, cl. (*a*), 3 C.L.J. 29.

(4671)—*O.* 22, r. 11, *s.* 107 (= *Civ. Pro. Code*, 1882, *s.* 582)—*Scope.*—S. 582 of the Civ. Pro. Code, was intended to affect only proceedings under the Code, and not to extend the operation of any portion of the Limitation Act. UDIT NARAIN SINGH v. HAROGOURI PROSAD, 12 C. 590, F.B. [*R.*, 10 A. 223, F.B., 29 M. 529 = 1 M.L.T. 348 = 16 M.L.J. 475, F.B.]

(4672)—O. 22, r. 11, s. 107—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 10 A. 20 = A.W.N. 1887, 270.

(4673)—O. 22, rr. 11, 3 (2)—*See* COSTS—SPECIAL CASES, 8 C. 440 = 10 C.L.R. 437.

—O. 22, r. 12, (= 1882, s. 582, last para.—1877, s. 582 last para.

(4673-*a*)—O. 22, r. 12—*See* NO 3568, *supra*.

—O. XXIII. r. 1 (= 1882, s. 373 = 1877, s. 373 = 1859, s. 97.)

See ABANDONMENT OF PART OF CLAIM.

See WITHDRAWAL OF SUIT.

(4674)—*Ors.* 23, 16, *r.* 11—*Suit, withdrawal of—Appeal, presentment of—Withdrawal of suit after appeal presented—Practice and procedure.*—A suit to recover possession of lands was dismissed by the Court of first instance. The plaintiff preferred an appeal, but, before the appeal was admitted, he applied, under O. 23, Civ. Pro. Code, 1908, for leave to withdraw the suit and bring a fresh suit. The application was heard and granted by the District Judge without giving notice to the defendant. On appeal by the defendant: *Held* (1) that the duty of the District Judge, upon the presentation of the appeal, was either to dismiss the appeal without sending notice to the respondent or to adjourn the hearing, and, if the appellant did not appear, to dismiss the appeal; (2) that there was no provision allowing the District Judge to entertain an application, the effect of which was to get rid of the decree of the lower Court without any notice to the decree-holder and without any hearing of the appeal; (3) that the course taken by the District Judge was not sanctioned by the provisions of O. 23, which contemplated the pendency of the suit and which did not apply where the suit had been disposed of and a decree passed in favour of the defendant. EKNATH RANOJI FALKE v. RANOJI BOWAJI FALKE, 13 Bom. L.R. 237.

(4674-*a*)—*O.* 23, *r.* 1 (= 1882, *Civ. Pro. Code*, *s.* 373)—*Order allowing plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action—Appeal.*—No appeal will lie from an order under s. 373 of the Code of Civil Procedure giving permission to a plaintiff to withdraw his suit with liberty to bring a fresh suit upon the same cause of action. SAYA MAL v. LAIK SINGH, A.W.N. 1895, 21. (A.W.N. 1895, 17, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4675)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 373)—*Withdrawal of suit—Reference to arbitrators—Mortgage--Redemption of.*—The mutual withdrawal of the first suit and the reference to arbitration, which proved infructuous because the arbitrators declined to give a decision, is not a bar to the institution of a fresh suit on the same cause of action. (U.B.R. 1897—1901, Vol. II, 284, *F.*) Justice, equity and good conscience require that the mortgagor, after having left the property without interference for so long a time, should not be allowed on her return to redeem for a mere trifle, land that was of little value when she relinquished possession of it 54 years ago, but which during that long period has by the fostering care of the mortgagee become a valuable property. The question as to when equity should step in must be determined by the individual features of each case. MA KYAW v. MA THWE, **U.B.R. 1897—1901, Vol. II, 286.** (U.B.R. 1892—1896, Vol. II, 548, *R.*)

(4676)—*O.* 23, *r* 1 (=*Civ. Pro. Code*, 1882, *s.* 373)—*Withdrawal of suit with the consent of defendant—Reference to arbitrator.*—The withdrawal of suit and the mutual reference to arbitration, which proved infructuous because the arbitrators declined to give a decision, is not a bar to the institution of a fresh suit on the same cause of action. MA KO v. MAUNG PO TUN, **U.B.R. 1897—1901, Vol. II, 284.** (14 B. 31, 9 A. 168, *R.*) [*F.*, U.B.R 1897--1901, Vol. II, 286.]

(4677)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 373)—"*Order*"—"*Decree*"—*Appeal.*—This was an appeal from an order of the lower appellate Court setting aside a decree in part, which the plaintiffs had obtained from the Munsiff, with permission to the plaintiffs to bring a fresh suit. A preliminary objection was raised on behalf of the respondents that no appeal lay from such an order. *Held* that the objection was to be allowed to prevail. ZAHURI v. DINA NATH. **A.W.N. 1893, 204.** (A.W.N. 1893, 189, *F.*) [*F.*, 17 A. 97=A.W.N. 1895, 17.]

(4678)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1859, *s.*97)—*Dismissal of suit—Right reserved to bring fresh suit—Act XXIII of* 1861, *s.* 37.—Plaintiff sued for proprietary possession on the ground of his having been dispossessed. The defence was proprietary possession for a long time, while it appeared that the defendant held it as mortgagee. The plaintiff's claim was dismissed, reserving to him under s. 97, Act VIII of 1859, and s. 37, Act XXIII of 1861 the right to bring a fresh suit as mortgagee for redemption. KALLU v. HUKMA, **24 P.R. 1872.**

(4679)—*O.* 23, *r.* 1 (=*old s.* 373)—*Nature of order to be passed.*—A former suit by the plaintiff was allowed to be withdrawn without leave to bring a fresh suit, because the plaintiff stated that he hoped the suit would be settled out of Court. *Held* that the order allowing the plaintiff to withdraw was illegal and did not bar a fresh suit and that the order, though an appeal was not preferred against it at the time, could be objected to in the present suit. HASHDAR ALI v. HASSAN ALI, **147 P.R. 1888.** (93 P.R. 1887, *F.*)

(4680)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.*373)—*Withdrawal of suit on permission - Subsequent fresh suit not barred by s.* 43.—Where a prior suit instituted on the same cause of action had been withdrawn, it is only when such withdrawal had been made without permission obtained under the first paragraph of s, 373 of the Civ. Pro. Code, that s. 43 of the Code would apply so as to bar the plaintiff from suing again on the same cause of action. When, however, the suit had been withdrawn under s. 373 of the Code, the necessary permission under the section having been granted, the effect of such permission would be that the parties would be left in the same position as if the suit had never been brought. BEHARI LAL PAL v. SRIMATI BARAN MAI DASI, **17 A. 53=A.W.N. 1894, 201.** (10 M 160, *R.*) [*R.*, 14 C.P.L.R. 104, 2 C.L.J. 480.]

(4681)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Application under--Rejection—Dismissal of suit.*—Where the plaintiff in a suit prayed under s. 373, Civ. Pro. Code, for permission to withdraw the suit and bring a fresh one, but the Court in disallowing the application dismissed the suit "*in toto*," *held* that the rejection of an application under s. 373 could result only in the suit proceeding in its usual course and that the dismissal of the suit should be set aside. HARNAND MISR v. DINA SINGH, **A.W.N. 1888, 132.**

(4682)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 373).—Though the provisions of the Code of Civil Procedure are applicable to suits under the Indian Succession Act, s. 261, still, when an application for probate has been withdrawn before it became contentious, s. 373, Civ. Pro. Code, is not applicable, and will not bar a subsequent propounding of the will. PAKIAM PILLAI v. INNASI FERNAND, **19 M. 458.**

(4683)—*O.* 23, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 373)—*Withdrawal of suit without permission to sue again, effect of.*—The disability to sue again laid down by s. 373 of the Civ. Pro. Code attaches to the particular person who sets a Court of Law in motion and then wantonly stops the machinery. He is not to be allowed to sue in Court again in any other guise whatever for the same matter. Further, it is also one of the objects of s. 373 to protect a defendant from being harassed by repeated litigation, with reference not only to the allegations constituting the plaintiff's case, but also as to those which constitute the defence or any part of it. It is therefore open to the defendants to successfully contend that the plaintiff, having once, without obtaining the necessary leave, withdrawn from the contest on the particular defence set up by them, is debarred from

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agitating the very same question by means of a fresh suit. ACHUTA MENON v. ACHUTAN NAYAR, **21 M. 35.** [*R.*, 1 P.R. 1904 = 41 P.L.R. 1904, 9 O.C. 164.]

(4684)—*O. 23, r. 1 (= s. 373, Civ. Pro. Code, 1882)—Withdrawal of a suit to establish the right to sell certain property in satisfaction of the decree, without leave to bring fresh suit—Filing of fresh suit.*—Where, on the withdrawal by the plaintiff of a suit to establish his right to sell certain property in execution of his decree, without leave to bring a fresh suit, a second suit was instituted to establish his right to sell the same property for satisfying another decree against the sameperson, it was not barred by the provisions of s. 373, Civ. Pro. Code, although the property and the defence were the same, because the cause of action was different, arising as it did from an order passed in a different claim case. KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY, **21 C. 265.** [*F.*, 4 C.W.N. 110; *R.*, 9 O.C. 164; *Cited*, 1 P.R. 1904 = 41 P.L.R. 1904.]

(4685)—*O. 23, r. 1 (= Civ. Pro. Code, 1882, s. 373)—Two suits—The same subject-matter.*—The mere fact of two suits being in respect of the same property is not sufficient to make the latter suit one for the same subject-matter as the former, when the state of facts leading to the two suits, and the reliefs claimed under them are different, and s. 373, Civ. Pro. Code, has no application to such a case. (21 C. 265, *F.*) *Quære*:—Whether the mere fact that a plaintiff withdraws with the consent of the defendant, but without the leave of the Court, brings the case within s. 373, Civ. Pro. Code. GOPAL CHANDRA BANERJEE v. PURNA CHUNDRA BANERJEE, **4 C.W.N. 110.**

(4686)—*O. 23, r. 1 (= Civ. Pro. Code, 1882, s. 373)—Withdrawal of suit—Notice to show cause.*—An order under s. 373, Civ. Pro. Code, should not be passed without giving notice to the opposite party to show cause against it. KALIAN SINGH v. LAKRAJ SINGH, **6 A. 211 = A.W.N. 1884, 28.** [*R.*, 9 A. 253.]

(4687)—*O. 23, r. 1 (= s. 373, Civ Pro. Code, 1882)—Misjoinder of causes of action and parties—Withdrawal of suit with permission to bring a fresh suit—Fresh suit Limitation Act (XV of 1877) s. 14—"Cause of like nature."*—Where a suit which fails by reason of misjoinder of causes of action and parties, is allowed to be withdrawn with permission to bring a fresh suit the time taken up in prosecuting the first suit, cannot be deducted, and the limitation is to apply to the second suit as if it was the first. *Semble.*—The misjoinder of causes of action or of parties is not a "cause of like nature" within the meaning of s. 14 of the Limitation Act, 1877. VERAJLAL v. SOMESHWAR, **7 Bom. L. R. 90 = 29 B. 219.**

(4688)—*O. 23, r. 1 (= Civ. Pro. Code, 1882, s. 373)—Withdrawal of suit—Fresh suit for the same subject-matter—Leave of the Court—Withdrawal of a part of claim.*—S. 373 of the Civ. Pro. Code enables the Court to permit withdrawal either of the whole suit or of a part with liberty to bring a fresh suit either in respect of the whole suit or of a part as the case may be. Where a plaintiff wishes to withdraw from a part of his claim, with liberty to bring a fresh suit in respect of it, he must either proceed with the remaining part of claim, or if he does not, the suit must be dismissed as to it. There is nothing in s. 373 of the Code empowering the Court to permit the withdrawal of the whole of a suit with liberty to bring a fresh suit in respect of a part of it only. If such a withdrawal is permitted the order of the Court in respect of the portion withdrawn without leave given to bring a fresh suit must take effect otherwise than as an order of withdrawal, which under s. 373, simply precludes a plaintiff from suing again in respect of the claim. HONAPPAGOWDA v. DYAMANGOWDA, **5 Bom. L.R. 223.**

(4689)—*O. 23, r. 1 (= Civ. Pro. Code, 1882, s. 373)—Adjustment of suit by parties—Joint application for suit being struck off—Second suit barred by s. 373, Civ. Pro. Code*—The parties to a suit represented to the Court that the suit had been adjusted, and jointly prayed that it might be struck off, and the Court wrongly passed an order to that effect, instead of acting under s. 375 of the Civ. Pro. Code, as it should have done. The plaintiff who, without seeing to the proper order being recorded, remained satisfied with action which practically amounted to the withdrawal of his suit without permission to sue again was held to be precluded by s. 373 of the Civ. Pro. Code, from bringing a second suit in respect of the same subject-matter. GULKANDI LAL v. MANNI LAL, **23 A. 219 = A.W.N. 1901, 66.**

(4690)—*O. 23, r. 1 (= old s. 373)—Applicability to execution proceedings.*—*Held* that this section was not applicable to execution proceedings. MUSST. JUSO-DHA DEVI v. LACHMAN DAS, **37 P.R. 1892.** (12 A. 392, *Diss.*)

(4691)—*O. 23, r. 1 (= old s. 373)—Several plaintiffs—Withdrawal without consent of others—Effect of permission of Court—Meaning of "plaintiffs."*—In a case where there are several plaintiffs, the consent of the remaining plaintiffs is a necessary condition to the withdrawal of suit by one of the plaintiffs. "Several plaintiffs" as used in the sections means "plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly, severally or in the alternative in respect of the same cause of action." JAGGU v. MUSST. MANNI JAN, **93 P.R. 1887.** (95 P.R. 1884, *R.*) [*F.*, 147 P.R. 1888.]

(4692)—*O. 23, r. 1 (= s. 373, Civ. Pro. Code, 1882)—Withdrawal of suit—Withdrawal in appeal—Change in substantive law during*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

progress of a suit—Law applicable to the suit—Dekkhan Agriculturists' Relief Act (XVII of 1879,) ss. 12, 13.—Early in 1905, a redemption suit was filed in the Subordinate Judge's Court at Thana. The Dekkan Agriculturists' Relief Act was extended to the District in August 1905. At the trial, the Subordinate Judge took the accounts of the mortgage upon the footing of the application of ss. 12 and 13 of the Act and gave the plaintiff the benefit of those provisions. There was an appeal: and whilst it was pending, the case of *Fatmabibi* v. *Ganesh*, 9 Bom. L R. 971 was decoided. The plaintiff then seeing that by reason of the above ruling the defendant's appeal was likely to succeed, applied to the Court for leave under s.373 of the Code of Civil Procedure to withdraw the suit with liberty to file a fresh suit upon the same cause of action, in order that he might in the fresh suit obtain the benefit of ss. 12 and 13 of the Act. This was allowed. *Held*, that the Judge in permitting the plaintiff in the stage of appeal to withdraw the suit with liberty to file a fresh suit under s. 373 of the Civ. Pro. Code, and thus get the benefit of an alteration in the substantive law, acted without jurisdiction. *Held*, that the suit should have been tried upon the footing that the Dekkhan Agriculturists' Relief Act had no application between the parties. PRABHAKAR v. KHANDERAO, **10 Bom. L.R. 625.**

(4693)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1882)—Withdrawal of suit—Liberty to file fresh suit—Permission of the Courts—Costs.*—S. 373 of the Civ. Pro. Code, 1882, contemplates a withdrawal not of the suit but from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If the does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary. Hence, where a plaintiff applies to the Court for permission to withdraw from the suit with liberty to bring a fresh suit, and the Court is not minded to give the liberty, the proper order to pass is that the application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit be dismissed with costs. It is not competent to the Court to order on such application that the suit may be withdrawn and the plaintiff to bear all costs and to pay all costs. MAHANT BIHARIDASJI v. PARSHOTAMDAS RAMADS, **10 Bom. L.R. 293=32 B. 345.**

(4694)—*O. 23, r. 1—Suit, withdrawal of—Withdrawal, permissible under what circumstances.*—In O. 23, r. 1, Civ. Pro. Code, cl. (*b*) of sub-rule (2) must be read with cl. (*a*) and subject to the limitations cl. (*a*) suggests. A Court of appeal therefore is not competent to permit a suit to be withdrawn, when such suit has failed in the original Court for want of evidence. MABULLA SARDAR v. RANI HEMANGINI DEBI, **11 C.L.J. 512=6 Ind, Cas. 629.** (11 C.L.J. 45 *Appl.*)

(4695)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, (1882)—Withdrawal of first suit without liberty to bring a fresh suit—Second suit for the same matter barred—Permission of Court to be in express terms.*—Where a suit is withdrawn by plaintiff, absolutely and unconditionally, and there is nothing in the Court's order, upon plaintiff's application, from which it can be inferred that the Court granted plaintiff permission to withdraw with liberty to bring a fresh suit, the plaintiff withdrawing a suit, unconditionally and on his own responsibility, will be precluded from bringing a fresh suit for the *same matter*, as was involved in the first suit. If, however, the second suit is not for the "same matter" as involved in the first suit but, in reality, one to enforce the terms of the compromise in the first suit—*e.g.*, for possession in accordance with the compromise entered into therein—and the matter involved in the first suit is merely introduced as a subsidiary matter, such second suit will not be barred by s. 373. GHULAM ALI SHAH v. SHAHABAL SHAH, **3 P.R 905=87 P.L.R. 1905.**

(4696)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1877)—Sale of house—Suit to establish title—Sale not confirmed—Suit withdrawn—Sale upheld in appeal—Suit again filed—Second suit not barred.*—On the attachment of a house in execution of a decree against plaintiff's husband, the plaintiff sued to establish her title. Meanwhile the executing Court refused to confirm the sale. Thereupon the plaintiff withdrew her suit without permission, which was struck off the file. But the sale was then upheld in appeal. Then she brought a second suit. *Held* that this suit was not barred as a fresh cause of action different from that which formed the basis of the first suit had accrued to her by the appellate Court upholding the sale. MIR NASIR HUSAIN v. MUSST. FAKR JEHAN BEGAM, **119 P.R. 1881**

(4697)—*O. 23, r. 1 (=s. 373. Civ. Pro. Code, 1882) — Fresh suit — Same matter — Bengal Tenancy Act (VIII of 1885), s. 106—Suit in regular Court.*—S. 373 of the old Civ. Pro. Code of 1882 provides that, if a plaintiff withdraws from his suit without the permission of the Court, he shall be precluded from bringing a fresh suit for the same matter. The meaning of that section is that the plaintiff shall be precluded from bringing a fresh suit in that or any Court of similar or co-ordinate jurisdiction. It is not the meaning of that section that a plaintiff, when defeated in a suit under s. 106 of the Rent Law, will be precluded from bringing his ordinary action in the regular Civil Courts. ALTAP ALI v. SHEIKH MOHATAP, **9 Ind. Cas. 4.** (7 Ind. Cas. 340, 15 C.W. N. 57, *R.*)

(4698)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1882)—Order allowing withdrawal of suit and*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

refusing leave to bring fresh suit—No notice to the plaintiff of the order—Propriety—Plaintiff entitled to option as to withdrawing the suit, or proceeding with it—Practice.—Where the plaintiffs applied under s. 373, Civ. Pro. Code (1882), to withdraw their suit with permission to bring a fresh suit, and the District Munsiff allowed the withdrawal, but did not grant the permission to bring a fresh suit, without giving notice to the party of his intention to deal with the application in that way. *Held*, that the proper order was either an order refusing the application or an order in the terms prayed for; and that the plaintiffs were certainly entitled to have the option given to them either to go on with the suit or to withdraw unconditionally. SUBBAN CHETTY v. LATCHMI AMMAL, **6 M. L.T. 191=3 Ind. Cas. 206.**

(4699)—*O. 23, r. 1 (=s. 373. Civ. Pro, Code, 1882)—Power under—Nature of—When and by what Court exercisable—Unconditional withdrawal of appeal*—Res judicata—*Effect upon.*—*Held*, that leave to withdraw, under the terms of s. 373 of the Civ. Pro. Code, 1882, may be given at any time while, and by any Court, whether original or appellate, in which the litigation is pending. *Held*, that, so far as this section is concerned, the active power of the Court is limited, except as to costs, to those cases where the plaintiff asks for permission to withdraw with liberty to bring a fresh suit (9 C.P.L.R. 3, 17 A. 156, *F.*), and that leave to withdraw without liberty given to sue again is not a form of order contemplated by s. 373, Civ. Pro. Code. (9 C.L R 332, *Diss.*) There is no power on earth vested in Courts which can prevent a sole plaintiff, or one of several co-plaintiffs, from abandoning his claim, or part thereof, by a declaration that he withdraws it, or in any other of the several different ways open to him. Object of s. 373 discussed. *Held*, that the section must be strictly construed and that the words "sufficient grounds" in cl. (*b*) mean something which is *ejusdem generis* as a "formal defect" in cl. (*a*). Unconditional withdrawal of suit, which is optional with the plaintiff, may result in the subject-matter of the suit becoming again *res judicata*. (6 M. 43, 15 B. 370, 16 B. 243, *R.*) Such unconditional withdrawal of an appeal deprives the appellate Court of its seisin over the decree in appeal, and the matters decided by that decree cease to be *sub judice*. SITARAM v. MT. CHHOTKAI, **5 N.L.R. 88=3 Ind. Cas. 61.** (29 B. 13, *F.*)

(4700)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1882)—Permission to institute fresh suit—Plaint returning of, for presentation to proper Court—Suit, frame of—Jurisdiction of Revenue and Civil Courts—Appeal.*—The plaintiff brought a suit for possession of a village on the allegation that the husband of the defendant was the thekadar of the village; that on his death in 1896 he (the plaintiff) took possession of the village, but the defendant recovered possession of it by order of the Revenue Court, and that she had no sort of proprietary or under-proprietary right in it. The defendant pleaded that her husband was in possession of the vilage of *gasaradar* and that she was not liable to ejectment. The first Court held that the defendant could not be ejected as she held the land at a favourable rate of rent and that the plaintiff could only take proceedings under s. 52, Oudh Rent Act. On appeal the lower appellate Court held that on the allegations of the plaintiff the defendant did not become a trespasser on the death of her husband but was a tenant of the land and so could only be ejected by the Revenue Court. The plaintiff then appealed to the Judicial Commissioner and, when his appeal came on for hearing, asked the Court to dismiss the appeal and the suit with permission under s. 373, Civ. Pro, Code, to bring a fresh suit, or to return the plaint for presentation to a Revenue Court. *Held*, that permission could not be granted to the plaintiff under s. 373, Civ Pro. Code, to bring a fresh suit. *Held* further, that the suit as framed was cognizable neither by the revenue nor by the Civil Court and the plaintiff therefore could not be allowed to withdraw it from filing it in a revenue Court. MUHAMMAD ASHGAR ALI v. MUSAMMAT MARYAM, **5 O.C. 867.**

(4701)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1882)—Suit withdrawn under—Liberty to bring fresh suit on payment of costs—Costs not paid before institution of subsequent suit—Subsequent payment of costs.*—When a suit is allowed to be withdrawn on condition that the plaintiff should pay the costs of the defendant, and the plaintiff brings a second suit without paying the costs, the second suit is not bad *ab initio*. If the payment of costs ordered is made after the institution, the irregularity is cured. ABDUL AZIZ MOLLA v. EBRAHIM MOLLA, **S1 C. 965.**

(4702)—*O. 23, r. 1 (Civ. Pro. Code, 1882, s. 373)—Permission to withdraw suit—Implication of liberty to bring fresh suit.*—When a Court permits a withdrawal under s. 374 of the Code the condition of the liberty to bring a fresh suit is necessarily implied even if it is not expressly stated. DIWALIA KOSTI v. DINOO KOSHTI, **9 C.P.L.R. 3.** (20 W.R. 401, *D.*) [*F.*, **N.L.R.** 88.]

(4703)—*O. 23, r. 1 (=s. 373, Civ. Pro. Code, 1882)—Alienations by Hindu widow—Suit, after widow's death, for recovery of possession and declaration of invalidity of alienation—Prior suit during her life-time for declaration of invalidity of alienation withdrawn—No permission to bring fresh suit—Bar under s. 373, Civ. Pro. Code, 1882.*—Where a suit brought, during the life-time of a Hindu widow, by her reversioners, for a declaration that certain alienations made by her were invalid and not binding upon them, was withdrawn without liberty to bring a fresh suit, and where, after the widow's death,

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

another suit was brought by the same reversioners for the recovery of possession of the same properties after a declaration that the alienations were invalid and not binding on them. *Held*, that the second suit was bad as being opposed to s. 373, Civ. Pro. Code. MACHANA UAJHALA DIKSHATULU v. GORUGANTULU YAGGAMMA, **9 M.L.T. 468=8 Ind. Cas. 1066.** (21 M. 35, *F.*)

(4704)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Unconditional withdrawal of appeal and claim—Second suit—Not maintainable.*—A suit for redemption was dismissed by the Court of first instance for want of necessary parties. In the appellate Court the plaintiffs put in an application saying that he did not wish to prosecute his "appeal or claim," the other side having given up his costs. The plaintiff then brought a second suit to redeem. *Held*, that the effect of the application was that the plaintiff gave up all his claims to redeem the property, the consideration for the withdrawal being that the respondents gave up their costs, and the suit was barred by the last paragraph of s. 373 of the Code. RAM PRASAD v. DUNGAR SINGH. **4 A.L.J. 201=A.W.N. 1907, 91.**

(4705)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Withdrawal of suit for declaration without obtaining leave to bring another suit, suit for possession by reversioner after—Institution of fresh suit—Subsequent suit for the same matter.*—*Held*, that, where a reversioner withdraws his suit for a declaration without obtaining leave to bring another suit under s. 373 of the Code, his subsequent suit for possession will not be barred under the provisions of that section. JANGI SINGH v. DURGA SINGH, **9 O.C. 164.** (21 C. 265, 21 M. 350, 2 A.L.J. 69, *R.*)

(4705-*a*)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882) *Withdrawal of suit with liberty to bring fresh suit—Application to be treated as indivisible—Leave to withdraw without liberty to bring fresh suit, not to be given—Appeal treated as application for revision.*—An application for leave to withdraw from suit with liberty to bring a fresh suit on the same cause of action, should be dealt with as an indivisible whole. A Court, which grants leave to withdraw, but does not give the liberty prayed for, acts without jurisdiction, and if the order is not appealable, the High Court will interfere in revision, treating the appeal as an appliaction for revision. BHAGWAT PERSHAD v. LACHMI PERSHAD, **10 Ind. Cas. 346.** (32 B. 345, 10 Bom. L.R. 293, 9 Ind. Cas. 994, *Rel. on.*)

(4705-*b*)—O. 23, r. (1)—*See* BEN. ACT X OF 1859, 21 C. 514.

(4706)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882). — *X of* 1859—*Civ. Pro. Code, (Act XIV of* 1882), *s.* 373, *applicability of.*—The provisions of s. 373, Civ. Pro. Code, have no application to suit instituted under Act X of 1859. Where a plaintiff applied to withdraw a suit for rent and the Court permitted such withdrawal

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

but dismissed the suit and did not give distinct permission to bring a fresh suit upon the same cause of action. *Held*, that a fresh suit was maintainable. SHEIKH GOLAM MOHAMED v. SIVENDRA PADA BANNERJEE, **12 C.W.N. 893=35 C. 990.**

(4707)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Withdrawal of suit—Order conditional—Condition not fulfilled—Fresh suit, if maintainable.*—Where leave to withdraw a suit with liberty to bring a fresh suit was conditional on the plaintiff paying the costs of the former suit on or before a specified date, and the time fixed for the performance of the condition had expired without the condition performed. *Held* that a fresh suit was rightly dismissed. ROBERT FISHER v. NAGAPPA MUDALY, **7 M.L.T. 226=6 Ind. Cas. 288.**

(4708)—*O.* 23, *r.* 1—*Suit, withdrawal of—Leave to withdraw, when granted—Revision—High Court, power of.*—Under O. 23, r. 1 of the Civ. Pro. Code, a suit may be allowed to be withdrawn, when it must fail by reason of some formal defect or any analogous ground. A suit ought not to be allowed to be withdrawn when the plaintiff has adduced all his evidence and finds it insufficient to establish his allegations. When an order in favour of the plaintiff for withdrawal of the suit has been irregularly or improperly made, the High Court can interfere in the exercise of its revisional jurisdiction. KHARDA CO. LD., v. DURGA CHARAN CHANDRA, **11 C.L.J. 45=5 Ind. Cas. 187** (13 M.I.A. 160, *Appl.*) [*Appl.*, 11 C.L.J. 512.]

(4709)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Court's power to extend time for payment of costs of suit withdrawn.*— Plaintiff withdrew a suit with liberty to bring a fresh suit, under s. 373, Civ. Pro. Code. The Court granted the permission on condition of plaintiff's paying the costs of the suit to defendant within a time fixed. It being impossible for the plaintiff to pay such costs within the time stipulated, he applied, after the expiry of the time fixed by the Court, for an extension of time for the payment of the costs. The Court of first instance granted the extension. *Held*, the Court of first instance exercised a sound discretion in extending the time. PERIA MUTHIRIAN v. KARAPPANNA MUTHIRIAN, **29 M. 370.**

(4710)—*O.* 23, *r.* 1 (=*s.* 373, *Civ. Pro. Code*, 1882)—*Withdrawal of suit—Sufficient grounds.*—The Court ought not to allow a suit to be withdrawn, under s. 373, Civ. Pro. Code, 1882, after the parties are ready for trial, if such withdrawal may operate to the prejudice of the defendant. MAHIPAT SHAMLA v. NATHU VITHOBA, **11 Bom. L.R. 1109=4 Ind. Cas. 252=33 B. 722.**

(4710-*a*)—*O.* 23, *r.* 1—*Striking out the name of one of several defendants—Jurisdiction—Effect of striking off.*—Where the Court of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

first instance struck out the name of a defendant on the plaintiff's statement that he had no claim against him. *Held* that the Court in so doing acted without jurisdiction and the act of striking out the defendant's name was a nullity. BISHEN DASS v. HURPERSHAD, **19 P.R. 1870.**

(4711)—O. 23, r. 1—Order permitting withdrawal of suit under, not appealable—*See* APPEAL — DECREES AND EXECUTION OF DECREES, 16 A. 19 = A.W.N. 1893, 189.

(4712)—O. 23, r. 1—*See* APPELLATE COURT —OBJECTIONS FIRST TAKEN IN APPEAL, 3 A. 528.

(4713)—O. 23, r. 1—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 15 A. 169 = A.W.N. 1893, 78.

(4714)—O. 23, r. 1—*See* DECREE--DECREE, CONSTRUCTION OF, 9 A. 690 = A.W.N. 1887, 254.

(4715)—O. 23, r. 1—*See* EXECUTION OF DECREE— APPLICATION FOR EXECUTION AND POWERS OF COURT. 15 B. 370 = P.J. 1890, 336.

(4716)—O. 23, r. 1 — Applicability of—to appeals--*See* JURISDICTION OF CIVIL COURTS, 21 P.R. 1909 = 32 P.L.R. 1909 = 27 P.W.R. 1909 = 1 Ind. Cas. 604.

(4717)—O. 23, r. 1—*See* LIMITATION ACT, 1908, ART. 182—APPLICATION IN ACCORDANCE WITH LAW, A.W.N. 1891, 154.

(4718)—O. 23, r. 1 - *See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 23 C. 817.

(4719)—O. 23, r. 1—Abandonment of part of claim—Improper valuation of Court-fee—*See* MORTGAGE—REDEMPTION, 4 A.L.J. 375 = A.W.N. 1907, 133 = 29 A. 471.

(4720)—O. 23, r. 1—*See* PLAINT—AMENDMENT OF PLAINT, 10 M. 152.

(4721)—O. 23, r. 1—Suit to enforce right of pre-emption—Withdrawal from suit of one of the pre-emptors—Effect—*See* PRE-EMPTION—GENERAL, A.W.N. 1885, 189.

(4722)—O. 23, r. 1—*See* RES JUDICATA—GENERAL, 1 O.C. 97.

(4723)—O. 23, r. 1—*See* RES JUDICATA—GENERAL, 6 B. 482.

(4724)—O. 23, r. 1—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 13 A. 564 = A.W.N. 1891, 164.

(4724-*a*)—O. 23, r. 1—*See* NOS. 98, 114, 210, 337, 359, 365, 366, 367, 421, 1413, 1868-*a*, 1935, 1941, 2669, 2670, 2671, 2672, 2673, 2828-*a*, 3141, 3936, 4450, 4508, *supra*.

(4725)—*O. 23, r. 1, s. 89, sch. II, rr. 1, 5 (=ss. 373, 506, 510, Civ, Pro. Code, 1882)—Reference to arbitration matters in dispute in*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859—*continued.*

pending suit—Revocation of reference—Power to permit withdrawal, with liberty to bring fresh suit.—The plaintiff had, previously during the pendency of a suit between him and the defendants in respect of the same matter, applied for and obtained an order of reference under s. 506 of the Code. However before the expiry of the time fixed for the making of an award, he made an *ex parte* application under s. 373, for permission to withdraw from the suit, with liberty to bring a fresh suit. The application was granted and the suit struck off. Thereupon the plaintiff instituted the present suit. *Held*, that the Court had no power to revoke the reference, except in the events referred to in s. 510. If the Court had no such power, either it had no power to act under s. 373, if the effect of such section was a revocation of the order of reference, or, if the permission to withdraw did not involve such revocation, then the order to refer was still in force: so that the Court's order was either *ultra vires* or else inoperative as a revocation. The present suit was barred by s. 21 of the Specific Relief Act. *Per Tyrrell, J.*—The present suit was barred by the second clause of s. 373 as the Court had no jurisdiction to give the plaintiff permission to withdraw from the former suit and as, having delegated its authority to an arbitrator, it could not treat the suit, as one remaining on its own file. SHEOAMBAR v. DEODAT, **9 A. 168 = A.W.N. 1887, 13.** [*F.*, 27 A. 53 = A.W.N. 1904, 160 = 1 A.L.J. 398; *R.*, U.B.R. 1897—1901, 284; *D.*; 1 A.L.J. 257.]

(4726)—*O. 23, r. 1, s. 104, O. 43, r. 1 (=Civ. Pro. Code, 1882, ss. 353, 588)—Order granting permission to withdraw suit or appeal—Appeal.*—When permission is given under s. 373, Civ. Pro. Code, there is no formal or other expression of an adjudication upon any right claimed or defence set up, and such permission has not the effect of giving any decision on the suit or the appeal as the case may be; the order granting the same is therefore not a decree so as to be appealable as such, nor is it one of the orders specified as appealable in s. 588, Civ. Pro. Code. GENDA MAL v. PIRBHU LAL, **17 A. 97 = A.W.N. 1895, 17.** (6 A. 211, 16 A. 19, A.W.N. 1893, 204, 18 C. 322, *R.*; 8 A. 82, *Not F.*) [*R.*, 21 P.R. 1909 = 32 P.L.R. 1909.]

(4727)—*O. 23, r. 1, s. 107 (2), O. 22, r. 11, (=ss. 373, 582, Civ Pro. Code, 1882)—Decree in partition suit on agreement of parties—Withdrawal of whole suit, by plaintiff, in appeal, effect of.*—When in a suit for partition, a defendant has, by concession of the plaintiff, acquired rights, which, otherwise, could not have existed it is not open to the plaintiff, who has made that concession afterwards to annul its effect by withdrawing the suit in the appellate Court. Ss. 373, and 582 do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by the plaintiff's withdrawal of the entire

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

suit, of his own free will and without the permission of the Court. SATYABHAMABAI v. GANESH BALKRISHNA, **29 B. 13.**

(4728)—O. 23, r. 1, s. 107 (2), O. 22, r. 11—Appeal—Right of one of several appellants to withdraw his appeal as to his share only—*See* CUSTOMS—PUNJAB—INHERITANCE, 119 P.W.R. 1908.

(4729)—*O. 23, r. 1, s. 115 (=Civ. Pro. Code, 1882, ss. 373, 622)—Leave to withdraw given by Appellate Court—Material irregularity*—A Munsiff dismissed a suit. Plaintiff appealed and asked for permission to withdraw the suit with liberty to bring a fresh suit on the same cause of action, which the Judge accorded. The High Court, on revision, *held*, the Judge acted with material irregularity and the Munsiff's decree, not having been set aside, was binding on the plaintiff. TIRUPATI v. MUTHU, **11 M. 322.**

(4730)—O. 23, r. 1, s. 115—*See* RULES OF HIGH COURTS AND SUPREME COURTS, N.W.P. A.W.N. 1903, 12.

(4731)—*O. 23, r. 1, s. 141 (=Civ. Pro. Code, 1882, ss. 373, 647), whether applicable to applications for execution.*—By a mere fact of a decree-holder having withdrawn his first application for execution, without leave given by the Court to renew it, he is not precluded under s. 373, Civ. Pro. Code, from filing his second application. The section can have no application in the case of petitions for execution, by the effect of s. 647 of the Code. The proceedings spoken of in the latter section included original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. Both in the Civ. Pro. Code, and in the Limitation Act, the Legislature contemplates the legality of a succession of applications for execution. The principle of s. 373 cannot be applied to execution proceedings so as to place a decree-holder, who is not desirous of proceeding with his application for execution, in the same position as a plaintiff desiring to withdraw from his suit. THAKUR PRASAD v. FAKIRULLAH, **17 A. 106=22 I.A. 44 P.C.=5 M.L.J. 3=6 Sar. 526.** [10 A. 71, 18 C. 635, 12 A. 179 *appr.*,] (F. 24 C. 197=1 C.W.N. 236, 170 P.L.R. 1903, 22 P.R. 1905=57 P.L.R. 1905, 6 A.L.J. 760; R. 20 B. 198, 26 B. 10=3 Bom. L.R. 565, 26 M. 438, 130, P.L.R. 1902, 3 C.L.J. 276, 4 L.B.R. 83=14 Bur. L.R. 323; *D.*, 26 B. 76=3 Bom. L.R. 431, 8 O.C. 263, 2 Ind. Cas. 156.]

(4732)—*O. 23, r. 1, s. 141 (=Civ. Pro. Code, 1882, ss. 373, 647)—Execution of decree—Application for execution withdrawn without permission to make a fresh application—Civ. Pro. Code, ss. 373, 647.*—On an application for execution of a decree the Court passed an order of which the following is a translation:—"The application for execution is for attachment. The *talbana* and fees of the Amin have not been deposited. The statement of the pleader of the decree-holder is that after finding out the property of the judgment-debtor again an application will be made. At present no prosecution is aimed at. Therefore it is ordered that the case be struck off from the arrears in default." *Held* that the provisions of s. 373 of the Civ. Pro. Code, being applicable to execution proceedings and the decree holder not having obtained permission to make a fresh application, no fresh application of a like nature, could be made. KUAR SEN v. CHATTAR SINGH, **A.W.N. 1891, 92.** (10 A. 71, 12 A. 179, 12 A. 392, *F.*)

(4733)—*O. 23, r. 1, s. 141 (=Civ. Pro. Code, 1882, ss. 373, 647)—Execution of decree—Application for execution struck off without leave to make a fresh application—Civ. Pro. Code, ss. 373, 647.*—An application for execution of a decree having been filed, the judgment-debtor presented an application stating that he had obtained two months further grace from the decree-holder for payment of the decretal amount and that, with the consent of the decree-holder, the case might be struck off. The application also bore the signature of decree-holder. No permission was given to make a fresh application for execution. *Held* that a subsequent application for execution of the decree was barred by s. 373, read with s. 647 of the Civ. Pro. Code. SHAH SIFAT ALAM v. DUNIA PRASAD SINGH, **A.W.N. 1891, 98.** (12 A. 392, *F.*)

(4734)—*O. 23, r. 1, s. 141 (=Civ. Pro. Code, 1882, ss. 373, 647)—Execution of decree—Application for execution struck off at request of decree-holder's pleader, but attachment allowed to remain in force.*—An application for execution of a decree was struck off at the request of the decree-holder's pleader, but the Court at the time of striking off the application, directed that an attachment which had been obtained by the decree-holder upon property of the judgment-debtor should remain in force for six months. A subsequent application for execution was made by the decree-holder after the expiration of six months from the date of the order above referred to. *Held* that this last application was barred by the provisions of s. 373 of the Civ. Pro. Code, read with s. 647. QABUL SINGH v. SANWAL DAS, **A.W.N. 1891, 124.** (12 A. 392, *F.*)

(4735)—*O. 23, r. 1, s. 141 (=ss. 373, 647 Civ. Pro. Code, 1882)—Execution of decree—Application for execution—Intimation to Court that decree-holder did not wish to prosecute—Application struck off—Fresh application whether barred.*—Where a decree-holder, after presenting an application for execution, did not prosecute it by paying the proper process-fees, and, at the express request of her pleaders, withdrew the application, *held* that the proper interpretation of the Civ. Pro. Code, in such matters is to apply the provisions of s. 373 read with s. 647 of the Code, to execution-petitions,

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and that hence further application for execution was barred in the present case. MAHTAB KUAR v. SHAM SUNDAR LAL, **A.W.N. 1888, 272.** [*D.*, 12 A. 179.]

(4736)—O. 23, r. 1, s. 141—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 18 C 635, 15 M. 240 = 1 M.L.J. 750, A.W.N. 1888, 253.

(4737)—O. 23, r. 1, s. 141—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1899, 12 A. 179 = A.W.N. 1890, 53.

(4737-*a*)—*O. 23, r. 1 and O. 2, r. 2 (=Civ. Pro. Code, 1859, ss. 7, 97)—Withdrawal of claim after confession of judgment.*—Defendant confessed judgment in plaintiff's absence and before judgment was recorded, plaintiff applied for leave to withdraw the suit under s. 97, Civ. Pro. Code. Plaintiff's desire to withdraw and defendant's readiness to confess arose from the plaintiff having sued for part only of a debt and s. 7 barring suit for balance. *Held* that he was entitled to withdraw. JAKOOB ALI KHAN v. RURA MAL, **65 P.R. 1875.**

(4739)—O. 23, r. 1, sch. II, rr. 14, 15—*See* AWARD, 7 C.W.N. 186.

(4739)—*O. 23, rr. 1 and 2 (=ss. 373, 374, Civ. Pro. Code, 1882)—Limitation—Suit—Leave to withdraw*—Ultra vires—*Fresh suit—Limitation Act (XV of 1877), s. 14.*—An order giving leave to withdraw a suit and file a fresh suit on the same cause of action, on the ground that leave under cl. 12 of the Charter to institute it was granted by the Registrar, was held to be *ultra vires*, and the order was regarded as one only directing the plaint to be returned to the plaintiff. (13 M.I.A. 160, *F.*) S. 373 of the Code of Civil Procedure does not apply except to cases where the suit is properly pending in a Court in which the leave was granted. A plaint was filed well within the period of limitation. But, the leave to institute it under cl. 12 of the Charter was obtained from the Registrar. Under the practice laid down by the Court, it was by leave withdrawn, and on the same cause, a fresh suit, with proper leave, was then and there instituted but on a date when, under the usual circumstances, the suit would be barred by limitation. *Held*—that the leave to withdraw was not granted under s. 373 of the Code of Civil Procedure; that therefore, s. 374 of the Code could not operate as a bar to the fresh suit and that, under s. 14 of the Limitation Act (XV of 1877), it was not barred by limitation. RAMDEO v. GONESHNARAIN, **12 C.W.N. 921 = 35 C. 924.**

(4740)—*O. 23, rr. 1 and 2 (=s. 97, Civ. Pro. Code, 1859)—Applicability to rent suits—Withdrawal of suits.*—The principle of s. 97, Civ. Pro. Code, 1859 is inapplicable to rent suits, under Act X of 1859. BEER CHUNDER JOOBRAJ v. TRAINEE CHURN ROY, **11 W.R. 46.** (Marsh 148, *F.*)

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(4741)—O. 23, rr. 1, 2—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 18 C. 462.

(4742)—O. 23, rr. 1, 2—*See* JURISDICTION OF CIVIL COURTS, W.R. F.B. 47 = Marsh, 148 = 1 Ind. Jur. O.S. 41 = 1 Hay 347.

(4743)—O. 23, rr. 1, 2—Law as to withdrawal of suits—*See* LIMITATION ACT, 1908, s. 31 (2), 6 Ind. Cas. 700.

(4744)—O. 23, rr. 1, 2—*See* MINOR—SUITS BY AND AGAINST MINORS, 10 C. 357.

(4745)—O. 23, rr. 1, 2—*See* REVIEW—JURISDICTION TO REVIEW, 20 W.R. 401.

(4746)—O. 23, rr. 1, 2, s. 35 (1) and (2)—*See* COSTS—SPECIAL CASES, 1 M.H.C. 247.

(4747)—*O. 23, rr. 1, 2, s. 141 (=Civ. Pro. Code, 1882, ss. 373, 374, 647)—Execution-proceedings, applicability to.*—Ss. 373 and 374 of the Civ. Pro. Code, read with s. 647, apply to execution proceedings also (7 A. 359, 6 B. 681, *F.*; 10 B. 62, 6 M. 250, *Diss.*) Where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by the decree-holder was prohibited by the rule of s. 373 read with s. 647 of the Civ. Pro. Code. SARJU PRASAD v. SITA RAM, **10 A. 71 = A.W.N. 1888, 1.** [*Overruled*, 17 A. 106, P.C.; *Not F.*, 18 C. 635, 26 B. 76 = 3 Bom. L.R. 431, 22 P.R. 1905 = 57 P.L.R. 1905; *F.*, 11 A. 328, 12 A. 392, 12 A. 179; *Cons.*, A.W.N. 1888, 253; *R.*, A.W.N. 1888, 295, A.W.N. 1889, 204; *D.*, A.W.N. 1890, 9.]

(4748)—*O. 23, rr. 1, 2, 3, 4, (=Civ. Pro. Code, 1882, ss. 373, 374, 375 and 375-A)*—S. 375-A of the Code of Civil Procedure refers to applications in suits other than those under Ch. XXII, and enacts that the provisions of that Chapter, and especially of ss. 373, 374 shall not apply to such applications, but it does not prevent the provisions of s. 375 being brought into operation after the Court has passed a decretal order refering a suit to the Commissioner. PRAGDAS v. GIRDHURDAS, **3 Bom.L.R. 431 = 26 B. 76.**

(4749)—*O. 23, rr. 1, 3, sch. II, r. 20 (=ss. 373, 375, 525, Civ. Pro. Code, 1882)—Award—Compromise amending award—Delay in acting upon its conditions.*—*Held* that:—It is competent to the parties to compromise the proceedings under s. 525 of the old para 20 of second schedule to the new Code of Civil Procedure, by altering, amending or adding to the award. S. 375 as well as s. 373 of the former (Rules 3 and 1 of the O. XXIII of the latter Code) is as applicable to these proceedings as to other cases. (31 C. 516, *R.*) Where the compromise distinctly provides that, as regards matters not expressly dealt

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with therein, the terms of the award should apply, the decree should embody all the conditions of the compromise as well as all the subsisting terms of the award. When time is not so essentially a part and parcel of a compromise that even a short delay in not acting upon it is fatal to the interests of either side, a delay of one or two days in not complying therewith, especially when the defaulting party does not seem to be responsible therefor, cannot be regarded as such a serious breach of its conditions as to entitle either party to repudiate the compromise altogether. BEHARI LAL v. DHOLAM DAS, **38 P.W.R. 1910=5 Ind. Cas. 994.**

(4750)—O. 23. r. 1, O. 22, r. 11, s. 107—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 8 A. 82.

(4751)—*O. 23, r. 1 and O. 33, r, 11 (=ss. 373, 412, Civ. Pro. Code, 1882)—Pauper suit—Compromise of the suit—Withdrawal of the suit—Failure in the suit.*—Where a pauper plaintiff withdraws from a suit without permission under s. 373 of the Code of Civil Procedure, 1882, as the result of a compromise by which he obtains a substantial part of the relief claimed, he fails in the suit within the meaning of s. 412 of the Code of Civil Procedure. SECRETARY OF STATE v BHAGIRATHIBAI, **8 Bom.L.R. 689 =31 B. 10.**

(4752-4753)—*O. 23 r. 1, O.33, r. 11 (=ss. 373, 412, Civ. Pro. Code, 1882) Withdrawal of pauper suit by plaintiff—Failure in the suit—Court-fees, payable to Government, order as to.*—Failure by adjudication is not indispensable to attract the operation of s. 412 of the Code. (21 M. 113, *R.*). If a pauper plaintiff withdraws the suit with liberty to bring a fresh suit, he must be considered, for the purposes of s. 412, to have failed in the suit, withdrawn. Entire absence of success is failure. In the case of such withdrawal, the plaintiff must be directed to pay to the Government the Court-fees, which he would have had to pay if he had not been permitted to sue as a pauper. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NARAYAN BALKRISHNA KULKARNI, **29 B. 102=6 Bom. L.R. 1122.** (15 B. 77, 18 B. 464, *D.*)

(4754)—*O. 23, r. 1, O. 41, r. 22 (=Civ. Pro. Code, 1882, ss. 373, 561)—Appeal, right of appellant to withdraw, extent of.*—Where a respondent, has, under s. 561 of the Civ. Pro. Code, taken objections to the first Court's decree, which he could have taken by way of appeal against a decree partly against him, then, if the hearing has begun, the appellant cannot withdraw the appeal so as to prevent the respondent's cross-objections being heard, though he could have done so at any time before the hearing began. But where, the decree being wholly in the respondent's favour, he could neither appeal nor file objections under s. 561, the appellant cannot be prevented from exercising his ordinary right to withdraw his appeal at any time up to its actual decision. So, in cases where no objections whatever have been filed by the respondents to the appeal, it is not competent to the appellate Court to refuse to allow the appellant to withdraw his appeal at any time before judgment, and even subsequent to the close of the hearing of the appeal. KALYAN SINGH v. RAHMU, **23 A. 130.** (A.W.N. 1892, 58, 17 A. 518, *R.*; 3 M.H.C. 302, 9 B. 28, *D.*)

(4755)—*O. 23, r. 1, sch. 2, r. 20 (=ss. 373, 525, Civ. Pro. Code, 1882)—Application to file an award, sch. II, made without intervention of Court—Witharawal*—S. 373, Civ. Pro. Code, 1882, will apply to an application to file an award made without the intervention of the Court; and the plaintiff can withdraw his application before final judgment and the preparation of the decree. GAURI SHANKAR v. MAIDA KOER, **31 C. 516.**

(4756)—*O. 23, r. 1, cl. (2)—Withdrawal of suit "other sufficient ground," meaning of—Inability to prove case, whether sufficient ground for seeking Court's permission to withdraw suit—Suit for rent—Petition for withdrawal to enable plaintiff to join an alternative cause of action for use and occupation in a separate suit.*—The words "other sufficient ground" in O. 23, r. 1, cl. (2) of the Civ. Pro. Code, 1908, mean that the ground must be one *ejusdem generis* with the formal defect referred to in sub-clause (*a*). Mere inability of a party to prove his case is not sufficient ground for permitting him to withdraw it with leave to institute a fresh suit. Plaintiff, in a suit for rent, applied for leave to withdraw her case, with liberty to bring a fresh suit, on the ground that her witnesses were won over by the other side and that she was unable to prove her claim. She stated that, in the fresh suit, she wanted to add an alternative prayer for use and occupation; *Held* that there were no sufficient grounds for permitting the plaintiff to withdraw her suit. BURATHAGUNTA PENTADEE v. THURLAPATTI RAJAMMA, **8 Ind. Cas. 868=9 M.L.T. 204.** (11 C.L.J. 45, 33 B. 722, 11 Bom. L.R. 1109, 4 Ind. Cas. 252, *R.*)

——**O. XXIII, r. 2 (=1882, s. 374=1877, s. 374=1859, s. 97.)**

See ABANDONMEMT OF PART OF CLAIM.

See WITHDRAWAL OF SUIT.

(4757)—*O. 23, r. 2 (=Civ. Pro. Code, 1882, s. 374)—Limitation—Application for execution, withdrawal of application of principle of.*—The rule contained in s. 374 of the Civ. Pro. Code, 1882, *viz.*, that when a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, does not apply to execution applications. (6 B

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

681, *Diss.*; 22 C W.N. 512, *F.*) The plaintiff obtained a decree in 1874 and applied for its execution first on the 4th of August, 1875, then, on the 6th of July, 1878, and a third, on the 23rd July, 1880. This last application was withdrawn by the plaintiff at the request of the judgment-debtors with the permission of the Court to make another application. *Held* that another application made by the plaintiff for the execution of the decree on 30th November, 1882, was not barred, the principle of the rule in s. 374 of the Civ. Pro. Code, 1882, not being applicable to execution proceedings. TARACHAND MEGRAJ v. KASHINATH TRIMBAK, **10 B. 62.** [*Diss.*, 10 A. 71; *F.*, 18 C. 462, 18 C. 635; *R.*, 29 B. 219=7 Bom. L.R. 90; *D.*, 11 B. 467.]

(4757-*a*)—O. 23, r. 2—*See* NOS. 2673, 4739, 4740, 4741, 4742, 4743, 4744, 4745, 4746, 4747, 4748, *supra*.

(4758)—*O.* 23, *r.* 2, *s.* 141 (=*Civ. Pro. Code*, 1882, *ss.* 373 & 647)—"*Suit*"—"*Appeal*".—S. 647 makes s. 373 of the Code applicable to proceedings in execution. The words "suit" and "appeal" in s. 647 apply to those proceedings generally known as a suit and an appeal, *i.e.*, to suits and appeals in the strict acceptation of the terms, and they were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. RADA CHARAN v. MAN SINGH, **12 A. 392, F.B. = A.W.N. 1890, 119.** [*Diss*, 18 C. 462, 18 C. 515, 37 P. 1892, *N.F.*, 15 M. 240, 18 C. 635; *R.*, 26 B. 76=3 Bom. L.R. 431.]

(4759)—O. 23, r. 2, s. 141—*See* LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 7 A. 359=A.W.N. 1885, 51, 6 B. 681.

——O. XXIII, r. 3 (=1882, cf. s. 175=1877, s. 375=1859, s. 98).

See COMPROMISE.

(4760)—*O.* 23, *r.* 3 (=*Civ. Pro. Code*, 1882, *s.* 375)—*Compromise—Unlawful object—Stifling prosecution.*—The Court of first instance gave the parties to understand that a criminal prosecution was likely to take place against one or the other of them if the case went on. With the object of escaping from liability to be prosecuted, the parties entered into a compromise. *Held* that the compromise was not a lawful one. GANGA PRASAD v. HANUMAN, **A.W.N. 1883, 145.**

(4761)—*O.* 23, *r.* 3 (=*Civ. Pro. Code*, 1882, *s.* 375)—*Compromise, enforcement of—Fresh suit, right of, reserved.*—Where the previous suit, brought by plaintiff to recover a certain *jote* of which he had been dispossessed by defendant, was compromised, the defendant giving up a half-share of the land claimed and agreeing to give up a half share of another *jote* of which he had dispossessed the plaintiff, and the plaintiff

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was given an express right to recover the second *jote*, if it was not restored according to the defendant's undertaking, a fresh suit for the recovery of the second *jote*, on the failure of the defendant to carry out his agreement, is maintainable, and there is nothing in the Civ. Pro. Code, s. 375, to prevent the Court from giving effect to it in the suit. GUPTA NARAIN DASS v. BIJOYA SUNDARI DEBYA, **2 C.W.N. 663.** [*R.*, 2 A.L.J. 680=A.W.N. 1905, 128, 1 C.L.J. 388.]

(4762)—*O.* 23, *r.* 3 (=*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 98)—*Registered agreement by plaintiff agreeing to accept certain property of defendant in adjustment of suit claim—Agreement not recorded—Right of plaintiff to obtain decree and execute against defendant.*—The parties to a suit executed a written agreement, which was duly registered, whereby the plaintiff agreed to accept the property of the defendant, specified in the agreement, in adjustment of the said suit. The agreement was not recorded under s. 98 of Act VIII of 1859. Plaintiff proceeded with his suit, obtained a decree and sold the property mentioned in the agreement in execution of the said decree. The sale-proceeds being insufficient to satisfy the decree, other property belonging to the defendant was attached and sold. The defendant brought a suit for damages. *Held* that the agreements to withdraw the previous suit and to accept the properties of the said defendant in discharge of the claim were concluded agreements, and he was therefore entitled with interest to the sum which the peoperty not mentioned in the agreement fetched at the sale under the decree obtained by the then plaintiff. T. VENKATACHALASWAMI CHETTIAR v. KRISHNASAWMY IYER, **8 M.H.C. 1.**

(4763)—*O.* 23, *r.* 3 (=*Civ. Pro. Code*, 1882, *s.* 375)—*Power of Court to frame an issue as to a legal compromise subsequent to suit.*—S. 375, Code of Civil Procedure, was intended to meet cases where the parties, having agreed to compromise, subsequently fall out. When a legal compromise subsequent to the suit is alleged by one party and denied by the other, the Court has power to frame an additional issue as to its existence, and, if it is proved, to give effect to it. APPASAMI NAYAKAN v. VARADACHARI, **19 M. 419=4 M.L.J. 263.** [*R.*, 12 C.P.L.R. 56.]

(4764)—*O.* 23, *r.* 3 (=*Civ. Pro. Code*, 1882, *s.* 375)—*Compromise dealing with matters extraneous to suit—Procedure.*—A decree cannot be passed in terms of a compromise which does not deal with any of the reliefs claimed in the plaint, but deals with matters not the subject-matter of the suit. Nor is the Court justified in dismissing the suit as *per* compromise, recording the same. The proper course for the Court to adopt is to inform the parties that the terms cannot be embodied in a decree, and to ascertain from them or on evidence whether the term praying for dismissal of the suit is

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absolute or conditional on all the terms being incorporated. In the latter case, the suit should be proceeded with. MUTHU VIJAYA RAGUNATHA UDAYANA TEVAR v. THANDAVARAYA THAMBIRAN, 22 M. 214. [*F.*, 77 P.R. 1908 = 140 P.W.R. 1908; *R.*, 1 C.L.J. 388, 16 M.L.J. 354 = 30 M. 478, 30 M. 421 = 17 M.L.J. 255.]

(4765)—*O. 23, r. 3 (= Civ. Pro. Code, Act XIV of 1882, s. 375)*—*"Relates to the suit."*—The words "so far as it relates to the suit" in s. 375 must be restricted to relief which the Court could have given in the suit, and will not embrace reliefs which could only have been given in a suit based upon a different cause of action. Matters outside the scope of the suit should be excluded from the decree. VENKATAPPA NAYANIM v. THIMMA NAYANIM, **18 M. 410.** (*F.*, 77 P.R. 1908 = 140 P.W.R. 1908 : *R.*, 24 C. 908, F.B., 1 C.L.J. 388, 30 M. 478.)

(4766)—*O. 23, r. 3 (= Civ. Pro. Code, 1882, s. 375)*—*Compromise of suit—Withdrawal of consent before decree.*—An adjustment out of Court, of a pending suit, is binding on the parties, and neither of them can withdraw from it; and its terms may be proved, notwithstanding the fact that one of the parties may have withdrawn from it, or may deny it. KARUPPAN v. RAMASAMI. **8 M. 482.** (7 B. 304, *F.*) [*F.*, 9 M. 103; *Appr.* 20 B. 304, 24 C. 908, F.B.; *R.*, 5 O.C. 49, F.B., 19 M. 419, 12 C.P.L.R. 56, 12 M.L.J. 360.]

(4767)—*O. 23, r. 3 (= Civ. Pro. Code, 1882, s. 375)*—*Agreement to compromise appeal—Petition to Court by both parties—Withdrawal of consent by one party—Remedy.*—Where the parties to an appeal apply to the lower Court, to which an issue has been remitted for trial, to move the appellate Court to pass a decree in accordance with the terms of a compromise contained in their petition, it is open to the appellate Court to pass a decree in accordance with the agreement, though one of the parties has withdrawn his consent prior to the passing of such decree, and objects to its being made. APPASAMI v. MANICKAM, **9 M. 103** (7 B. 304, 8 M. 482, *F.*; 11 C. 250, *Observed.*) [*F.*, 18 M. 410 = 5 M.L.J. 145; *Appr.*, 16 B. 202, 5 O.C. 49, 20 B. 304; *R.*, 24 C. 908, F.B. = 1 C.W.N. 597, 12 C.P.L.R. 56, 23 M. 101, 12 M.L.J. 360; *D.*, 9 O.C. 365.]

(4768)—*O. 23, r. 3 (= s. 375, Civ. Pro. Code, 1882)*—*Decree on compromise—Appealability—Applicability of—Duty of trustee—Title adverse to beneficial owner.*—S. 375 of the Civ. Pro. Code, merely covers cases, in which all parties consent to have the terms (of a compromise entered into out of Court) carried out and judgment entered up, and not cases where the parties or some of them have declined to carry out the agreement before the judgment has been recorded. Therefore a decree in terms of a compromise, that was recorded at the instance of some only of the parties to a suit, is appealable. (7 B. 304, *Questioned*). [*Commented upon*, 9 M. 103; *Cons.*, 24 C. 908, F.B.; *Diss.*, 16 B. 202, 20 B. 304; *R.*, 5 O.C. 49, 12 C.P.L.R. 56, 2 O.C. 67.] The first duty of a trustee is to carry out the directions of the settlement, except such as are illegal, and if he has once acknowledged himself to be a trustee, he cannot set up a title adverse to that of the beneficial owner. HARA SUNDARI DEBI v. KUMAR DUKHINESSUR MALIA, **11 C. 250.**

(4769)—*O. 23, r. 3 (= s. 375, Civ. Pro. Code, 1882)*—*Transfer of Property Act, s. 83.*—Where a sum of money is deposited in Court under s. 83 of the Transfer of Property Act, by the vendee of the mortgagor, and the mortgagee raises objections, which however, are subsequently withdrawn in pursuance of a compromise, the mortgagee is not precluded by s. 375, Code of Civil Procedure, from enforcing the terms of the compromise by the fact that those terms were not brought to the knowledge of the Court. TATAYYA v. PICHYYA, **13 M. 316.**

(4770)—*O. 23, r. 3 (= Civ. Pro. Code, 1882, s. 375)*—*Compromise of suit—Subsequent dissent of one of the parties—Decree in terms of compromise.*—S. 375 of the Civ. Pro. Code, is intended to enforce any agreement by way of compromise between the parties to a proceeding, even though one of the parties who has so agreed should wish to withdraw his consent. It cannot therefore be contended that the section only applies where the parties continue to abide by their agreement at the moment of moving the Court for a decree in terms of the compromise, and that where they do not continue in accord the only remedy on the agreement sought to be enforced is by a suit for specific performance. Where such an agreement contains two undertakings, one only of which relates to the subject of the suit, but the two matters are quite distinct so that the performance of he one is not dependent on the performance to the other, it is competent to the Court to proceed under the section to enforce that portion of the compromise which relates to the subject-matter of the suit. RUTTONSEY LALJI v. POORIBAI, **7 B. 304.** [*F.*, 8 M. 482, 9 M. 103; *R.*, 16 B. 202, 18 M. 410 = 5 M.L.J. 145, 5 O.C. 49, 20 B. 304, 24 C. 908, F.B., 12 C.P.L.R. 56, 2 O.C. 67, 1 C.L.J. 388; *Doubted*, 11 C. 250.]

(4771)—*O. 23, r. 3 (= s. 375, Civ. Pro. Code, 1882)*—*Adjustment by agreement of parties—Recording of agreement—Decree in accordance with agreement.*—Where the parties to a suit have, by an agreement, adjusted the subject-matter of the suit, the Court is empowered under s. 375, Civ. Pro. Code, to direct that such agreement be recorded, and to make a decree in accordance therewith, even if one of the parties to such agreement object. (*O'Kinealy*

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and Beverley, JJ., dissenting). (11 C. 250, *Diss.*) This is not a case under s. 375, Civ. Pro. Code. So, the Court is not empowered to make such an order.—Per *O'Kinealy and Beverley, JJ.*—The High Court on its original side, exercising the equitable jurisdiction of the High Court of Chancery, would not, on a contested motion, give a decree of this nature. Per *O'Kinealy, J.*—S. 375, Civ. Pro. Code, applies only to a case in which the adjustment or satisfaction is made in Court, and cannot and ought not to be extended so as to specifically perform agreements made out of Court. BROJODURLADH SINHA v. RAMANATH GHOSE, **24 C. 908=1 C W N. 597, F.B.** (11 C. 250, *Diss.*) [*F.*, 12 C.P.L R. 56; *Appr.*, 25 C. 757, F.B.; *R.*, 2 O.C. 67, 24 M. 326, 26 B.76=3 Bom. L R 431, 31 C. 357=8 C.W.N. 197, 10 Bom. L.R. 366=32 B. 69=1 Ind. Cas. 622, *D.*, 5 C.W.N. 877.]

(4772)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375) — *Compromise decree — Extraneous matter.*—A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions if they are the considerations for the compromise of the subject-matter of the suit, must be incorporated in the decree; but if the other conditions are independent of it, they may be regarded as surplusage. PURNA-CHANDRA SARKAR v. NIL MADHUB NANDI, **5 C.W.N 485.** [*R.*, 1 C.L.J. 388, 17 M L.J. 255=2 M L.T. 319=30 M. 421, 35 C. 837=12 C.W.N. 819=7 C.L.J. 492; *D.*, 140 P.W.R. 1908=77 P.R. 1908.]

(4773)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375)—*Compromise— Agreement between plaintiff and one of the defendants—Contract, contingent.*—The plaintiff's son who was managing the suit and his pleader made an agreement with one of the defendants that should the plaintiff be successful in his suit with regard to certain land in possession of that defendant, then the plaintiff should purchase the said land from that defendant for Rs. 300. *Held*, that this agreement was not a compromise under s. 375, Civ. Pro. Code, 1882, but was a contingent contract to purchase, and was, as such, binding on the plaintiff. ISMAL v. DAUDBHAI, **2 Bom. L.R. 118.**

(4774)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375)—*Reference to Commissioner—Arbitration—Award—Agreement.*—There is nothing in Ch. XXXVII of the Code of Civil Procedure which would prevent a submission and the award made thereon being used as an agreement under s. 375 of the Code. PRAGDAS v. GIRDHURDAS, **3 Bom. L.R. 431=26 B. 76.**

(4775)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375).—When a plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree, in the terms of a compromise, whereby the status of landlord and tenant is established between the plaintiff and defendant, the Court in the exercise of its equitable jurisdiction is not precluded from granting such relief against forfeiture as it might have granted had the status arisen from contract or custom. KRISHNA BAI v. HARI, **8 Bom. L.R. 813=31 B. 15=1 M.L.T. 370.**

(4776)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375)—*Compromise—Subsequent disagreement—Application to record agreement—Practice.*—Upon the true construction of s. 375, Civ. Pro. Code, it is not necessary that the parties should be still of one mind at the time an application is made to record the agreement referred to in that section; it is enough that an agreement in adjustment of the suit has once been come to, although, at the time of the application, one of the parties either denies that it was made or wishes to withdraw from it or puts forward some other objection to its enforcement. The Court being already seized of the suit which is adjusted, the application to record the alleged agreement is necessarily a proceeding in that suit; and the Court, in connexion with that proceeding, necessarily has all the powers and has thrown upon it all the duties which appertain to it in regard to any other questions arising in any suit upon its file. THE GOKULDAS BULABDAS MANUFACTURING CO. LD. v. JAMES SCOTT, **16 B. 202.** (7 B. 304, *F.*; 11 C. 250, *Diss.*) [*Appr.*, 20 B. 304; *R.*, 24 C. 908, F.B.=1 C.W.N. 597, 23 M. 101, 90 C. 365.]

(4777)—*O. 23, r. 3—Compromise—Adjustment of a case in whole or in part—Terms offered by one party, not accepted by the other, effect of—Court, power of, to introduce new terms when all the terms not settled by compromise.*—In a suit against the defendant, who had built on the plaintiff's land, the plaintiff offered in Court to allow the defendant to retain his building subject to a rent fixed by him, but the Court decided to allow the defendant to remain on the plaintiff's land on payment of a rent fixed by the Court; *held*, that there was no agreement between the parties amounting to an adjustment of the case in whole or in part under O. 23, r. 3 of Act V of 1908. NAWAB GETI ARA BEGAM v. JAGAN NATH, **9 Ind. Cas. 426.** (9 O.C. 365, *R.*)

(4778)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, *s.* 375)—*Compromise also in respect of matters other than subject-matter of suit—Right of suit on compromise in respect of other matters.*—A suit cannot be brought upon a compromise with respect to matters other than those which were involved in the suit in which the compromise was made. PATI RAM PATEL v. MOTI RAM PATEL, **10 C P L.R. 56.**

(4779)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882 *s.* 375)—*Adjustment of suit—Subsequent objection by a party—Power of Court to pass decree*

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according to compromise.—Where the parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court is empowered to direct that such agreement be recorded, and to make a decree in accordance therewith, even though one of the parties to the agreement object. BHIWA TELI v. RAGHU, **12 C.P.L.R. 56.** (24 C. 908 *F.*)

(4780)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code, 1882)—Compromise decree not in accordance with relief claimed for in the plaint—Appeal—Procedure.*—The father of the plaintiffs mortgaged a portion of ancestral land to the defendant and, during the father's lifetime, the plaintiffs brought a suit against the mortgagee for a declaration that the mortgage should not affect their right of inheritance after their father's death. The parties came to terms and filed a *razinama* in Court by which it was agreed that the plaintiffs were to pay certain amount within one week and take possession of the mortgaged property. Upon this, the Court passed a decree in favour of the plaintiffs for possession of the land in accordance with the compromise. *Held*, that the compromise and the decree passed in accordance therewith were not limited, and did not relate to the subject-matter of the suit, which was merely for a declaration of the plaintiff's right to have the mortgage of the land by their father declared void and ineffectual, so far as their rights of succession were concerned, and not for the possession of the land. *Held*, that, therefore, the decree did not "relate to so much of the subject-matter of the suit as was dealt with by the compromise," and was not final within the purview of s. 375, and that an appeal, therefore, lay from that decree (18 M. 410 ; *F.*, 5 C.W.N. 4, *D.*) *Held*, that the proper course for the lower Court to adopt, in the circumstances, was to inform the parties that the terms of the compromise could not be embodied in a decree and if it appeared that the compromise was arrived at conditionally upon its being incorporated in the decree to proceed with the suit. BHAG SINGH v. NAZIR, **77 P.R. 1908=140 P.W.R. 1908.** (22 M. 214, *F.*)

(4781)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code, 1882)—Compromise need not be reduced to writing—Oral evidence of its terms under s. 91, Evidence Act—Specific Relief Act, s. 9.*—S. 375 of the Code does not require that the agreement or compromise itself shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit, or in other words, that a note of the terms should be made in the proceedings. The agreement or compromise itself, that is made out of Court may be in writing or by word of mouth. If the Court did not record the terms of it, s. 91, Evidence Act, is no bar to a suit being brought on the terms of the compromise. Moreover, s. 375 only allows the decree to be final, so far as relates to the subject-matter of the suit. So, when an agreement or compromise is made in a suit under s. 9, Specific Relief Act, the Court's decree under s. 375 does not bar any person from suing to establish his title to property and recover possession thereof. BI YA v. ON GAING, **3 L B.R. 243.**

(4782)—*O. 23, r. 3 (=Civ. Pro. Code, 1882, s. 375)—Suit by trustee—Decree in favour of trustee—Compromise giving up rights acquired by decree—Agreement opposed to purpose and usage of institution—Liability of agreement application to record—Agreement and pass decree in pursuance thereof—Permissibility.*—It is not in the power of a trustee to ignore and alter the fundamental character and uses of a religious institution as ascertained by judicial authority. Where an institution exists for the purpose of religious worship, but the exact form of worship or the class for whose benefit it was established cannot be discovered from the instrument creating the trust, (or where there is no such instrument) the Court can find no other means of deciding those questions than through the medium of inquiry into what has been the usage of the worshippers in respect thereto, and if, the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded or to say to the other worshippers that they (the managers) had changed their opinions in regard to the institution and that those worshippers should conform themselves to those changed opinions. It is the duty of a trustee to maintain the customary usage of the institution, and if he fails to do so, he is guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it. The trustee of a temple instituted a suit for a declaration that the defendant community was not entitled to enter the temple, and for an injunction and damages. The plaintiff obtained a decree in his favour in the first Court. During the pendency of an appeal by the defendants, the plaintiff entered into a compromise giving up all that he got by the decree of the first Court. Thereupon, the *gurukkal* of the temple and some other worshippers applied for and were made parties to the proceedings as supplemental plaintiffs. The trustee-plaintiff withdrew from the compromise, and the supplemental plaintiffs opposed the application for the agreement being recorded and a decree passed in terms thereof. *Held* that, having regard to the finding that by custom and the *shastras* the defendants were prohibited from entering the plaint temple and that their entry into the temple necessitated purificatory ceremonies, the propose compromise was essentially a breach of trust on the part of the first plaintiff and was not a *bona fide* transaction. It was therefore not a lawful

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compromise within the meaning of s. 375 of the Code. RAJAH M. BASHKARA SETUPATHI AND IRULAPPA NADAN v. NARAYANASAMI GURUKKAL, **12 M.L.J 360.** [*Confirmed*, 21 M. 236=12 C.W.N. 946=4 M.L.T. 101=18 M.L.J. 307=10 Bom. L.R. 781=8 C.L.J. 230, P.C.=35 I.A. 176.]

(4783)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code, 1882)—Agreement between parties to suit that plaintiff and his young r brother should execute a sale-deed of plaint property to defendant, within a week, and that the suit should be dismissed in default—Refusal of younger brother to join in its execution—Impossibility of performance—Contract Act, s. 56.*—S. 375 of the Code does not preclude the parties to a suit from entering into an agreement, to the effect that the plaintiff and his younger brother should execute a joint sale-deed, within a week, conveying the property in dispute to the defendant, for a certain amount, and that, if the plaintiff should fail to do so, the suit should be dismissed. Nor does it preclude the Court from giving effect to it, if satisfied that the party has failed to perform his part. The refusal, by the younger brother, to join in the execution of the agreement cannot make the performance of the agreement by the plaintiff impossible, within the meaning of s. 56, Contract Act. RANGASWAMY KAUNDAN v. TRISA MAISTTY, **17 M.L.J. 37.**

(4784)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code, 1882)—Suit on bond for money decree—Charge created by compromise—Relief claimed under compromise different from relief claimed in plaint—Courts powers in granting relief.*—The claim of the plaintiff in the plaint was only for money due under bonds which gave no charge on the defendant's property, but the defendants agreed to such a charge as one of the terms of the compromise, which they entered into with the plaintiff. The Court passed a decree in terms of the compromise. Subsequently, the defendants questioned the validity of the charge on the ground that the plaintiff prayed only for a money decree in the plaint, without claiming any charge and that it was, therefore, not competent to the Court to give a decree creating a charge, even though they agreed to such a charge. *Held*, there was nothing in principle or in the language of s. 375 of the Code to preclude the Court from embodying in the decree the charge which the parties agreed to as security for the debt or to restrict the relief to be granted in accordance with the compromise to what is prayed for in the plaint or less. JOTI KURUVETAPPA v. SRI DEVANDRA KIRTI BUTTARAKAPPATRACHARIA, **16 M.L.J. 354=30 M. 478.** (18 M. 414, 22 M. 214, *Commented on.*) [*F.*, 6 M.L.T. 312=3 Ind. Cas. 701, 2 Ind Cas. 430; *R.*, 30 M. 421=17 M.L.J. 255=2 M.L.T. 349.]

(4785)—O. 23, *r.* 3 (=s. 275, *Civ. Pro. Code*, 1882)—*Compromise—Court to enquire as to agreement.*—It is not necessary that the parties should assent to the compromise before the Court and the Court is at liberty, if any party refuses to assent to it, to enquire whether an assent had been given elsewhere and if it finds this proved, it can pass a decree in accordance with the compromise. HARKHA v. KIRKPATRICK, **8 P.R. 1896, F.B.**

(4786)—*O. 23, r. 3 (=old s. 375)—Compromise decree—Finality—Lawful agreement.*—A compromise decree is final and no appeal lies. But it can be set aside on the ground of fraud by a suit or by review. This section requires that there has been an agreement the objects of which are not unlawful, and it has nothing to do with the question of the legal validity of the agreement. MUSST. LALAIRI v. HUSSAIN SHAH, **114 P.R. 1892.** (105 P.R. 1889, 81 P.R. 1890, *R.* & *F.*)

(4787)—*O. 23, r. 3 (=Civ. Pro. Code, 1882, s. 375)—Appeal—Compromise—Decree embodying matters extraneous to suit—"Relating to suit," meaning of—Partition suit—Compromise decree—Embodying of extraneous matter validity of.*—Where a compromise decree embodied matters extraneous to the suit an appeal lay from the decree, since a decree under s. 375, Civ. Pro. Code, Act XIV of 1882, was final, so far as it related to so much of the subject-matter of the suit as was dealt with by the compromise. The words "so far as it relates to the suit" in s. 375 of the Code were restricted to relief which the Court could have given in the suit, and did not embrace reliefs which could only have been given in a suit based upon a different cause of action. Where a partition suit was compromised, the Court could not embody in the decree stipulations which were based upon the assumption that the suit property was impartible. LAKSHMIKANTHAYAMMA v. RAJA OF KALAHASTI, **5 M.L.J. 145.**

(4788)—*O. 23, r. 3 (=old s. 375)—Compromise decree—Appeal—Revision—Act XL of 1858—Guardian—Appointment of.*—The mode of appointing a guardian under s. 3, Act XL of 1858, is by a certificate. Where a person, on the day on which he was appointed guardian *ad litem* but before the issue of a certificate, entered into a transaction on behalf of a minor, he was held to have acted *intra vires*. A guardian *ad litem* cannot compromise a suit without the express sanction of the Court. Such a compromise being a material irregularity will be thrown out in revision. A decree based on a compromise is final and no appeal lies therefrom. MUSST. RAMBHAJJI v. HARNARAIN, **105 P.R. 1889.** (114 P.R. 1882, *R.* & *F.*)

(4789)—*O. 23, r. 3 (=old s. 375—Compromise—Right to withdraw.*—A party is not at liberty to withdraw his consent once given unconditionally to a decree being passed in

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terms of the compromise. HAMID ULLA v. HAYAT KHAN, **182 P.R. 1888.**

(4790)—*O.* 23, *r.* 3 (=*old s.* 375)—*Compromise by guardian—Grounds for setting aside—Widow—Exclusion from share—Custom*—A compromise decree affecting the interests of a minor and made with consent of Court can be set aside if the Court at the time was not fully aware of the facts even though there be no fraudulent withholding of knowledge or concealment of facts. There is no custom among Khanna Katris, carrying on business in the cantonment of Peshawar, that a widow shall be excluded from her legal share, receiving maintenance only. HAR NARAIN v. MUSST. DEOKI, 24 P.R. 1893. [*R.*, 34 P.R. 1909=181 P.L.R. 1908=169 P.W.R. 1908, 54 P.R. 1906; *Cited*, 99 P.R. 1907.]

(4791)—*O.* 23, *r.* 3 (=*old s.* 375)—"*Lawful,*" *meaning of—Compromise decree—Setting aside of.*—The word "lawful" refers to the subject-matter of the compromise and not the binding character of the parties. A compromise-decree can be set aside either by a suit or by a review. BUDHU MAL v. MUSST. RUP KUAR, **81 P.R. 1892.** [*R. & F.*, 114 P.R. 1892.]

(4792)—*O.* 23, *r.* 3 (=*old s.* 375)—"*Lawful*"—*Setting aside compromise decree.*—The word "lawful" refers to the terms of the compromise and not to the binding character of the parties. ALA BAKHSH KHAN v. KASIM ALI KHAN, 48 P.R. 1895.

(4793)—*O.* 23, *r.* 3 (=*s.* 374, *Civ. Pro, Code*, 1882)—*Compromise likely to give trouble—Powers of Court to record—Effect of resiling from compromise—Indian Contract Act (IX of* 1872), *s.* 24—*Unlawful agreement—Different portions separable.*—A Court cannot disregard a compromise merely because it sees that the working out of the compromise is likely to give trouble. A lawful compromise arrived at by the parties must be recorded by the Court, which must pass a decree in accordance therewith. A Court has power to determine whether a compromise has been arrived at, and it is not bound to disregard it if any of the parties resiles from it. (19 M. 419, 20 B. 304, 24 C. 908, *R. & F.*) By a compromise the defendant agreed to sell his property in lieu of a debt to the plaintiff, and to relinquish his ex-proprietary holding in his favour, and the plaintiff accepted the compromise. The Court below passed a decree in terms of the compromise. *Held*, that the compromise was lawful, except in respect of the agreement for the relinquishment of the ex-proprietary holding, and the parties having treated the different parts of the compromise as separable and having acted upon them, the compromise, so far as it related to other matters, was lawful. KHURSHED ALI v. WAZIR-UN-NISSA, **7 A.L.J. 778=6 Ind. Cas. 857.**

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(4794)—*O.* 23, *r.* 3 (=*s.* 375, *Civ. Pro. Code*, 1882)—*Compromise decree containing reliefs not covered by suit, validity of.*—The mere fact that a compromise decree provided for reliefs, which the plaintiff could not have obtained in the suit, if it had been tried out, affords no ground for questioning the decree in execution (9 A. 229, 16 M.L.J. 354, 5 C.W.N. 485, *R.*) provided there is nothing unlawful in them, although the terms of the decree might have been objected to an appeal. ANANTHA NARAYANA AIYAR v. ABDUL KARIM, **17 M.L.J. 255=2 M.L.T. 349=30 M. 421.** (18 M. 410, 22 M. 214, *R.*) [*F.*, 2 Ind. Cas. 430.]

(4795)—*O.* 23, *r.* 3 (=*s.* 375, *Civ. Pro, Code*, 1882)—*Compromise, validity of—Suit, scope of.*—A sued B for damages for crops misappropriated. A petition of compromise was put in, by which the amount of damages was settled, and B also agreed to hold the land under A at a specified rent; *Held*, that the agreement as to the tenancy was outside the scope of the suit, and although incorporated in the decree, did not operate as *res judicata*. PURNA CHANDRA BURMAN v. PANCHKARI GHOSE, **5 C.L.J. 15.** (22 M. 508, P.C., *D.*)

(4796)—*O.* 23, *r.* 3 =(*s.* 375, *Civ. Pro. Code*, 1882)—*Compromise by a natural son in a suit against adopted son of his father—Binding nature of compromise on minor sons of natural son—Right of after-born son to impeach compromise—Compromise not registered as required by Registration Act, s.* 17—*Binding nature of compromise so far as it dealt with properties not subject-matter of suit—Hindu law*—Mitakshara *family—Right of adopted son's son to share in family property along with natural son of adoptor—Extent of his share.*—An Oriya Brahmin, governed by the *Mitakshara* law, took a son in adoption; after this, he had a natural son born. The plaintiffs, in the present suit, were the sons of the natural son of the owner, who made the adoption; and defendant No. 1, the son of the adopted son. The adopted son pre deceased the adoptor and, after the death of the latter, defendant No. 1, got his name registered in the Collectorate in respect of an eight annas share in certain Zemindaries left by the adoptive father of his father. Thereupon, the natural son of the owner brought several suits to recover, from the present defendant No. 1, the share of the Zemindaries, which he got registered in his name on the ground that the adoption was neither true in fact nor valid in law. The parties to these suits, however entered into a compromise and, in pursuance of the compromise, the present defendant No. 1 got possession of certain properties. The present first plaintiff was a minor during the pendency of the previous suits and second plaintiff was not born then. The present suit was for a declaration that the compromise effected by their father was not binding on plaintiffs and to eject defendants from the plaint properties and place

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them and their father in joint possession of the same. The petition of the compromise dealt also with properties not the subject of the previous suits. *Held*, the second plaintiff, not having been born at the time of the compromise, could not impeach it. So far as the first plaintiff was concerned, the first question for consideration was whether defendant No. 1, the natural son of an adopted son, was entitled to any share when there was a natural son to the adoptor. According to Hindu Law, an adopted son occupies the same position and has the same rights and privileges in the family of the adoptor, as the legitimate son, except in a few specified instances. An absolute adoption operates as birth of the boy in the family of adoption and as civil death in the family of birth. An adopted son, by the very fact of his adoption, acquires a vested interest in the ancestral property of his adoptive father; he does not become divested of such interest, though its extent may be altered, by the subsequent birth of a legitimate son of his adoptor, and the grandson by the adopted son acquires by birth a right in his grand father's estate, which entitles him to share in such property though his father be dead, along with the legitimate son of his grand father. And the share which an adopted son gets is a fifth of the entire property and a fourth of the natural son's share. (17 B. 100, 1 M.H.C. 45, *R. & F.*; (4 C. 425, *Exp. & Diss.*). Consequently, defendant No. 1 was entitled to a fifth of the whole property left by the adoptor. The next question was, whether the compromise was beneficial to the present plaintiffs. There is a considerable conflict of opinion as to whether the share to be allotted to the adopted son on partition is not more than one fifth. And the compromise, under the circumstances, was settled on terms most favourable to the present plaintiffs. Though the present first plaintiff was not a party to those suits, as the compromise was executed by the *Karta* of the family and as he was not prejudiced thereby, it was binding on him. (14 M.I.A. 367, 1 A. 651, 16 A. 231, 1 B.H.C. App. 51, *R.*) There was no proof that the compromise was the result of mistake, inequality of position, undue influence, coercion or fraud such as would be sufficient in law to vitiate it. Mere inequality of benefit could not afford sufficient ground for vitiating it. (2 M.I.A. 181, 7 M.I.A. 311, 14 M.I.A. 24, 8 C. 138, 22 B. 482, *R.*) [*R.*, 4 C.L.J. 323.] But that portion of the compromise, which dealt with properties not the subject of the previous suits, could not be enforced, since the petition of compromise was not registered as required by s. 17 of the Registration Act. (30 C. 783, 26 I.A. 101=22 M. 508, *R.*, 25 I.A. 9=20 A. 171, *Expl. & D.*) In the result, the plaintiffs were given a decree in respect of four-fifth of the plaint properties, which were not the subject-matter of the previous suits and, as regards properties comprised in the previous suits, the compromise-decree was held binding. BIRBHADRA RATH v. KALPATARU PANDA, **1 C.L.J. 388.** [*R.*, 35 C. 837=12 C.W.N. 849=7 C.L.J. 492; *Cons.*, 28 **A.** 78=2 A.L.J. 564=A.W.N. 1905, 195.]

(4797)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, s. 375)—*Suit for share of profits—Compromise*—Res judicata.—The plaintiff brought a suit under the Oudh Rent Act against the defendants for the share of the profits of certain lands for the years 1295, 1296 and 1297 Fasli; subsequently a petition of compromise was presented by parties and the suit was consequently dismissed under s. 175, Civ. Pro. Code. In August 1896, the plaintiff instituted another suit against the same defendants for her share of profits of the same land for certain years subsequent to 1297 Fasli. *Held*, that the previous decision based on the compromise operated as *res judicata* in regard to the plaintiff's right to recover profits as co-sharer not only for the years included in the first suit, but also for future years. *Held further*, that the plaintiff relinquished under the terms of the compromise her claim to profits as co-sharer, and in lieu thereof accepted from the defendants for her support an annual cash allowance and in default of the payment of this allowance the possession of certain specified lands. KISHAN SINGH v. GANESHA, **2 O.C. 112.**

(4798)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code*, 1882)—*Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—Public policy—Minority of some of the defendants.*—A person, who sues to recover money on a registered mortgage bond, and also money due on an account, may, in accordance with the terms of the compromise entered into under s. 375, obtain a mortgage-decree for the whole amount of his claims, including the (account) debt not secured by a mortgage. Such a compromise is neither illegal nor opposed to public policy. The fact that some of the defendants are minors makes no difference, if the Court approves of the compromise as being in their interest. SUBBARAYADU v. VENKATARATNAM, **17 M.L.J. 200.**

(4799)—*O. 23, r. 3 (=s. 375, Civ. Pro. Code*, 1882)—*Compromise, finality of—Appeal from decree passed on compromise—Interpretation of compromise, difference between parties in.*—In a suit for partition, the parties filed a written compromise but when the compromise was put before the Court, there arose, on the objection of the defendant, a dispute between them as to the interpretation of one of its clauses upon which the Court passed an order to the effect that, as there was a dispute as to the interpretation of the compromise, it could not be approved and the Court then proceeded to try the case. Some evidence in the case was then recorded and the case was adjourned to a future date for the hearing. On the date fixed for the hearing, one of the parties, the plaintiff, stated before the Court that he had settled the points of difference and he agreed to the interpretation

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put upon the clause by the defendant. The Court, thereupon, passed a decree based on that compromise. *Held*, on appeal, that there being no agreement between the parties as to the interpretation of the compromise when it was originally filed, there had been no real and genuine adjustment of the case before the Court and in fact no final compromise between the parties upon which the Court could proceed to decide the case. If the Court wished to act upon the compromise according to the amendment originally suggested by the defendant and subsequently agreed to by the plaintiff, a fresh compromise amending those terms should have been put in and verified by all the parties concerned. *Held*, further, that there being no decree passed in the case within the meaning of s. 375, Civ. Pro. Code, inasmuch as there had been no real agreement between the parties, the decree so passed was open to appeal and could not be considered as final. RAM LAL v. BALAK RAM, **9 O C 365**. (29 M. 104, 9 M. 103, 16 B. 202, 1 C.W.N. 597, 5 C.W.N. 877, 7 C.W.N. 419, *R.*)

(4800)—*O. 23, r. 3 (=Civ. Pro. Code*, 1859, s. 98)—*Satisfaction of claim.*—A Court cannot dispose of a suit according to a compromise if the plaintiff professes himself merely satisfied *aliunde*, it must be that the defendant has satisfied the plaintiff. JERVIS v. MANSFIELD, **12 P.R. 1867.**

(4800 *a*)—*O. 23, r. 3 (=Civ. Pro. Code*, 1882, s. 375)—*Agreement of compromise—Duty of Court to record lawful compromise.*—The terms of s. 375 are imperative and, under the section, the Court is bound to record any compromise between the parties except when the agreement of compromise is in itself unlawful. The lower Courts were therefore held to be wrong in having refused to act upon the compromise between the parties merely because, in their view, it was too favourable to the plaintiff. MOTIRAM v. YESU, **22 B. 238.**

(4800-*b*)—O. 23, r. 3—Whether a proceeding under s. 93 of the Bengal Tenancy Act is a suit within the meaning of—*See* BEN. ACT VIII OF 1885, 4 C.L.J. 564.

(4801)—O. 23, r. 3—*See* U.P. ACT XVII OF 1876, ss. 52, 53, 2 O.C. 67.

(4802)—O. 23, r. 3—*See* APPEAL—DECREES AND EXECUTION OE DECREES, 18 M. 410.

(4803)—O. 23, r. 3—*See* CONSENT DECREE, 5 C.W.N. 877.

(4804)—O. 23, r. 3—Compromiae decree—"Relates to the suit," meaning of—Registration of compromise—*See* LEASE—GENERAL, 6 M.L.T. 313=20 M.L.J. 20=33 M. 102=3 Ind. Cas. 701.

(4805)—O. 23, r. 3—*See* LIS PENDENS, 2 O. C. 330.

(4806)—O. 23, r. 3—Decree based on illegal compromise not binding—*See* MAHOMEDAN LAW—ALIENATION, **2 Ind. Cas. 865.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4807)—O. 23, r. 3—*See* PRACTICE AND PROCEDURE, 5 C.L.R. 464.

(4808)—O. 23, r. 3—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 76, 83, 31 C. 357=8 C.W.N. 197.

(4809)—O. 23, r. 3—*See* REVISION—SMALL CAUSE COURT CASES, 25 M. 548.

(4809-*a*) O. 23, r. 3—*See* NOS. 367, 1935, 1942, 2674, 3336, 3338, 4748, 4749, *supra* AND NO. 5140, 5801-*a*, 5803-*a*, *infra*.

(4810)—O. 23, r. 3, O. 31, r. 1—Unlawful compromise by trustee—Admitting beneficiaries as parties when trustee not interested—*See* HINDU TEMPLE, 12 C.W.N. 946, P.C.=4 M.L.T. 101=8 C.L.J. 230=31 M. 236=10 Bom. L.R. 781.

(4811)—*O. 23, r. 3, O. 32, r. 7 (=Civ. Pro. Code*, 1882, ss. 375, 462)—*Reference to arbitration in pending suit—Interest of minors involved—Order of reference not made by Court—Validity of award.*—During the pendency of a partition suit, in which the interests of some minors were involved, the parties referred the matters in dispute to certain arbitrators appointed by them. No order of reference was however made by the Court. The question was whether the award made by the arbitrators could be given effect to. *Held* that, assuming that the award was but the completion of the agreement of the parties, and that such agreement *plus* the award affected the rights of the parties in the pending suit, it could only be an agreement adjusting the suit, and as such could be recorded and acted upon under s. 375, Civ. Pro. Code, provided it was a lawful agreement. But the agreement was not lawful inasmuch as the submission related to the rights not only of the adult parties but of minors also. Leave of the Court was not obtained under s. 462, Civ. Pro. Code, either before the submission to arbitration of after the award, and the adjustment was therefore not binding on the minors, The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to leave such adjudication to a private tribunal. Such an agreement was one clearly falling within s. 462 of the Code. *Held* also that a partial adjudication being impossible in a partition suit, the adjustment could not bind even the parties thereto who were not minors. LAKSHMANA CHETTY v. CHINNATHAMBI CHETTI, **24 M. 326.** [*N.F.*, 8 C.L.J. 294; *R.*, 26 B. 76=3 Bom. L.R. 431 26 B. 109=3 Bom. L.R. 565, 6 O.C. 175, 17 C.P.L.R. 147, 33 B. 69=10 Bom. L.R. 366.]

(4812)—*O. 23, r. 3, sch. II, rr. 1, 17 (=ss 375, 506, 523, Civ. Pro. Code*, 1882 *and the second schedule, new Code)—Agreement to refer to arbitration—Decree, nature of—Scope—Adjustment of suit.*—On a party to an agreement applying to refer matters in dispute to an arbitrator, the Court has no power to make a

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

decree under s. 375, Civ. Pro. Code, that the agreement to refer to arbitration be recorded, that the suit be referred to an arbitrator (with all such powers and authorities as are vested in arbitrators under the Civ. Pro. Code) to be completed within 6 months, and that the records of the suit be delivered over to the arbitrator. Such a decree is in the nature of an order made under the arbitration sections of the Code (rather than under s. 375). S. 506 applies to the case where parties have agreed to refer in a pending suit, and s. 523 to the case where there is no pending litigation. S. 523 does not apply, when an agreement to refer to arbitration is not in writing. (29 C. 167, *R.*; 4 B. 1, *Doubted*). S. 375 is inapplicable to a mere agreement to refer to arbitration. Under that section, the subject-matter of the suit must be adjusted by the agreement. (26 B. 76, *D.*) Per *Maclean, C.J., Hill and Stevens, JJ.*, were not prepared to hold that under no circumstance could an agreement to refer to arbitration be properly treated as an adjustment of the suit such as is contemplated by s. 375. TINCOWRY DEY v. FAKIR CHAND DEY, **30 C. 218.**

(4813)—O. 23, r. 3, sch. II, rr. 1, 18—*See* ARBITRATION — REFERENCE TO ARBITRATION, 7 C.W.N. 180.

(4814)—*O. 3, r. 3, sch. II, rr. 9, 18 (=Civ. Pro. Code, 1882, ss. 375, 515, 523)—Retirement of some of the arbitrators before expiry of time fixed for filing award—Presentation of award by umpire.*—An agreement to refer to arbitration was filed in Court and in accordance therewith two arbitrators were appointed on each side and an umpire. The Court made an order fixing a date within which the award was to be filed, but, before the expiry of the period so fixed, two of the arbitrators retired. Subsequently to their retirement, the umpire forwarded a document to the Court which was of the nature of a compromise, and which he recommended should become the subject of a decree. *Held* that no decree could be based upon such document, inasmuch as it was not an award, nor was there any proceeding before the Court in which the compromise presented by the umpire could be filed under s. 375, Civ. Pro. Code. NIAZ AHMED v. ABDUL HAMID, **1 A.L.J. 29=A.W.N. 1904, 49.**

(4815)—*O. 23, r. 3, sch. II, r. 20 (=Civ. Pro. Code, 1882, ss. 375, 525)—Agreement adjusting suit by arbitration—Power of Court to determine fact of agreement having been made—Mode of determination—Award as to matter not referred to arbitrators—Effect.*—When one of the parties to a suit sets up an agreement whereby, it is alleged, the suit has been adjusted, but the agreement is disputed by the other, the Court has jurisdiction, under s. 375 of the Civ. Pro. Code, 1882, to determine the fact whether such agreement has been come to, and, if it is satisfied that such is the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

case, to record it. (8 M. 482, 9 M. 103, 7 B. 304, 16 B. 202, *R.*) S. 375 does not say "if the parties agree that a suit is adjusted," nor "if the parties certify to the Court that a suit had been adjusted," but only "if a suit *be* adjusted," which is a fact capable of being proved although one party may deny it, and which the Court ought to try in the same way as any other relevant fact which is alleged and denied in the course of the suit. Whether it should be tried on affidavit or by oral evidence, is a matter entirely for the discretion of the Court. [*F.*, 7 A.L.J. 778=6 Ind. Cas. 857; *R.*, 21 B. 535, 24 C. 908, F.B.=11 C.W.N. 597, 3 Bom. L.R. 431=26 B. 76, 33 B. 69=1 Ind. Cas. 622=10 Bom. L.R. 366, 50 P.L.R. 1911=9 Ind. Cas. 195.] In the present case, plaintiff's suit was for recovery of certain property which was alleged to be in the possession of the defendant. In the course of the suit, the plaintiff and the defendant by a submission paper referred "all matters in difference in the suit" to the decision of two arbitrators, who after some inquiry passed an award directing the defendant to pay plaintiff the sum of Rs. 6,000, and that the account of the plaintiff in the defendant's books should be cancelled. On an application by the plaintiff to the Court that the submission and award should be filed as an agreement adjusting the suit under s. 375 of the Civ. Pro. Code, 1882, or in the alternative that the award should be filed under s. 525, the defendant disputed the agreement and denied the validity of the award. *Held*, that the Court had jurisdiction to determine if the agreement adjusting the suit has been made. And on the Court finding that the suit had been so adjusted by the submission and award, they were ordered to be filed and the adjustment recorded. Where in the case mentioned above the arbitrators also decided the plaintiff's claim to two ornaments said to be in the possession of the defendant which was not referred to them by the submission paper, but which was said to have been verbally referred to them during the course of the arbitration, *held* on the same application that the Court could not make any order as to this portion of the award which dealt with a matter not relating to the subject-matter of the suit, and ordered that a separate application should be made with regard to the ornaments. SAMIBAI v. PRAMJI PRAGJI, **20 B. 304.**

——O. XXIII, r. 4 (=1882, s. 375-A).

(4115-*a*)—O. 23, r. 4.—*See* NO. 4748, *supra.*

——O. XXIV, r. 7 (=1882, s. 376=1877, s. 376).

(4815-*b*)—O. 24, r. 1—Payment into Court, after suit—Practice—*See* TRANSFER OF PROPERTY ACT, 1882, s. 88, 10 M.L.T. 37.

——O. XXIV, r. 2 (=1882, s. 377=1877, s. 377).

(4816)—O. 24, rr. 2, 4—*See* PRACTICE AND PROCEDURE, 26 C. 766.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXIV, r. 3 (=1882, s. 378=1877. s. 378.)

(4816-*a*)—O. 24, r. 3—*See* NO. 534, *supra*.

——O. XXIV, r. 4 (=1882, s. 379=1877, s. 379.)

(4816-*b*)—O. 24, r. 4—*See* NO. 4816, *supra*.

(4816-*c*)—*O.* 24, *r.* 4 (2) — *Costs.*—Under O. 24, r. 4 (2), Civ. Pro. Code, the Court must distinctly find as to which of the parties is most to blame for the litigation, before making an order as to costs. JAYANTHI KRISHTAPPA v. JAYANTHI CHENNAYYA, **1912, 1 M.W.N. 38.**

(4816-*d*)—*O.* 24-*A*—*Costs—Discretion of the Court.*—O. 24-A gives the Court discretion in awarding costs in suits for debts, when the amount is deposited in Court. RAMASAWMI REDDI v. LAKSHMAMBAL, **1911, 2 M W.N. 568.**

——O. XXV, r. 8, para (1) (=1882, s. 380 (1) =1877, s. 380=1859, ss. 34, 35), para. (2) (=1882, s. 382=1877 s. 382); and para. (3) (=1882, s. 380 (2).

See SECURITY FOR COSTS.

(4817)—*O.* 25, *r.* 1—*Woman plaintiff—Security for costs—Suit for defamation.*—The plaintiff, a woman, brought an action for defamation against the defendant, who it was alleged was circulating reports about her moral character. The plaintiff in filing the suit appeared to have been actuated by perfectly *bona fide* motives, and to have filed it in the *bona fide* belief that the defendant was the person who circulated the report, and for the *bona fide* purpose of protecting her right to maintenance and defending herself against the gravest charge of immorality. The defendant applied for security of his costs to be required from the plaintiff, under O. XXV, r. 1 of the Civ. Pro. Code, 1908: *Held*, that it would be a wrong exercise of the discretion, under O. XXV, r. 1, if the Court were to practically defeat the suit, when it was quite ripe for hearing, by ordering the plaintiff to lodge security. *Held*, further, that the Court could, if it so chose, exercise the discretion given by the rule, in favour of a woman-plaintiff, upon such terms as it might think fit to impose. NAMUBAI v. DAJI GOVIND WARANG, **12 Bom. L.R. 1071=8 Ind. Cas. 1055.**

(4818)—*O.* 25, *r.* 1—*Minor plaintiff—Next friend residing outside British India—Security for costs—Court's discretion.*—In the case of an infant, the Court need not run any risk of stopping the suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs. The Courts have apparently considered that the interests of other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the infant, or if there is a just cause other than the poverty of the next friend, to have him removed. BHAISHANKER AMBASHANKER OZA v. MULJI ASHARAM, **13 Bom. L.R. 480.**

(4818-*a*)—O. 25, r. 1—*See* NO. 5000-*a*, *infra*.

(4819)—*O.* 25, *r.* 1 (1) (=*Civ. Pro. Code of* 1877, *s.* 380)—'*Residence,*' *meaning of.*—The word 'residence' may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which the word is used. The word in s. 380 of the Civ. Pro. Code, 1877, was intended by the Legislature to mean a residence under such circumstances as would afford reasonable probability that the plaintiff would be forthcoming when she suit was decided. MAHOMED SHUFFLI v. LALDIN ABDULLA, **3 B. 227.** [*R.*, 6 B. 100, 8 M. 205, 14 B. 541, 1 L.B.R. 222, 29 M. 239=16 M.L.J. 238=1 M.L.T. 71.]

(4819-*a*)—*O.* 25, *r.* 1 (1) (=*Civ. Pro. Code*, 1859, *s.* 34)—*Security for costs—Plaintiff residing out of jurisdiction—Suit for administration.*—The provisions of s. 34, Act VIII of 1859, were not intended to apply to a case where the plaintiffs brought a suit for the administration and partition of the property in which they were entitled to a share, the extent of the share being in dispute. RUSSICKLALL DAY v. JADUBRAM DOY, **10 B.L.R. App. 25.**

(4819-*b*)—*O.* 25, *r.* 1 (1) (3), (=*Civ. Pro. Code*, 1882, *s.* 380)—*Requiring security for costs from infant female plaintiff.*—Either an infant female plaintiff or her next friend must not be required to give security for costs under s. 380, Civ. Pro. Code, 1882, except in exceptional cases. BAI POREBAI v. DEVJI MEGHJI, **28 C. 100.** [*F.*, 18 M.L.J. 155; *Appl.*, 13 Bom. L.R. 480; *R.*, 32 B. 602=10 Bom. L.R. 337; *D.*, 27 B. 100.]

(4820)—*O.* 25, *r.* 1 (1, 3) (=*s.* 380, *Civ. Pro. Code*, 1882)—*S.* 380, *Civ. Pro. Code, object of.*—The object of s. 380, Civ. Pro. Code, 1882, is to provide for the protection of the defendants in certain cases where, in the event of success, they may have a difficulty in realising their costs. *In the goods of* PREMCHAND MOONSHEE, **21 C. 832.**

(4821)—*O.* 25, *r.* 1 (1, 3) (=*s.* 380, *Civ. Pro. Code*, 1882)—*Security — Costs of defendant—Plaintiff insolvent.*— When an undischarged insolvent sues as plaintiff for his own benefit he must give security for costs, s. 380 of the Civ. Pro. Code, 1882. BOMANJI v. NUSSERWANJI, **5 Bom. L.R. 113=27 B. 100.**

(4822)—O. 25, *r.* 1 (1, 3) (=*s* 380, *Civ. Pro. Code*, 1882)—*Security for costs from a woman — Suit for "money" includes a suit which results in a decree for money — Apreal lies against the order of a Judge sitting on the original side directing security from a woman —*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Letters Patent, cl. 15.—Suits which are not exclusively for money but which will result in a decree for money on the relief sought come within the purview of s. 380 of the Code of Civil Procedure. An appeal lies against an order passed by a Judge sitting on the original side of the High Court requiring security from a woman under s. 380 of the Code of Civil Procedure. Such an order is a judgment within the meaning of cl. 15 of the Lettters Patent. SOONABAI v. TRIBHOVANDAS N.MALVI, **10 Bom. L.R. 337=32 B. 602.**

(4823)—*O.* 25, *r.* 1 (1, 3) (=s. 380, *Civ. Pro. Code*, 1882)—*" Such plaintiff," construction of —Infant plaintiff — Next friend—Liability of infant plaintiff to give security for costs.*—The words "such plaintiff" in the second paragraph of s. 380. Civ. Pro. Code, cannot be construed as applying to the infant plaintiff's next friend. In the case of infant plaintiff's, unless the circumstances are exceptional, the English practice, under which they could not be required to give security for costs, should be followed. MANI BAI v. LODD GOVIND DASS, **18 M.L J. 135.** (22 B. 100, *F.*)

(4824)—*O.* 25, *r.* 1 (1, 3) (=s. 380, *Civ. Pro. Code*, 1882)—*Security — Court—Discretion.*—S. 380 of the Civ. Pro. Code is not to be so applied as to drive away all poor plaintiffs. It gives to the Court discretionary powers to be exercised on a consideration of all the facts and circumstances of the case. The principle on which the Court acts under the section is to see whether, at first sight, the suit appears *bona fide*, and whether the defence is such as is likely to succeed. MOTIBAI v. DARUWALLA, **6 Bom. L.R. 1072.**

(4825)—*O.* 25, *r.* 1 (1, 3) (=s. 380, *Civ. Pro. Code*, 1882)—*Security for costs—Plaintiff residing outside the jurisdiction of the Court.*—The plaintiff, a woman and a resident of Bushire outside the jurisdiction of the Bombay High Court and possessing no immoveable property within its jurisdiction, brought early in 1903 an administration suit on its original side. The defendant applied on the 10th March, 1905, under s. 380 of the Civ. Pro. Code, for compelling the plaintiff to give security for defendant's costs: *Held*, that, under the circumstances of the case, no order under the section should be made, since there was a long delay on the part of the defendant in applying for the security, the suit was one for administration where the plaintiff's title at least to a share of the property, was not disputed, which would fully cover the defendant's cost and in administration suits ordinarily costs come out of the estate. BIBI FATMA SULTAN v. AGA MAHOMED, **7 Bom. L.R. 495.**

(4826)—*O.* 25, *r.* 1 (1) (3) (=s. 380, *Civ. Pro. Code*, 1882)—*" Suit for money"—Security for costs, circumstances under which Court will order.*—The words "suit for money" in s. 380, has a wider meaning than a "suit for debts." In considering the question, whether a suit is for money, the Court "must look at the substance." A suit to recover moneys and certain specified articles or the value thereof is a suit for money within the terms of paragraph 2 of s. 380, Civ. Pro. Code, [*F.*, 10 Bom. L. R. 337 =32 B. 602; *D.*, 31 B. 309=9 Bom. L.R. 409.] *Held* s 380 is not imperative on the Court.—Per *Wilson, J.* In a suit for money, if the plaintiff, a woman, has no immoveable property to be security for the defendant's costs, the Court orders security for costs to be given. DEGAMBARI DEBI v. AUSHOOTOSH BANERJEE, **17 C. 610.** [*F.*, 23 B. 100; *Appr.*, 21 C. 832.]

(4827) *O.* 25, *rr.* 1 (1) (3) (=s. 380, *Civ. Pro. Code*, 1882)—*British Contonment of Secunderabad.*—For the purpose of s. 380, Civ. Pro. Code, the British Cantonment of Secundrabad must be regarded as being a place out of British India. HOSSAIN ALI MIRZA v. ABID ALI MIRZA, **21 C. 177.**

(4828)—O 25, r. 1 (1, 3)—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, 10 Bom. L.R. 337=32 B. 602.

(4829)—O. 25, r. 1 (1) (3)—*See* LETTERS PATENT, HIGH COURT, 1865—MADRAS ART. 15, 26 M. 502.

(4830)—O. 25, r. 1 (1) (3)—*See* RESIDENCE, 9 B. 244.

(4831)—*O.* 25, *rr.* (1, 3), 2 (=*Civ. Pro. Code*, 1882, *ss.* 380, 381)—*Plaintiff—Security for costs—Fresh suit—Practice—Procedure.*—Where an order is made for a plaintiff to give security for costs under s. 380 of the Civ. Pro. Code and the suit is dismissed under s. 381 as a consequence of his not having obeyed that order, he can file a fresh suit on the same cause of action. HARIRAM v. LALBAI, **4 Bom. L.R. 262=26 B. 637.**

(4832)—*O.* 25, *r.* 1 (1, 3), *O.* 33, *r.* 8 (=*ss.* 380, 410, *Civ. Pro. Code*, 1882)—*Pauper plaintiff, it can be required to furnish security for defendant's costs.*—The provisions of s. 380 of the Civ. Pro. Code cannot apply to the case of a person to whom permission had been granted under s. 410 of the Code to sue as a pauper, as the effect of an order requiring such a person to furnish security for the defendant's cost would be to render nugatory the order under s. 410. In making an order, under s. 380 of the Civ. Pro. Code, against a plaintiff who had been permitted to sue as a pauper, the Court acted in the exercise of its jurisdiction illegally and with material irregularity. MUSSAMAT HAFIZAN v. ABDUL KARIM, **12 C.W N. 163= 7 C.L.J. 312.** (17 W.R. 68, *Rel. on.*)

(4833)—*O.* 25, *r.* 1 (1, 3) *and O.* 41, *r.* 10(=*ss.* 380, 549, *Civ. Pro. Code*, 1882)—In exercising discretion under s. 549 of the Civ. Pro. Code the appellate Court may well be guided by the provisions of s. 380 of the Code. **RAM SINGH v. BALUBAI, 5 Bom. L.R. 661.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXV, r. 2 (=1882, s. 381=1877, s. 381 =1859, s. 35).

(4834)—O. 25, r. 2—*See* RES JUDICATA—GENERAL, 6 B. 482.

(4834-*a*)—O. 25, r. 2—*See* NO. 4831, *supra* and NO. 5283, *infra*.

—— O. XXVI, r. 1 (=1882, s. 383=1877, s. 383=1859, s. 175.)

See COMMISSION.

(4834-*b*)—O. 26, r. 1—*See* NOS. 1537, 2219, *supra*.

(4835)—*O. 26, r. 1, s. 76, O. 26. r. 4 (=ss. 383, 386, Civ. Pro. Code, 1882)—Commission to examine witnesses—Discretion of Court—Power of Court to exempt personal appearance to give evidence—Power of Court to refuse summons—Abuse of legal process—Letters Patent, s. 15.*—The head of a *Mutt*, a party to a suit, was cited as a witness in certain execution-proceedings in the suit. The witness having unsuccessfully applied to the Sub-Judge, who issued the summons, to be examined on Commission, preferred an appeal to the High Court. A single Judge of the High Court heard the appeal and allowed it, and ordered the witness to be examined on commission. Against this decision, an appeal was preferred, under s. 15 of the Letters Patent, by the unsuccessful party. It was contended, for the appellant, (1) that the High Court had no power to set aside an order refusing the issue of a commission ; (2) that s. 383 of the Code of Civil Procedure did not authorise the issue of a commission under the circumstances of the case ; and (3) that the Sub-Judge had no discretion to refuse summons ; the respondent contended that no appeal lay, under the Letters Patent, against the order of the single Judge of the High Court. *Held*, that the High Court had the power, under the Charter Act, to set aside the order of the Subordinate Judge, as one made without the proper exercise of his judicial discretion ; that a Court has no power to issue a Commission except in cases enumerated in s. 383 and that no power is given by the Civ. Pro. Code, to a Court to exempt any person from appearance in Court ; (7 W.R. 349, *R.*) ; the Courts have not the absolute discretion or inherent power to issue a commission, except when authorised by the provisions of the Civ. Pro. Code ; nor is the Court bound to issue a Commission when all the conditions laid down in s. 383 exist ; where such examination may result in manifest injustice to any party or where it is not calculated to permit of the evidence being tested fairly, or where the application is made to avoid cross examination before the Court, a commission need not be issued ; though every Court is bound to issue a summons to a witness, every Court has an undoubted right to prevent the abuse of its process, and, when such an

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

abuse is likely to occur, it may refuse a summons; that, in this case, it having appeared that the summons was applied for, not *bona fide*, but in order to harass the witness and attempt to gain an undue advantage over the witness, who was a party to the suit, the lower Court (the single Judge of the High Court) was right in refusing the summons on the ground that it would result in an abuse of process; and that the appeal lay under the Letters Patent ; the order of the single Judge was a judgment, because it was an adjudication on the undoubted right of a litigant to the suit to insist on the appearance of a witness in Court. VEERABADRAN CHETTY v. NATARAJA DESIKAR, 28 M. 28=14 M.L.J. 329. [*Appr.*, 31 M. 60=3 M.L.T. 246, *D.*; 11 Bom. L.R 241.]

(4836)—*O. 26, rr. 1, 2, 3, 4 and s. 76 (=Civ. Pro. Code, 1859, s. 175).*—Instructions relative to the issue of Commissions under Act VIII of 1859, s. 175, for the examination of witness, Civ. No. 7 of 20th February, 1872. **17 W. R H.C. Rules & Ors. 3.**

(4837)—*O. 26, r. 1 and sch. 2, r. 1 (=ss. 383, 506, Civ. Pro. Code, 1882)—Arbitration—Reference of a case to an arbitrator—Powers of the Court to issue commission for examination of witnesses.*—When a case is referred to arbitration, under s. 506 of the Civ. Pro. Code, it is competent to the Court to issue, under s. 383. of the Code, a commission for the examination of witnesses. RABIABAI v. RAHIMABAI, **7 Bom. L.R. 560.**

——O. XXVI, r. 2, (=1882, s. 384=1877, s. 384 =1859, s. 175.

(4837-*a*)—O. 26, r. 2—*See* NOS. 1537, 2787-*a*, 4836, *supra*.

——O. XXVI, r. 3, 1882, s. 385=1877, s. 385, =1859, s. 75.)

(4837 *b*)—O. 26, r. 3—*See* NOS. 1537, 2787-*a*, 4836, *supra*.

——O. XXVI, r. 4 (=1882, s. 386=1877, s. 386 =1859, s. 175.

See COMMISSION.

(4838)—O. 26, r. 4—*See* LIMITATION ACT, 1908, art. 171, 6 B. 26.

(4838-*a*)—O. 26, r. 4—*See* NOS. 1537, 4835, 4836, *supra*.

——O. XXVI, r. 5 (=1882, s. 387=1877, s 387=1859, ss. 177, 178).

See COMMISSION.

(4838-*b*)—O. 26, r. 5—*See* NO. 3019 *a*, *supra*

(4839)—*O. 26, rr. 5, 17 (=ss. 387, 399, Civ. Pro. Code, 1882)—Evidence on commission of witness in foreign territory—S. 13, Act X of 1873 (Oaths)—Practice.*—A commission rightly issued under s. 387, Civ. Pro. Code, 1882, by

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the High Court, for examination of a witness in French territory, and executed in accordance with the provisions of s. 399 of the Code, is properly issued and executed. The evidence of such witness is admissible and s 13, Act X of 1873, has no application. KADAMBINI DASSI v. KUMUDINI DASSI, **30 C. 934=7 C.W.N. 806.**

(4840)—*O. 26, r. 5, O. 48, r. 3 (=Civ. Pro. Code, 1882, ss. 387, 644)—Warrant for arrest of judgment-debtor, by whom to be signed.*—Signed by Judge, necessity. Form No. 154, sch. IV, Civ. Pro. Code, 1882, as the provision for variation in s. 644, Civ. Pro. Code, shows, cannot be taken as implying a direction that a warrant for arrest, in particular, must be signed by the Judge himself. THE DEPUTY LEGAL REMEMBRANCER v. MIR SARWARJAN, **6 C.W.N. 845.**

——O. XXVI, r. 7 (=1882, s. 389=1877, s. 389 =1859, s. 179).

See COMMISSION.

(4840-*a*)—O. 26, r. 7—*See* NOS. 3075-*c*, 3141-*a supra.*

(4841)—*O. 26, rr. 7, 8 (=ss. 389, 390, Civ. Pro. Code, 1822)—Evidence taken on commission, when evidence in suit—Meaning of 'forming part of the record in s. 389.'*—Evidence taken on commission does not become evidence in the suit until the same has been tendered and read as evidence in the suit by the party in whose behalf it has been taken. *In the goods of* GOURI PROSAD KUNDU, HEMANTA KUMARI v. BANKU BEHARI SIKDAR, **9 C.W.N. 794.** (8 B.L.R. 102, *Appendix*; 3 C.W.N. ccxxxix, *Diss.*; 7 C.W.N. 786, *F.*) [*D.*, 35 C. 28, 36 C. 566=13 C.W.N. 525.]

(4842) — O. 26, *rr.* 7 *and* 8 (=*ss.* 389 390, *Civ. Pro. Code*, 1882) — *Evidence of* purdanashin *lady taken on commission on behalf of defendant — Plaintiff's right to refer to such evidence--Practice.*—Under the provisions of s. 389, Civ. Pro. Code, evidence taken on commission shall, subject to s. 390, form part of the record in the suit; and any party is entitled to refer to such evidence as a matter of record. Thus, where the defendant examined a *purdanashin* lady on commission, and the deposition was filed in the record, but the defendants refused to tender it, it was held, that the plaintiffs were entitled to read it as a part of their case; and that there was nothing in s. 389, Civ. Pro. Code, to prevent their doing so. *Held*, also, that such a procedure was in accordance with mofussil practice. MAN GOBINDA CHOWDHURY v. SHASHINDRA CHANDRA CHOWDHURI, **35 C. 28.** [*Appr.* 36 C. 566=13 C.W.N. 525.]

(4842-*a*)—O. 26, *rr.* 7, 8 (=*Civ. Pro. Code*, 1859, *s.* 179)—*Use by one party of evidence taken under commission by another party.*—The evidence of a defendant taken under a commission, may be read on behalf of the plaintiff, without the deposition being put in as part of his case. Having been put in, the deposition under s. 179, Act VIII of 1859, became part of the record. DWARKANATH DUTT v. GUNGA DAYI, **8 B.L.R. App. 102.** [*Diss.*, 9 C.W.N. 794; *F.*, 5 C.L.R. 109, 26 C. 391=3 C.W.N. ccxxix, *Appr.*; 36 C. 566=13 C.W.N. 525; *R.*, 35 C. 28.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—— O. XXVI, r. 8 (=1882 s. 390=1877, s. 390 =1859, s. 179.)

(4842-*a*-1)—O. 26, r. 8—*See* NOS. 3075-*c*, 3141-*a*, 4841, 4842, 4842-*a supra.*

——O. XXVI, r. 9 (=1882, s. 392=1877, s. 392 =1859, ss. 180, 307).

See COMMISSION.

See LOCAL INVESTIGATION.

(4843)—*O. 26, r. 9 (=Civ. Pro. Code, 1882, s. 392)—Local investigation—Commissioner, trial of issues not to be delegated to.*—The local investigation contemplated by s. 392, Civ. Pro. Code, presupposes the existence of some independent evidence on record which requires to be elucidated, and the Court ought not, therefore, to delegate, to a Commissioner, under the section, the investigation of any material issue which it is bound to try. The section has reference to the investigation of such questions as those relating to the identification of lands, or houses, their physical features, market value, etc., but not to questions of title to, and possession of, the lands themselves. SANGILI v. MOOKAN, **16 M. 350=3 M.L.J. 137.**

(4843-*a*)—*O. 26, r. 9 (=Civ. Pro. Code, 1859, s. 180)—Determination of a commission, issues not to be referred to generally.*—When issues are fixed, they ought not to be referred generally for the determination of a commission; a commission can only report on some matter in dispute or in evidence. HYDER SHAH v. JAFIR SHAH, **11 P.R. 1868.**

(4844)—*O. 26, r. 9 (=Civ. Pro. Code, 1882, s. 392)—Local enquiry—Judge—Judge's duty —Difference between old and new Codes.*—S. 392 of the old Code implies that a Judge may hold a local investigation. A commission is to issue for the purpose of local investigation only when such investigation cannot be conveniently conducted by the Judge in person. When a Judge makes a local investigation, he should put the result on record, so that the parties may see what he considers established. A Judge should not hold a local investigation with a view to gather information which he might use as the foundation of his judgment. He might inspect the locality with a view to enable him to understand the evidence. But if any additional information was required, the proper course would be to appoint a Commissioner under s. 392 of the Code, whose report might be used in evidence and who might be examined as a witness. The difference between the old Code and the new Code referred to. RAIKI-HORI GHOSE v. KUMUDINI KANTA GHOSE, **15 C.L.J. 138.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4844-*a*)—O. 26, r. 9—*See* NO. 3107-*a supra*.

(4845)—*O.* 26, *rr.* 9 *and* 10 (=*s.* 180, *Civ. Pro. Code*, 1859)—*Deputy Collector—Examination of witnesses by Civil Ameen.*—S. 180, Civ. Pro. Code, as applied to Act X, cases allows Courts of first instance the widest discretion in regard to local investigations; and a Deputy Collector may depute a Civil Ameen to examine witnesses in a suit for enhancement. GOUR CHUNDER ROY v. RASH BEHAREE DUTT, **10 W.R. 43=1 B.L.R.S.N. 1.**

(4846)—*O.* 26, *rr.* 9 *and* 10 (=*Civ. Pro. Code*, 1859, s.180).—Zillah Judge's sanction not necessary to subordinate Civil Courts issuing a Commission of inquiry under Act VIII of 1859, s. 180, Civil Cir. No. 4 of 15th February 1872. **17 W.R H.C. Rul. & Or. 2.**

(4847)—O. 26, rr. 9, 10—*See* AMEEN, 1 B. L.R.S.N. 1 (*b*), 9 W.R. 566, 17 W.R. 473, Note, 6 W.R. 254.

(4848)—O. 26, rr. 9, 10—*See* COMMISSIONER FOR TAKING ACCOUNTS, 3 N.W.P. 217.

(4849)—O. 26, rr. 9, 10—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 13 W.R. 113, 9 W.R. 601, 15 W.R. 291, 8 W.R. 267, 8 W. R. 287, 12 W.R. 136.

(4850)—*O.* 26, *rr.* 9, 10, 11, 12, 18 (=*Civ. Pro. Code*, 1859, *ss.* 180, 181)—Quarterly returns of receipts and disbursements, on account of Civil Court Ameens and other Commissioners appointed under Act VIII of 1859, ss. 180 and 181. Civ. Cir. No. 12 of 8th April 1872. **17 W.R.H.C. Rules and Ors. 11.**

——O. XXVI, r. 10 (=1882, s. 393=1877, s. 393=1859, s. 180.)

See COMMISSION.

See LOCAL INVESTIGATION.

(4850-*a*)—O. 26, r. 10—*See* NO., 4845, 4846, 4847, 4848, 4849, 4850 *supra*.

(4851)—*O.* 26, *r.* 10, *s.* 99 (=*ss.* 393 *and* 578, *Civ. Pro. Code*, 1877—*Omission to file record of evidence with report of local commission—Effect.*—Under s. 393 depositions of witnesses examined on commission must be recorded and filed with the report. A failure to do so will be cured under s. 578 when no objection is taken till the stage of second appeal. GANESH RAM v. RANJA, **61 P.R. 1882.**

——O. XXVI, r. 11 (=1882, s. 394=1877, s. 394=1859, s. 181.)

See ACCOUNTS.

See COMMISSION.

(4852)—*O.* 26, *r.* 11 (=*Civ. Pro. Code*, 1882, *s.* 394)—*Suit for account.*—In a suit for an account the usual and proper course is first to ascertain if the defendant is liable to account to the plaintiff; if so, the Court appoints a day for the defendant to file an account; then another day is fixed, giving plaintiff time to examine the account and to file any objection which he may have to make to the accounts put in by the defendant. Then the Court fixes another day, if that course be necessary, to ascertain if the accounts filed by the defendant are correct, and to do this the Court allows the defendant to make out, if he can, by papers, bills, books and witnesses, that each item to which the plaintiff objects is correct, and also allowing the plaintiff, if he can, to show that each item entered is not correct, or that items are omitted which ought to have been shown, or that the evidence which the defendant produces in support of the items objected to is not sufficient to justify the Court in accepting that item, or these items, as correct. The Court then goes through the account item by item, and finally arrives at the amount which, on the evidence, appears to be due by the defendant to the plaintiff. And if the plaintiff has asked, as he might and should ask, for a decree for the amount so found due, the Court proceeds to decree that amount. It is only when the accounts are very large, and the disputed items very numerous, that the Court is justified in appointing a Commissioner. EBRAHIM v. SHABAN, **L.B.R. 1872—1892, 309.**

(4853)—O. 26, r. 11—*See* COMMISSIONER, 3 M. 259.

(4853-*a*)—O. 26, r. 11—*See* NO. 4850 *supra*, AND NO. 4879, *infra*.

(4854)—*O.* 26, *rr.* 11, 12 (=*Civ. Pro. Code*, 1882, *ss* 394, 395)—*Report of Commissioner—Order confirming the report—Appeal—Appellate Court, power of, to deal with findings of fact by the Commissioner.*—Per *Prinsep and Hill, JJ.* (*Maclean, C J., dissenting*). In an appeal from a judgment and order confirming the report of a Commissioner appointed under s. 394, Civ. Pro. Code, it is open to the Court of appeal to deal with the report on matters of fact and its powers are not limited to questions of principle when examining such report. (6 Bom. H.C. 149, 6 M.H.C. 36, *Referred to*). The Court, whether of first instance or of appeal, must be satisfied with the proceedings of a Commissioner before it accepts them, and the fact that the judgment of the first Court is in affirmance of the report of a Commissioner does not affect the powers of the Court of appeal. (4 C.W.N. 808=28 C. 1, *D.*; 1 I.A. 346, *R.*) Per *Prinsep, J.*—The report of a Commissioner requires affirmance by an order of Court to make it operative and cannot be regarded as a judgment of the Court. Per *Hill, J.*—Under s. 395, Civ. Pro. Code, the report of a Commissioner it accepted by the Court is only evidence in the suit of facts found by him, but is not decision upon it, nor can it be treated on the same footing as the verdict of a jury (4 Giff, 683, 4 C.W.N. 808, *D.*; 19 Q.B.D. 155, *R.*) Per *Maclean, C.J.*—If there has been a fair investigation of the matter by the Registrar and his finding has been confirmed by the

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Judge of first instance, the Court of appeal ought not to interfere except on the strong ground of manifest error or manifest abuse. It should not interfere merely on the ground that if the matter was *res integra* it would have been disposed to attach more weight to this or that particular piece of evidence. R. M.S. CHETTY v. MAHOMED ESSA SAHEB, **5 C.W.N. 692.** (4 C.W.N. 808, *Referred to.*)

(4855)—O. 26, rr. 11 & 12—*See* COMMISSIONER FOR TAKING ACCOUNTS, 6 B.H.C.A.C. 149.

(4856)—O. 26, rr. 11, 12, 18—*See* COMMISSIONER, 1 M.H.C. 1.

(4857)—O. 26, rr. 11, 12, 18—*See* COMMISSIONER FOR TAKING ACCOUNTS, 1 M.H.C. 418, O. XXVI, r. 12 (1882, s. 395=1877, s. 395 =1859, s. 181.)

(4857-*a*)—O. 26, r. 12—*See* NOS. 4850, 4854, 4855, 4856, 4857, *supra* AND No. 4879, *infra*.

—— O. XXVI, r. 13 (=1882, s. 396=877, s. 396).

See COMMISSION.

See PARTITION.

(4858)—*O.* 26, *r.* 13 (=*Civ. Pro. Code, Act X of* 1877, s. 396)—*Interpretation.*—The intention of the section is, that, upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are, and shall direct by a preliminary decree or order that Commissioners be appointed to make the partition.—Per *Pontifex, J.* GYAN CHUNDER SEN v. DURGA CHURN SEN, **7 C. 318= 8 C.L.R. 415.** [*R.*, 12 C. 275.]

(4858-*a*)—*O.* 26, r. 13—*See* NOS. 60, 82, 150, 344, 1085, 2917-*a*, *supra*.

(4859)—*O.* 26, *rr.* 13, 14 (=*Civ. Pro. Code*, 1882, s. 396)—*Proceedings under—Nature—Taking of such proceedings in execution.*—The proceedings contemplated by s. 396 of the Civ. Pro. Code are proceedings in a suit, before the passing of the decree, in order to enable the Court in that suit to determine exactly the terms of that decree. Where such proceedings were left to be taken in execution, it was treated as an error in point of form, and the further proceedings taken after the decree declaring the rights of the several parties, were, (following the procedure in 7 C. 318=8 C.L.R. 415) regarded as proceedings to obtain a decree on further consideration. BHOOBUN MOYI DABEA v SHURUT SUNDERY DEBEA, **12 C. 275.**

(4860)—*O.* 26, *rr.* 13 *and* 14 (=s. 396, *Civ. Pro. Code*, 1882) — *Commission—Partition—Proposing a number of schemes.*—It is not competent to a Court, under s. 396 of the Civ. Pro. Code, to appoint only one commissioner to effect a partition. It is not contemplated by s. 396 of the Civ. Pro. Code that the commissioners should propose a number of schemes and ask the Court to choose any one of them. BHIWAJI v. NARAYAN, **6 Bom. L.R. 516.**

(4861)—*O.* 26, *rr.* 13 *and* 14 (=*old* s. 396) —*Order fixing plaintiff's share—Appeal.*—The order of a Court, fixing plaintiff's share and directing partition is not appealable and it cannot be considered a decree within the meaning of s 2 of the Code of 1882. PARMA NAND v. RUP CHAND, **37 P.R. 1896.**

(4862)—*O.* 26, *rr.* 13, 14 (=*old* s. 396)—*Partition-suit—Determination of particular properties decreed by executing Court.*—Though there are cases in which a Court should specify in a partition-decree, the particular properties which ought to form the shares decreed, it is not necessary that, in all cases, specific shares must be declared by metes and bounds in the decree itself and may in certain cases be determined in execution. GANGA RAM v. GUR SARAN DAS, **31 P.R. 1887.** But see GOPAL DAS v. MUSSAMMAT GULAB DEVI, **70 P.R. 1897.** (45 P.R. 1882, *Cited.*) [*R.*, 9 P.R. 1901=1 P.L.R. 1901.]

(4863)—*O.* 26, *rr.* 13 *and* 14 (=*old* s. 396) —*Commission — Court's power to issue to single person — Estoppel.*—This section contemplates an order ascertaining the property to be divided, the parties interested, their several rights therein; and provides for the issue of a commission to make partition and on the commissioner's report for the drawing up of a decree. If the parties have acquiesced in the irregular proceedings, they are estopped by their own conduct from taking objection to such proceedings after their conclusion merely on the ground of their irregularity. An order declaring the rights of the parties in a partition suit is not appealable. It is incompetent for a Court to appoint only one Commissioner to effect a partition. But the parties may waive their right to have more than one commissioner. KANSHI NATH v. BULAKI DAS, **124 P.R. 1893.** (7 C. 318, *R.*) [*F.*, 37 P.R. 1896; *R.*, 29 P.R. 1908=71 P.W.R 1907=61 P.L.R. 1907.]

(4864)—*O.* 26, *rr.* 13, 14 (=s. 396, *Civ. Pro. Code*, 1882)—*If exhaustive—Judgment, loss of—Re-writing judgment—Partition suit, lots—Drawing lots—Lots, drawing of—S. 72, Estates Partition Act.*—Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it. It cannot be expected that the Civ. Pro. Code would provide for such a contingency. *Semble*: A Judge, in making allotments in a partition suit, should not draw lots in the manner provided by s. 72 of the Estates Partition Act (V of 1897), but should follow the procedure laid down in s. 396 of the Civ. Pro. Code and make the allotment of the shares after a full consideration of the rights and objections of different parties. NARSINGH NARAIN SINGH v. HARKHU SINGH, **8 C.L.J. 521.** [*R.*, 11 C.L.J. 243.]

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(4865)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Suit for partition of immoveable property—Commissioner appointed to make partition—Court not competent to modify Commissioner's report.*—Where, in a suit for partition of immoveable property, a Commissioner has been appointed under s. 396 of the Code to ascertain the shares of the parties, the Court, when passing its final decree, must either accept or reject the report of the Commissioner, but is not competent to modify it. JANKI PRASAD v. GAURI SAHAI, **A.W.N. 1905, 188=2 A.L.J. 709=28 A. 75.** (A.W.N. 1898, 45, *R.*)

(4866)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Partition—Commission to make partition--Issue of commission to one person only*—A Court issuing, under s. 396 of the Code, a commission to make partition of immoveable property not paying revenue to Government, cannot legally issue such commission to one commissioner only. Per *Richards, J.*—But there is nothing to prevent the parties to partition proceedings, agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed. MULCHAND v. MUHAMMAD ALI KHAN, **A.W.N. 1907, 32=2 M.L.T. 63=4 A.L.J. 76=29 A. 235.**

(4867)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Decree in a partition-suit—Application for division by metes and bounds, whether one for execution of the decree—Limitation Act, sch. II, arts.* 178 *and* 179, *applicability of—Right of judgment-debtor to plead bar by limitation of a previous application ordered without objection*—'Res judicata.'—The decree of the Munsiff, in a suit for partition by metes and bounds, was defective as a final decree for partition, since the Munsif, who could have indicated, in the decree, the exact portion of share, which was to be given up to the plaintiff, omitted to do the same and the decree did not specify such share by metes and bounds. *Held*, until the exact position of the plaintiff's share was indicated and a final decree passed, accordingly, as contemplated by s. 396 of the Code, there was no decree, which the Court could execute; and applications towards effecting a partition before such final indication would constitute proceedings in the suit itself and not in execution of the decree as pointed out in *Dwarka Nath Misser* v. *Barinda Nath Misser* (22 C. 425, *F.*) The applications abovementioned were not applications to which the Limitation Act would be a bar since the defect in the decree to cure which they were made was one which the Court itself was bound to cure without any formal application by the parties. (28 M. 127, *F.*) *Held*, also, where an order for execution has been made by a competent Court on a previous application for execution, after due service of notice on, and without any objection by, the judgment-debtors, it could not afterwards be pleaded on a subsequent application that the previous application was barred. DURGA DAS v. FAQIR CHAND, **47 P. R. 1906=86 P.L.R. 1907.** (8 C. 151, 6 B. 54, 24 A. 282 and 24 M. 669, *R.*)

(4868)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Final decree—Suit for partition—Lands not paying revenue to Government—Partition by metes and bounds—Court, competency of, to act of itself.*—Where in a suit for partition of lands not paying revenue to Government, there had been no partition by metes and bounds effected, under s. 396, Civ. Pro. Code, so that the final decree contemplated by that section had not been passed, *held* that the suit was to be regarded as still pending, the District Judge still being bound to pass the final decree, under s. 396, and that it was not open to the plaintiff to bring a fresh suit for partition. The Court is competent to pass the final decree, for partition, under s. 396, Civ. Pro. Code, even without the application of the parties. TOGARAM APPADU PATNAIDU v. TOGARAM VENKATA RANGA RAU, **18 M.L.J. 23=3 M.L.T. 328.** (25 M. 277, 28 M. 129, 22 C. 425, *F.*) [*Appr.*, 8 M.L.T. 295; *R.*, 31 M. 540=5 M.L.T. 222.]

(4869)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Suit for partition—Preliminary decree in plaintiff's favour—Resistance to Commissioners—Refusal of plaintiff's application for re-issue of Commission--Court's power.*—Where the Court of first instance, in a suit for partition, made a preliminary decree, partially in the plaintiff's favour, but the plaintiff resisted the Commissioner appointed by the Court and objected to his preparing a plan for the partition, and the Court thereafter refused the plaintiff's application for the re-issue of the commission and entirely dismissed the suit, the Court below having in appeal upheld the order of dismissal, *held* that, as the Court of first instance had passed a preliminary decree decreeing a part of the plaintiff's claim, it had no authority to nullify that decree by totally dismissing that suit, and that under the circumstances the Court ought to have acceded to the request of the plaintiff to re-issue the commission and to have seen that the order was obeyed. MASUM UN-NISSA v. LATIFAN, **7 A. L.J. 196=5 Ind. Cas. 872=32 A. 319.**

(4870)—*O.* 26, *rr.* 13, 14 (=*s.* 396, *Civ. Pro. Code*, 1882)—*Partition suit how long to be deemed to be pending.*—A partition-suit must be considered pending until the final decree under s. 396 is passed. TOGARAM APPADU PATNAIDU v. TOGARAM APPALASWAMI PATNAIDU, **8 M.L.T. 295=8 Ind. Cas. 393.** (18 M.L.J. 23, *F.*)

(4870-*a*)--*O.* 26, *rr.* 13, 14 (=*Civ. Pro. Code*, 1882, *s.* 396)—*Examination of witnesses—Party's right to the issue of a commission*—party to a suit is entitled as of right to the issue of a commission to examine a witness

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beyond the prescribed distance, apart from the question whether he would have ultimately benefited by it. It would be at his own risk that the commission would be issued. SITAMMA v. SUBRAYA, **21 M.L.J. 889.** (15 W.R. 447, *R.*)

(4871)—O. 26, rr. 13, 14—*See* ACT IV OF 1893, s. 2, 5 C.W.N. 128.

(4872)—O. 26, rr. 13, 14—*See* EXECUTION OF DECREE—GENERAL, A.W.N. 1903, 187.

(4873)—O. 26, rr. 13, 14—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 19 A. 194=A.W.N. 1897, 16.

(4874)—O. 26, rr. 13, 14—*See* STAMP ACT, 1899, s. 2 (15), 7 Bom. L.R. 308=29 B. 366.

(4875)—*O.* 26, *rr.* 13, 14, *s.* 100 (=*ss.* 396 *and* 584, *Civ. Pro. Code*, 1882)—*Appointment of Commissioner—Not necessary in every partition suit—Parties concluded by conduct—Objection taken for the first time, in second appeal.*—It is not necessary, in every case wherein a decree is made for the partition of immoveable property not paying revenue to Government to appoint a Commissioner under s. 396, Civ. Pro. Code. The section clearly contemplates a discretion in the Court. In the present case, it was clear that neither the Court, nor the decree-holder thought it necessary to postpone the execution of the decree until a Commissioner was appointed. (18 M.L.J. 23, *Diss.*) A partition decree is not to be considered pending, until action is taken under s. 396. The contention, that the bar of limitation to the execution of decree is saved by the petitioner's attaining majority only recently could not be allowed in second appeal, as it depended on a question of fact which should have been established in the Courts below. KRISHNAMACHARIAR v. KUPPAMMAL, **31 M. 540=5 M.L.T. 222.**

——O. XXVI, r. 14 (=1882, s. 396 (2) (3)=1877, s. 396 (2) (3).)

(4875-*a*)—O. 26, r. 14—*See* NOS. 60, 115, 344, 1085, 2917-*a*, 4859, 4860, 4861, 4862, 4863, 4864, 4865, 4866, 4867, 4868, 4869, 4870, 4870-*a*, 4871, 4872, 4873, 4874, 4875, *supra*.

—— O. XXVI, r. 15 (=1882, s. 397=(1877, s. 397=1859 s. 182.)

(4875-*b*)—O. 26, r. 15—*See* NO. 1086, *supra*.

(4876)—*O.* 26, *rr.* 15, 16, (=*s.* 182, *Civ. Pro. Code*, 1859)—*Abatement of suit under s.* 182 *of Act VIII of* 1859—*Fresh suit under Act X of* 1877.—The being no provisions, corresponding to ss. 12 and 371 of Act X of 1877 in the Act of 1859, a suit declared abated under s. 102 of the latter, does not bar a fresh suit upon the same cause of action, brought after Act X of 1877 came into force. PALLUKUNATH RAMAN MENON v. MULLAN KAJI SRI KUMARAN NAMBUDRI, 3 **M. 31.**

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXVI, r. 16 (=1882, s. 398=1877, s. 398=1859, s. 182.)

See COMMISSION.

(4877)—*O.* 26, *r.* 16 (=*s.* 398, *Civ. Pro. Code*, 1882)—*Account, Commissioner to examine—Commissioner's duty—Commissioner, when to take evidence under s.* 398, *Civ. Pro. Code—Commissioner, not a Judge or an Arbitrator—Decision of Commissioner, value of.*—On an application by the parties, the appellate Court ordered a certain vakil to be appointed Commissioner with powers under s. 398, Civ. Pro. Code, to examine the accounts and objections to the same and it was further ordered that the vakil should submit to the Court his report on the said accounts and objections. *Held*, that the object of the order was to refer to the Commissioner the examination of the accounts for the purpose of enabling the Court to see what the accounts were, and the duty of the Commissioner was to make out an account, showing to the Court exactly what the account, in the books stood and nothing else. The business of the Commissioner was practically to place himself in the position of an assistant to the Court, so as to give the Court all the information which the accounts gave and thus to enable the the Court to come to a decision. *Held, further*, that, under s. 398 of the Code, the Commissioner is entitled to take evidence in the matter referred to, so as to be able to report to the Court for the purpose of enabling it to give a judgment on the points at issue. The Commissioner cannot deal with the case as if he is the Judge or an arbitrator appointed by the parties. If the Commissioner's report does not show what the accounts are, but merely contains a decision in favour of one party, the report is waste paper and is of no assistance to the Court whatever. TINCOWRI DEBI v. SUTTYA DOYAL BANERJI, **6 C.L.J. 103.**

(4877-*a*)—O. 26, r. 16—*See* NO. 4876, *supra*.

——O. XXVI, r. 17 (=1882, s. 399=1877, s. 399).

See COMMISSION.

(4878)—O. 26, r. 17—*See* PRACTICE AND PROCEDURE, 23 C. 404.

(4878-*a*)—O. 26, r. 17—*See* NO. 4839, *supra*.

—— O. XXVI, r. 18 (=1882, s. 400=1877, s. 400=1859, s. 181).

See COMMISSION.

(4878-*b*)—O. 26, r. 18—*See* NOS. 82, 4950, 4956, 4857, *supra*.

(4879)—O. 26, rr. 18, 11, 12—*See* COMMISSIONER FOR TAKING ACCOUNTS, 1 I.A. 346.

(4880)—O. 26, r. 18, O. 33, r. 11, O. 32, rr. 5, 3, 5 (2)—*See* MINOR—SUITS BY AND AGAINST MINORS, 13 B. 234.

——O. XXVII, r. 1 (New).

(4880-*a*)—O. 27, r. 1—*See* NOS. 1539, 1574, *supra*.

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——C. XXVII, r. 2 (=1882, s. 417=1877, s. 417 =1859 ss. 17, 26).

(4880-*b*)—O. 27, r. 2—*See* NOS. 1584, 1585, 2705, 2719, 2720, 2721, 2721-*a*, 2787, 2787-*b*, 2787-*c*, *supra*.

——O. XXVII, r. 3 (=1882, s. 418=1887, s. 418 =1859, s. 26.)

(4880-*c*)—O. 27, r. 3—*See* NOS. 2787, 2787-*b*, 2787-*c*, *supra*.

——O. XXVII, r. 6=(1882, s. 421=1877, s. 421 =1859, s. 67.)

(4880-*d*)—O. 27, r. 6—*See* NO. 1574, *supra*.

——O. XXIX, r. 1 (=1882, s. 435=1877, s. 435=1859, s. 26.)

(4881)—*O.* 29, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 492)—*Injunction restraining Revenue Court from continuing partition proceeding pending appeal.—Held*, following 57 P.R. 1 899; S.C., P.L.R. 1900, p. 60, that the Chief Court is not competent to issue an injunction restraining a Revenue Court from continuing partition proceedings pending the decision of appeal against the decree of a Civil Court filed in the Chief Court in which the question of title as to the property under partition is in dispute. KHUSHALA v. DIT MAL, **133 P.L.R. 1903.** (4 C. 380, F.B., 26 M. 168, 12 C. 515, *R.*)

(4882)—*O.* 29, *r.* 1 (=*Civ. Pro. Code*, 1882, s. 435)—*Verification on behalf of Corporation—Defective verification—Objection in the first Court—Appellate Court.*—Where a petition by the Bank of Bengal was verified by a person described as the Officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorised to sue or verify the petition on behalf of the Bank at Chittagong, or that he was not able to depose to the facts of the case, *held* that the petition was properly verified under s. 435, Civ. Pro. Code. If objection is taken to defective verification at an early stage when the case is on trial in the first Court, the petition or the plaint may be returned for the purpose of remedying the defect; but in the appellate stage, if there is no reason to suppose that anybody is prejudiced by the defective verification, it will not be taken as a ground for returning the plaint for amendment, or for refusing the relief, on the basis of the alleged defect in the plaint. RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB, **5 C.W.N. 91.** (18 A. 396, 22 A. 55, *F.*)

(4883)—*O.* 29, *r.* 1 (=*s.* 435, *Civ. Pro. Code*, 1882)—*Suit by association—Secretary—Articles—Conditions of retirement.*—A Secretary of an Association cannot under s. 435, sue on behalf of the Association unless it is laid down in the Articles of Association. Where one of the Articles of the Association provides that a member resigning his membership must pay all sums due by him to the end of the resigning month, a member designing to withdraw from the Association must comply with the condition laid down therein and unless it is complied with, he will not cease to be a member. NORTHERN INDIA TRADES ASSOCIATION v. MATTHEWS, **58 P.R. 1886.**

(4884)—*O.* 29, *r.* 1 (=*s.* 435, *Civ. Pro. Code*, 1882)—*Power of Secretary to sue on behalf of a registered Corporation.*—A Secretary to a Corporation can subscribe and verify the plaint on behalf of the Corporation if the latter was incorporated under s. 26 of the Companies Act, 1882. NORTHERN INDIA TRADES ASSOCIATION v. LAURIE, **43 P.R. 1885.**

(4885)—O. 29, r. 1—Unincorporated Society, suit not maintainable by, in the name of officer or agent—*See* PLAINT—GENERAL, 16 A. 420 =A.W.N. 1894, 154.

(4886)—O. 29, r. 1—*See* PLAINT—FORM AND CONTENTS OF PLAINT, 20 A. 167=A.W.N. 1898, 7, 12 C. 41.

(4886-*a*)—O. 29, r. 1—*See* NOS. 1577, 2753, 2787, 2787-*a*, 2787-*b*, 2787-*c*, *supra*.

(4887)—*O.* 29, *r.* 1, *O.* 6, *r.* 15 (2), (3), *O.* 6, *r.* 17, *O.* 7, *r.* 11 (=*ss.* 435, 52, 53, *cl.* (*c*), *Civ. Pro. Code*, 1882)—*Suit by corporation—Plaint verified by principal agent as true to his 'information and belief'- Sufficiency of verification—Dismissal of suit for insufficiency of verification.*—A suit was instituted by a limited Company. The plaint was verified by its principal agent in these terms:—"The particulars set forth in this plaint and in the account are true to my information and belief." The original Court dismissed the suit on the ground that there was not sufficient verification of the plaint within the meaning of s. 435 of the Code. *Held*, in s. 435, there is nothing about actual personal knowledge on the part of the verifier as there is in s. 52. That section shows that a verifier may depose upon his information and belief. Even if this view is not correct, leave ought to have been granted to the plaintiff to amend the plaint and the suit ought not to have been dismissed. THE PORT CANNING AND LAND IMPROVEMENT CO. LD. v. DHARANIDHAR SARDAR, **9 C.W.N. 608.**

——O. XXIX, r. 2 (=1882, s. 436=1877, s. 436 =1859, ss. 45, 63.)

(4888)—*O.* 29, *rr.*2, 3 (=*s.* 436, *Civ. Pro. Code*, 1882)—*Indian Companies Act* (*V of* 1822), *s.* 89—*Limitation Acts* (*XV of* 1877 *and IX of* 1908), *art.* 164—*Service of summons—Companies registered under the Indian Companies Act*—Ex parte *decree—Period of limitation to set aside* ex parte *decrees—Knowledge of the decree—General Clauses Act* (*X of* 1897), *s.* 6—*Acts of procedure—Restrospective effect—Construction of statute.*—The service of summons on a company registered under the Indian Companies Act, 1882, is regulated by s. 89 of the Act. S. 436 of the Civ. Pro. Code, 1882,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

does not apply to companies registered under the Indian Companies Act, but to the more uncommon class of companies authorised to sue or to be sued in the name of an office or trustee. When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expresseed, the enactment applies to all actions whether commenced before or after the passing of the Act. The plaintiff obtained an *ex parte* decree on the 15th November, 1904. An application to execute the decree was made on the 3rd September, 1909; and notice under O. XXI, r. 22 of the Code of 1908, was served on the defendant on the 14th September, 1909. On the 20th September, 1909, the defendant obtained a rule against the plaintiff to show cause why the *ex parte* decree should not be set aside. The plaintiff contended that the defendant had knowledge of the decree before the 14th September, 1909, and that his application was barred under art. 164 of the Limitation Act of 1908. The defendant, in contending that the application was governed by art. 164 of the Limitation Act of 1877, relied on s. 6 of the General Clauses Act, 1897. *Held*, overruling the defendant's contention, that the remedy in respect of the liability involved in the *ex parte* decree was given by the Civ. Pro. Code, and that the Limitation Act, merely regulated the time within which the remedy must be sought. *Held*, that, therefore, the defendant's application was barred under art. 164 of the Limitation Act, 1908. HOPE MILLS v. VITHALDAS PRANJIVANDAS, **12 Bom.L.R. 730.**

(4889)—*O. 29, rr. 2, 3, O. 5, r. 6 (= Civ. Pro. Code, Act VIII of 1859, s. 45)*—"*Sufficient time*"—*Time allowed, when sufficient—Appellate Court, powers of.*—Under s. 45, Civ. Pro. Code, a defendant is entitled to "sufficient time to enable him to appear and answer in person or by pleader," and the date of the defendant's appearance should have been fixed so as to admit of his having such "sufficient time" What may be sufficient time in one case will in another be altogether insufficient, and the nature of the rights involved, the importance of the claim, the distance of the parties from the Court, and often various other circumstances will be elements essential to the determination of what time is reasonably allowable. When the time allowed is obviously insufficient, an appellate Court will interfere. KHADAR BHI v. RAHIMAN BHI, **3 M.H.C. 167.**

——O. XXIX, r. 3 (= 1882, s. 436 = 1877, s. 436 = 1859, ss. 45 and 63.

(4889-*a*)—O. 29, r. 3—*See* NOS. 4888, 4889, *supra.*

——O. XXX (New).

(4890)—O 30—Whether affects s. 239, Contract Act—*See* ARBITRATION—GENERAL, 4 S.L.R. 196=9 Ind. Cas. 712.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4890-*a*)—*O. 30 and O. 34, r. 1—Suit relating to firm property—Mortgage—Service of summons on the manager, whether sufficient.*—A mortgage suit by or against a firm is on the same footing as other suits relating to properties of the firm, and service of summons or notice on the manager of the firm is service on all partners of the firm. HARDWARI MAL v. MR. ATHERTON WEST, **12 Ind. Cas. 629.**

—— O. XXX, r. 10 (New).

(4890-*b*)—*O. 30, r. 10—Suit against person carrying on business in firm's name—High Court Charter, cl. 12 — Jurisdiction—Person living outside but carrying on business within jurisdiction of High Court — Contract signed by manager — Authority of manager — Power-of-attorney, construction of — Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages—Contract Act, s. 107.*—A plaintiff is entitled in respect of a firm transaction to sue the defendant under the name in which he traded, by virtue of O. XXX, r. 10 of the Civ. Pro. Code, 1908. There is nothing in that rule which says anything about residence either in or without the jurisdiction of the High Court, and it has not the effect of curtailing the powers which the High Court derives from cl. 12 of the Charter, under which it has jurisdiction over persons who carry on business within its local limits. A contract was signed by the manager of the defendant's business in Calcutta, the defendant himself being a resident of Singapore. The defendant is sued in his firm's name for damages for breach of the contract in the Original Side of the High Court: *Held*, that the suit was maintainable in the form in which it has been brought, and the High Court has jurisdiction to try it. The defendant by a power-of-attorney empowered his manager to contract, superintend and carry on the business of general merchants as now carried on by the defendant in Singapore. The manager entered into forward contracts with the plaintiff in respect of sugar, and there is evidence that the defendant's firm was accustomed in Calcutta to enter into forward contracts in the sugar trade: *Held*, that the manager had authority to enter into the contract sued upon and that the defendant was liable. By the contract the defendant purchased 750 tons of sugar, the delivery of which was to be made in five equal shipments in August, September, October, November, and December 1910. Notice was given of the arrival of the August shipment amounting to 150 tons. The defendant took delivery of 25 tons but failed to take delivery of the balance which was re-sold by the plaintiff at a loss, and he now sued to recover the loss: *Held*, that as no goods had been appropriated to the fulfilment of the contract, the plaintiff had no right to re-sell and charge the defendant for the difference between the contract price and the price at which he sold the balance of the sugar, but that the measure of damages

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

is the difference between the market price on the date of the breach and the contract price. E.D. SASSOON AND CO. v. M.S.F. ANGULLIA AND CO., **10 Ind. Cas. 895.**

——O. XXXI, r. 1 (=1882, s. 437=1877, s. 437).

See ADMINISTRATOR.

See EXECUTOR.

See TRUST.

See TRUSTEE.

(4891)—*O. 31, r. 1 (=s. 437, Civ. Pro. Code, 1882)—Suit against* mutwallis—*Suit for rent—Parties—Minor—Representation.*—When a suit for rent was brought against two persons, in the capacity of *mutwallis*, but one of them who was a minor was not properly served, and no guardian was appointed on his behalf. *Held*, that *mutwallis* are trustees, and that the presence of all of them in the suit was essential, and that it was properly dismissed for defect of parties. SYED ABDUL RAB CHOWDHURY v. H. C. EGGAR, **12 C.W.N. 160=35 C. 182.**

(4892)—*O. 31, r. 1 (=Civ. Pro. Code, 1882, s. 437)—Suit by trustee—Compromise by trustee against interest of beneficiaries—Right of beneficiares to be made parties.*—Where a trustee is either wholly uninterested or is adverse to the interest of the beneficiaries, the latter may be made parties to the suit. The trustee of a temple instituted a suit for a declaration that the defendant community was not entitled to enter the temple, and obtained a decree in his favour in the first Court. During the pendency of an appeal by the defendants, the plaintiff entered into a compromise giving up all that he got by the decree of the first Court. Thereupon the *Gurukkal* of the temple and some others interested in it applied to be made parties. *Held* that the petitioners could be permitted to come in as parties in order that they might be at liberty to show that a decree should not be passed in accordance with the compromise. *Held* also that the proper course was to make them parties to the suit and not to the appeal. NARAYANASAMI GURUKAL *et al* v. IRULAPPA, **12 M.L.J. 355.** [*F.*, 29 M. 106=15 M.L.J 475; *R.*, 30 M. 158=17 M.L.J. 1=2 M.L.T. 69.]

(4893)—*O. 31, r. 1 (=Civ. Pro. Code, 1882, s. 437)—Decree for foreclosure against executor—Applicatian for redemption by beneficiary and purchaser of his interest.*—Where a decree for foreclosure was obtained against S who was the executor of his father's estate and subsequently A, a brother of S, and M, a purchaser of most of the mortgaged properties from A, made an application to be made parties and to redeem: *Held* that they were not entitled to be made parties to the redemption proceedings and they had no right to redeem the property. MOHANAND CHATTERJEE v. AKHOY KUMAR BARARI, **6 C.W.N. 488.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4894)—O. 31, r. 1—*See* MORTGAGE—GENERAL, 3 L.B.R. 241.

(4895)—O. 31, r. 1—*See* PROBATE—EFFECT OF PROBATE, 8 B. 474.

(4896)—O. 31, r. 1—Order under, allowing new trustee to be brought on record—Appeal—*See* REGISTRATION ACT, 1908, s. 17 *b*, 6 M. L T. 240=3 Ind. Cas. 435.

(4896-*a*)—O. 31, r. 1—*See* NOS. 2199, 4810, *supra*.

——O. XXXI, r. 2 (=1882, s. 438=1887, s. 438).

(4897)—O. 31, r. 2—*See* RECEIVER, 19 B. 83.

(4897-*a*)—O. 31, r. 2—*See* NOS. 2486, *supra*.

——O XXXII, r. 1 (=1882, s. 440=1877, s. 440).

See LUNATIC.

See MINOR.

(4898)—O. 32, r. 1—*See* BOM. ACT XX OF 1864, s. 2, 3 B. 149.

(4898-*a*)—O. 32, r. 1—*See* NO. 1088, *supra* and NO. 4976, *infra*.

(4899)—*O. 32, rr. 1, 3 (1), 4 (2) (=ss. 440, 443, Civ. Pro. Code, 1882)—Representation of minor plaintiff—Leave of Court—Certificated guardian not appointed—Compromise—Court to decide if for benefit of minors.*—Where the mother of a minor is allowed by Court to act for her son, it is a fair inference that she was appointed guardian by the Court, even though there is no formal order in the record so appointing her. Where the Court acts in contravention of s. 443, Civ. Pro. Code, and, overlooking the claims of the certificated guardian, appoints somebody else guardian of the minor, it is a mere irregularity. (29 A. 290, *Appr. & F.*). Even though there be no order which states in so many terms, that the Court has considered the compromise and held it to be for the benefit of the minors, it must be assumed, in the absence of evidence to the contrary, that the Court did its duty in the matter. MIDNAPORE ZEMINDARI CO. v. GOBINDA MAHTO, **8 C.L.J. 31.** [*R.*, 13 C.W. N. 163=8 C.L.J. 274.]

(4899-*a*)—*O. 32, rr. 1, 4 (=Civ. Pro. Code 1882, s. 440)—Competency of guardian of person of lunatic to sue in respect of lunatic's estate—Guardian and Wards Act VIII of* 1890).—A guardian of the person only of a lunatic has no power to institute a suit in respect of the estate of the lunatic. The manager of the lunatic's estate is the only person who can bring such a suit. The word "guardian" in s. 440 of the Civ. Pro. Code, 1882, as amended by the Guardian and Wards Act (VIII of 1890), when applied to a lunatic, means the manager of his estate. Under s. 440, a person other than the guardian has power to institute a suit with the leave of the Court. BAI DIVALI v. HIRALAL, **23 B. 403.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4900)—*O. 32, rr, 1 and 4 (1) (2) (=Civ. Pro Code, 1882, ss. 440, 445)—Suit on behalf of minor—Next friend no relation—Eligibility.*—The appellant brought this suit on behalf of a minor and obtained permission in the Court of first instance to sue as next friend. The respondent contended that the plaintiff was not competent to sue on the minor's behalf, not being his guardian and not being even related to the minor. The first Court gave a decree to the plaintiff but the appellate Court reversed it. *Held* that the suit could not be dismissed merely on the ground that the plaintiff had no right to sue. JAISRI SINGH v. PAL SINGH, **A.W.N. 1883, 198.**

(4901) — *O. 32, rr. 1, 4 (2) (= old s. 440) — Suit by next friend — Absence of certificate — Omission of order to sue through next friend—Effect.*—Failure to pass formal order under s. 30 of Act XL of 1858 is not a fatal defect but a mere irregularity liable to be cured by s. 578. Civ. Pro. Code of 1882. RAM RAGHBIR v. GAURI PERSHAD, **166 P. R. 1889.**

(4902)—*O. 32, rr. 1, 4 (2) (=Civ. Pro. Code, 1882, s. 440)—Guardian and minor—Suit by other than certificated guardian.*—Where there was a guardian duly appointed by a competent Court, in existence at the time of the suit on behalf of two minors, but the suit was filed by a person who was not their certificated guardian, *held* that, having regard to s. 440, Civ. Pro. Code, the suit was wrongly brought, that the plaint should be returned for amendment, and that the defect in the form of the suit was not remedied by the fact that the persons appearing therein as guardian of the minors was the *karta* of the joint family of which all the plaintiffs were members. SHAM KRISHNA v. RAM DAS, **20 A. 162=A.W.N. 1898, 9.** (13 C. 189, *R.*) [*R*, 7 O.C. 234, 11 O.C. 159.]

(4903)—*O. 32, rr. 1, 4 (2) (=Civ Pro. Code, 1882, s.440)—Guardians and Wards Act (VIII of 1890), s. 53—Hindu father has no statutory power to appoint testamentary guardian—"Authority competent in this behalf."*—The words "authority competent in this behalf," in Code of Civil Procedure, s. 440, do not include the case of a Hindu father purporting to appoint a testamentary guardian to his son, even assuming that he has power to appoint a guardian under general Hindu law. S. 440 of the Code of Civil Procedure does not apply to all guardians; as it cannot apply to natural guardians. *Quære.*—Whether a Hindu father has power to appoint a guardian to his minor son under the Hindu law? BUDHILAL v. MORARJI, **9 Bom. L.R. 553=31 B. 413, (reversing 8 Bom. L.R. 522).**

(4904 & 4905)—*O. 32, rr. 1, 4 (2)(=Civ. Pro. Code, 1882, s. 440)—Act XL of 1858, s. 3—Construction—Suit by minor—Plaint—Return—*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859,—*continued.*

Permission when to be obtained—Suit by volunteerguardian—Binding effect on minors.—**Where a suit is brought in violation of s. 440 of the Civ. Pro. Code, 1882, and of the Provisions of Act XL of 1858, the original Court ought to return the plaint in order that the error might be rectified. The obtaining of permission required by s. 3 of Act XL of 1858, in the case of a suit on behalf of a minor should either precede or be contemporaneous with the institution of the suit, and the permission, if applied for before the suit is brought and if granted, should be formally recorded. A volunteer guardian has no right to sue on behalf of a minor; in the case of a person suing in his own name, and without authority as guardian of a minor, the decision, if adverse to the minor's interests, would not bind the minor. RASICK DAS BARRAJE v. JAGUDAMBA DABEE, 18 C.L.R. 405=10 C. 102.**

(4906)—*O. 32, rr. 1, 4 (2) (=s. 440, Civ. Pro. Code, 1882)—Minor—Suit by next friend—Notice to certificated guardran—No formal order granting leave to next friend to sue—Presumption.*—**A, as next friend of B, a minor, instituted a suit to have a sale-deed executed by C, the certificated guardian of B, set aside. Notice was issued to C, under s. 440, Civ. Pro. Code, but he showed no cause. No formal order granting leave to A to institute the suit was recorded, but the Court proceeded to frame issues, and examine witnesses. *Held*, that it must be presumed that the Court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf, and the Court below was wrong in dismissing the suit on the ground that leave to institute the suit had not been formally granted and recorded. SRIDHAR RAO v RAM LAL, 5 A.L.J. 663=A.W.N. 908, 251=4 M.L.T. 443 =31 A. 7=1 Ind. Cas. 555.**

(4907)—O. 32, rr. 1, 4 (2)—*See* GUARDIAN AND WARDS ACT, 1890, s. 52, A.W.N. 1907, 213=4 A.L.J. 597=29 A. 672.

(4908)—O. 32, rr. 1, 4 (2)—*See* HINDU LAW —DEBTS, 6 M.L.T. 303=20 M.L.J. 89=4 Ind. Cas. 105.

(4909)—O. 32, rr. 1, 4 (2), s. 99—Minor—Suit instituted without next friend, effect of—Irregularity—*See* GUARDIAN—GENERAL, 11 O.C. 159.

(4910)—*O. 32, rr. 1, 4 (2), s. 115 (=ss. 440 and 622, Civ. Pro. Code, 1882)—Next friend of a minor plaintiff execution against for costs —Decree, scope of.*—**A minor plaintiff sued by his next friend. The decree passed in the suit was in favour of the defendant. The minor, still suing by his next friend, appealed. The**

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

appeal was dismissed. No order under s. 440, Civ. Pro. Code, was passed ordering the next friend to pay any costs in the suit. The decree holder attempted to execute the decree so far as costs were concerned against the next friend. The next friend filed objections. The Subordinate Judge disallowed the objection and allowed the application for execution of the decree against the person of the next friend. The next friend applied to the High Court for revision under s. 622, Civ. Pro. Code. *Held* that the Subordinate Judge had no jurisdiction to extend the scope of the decree or to allow the application so far as the next friend was concerned. Per *Mahmood. J.*—The power of the High Court to interfere under s. 622, Civ. Pro. Code, considered. LACHMAN PRASAD v. RAM NARAIN, **A.W.N. 1887, 129.**

(4911)—O. 32, rr. 1, 4 (2), s. 115—*See* DECREE—DECREE. CONSTRUCTION OF, A. W.N. 1889, 173.

(4912)—*O.* 32, *rr.* 1, 4 (2), 2 (=*Civ. Pro. Code*. 1882. *ss* 440, 442)—*Application to appoint a guardian* ad litem—*Limitation.*—When an application for the appointment of a guardian *ad litem* is made within a reasonable time after filing the plaint the suit is not to be held barred by limitation owing to the application having been made at the time when the suit was barred, provided the plaint was filed within the limitation period. IMAMI v. SADDAN, **31 P.L.R. 1901=18 P.R. 1901.**

(4913)—*O.* 32, *rr.* 1, 4, 10, (1) (=*ss.* 440, 445 448, *Civ. Pro. Code*, 1877)—*Minor plaintiff—Removal of next friend for misconduct--Omission to appoint another — Effect.*— Where a next friend of a minor plaintiff is removed for misconduct it is the duty of the Court to appoint another in his stead ; otherwise all the proceedings of the Court from that stage will be a nullity in spite of the fact that the defendant did not press the objection till the stage of second appeal. RAHIM v. AHMAD, **125 P.R. 1882.** (100 P.R. 1882, *Cited.*)

(4914)—O. 32, *rr.* 1, 4, (2), 16, *s.* 115 (=*ss.* 440 464, 622, *Civ. Pro. Code*, 1882)—*Suit against Collector as agent of Court of Wards—Disqualified owner* s. 11—*Act XXXV of* 1858 *(Care of Estates of Lunatics)—Ss.* 175, 176, *Oudh Land Revenue Act (XVII of* 1876)—*Judgment of lower Court—Mere technicality not aground for setting it aside under s.* 622, *Civ. Pro. Dode.*—A disqualified proprietor (a lunatic) will be rightly represented in a suit, when his estate has been taken charge of, by the Court of Wards, ss. 175 and 176, Act XVII of 1876, will not vitiate such a suit. On a purely technical ground alone the decision of a lower Court ought not to be declared a nullity under s. 622, Civ. Pro. Code, 1882. ĀSHARFI LAL v. THE DEPUTY COMMISSIONER OF BARA BANKI, **5 M.L.J. 77 P.C. =22 C.729, P.C.=22 I.A. 90=6 Sar. 590.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXXII, r. 2 (=1882, s. 442=1877, s. 442).

See LUNATIC.

See MINOR.

(4915)—*O.* 32, *r.* 2 (=*Civ. Pro. Code*, 1882), *s.* 442.—The above-section refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor. BENI RAM BHUTT v. RAM LAL DHUKRI, **13 C. 189.** [*R.*, 20 A. 162=18 A.W.N. 9.]

(4916)—*O.* 32, *r.* 2 (=*Civ. Pro. Code*, 1882, *s.* 442)—*Institution of suit by minor without next friend—Father's willingness to be placed on record as next friend—Application to Court by defendant for order striking plaint off the file—Procedure by Court.*—On the 5th of April, 1888, the plaintiff brought an administration suit against the executors of her late husband. On the 2nd of May, the defendants' solicitors gave notice to the solicitors of the plaintiff that the plaintiff was a minor suing without a next friend and the plaint must be struck off the file in consequence. The plaintiff's solicitor replied that, if the plaintiff was really a minor, he would take steps to have her father appointed her next friend and the plaint and proceedings amended accordingly. On the 7th of May, inspection was given to the plaintiff's solicitor of the plaintiff's horoscope, and after that inspection the plaintiff's solicitor proposed that the plaint and proceedings should be amended by the insertion of the name of the plaintiff's father as her next friend. Nothing was done by either party or sometime afterwards, and on the 6th June, the defendants' attorneys gave notice to the plaintiffs of an application for an order that the plaint should be taken off the file under s. 442 of the Civ. Pro. Code. The plaintiff likewise applied to be allowed to amend the proceedings by the insertion of the name of her father as her next friend. *Held* that, the suit not being a vexatious one, and the father of the plaintiff not having fraudulently concealed her age and having stated on oath that he *bona fide* believed her to be of age and being willing to be placed on the record as her next friend, the plaint could not be struck off the file. *Held* also that the Courts both in India and England, as a rule, only strike the plaint off the file the where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in the claim. Where the fact of minority is a *bona fide* question of evidence and the defendant's allegation is found correct, then, the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. RATTONBAI v. CHABILDAS LALOOBHOY, **13 B. 7.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4917)—*O.* 32, *r.* 2 (=*Civ. Pro. Code*, 1877, *s.* 442)—*Minor co plaintiff—No representation by next friend—Appellate Court—Procedure.*—The mere fact that one of the plaintiffs was a minor on whose behalf the suit had not been instituted by a next friend was no ground for reversing the decree of the Court of first instance in favour of all the plaintiffs. The decree of the lower Court must be set aside, and the suit must be restored to the file of that Court for retrial, after appointment of a next friend for the minor. WAZI RAI v. SHEOBART RAI, **A.W.N. 1881, 150.**

(4917-*a*)—O. 32, r. 2—*See* NOS. 4880, 4912, *supra*.

——O. XXXII, r. 3 para (1) (=1882, s. 443=1877, s 443. (para (2)=1882, s. 446=1877, s. 446).

See LUNATIC.

See MINOR.

(4918)—O. 32, r. 3—Widow appointed by District Judge, guardian of minor adopted son—Right of widow to bring suit to set aside adoption—*See* GUARDIAN AND WARDS ACT, 1890, ss. 47, 48, 30 C. 613=7 C.W.N. 419.

(4918-*a*)—O. 32, r. 3—*See* NOS. 1777, 2728-*a*, 2852 *a*, 3024, 4899, *supra*.

(4919)- *O.* 32, *rr.* 3, (1) 4 (2) (=*s* 443, *Civ. Pro. Code*, 1882)—*Duty of Court.*—A Court cannot be too jealous in observing the requirements of the law in regard to infants, and in seeing that in suits affecting them their interests are properly safe-guarded. Under s. 443, Civ. Pro. Code, in the appointment of a guardian, the Court ought to be satisfied, not merely that the proposed guardian is a fit and proper person to act as such, but also that he has no interest directly or indirectly adverse to the minor. The question under the section is not whether the proposed guardian is willing to act, but whether the Court is satisfied upon proper materials that he is the proper person to appoint, and whether there is either a formal or informal appointment of a guardian. BHURA MAL v. HAR KISHAN DAS, **24 A. 383, F.B.=A.W.N. 1902, 76.** [*R.*, 5 C.L.J. 434.]

(4920)—*O.* 32, *rr.* 3 (1), 4 (2) (=*Civ Pro. Code*, 1882, *s.* 443)—*Appointment of guardian during enquiry under—Procedure.*—On the plea of minority being set up by the defendant in a suit, a guardian to represent him should be appointed for the purposes of the inquiry contemplated by s. 443 of the Civ. Pro. Code. A preliminary issue should be raised, relating to the question of the defendant's minority, and such issue ought to be tried and adjudicated on in the same way in which any other material issue is tried and decided. KASI DOSS v. KASSIM SAIT, **16 M. 344.**

(4921)—*O.* 32, *rr.* 3 (1), 4 (2) (=s. 453, *Civ. Pro. Code*, 1882)—*Guardian* ad litem—*Procedure, appointment of guardian* ad litem *invalid*—*Effect of invalidity on decree passed against minor defendant.*—The provisions of s. 443 as to the appointment of a guardian *ad litem* for a minor defendant are imperative, and where those provisions are not substantially complied with, the minor is not properly represented and any decree which may be passed against him is a nullity. HANUMAN PRASAD v. MUHAMMAD ISHAQ, **A.W.N. 1905, 229=2 A.L.J. 615=28 A. 137.**

(4922)—*O.* 32, *r.* 3 (1), 4 (2) (=*old s.* 443)—*Suit against minor—No order as to gurdian—Informal sanction.*—The circumstance that no order was passed by the Court appointing a guardian *ad litem* to a minor defendant will not invalidate the proceedings if the records show that the Court has informally sanctioned such appointment. DHANPAT MAL v. KHAZANA, **67 P.R. 1897.**

(4923)—*O.* 32, *rr.* 3 (1), 4 (2) (=*s.* 443, *Civ. Pro. Code*, 1882)—*Violation of the provisions of—Irregularity—Decree against guardian* ad litem, *other than certificated guardian.*—The violation of the provisions of s. 443 of the Civ. Pro. Code, by a Court is merely an irregularity, and, as such, does not of itself vitiate either a decree passed in a suit or a sale consequent upon such a decree. Where, therefore, the mother of certain minor defendants was appointed their guardian *ad litem* when there was a certificated guardian, and a decree was passed against the minors and their property was sold in execution of the decree, *held*, that the decree and the sale were not void. DAMMAR SINGH v. PIRBHU SINGH, **4 A.L.J. 155=A.W.N. 1907, 70=29 A. 290.** [*F.*, 8 C.L.J. 31; *R.*, 7 C.L.J. 270.]

(4924)—O. 32, r. 3 (1), 4 (2)—*See* ACQUIESCENCE, 21 M. 167.

(4925)—O. 32, rr. 3 (1), 4, (2)—*See* EXECUTION OF DECREE—MISCELLANEOUS, 7 C.L.J. 270.

(4926)—O. 32, rr. 3 (1), 4 (2)—Court should not appoint as *guardian ad litem* a person whose act is called in question in the suit, even though it is a case to which s. 443, Civ. Pro. Code, applies—*See* GUARDIAN—GENERAL, 11 O.C. 319.

(4927)—O. 32, rr. 3 (1), 4 (2)—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 7 C.L.R. 407.

(4928)—O. 32, rr. 3 (1), 4 (2)—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 5 B. 306.

(4929)—O. 32, rr. 3 (1), 4 (2)—Court's jurisdiction to pass a decree against a minor when he is not properly represented on the record—*See* GUARDIAN — DUTIES AND POWERS OF GUARDIANS, 2 A.L.J. 615=A.W.N. 1905, 229=28 A. 137.

(4930)—*O.* 32, *rr.* 3 (1), 4 (2), s. 99 (=*ss.* 443, 578, *Civ. Pro. Code*, 1882)—*Proper appointment of guardian* ad litem, *though no formal order—Service of summons on wrong defendant—Irregularity—Procedure.*—Under s. 443, Civ. Pro. Code, the Court, after satisfying itself of

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the fact of minority, is bound to appoint a proper person to act on behalf of a minor in the conduct of a case. This rule should be strictly followed. But a defect in following the procedure prescribed by that section is not necessarily fatal to the proceedings. Where, in a suit against the minors, the minors are effectively represented by their mother (with the consent of the Court), though no formal order appointing her to be their guardian is drawn up and no attempt is made to serve the summons upon the minors personally or upon their mother, a *pardanashin* lady, before serving it upon the only adult male member and *karta* of the family, these defects in procedure—,if they have not caused any prejudice to the minors—, are, at most, irregularities which, under s. 578, Civ. Pro. Code, 1882, would not have furnished grounds for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit ; much less, could they furnish any ground for reversing the proceedings by a fresh suit. WALIAN v. BANKE BEHARI PERSHAD SINGH, **30 C 1021, P.C. = 30 I A. 182 = 7 C.W.N. 774 = 5 Bom. L.R. 822 = 8 Sar. 512.** (14 C. 204, *Appr.*; 16 C. 40, P.C. *F.*) [*F.*, 29 M. 58 = 16 M.L.J. 14; *R.* 7 O.C. 334, 5 C.L.J. 434, 10 O.C. 321, 11 O.C. 159 ; *D.*, 28 A. 137 = 2 A.L.J. 615 = A.W.N. 1905, 229, 29 A. 675 = A.W.N. 1907, 225.]

(4931)—O. 32, rr. 3 (1), 4 (2), s. 141—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 50, 83, 27 C. 350.

(4932)—*O.* 32, *rr.* 3 (1), 4 (2), 15 (=*Civ. Pro. Code*, 1882, *ss.* 443, 463)—*Lunatic defendant—No adjudication under Act XXXV of* 1858—*Guardian Practice.*—Although s. 443 of the Code read with s. 463, does not oblige a Court to appoint a gurdian *ad litem* for a defendant of unsound mind except in the case where he has been adjudged to be of unsound mind under Act XXXV of 1858, still, upon general principles, and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on inquiry, that he is of unsound mind so as to be unfit to defend the suit (See *Daniel*, Ch. Pr., Vol. I, p. 182). VENKATRAMANA RAMBHAT v. TIMAPPA DEVAPPA, **16 B. 132.** [*F.*, 33 C. 1094 = 10 C.W.N. 719 = 4 C.L.J. 306 ; *R.*, 20 A. 2, 23 B. 653 = 1 Bom. L.R. 88, 24 M. 504.]

(4933)—*O.* 32, *rr.* 2 (3), 4 (1) (=*s.* 443, *Civ. Pro. Code*, 1877)—*Minor defendant—Omission to appoint guardian—Effect.*—When the fact that the defendants were minors was brought to the notice of the Court, it was its duty to appoint a guardian *ad litem* for them and where no such appointment is made, the proceedings as against them will be void, such appointment if made must be recorded by the Judge ; in no case will the necessary permission to appoint the guardian be presumed. DINA v. BAHAWAL BAKSH, **100 P.R. 1882.** *See, also,* SUKHA SINGH v. BUR SINGH, **100 P.R. 1882, Note.** [*Cited*, 125 P.R. 1882 ; *Not F.*, 67 P.R. 1897.]

(4934)—*O.* 32, *r.* 3 (2), (3) (4) (=*s.* 456, *Civ. Pro. Code*, 1882)—*Representation of minors—Order appointing guardian* ad litem—*Absence of evidence of affidavit—Presumption of regularity.*—In a case, where the question was whether certain minors were properly represented at the hearing of a suit in which the decree now impugned was made, the order appointing a guardian *ad litem* of the minors was on the record, but no affidavit required by s. 456, Civ. Pro. Code, 1882, was forthcoming. *Held*, that it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done ; and that the minors were properly represented by the guardian *ad litem* appointed by the Court. MUNSHI MUNNU LAL v. GHULAM ABAS, **12 Bom. L.R. 489, P.C. = 11 C.L.J. 357 = 14 C.W.N. 794 = 8 M.L.T. 573 = 13 O.C 123 = 6 Ind. Cas. 788 = 20 M.L.J. 591 = 32 A. 287.**

(4935)—*O.* 32, *r.* 3 (2) (3), (4) (=*Civ. Pro. Code*, 1882, *s.*456)—*Compromise by guardian* ad litem—*Suit on behalf of minor to set aside compromise decree.*—Where a Court appoints a guardian *ad litem*, it must be presumed that the Court has satisfied itself that he has no interest in the matter in question in the suit adverse to that of the minor and that he is a fit person to be appointed guardian *ad litem*. Therefore, if the guardian *ad litem* effects a compromise of the suit with the leave of the Court, the compromise can be set aside only upon the minor proving fraud or collusion on the part of their guardian, and the prejudicial nature of the compromise. RAJA RAM v. ZAMAN KHAN, **1 A L.J. 130.**

(4936)—*O.* 32, *rr.* 3 (2), (3), (4), 4 (1) (=*Civ. Pro. Code*, 1882, *ss.* 456 *and* 457)—*Minor, suit brought by, to set aside a decree passed against him — Guardian* ad litem, *appointment of, conditions necessary for—Proper representation of minor in a suit to be done with great care—Affidavit that the guardian has no interest adverse to the minors—Certificated guardian, mortgage executed by, without the sanction of the Court, not void* ab initio—*Negligence on the part of a guardian* ad litem *in conducting the suit necessary to be shown before the decree can be set aside.*—*Held*, that a mortgage executed by a certificated guardian without the sanction of the Court is not void *ab initio*, but that the absence of such sanction relegates the guardian to the position which he would have occupied if he had not been granted a certificate at all. *Held*, also, that, where a minor challenges the validity of a decree passed in a suit brought against him, he must establish, either that he was not properly represented in the suit in which the decree was passed against him, or that the guardian *ad litem* appointed by the Court was guilty of gross negligence in the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

conduct of that suit. *Held*, further, that, where a person is appointed by a Court as the guardian *ad litem* of a minor, it is the duty of the Court to see that the provisions of the Code relating to the appointment of the guardian are duly complied with. There must, in such cases, be an affidavit verifying the fact that the proposed guardian has no interest adverse to the minor and is a fit person to be appointed. Where, therefore, there has been no such enquiry at all as to the fitness of the guardian, his appointment is not good in law, and the minor cannot be said to be properly represented in the case, and the decree, if any, passed against the minor in such a suit is not binding on him. GHULAM ABBAS v. MUNNA LALL, **10 O.C. 321**. (9 A. 340, 25 A. 59, 9 O.C. 97, 12 B. 18 A.W.N. 1894, 141, 16 I.A. 195, 28 A. 137, 23 A. 459, 18 A. 373, 23 B. 287, 11 B. 130, 24 A. 383, 22 C. 8, 18 A. 373, 30 C. 1021, 5 O.C. 197, 33 I.A. 128, *R.*)

(4937)—*O.* 32, *rr.* 3, 4 and 11—*Guardian* ad litem—*Duration of office.*—A guardian of a minor defendant is not *functus officio* on a decree being passed in a suit. He holds his office till removed by death or act of Court. So all applications on minor's behalf arising out of, or connected with the suit, including one for review must be made by the guardian. NUR MUHAMMAD v. SHAH MAL, **118 P.R. 1883.**

——O. XXXII, r. 4, para (1) (=1882, s. 445=1877, s. 445), para (2) (=1882, ss. 440, 443=1877, ss 440, 443), and para (4) (=1882, s. 456=1877, s. 456).

See LUNATIC.

See MINOR.

(4937-*a*)—O. 32, r. 4—*See* NOS. 1087, 1088, 1777, 2728-*a*, 2852-*a*, 3024, 4899, 4899-*a*, 4900, 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4908, 4909, 4910, 4911, 4912, 4913, 4914, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, 4930, 4931, 4932, 4933, 4936, 4937, *supra*, and NOS. 4976, 4985, *infra*.

(4938)—*O.* 32, *r.* 4 (1) (=*s.* 457, *Civ. Pro. Code*, 1882)—*Lunatic—Guardian* ad litem—*Competency of married woman.*—Under s. 457 of the Code, a married woman cannot be made the guardian *ad litem* of a lunatic. Such order, if made, is illegal. In such cases, the lunatic cannot be deemed to have been properly represented in the suit. ZAMINIA BEGAM v. NIHAL CHAND, **A.W.N. 1883, 90.**

(4939)—*O.* 32, *r.* 4 (1) (=*s.* 457, *Civ. Pro. Code*, 1882)—*Guardian* ad litem—*Married woman—Her right to enter into a compromise from the minor defendant—Compromise irregular not illegal, when sanctioned by Court.*—The appointment of a married woman as a guardian *ad litem* for a minor defendant is, though a departure from the provisions of the Code of Civil Procedure, a mere irregularity. (30 I.A. 182, *R.*). When a decree had been passed on the basis of a compromise entered into by the guardian *ad litem*, on behalf of a minor defendant, such guardian being a married woman, with the previous sanction of the Court, and no collusion or fraud between such guardian and the plaintiff was proved, the High Court refused, in a suit by the minor, to set aside the compromise on the ground of the guardian *ad litem* having been a marrried woman. A compromise sanctioned by Court on the part of an infant cannot be set aside by him on any ground which would be insufficient to set aside a compromise between persons *sui juris*. KUNHI KUTTIALI HAJI v. KUNHI PATHA, **29 M. 58=16 M.L.J. 14.** [*R.*, 4 A.L.J. 698=A.W.N. 1907, 243=79 A. 728.]

(4940)—*O.* 32, *r.* 4 (1) (=*s.* 457, *Civ. Pro. Code*, 1882)—*Guardian of minor plaintiff respondent—Married woman—Custom—Alienation by father—Necessity for sale established—Consideration for sale higher than the amount necessary to raise.*—A minor plaintiff filed a suit, through his mother as his next friend, against his father, and the case was decreed. The defendant appealed making the mother as guardian of the minor plaintiff respondent. A question was raised whether the mother could continue to act as guardian, notwithstanding the provisions of s. 457 of the Civ. Pro. Code. The Chief Court did dot consider it necessary to take the matter up of its own motion, when the appellant elected to proceed with the appeal as brought. Where necessity for sale of ancestral property by a father is established, no declaration should be given in favour of sons that the sale would not affect their interests after the father's death, for the mere fact that the property was sold at a higher price by a small sum than it was necessary for the father to raise. WADHAWA MAL v. WADHWA, **144 P.L.R. 1906=8 P.R. 1908=33 P.W.R. 1908.**

(4941)—*O.* 32, *r.* 4 (1) (=*s.* 445, *Civ. Pro. Code*, 1882)—*Married woman—Whether capable of acting as next friend*—" S. 475, Civ. Pro. Code, has no application to the case of a next friend. S. 445 governs the case." Per *Trevelyan and Banerjee, JJ.*—A married woman can act as the next friend of a minor plaintiff. ASIRUN BEBI v. SHARIP MONDUL, **17 C. 488 F.B.** (11 C. 733, *Overruled.*) [*R.*, 1 L.B.R. 38, 6 C.L.J. 36.]

(4942)—*O.* 32, *r.* 4 (1) (=*s.* 457, *Civ. Pro. Code*, 1882)—*Guardian* ad litem—*Co-defendant—Married woman.*—The mother of several minor defendants, who was herself a defendant as also was her husband, was appointed guardian *ad litem* for her minor sons. *Held*, this was illegal being contrary to the provisions of s. 457, Civ. Pro. Code, and the suit must be decided afresh after the appointment of a new guardian KALI SHANKAR SAHAI v. MAHARAJA PRATAB UDAI NATH SAHI DEO, **6 C.L.J. 36.**

(4943)—O. 32, r. 4 (1)—Married woman appointed gurdian *ad litem*—Right to question validity of decree in execution—*See* APPEAL—MISCELLANEOUS, 8 Ind. Cas. 26.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4943-*a*)—O. 32, r. 4 (1)—Appointment of guardian *ad litem* without his consent—Decree against infant represented by guardian appointed without consent—Effect—*See* GUARDIAN AD LITEM, 15 C.L.J. 3.

(4944)—O. 32, r. 4 (1)—*See* HINDU LAW—JOINT FAMILY, 23 A. 459.

(4945)—O. 32, r. 4 (1) and s. 115—*See* PAUPER SUIT, A.W.N. 1888, 150.

(4945-*a*)—O. 32, r. 4 (3)—Appointment of guardian *ad litem* without his consent—Decree against infant represented by such guardian—Effect—*See* GUARDIAN AD LITEM, 15 C.L.J. 3.

——O. XXXII, r. 5 (=1882, s. 441=1877, s. 441.)

See LUNATIC.

See MINOR.

(4945-*b*)—O. 32, r. 5—*See* NO. 4880, *supra*.

(4946)—*O. 32, r. 5 (2) (=Civ. Pro. Code,* 1882, *s.* 444)—*Minor not being represented by guardian* ad litem.—When the Court orders execution against a minor when the latter is not represented by a guardian *ad litem*, the order is illegal; and that order is liable, under s. 444, Civ. Pro. Code, to be discharged by the Court which has made it, as soon as the fact is proved before it. CHERIANUJAN THIRUMALPAD v. KARARNAMALPAD, **9 M.L.J. 144.**

(4946-*a*)—O. 32, r. 5 (2)—*See* GUARDIAN—GENERAL, A.W.N. 1893, 104.

——O. XXXII, r. 6 (=1882, s. 461=1877, s. 461).

See LUNATIC.

See MINOR.

(4947)—*O. 32, r. 6 (=s.461, Civ. Pro. Code,* 1882)—*Mitakshara joint family—Suit by managing member for family debt—Representing minor co-parcener as next friend—Withdrawal of decretal money from Court—Next friend if must furnish security.*—A suit to recover a joint family debt was instituted by the managing member of a joint Mitakshara family appearing for himself and as next friend of the other member of the joint family who was a minor. A decree having been obtained and the decretal amount deposited in Court by the defendant, the plaintiffs applied for the withdrawal of the amount. *Held*—That s. 461 of the Civ. Pro. Code did not apply to the case, and the managing member could not be required to take the Court's leave and to give security under that section before being allowed to withdraw the money. HARIHAR PERSHAD SINGH v. MATHURA LAL, **12 C.W.N. 598=35 C. 561=8 .L.J. 256.** [*F.*, 32 M. 139=4 M.L.T. 462; *R.*, 11 O.C. 246.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXXII, r. 7 (=1882, s. 462=1877, s. 462.)

See LUNATIC.

See MINOR.

(4948)—*O. 32, r. 7 (=old s. 462)—Oaths Act—Offer to be bound by oath—Effect.*—It is competent for the next friend of a minor to bind the latter by an offer under the Oaths Act that the oath or solemn affirmation by the other party to or by any witness in such proceeding shall, as against the minor, be conclusive proof of the subject in question. The leave of the Court under this section is not required. MALAK SORAB v. ANOKH RAI, **18 P.R. 1891.** [*R.*, 4 P.R. 1907, *D.*, 75 P.R. 1900.]

(4949)—*O. 32, r. 7 (=old s. 462)—Suit for custody of wife—Reference to arbitration—No record of Court as to sanction—Irregularity.*—In a suit by minor through his next friend for the custody of his minor wife represented by her mother as guardian *ad litem*, the Court allowed the matter in dispute to be referred by the respective guardians to two arbitrators without recording an order under this rule. This was held to be a material irregularity. HIRA v. DINA, **37 P.R. 1895.** [*R.*, 4 P.R. 1907.]

(4950)—*O. 32, r. 7 (=old s. 462)—Leave to compromise given without enquiry—Binding effect on minor.*—Where there is nothing to show that the Court satisfied itself after due inquiry that the compromise was beneficial to the minor and the compromise had not been expressly sanctioned by the Court, a decree according to the compromise will not bind the minor. BISHEN SINGH v. MIR SINGH, **17 P.R. 1899.**

(4951)—*O. 32, r. 7 (=old s. 462)—Guardian binding by oath—Sanction of Court—Minor's benefit.*—An agreement by the next friend of a minor to relinquish a claim should the opposite party take oath is not binding on the minor if it is not made with the express sanction of the Court, accorded after enquiry as to whether it would be for the minor's benefit. SHADI v. NATHU, **186 P.R. 1889.** [*R.*, 18 P.R. 1891, F.B.]

(4952)—*O 32, r. 7 (=s. 462, Civ. Pro. Code,* 1882)—*Court's duty in granting leave—Compromise—Certificated guardian if to take permission of Judge—Guardian and Wards Act (VIII of* 1890), *s. 29—Review—Suit to set aside decree, if maintainable—Fraud—Valuation—Jurisdiction.*—A compromise of a suit is not one of the acts contemplated in s. 29 of the Guardian and Wards Act; hence a certificated guardian can compromise a suit without obtaining the sanction of the District Judge. The statutory provision for safe-guarding the interests of minors in suits, is contained in s. 462 of the Code of Civil Procedure. The Court in sanctioning a compromise on behalf of an infant under s. 462

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of the Code of Civil Procedure, should record the fact that the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court. (16 W.R. 232, 17 A. 531, 26 B. 109, 2 C.W.N. 90, 29 M. 104, *F.*) Where a decree is passed on adjudication, no separate suit lies to set aside the decree except on the ground of fraud, but where it is passed simply upon a compromise, a suit lies upon grounds other than that of fraud. (34 C. 83, *F.*) Where the minors were defendants represented by their mother and guardian, in the original suit as also in the review petition, and the application for review was discharged with the express direction that the applicant's proper remedy was by way of suit and not by way of review, a suit by the minors through a new next-friend, their mother and former guardian *ad litem* being impleaded as a defendant, lies to set aside the decree on grounds other than that of fraud. (2 C.L.J. 508, *D.*) Where the plaintiffs valued their claim in the Munsiff's Court at Rs. 500, and issue was taken on the point, (which if decided in favour of the defendant would have ousted the Munsiff's jurisdiction), but no evidence was adduced, there was no waiver of jurisdiction and the High Court can interfere on second appeal. BIKU HALWAI v. MOHESH HALWAI, **8 C L J. 266.** (24 M. 43, *D.*) [*F.*, 8 C.L.J. 274=13 C.W.N. 163=4 Ind. Cas. 467; *R.*, 13 C.W.N. 1197=2 Ind. Cas. 129=10 C.L. J. 420.]

(4953)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Compromise on behalf of infant—Sanction of Court—Compromise if can be set aside.*—When a suit in which a minor plaintiff (represented by his next friend) was a party, was compromised after it had been opened on his behalf, and the witness examined, and it appeared that the infant had no separate interest from the adult members of the family, who took part in the compromise and assented to it, and the Court, having had its attention drawn to it, approved of it, and it was stated solemnly in an order made by the Court to be for the benefit of the infant. *Held* that the compromise cannot be set aside. RAMASWER PERSHAD SINGH v. RAMBAHADUR SINGH, **11 C.W.N. 178. P.C.=34 C. 70=5 C.L.J. 178=17 M.L.J. 59=2 M.L.T. 165.**

(4954)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Compromise by guardian ad litem without leave of Court, validity of—Suit to recover possession of property from defendant who obtained it under compromise decree—Limitation Act, arts. 91, 144, applicability of.*—While the present plaintiffs were minors, a suit was

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brought against them for recovery of certain share in a zamindary. The suit was compromised by the plaintiff's mother, who was the guardian *ad litem* in that suit, without obtaining the leave of the Court. The present suit was for the recovery of the share obtained by the defendants in pursuance of the compromise-decree on the ground that the defendants had no share in the zamindari, inasmuch as it was the self-acquired property of the plaintiff's father. Whether art. 91 of the Limitation Act applied to the suit, was the point that had to be decided. *Held*, art. 91 applies where there is a question of cancelling an instrument. In the present case there was no instrument. A decree cannot be considered an instrument. If the compromise was an instrument under s. 462 of the Code, it was void as against the minors, *i.e.*, the present plaintiffs. The substantial relief sought by the plaintiffs was possession of their property, of which they had been deprived by a proceeding that was totally illegal. Hence the suit was governed by art. 144. DWARKA v. SALIK, **8 O.C. 191.**

(4955)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Minor—Compromise—Leave of Court*—For the exigencies of s.462 of the Code being properly complied with so as so enable the validity of a compromise, entered into on behalf of a minor, to be maintained, when such compromise is *subsequently* challenged, it must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. MONOHAR LAL v. JADU NATH SINGH, **4 C.L.J. 8, P.C.=8 Bom. L.R. 489=10 C.W.N. 898=9 O.C. 219=1 M.L.T. 210=16 M. L.J. 291=3 A.L.J. 710=28 A. 585=33 I.A.528.**

(4956)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Withdrawal from suit by next friend—Right of minor to have it restored through another next friend.*—In all cases where an infant is a ward of Court, no act can be done affecting the person or property or state of the minor, unless under the express or implied direction of the Court. A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court. (*Gregory* v. *Molesworth*, (1747), Atk. 626, 13 B. 137, *approved.*) On the withdrawal of the next friend of a minor plaintiff from a suit, the minor is entitled to have the suit re-opened or reviewed through another next friend. In that case, it is sufficient to show that the former next friend was grossly negligent of the minor's interest in withdrawing from the suit. Fraudulent conduct on the part of the former next friend need not be proved. RAM SARUP LAL v. SHAH LATAFAT HOSSEIN, **29 C. 735.** (*Gregory* v. *Molesworth*, (1747) 3 Atk. 626. (13 B. 137, *R.*) [*F.*, 27 M. 377=14 M.L.J. 1591.

(4957)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882—Dismissal for default—Minor—Next*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

friend making default in appearance—Absence of pleader.—The idea that defaults in appearance can always be atoned for by paying costs is an erroneous idea and should not be allowed to gain ground. A minor's suit is liable to be dismissed for his next friend making default in appearance at the time of hearing of the suit. The fact of the majority of the plaintiff makes no difference, for there is no distinction in the Civ. Pro. Code in his favour. The minor may sue again through another next friend or himself on attaining majority. MUSSAMMAT GURDEVI v. RAMAN MAL, **99 P.L.R. 1910=8 Ind. Cas. 547.**

(1958)—*O. 22, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Compromise—Minor—Leave of Court—Award—Decree upon award.*—S. 462 of the Civ. Pro. Code, contemplates the existence of a guardian and a pending litigation. Hence, the section has no application where the mother of a minor agrees, on behalf of the minor, to an award, and a decree is afterwards permitted to be passed in terms of the award. VITHALDAS v. DATTARAM, **3 Bom. L.R. 887=26 B. 298.**

(4959)—*O. 32, r. 7 (=Civ. Pro. Code, 1882, s. 462)—S. 462—Decree—Compromise by leave of Court—Order reversing the compromise not legal—Procedure—Practice.*—Where the leave of a Court was given to a compromise of a decree on behalf of minors, it was not competent for the Court to re-open that matters *proprio motu* and to set aside its order on the ground that the compromise gave the minors less property than what they were entitled to under the decree. The modes in which such an order can be impeached resolve themselves into two at the most, *viz.*, by review or by suit. VIRUPAKSAPPA v. SHIDAPPA, **1 Bom. L.R. 82 =23 B 620.**

(4960)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Compromise—Execution proceedings—Minor—Avoidance of compromise before attaining majority.*—S. 462 of the Code of Civil Procedure is applicable to a compromise of execution proceedings. A mere endorsement of "Kabul," or any other word of a similar import, on a *darkhast* does not imply a sufficient compliance with the provisions of s. 462, Civ. Pro. Code. The question whether the permission contemplated by the section has been given or not is a question of fact; to determine it, however, it is of the greatest importance to see whether the Court had before it the materials necessary for arriving at a judicial conclusion. A minor can avoid a compromise, entered into on his behalf by his next friend or guardian, even before attaining majority. *Semble.*—When a Court grants permission under s. 462, Civ. Pro. Code, and then finds out that such permission was improperly given it can revoke that permission in a proceeding under s. 244 of the Code. VIRUPAX v. SHIDAPPA, **3 Bom. L.R. 565=26 B. 109.**

(4961)—O. 32, *r.* 7 (=1882, *Civ. Pro. Code, s.* 462—*Guardian and minor—Compromise of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

suit to which a minor is a party—Duty of Court in dealing with such compromise.—Where a compromise is sought to be effected in a suit in which one of the parties is a minor it is incumbent on the Court to consider carefully the nature and terms of the compromise and whether it is for the benefit of the minor, and if the proposed compromise be accepted by the Court and judgment passed in the terms thereof such judgment should show clearly the reasons which led the Court to accept and act upon the compromise. HIRA SINGH v. KALIAN SINGH, **A.W.N. 1896, 127.** (A.W.N. 1895, 126, 2 M. 103, *F.*)

(4962)—*O. 32, r. 7 (=Civ. Pro. Code, 1882, s. 462)—Compromise petition signed by guardian ad litem—Leave to compromise not obtained—Refusal of guardian to present compromise petition—Enforcement of compromise.*—During the pendency of a suit, a compromise was arrived at between the parties. The guardian *ad litem* of the minor defendants signed the petition of compromise and agreed to present it in Court at the next hearing of the suit. Leave of the Court was not obtained under s. 462, Civ. Pro. Code. On the appointed day, the guardian declined to present the petition. On the plaintiff seeking to enforce the compromise, the guardian objected to a decree being passed in terms thereof. *Held*, that as leave to enter into the compromise was never asked for on behalf of the minor defendants, and in the face of the opposition on the part of the person representing the minor defendants in the litigation, the Court had clearly no power to enforce the compromise, even though it appeared that the terms of the compromise were beneficial to the minors. RANGA RAO v. RAJAGOPALA RAJU, **22 M. 378.**

(4963)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Want of sanction of Court to compromise a suit on behalf of a minor party—Effect of want of sanction—Compromise without sanction avoidable, not void.*—A compromise, by a guardian *ad litem* on behalf of a minor defendant, is not void *ab initio* but only voidable, at the option of the minor, on his attaining majority if the equities of the case require the setting aside of the compromise. But, if the terms of the compromise are not only fair but positively advantageous to the minor and the same has been acted upon by the parties, and when restoration of the parties to their original position is impossible, the Court, will not set aside such a compromise on the simple ground that the sanction of the Court, that heard the suit, was not obtained. GHULAM ALI SHAH v. SHAHABAL SHAH, **3 P.R. 1905=87 P.L.R. 1905.**

(4964)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Compromise of suit—Court, sanction of—Minor party—Absense of sanction—Compromise not binding on minor.*—Where a compromise is entered into by parties to a suit in which a minor is interested, it is not binding

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

on the minor, unless leave of the Court is obtained under s. 462, Civ. Pro. Code. And where the minor comes forward to set aside the compromise, the Court has no power to uphold it on the ground that it is for the benefit of the minor or that the minor has derived benefit from it. BHIWA JOTIBA v. DEVCHAND BECHAR, **13 Bom. L.R. 280**.

(4965)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Guardian and minor—Compromise of suit by guardian* 'ad litem'—*Sanction of Court not given—Suit by minor impeaching compromise—Voidable transaction—Burden of proof—Further appeal—Ground not urged in the lower appellate Court.*— The Chief Court should not refuse to hear arguments as to a ground not taken in the lower appellate Court, when to pass it over would not be equitable. The guardian *ad litem* of minor defendants, who was their mother, compromised the suit on their behalf without obtaining sanction of the Court. In execution proceedings, another compromise was made and sanction of Court was not obtained. Houses belonging to the minors were sold in execution of decree, and the auction-purchasers sold them to a certain person who sold one of them to another person. The transferees acted in good faith. The plaintiffs, minors, brought the present suit for recovery of the houses, on the ground that the compromise was not valid and the decree was a nullity and incapable of execution. The Court granted a decree on the ground that, sanction of the Court not having been obtained, the plaintiffs were not bound by the decree. *Held*, that want of such sanction only rendered the decree voidable at the instance of the minors, but they could only avoid it in case of its being found that their interests were perjudiced by the compromise. The Chief Court remanded the case for re-decision after enquiry into the issue as to whether the compromise was nor for the benefit of the minors. The burden of proof was placed on the plaintiffs, as they sought relief from the Courts, and it was for them to show that in equity they were entitled to relief, and because *prima facie* there was no reason to suppose that the mother was in collusion with the former plaintiff, or had any reason to admit a claim which was not really due or in any way to act prejudicially to her son's interests. DALO MAL v. SUNDAR, **134 P.L.R. 1911.** (3 C.W.N. 375, 20 A. 98, 30 M. 295, 8 C.L.J. 31, 3 P.R. 1905=87 P.L.R. 1905, 25 B. 337, 37 P.R. 1895, 17 P.R. 1899, **28 A. 585, P.C., *R.*)**

(4966)—*O. 32, r. 7 (=Civ. Pro. Code, 1882, s. 462)—Agreement to refer pending suit by guardian of minor defendant—Sanction of Court not obtained — Validity of award made.*—An agreement made by a guardian on behalf of a minor, to refer to arbitration the whole or any part of a dispute already in litigation, is an agreement covered by s. 462 of the Code and requires the sanction of the Court and such sanction will not be implied from the mere fact that the Court makes an order of reference in accordance with the agreement. If a reference is made on such an agreement without the sanction of the Court being obtained to the agreement, whether the submission to the arbitration nor the award based thereon will be binding on the minor. MT. RANI BAHU v. AMIRAT LAL, **17 C.P.L.R. 147.** (24 M. 326, 26 M. 47, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(4966 *a*)—*O. 32, r. 7 (=s. 462, Civ. Pro. Code, 1882)—Minor, validity of a compromise entered into by next friend of—Concealment of facts not relating to the property in dispute, effect of—Judicial discretion, exercise of—Duty of Court sanctioning the compromise—Right of minor to challenge the compromise in subsequent proceedings.*—During the minority of the appellant in this case, a suit was instituted by his father on his behalf claiming possession of certain property against the respondent. This suit was settled by a compromise agreed to by the minor's father on his behalf. The compromise was also duly sanctioned by the Court. Under this compromise the appellant got a decree for a portion of the property and the remainder of his claim was dismissed. The appellant, on attaining majority, instituted the present suit asking that a decree be passed cancelling the compromise and the decree based thereon, that the parties be relegated to the position which they held before the compromise was filed and that the appellant be authorized to finish his case from the stage at which the compromise had been filed. The appellant urged in support of his claim that his previous case was so strong that he was sure to win it and the actual reason why the appellant's father entered into the compromise was that the elder brother of the appellant was to be adopted by the respondent's mother and that as this fact was concealed from the Court, when it gave its sanction to the compromise, the decree and the compromise were of no avail: *Held*, that the compromise was duly sanctioned by the Court and a decree passed thereon and that consequently it could not be set aside. *Held*, further, that the appellant could not now ask the Court to look at the record of the previous case to determine whether it was a strong or a weak one. The Court sanctioning the compromise had considered the point in dispute between the parties and had granted leave for the compromise after the exercise of its judicial discretion. No facts in connection with the *property in dispute* between the parties were withheld from the Court. The Court knew exactly what the plaintiff claimed and what the defendant claimed, and after having considered all the facts relating to the property in dispute and after following the provisions of law came to the conclusion that the compromise was a fair one. The Court cannot now go into the facts of the previous case and determine whether sanction had been properly granted or

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not and whether there had been a proper exercise of its judicial discretion in the matter. AMARPAL SINGH v. CHHABRAJ KOER, **11 Ind. Cas. 105.** (6 C. 637, 24 C. 853, *R.*)

(4966-*b*)—*O. 32, r. 7 (=Civ. Pro. Code, 1882, s. 462)—Compromise without leave of Court not binding on minor—Effect of hardship to other party—Minor's duty to return any benefit under compromise—Liability on joint contract.*—A compromise entered into on behalf of a minor without leave obtained under s. 462, Civ. Pro. Code, is not enforceable against the minor. It cannot be treated as binding upon him on the ground that the application of the section would work a hardship so far as the party seeking to enforce the compromise against the minor is concerned. (20 A. 98, *Diss.*; 9 C. 810, 26 B. 109, 3 C.L.J. 119, *R.*) The fact of the restoration to the *status quo* before the contract being impracticable is also no ground for not setting aside the compromise. The withdrawal of the other party from the suit cannot be deemed to be services rendered to the minor for which the minor should pay compensation before the compromise is set aside. There is no authority for the proposition that, if a joint contract by A and B is unenforceable against A, it is also unenforceable against B. SETHURAM SAHIB v. VASANTA RAO, ANANDA RAO DHYBAR, **34 M. 314.** (25 M. 389, *D.*)

(4967)—O. 32, r. 7—*See* ACT X OF 1873, s. 9, 27 C. 229=4 C.W.N. 327, 12 M. 483.

(4968)—O. 32, r. 7—*See* COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 17 A. 531=A.W.N. 1895, 126, 3 M. 103.

(4969)—O. 32, r. 7—Authority of vakil to abandon an issue—Civ. Pro. Code, 1882, s. 462—*See* COMPROMISE—MISCELLANEOUS, 22 M. 539.

(4970)—O. 32, r. 7—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 12 B. 636.

(4971)—O. 32, r. 7—Competency to compromise, without sanction of Court, on behalf of minor—Guardian for the suit, father of minor, and a party to suit—*Bona fide* compromise entered into without sanction of Court, on behalf of minor and the members of family—Validity—*See* GUARDIAN AD LITEM, 6 M. L.T. 325.

(4971-*a*)—O. 32, r. 7—Terms of compromise—Benefit of minor—When sanction defective—*See* PARTITION—GENERAL, 13 Bom. L.R. 963.

(4972)—O. 32, r. 7—Leave of Court, must be express — Presumption — Compromise decree when to be set aside—*See* PRIMOGENITURE, 8 C.L.J. 274=13 C.W.N. 163=4 Ind. Cas. 467.

(4973)—O. 32, r. 7—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 86, 89, 1 O.C. 49.

(4973-*a*)—O. 32, r. 7—*See* NOS. 338, 368, 3337, 3338, 3569, 4811, *supra*, AND NOS. 4981, 5007, 5793, *infra*.

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(4974)—O 32, r. 7, s. 59, sch. II, r. 1—*See* ARBITRATION—REFERENCE TO ARBITRATION, A.W.N. 1905, 171=2 A.L.J. 493=28 A. 25.

(4975)—*O. 32, r. 7, s. 114, O. 47, rr. 1 and 2 (=ss. 462, 623, 624, Civ. Pro. Code, 1882)—Decree on compromise against a minor, procedure to set aside—Review on the ground of fraud—Decree on compromise against a minor, duty of Court passing—Compromise by guardian without leave of Court—Discovery of new and important matter of evidence.*—Where a decree is regular in itself, and, on the face of it, correct, it can only be set aside by a suit. Where the plaintiff seeks to set aside a decree based on a compromise, entered into by his guardian when he was a minor, merely on the ground that the compromise was fraudulent, his only remedy lies in a fresh suit and he cannot revive the previous suit by an application for review. (13 B. 137, *F.*; 25 C. 649, 22 C. 8, *R.*; Observations to the contrary in 6 C. 637, 10 C. 357, 13 B.L. R. App. 11, *Diss. from.*) But, where, it is clear upon the face of the judgment or the decree, which is impugned, that it is irregular, and incorrect, and not in compliance with the provisions of the law, the plaintiff can proceed by way of review. Where a Court, passing a decree in terms of a compromise against a minor, did not enquire into the circumstances that led to the filing of the petition of compromise, nor grant any leave to compromise, as required by s. 462, Civ. Pro. Code, the decree passed is not in compliance with the provisions of the law and may be set aside on review. BARHAMDEO PRASAD v. BANARSI PRASAD, **3 C.L.J. 119.** (9 C. 810, 3 M. 103, 17 A. 531, *R.*; 20 A. 98, *Doubted.*) [*R.*, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129, 34 C. 83.]

(4976)—*O. 32, rr. 7, 1, 4 (2) (=Civ. Pro. Code, 1882, ss. 462 and 440)—Compromise on behalf of minor—Sanction of Court—Certificated guardian not excepted.*—In s. 462, Civ. Pro. Code, no exception is made in the case of a certificated guardian; on the other hand he is expressly referred to in s. 440. So, s. 462, Civ. Pro. Code, applies also to the case of a certificated guardian. S. 462, Civ. Pro. Code, does not refer only to agreements out of Court but it also includes a compromise finally determining the suit. The policy of the law is to protect minors from being taken at a disadvantage by their guardians, and a minor's interests would generally be quite as much imperilled by the final decree as by an agreement at some earlier stage of the suit. (3 M. 103, 13 B. 137, *Rel. on.*) The fact that the Court passes a decree in terms of the compromise does not amount to a sanction of the compromise by the Court. In order that a compromise may bind a minor, the express leave of Court must be obtained, and it must be arrived at upon the exercise of the judicial discretion as to the propriety of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

compromise in the interest of the minor. (17 A. 531, 9 C. 819, *Rel. on.*) Where a certificated guardian, acting as next friend to a minor in a suit, entered into a compomise with the defendant without the leave of the Court, by which it was agreed that the defendant should obtain a *mokarari* lease of certain lands belonging to the minor, and the Court gave a decree in the terms of such compromise: *Held*, in a suit to eject the defendant and set aside the compromise, that though the guardian had previously been empowered by an order of the District Judge to grant leases on behalf of the minor, the lease in dispute was invalid as it had not been granted by a registered instrument; and the compromise decree which the minor, under the express authority of law, sought to avoid, could not be invoked by the defendant as substitute for a duly registered and valid lease, that the defendant having been recognised as a tenant by the certificated guardian, who was fully justified in law in placing tenants on the land and in accepting rent from tenants whom he found already in occupation of the land, he was in no sense a trespasser, notwithstanding the invalidity of the original lease and of the compromise; he was an acknowledged tenant and could not be lawfully evicted without notice. LALA MAJLIS SAHAI v. MUSST. NARAIN BIBI, **7 C.W.N. 90.** [*F.*, 8 C.L.J. 266, 8 C.L.J. 274 = 13 C.W.N. 163; *R.*, 36 C. 674 = 9 C.L.J. 523.]

(4977)—*O. 32, r. 7, sch. II, r. 1 (=ss. 462, 506, Civ. Pro. Code, 1882)—Guardian and minor—Arbitration—Authority of guardian to agree to a reference to arbitration on behalf of the minor—Semble.*—That s. 462 of the Civ. Pro. Code does not apply to proceedings under Ch. XXXVII of the Code. A minor party, therefore, will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence although the Court has not, under the provisions of s. 462, sanctioned the agreement to refer. HARDEO SAHAI v. GAURI SHANKAR, **A.W.N. 1905, 171 = 2 A.L.J. 493 = 28 A. 35.** (27 C. 229, 12 M. 483, *F.*)

(4978)—*O. 32, r. 7, sch. II, r. 20 (=ss. 462, 525, Civ. Pro. Code, 1882) — Mahomedan mother, right as guardian of minor—Power to make contract or refer to arbitration on minor's behalf—Guardian* ad litem*—Right to give relief to illiterate women imposed upon—Pleader and client.*—The mother of a *Mahomedan* minor, not being the legal guardian of his estate, has no power to make a binding contract on behalf of the minor; nor can she pass a valid reference to arbitration on behalf of the minor. But, if she be duly appointed as the guardian *ad litem* of the minor, and makes an application under s. 525 to have an award filed in Court, and a decree is passed in terms of the award, the minor is bound by it, unless good cause be shown to set aside the decree. Such a decree is not a nullity on the ground that previous sanction of the Court was not obtained under s. 462, Civ. Pro. Code. S. 462, Civ. Pro. Code, applies only to an agreement or compromise entered into by a next friend or guardian for a suit. It can have no application to an agreement to refer to arbitration where no suit is pending. If an award is filed under s. 525, and a guardian *ad litem* is duly appointed, but shows no cause why the award should not be filed, and allows judgment to be given in terms of the award, then also s. 462 has no application, for there is no agreement or compromise. But where a guardian *ad litem* is actually a party to an application to have the award filed, that is a party to an agreement that no objections shall be filed on either side, then sanction of the Court under s. 462 becomes necessary. And if such sanction is not obtained, the Court has power to set aside the decree so far as the minor is concerned. Though the Court will always be ready to give relief to illiterate women who have been imposed upon, yet it must observe the ordinary resognized rules of law and procedure in granting such relief. In dealing with questions arising between pleader and client, the client must be identified with his pleader, and suffer from the consequences of his dishonesty or want of skill. MIR MAIN GHULAM HYDERKHAN v. MUSSAMAT HAYAT KHATUN, **1 S.L.R. 160.**

——O. XXXII, r. 8 (=1882, s 447=1877, s. 447).

See LUNATIC.

See MINOR.

(4979)—O. 32, r. 8—Next friend ceasing to be guardian under Guardian and Wards Act—*See* DECREE—MISCELLANEOUS. 5 A.L.J. 35 = A.W.N. 1908. 23 = 3 M.L.T. 128 = 30 A. 105.

——O. XXXII, r. 9 (=1882, s. 446=1877, s. 446).

See LUNATIC.

See MINOR.

(4980)—*O. 32, r. 9 (=s 446, Civ. Pro. Code, 1882)—Guardian* ad litem*, application for leave to appeal by next friend of minor in presence of—Minor, next friend of.*—H. B. was the guardian *ad litem* of the minors on whose behalf an application for leave to appeal to Her Majesty in Council was made by B.A. *Held*, that the provisions of s. 446, Civ. Pro. Code, are only applicable when a suit is pending, and that as the suit was not pending when the application for leave to appeal was made, any person might have made such an application as the next friend of the minors, and that therefore the application of B. A. should be granted. AMINULLAH v. SECRETARY OF STATE FOR INDIA, **4 O.C. 98.**

(4981)—*O. 32, rr. 9, 7 (=Civ. Pro. Code 1882, ss. 446, 462—Next friend of minor not*

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doing his duty properly—Adverse interest.—A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court, and no act can be done affecting the property of the minor unless under the express or implied direction of the Court. It is the duty of the Court, if it finds that the next friend does not do his duty in relation to the suit, not to permit him to prejudice the interest of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next freind and the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or to withdraw from it. Where the next friend of a minor plaintiff applied for the withdrawal of the suit without permission to bring another suit, and the Court passed an order on the petition for withdrawal, the High Court set aside the order under s. 622, Civ. Pro. Code, and directed that the suit be restored to file and proceeded with and disposed of according to law. DORASWAMY PILLAI v. THUNGASAMI PILLAI, **27 M. 377.**

—— O. XXXII, r. 10 (=1882, s. 448=1877, s. 448.)

(4981-*a*)—O. 32, r. 10—*See* NO. 4913, *supra.*

—— O. XXXII, r. 11, para (1) (=1882, s. 458=1877, s. 458, para (2)=1882, s. 459=1877, s. 459).

See LUNATIC.

See MINOR.

(4982)—*O. 32, r. 11 (1) (=s. 458, Civ. Pro. Code, 1882)—Guardian* ad litem—*Applying to be discharged—Inability to find funds—Proper course to be adopted—Dismissal of suit improper.*—Where the guardian *ad litem* of a minor defendant asked that he might be discharged from the guardianship as he was unable to find funds for the conduct of the case, the proper order that the Judge should have made was to discharge the guardian under s. 458, Civ. Pro. Code, 1882, and to appoint a fresh guardian in his stead for the conduct of the case. The suit should not have been dismissed. LANK RAMA SAWMI v. LANK LAKSHMANA, **9 M.L.T. 333 =9 Ind. Cas. 435.**

(4983)—O. 32, r. 11 (1)—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 12 B. 553.

(4983-*a*)—O. 32, r. 11—*See* NO. 4937, *supra.*

(4984)—*O. 32, r. 11 (1), s. 115 (=ss. 458 and 622, Civ Pro. Code, 1882)—Guardian* ad litem, *appointment of, without consent not valid—Guardian and Wards Act (VIII of 1890), guardian appointed under—Not* ex-officio *guardian ad litem.*—A guardian appointed under Act VIII of 1890 does not become *ex-officio* a guardian *ad litem* in any given proceeding. A guardian must be appointed by the Court. The District Munsiff issued a notice to the proposed guardian, and, on receiving no reply, appointed him, finding that he had been appointed guardian of the property under Act VIII of 1890. The guardian applied under s. 458, Civ. Pro. Code, to be removed, on the ground that his interest was adverse to the minor in the suit. The District Munsiff refused to remove him. *Held*, that the appointment was not proper as the guardian was appointed without his consent and his interests were opposed to those of the minor, and the District Munsiff ought to have removed him. The District Munsiff was bound to cancel the appointment, when the guardian, never having expressed his consent, came forward alleging his unwillingness, and the fact that an order of appointment was made in his absence does not affect the question. *Held*, also that the District Munsiff acted with material irregularity within the meaning of s. 622, Civ Pro. Code, as he had no discretion in the matter. MAHAMMED ABDUL SATAR SAHIB v. MEKKENA KONDAPPA NAIDU, **5 M.L.T. 162.**

(4985)—O. 32, rr. 11 (1), 4 (*d*), 1—*See* COSTS—SPECIAL CASES, 3 M. 263.

(4986)—*O. 32, r. 11 (2) (=s. 459, Civ. Pro. Code, 1882)—Guardian* ad litem—*Married woman—Husband alive but* non-compos mentis.—In no case can a married woman be appointed as guardian *ad litem* inasmuch as she is so disqualified and any apparent appointment of her as guardian is not a mere irregularity. A woman whose husband is alive but *non compos mentis*, cannot be appointed guardian *ad litem* of her minor son. KUNDAN LAL v. GAJADHAR LAL, **4 A.L.J. 698=A.W.N. 1907, 243=29 A. 728.** (23 A. 459, *F.*)

—— O. XXXII, r. 12, para (1) (=1882, s. 450 =1877, s. 450; para (2) =1882, s. 451 =1877, s. 451; para (4) =1882, s. 452 =1877, s. 452; para (5) =1882, s. 453 =1877, s. 453).

See LUNATIC.

See MINOR.

(4987)—*O. 32, r. 12 (2) (3) (=s. 451, Civ. Pro. Code, 1882)—Omission to comply with requirements of—Application under the section—Notice—Provision of section applies to a pending suit.*—The omission to comply with the requirements of s. 451, Civ. Pro. Code, is simply an irregularity. Execution of a decree is not barred by such omission. [*R.*, 19 M. 127.] An application for leave to proceed with a suit under s. 451, is not required to be made on notice. An *ex parte* application under that section may be made at any time. The provision in s. 451 requiring the title of a suit to be corrected, would apply to a pending suit, and not to a suit after final decree, in which it only remains to proceed in execution. DOORGA MOHUN DASS v. TAHIR ALLY, **22 C. 270.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1887, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXXII, r. 15 (1882, s. 463=1877, s. 463).

See LUNATIC.

See MINOR.

(4988)—*O. 32, r. 15 (=old s. 463)—Idiot plaintiff--Presentation by guardian—Success on.*—A person appointed under Act XXXV of 1858 as manager of an idiot plaintiff's estate can properly sue on behalf of the idiot. A suit by a plaintiff that she was entitled to succeed to suit property against defendant's claiming title by mea ns of an alleged will ought not to be dismissed, on the ground that she was disqualified from inheriting without deciding the question of the validity of the will. MUSSAMMAT JANDI v. KASHI RAM, **19 P.R. 1899.**

(4989)—*O. 32, r. 15 (=old s. 463)--Suit by next friend on behalf of alleged lunatic.*—It is not open to Court to permit a suit to be brought in the name of an alleged lunatic through a next friend unless and until the said plaintiff has been formally adjudged to be of unsound mind under Act XXXV of 1858 or some other law for the time being in force. KANWAL RAM v. BHAWANI RAM, **18 P.R. 1896.** [*Diss.*, 31 P.R. 1905 =54 P.L.R. 1905 ; *Cited*, 14 P.R. 1902, Cr.).

(4990)—*O. 32, r. 15 (=Civ. Pro. Code, 1882, s. 463)—Suit against lunatic not so adjudged under the Lunacy (District Courts) Act XXXV of 1858—Determination of lunacy and appointment of guardian* ad litem*--Procedure.*--A Hindu widow, not a minor, was of unsound mind. Her mother, acting as her guardian, alienated, in favour of her brother some of the properties inherited by her daughter from her husband. The widow had not been adjudged a lunatic under the Lunacy (District Courts) Act XXXV of 1858. Plaintiff, a reversioner, sued to set aside the alienation, naming the mother as the guardian of the widow. It did not appear that the Court of first instance satisfied itself that the widow was in fact a lunatic or that the mother was her proper guardian. The question was whether the lunatic could be sued without being so adjudged under the Act. *Held* that, in the absence of any provision in the Civ. Pro. Code for the case of persons of unsound mind who have not been adjudged to be so under the Act, the Court was bound to provide for the protection of the lunatic defendant by the appointment of a proper guardian *ad litem*, the right of suit against the lunatic being unquestionable. The suit was therefore remanded for disposal in due course after ascertainment by the Court of first instance that the widow was a lunatic and that the proposed guardian *ad litem* was a fit and proper person. KADALA REDDI v. NARISI, **24 M. 504.** [*F.*, 31 P.R. 1905=54 P.L.R. 1905, 33 C. 1094=4 C.L.J. 306=10 C.W.N. 719.]

(4991)—*O. 32, r. 15 (=s. 463, Civ. Pro. Code, 1882)—Provisions of, not exhaustive—Unadjudged lunatic, right of, to sue by next friend.*—The provisions of ch. XXXI of the Code are not exhaustive, and where a person is admitted, or has been proved, to be, of unsound mind, whether he has been adjudged a lunatic under Act XXXV of 1858 or not, he has the right to sue through his next friend, provided that what is done is clearly for his benefit. SHEVE THE v. THA KADO, **3 L.B.R. 169.** (20 A. 2, 23 B. 653, *F.*; 13 B. 656, *D.*)

(4992)—*O. 32, r. 15 (=s. 463, Civ. Pro. Code, 1882)—Suit on behalf of alleged lunatic not so adjudged—Guardian* ad litem*—Act XXXV of* 1858.—A person of unsound mind, through his next friend, sued to recover land, improperly alienated by his father. The defence was that the suit through the next friend was not competent, since plaintiff had not been adjudged a lunatic, under Act XXXV of 1858. *Held*, that a Civil Court has power to allow a lunatic, after ascertaining him to be of unsound mind, to sue through a next friend, even though he has not been adjudged to be so under the Act. Civil Courts have power, in suits brought by, or, against, unadjudged lunatics, to enquire into the fact of the unsoundness of mind of the party and order the appointment of a next friend or guardian as the case may be. JANBA v. JOGA, **31 P.R. 1905=54 P.L.R. 1905.** (20 A. 2, 23 B. 653, 24 M. 504, 7 C. 242, *F.* ; 91 P.R. 1887, *R.*; 13 P.R. 1896, *Diss.*)

(4993)—*O. 32, r. 15 (=s. 463, Civ. Pro. Code, 1882)—Lunatic, not adjudged as such under Act XXXV of* 1858*—Right to sue through next friend.*—The question for decision, in this case, was whether, irrespective of Ch. XXXI of the Code, a next friend had a right to sue on behalf of a person, who was of unsound mind although not so adjudicated under any law for the time being in force. *Held*, that the provisions of Ch. XXXV of the Code are not, in this respect, exhaustive and, therefore, if a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858, or any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem*, where he is the defendant. NGA KU v. NGA THA HLAING, **U.P.R. 1905, Civ. Pro. 80.** (20 A. 2, 23 B. 653, *F.*)

(4994)— O. 32, r. 15 — *See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 3, 5, 12, 14 C.W.N. 256=2 Ind. Cas. 818.

(4994-*a*)—O. 32, r. 15—*See* No. 4932, *supra*.

——O. 32, r. 16 (=1882, s. 464=1877, s. 464).

(4994-*b*)—O. 32, r. 16— *See* No. 4914, *supra*.

——O. XXXIII, r. 1 (=1882, s. 401=1877, s. 401=1859, s. 297).

See PAUPER SUITS.

(4995)—*O. 33, r. 1 (—Pauper suit by—Representative of pauper—Representative not a pauper—Representative cannot continue the suit*

Civ Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued,*

in forma pauperis.—The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continiung litigation. The representative of a pauper is not entitled to continue the suit of his testator, if he is not a pauper himself. RAO SAHEB MANAJI RAJUJI KALEWAR v. KHANDOO BALOO, **13 Bom. L.R. 577.**

(4996)—*O.* 33, *r.* 1(=*s.* 401, *Civ. Pro. Code*, 1882)—*Application to file a suit* in forma pauperis.—The words "other than his necessary wearing apparel and the subject-matter of the suit" in the explanation to s. 401 of the Civ. Pro. Code, 1882, do not qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100. KRISHANABAI v. MANOHAR, **8 Bom. L.R. 671 =30 B. 593.**

(4997)—*O.* 33, *r.* 1 (=*s.* 401, *Civ. Pro. Code*, 1882)—*Death of plaintiff—Representative added in appeal—Consent-decree - Objection to plaintiff suing* in forma pauperis—*Estoppel.*—Where a decree was passed in favour of a pauper plaintiff in ignorance of her death, and the defendant, having made her representative party to the appeal, consented to an order of remand and re-trial with the representative as party, *held* that it was not open to the defendant subsequently to raise the objection that the representative of the plaintiff was not entitled to sue *in forma pauperis*. AKBAR HUSSAIN v. ALIA BIBI, **25 A. 137=A.W.N. 1902, 206.**

(4998)—*O.* 33, *r.* 1—*Petition to sue* in forma pauperis.—The petitioner prayed to be allowed to sue as a pauper to set aside the sale of her property by the respondent to whom it was mortgaged. The respondent brought into Court Rs. 101 as the surplus due to the petitioner after the amount due on the mortgage had been satisfied, and contended that the petitioner, being entitled to that sum, was not a pauper. *Held*, that the petitioner was a pauper as defined in O. 33, r. 1 of the Code. The words "such suit" in the first part of the explanation to O. 33, r. 1, refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. "The suit" referred to in the second part of the explanation is also the suit which may be instituted under the rule. FATMA BAI v. DOSSABAHOY UMRIGAR, **12 Bom. L.R. 102=34 B. 638=5 Ind. Cas. 688.** (10 B. 207, *N.F.*)

(4999)—O. 33, r. 1—Applicability of—Suits before Revenue authorities under Ben. Act X of 1859—*See* BEN. ACT X OF 1859, 21 C. 428.

(4999-*a*)—O. 33, r. 1—*See* Nos. 2200, 2788, *supra.*

(5000)—*O.* 33, *r.* 1, *O.* 7, *r.* 17 (=*ss.* 401 *and* 62, *Civ. Pro. Code*, 1877)—*Application to*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

sue as a pauper—Subject-matter of dispute not to be taken into account—Refusal of application—Revision.—Property forming part of the subject-matter of the suit should not be taken into account in determining whether the plaintiff is a pauper or not. An enquiry as to whether the plaintiff is a pauper or not being a judicial proceeding and an order determining the same not being subject to appeal, a revision lies against such order on any of the grounds mentioned in s. 622, Civ. Pro. Code, 1877. SHAIKH MUHAMMAD MUBARIK v. SHEIKH FAZL ELAHI, **99 P.R. 1882.** (81 P.R. 1881, *Cited*; 4 A. 91, *Disappr.*)

(5000-*a*)—*O.* 33, *r.* 1, *O.* 25, *r.* 1—*Leave to continue a suit* in forma pauperis—*Order for security for costs—Security for costs incurred prior to granting leave to sue as pauper—Security cannot be demanded even for antecedent costs—Practice.*—An order to give security for costs obtained in a suit filed in the ordinary course ceases to operate as regards antecedent costs, if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired. BAI LAXMI v. HARJIWAN NATHU, **13 Bom. L.R. 93**

(5000-*b*)—O. 33, r. 1, O. 33, r. 5—Application for permission to sue *in forma pauperis*—Possibility of professing pauper's raising money on his claim, no ground for rejecting his application—Revision—*See* PAUPER SUIT, A.W.N. 1893, 11.

(5001)—*O.* 33, *rr.* 1, 5, *O.* 44, *r.* 1 (=*ss.* 401, 407, 592, *Civ. Pro. Code*, 1882)—*Leave to appeal* in forma paupries—*Reference to Subordinate Court—Final disposal of the application—Appellate Court's duty.*—On an application for leave to appeal *in forma pauperis*, the High Court directed the Subordinate Judge to inquire into the pauperism or otherwise of the appellant and report. The Subordinate Judge made the inquiry and reported that the petitioner was a pauper, and also that she had rendered herself incapable of appealing as a pauper by entering into an agreement, with some persons falling within the terms of s. 407 (*d*). *Held* that the order of the Court calling upon the Subordinate Judge to report did not operate as a final disposal of the application, and that it was open to the High Court upon the receipt of the report to consider whether the case was one in which leave to appeal *in forma pauperis* ought to be granted. But the High Court dismissed the application on the ground that the petitioner had entered into an agreement falling within s. 407 (*d*). In deciding whether leave is to be given to a person to appeal *in forma pauperis*, it is the duty of the Court to have regard to the rules contained in Ch. XXVI, the right of appeal according to the construction of s. 592 of the Code, being subject to the rules contained in that chapter. HAMFA BAI v. MEANJEE SAIT, **17 M.L.J. 447=3 M.L.T. 11=30 M. 547.** (26 M. 369, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—— O. XXXIII, r. 2 (=1882, s. 403=1877, s. 403=1859, ss. 299, 300).

See PAUPER SUITS.

(5002)—O. 33, r. 2—*See* APPEAL—COSTS, 18 W.R. 286.

(5003)—O. 33, r. 2—Objection to application for leave to sue as pauper—Payment of Court-fees after expiry of limitation—*See* LIMITATION ACT, 1908, ss. 3, 4, 5, 18 A. 206=A.W.N. 1896, 33.

(5003-*a*)—O. 33, r. 2—*See* NOS. 2390-*a*, 4581, *supra*.

(5004)—O. 33, rr. 2, 7—*See* LIMITATION ACT, 1908, s. 3, 17 A. 526=A.W.N. 1895, 106.

(5005)—*O. 33, r. 2, O. 44, r. 1 (=ss. 403, 592, Civ. Pro. Code, 1882)—Application for leave to appeal as pauper, verification of.*—An application for leave to appeal as a pauper under s. 592 of the Code of Civil Procedure, contained no schedule of any moveable and immoveable property belonging to the applicant with the estimated value thereof, and was not verified in the manner prescribed by law for the verification of plaints. *Held* that the Court had no alternative but to reject the application. MUHAMMAD SALAMAT-UT-LAH v. RAM JIWAN, **11 O C. 19.**

——O. XXXIII, r. 3 (=1882, s. 404=1877, s. 404=1859 s 301).

See PAUPER SUITS.

(5005 *a*)—O 33, r. 3—*See* NO. 2390-*a*, *supra*.

(5006)—*O. 33, r. 3, O. 44, r. 1 (=Civ. Pro. Code, 1882, ss. 401, 592)—Leave to appeal in forma pauperis—Presentation of application in person—Applicability of rules in ch. XXVI of the Code.*—An application was presented through a vakil for leave to appeal *in forma pauperis*. It was returned for presentation by the applicant in person or by one specially authorised to do so. The application was accordingly represented by the applicant in person, but it was then out of time and was consequently rejected. *Held* that the provision in s. 404 of the Code requiring an application for leave to sue as a pauper to be presented in person or by specially authorized agent did not apply to an application under s. 592 of the Code for leave to appeal as a pauper. All action taken subsequent to the presentation of an application for leave to appeal as a pauper was to be subject to the rules contained in Ch. XXVI of the Code, but the presentation of the application itself was not subject to such rules. The application should not have been returned and was therefore in time. MAILTHY v SOMAPPA BANTA, **26 M. 369.** (8 M. 504, *Not F.*) [*D.*, 30 M. 547=17 M.L.J. 447=3 M.L.T. 11.]

——O XXXIII, r. 4 (=1882, s. 406=1877, s.406 =1859, s. 304).

See PAUPER SUITS.

(5007)—*O. 33, r. 4, O. 32, r. 7, sch. II, r. 1, O. 41, r. 23 (=Civ. Pro. Code, 1882, ss. 406, 462, 506 and 562)—Decree in accordance with award*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXII of 1861 and VIII of 1859)—*continued.*

—Validity of reference to arbitration by guardian ad litem of minor without Court's sanction.—Where a decree purports to have been passed in accordance with the terms of an award filed by arbitrators, and objections thereto were not raised in the lower Court, nor filed against the award, within the period of ten days prescribed under art. 158, Limitation Act, it cannot, for the first time, be contended in revision that, some of the defendants being minors, reference could not be made by their guardian *ad litem*, without obtaining express sanction of the Court, under s. 462, Civ. Pro. Code, and that there was no written application for reference by these guardians *ad litem*. It is not necessary that such application should be in writing (27 C. 61, *R.*) The word "agreement" in s. 562 of the Code seems to refer to an agreement by way of settlement, rather than of the nature of an application under s. 406. UDA v. MAL CHAND, **4 P.R. 1907=20 P.W.R. 1907.** (24 M. 326, 28 A. 35, 37 P.R. 1895, 18 P.R. 1891, F.B., *R.*)

(5008)—*O. 33, rr. 4, 5 (Civ. Pro. Code, 1882, ss. 406, 407)—Application for leave to sue in forma pauperis—Existence of good cause of action, whether ground for granting leave.*—When an application for leave to sue *in forma pauperis*, has been made, the Court is not bound to give leave, merely because the allegations made by the petitioner are such, that, if true, they would give a good cause of action. SANKARARAMA AIYAR v. SUBRAMANIA AIYAR, **27 M. 120.** (20 A. 299, 27 M. 37, *Rel. on.*)

(5009)—*O. 33, rr. 4 and 5 (=ss. 406, 407 (c), Civ. Pro. Code, 1882)—Pauper suit—Application for leave to sue in forma pauperis Right to sue.—Held*, that the allegations in the plaint have to be looked to, in order to see whether they show a right to sue in the Court to which the application for leave to sue *in forma pauperis* is presented, and if they do show such a right, it is not for the Court to prejudge the case. In his application for leave to sue *in forma pauperis*, the plaintiff did not set forth what was the law or rules or custom governing the succession to the *Mahantship* of the *Math* concerned, nor did he assert that by what law, rule or custom he was the one and only successor and he simply stated that ten years ago the defendant got unlawful possession of the *Math* property, that the late *Mahant* had two *chelas* of whom one was dead and the plaintiff was the survivor, that the defendant was sister's son of the late *Mahant*, and that for this reason, the defendant had no right by law or custom in the presence of the plaintiff. In the course of the proceedings, the plaintiff admitted that the defendant had a will of the deceased *Mahant* in his favour and also the acquiescence of the religious brotherhood generally. *Held*, that as the plaintiff's allegations did not show a right to sue, application for leave to sue *in forma pauperis* could not be granted. PURSHOTAM GIR v. PARS RAM GIR, **91 P.L.R. 1909=131 P.W.R. 1909=4 Ind. Cas. 976.** (13 B. 126, 27 M. 37, 7 A. 229, 155 P.R. 1888, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5010)—*O.* 33, *rr.* 4, 5, 7 (3)—Forma pauperis *application to sue in—Court's duty—High Court, jurisdiction—Cause of action.*—Before an application for leave to sue in *forma pauperis* is granted, it is the duty of the Court to satisfy itself that the allegations of the petitioner do show a cause of action, and the allegations are not only those made in the plaint but also include those made in the examination of the applicant before the Court. It is open to the High Court to determine at the preliminary stage whether the plaintiff is or is not entitled to succeed on the basis of the alleged cause of action. NAWAB BAHADUR OF MOORSHEDABAD v. HARISH CHANDRA ACHARJEE, **18 C.L.J. 593.**

——O. XXXIII, r. 5 (=1882, ss. 407, 405=1877, ss. 407, 405=1859, ss. 302, 304).

See PAUPER SUITS.

(5011)—*O.* 33, *r.* 5 (=*s.* 407, *Civ. Pro. Code*, 1882)—*Application to sue as pauper—Plaintiff not likely to prove claim—No ground for rejecting.*—S. 407, Civ. Pro. Code, 1882, does not warrant the rejection of an application to sue *in forma pauperis* on the ground that the plaintiff is not likely to prove his claim. It is enough if a *prima facie* right to sue exists. NATHU v. SHEIKH SHAH MUHAMMAD, **25 P.R. 1885.**

(5012)—*O.* 33, *r.* 5 (=*old s.* 407)—*Merits of case and probability of success—Court not to consider.*—A Court cannot decide what prospect an applicant has of success on the merits. If the plaint disclosed a claim cognizable by the Court, it should go no further. MUSSAMMAT DAYA KOUR v. THAKUR SINGH, **155 P R. 1888.**

(5013)—*O.* 33, *r.* 5 (=*old s.* 405)—*Omission to enter all properties, whether ground for rejecting application to sue as a pauper.*—The fact that the applicant praying to sue *in forma pauperis* has omitted to set out in the schedule some of his properties is not a sufficient ground for rejecting his application. JHANDA MAL v. DIT MAL, **27 P R. 1887.**

(5014)—*O.* 33, *r.* 5 (=*old s.* 407)—*No preliminary enquiry—Court issuing notice to defendant—Effect—"Right to sue in such Court"*—A Court without holding enquiry under ss. 405 or 407, Civ. Pro. Code, 1882, into an application to sue as a pauper issued notice to the defendant fixing a date for the parties to give evidence; but, on that date, it dismissed the application on the ground of limitation. The omission to proceed under ss. 405 or 407 is a material irregularity under s. 622. The words "right to suein such Court" refer not only to want of jurisdiction in the particular Court in which the application is made but also to a case where the right to sue is barred by the law of limitation. MUHAMMAD TAHIR v. SECRETARY OF STATE FOR INDIA, **180 P.R. 1894.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5015)—*O.* 33, *r.* 5 (=*s.* 407, *Civ. Pro. Code*, 1877)—*Application to sue as a pauper—Order giving permission to see for part of the claim—Legality of.*—Where a Court finds that an applicant to sue *in forma pauperis* is unable to pay the Court-fees upon his claim, it should allow him to sue as a pauper for the whole amount claimed and it is illegal on the part of the Court because it finds that he may succeed only as to that part. LAKHA v. MUSSAMMAT RAMA, **81 P.R. 1881.** [*Cited*, 99 P.R. 1882.]

(5016)—*O.* 33, *r.* 5 (=*Civ. Pro. Code*, 1882, s. 407)—*Pauper application—Merits of the case.*—In an application for permission to sue as a pauper, it is not open to the Court to consider the merits of the case, the rights of the parties and matters foreign to the scope of the enquiry directed by s. 407, cl. (*c*) of the Civ. Pro. Code. Where, therefore, a party applied for leave to sue as a pauper for reliefs dependent on the construction of a Will, and the Court proceeded to discuss the terms of the Will and, holding that on the merits the plaintiff had no right to sue, rejected the application, *held* that the dismissal was illegal. GOPAL CHANDRA NEOGY v. BIGOO MISTRY, **8 C.W.N. 70.** [*Not F.*, 11 O C. 67; *R.*, 3 L.B.R. 248.]

(5017)—*O* 33, *r.* 5 (=*cl.* (*d*), *s.* 407, *Civ. Pro. Code*, 1882)—*Application for leave to sue in forma pauperis—Interest in subject-matter of suit—Champerty.*—In Mr. Whitley Stokes' introduction to the Code of Civil Procedure it is said with regard to s. 407 that the application of a pauper will be rejected when it appears that he has entered into any champertous agreement. Reference may therefore be made to English law to ascertain what kind of agreements are regarded as improper and unallowable. By the Solicitors Act, 1870, 33 and 34 Vict. C. 28, a solicitor may make an agreement in writing with his client respecting payment for his services subject to the allowance of the taxing officer of the Court, and with express exception of any purchase of the interest of his client in any suit or action, and of any agreement stipulating for payment only in the event of success. The agreement of the applicant with his Advocate making payment of fees dependant on the success of the suit gives the Advocate such an interest in the subject-matter of the suit as is contemplated by cl. (*d*) of s. 407 of the Code of Civil Procedure. J.S. HESSE v. A. HUSAIN ALLY AND CO., **U.B.R. 1892—1896, 272.** (9 B. 371, 7 A. 661, *R.*)

(5018)—*O.* 33, *r.* 5—*Application to sue in forma pauperis—Rejection on the ground that litigation would end in failure.*—A Court cannot refuse an application for leave to sue in *forma pauperis* on the ground that the litigation would very likely end in failure. CHHANGIA v. JOTI PERSHAD, **6 Ind. Cas. 703** (A.W.N. 1893, 218, *F.*)

(5018-*a*)—O. 33, r. 5—*See* NOS. 4581, 5000-*b* 5001, 5008, 5009, 5010, *supra.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5019)—*O.* 33, *r.* 5, *s.* 115 (=*Civ. Pro. Code*, 1882. *ss.* 407, 622)—*Civ. Pro. Code* (*Act XIV of* 1882), *s.* 407, *investigation under—Power of revision of High Court.*—The High Court can interfere under Civ. Pro. Code, s. 622, when the lower Court, in an investigation under s. 407, has applied a course of enquiry to the matter, which is not applicable to it, and has thereby failed to apply to the matter a course of enquiry which is applicable to it. DEBO DAS v. MOHUNT RAM CHARN DASS OHELLA, **2 C.W.N. 474.** (1 C.W.N. 626, 11 C. 6, 13 C. 225, 14 C. 321, 15 C. 47, 20 C. 8, *Expl.*) [*F.*, 8 C.W.N. 70, 11 O.C. 67.]

(5020)—O. 33, r. 5, ss. 132, 133—*See* REVISION—GENERAL, 12 O.C. 381=4 Ind. Cas. 777.

(5020-*a*)—*O.* 33, *rr.* 5 *and* 6—*Application for permission to sue as pauper—Government Pleader entitled to cross-examine witnesses for applicant.*—Upon an application for permission to sue as a pauper, where there exist no grounds, such as are referred to in O. 33, r. 5, to reject the application, *held*, that the Government Pleader is entitled to cross-examine the witnesses produced by the applicant in support of his application. Under rule 6 it is quite clear that the Government is to be deemed to be a party to the proceedings in which it is decided whether the applicant is a pauper or not. THE SECRETARY OF STATE FOR INDIA v. TAZIM-UN-NISA, **8 A.L.J. 1148.**

(5021)—*O.* 33, *rr.* 5, 6, 7 (=*Civ. Pro. Code*, 1882, *ss.* 407, 408, 409, *para* 2)—*Application to sue in* forma pauperis.—Paragraph 2 of s. 409 enables the parties to argue the question as to whether the applicant is or is not subject to any of the prohibitions specified in s. 407, if they so desire, and requires the Court, if any argument is offered, to consider the argument; but it does not preclude the Court, if no argument is offered when the matter comes on for hearing under s. 409, from considering whether the applicant is subject to any of the prohibitions specified in s. 407, and if the Court is of opinion that he is, from dismissing the application. It does not follow, because at the time when the Court acting under s. 408 fixes a day for the hearing of the application, it sees no reason to refuse the application on any of the grounds stated, that at a later stage, when exercising the powers conferred by s. 409, it is not open to the Court to consider whether the applicant is subject to any of these prohibitions. All that s. 408 means is that the Court, at that stage of the proceedings, must be of opinion that, on the materials before it, there is no reason to refuse the application on any of the grounds stated in s. 407. It is also the duty of the Court, when the hearing takes place at a later stage under s. 409, to consider whether or not the applicant is subject to any of the prohibitions specified. Paragraph (*c*) of s. 407 does not refer solely to a question of jurisdiction. Under that section, an applicant must also make out that he has a good subsisting *prima facie* cause of action capable of enforcement. AMIRTHAM v. ALWAR MANIKAM, **27 M. 37.** (20 A. 299, *F.*) [*R.*, 27 M. 120, 91 P.L.R. 1909.]

(5022)—*O.* 33, *rr.* 5 *and* 7—*Application to sue as a pauper—Ground for rejection.*—A Court cannot reject an application for leave to sue as a pauper on the ground that the allegations of the plaintiff do not *prima facie* show that his suit would succeed. It has only to see whether the plaintiff discloses a claim cognizable by the Court in question. SAMNATH v. GANGANATH, **122 P.R. 1886.**

(5023)—*O.* 33, *rr.* 5 *and* 7 (=*ss.* 407, 409, *Civ. Pro. Code*, 1882)—*Suit in* forma pauperis *—Evidence taken for deciding limitation—Jurisdiction.*—A Court has jurisdiction to decide the question of limitation under ss. 407 and 409 of the Code. The Court before which an application is made to sue in *forma pauperis* has power not only to enquire into the question of pauperism, but also as to whether the applicant has a *prima facie* good and subsisting cause of action; and for the purpose it may take evidence under s. 409, Civ. Pro. Code. In case of doubt the Court whose permission is asked to sue in *forma pauperis* should grant the application if the applicant has made out that he is a pauper: but even in such a case, if the Court proceed to shift the matter, it cannot be said to exceed its jurisdiction, but at the most would be acting irregularly. E.N. VENKOBA RAO v. THUNIA NATARAJA CHETTY, **4 M.L.T. 302.** (20 A. 299, 19 M. 197, *F.*)

(5024)—*O.* 33, *rr.* 5 *and* 7—Bona fide *claim —Abuse of process of Court*—If the applicant is a pauper and it is not denied that he is, he is entitled to the benefit of O. 33. The fact that he had co-heirs who were men of means is immaterial. There could be no abuse of the process of the Court when the applicant had a *bona fide* claim on his own account, and was not entitled to require financial assistance from the co-heirs towards the payment of the Court-fees. The Court is bound to decide under O. 33, r. 7, on the grounds specified in r. 5. MI HLA MIN v. MI KET, **U.B.R. 1910, 2nd Qr., 26.**

(5025)—O. 33, rr. 5 and 7—Application for leave to sue as pauper, when good *prima facie* title to property in suit not established—*See* PAUPER SUITS, 11 O.C. 67.

(5025-*a*)—*O.* 33, *rr.* 5 (*d*), 7, 8—*Pauper application—Right to go into the merits of the case—Practice—Procedure.*—In an application for leave to sue as a pauper, the District Judge, without passing any order as to the application itself, framed the issues and proceeded to try them, and subsequently dismissed the claim to sue as a pauper, holding under O. 33, r. 5 (*d*) "that there is no cause of action to be entertained:" *Held*, that this procedure

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

was *ultra vires*. The Court had no jurisdiction to go into the merits of the case until it had first passed an order under r. 7 (3) allowing the applicant to sue as a pauper. The Court has to see whether the allegations made by the applicant show a good cause of action, and the fact that the allegations are traversed by the respondents is immaterial for the purpose of the proceedings under O. 33. SEIN TUN U v. AUNG ZAN U, **11 Ind. Cas. 887.**

(5026)—*O.* 33, *rr.* 5, 6, 7, 15—*Order rejecting application for permission to sue as pauper—Appeal.*—An order rejecting (r. 5) or refusing (r. 7) an application for permission to sue as a pauper does not involve the rejection or dismissal of the plaint, as the applicant may proceed with the plaint if he can procure the necessary Court-fee stamps (r. 15). Such an order is not a decree as it is not an adjudication in a suit, and no appeal lies from such an order. MI MYA v. MI GYI, **U.B.R. 1910, 2nd Qr., 28.**

——O. XXXIII, r. 6 (=1882, s. 408=1877, s. 408=1859, s. 305.)

See PAUPER SUITS.

(5026-*a*)—*O.* 33, r. 6—*See* NOS. 5020*a*, 5021 *supra.*

(5027)—O. 33, rr. 6, 7—*See* COURT, 1 B.H.C. 102.

(5028)—*O.* 33, *rr*, 6, 7, *s.* 115 (=*Civ. Pro. Code*, 1882, *ss.* 408, 409, 622)—*Investigation on application for leave to sue in* forma pauperis—*Enquiry into merits—Material irregularity.*—Where, on an application for leave to sue in *forma pauperis*, the Court fixed a day under s. 409, it was not competent to the Court to enter into the merits of the case and dismiss the application on the ground that on the evidence on record the applicant had no subsisting cause of action. The receipt of evidence as to the merits during the enquiry into pauperism and the decision of the case on the merits at that stage was a material irregularity. RATHNAM PILLAI v. PAPPA PILLAI, **13 M.L.J. 292, F.B.** [*F.*, 13 M.L.J. 425, 6 M.L.T. 359=3 Ind. Cas. 829.]

——O. XXXIII, r. 7 (=1882, s. 409=1877, s. 409=1859, s. 306.)

See PAUPER SUITS.

(5029)—*O.* 33, *r.* 7 (=*s.* 409, *Civ. Pro Code* 1882)—*Enquiry into pauperism, limits of—Enquiry into merits improper—Waiver.*—On an application for permission to sue *in forma pauperis*, the Sub Judge held an enquiry under s. 409, Civ. Pro. Code, and, on the evidence taken, *held* that the suit was barred by limitation. *Held* that the Sub Judge was in error in going into the merits in the enquiry under s. 409. The evidence taken under the section must be confined to the question of pauperism. (13 M.L.J. 295, F.B. *F.*; 19 M. 197, 20 A. 299, *Not F.*) That the petitioner allowed evidence to be taken, cannot amount to waiver. VENKOBA ROW v. THUNIYA NATARAJA CHETTY, **6 M.L.T. 359.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5030)—*O.* 33, *r.* 7 (=*old s.* 409)—*Dismissal of application for default—Fresh application.*—An application for leave to sue as a pauper dismissed for default in prosecution will not bar a subsequent application for the same. ACHRU v. DITTA MAL, **64 P.R. 1896.**

(5030-*a*)—*O.* 33, *r.* 7—Shebait *personally indigent and not possessed of idol's properties if may apply for leave to sue in* forma pauperis *to recover idol's property—Idol's property in hands of* co-shebaits *contesting suit.*—A *shebait* applied for leave to sue in *forma pauperis* to recover certain endowed properties which, he alleged, some of the defendants, who were his *co-shebaits*, had illegally alienated in favour of the other defendants. Neither in his personal capacity nor as *shebait* was he possessed of sufficient means to enable him to pay the Court-fees prescribed for the plaint; *Held*, in revision, that the application could not be rejected merely because the *shebait* defendants held properties of the idol sufficient to pay the requisite Court-fees. NANDA LAL CHATTERJEE v. DWARKA NATH DAS, **16 C.W.N. 93.**

(5031)—O. 33, r. 7—*See* LIMITATION ACT, 1908, s. 3 and s. 14, 9 Bom. L.R. 204.

(5031-*a*)—O. 33, r. 7—*See* NOS. 5004, 5010, 5021, 5022, 5023, 5024, 5025, 5025-*a*, 5026, 5028, *supra.*

(5032)—O. 33, rr. 7, 8, 15—*See* LIMITATION ACT, 1908, s. 3, 24 C. 889.

(5033)—*O.* 33, *rr.* 7, 15 (=*Civ. Pro. Code*, 1882, *ss.* 409, 413)—*Application for leave to sue* in forma pauperis—*Refusal of application, bar to subsequent application in same right—Jurisdiction, plea of—Court's power to dismiss suit at any stage on point of Jurisdiction.*—The plaintiff as heir of one of the mortgagors applied for leave to sue *in forma pauperis* for the redemption of the mortgage. The application was rejected, and the actual words of the order were as follows:—"Since the applicant does not wish to proceed with the application, I reject his application to be allowed to sue *in forma pauperis* and order him to pay opponent's costs, and bear his own." Plaintiff again applied after some time for leave to sue *in forma pauperis* for the redemption of the same mortgage. The defendants did not object, and the application was granted and it was registered as a suit. The enquiry lasted over more than 3 years, and when the case was nearly ripe for judgment, the Government pleader intervened and asked that the inquiry should not proceed further until plaintiff had paid the costs due to Government in respect of his former rejected application. The lower Court advised the plaintiff to pay the costs due to the Government and the Court-fees in the present suit; but the plaintiff declined to do either. The suit was accordingly dismissed, under s. 413 of the Civ. Pro. Code, 1882, and the plaintiff was ordered to pay the Court-fees under s. 412 of the Code.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Held on appeal (i) that the order rejecting the appellants's first application was an order under s. 409 of the Code, and that the refusal operated as a bar to the entertainment of the second application; (ii) that the lower Court was not only competent but bound to take notice at any stage of the suit of this bar to its jurisdiction; (iii) and that the two applications were made in the same right to sue and not in different rights. As a general rule a Court cannot set aside any order passed by it of its own motion, but this rule does not apply to matters involving questions of jurisdiction, limitation, *res judicata* etc., which take away jurisdiction. The same set of facts which the mind at once grasps as jurally integral ought not to be made the basis of repeated proceedings, and the rule obtains that all the circumstances which exist when the former of two actions is brought, and can be brought forward in support of it shall be brought forward then, and not reserved for a second action arising out of the same events. Though the forms of action differ, the cause of action is identical, and the test is whether the evidence in support of both actions is substantially the same. RANCHOD MORAR v. BEZANJI EDULJI, 20 B. 86. (P.J. for 1874, 218, *R.*)

(5034)—*O.* 33, *rr.* 7 *and* 15 (=ss. 409, 413, *Civ. Pro. Code*, 1882)—*Application to sue as pauper, rejection of—Payment of Court fees after period of limitation for suit—Limitation Act s 4 applicability of—Civ. Pro. Code*, 1882, *ss.* 409, 413.—Where an application to sue as pauper has been rejected under s. 409 of the Civ. Pro. Code, 1882, the only course open to the applicant is that declared in s. 413, *viz.*, to institute a suit, and the date of the institution of the suit for purposes of limitation would be the actual date thereof. The plaintiff could not be regarded as a pauper, and the provisions of s. 4 of the Limitation Act, 1877, relating to paupers would have no application. (2 C. 389, *F.*; 2 A. 241, *D.*) Plaintiff's application to sue as a pauper was rejected after investigation on the 15th July, 1890, but time was granted to him, on his application, for payment of the Court-fees. He paid the Court-fees on 12th August, 1890, on which date the suit was barred. The defendant pleaded limitation, and the plaintiff contended that the suit should be taken to have been instituted at the date of his application to sue as a pauper. *Held* that the suit was barred, as on the disposal of the application under s. 409, Civ. Pro. Code, 1882, there was no proceeding pending which could be continued and kept alive by the payment of Court-fees. KESHAV RAMACHANDRA v. KRISHNARAO VENKATESH, 20 B. 508. [*Not. F.*, 84 P.R. 1904; *F.*, 24 C. 889, 9 Bom. L.R. 204; *Appr.*, 1 S.L.R. 71; *D.*, 21 B. 576.]

(5035)—O. 33, rr. 7, 15, O. 47, r. 1, s. 114, O. 47, r. 3—*See* REVIEW—REVIEW WHEN LIES, 4 B. 414.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859—*continued.*

(5036)—*O.* 33, *r.* 7, *O.* 43, *r.* 1, ss. 104, 105 (= *Civ. Pro. Code*, ss. 409, 588, 591)—*Order admitting suit in* forma pauperis *propriety of, whether could be attacked by defendant on appeal.*—Where, after the necessary inquiry, the Court of first instance had made an order under s. 409 allowing an application to sue in *forma pauperis* and ultimately decreed the plaintiff's claim, and the defendant appealed on the ground, among others, that the plaintiff was not a pauper and ought not to have been allowed to sue as such, it was *held* to be incompetent to the defendant to take such plea on appeal, and that it was *ultra vires* of the appellate Court to entertain such plea. The order granting the application to sue as a pauper is an order affecting the institution of a suit rather than its decision and, therefore, not an order contemplated by s. 591 of the Code, and cannot be dealt with in appeal in spite of the provisions of s. 588 of the Code. MUMATZAN v. RASULAN, 23 A. 364.

——O. XXXIII, r. 8 (=1882, s. 410=1877, s. 410=1859, s. 308).

See PAUPER SUITS.

(5037)—O. 33, r. 8—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 8 W.R. 239.

(5038)—O. 33, r. 8—*See* HINDU LAW—WIDOW, 4 A.L.J. 795=A.W.N. 1908, 29=2 M.L.T. 514=30 A. 95.

(5038-*a*)—O. 33, r. 8—*See* NOS. 503, 4581, 4832, 5025-*a*, 5032, *supra*.

(5039)—O. 33, r. 8, O. 39, rr. 1, 2, s. 104, O. XLIII, r. 1, ss. 115, 141—*See* INJUNCTION—SPECIAL CASES, A.W.N. 1890, 167.

——O. XXXIII, r. 9 (=1882, s. 414=1877, s. 414.

(5039-*a*)—O. 33, r. 9—*See* NO. 5018, *Infra*.

——O. XXXIII, r. 10 (=1882, s. 411=1877, s. 411=(1859, s. 309).

See PAUPER SUITS.

(5040)—*O.* 33, *r.* 10 (=*Civ. Pro. Code*, 1882, s. 411)—*Sum recoverable by Government as stamp fees, first charge on proceeds of sale.*—The purchase of certain property by a person at a sale held in order to recover the amount due to Government as stamp fees in a suit filed *in forma pauperis*, in which the plaintiffs were successful, prevails against a subsequent purchase of the same property in execution of a decree obtained against the estate of the deceased owner for debts due by him, as the sum recoverable by Government is a first charge on the property under s. 411 of the Civ. Pro. Code. PUTHIA VALAPPIL BARGA *alias* KUNHUNHA UMMA v. VELOTH ASSENAR, 25 M. 739=12 M.L.J. 406.

(5041)—*O.* 33, *r.* 10 (=*Civ. Pro. Code*, 1882, s. 411—*Invalidity of sale to recover Court-fees not really due—Suit for possession by*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

prior mortgagee—No suit necessary to set aside sale.—A sale held for Court-fees wrongly believed to be due to the Crown, while they were not actually so due, is invalid, as the order for such sale is *ultra vires*. In such a case, where a prior usufructuary mortgagee of the property sold brought a suit for recovery of possession, *held* that he was entitled to his claim, even though he did not ask as a relief in the suit that the sale should be set aside. BALWANT RAO v. MUHAMMAD HUSAIN, **15 A. 324=A.W.N. 1893, 140.** (12 C. 307, *R.*) [*F.*, 16 A. 5; *R.*, 19 A. 308, 163 P.L.R. 1901, 26 A. 346=A.W.N. 1904, 35=1 A.L.J. 53.]

(5042) — O. 33, r. 10—*See* ATTACHMENT, SUBJECTS OF ATTACHMENT, 20 C. 111.

(5043)—O. 33, r. 10—*See* LIMITATION ACT, 1908, arts. 149, 182, 2 B.L.R. App. 22=11 W.R.O.C. 67.

(5044)—O. 33, r. 10—*See* PAUPER SUITS, A.W.N. 1907, 157=29 A. 537=4 A.L.J. 720.

(5045)—*O.* 33, *rr.* 10, 11 (=*Civ. Pro. Code*, 1882, *ss.* 411, 412.—*Suits disposed of by compromise.*—It is competent to the Judge to make an order under ss. 411 and 412, Civ. Pro. Code, as to the payment of the Court-fee, even in cases in which a decision is passed in terms of a compromise. The words in the section are "succeeds" and "fails in the suit" and they refer to the ultimate decision or result of the suit and not to the mode in which the decision is arrived at. REFERENCE UNDER COURT-FEES ACT, s. 5, **4 M.L.J. 98.** (15 B. 78, 79 *Not F.*)

(5046)—O. 33, rr. 10, 11—*See* PAUPER APPEALS, 13 A. 326=A.W.N. 1891, 97.

——O. XXXIII, r. 11 (=1882, s. 412=1877, s. 412),

See PAUPER SUITS.

(5047)—*O.* 33, *r.* 11 (=*s.* 412, *Civ. Pro. Code*, 1882)—*Withdrawal of suit on compromise—Payment of Court-fees—Financial Commissoiner's authority over litigation concerning Government.*—Where a person is permitted to sue as a pauper, but the suit is withdrawn under a compromise, and he gives up his claim to the subject of the suit, the suit must be deemed to have failed within the meaning of s. 412 of the Code. It did not succeed in attaining its object, and it is immaterial whether the plaintiff voluntarily gave it up or lost it by the decision of the Court. He is liable to pay the Court-fees payable by him if he was not allowed to sue as pauper. The Financial Commissioner, Punjab, has, under Government rules, full authority over litigation in which the Government is concerned. And the right of the Government Advocate to represent the Secretary of State cannot be questioned. SECRETARY OF STATE FOR INDIA v. SURJU DAS, **104 P.R. 1908=160 P.W.R. 1908.** (31 B. 10, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5047 *a*)—O. 33, r. 11—*See* NOS. 1088, 4751, 4752, 4753, 4880, 5045, 5046, *supra*.

(5048)—O. 33, rr. 11, 9—*See* PAUPER APPEALS, 18 B. 464.

——O. XXXIII, r. 12 (New).

See PAUPER SUITS.

(5049)—*O.* 33, *r.* 12—*Civ. Pro. Code (Act XIV of 1882), s.* 412—*Pauper suit—Settlement of case—No order about Court-fees payable to Government—Government's right to appeal—Limitation—Practice.*—A suit instituted *in forma pauperis* was settled out of Court. The Court accordingly dismissed the suit, but made no order under s. 412 of the Civ. Pro. Code of 1882. This was in October 1908. Government had then ninety days time within which to appeal. Before the period expired, the new Code of 1908 came into force, which allowed Government to apply at any time to the Court for an order for the payment of Court-fees. (O. 33, r. 13.) Government applied to the Court under r. 12 of O. 33; but it dismissed the application on the ground that it had no jurisdiction to pass a fresh order. On appeal to the High Court: *Held* (1) that the order passed by the lower Court under r. 12 of O. 33 was an order under s. 47 and was therefore appealable. (2) That, although at the time the suit was dismissed, the only remedy open to Government was to apply to the High Court under its extraordinary jurisdiction, before the period prescribed for it could expire, a new law had come into force, which gave a new remedy to apply under r. 12, O. 33. It enabled Government to make an application to the Court to pass an order according to law. (3) That, the suit having been dismissed, there was a failure of it and the right accrued to Government to have the Court-fee from the party defeated. SECRETARY OF STATE v. NARAYAN, **13 Bom. L.R. 686.**

——O. XXXIII, r. 15 (=1882, s. 413=1877, s. 413=1859, s. 310.)

See PAUPER SUITS.

(5049-*a*)—O. 33, r. 15—*See* NOS. 2675, 4581, 5026, 5032, 5033, 5034, 5035, *supra*.

(5050)—*O.* 33, *r.* 15, *O.* 44, *r.* 1—*Application for leave to appeal* in forma pauperis *rejected—Application to treat rejected application as ordinary memo. of appeal—Not allowable—Effect of the words 'in all matters' in O.* 44, *r.* 1.—The Courts ought not to grant an application to treat the memorandum of appeal accompanying a rejected application to appeal *in forma pauperis* as an ordinary memorandum of appeal and to allow time for payment of Court-fees. After rejection of an application to sue *in forma pauperis*, the only course open is to institute a suit in the ordinary manner; likewise, after rejection of an application for leave to appeal *in forma pauperis*, the only course open is to institute an appeal in the regular

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

manner, *i.e.*, by filing a fresh memorandum of appeal duly stamped with the appropriate Court-fee. The effect of words 'in all matters' in O. XLIV, r. 1 and of O. XXXIII, r. 15, pointed out. ALLAH BUX v. MORDAR, **4 S.L.R. 263.**

(5050-*a*)—O. 34—Joint decree for sale—Application for order absolute by some of the decree-holders — How far competent — *See* TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, 8 A.L.J. 1229.

——O. XXXIV, r. 1 (=Transfer of Property Act, s. 85).

See CHARGE.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5051)—*O.* 34, *r.* 1—*Mortgage-suit—Party defendant, refusal to join a person as—Person interested in the mortgaged premises, if a proper party defendant—Opportunity to be heard before enforcement of mortgage-security—Adopted son of the person, executrix to whose estate executed the mortgage—Multiplicity of suits, avoidance of, if desirable.*—Under O. 34, r. 1 of the Code, the adopted son of the person, the executrix to whose estate executed a mortgage in favour of the plaintiff, is a person entitled to be added as a party defendant in a suit for enforcing the mortgage-security. The test to be applied is whether the petitioner who applies to be made a party defendant is a person who has an interest in the right of redemption. Where the plaintiff alleges that the mortgage was executed by the executrix under circumstances which made the security binding upon the estate, and the defendant is the adopted son of the deceased owner of the estate, the latter is a person interested in the right of redemption. It is desirable that, in a suit for enforcement of a mortgage security, all the parties interested should be brought before the Court, in order that multiplicity of litigation might be avoided (14 C.W.N. 703, 11 C.L.J. 426, *R.*) The rule laid down in the case of (33 C. 425, *Expl. & D.*) that, to a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and the mortgagee are not proper parties, is not inflexible GOKUL CHANDRA ROY v. RASHESWARI CHOWDHURANI, **14 C.L.J. 108** (5 C.L.J. 95, *R.*)

(5051-*a*)—O. 34, r. 1—*See* NOS. 2492-*b*, 4890-*a*, *supra*.

——O. XXXIV, r. 2 (=Transfer of Property Act, 1882, s. 86.)

See CHARGE.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5051-*b*)—O. 34, r. 2 — *See* NO. 2215 *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5052)—*O.* 34, *rr.* 2, 5—*Extension of time for redemption of a foreclosure-decree.*—A Court has no power to extend the time fixed by it for paying into Court the amount due under a foreclosure-decree. CHENNIAH CHETTY v. MA MI, **9 Ind. Cas. 771.**

——O. XXIV, r. 4 (=Transfer of Property Act, 1882, s. 88.

See CHARGE.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5053)—*O.* 34, *rr.* 4 *and* 5—*Preliminary decree for sale, extension of time fixed for payment under—Compromise extending time fixed for payment under preliminary decree, validity of.*—*Held*, that, under O. 34, rr. 4 and 5, the Court cannot extend the time fixed for payment under the preliminary decree for sale. *Held*, further, that a Court cannot accept a compromise and pass an order in accordance with its terms, which would have the effect of extending the time fixed for payment under the preliminary decree. DURGA BHARTHI v. ANDESH RAI, **14 O.C. 147.** (13 O.C. 28, *F.*; 19 A. 186, 7 A.L.J. 251, *R.*)

——O. XXXIV, r. 5 (=Transfer of Property Act 1882, s. 89.)

(5053-*a*)—O. 34, r. 5—*See* NOS. 5052, 5053, *supra*.

——O. XXXIV, r. 6 (=Transfer of Property Act, 1882, s. 90.)

See CHARGE.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5054)—O. 34, r. 6—Application in execution proceedings— Limitation — *See* LIMITATION ACT, 1908, ss. 14 (2), 15 (1) and art. 18, 10 Ind. Cas. 21.

(5054-*a*)—O. 34, r. 6—Decree under—Effect—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 16, 8 A.L.J. 1241.

(5054-*b*)—O. 34, r. 6—*See* NOS. 3217-*h* 1, *supra*.

— O. XXXIV, r. 9 (New).

See CHARGE.

See MOTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5055)—*O.* 34, r. 9, s. 144 (1) (=ss. 501, 583, *Civ Pro. Code*, 1882)—*Restitution in execution—Right of suit—Separate suit—If necessary—Decree not containing order for adjustment of accounts—Execution.*—When there has been a wrong done by an order of a Court which has

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been set aside on appeal, the Court executing the final decree, without express authority of law, is competent to put the parties in *statu quo*. Notwithstanding s. 583, a separate suit can be brought to obtain restitution within the terms of that section; but it has never been held that restitution cannot be obtained in execution of the final decree of the appellate Court. The same rule applies to a matter under s. 501, Civ. Pro. Code. (20 W.R. 441, B.L.R. Sup. Vol. 985=9 W.R. 402, 3 C. 721, 14 C. 484, 21 C. 989, *R.*) [*Appl.*, 4 A.L.J. 19=A. W.N. 1906, 315=29 A. 143; *Appl. & F.*, 6 C.L.J. 662=3 M.L.T. 41.] When a decree does not expressly direct an adjustment of accounts in the terms of s. 501, Civ. Pro. Code, such adjustment can be ordered in execution, if it be shown from the nature of the decree that it could and should have contained such an order and is imperfect without it. RADHEY SINGH v. MANGNI RAM, **6 C.W.N. 710.**

——O. XXXIV, r. 14 (New).

See CHARGE.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 100.

(5056)—*O. 34, r. 14—Transfer of Property Act (IV of 1882), s. 99—Decree on mortgage—Sale of property mortgaged—Sale proceeds insufficient to satisfy the decree in full—Balance remaining payable—Second mortgage on other property between same parties—Redemption-decree by mortgagor—Mortgagee applying for sale of the second property for the balance payable under the first decree—Sale.*—In execution of a decree obtained in 1897 upon a mortgage, the mortgaged property was sold, but the sale-proceeds were insufficient to satisfy the judgment-debt. The same mortgagee was holder of another mortgage executed by the same mortgagor upon other property. The mortgagor having died, his heirs sued to redeem the second mortgage and obtained a decree for redemption and an order for payment of the mortgage-debt by instalments, the mortgagee having been entitled to charge on the property. In 1908, the mortgagee applied for execution against the second property in respect of the unpaid balance under the first decree. The Subordinate Judge held that an attachment was permissible even though s. 99 of the Transfer of Property Act, 1882, applied. The District Judge, on appeal, held that the application was in contravention of s. 99 and dismissed the *darkhast*, but, on review, he held that the attachment was permissible. On appeal: *Held*, that the Civ. Pro. Code of 1908, in so far as it repealed s. 99 of the Transfer of Property Act, 1882, and substituted in its place, O. 34, r. 14, merely effected a change of procedure in the manner in which mortgaged property had to be realised in execution or money-decrees, and therefore the mortgagee was entitled under

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O. 34 to an order for the sale of the second property in satisfaction of the unpaid balance. BAI GANGA v. RAJARAM ATMARAM, **13 Bom. L.R. 245.**

(5057)—*O. 34, r. 14—Usufructuary mortgage—Possession not given to mortgagee—Suit for possession compromised—Mortgagee taking simple money-decree—Sale of mortgaged property.*—Where a usufructuary mortgagee, not having obtained possession, brought a suit therefor, but consented to take a simple money-decree instead, *held* that he was entitled, in execution of the consent decree, to bring the mortgaged property to sale. GANESH SINGH v. DEBI SINGH, **7 A.L.J. 321=5 Ind. Cas. 419 =32 A. 377.** (25 A.W.N. 152, 28 A. 58, 6 A.L.J. 731, *D.*; 8 C.W.N. 264, *F.*)

(5057-*a*)—*O. 34, r. 14*—Malikana—*Whether liable to attachment—Pensions Act (XXIII of 1871), s. 11.*—*Held*, that a *Malikana* allowance payable from a Government Treasury is of the nature of a pension and by Act XXIII of 1871, s. 11, is not liable to attachment by process of any Court in British India at the instance of a creditor or in satisfaction of a decree or order of a Court. LALMAN v. KALKA PRASAD, **8 A.L.J. 1326.**

—— O. XXXV, r. 1 (=1882, s. 471=1877, s. 471.)

(5057-*b*)—O. 35, r. 1—Suit for trust properties — Necessary parties—Non-joinder of trustees—Effect—*See* TRUST. 1911, 2 M.W.N. 537.

(5057-*c*)—O. 35, r. 1—*See* NO. 1597, *supra*.

—— O XXXV, r. 2 (=1882, s. 472=1877, s. 472).

(5057-*d*)—O. 3, r. 2—*See* NO. 1597, *supra*.

—— O. XXXV, r. 4 (=1882 s. 473=1877, s. 473.)

(5057-*e*)—O. 35, r. 4—*See* NOS. 1597, 1598, *supra*.

—— O. XXXV, r. 5 (=1882, s. 474=1877, s. 474.)

(5057-*f*)—O. 35, r. 5—*See* NOS. 99, 1597, *supra*.

—— O. XXXVI, r. 1 (=1882, s. 527=1877, s. 527 =1859, s. 328.)

(5057-*g*)—O. 36, r. 1—*See* NO. 1602, *supra*.

—— O. XXXVI, r. 2 (=1882, s. 528=1877, s. 528=1859, s. 328.)

(5057-*h*)—O. 36, r. 2—*See* NO. 1602, *supra*.

—— O. XXXVI, r. 3 (=1882, s. 529=1877, s. 529 =1859, s. 329.

(5057-*i*)—O. 36, r. 3—*See* NO. 1602, *supra*.

—— O. XXXVI, r. 4 (1882, s. 530=1877, s. 530 =1859, s. 330.)

(5057-*j*)—O. 36, r. 4—*See* NO. 1602, *supra*.

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—— O. XXXVI, r. 5 (=1882, s. 531 =1877, s. 531=1859 s. 331.)

(5057-*k*)—O. 36, r. 5—*See* NO. 1602, *supra*.

(5057-*l*)—*O. 37—Summary suit*—Ex parte *decree passed—Defendant proving impossibility to appear and defend within time fixed—Remedy of defendant—Setting aside of* ex parte *decree.*—In a suit instituted under O. XXXVII of the Code, summonses were issued requiring the defendants to appear and obtain leave to defend within ten days. It was practically impossible for them to appear and defend the suit within this time limit. A decree was passed *ex parte*. The defendants applied to have the *ex parte* decree set aside: *Held*, that the only method which the law allowed of obtaining reasonable time to defend in such cases was to apply for setting aside the *ex parte* decree, and that, as it was impossible for defendants to appear and defend within ten days, the *ex parte* decree should be set aside, and they should be granted leave to defend the suit. THE FIRM OF JAMNADAS v. A. E. GAYER, **11 Ind. Cas. 433.** (2 B. 644, *F.*)

(5058)—O. 37—Summary suit—Leave to defend—When allowable—Partial failure of consideration—Effect—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 45, 4 S.L.R. 147.

—— O. XXXVII, r. 2 (=1882, s. 532=1877, s. 532).

See NEGOTIABLE INSTRUMENTS.

(5059)—*O. 37, r. 2 (=s. 532, Ch. XXIXX, Civ. Pro. Code, 1882)—Suit on pro-note—Interest.*—Case where it was held that, when a pro-note does not provide for interest, none can be recovered in a suit thereon under s. 532, Civ. Pro. Code, 1882. In such a suit, plaintiff cannot adduce extrinsic evidence to show that interest had been agreed upon. BHUPATI RAM v. SOURENDRA MOHUN TAGORE, **30 C. 446=7 C.W.N. 412.** (1 C. 130, *R.*) *D.*, 17 M.L.J. 296.]

(5059 *a*)—*O. 37, r. 2—Summary suits on bills of exchange—Value below Rs. 1,000—Cognisability by Karachi Small Causes Court—Jurisdiction of other Courts precluded—Provincial Small Cause Courts Act, 1887, s. 16—Effect of O. 37, r. 2.*—The Small Cause Court at Karachi has jurisdiction to try suits on Bills of exchange, Hundis, etc., up to Rs. 1,000, and such a suit being cognizable by the Court of Small Causes, all other Courts are deprived of jurisdiction by s. 16, Provincial Small Cause Courts Act. O. 37, r. 2, gives jurisdiction to the Courts to which the order applies to try the specified class of suits by summary procedure, and the jurisdiction refers only to the mode of trial, and no jurisdiction is conferred to try suits which the specified Courts are not otherwise competent to try. *Re* DOULA VALABDAS v. HALO KANYA, **5 S.L.R. 155.** (1 S.E. Sel. Dec. 83, *Appr.*; 8 Ben. L.R. App. 10 *Expl.*, 6 C. 499, *R.*)

(5059-*b*)—O. 37, r. 2—*See* NO. 1699, *supra*.

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——O. XXXVII, r. 3 (=1882, s. 523=1877, s. 523).

(5059-*c*)—O. 37, r. 3—*See* NO. 1699, *supra*.

—— O. XXXVII, r. 4 (=1882, s. 534=1877, s. 534).

See NEGOTIABLE INSTRUMENTS.

(5060)—O. 37, r. 4—*See* APPEAL—EX PARTE CASES, 2 B. 644.

—— O. XXXVII, r. 6 (=1882, s. 536=1877, s. 536).

See NEGOTLBLE INSTRUMENTS.

(5061)—O. 37, r. 6—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 23 M. 547=10 M.L.J. 329, F.B.

(5062)—*O. 37, r. 6, ss. 92, 93 (=ss. 536, 539 Civ. Pro. Code, 1882)—Trust for a burial-ground—Public religious purposes.*—The words "or religious" were added to meet the difficulty referred to in 11 C. 33. In the corresponding Act of 1877 the words "or religious" were not included. So is a trust for burial ground of a religious community. A trust for a burial ground of a given religious community is a trust for a public religious purpose within the meaning of s. 539, Civ. Pro. Code. MAHOMED ESOOF *alias* MAUNG PO GALE v. NURRUDDIN *alias* MAUNG GYI, **L.B.R. 1893—1900, 648.** (20 C. 397, 16 B. 626, 11 C. 33, *R.*)

(5063)—O. 37, r. 1—Suit for damages for breach of contract—Arrest under s. 477, Civ. Pro. Code, 1882, of defendant before judgment—Summons not served on defendant—Application for withdrawal of suit under s. 373, Civ. Pro. Code, 1882 Objection by defendant—Procedure—*See* WITHDRAWAL OF SUIT, 15 B. 160.

—— O. XXXVIII, r. 1 (a) (=1882, s. 477=1877, s. 477=1859, s. 74; and r. 1 (b) = 1882, s. 478=1877, s. 478=1859, s. 75.)

See ARREST.

See ARREST BEFORE JUDGMENT.

See ATTACHMENT.

See ATTACHMENT BEFOEE JUDGMENT.

See EXECUTION OF DECREE.

(5064)—*O. 38, rr. 1, 2 (=ss. 477, 479, Civ. Pro. Code, 1882)—Suit for work done—Defendant, with no domicile or property, about to leave jurisdiction—Security for personal appearance.*—If a person comes on business to India, in which he has no domicile or property, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known that he intends to leave as soon as the work is completed, there is an implied understanding, assuming that the work was done on his credit, that it shall be settled so paid for before he leaves the country. Such a case falls under s. 477 of the Civ. Pro. Code,

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and there is no authority for saying that the principles applied in England to the granting of *writs ne exeat regno* should be applied in India. It was accordingly ordered in the case, the plaintiff's suit being found to be *bona fide* and not brought merely to harass the defendant, that the defendant should, as prayed for by the plaintiff, furnish security for his appearance, while the suit was pending, within a week, in terms of s. 479 of the Code, such security to be for the amount of the claim. PROBODE CHUNDER MULLICK v. M. DOWEY, **14 C. 695.**

(5065)—*O.* 38, *rr.* 1 (6), 2 (=1859, *ss.* 75, 78) —*Act XV of* 1869—*Arrest before judgment.*—Ss. 75, 78, Act VIII of 1859, do not provide for a warrant of arrest before judgment being taken out to secure the easy execution of decrees, if such decrees are obtained; nor does s. 75 oblige defendants generally to give security. The application of the former section is confined to cases where the defendant is about to remove himself or his property beyond the jurisdiction with the intention of evasion, obstruction or delay, and the latter to cases where the defendant neither furnishes security nor offers a sufficient deposit. Where a defendant is detained in custody under these sections, and the Judge, wishes to have him brought before the Court, it is not necessary to resort to the provisions of Act XV of 1869; a direction to the jailor will suffice. KILARAM MAJI v. NARAYAN DAS, **5 B.L.R. 215=13 W R. 278.**

——O. XXXVIII, r. 2 (=1882, s. 479=1877, 479=1859, s. 76).

See ARREST.

See ARREST BEFORE JUDGMENT.

See ATTACHMENT.

See ATTACHMENT BEFORE JUDGMENT.

See EXECUTION OF DECREE.

(5066)—*O.* 38, *r.* 2—A suit against a security for the appearance of the defendant in a former suit, is not affected by s. 11, Act XXIII of 1861. SIKOORAM AGURWALLA v. KOMALAKANT DEY, **2 W.R. 65.**

(5066-*a*)—O. 38, r. 2—*See* NOS. 5064, 5065, *supra.*

——O. XXXVIII, r. 4 (=1882, s. 481=1877, s. 481=1859, s. 78).

(5067)—O. 38, r. 4—*See* SUBSISTENCE MONEY, 1 Ind. Jur. N.S. 327=Bourke, O.C. 423.

(5067-*a*)—O. 38, r. 4—*See* NO. 1222, *supra.*

——O. XXXVIII, r. 5 (=1882, ss. 483, 484=1877, ss. 483, 484=1859, ss. 81, 83).

See ARREST.

See ARREST BEFORE JUDGMENT.

See ATTACHMENT.

See ATTACHMENT BEFORE JUDGMENT.

See EXECUTION OF DECREE.

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(5068)—*O.* 38, *r.* 5 (=*s.* 483, *Civ. Pro. Code*, 1882)—*Attachment on insufficient grounds—Damages—Proof of malice—Memo of objections withdrawn—Jurisdiction as to costs.*—An order, under s. 483, Civ. Pro. Code, where the application has been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable. *Quare*:—Whether it is necessary to prove that the defendant acted maliciously in the above case. The practice, as to the form of an order when a memorandum of objections has not been stamped and has not been moved, does not seem to be uniform, but, orders dismissing the memorandum in such circumstances have been made and there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing an application, there is, of course, jurisdiction to make an order dismissing it with costs. PALANI KUMARASAMI PILLAI v. UDAYAR NADAN, **4 M.L.T. 303=18 M.L.J. 490=32 M. 170=2 Ind. Cas. 345.**

(5069)—*O.* 38, *r.* 5 (=*s.* 483, *Civ. Pro. Code*)—*Attachment before judgment—Conduct of defendant — Commencement of suit.*—In considering an application for attachment before judgment, the Court is not restricted to the conduct of the defendant subsequent to the commencement of the action. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention. MACGREGOR v. THE CAWNPORE SUGAR WORKS, LD., **11 C.L.J. 19=5 Ind. Cas. 181.**

(5070)—*O.* 38, *r.* 5 (=*Act VIII of* 1859, *s.* 81) —*Decree—Execution — Jurisdiction.*—Express words are necessary in order to give to a Court of locally limited jurisdiction a power of action beyond its local limits. The common sense meaning of s. 81, Act VIII of 1859, is that the property there spoken of is property within the jurisdiction of the Court, *viz.*, property which, when the decree is made, the Court would be able to reach and make available in satisfaction of the decree. There is nothing in the Act to indicate that the Legislature intended an extra-jurisdiction power of attachment to be given to a local Court before judgment. Where an order under that section by the first subordinate Judge of the 24 Pergunnas in respect of property in Calcutta was sent up to the High Court in order that it might be endorsed in accordance with the provisions of s. 1 of Act XXIII of 1840, the High Court refused to endorse it. BALARAM MULLICK v. E.R. SOLANO, **8 B.L.R. 335.** [*F.*, 5 Bom. L.R. 570.]

(5071)—*O.* 38, *r.* 5 (=*old s.* 483)—*Attachment before judgment—Suit for damages—Principles governing such.*—The principles governing

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a suit for damages caused to plaintiff by an attachment before judgment, unnecessarily and maliciously applied for by the other party are *mutatis mutandis* the same as those in an action for malicious prosecution. DALI CHAND v. ALAF KHAN, **86 P R 1893.**

(5072)—*O. 38, r. 5 (=Civ. Pro. Code, 1877, s. 484)—"Conditional attachment," meaning of.*—S. 484 of the Civ. Pro. Code, 1877, speaks of a "conditional attachment" as within the competence of the Court. This might mean an attachment to be made conditionally on the security not being furnished nor cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order. The form at the end of the Code for a provisional attachment shows that the latter was the intention of the Legislature. LOTLIKAR v. LOTLIKAR, **5 B. 643.**

(5073)—*O 38, r. 5 (=s. 483, Civ. Pro. Code, 1882)—Attachment before judgment—Appointment of receiver-Affidavits—Contents—Practice.*—S. 483 of the Civ. Pro. Code provides for the attachment of property of the judgment debtor: it does not apply to the joint property of a partnership of which the judgment-debtor is a member. In cases of this kind the proper order to make is the appointment of a receiver, under s. 503 of the Code. DAMODAR v. PANALAL, **9 Bom. L R. 540.**

(5074)—*O. 38, r. 5 (=s. 483, Civ, Pro. Code, 1882)—Attachment before judgment—Property outside jurisdiction.*—Under the provisions of ss. 483 and 464 of the Civ. Pro. Code, 1882, a Court has no power to attach before judgment property outside the limits of its jurisdiction. RAJA GOKULDAS v. JANKIBAI; JAMNADAS v. RAICHAND, **8 Bom. L.R. 570.**

(5074-*a*)—*O. 38, r. 5 (=Civ. Pro. Code, 1882, s. 484)—Application for filing of award and decree thereon—Objection by creditor—Creditor not entitled to be made party—Remedy under.*—Plaintiff filed an award and prayed for a decree in its terms as between himself and defendant. A creditor of the defendant contesting the award as fictitious and fraudulent as against creditors sought to be made a party in the proceedings, and the Subordinate Judge added him as defendant No. 2 and in the result refused to file the award or pass a decree thereon. The High Court directed the Subrodinate Judge to file and proceed on the award since the first defendant raised no objection to the award and in the absence of any illegality on its face, the Subordinate Judge was bound to file it. The creditor of defendant No. 1 should not have been made a party to the proceedings or allowed to contest the award. He had no *locus standi* whatever. If he thought that the award proceedings were a fraudulent device to protect first defendant's property from creditors including himself, his remedy was to apply under s. 484 for an attachment before judgment of the first defendant's property. DUNGARSI v. UJAMSI, **22 B. 727.**

(5075)—O. 38, r. 5—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, **12** W.R.F.B. 16.

(5076)—*O.* 38, r. 5—*See* INSOLVENCY—MISCELLANEOUS, 1 Ind. Jur. N.S. 325 AND ON APPEAL (*Ibid*) 373.

(5077)—O. 38, r. 5—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 21 W.R. 375.

(5077-*a*)—O. 38. r. 5—*See* NOS. 509, 1307, 3732, *supra*.

(5078)—*O. 38, r. 5, s. 113, O. 46. r. 1 (=ss. 483 and 617, Civ. Pro. Code, 1882)—Attachment before judgment of property outside jurisdiction, validity of—Grounds of reference to Chief Court under s. 617.*—Property outside the local limits of the jurisdiction of a Court cannot be attached before judgment under Ch. XXXIV of the Code. A Subordinate Court in Lower Burma is bound to follow the rulings of the Chief Court, Lower Burma, notwithstanding that another High Court had ruled differently on the point, and the fact that there is such a conflict between the Chief Court's ruling and another High Court's ruling is no ground for referring the question to the Chief Court under s. 617, Civ. Pro. Code. SIVA SAWMY SITIA v. SULIMAN DAWOODJI PAREK, **3 L.B.R. 253.** (1 L.B.R. 310, 8 M. 20, 5 Bom. L.R. 570, *F.*; 7 C.W.N. 216, *Not F.*)

(5079)—*O. 38. r. 5, s. 136 (=ss. 483 and 648, Civ. Pro. Code, 1882)—Property outside the jurisdiction of Court—Applicability of s. 483.*—S. 648 of the Code does not extend the operation of s. 483 to property situated outside the jurisdiction of the Court. KIN KIN v. NGA KYAW WE, **U.B.R. 1907, Civ. Pro. Code. 13.** (1 L.B R. 310, L.B.R. 1893—1900. 56, 8 M. 20, 7 C.W.N. 216, *R.*)

(5080)—O. 38, r. 5, s.136—*See* ATTACHMENT BEFORE JUDGMENT, 7 C.W.N. 216.

(5081)—*O. 38, rr. 5, 6 (=Civ. Pro Code, 1882, ss. 483, 485)—Civ. Pro. Code, ss. 483, 485—Attachment before judgment.*—The procedure prescribed in the matter of attachment before judgment should be carefully followed. **J. DONNAN v. S.P.A. V. SATHAPPA CHETTY, U.B.R. 1892—1896. Vol. II. 274.**

(5082)—O. 38. rr. 5 and 6—Applicability to divorce proceedings—*See* DIVORCE, 37 C. **613** =7 Ind. Cas. 792.

(5083)—*O. 38, rr. 5, 10, s. 145 (=ss. 483 and 488 and 253, Civ. Pro. Code, 1882)—Attachment before judgment—Removal on K giving security—Suit dismissed by lower Court but decreed on appeal—Liability of surety for amount of appellate decree.*—An attachment before judgment, which was issued in a suit to attach

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certain money due to the defendant, was subsequently withdrawn on K giving security to pay over the money so due or the decretal amount. The suit was dismissed by the lower Court, but decreed on appeal. It was then sought to execute the amount of the appellate decree against K. *Held*, that K's liability ceased when the suit was dismissed by the lower Court, as the attachment itself to remove which K gave the security, must have been removed, under s. 488, with the dismissal of the suit. MA BI v. S. KALIDAS, **5 L.B.R. 156 =5 Ind. Cas. 985.** (12 B. 71, *F.*)

(5084)—O. 38, r. 5 and O. 41, r. 5—*See* SURETY—ENFORCEMENT OF SECURITY, 12 B.71.

(5085)—*O.* 38, *r.* 5, *O.* 43, *r.* 1, *s.* 104 (=*Civ. Pro. Code*, 1882, *ss.* 483 *and* 588)—*Appeal—Order refusing attachment*—No appeal lies under s. 588 of the Code of Civil Procedure from an order dismissing an application under s. 483 of the Code for an order for the attachment of some property to meet any decree which the applicant might obtain under s. 90 of the Transfer of Property Act, 1882. AMBA PRASAD v NARAIN DAS, **A.W.N. 1898, 18.**

——O XXXVIII, r. 6 (New).

(5085-*a*)—O. 38, r. 6—*See* NOS. 3733, 5081, 5082, *supra*.

——O. XXXVIII, r. 8 (=1882, s. 487=1877, s. 487=1859, s. 86).

(5085-*b*)—O. 38, r. 8—*See* NOS. 3437, 3574, *supra*.

——O. XXXVIII, r. 9 (=1882, s. 488=1877, s. 488=1859, s. 87.)

(5085-*c*)—O. 38, r. 9—*See* NOS. 3574, 3817, 4040, *supra*.

——O. XXXVIII, r. 10 (=1882, s. 489=1877, s. 489=1859, s. 89.)

(5085-*d*)—O. 38, r. 10—*See* NOS. 1535, 5083, *supra*.

——O. XXXVIII, r. 11 (=1882, s. 490=1877, s. 490.)

(5085-*e*)—O. 38, r. 11—*See* NOS. 1535, 3437, *supra*.

——O. XXXVIII, r. 12 (New.)

See ARREST.

See ARREST BEFORE JUDGMENT.

See ATTACHMENT.

See ATTACHMENT BEFORE JUDGMENT.

See EXECUTION OF DECREE.

(5086)—*O.* 38, *r.* 12 (=*s.* 490, *Civ. Pro. Code*, 1882).—Where an attachment before judgment has been levied and an *ex parte* decree passed, the time to set it aside is thirty days, under art. 164 of the Limitation Act, from the date of executing any process for enforcing the judgment. An application after decree for confirmation of the attachment under s. 490, Civ. Pro. Code, 1882, does not give the starting point of limitation as it is not an enforcement of any process of execution warranted. SIDHARATHRAI v. ANANTRAM, **8 Bom. L.R 567.**

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(5086 *a*)—O. 38, r. 12—*See* NOS. 1307, 1308, 3220, 3429, 3437, 3728, 3732, *supra*.

——O. XXXIX, r. 1 (=1882, s. 492=1877, s. 492=1859, s. 92).

See INJUNCTION.

(5087)—*O.* 39, *r.* 1 (=*old s.* 492)—*Injunction Alienation—Validity.*—The effect of a temporary injunction is not to make a subsequent alienation of the property in respect of which the injunction was issued illegal and void. KALA KHAN v. KIRPAL SINGH, **144 P.R. 1889.**

(5088)—*O.* 39, *r.* 1 (=*s.* 492, *Civ. Pro. Code*, 1882)—"*Waste*"—"*Damage.*"—A suit was brought by a Muhammadan woman against her husband for a declaration that she was entitled to the possession of certain specified villages for her dower debt. The defendant applied to the Court under s. 492, Civ. Pro. Code, stating that several decrees had been passed against him in favour of certain persons named, that these latter in execution of their decrees had brought those villages to sale, that the sale was then pending, that the result of the action brought by his wife would be to depreciate the selling value of the property and prayed for a temporary injunction to restrain the sale of the properties in execution of the decrees till the disposal of the suit brought by his wife. *Held* that there would be no waste or damage of the property within the meaning of s. 492, Civ. Pro. Code, that the property was not being wrongfully sold in execution of a decree, and that the application should not be allowed, as it would have the result of unnecessarily delaying the decree-holders' remedy. MUHAMMAD ISMAIL KHAN v. KISHAN SAHAI, **A.W.N. 1887, 42.**

(5089)—*O.* 39, *r.* 1—"*Wrongly sold in execution of a decree*"—*Temporary injunction—Act* XIV *of* 1882, *s.* 492—*Act* X *of* 1877, *s.* 492—*Act* VIII *of* 1859, *s.* 92.—By using the words "wrongfully sold in execution of a decree," the Legislature intended that an injunction might be granted, when property, which the claimant claimed to be his, was in danger of being sold in execution of a decree against another person or even against himself. *Re* ABDULLA KHAN v. BANKÉ LAL, **7 A L.J. 932, F.B.=7 Ind. Cas. 183.** (26 A. 311, *Overruled.*)

(5090)—*O.* 39, *r.* 1 (=*s.* 492, *Civ. Pro. Code*, 1882)—*Application—Second appeal—Practice—Procedure.*—No second appeal lies from an application under s. 492 of the Civ. Pro. Code, 1882. RAMCHANDRA v. JANARDHAN, **4 Bom. L.R. 138.**

(5091)—*O.* 39, *r.* 1 (=*s.* 492, *Civ. Pro. Code*, 1882)—*Injunction, temporary—Procedure in*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

respect of application for injunction—Receiver, appointment of.—After the institution of her suit against the defendant for possession of moveable and immoveable property, the plaintiff applied for the appointment of a receiver. She subsequently applied under s. 492, Civ. Pro. Code, for a temporary injunction, such injunction to have effect until her application for the appointment of a receiver was decided. The Court made an order directing that the application should be placed on the record of the suit. *Held* that the Court should have entertained and decided the application instead of treating it in the way it did. *Held* further, that an injunction could not properly be issued in respect of the property unless the plaintiff showed that she had a case, founded an apparent title, for the appointment of a receiver, for she would not be entitled to have a receiver appointed unless she made out a good *prima facie* title to the property. KADIR JAHAN BEGAM v. NATHU *alias* UDIT NARAIN, **5 O.C. 65.**

(5092)—*O. 39, r. 1 (=s. 492, Civ, Pro. Code, 1882)—Code not exhaustive—Injunction—Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Protection by injunction even when lis pendens applies—Suit for specific performance of contract for lease of immoveable property is one relating to the property—Civil Court's power to stay proceedings in Criminal Court—Crim. Pro. Code (Act V of 1898), s. 145, proceedings under, not criminal proceedings.* The Civ. Pro. Code is not exhaustive. Therefore, a Court of Equity has power, in a case of specific performance, to interfere by an injunction, in order to maintain matters in their present state, even if the case does not fall strictly within the purview of s. 492 of the Code. There is no reason why, because the plaintiff might possibly be protected in one way, namely by the doctrine of *lis pendens*, he should not also be protected in another way, namely by an injunction. A suit for specific performance of a contract for lease of immoveable property does in fact relate to the property, which is the subject-matter of the contest, within the meaning of s. 52 of the Transfer of Property Act. A Civil Court has no right to issue an injunction which would have the effect of staying proceedings in a Criminal Court. But proceedings under s. 145, Crim. Pro. Code, cannot be said to be criminal proceedings within the meaning of that principle, and a Civil Court's action cannot possibly be fettered by any action, which one of the parties to the suit may choose to take before the Magistrate under the provisions of that section. NAWAB SALTANT-ARA MUNNI BEGUM v. SETH DOOLI CHAND, **2 Ind. Cas 266.**

(5093)—*O. 39, r. 1 (=s. 492, Civ. Pro. Code, 1882)—Injunction to party and not to Court—Contemplates property being in danger of waste.*

Civ. Pro Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—An injunction under s. 492 of the Code cannot be issued to a Court but only to a party, and an injunction to a party contemplates that some property, the subject-matter of the suit, is in danger of being wasted. RAJAH RAM v. DHARAM DAS, **2 A.L.J. 601.**

(5094)—*O. 39, r. 1 (=s. 492, Civ. Pro. Code, 1882)—Injunction—Decree of Revenue Court—Execution in Civil Court—Decree, character of s. 93, N.W.P. Rent Act (XII of 1881).*—The Revenue Courts are Courts of civil jurisdiction within the meaning of the Code of Civil Procedure, in that, their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature. Hence a Civil Court may, under s. 492, Civ Pro. Code, grant a temporary injunction, staying proceedings in execution of decree passed in a suit under s. 93 of the North Western Provinces Rent Act (XII of 1881) and which was transferred for execution to a Civil Court, (16 A. 496, *Dissented from*; 9 C. 295=12 C.L.R. 361=9 I.A. 174, 5 A. 406, *R.*) The decree does not lose its original character. It is only in the course of execution that the Civil Court should treat such a decree in all respects as if it had been passed by itself. RAM LOCHAN SINGH v. KUMAR NEWAZ PROSAD SINGH, **9 C.L.J. 125 =36 C. 252=13 C.W.N. 791=1 Ind. Cas. 933.**

(5095)—*O. 39, r. 1 (=Civ. Pro. Code, 1882, s. 492)—Meaning of 'wrongfully sold.'*—Where an unsuccessful decree-holder got a decree in his favour in a suit under s. 283 of the Civ. Pro. Code against the claimant in the execution proceedings, and such claimant, after preferring an appeal from the decree, applied under s. 492 to restrain the decree-holder from selling property, *held* that the words 'wrongfully sold' in that section did not apply to the case and that no injunction could be granted. *In the matter of the petition of* CHANDO BIBI, **26 A. 311.** (10 A. 80, *Overruled.*)

(5096)—*O. 39, r. 1 (=Civ. Pro. Code, 1882, s. 492)—Temporary injunction.*—Where the plaintiffs filed an affidavit under s. 492 of the Code of Civil Procedure, alleging their own possession, and stating that the defendant was sending four karindas on to the property in order to collect rents, was suing tenants for rent, and had applied to the Collector for partition. *Held* that these facts did not justify the granting of an order under s. 492; that the provisions of s. 492 are extraordinary and should never be applied except under extraordinary circumstances. DARAB KUER v. GOMTI KUER, **A.W.N. 1900, 159.**

(5097)—*O. 39, r. 1 (=Civ. Pro. Code, 1877, s. 492)—Specific Relief Act (I of 1877), s. 56 (b)—Temporary injunction—Execution of decree of Revenue Court.*—A Civil Court is not precluded by s. 56 (*b*) of the Specific Relief Act, from granting a temporary injunction to stay the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

execution of a decree of a Revenue Court for rent, where the decree is one appealable to the High Court, and the party against whom an order has been passed under s. 179 of the N.W. P. Rent Act, 1873, has sued in the Civil Court under s. 181 of the Act. This was an application under s. 492 of the Civ. Pro. Code, 1877, by the appellant in an appeal from an original decree pending in the High Court, for an injunction to restrain the sale, in execution of a decree, of the property in dispute in the suit, in which the appeal arose. It appeared that in April 1874, the appellant's husband executed a deed of gift in favour of the appellant of certain property. In September 1874, the respondent obtained a decree for arrears of rent under the N.W.P. Rent Act, 1873. This decree was appealable to the High Court, and in fact was appealed from and affirmed. The respondent caused the property which was conveyed by the deed of gift to be attached in execution of this decree. The appellant claimed the property under the deed of gift, and the Collector disallowed the claim under s. 179 of the N.W.P. Rent Act, 1881. The appallant then, under s. 181 of the Act, instituted a suit in the Civil Court to establish her right to the property under the deed of gift. *Held*, the Civil Court could grant the injunction prayed for, and there was no prohibition of it under s. 56 (*b*) of the Specific Relief Act, I of 1877. BAHURIA MANRAJ KUARI v. MAHARAJA RADHA PRASAD SINGH, **A.W.N. 1884, 332.** [*R.*, 10 A. 80=A.W.N. 1888, 7.]

(5098)—*O.* 39, *r.* 1 (=*Civ. Pro. Code*, 1877, *s.* 492)—*Temporary injunction.*—This was an application under s. 492 of the Civ. Pro Code, supported by an affidavit, for grant of a temporary injunction to restrain the defendant from selling certain property in execution of his decree, on the ground that it was in danger of being wrongfully sold, inasmuch as the judgment-debtor was only the manager of the property, which was trust property, and the question of title in it was the subject of a suit pending in appeal before the Court. *Held* that the circumstances set out justified the granting of a temporary injunction to the effect that the defendant, decree-holder, shall not proceed to bring the property to sale pending the decision of the suit by the High Court in appeal, the property to remain in attachment meanwhile. GANGA NAND v. BALGOBIND DAS, **A.W.N. 1884, 349.** (11 B.L.R. App. 27, *D.*) [*R.*, 10 A. 80=8 A.W.N. 7, 33 A. 79=7 A.L.J. 933, F.B.]

(5099)—*O.* 39, *r.* 1 (=*s.* 492, *Civ. Pro. Code*, 1882)—*Temporary injunction.*— In this case, the petitioner applied to the High Court for the issue of an injunction under s 492, Civ. Pro. Code, staying further execution of the decree passed by the Subordinate Judge of M in a certain civil suit, pending the disposal of an appeal from the decree. It appeared that the appeal was pending not in the High Court but in the Court of the District Judge of M. *Held* that s. 492, Civ. Pro. Code, did not, under the circumstances of the case, apply to a matter of that kind, and that the injunction prayed for should at least have been prayed for by him in the Court where the suit was originally pending, and that therefore the petition should be rejected. HANSRAJ v. NAND RAM, **A.W.N. 1887, 197.**

(5100)—*O.* 39, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 492)—*Property wrongfully sold in execution of decree—Temporary injunction.*— Where an application for a temporary injunction under s. 492, is made on the ground that property is about to be wrongfully sold in execution of a decree *held* that, in deciding such an application, the Court may have regard to probability, convenience and expediency, as indicated by the *prima facie* merits of the applicant's case. LEE LOKE SHAIN v. LIM TIE MUN, **2 L.B.R. 89.** (10 A. 80, 22 C. 459, *F.*; 12 C. 515, 23 B. 351, *R.*)

(5101)—*O.* 39, *r.* 1 (=*Civ. Pro. Code*, 1882, *s.* 492), *object of.*—One of the objects of the Legislature in passing such a provision was to guard as far as possible against multiplicity of suits. KIRPA DAYAL v. RANI KISHORI, **10 A. 80=A.W.N. 1888, 7.**

(5102)—O. 39, r. 1—*See* JURISDICTION OF CIVIL COURTS, 16 A. 496=A.W.N. 1894, 180.

(5103)—O. 39, r. 1—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 33, 34, 2 Bom. L.R. 797.

(5103 *a*)—O. 39, r. 1—*See* NOS. 400, 503, 1338, 1346, 2248, 3024, 5039, *supra* and NOS. 5149, 5150, *infra.*

(5104)—*O* 39, *r.* 1 *and s.* 95 (=*Civ. Pro. Code*, 1882, *ss.* 492, 497)—*Injunction restraining debtor from alienating his property—Alienation to creditor with notice of order—Validity of alienation.*—Though an order under s. 497 of the Code does not by itself operate to make a subsequent alienation void, yet a sale by a debtor, who has received notice of the order, to one of his creditors, who has had knowledge of the issue of the order and prejudicial to the other creditors is void. AGARCHAND v. CHAJJOOLAL, **12 C.P.L.R. 109.** (9 A. 497, *R.*)

(5105)—*O.* 39, *r.* 1, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 492, 588)—*Suit to get declaration that certain decree was collusive—Suit dismissed—Injunction for stay of execution of alleged collusive decree pending appeal refused.*—A suit was instituted by a creditor against his debtor and the debtor's wife for a declaration that a decree obtained by the latter against the former was fictitious and collusive obtained to defeat the claims of creditors.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

The claim was dismissed and an appeal against the order of dismissal was made to the Chief Court. Before it was admitted to a hearing it was prayed that pending the appeal injunction should issue for stay of execution of the wife's decree against her husband. The Chief Court declined to grant the injunction. FATTEH CHAND v. MUSSAMMAT MENGHI BAI. **99 P.L.R. 1904.**

(5106)—*O. 39, rr. 1, 2 (=ss. 492, 493, Civ. Pro. Code, 1882)—Court's power to issue injunction where there is no allegation that the property the subject of the suit is likely to be wasted or removed by defendants.*—Where there is no allegation that the property which is the subject of the suit is likely to be wasted or removed by the defendants, the Court has no jurisdiction to issue an injunction under s. 492 of the Code. S. SUBRAMANIA NAYINAR v. S. VENGU IYER, **4 M.L.T. 91=18 M.L.J. 302.**

(5107)—O. 39, rr. 1, 2—*See* SPECIFIC RELIEF ACT, 1877, 6 B. 266.

(5108 5109)—*O. 39, r. 1, O. 40, rr. 1, 2, 3 (=ss. 492, 503, Civ. Pro. Code, 1882)—Orders purporting to be passed under, in absence of jurisdiction, appeal preferable against—Guardian and Wards Act (VIII of 1890), s. 43 (4).*—Where a Court acting under misconception of its powers under s. 43 of the Guardian and Wards Act purported to act under s. 492 of the Civ. Pro. Code, so far as regards its order issuing an injunction in the matter, and apparently under s. 503 of the Code as regards the appointment of a Receiver, orders made under either of the sections being appealable, the fact that the Court had no power, in the case under the Guardian and Wards Act, to pass an order as under the sections of the Civ. Pro. Code, was *held* not to bar the appellate Court from treating the order as having been passed under that Code for the purpose of entertaining an appeal against such order. ABDUL RAHIMAN SAHEB v. GANAPATHI BHATTA, **23 M. 517=10 M.L.J. 303.** (10 I.A. 4, 9 C. 482, *R.*) [*F.*, 28 M. 127=14 M.L.J. 436.]

(5110)—O. 39, r. 1, O. 40, rr. 1, 2, 3, 5—*See* INSOLVENCY—MISCELLANEOUS, 4 B.L.R.A.C. 72, Note=12 W.R. 103.

(5110-*a*)—*O. 39, r. 1, O. 40, rr. 1, 2, 3, 5, O. 21, rr. 58, 59, 60, 61, 63, 64 (=Civ. Pro. Code, 1859, ss. 92, 246)—Claim petition rejection of—Subsequent suit—Injunction.*—In execution of a decree, certain immoveable property was attached. The plaintiff presented a claim petition. The petition was dismissed. Thereupon, the plaintiff sued to establish his right. *Held* that, in such a suit, an injunction to stop the execution proceedings, under s. 92, Civ. Pro. Code, 1859, could not be granted. His proper course would be to present another petition in the execution proceedings. ROY LUCHMIPUTT SINGH BAHADOOR v. SECRETARY OF STATE FOR INDIA, **11 B.L.R. App. 27=20 W.R. 11.** [*F.*, 24 W.R. 70; *D.*, 12 C. 515.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——**O. XXXIX, r. 2 (=1882, s. 493=1877, s. 493=1859, s. 93).**

See INJUNCTION.

(5111)—*O. 39, r. 2 (=s. 493, Civ. Pro. Code, 1882)—Temporary injunction—"Other injury" does not include trespass.*—The words "other injury" in s. 493, Civ. Pro. Code, have no reference to acts of trespass upon property. Therefore, a person will not be entitled to a temporary injunction under the section, on the ground of such trespass. DARAB KUAR v. GOMTI KUAR, **22 A. 449=A.W.N. 1900, 170.**

(5112)—*O. 39, r. 2 (=s. 493, Civ. Pro. Code, 1882)—Injunction—Mode of enforcing it—Breach of terms of an injunction—Whether it amounts to an offence—Whether the Court can punish such offence of its motion—Application for sanction to prosecute for the offence of—Whether such application gives authority to the Court to punish for disobedience of injunction—Crim. Pro. Code. (Act V of 1898, s. 195—Penal Code (Act XLV of 1860), s 188.*—The object of paragraph 3 of s. 493, Civ. Pro Code, 1882, is to provide a mode of enforcing an injunction. It is not to be assumed that the use of the word "disobedience" in the paragraph entitled the Court to treat a breach of the terms of an injunction as an offence and to punish such offence of its own motion. The Court can act under this section only when set in motion by the party, who deems himself aggrieved. (26 M. 494, *F.*) In a suit to cancel an instrument of sale of paddy, the Court issued an injunction restraining the defendant from selling the paddy specified in the document. The injunction was served on the defendant and afterwards the suit was decided in favour of the plaintiff, who afterwards presented a petition complaining that, while the injunction remained in force, the defendants had sold some of the paddy, and asked for sanction under s. 195, Crim. Pro. Code, to prosecute defendant under s. 188, Penal Code. The Judge caused a preliminary inquiry to be made and then called on defendant to show cause why he should not be committed under s. 493, Civ. Pro. Code, and he committed the defendant (present appellant) to the criminal jail for four months, the order being passed explicitly as a punishment for disobeying the injunction. *Held* that the application for sanction to prosecute the defendant did not give the Court authority to act under cl. (3), s. 493, Civ. Pro. Code, 1882. MAUNG THA U. v. LUTCHMAN CHETTY, **14 Bur. L.R. 276.**

(5113)—*O. 39, r. 2 (=Civ. Pro. Code, 1882, s. 493)—Issue of temporary injunction by District Court—Disobedience to injunction—Power of Court to take contempt proceedings suo*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

motu.—Plaintiffs obtained a temporary injunction restraining the defendants from cutting certain crops. The defendants in breach of the terms of the injunction and after service upon them of the order cut the crops. The District Judge *suo motu* initiated contempt proceedings against the defendants and committed them to prison for contempt. *Held* that a District Court is not a Court of Record and has no inherent power to commit for contempt. The jurisdiction of a District Court to commit in this matter is conferred by s. 493, Civ. Pro. Code. Under this section the Court may, in case of disobedience, enforce an injunction by attachment of property or by imprisonment of the party disobeying. The powers conferred by this section are only exerciseable when the Court is set in motion by a party who deems himself aggrieved. KOCHAPPA v. SACHI DEVI, **26 M. 494.** [*F.*, 14 Bur. L.R. 276; *R.*, 30 M. 413 =17 M.L J. 334=2 M.L.T. 365.]

(5114)—*O.* 39, *r.* 2 (=*Civ. Pro. Code*, 1882, s. 493)—*Agreement to sell certain mineral produce solely to plaintiff—Breach of covenant—Temporary injunction — Discretion.*—Defendants entered into an agreement with the plaintiffs to consign all the mica produced in their mines solely to plaintiffs for a certain number of years and not to consign the mica during that period to third parties. Plaintiffs sued for specific performance of the contract and for an injunction restraining the defendants from acting in violation of the terms of the agreement. During the pendency of the suit plaintiffs applied for and obtained an *interim* injunction restraining the defendants from disposing of the mica in their possession and that might be produced from the mines to third parties until the further order of the Court. Defendants perferred an appeal against this order. *Held* that the granting of a temporary injunction under s. 493, Civ. Pro. Code, is a matter of judicial discretion and that, in the circumstances of the case, the *interim* injunction was rightly granted. *Quære*:—Whether the principles governing the grant of a perpetual injunction under the Specific Relief Act and the grant of a temporary injunction under s. 493, Civ. Pro. Code, are identical. SUBBA NAIDU v. HAJI BADSHA SAHIB, **26 M. 168=13 M.L.J. 13.** (6 B. 266, *R.*) [*R.*, 133 P.L.R. 1903.]

(5115)—O. 39, r. 2—*See* CONTEMPT OF COURT, 19 B, 152.

(5116)—O. 39, r. 2—*See* SPECIFIC RELIEF ACT, 1877, 26 M. 168=13 M.L.J. 13.

(5116 *a*)—O. 39, r. 2—*See* NOS. 496-*b*, 503, 510, 3024-*a*, 5039, 5106, 5107, *supra*.

(5117)—*O.* 39, *r.* 2, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 493,588)—*Appeal from order dismissing petition to commit for disobedience to injunction—Order of remand- Appeal from order of remand.*—Petition under s. 493, Civ. Pro. Code, for the committal of counter-petitioner to prison for disobedience to an injunction of the Court. The first Court dismissed the petition. On appeal, the District Court remanded the petition for disposal on the merits. Counter-petitioner appealed to the High Court against the order of remand. *Held* that no appeal lay against the order of remand. According to s. 588, of the Code, any order passed on appeal against an order passed under s. 493 is final. It does not matter that the order appealed against is an order of remand. VENKATAPATHI NAIDU v. TIRUMALAI CHETTI, **24 M. 447.** [*F.*, 14 P. R. 1904=140 P.L.R. 1904=17 M.L.J. 53, Note =3 M.L.T. 249, 120 P.R. 1907.]

(5118)—*O.* 39, *rr.* 2, 3, *O* 40, *rr.* 1 *to* 3 (=*Civ. Pro. Code*, 1882, *ss.* 493, 494, 503)—*Application for* ad interim *injunctions or appointment for receivers.*—An application for injunction should ordinarily be made by a separate petition. The application for such relief should certainly always be supported by affidavit and should not rest merely on the allegations in a verified plaint, even when it sets out the plaintiff's case minutely. The Court shall in all cases except when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party. GORID DUT BOGLA v. PERUSHAW SORABSHAW, **2 L.B.R. 222.**

——O. XXXIX, r. 3 (=1882, s. 494=1877, s. 494=1859, s. 95.)

See INJUNCTION.

(5118-*a*)—*O.* 3, r. 3—*See* NOS. 3024-*a*, 5118, *supra*.

(5119)—*O.* 39, r. 3, s. 104, O. 43, r. 1—*See* APPEAL—ORDERS, 12 M. 186.

——O. XXXIX, r. 4 (=1882, s. 496=1877, s. 496=1859, s. 93).

See INJUNCTION.

(5120)—*O.* 39, *r.* 4, s. 95 (=*Civ. Pro. Code*, 1882, *ss.* 496, 497)—*Suit for injunction—Dismissal of suit on ground of plaintiff's fraudulent conduct—Defendant without title — Right of defendant to sue for damages for wrongful temporary injunction obtained by plaintiff.*—Damages under s. 497 of the Code must be awarded by an order of the Court in the suit, and can only be given if it appears to the Court deciding the suit that there was no probable ground for instituting the suit. Where a suit for injunction was dismissed on the ground that the plaintiff's conduct was fraudulent, though he had title to the property which was the subject-matter of the suit, the defendant could not maintain a suit for damages for the *interim* injunction obtained by the plaintiff in the course of the suit, since the defendant had no title to the property. SENI CHETTIAR v. SANTHANATHAN CHETTIAR, **13 M.L.J. 70.**

——O. XXXIX, r. 6 (=1882, s. 498=1877, s. 498.

(5120-*a*)—O. 39, r. 6, *See* NO. 3937, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XXXIX, r. 7 (=1882 s. 499=1877, s 499.)

See INJUNCTION.

(5121)—*O.* 39, *r.* 7 (=*s.* 499, *Civ. Pro. Code*, 1882).—An application for an order under Civ. Pro. Code, s. 499 can only be made by a plaintiff, after summons has been served and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. SENGOTHA v. RAMASAMI, **7 M. 241.**

(5122)—*O.* 39, *r.* 7 (=*s.* 499, *Civ. Pro Code*, 1882), *application under—Order for inspection.*—In a suit for damages alleged to have been caused to the plaintiff's house owing to the construction by the defendant of his premises, *held*, on an application under s. 499, Civ. Pro. Code, by the defendant for inspection of the plaintiff's premises, that the Court has the power under that section, to make an order for inspection in order to ascertain the extent of the alleged injury to the promises and to determine the amount of damages. DHORONEY DHUR GHOSE v. RADHA GOBIND KUR, **24 C. 117=1 C.W.N. 99.**

(5123)—O. 39, r. 7—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 30, 31 and 53, A.W.N. 1905, 127.

(5123-*a*)—O. 39, r. 7—*See* NO. 2201, *supra.*

(5124)—O. 39, *r.* 7, *s.* 105, 115 (=*ss.* 499 591, 622, *Civ. Pro. Code*, 1882)—*Interlocutory orders, revision of—Act conferring jurisdiction—Powers to do acts necessary to its execution—Order to open a door way to allow Receiver for making in inventory.*—The High Court refuses to interfere in revision with interlocutory orders, because, under s. 591, Civ. Pro. Code, they can be made ground of objection in the appeal from the decree. But where the Court of appeal cannot grant any relief for any damage that might be caused by such order, it is not an interlocutory, but a final order. (18 B. 35, 1 S.L.R. 120, *R.*) Where an Act confers a jurisdiction, it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary to its execution. The power is, however, limited to such acts as are essentially necessary to give effect to the order. (11 B. 157, *R.*) An order by a Sub-Judge to open up a particular passage by the defendant, to allow a receiver to enter upon the premises for the purpose of making an inventory, is without jurisdiction, if the defendant provides another means of access through his premises. DERO. H. H MIR HASSAN ALIKHAN v H. H. MIR ABDUL HUSSAIN KHAN, **2 S L.R. 22.**

——O. XXXIX, r. 9 (=1882, s. 501=1877, s. 501=1859, s. 91.)

See INJUNCTION.

(5125)—*O.* 39, *r.* 9 (=*s.* 501, *Civ. Pro. Code*, 1882).—When a decree does not expressly direct an adjustment of accounts, in the terms of s. 501, Civ. Pro. Code, such adjustment can be ordered in execution, if it be shown from the nature of the decree that it could and should have contained such an order and is imperfect without it. RADHEY SINGH v. MANGNI RAM, **6 C W.N. 710.**

——O. XXXIX, r. 10 (=1882, s. 502=1877, s. 502).

See INJUNCTION.

(5126)—*O.* 39, *r.* 10 (=*Civ. Pro. Code*, 1882, *s.* 502)—*Party making the admission not holding property—Money held by another Court to credit of another suit*—S. 502, Civ. Pro. Code, only applies when the party making the admission holds the property or other thing capable of delivery; but even assuming that that section was intended to apply to a case where the property is not held by the party making the admission, the section would not cover a case where the money was held by another Court to the credit of another suit. (*Subramania Ayyar, J., dissenting.*) There is nothing in the language or the reason of s. 502, Civ. Pro. Code, to confine its operation only to cases where the money or the thing capable of delivery is actually held by a party to the suit. The order contemplated by that section can be passed whether the money or other thing is in the hands of a party to the litigation or not, so long as such order is enforceable without infringing the rights of a person not a party to the suit. Further, the jurisdiction arising from custody of property by a Court, cannot bar the trial of a question relating to the property in another Court, if such trial cannot be had in the Court having the custody. (3 Wallace 334, 24 Howard 450, *R.*)—Per *Subramania Ayyar, J.* RAJA PARTHASARADHI APPA ROW v. RAJAH RANGIAH APPA ROW, **27 M. 168** [*R.*, 29 M. 126=16 M.L.J. 79=1 M.L.T. 31.]

(5127)—O. 39, r. 10—*See* MAD. ACT II OF 1864, ss. 2, 32, 42, 26 M. 686, F.B.

——O. XL, r. 1 (=1882, s. 503=1877, s 503 =1859, ss. 92, 243.)

See APPEAL—RECEIVER.

See RECEIVER.

(5128)—*O.* 40, *r.* 1—*Receiver—"Just and convenient."*—The words "just and convenient" in O. XL, r. 1 of the Code of 1908, are very wide and were adopted from the English Judicature Act. A few of the principles on which the Courts of Equity Act in England are as follows:—The discretion is to be exercised with the greatest care and caution and it must be guided by law. A receiver is to be appointed on the principle of preserving property pending the litigation which is to decide the rights of the parties to the property. If the relief sought by a defendant is not connected with the subject

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matter of the plaint, the defendant must, if he desires a receiver, institute an action of his own for such purpose. A receiver is not appointed, except on special grounds, at the instance of a person alleging a mere legal title against another party in possession of immoveable property, who also claims to hold by a like legal title. PANA SEENEE v. ANA MAHALINGAM, **8 Ind. Cas. 1191.**

(5129)—*O. 40, r. 1—Suit on legal or equitable mortgage—Interest in arrears of property insufficient to pay charges thereon—Jurisdiction of the Court to appoint a Receiver—Principle of appointment.*—A brought a suit on his equitable mortgaged by deposit of title-deeds to recover the amount due on his mortgage by sale of the mortgaged properties. The interest was in arrears. The property was also insufficient to pay the amount due to A, and a receiver was therefore appointed. The question was whether he was rightly appointed under the circumstances above described. *Held*: The wording of s. 503 of the old Code was materially different from the wording of O. XL, r. 1 of the Code now in force. The legislature has adopted the language used in the English Judicature Act, and now a Court may appoint a receiver where it appears *just* and *convenient* to do so. The practice of the English Courts should be followed. A receiver may therefore be appointed, as a matter of course, if the interest on mortgages, whether legal or equitable, is in arrears. Also, in case of equitable mortgages, (the expression puisne mortgages being included therein a receiver may be appointed, if there is reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon. AHMED CASSIM BAROOCHA v. M.L.R.M.A., **5 L B.R. 135.**

(5129-*a*)—*O. 40. r. 1 (=Civ. Pro. Code, 1859, s. 243)—Appointment of manager only for property actually attached.*—A Civil Court executing a decree can appoint a manager under s. 243 of Act VIII of 1859 only for the property that has been actually attached upon the decree holder's application, and not for other property of the judgment-debtor, as the Code merely contemplates attachment, seizure and sale and not a quasi insolvency proceeding—a winding up of the debtor's estate and liquidation of his liabilities. FATTEH SINGH v. GUNGA PERSHAD, **53 P.R. 1874.**

(5129-*b*)—*O. 40, r. 1—"Just and convenient"—Injunction and Receiver—Substantial ground for relief—Prima facie case—Advantageous position.*—"Just and convenient" in O. XL, r. 1, Civ. Pro. Code, means that the Courts in India have the fullest jurisdiction to appoint as well as to remove a receiver in the exercise of a sound judicial discretion. (4 C.W.N. 252, *F.*) In the case of an injunction, it is enough to show that a plaintiff has a fair question to raise as to the existence of the right alleged, but for the appointment of a receiver a good *prima facie* title has to be made out. (22 C. 459, *R.*)

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A receiver or agent is not to be appointed in supersession of a *bona fide* possessor of the property in controversy, unless there is some substantial ground for interference. To anticipate the success of the plaintiff in the action would be to place the defendant in a position in which the circumstances of the case do not justify the Court in placing her. SIVAGNANATHAMMAL v. ARUNACHALAM PILLAI, **2 M.W.N. 1911, 75.**

(5129-*c*)—O. 40, r. 1—*See* MANAGER OF ATTACHED PROPERTY, 53 P.R. 1874.

(5129-*d*)—O. 40, r. 1—*See* NOS. 400, 907-*a*, 1285, 1682, 2254, 3024-*a*, 3715, 3734, 3782, 4152, 4153, 4154, 4155, 5108, 5110, 5110-*a*, 5118, *supra.*

(5130)—*O. 40. rr. 1 to 3 (=s. 503, Civ. Pro. Code, 1882)—Attachment—Mortgage decree—Attachment before judgment in suits for money decrees in Subordinate Court—Lien upon crop by labourers—Joinder of receiver as defendant.*—Applicant, as mortgagee, holding a mortgage decree against the crops, and the crops being under attachment and in the possession of a receiver at his instance, asked the District Judge to remove attachments placed on part of the crops before judgment at the instance of persons suing only for money decree. Upon these facts the only course for the District Judge was to declare that the mortgagee's decree should have priority. The question whether the respondents had a lien on the crops did not properly come before the District Judge for decision in these proceedings. The District Judge in these proceedings had no power to direct that a certain person shall be joined as a defendant in a suit pending in a Subordinate Court. To order a receiver to defend a suit with a view to ensuring the plaintiff getting what is justly due to him in the opinion of the Judge who appointed the receiver, is not a legitimate use to make of the powers conferred by s. 563, Civ. Pro. Code. A. VEERAPUTHRA DAVEN v. VAIDALINGUM DAVEN. **L.B.R. 1893—1900, 432.**

(5131)—*O. 40, rr. 1 to 3 (=old s. 503)—Appointment of receiver—Power of Court to cancel.*—The Code does not authorize a District Judge either upon an application to himself or upon reference by a Sub Judge to cancel an order of appointment of a receiver in a suit not pending in the Court of the District Judge. SEVA DAS v. PURAN DAS, **74 P.R. 1889.**

(5132)—*O. 40, rr. 1 to 3 (=old s. 503)—Order under—Directions to receiver—Appeal.*—Though an appeal lies from an order appointing or refusing to appoint a receiver, the orders giving "Directions" to receiver after his appointment are not appealable. KAPUR CHAND v. NARINJAN LAL, **107 P.R. 1895.**

(5133)—*O. 40, rr. 1 to 3 (old s. 503)—Court's duty and power.*—This section does not empower a Court to authorize a receiver to enter

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upon immoveable property in the possession of another person, without his consent, in order to take an inventory of such property as the plaintiff may indicate as the property in dispute. MUSSAMMAT MAI GUJRI v. DIWAN AMAR NATH, **69 P.R. 1891.**

(5134)—*O. 40, rr. 1 to 3 (old s. 503)—Appointment of receiver—When to make.*—Before the power given in this section can be exercised, it should be shown that the appointment of a receiver is necessary and not merely expedient. BHAI BHAGA SINGH v. HARNAM SINGH, **136 P.R. 1890.** [*Cited*, 73 P.R. 1902=59 P.L.R. 1902.]

(5135)—*O. 40, rr. 1 to 3—Appointment of receiver—Enquiry.*—The direction that the powers conferred by O. 36 (Civ. Pro. Code, 1882) must be exercised only by High Courts and District Courts does not exclude a Court superior to the District Court from exercising such power. The enquiry as to the necessity of appointing a Receiver must be made judicially, and if the question of appointing a receiver is in dispute between the parties, it must be determined after enquiry with reference to the evidence. BUDH PARKASH v. SANTRAIN, **102 P.R. 1885.**

(5136)—*O. 40, rr. 1 to 3 (=s. 503, Civ. Pro. Code, 1882)—New receiver, in place of old—Civil proceedings commenced by old receiver pending at date of new receiver's appointment—Necessity for making new receiver party.*—A receiver, appointed for the managment of an estate, ceased his connection with the estate after he had filed an appeal on behalf of the estate. The question of decision before the High Court was, whether the appeal should abate or could go on without reference to the change of receiver. *Held*, that a receiver, when empower to sue, is clothed distinctly with an interest in regard to the subject of the litigation The interest ceases, when the authority to sue terminates; but the litigation, commenced by him, does not abate. It cannot proceed, without the officer succeeding being impleaded so properly as to represent the interest concerned. AKULA PARADESI v. DHELLI JAGANATHA ROW, **28 M. 187.**

(5137)—*O. 40, rr. 1 to 3 (=s. 503, Civ. Pro. Code, 1882.—Receiver, appointment of application for—Conditions necessary for the appointment of a receiver—"Preservation, realisation, better custody, or managment of the property," meaning of—Decree-holder, application by, for appointment of a receiver of the property under attachment in execution of his own decree—Sale of heavily encumbered property.*—*Held*, that the power of a Court to appoint a receiver of the property, attached by the decree-holder, depends upon s. 503 of the Code. It must therefore be made to appear to the Court that the appointment of a receiver is necessary for the realization, preservation, or better custody

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or managment of the property. Where, therefore, a decree-holder had attached certain property in execution of his decree and the Court refused to pass an order for sale of the property, on the ground that it was heavily encumbered, the decree-holder could not apply for the appointment of a receiver under s. 503. RAJA MUNESHAR BAKHSH SINGH v. BABU JAGAN NATH PRASAD, **10 O. C. 268.** (23 C. 772, 777, 778, *R.*)

(5138)—O. 40, rr. 1, 2, 3—*See* MANAGER—MANAGER OF ATTACHED PROPERTY, 8 C. 719=11 C.L.R. 13.

(5139)—O. 40, rr. 1 to 3—Position of official receiver—*See* OFFICIAL RECEIVER, 5 L.B.R. 213, F.B =8 Ind. Cas. 976.

(5140)—O. 40, rr. 1, 2, 3, s. 92, O. 23, r. 3, O. 1, rr. 8, 10 (2), 11, s. 107 (2)—*See* ACT XX OF 1863, ss. 5, 14, 8 C.W.N. 404.

(5141)—*O. 40, rr. 1 to 3, s. 104, O. 43, r. 1 (=s. 503, cl. 24, s. 588, Civ. Pro. Code, 1882, new Code), order refusing to appoint Receiver on recommendation from lower Court appealable.*—Where the District Judge receives a report from the Subordinate Court recommending the appointment of a Receiver, and on that report and recommendation, he refuses to make the appointment, his order must be taken as an order made under s. 503, and not one falling under s. 505 of the Civ. Pro. Code of 1882. Such an order is appealable under cl. 24, s. 588. KHAGENDRA NARAIN SINGH v. SHASHADHARJHA, **31 C. 495.**

(5142)—*O. 40, rr. 1, 2, 3, O. 21, r. 83 (=s. 243, Civ. Pro. Code, 1859).*—This circular calls attention to s. 243, Act VIII of 1859, regarding the appointment of a Manager for property which has been attached Civ.Cir. No. 19, dated 11th July 1871. **16 W.R. Civ Cir. 2.**

(5143)—*O. 40, rr. 1, 2, 3, O. 21, r. 83 (=s. 243, Civ.Pro.Code, 1859)—No stay of sale.*—Under s. 243 of the Civ. Pro. Code a Court cannot authorize an order in execution department having the effect of staying the sale of certain property for one year. FYZ-OOD DEEN v. GIRAUDH SINGH, **2 N.W.P. 1.** [*R.*, 14 M. 277; *F.*, 5 A. 221.]

(5144)—O. 40, rr. 1, 2, 3, O. 21, r. 83—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 1 B.L.R. 7, F.B.=10 W.R. F.B., 5.

(5145)—O. 40, rr. 1, 2, 3, O. 21, r. 83—*See* ATTACHMENT—MISCELLANEOUS, 3 B.L.R. App. 107=12 W.R. 66.

(5146)—O. 40, rr. 1, 2, 3 and O 21, r. 83—*See* MANAGER—MANAGER OF ATTACHED PROPERTY, 3 C. 335=1 C.L.R. 295, Marsh 261=2 Hay 112, W.R. 1864, Mis. 5, 11 W.R. 505, 13 W.R. 423, 15 W.R. 477, 15 W.R. 322, 19 W.R. 37, 19 W.R. 66, 26 W.R. 33.

(5147)—*O. 40, r. 1, cl. (1) (d) and O. 43, r. 1 (s)—Directions to receiver, if appealable.*—Where

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both the parties have agreed to the appointment of a receiver of the properties in dispute, and the Court has, in appointing the receiver, given him certain directions as to the disposal of the income. *Held*, that an appeal lies from those directions by virtue of O. 43, r. 1 (*d*) of the Code. MOHUNT ANANT DAS v. RAM PARKASH DAS, **14 C.W.N. 183=5 Ind.Cas.69.**

(5147-a)—*O. 40, r. 1 (d), O. 43, r. 1 (s)—Receiver—Order directing him to pay maintenance—Whether appeal lies.*—An appeal lies against an order directing the receiver appointed in the suit to pay every month a certain sum of money to the appellant as maintenance pending the disposal of the suit. KOMALATHAMMAL v. C.V. SRINIVASACHARIAR, **11 M.L.T. 383.** (35 C. 568, *R. & D.*)

(5148)—O. 40, rr. 1, 2, 3, 5, s. [illegible]—*See* COMPENSATION, 5 B.L.R. App. 4=13 W.R. 305.

(5149)—O. 40, rr. 1, 2, 3, 5, [illegible]. 39, r. 1—*See* INJUNCTION UNDER CIV. PRO. CODE, 14 W.R. 109.

(5150)—O. 40, rr. 1, 2, 3, 5, O. 39, r. 1, O. 21, r. 12, O. 21, rr. 58, 59, 60, 61, 63, 64—*See* EXECUTION OF DECREE—MISCELLANEOUS, 3 B.L.R.A.C. 413=12 W.R. 329.

——O. XL, r. 2, (1882, s. 503=1877, s. 503=1859, ss. 92, 243.

(5150-a)—O. 40, r. 2—*See* NOS. 400, 1285, 1682, 3024 *a*, 3715, 3734, 3782, 4152, 4153, 4154, 4155, 5108, 5110, 5110 *a*, 5118, 5130, 5131, 5132, 5133, 5134, 5135, 5136, 5137, 5138, 5139, 5140, 5141, 5142, 5143, 5144, 5145, 5146, 5147, 5148, 5149, 5150 *supra*.

——O. XL, r. 5, (=1882, s.503=1877, s. 503=1859, ss. 92, 243.)

(5150-b)—O. 40, r. 3—*See* NOS. 400, 1285, 1682, 3024*a*, 3715, 3734, 3782, 4152, 4153, 4154, 4155, 5108, 5110, 5110 *a*, 5118, 5130, 5131, 5132, 5133, 5134, 5135, 5136, 5137, 5138, 5139, 5140, 5141, 5142, 5143, 5144, 5145, 5146, 5148, 5149, 5150 *supra*.

——O. XL, r. 5, (=1882, s. 504=1877, s. 504 1859, s. 92).

See APPEAL—RECEIVER.

See RECEIVER.

(5150-c)—O. XL, r. 5—*See* NOS. 400, 5110, 5110*a* 5148, 5149, 5150 *supra*.

(5151)—*O. 40, r. 5, sch. II, rr. 8, 15 (=Civ. Pro. Code, 1882, ss. 504, 514, 521—Time of delivering award.*—Where a date is fixed for the filing of an award, and the question is whether it is bad as being late, the date on which the arbitrators made the award and not that on which the award reached the Court is the one to be considered. Where an award was made and signed on the day fixed by the Court for filing it and delivered to the peon of the Court on the same day, but it was received by the Court only on the next day, *held* that the award was dot band on that accoount. SITA RAM v. BHAWNI DIN RAM, **26 A. 105=A W.N. 1907, 205.** (8 A. 543, 548, 13 A. 300, 13 B. 119, 22 M. 22, *R.*) [*F.*, 89 P.R. 1907; *R.*, 2 N.L.R. 81]

——O. XLI, r. 1 (1882, s. 541=1877, s. 541 =1859, ss. 333, 335.)

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 96 to 99 and 109 to 112.

See PAUPER APPEALS.

See PAUPER SUITS.

(5152)—*O. 41, r. 1 (=s. 333, Civ. Pro. Code 1859).*—The word "decree" in s. 333, Civ. Pro. Code, 1859, includes judgment. HOSSANEE BEGUM v. DUMREE MAHTOON, **2 W.R. Mis. 51.**

(5153)—*O. 41, r. 1 (=Civ. Pro. Code, 1882, s. 541)—Sending of appeal by post, not sufficient presentation.*—The section implies actual delivery to the proper officer of the Court. Consequently the sending of an appeal by post is not a sufficient presentation within the meaning of the section. KRIPASINDHU DAS v. KUNJBAN DAS, **8 C.P.L.R. 93.**(8 M. 41, *D.*; 15 M. 137, *R.*)

(5154)—*O. 41, r. 1 (=Civ Pro. Code, 1882, s. 541)—Appeal—Necessity for copy of decree accompanying memorandum of appeal—Limitation*—An appellate Court cannot dispense with the presentation of a copy of the decree appealed against in connection with a memorandum of appeal. Where therefore no such copy of the decree is presented within the period of limitation prescribed for the appeal, the appeal will be barred. GULAB DEVI v. SHANKER LAL, **A.W.N. 1892, 41.** [*R.*, 16 A. 77.]

(5155)—*O. 41, r. 1 (=Civ. Pro. Code, 1882, s. 541)—Vague and general ground of objection to be ignored by Court.*—A vague and general ground of objection should never be inserted in a memorandum of appeal at all and if inserted, it should be absolutely ignored by Court. RAGHOBA v. BHAIRAVISING, **8 C.P.L.R. 81.**

(5156)—*O. 41, r. 1 (=s. 541, Civ. Pro. Code, 1882)—Memo. of appeal—Necessity for copy of decree being given.*—The provisions of s. 541 of the Code are imperative and a memorandum of appeal is not a good memorandum of appeal in law unless it is accompanied by a copy of the decree appeal against. MT. NARBADI v. MT. GAJRI, **9 C.P.L.R. 109.** (16 A. 77, *F.*)

(5156-a)—*O. 41, r. 1—Appeal—Memorandum of appeal not accompanied by copy of decree appealed from—Validity of appeal—Decree—Review—Amended decree, appeal from.*—If a memorandum of appeal is not accompanied by a copy of the decree appealed against it is not a valid memorandum and the appeal must be dismissed on that ground. Where the decision

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of an appellate Court is reviewed and an amended decree passed, an appeal from the amended decree must be accompanied by a copy of that decree; as otherwise the appeal is not a valid appeal and must be dismissed. KEAMAT v. ABHOORAM MISTRY, **11 Ind. Cas. 8.**

(5156-*b*)—*O.* 41, *r.* 1—*Receiver, appointment of*—Paradanashin *ladies of culture.*—It would be a very improper use of the powers conferred on a Court under O. 41, r. 1, to take out of the hands of ladies, who appear to be ladies of culture and well capable of managing their property and examining accounts, property of which they have been in possession for something like two years, and hand over the property to a Receiver, upon nothing more than passing rumours. TEJ BAL BIKRAM SINGH v. RAMRAJ KUAR, **11 Ind. Cas. 103.**

(5157)—O. 41, r. 1—*See* COURT FEES ACT, 1870, ss. 4, 23, 12 A. 129=A.W.N. 1890, 39, F.B.

(5158)—O. 41, r. 1—*See* LIMITATION—GENERAL, 71 P.W.R. 1908.

(5159)—O. 41, r. 1—*See* LIMITATION ACT, 1908, ss. 4 and 5, 5 W.R. Act X, Rul. 46.

(5160)—O. 41, r. 1—*See* LIMITATION ACT, 1908, ss. 4, 5 and 14, 5 W.R. Act X, Rul. 44.

(5161)—O. 41, r. 1—*See* PRACTICE AND PROCEDURE, 16 A. 77=A.W.N. 1893, 223.

(5161-*a*)—O. 41, r. 1—*See* NO. 5169, *infra.*

(5162)—O. 41, rr. 1, 2, 3, O. 21, r. 83—*See* DECREE—DECREE, CONSTRUCTION OF, 13 W.R. 453.

(5163)—*O.* 41, *r.* 1, *O.* 42, *r.* 1, *s.* 108 (=ss. 541, 587, *Civ. Pro. Code*, 1877).—Ss. 541 and 587, Civ. Pro. Code, do not require that any other documents should be presented with the appeal than a copy of the decree against which the appeal is presented, and the judgment on which it is founded. PIRATHI SINGH v. VENKATRAMANAYYAN, **4 M. 419. F.B.** [*R.*, 32 B 14=9 Bom. L.R. 1138=2 M.L.T. 410.]

—O XLI, r. 2 (=1882, s. 543=1877, s. 542 =1859, s. 334).

See APPEAL.

See APPELLATE COURT.

See CIV PRO. CODE, 1908, ss. 96 to 99 and 109 to 112.

See PAUPER APPEALS.

See PAUPER SUITS.

(5164)—*O.* 41, *r.* 2 (=*Civ. Pro. Code*, 1882, s 542)—*New matter to be urged only with permission of Court.*—No new matter, (i *e.*,) not set forth in the memo. of appeal, should be allowed to be urged in argument except with the permission of the Court under the provisions of s. 542. RAGHOBA v. BHAI RAV SINGH, **8 C.P.L.R 81.**

(5165)—*O.* 41, *r.* 2 (=*Civ. Pro Code*, 1882, s. 542)—*Second appeal—Point of limitation not urged in appeal grounds—Permission of Court necessary to argue limitation.*—A party not urging a point of limitation as to the first appellate Court in his grounds of second appeal, cannot argue it except on obtaining the permission of the Court under s. 542, Civ. Pro. Code. AHMAD ALI v. WARIS HUSAIN, **15 A. 123=A.W.N. 1893, 47.** [*R.*, 34 C. 941=6 C.L.J. 237=11 C.W.N. 959.]

(5166)—O. 41, r. 2—*See* GOVERNMENT, 5 M.L.T. 214.

(5166-*a*)—O. 41, r. 2—*See* NOS. 369, 1826, 2676, 3085, 3087, 5162, *supra.*

(5167)—O. 41, r. 2, s. 100, Scope of—*See* LIMITATION ACT, 1908, s. 3, arts. 132, 147, 11 C.W.N. 959. F.B.=6 C.L.J. 237=34 C. 941.

(5168)—O. 41, r. 2, s. 104, O. 43, r. 1—*See* U.P. ACT XIX OF 1873, ss. 113, 114, 115, 131 132, 241 (*f*), A.W.N. 1887, 185.

(5169)—*O.* 41, *rr.* 2, 3, 1, *O.* 21, *r.* 83 (=*Civ. Pro Code*, 1859, *s.* 243)—*Power of Civil Courts to manage encumbered estates—Applicability to case of more than one decree-holder.*—It never could have been intended by the provisions of s. 243, Civ. Pro. Code, to give the Civil Courts for an indefinite length of time the management of the encumbered estates of the country, or to compel decree-holders to submit to such an unreasonable delay as 15 or 20 years before they can receive satisfaction of their decrees. [*R.*, 6 M.H.C. 127, 14 M. 277.] It is extremely doubtful whether s. 243, Civ. Pro. Code, was intended to be applied to the case of more than a single decree-holder, or whether the Court has any authority to compel a prior attaching decree-holder to admit those subsequently attaching the estate to share rateably with him in the nett-income of the estate. REDNUM ATCHUTARAMAYAYA v. DADA SAHIB, **5 M.H.C. 272.**

—O. XLI, r. 3 (=1882, s. 543=1877, s. 543 =1859, s. 336).

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 96 to 99 and ss. 109 to 112.

See PAUPER APPEALS.

See PAUPER SUITS.

(5170)—*O.* 41, *r.* 3 (=*Civ. Pro Code*, 1882, s. 543)—*Memorandum of appeal, order rejecting—Appeal.*—An order passed under s. 543, Civ. Pro. Code, rejecting a memorandum of appeal amounts to a formal expression of an adjudication upon a right claimed or defence set up in a Civil Court with such adjudication, so far as regards the Court expressing it, decides the suit or appeal, and is appealable. SWAMI DAYAL v. ASGHARI KHANAM, **3 O.C. 334.**

(5171)—*O.* 41, *r.* 3 (=*old s.* 543)—*Rejection of appeal, when to be made.*—The time for rejecting an appeal is when it is presented, and not

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after it has once been admitted. GOPEE BULLUB ROY v. GOLUCK PROSHAD BOSE, **W.R. 1864, 135.**

(5172)—*O. 41, r. 3 (=s. 543, Civ Pro Code, 1882=s. 336, Civ. Pro. Code, 1859)—Practice—Rejection of memorandum of appeal.*—Whenever a memorandum of appeal is rejected under the discretionary power vested in the Court, a judicial order to that effect, and the reasons for the same ought to be recorded. LALLA JUGSEB SAHOY v. KASSENAUTH SEIN, **1 Ind. Jur. O.S. 121.**

(5172-*a*)—O. 41, r. 3—*See* NOS. 105, 2795-*j*, 2802-*f*, 3085, 5162, 5169, *supra*.

——O. XLI, r. 4 (=1882, s. 544=1877, s. 544 =1859, s. 337).

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 96 to 99.

(5173)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Joint decree—Joint appeal—One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement*—Where several defendants jointly appeal against a joint decree, to which s. 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate. RAM LAL v. DEBI SINGH, **10 Ind. Cas. 27.** (25 A. 27, *F.*; 22 A. 222, *Overruled*.)

(5174)—*O. 41, r. 4 (=old s. 544)—Suit requiring sanction of superior Court for institution in such lower Court—No sanction—Effect.*—Where a suit, at the time of its institution within the jurisdiction of the Court in which it is brought, has undergone a substantial change, and become a suit which by law requires the order of a superior tribunal for its hearing in the Original Court, and such order has not been obtained the plaintiff cannot subsequently, on appeal, be allowed to revert to the original form of the suit for the purpose of upholding the lower Court's judgment as far as regards the original defendants. BULDEO DOSS v. BULDEO DOSS, **3 N.W.P. 199.**

(5175)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Reversal of decree against non appealing party.*—Under s. 544 the Court has power to reverse a decree even as against a party who has not preferred an appeal. RAMKRISHNA v. JAIRAM, **3 C.P.L.R. 130.**

(5176)—*O. 41, r. 4—Suit against agent and surety—Decree against agent only—Appeal—Reversal of decree on ground not being common to both.*—Where a suit against an agent and his surety is decided against the former alone and an appeal is preferred by the plaintiff to make the latter liable, the appellate Court cannot reverse the decision as against the agent, on the ground of the same not having proceeded on ground common to both defendants. RAM MOHINEE DEBIA v. JABED SIRCAR, **6 W.R. Act X, Rul. 82.**

(5177)—*O. 41, r. 4—Co-defendant or co-respondent's liability in appeal.*—X sued Y & Z for possession of a ferry ghat and obtained a decree against Y alone. In appeal Y was released and Z was made liable who accordingly preferred an appeal to the High Court. *Held*, that Z could not legally be made liable either on the appeal of Y, or on the cross-appeal of X to Y's appeal. GREESH CHUNDER SINGH v. GOUR MOHUN BANERJEE, **7 W.R. 49.**

(5178)—*O. 41, r. 4 (=Civ. Pro. Code, 1859, s. 337)—Decree proceeding on common ground—Construction.*—A decision appealable under s. 337 of the Civ. Pro. Code, 1859, by one of several plaintiffs or defendants, as proceeding upon a ground common to all, must be one affecting, in the same manner, all the plaintiffs or defendants, that is to say, a decree incapable of division, and one upon which it would be impossible for the Court to find in one sense for one of the plaintiffs or defendants, and in another sense for the other plaintiffs or defendants. SRIMAN CHATAK v. BRAJAMOHAN GHOSAL, **8 B.L.R. App. 41=11 W.R. 549**; RUGGHOONATUTH NEWGY v. SUDHAMOYEE DABEA, **Marsh 106=1 Hay 183.** [*F.*, 17 M. 265; *D.*, 30 C. 429, 5 Ind. Cas. 388.]

(5179)—*O. 41, r. 4 (=s. 544 of 1882, Civ. Pro. Code, 1859, s. 337)—Power of appellate Court.*—A Court of appeal is competent under s. 337, Act VIII of 1859, to reverse the whole of the decree of the Court below on the appeal of one only of the parties against whom the decree was passed, if the decision of the lower Court proceed on any ground common to all the defendants. SRIMATI JADUMANI DASI v. SRIMATI FUDU BIBI, **7 B.L.R. Ap. 28.**

(5180)—*O. 41, r. 4 (old s. 544)—Appeal by one—Reversal of decree against all, when proper.*—A decree against several defendants one of whom alone appeals cannot be reversed as against the rest, when it did not proceed on ground common to all. MITHA MAL v. FAIZ MAHAMMAD, **113 P.R. 1889.**

(5181)—*O. 41, r. 4 (=Civ Pro Code, 1882, s. 544)—Joint plaintiffs—Appeal on grounds common to all—Omission of name of one of the joint plaintiffs—Power of appellate Court to decree claim in favour of all—Revision.*—Five zemindars sued to recover instalments of a certain cess in which they alleged themselves to be all jointly interested by reason of their joint proprietary interest in a Bazaar out of which the cess arose. They obtained a joint decree for a portion of their claim. From this decree they appealed, but, by some accident apparently, for it did not appear that he had refused to

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join in the appeal, the name of one of the plaintiffs was omitted. The lower appellate Court, however, heard the appeal as if all the five plaintiffs were appellants before it and decreed the appeal, and subsequently discovering that the name of one of the joint plaintiffs was not entered in the list of appellants added a postscript to its judgment to amend the decree by addition of his name, under the provisions of s. 544 of the Civ. Pro. Code. The four plaintiffs-appellants then applied for revision of the judgment in appeal as against the fifth plaintiff. *Held* that the lower appellate Court must under the circumstances be taken to have been acting with the provisions of s. 544 of the Civ. Pro. Code, and that there was no reason to interfere in revision with the decree. BHAWANI PRASAD PATAK v. RAGHUNATH PRASAD, **A.W.N. 1891, 207.**

(5182)—*O. 41, r. 4 (=old s. 544)—Scope and application of.*—The use of the power given by this section to appellate Courts is discretionary and not imperative, though the discretion must be exercised in a logical and reasonable manner, and for the legitimate exercise of that power it is necessary that the "*Common ground*" therein referred to should be the only basis of the decree under appeal. If there is any special ground which also formed the basis of the decree under appeal, this section will have no application. BURE KHAN v. SANT RAM, **8 P. R. 1895.**

(5183)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Decree proceeding on ground common to all defendants—Decree in appeal by one only of defendants, effect of.*—S. 544, Civ. Pro. Code does not direct that an appellate Court reversing, on an appeal by some only, the decree of the lower Court which was made upon a ground common to all the defendants or plaintiffs, as the case may be, should pass a decree in favour of the persons who are not before it in appeal. But the effect of the section is to make a decree passed in favour of some only of the defendants or plaintiffs under the circumstances mentioned in it operate in favour of all the plaintiffs or defendants as the case may be. When, therefore, a suit brought against several defendants was dismissed with costs, and, on an appeal by the plaintiffs, the case was remanded to the Court of first instance, and on an appeal against the remand order by one only of the defendants, the High Court set aside the remand order and restored the decree of the first Court, *held* that the decree of the first Court having been restored in its entirety, even the defendants who were not parties to the appeal before the High Court were entitled to take out execution of that decree for the costs. MUL CHAND v. RAM RATAN, **20 A 493 = A. W.N. 1898, 121.** (11 A. 267, *D.*, 4 A. 376, *R.*)

(5184)—*O. 41, r. 4 (=Civ. Pro. Code, 1877, s. 544)—Appeal—Reversal of whole decree on appeal by some of several defendants.*—The plaintiff sued to enforce a right of pre-emption in

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respect of a contract which was alleged to be a *zar-i peshgi* lease. The alleged contract was the subject of two separate deeds; the one an hypothecation bond, the other a simple lease. These documents were in favour of different parties; and the property which was the subject of one was not precisely the same as the property the subject of the other deed. The parties to the two deeds, who were all made defendants, contended that the two transactions were separate and independent, and the parties to the one deed had not connection with the other. The first Court gave the plaintiffs a decree against all the defendants regarding the two deeds as a single *zar i-peshgi* lease. One set of defendants, *viz*, the parties to the lease, appealed from the whole decree, and the lower appellate Court, taking a contrary view to that taken by the first Court, dismissed the plaintiff's suit. *Held* that the Court below was competent to dismiss the suit as against those defendants who had appealed as well those who had not. CHIRAG ALI v. SALIK RAM, **A.W.N. 1882, 86.**

(5185)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Application of.*—S. 544 was inapplicable to the above case. It applied only to appeals by parties arrayed on the same side of a litigation in the original Court, and against whom judgment on a common ground has been passed and only some of them appeal from such judgment on behalf of themselves and others who do not join in the appeal. CHEDA LAL v. BADULLAH, **11 A. 35.** (7 M.I.A. 283, 10 M.I.A. 340, 12 M.I.A. 157, *R.*)

(5186)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—"Any ground common to all the plaintiffs or to all the defendants."*—S. 544, Civ. Pro. Code, pre-supposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. An appellate Court has no power under this section, to reverse the decree of a lower Court given for a plaintiff, in favour of a defendant who has not appealed, and in respect of property in which those who have appealed disclaim all interest. SYED HUSSAIN v. MADAN KHAN, **17 M. 265.** (3 B.L.R. App. 41, 13 M. 249, *Cited & F*; 8 M. 192, 11 M. 197, *D.*) [*Overruled*, 30 M 470, F.B. = 17 M.L.J 119 = 2 M. L.T. 104; *Diss.*, 30 C. 429; *D.*, 28 M. 122 = 15 M.L.J. 28.]

(5187)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Appeal by two out of several defendants—Withdrawal of one of the appellants—Power of appellate Court.*—Several of the defendants, in a suit to redeem kanom, disclaimed all interest and an appeal was preferred from the decree, by the remaining two defendants who were the only substantial defendants in the suit. The appellate Court was held to be competent to proceed with the appeal and reverse the whole decree, even when subsequently one of the two appellants withdrew,

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leaving the appeal to be prosecuted by the only remaining appellant. SRI MANA VIKRAMAN v. RAYAN, **16 M. 293.** [*R.*, 30 M. 470=2 M. L.T. 104=17 M.L.J. 119.]

(5188)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882=s. 337, Civ. Pro. Code, 1859)—Appeal by alienee of Hindu widow—Suit by reversioner.*—In a suit by the reversioners against a Hindu widow and her patnidar impugning the act of the widow in granting the patni as an act of waste prejudicial to their interests, and claiming to set aside the patni as invalid and obtain immediate possession a decree was granted against both defendants. *Held* that, under s. 337 of the Civ. Pro. Code, the patnidar had such an interest as would entitle him to appeal against that part of the decree which regarded the rights of the widow, as well as that part which affected himself. HURRY KISSEN DOSS v. LALL SOONDER DOSS, **1 Ind. Jur. O.S 32.** LALL SOONDER DOSS v. HURRY KISSEN DOSS, **Marsh 113=1 Hay 339.**

(5189)—*O. 41, r. 4 (=Civ. Pro. Code, 1859, s. 337)—Appeal by some of the defendants—Power of appellate Court.*—Y sued on a mortgage bond executed by A. B, who claimed the property under a mortgage from A, was admitted as a defendant on his own application, but, afterwards, B's claim being satisfied by A, he withdrew or was excluded from the suit. Before this was done, he had incurred certain costs which, by the Munsif's decree, he was ordered to bear himself. Upon appeal by A, the Civil Judge found that the mortgage bond sued upon was not proved, dismissed the suit and ordered Y to pay all costs, those of B included. *Held* that it was competent to the Civil Judge, under the circumstances, so to modify the plaintiff's decree, as the main ground of the whole decision, *viz.*, the validity of the mortgage bond, affected all the defendants in common, and the appeal of A and the decision of the appellate Court had reference to that common ground. YERRABALU VIRARAGAUA REDDI v. ABDUL KHADIR SAHIB, **4 M H.C. 26.** [*F.*, 28 M. 122=15 M. L.J. 28; *Appr.*, 17 M.L J. 119, F.B.=30 M. 470=2 M.L.T. 104.

(5190)—*O. 41, r 4 (Civ. Pro. Code, 1882, s. 544), scope of—Appeal by some only but on ground common to all judgment debtors—Decree when can be reversed against all.*—S. 544 does not enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed againt has proceeded upon a ground common to all the defendants, *i.e.*, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them that under s. 544 any one of the defendants

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may appeal against the whole decree, and the appellate Court may reverse or modify the decree in favour of all the defendants. PURAN MAL v. KARANT SINGH, **20 A. 8=A.W.N 1897, 154.** (14 W.R. 130, *R.*) [*F.*, 22 A. 386, 15 C.P. L.R. 116, 9 C.L.J. 461; *R.*, 8 C.W.N. 496.]

(5191)—*O. 41, r. 4 (=s. 544, Civ Pro. Code, 1882), application of.*—The section applies where the decree against several defendants proceeds on any ground common to all the denfendants and only some of such defendants appeal. It does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants, and to reverse the decree of the Court below in favour of all defendants. CHAJJU v. UMRAO SINGH, **22 A. 386=A W.N. 1900, 120.** (20 A. 8, *R.*) [*R.*, 15 C.P.L.R. 116.]

(5192)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)— Modification of pattas tendered to raiyats who do not appeal.*—The District Court is not entitled under s. 544, Code of Civil Procedure, to alter pattas tendered to raiyats who have not appealed from the decision of the Collector, according to the opinion formed by it in appeals preferred by other raiyats in other appeals. APPU RAU v. RATNAM, **13 M. 249.** [*F.*, 17 M. 265; *R.*, 27 M. 143.]

(5193)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—When Court can exercise powers under section—Common ground.*—An appellate Court can exercise the power with which it is invested by s. 337, Civ. Pro. Code, only when the decision of the lower Court has proceeded on ground common to all the defendants PROTAB CHUNDER DUTT v. KOORBANISSA BIBEE, **14 W.R. 130.** [*F.*, 20 A. 8; *Expl.*, 9 C.L J. 461.]

(5194)—*O. 41, r. 4 (=old s. 544)—Appeal by single defendant—Defence not common to all—Reversal of decree as to other defendants.*—Where one of several defendants appeals against a portion of a decree, and his defence in the lower Court is not one common to the other defendants, the decree cannot be reversed in favour of the defendants who have not appealed. RAM CHUNDER PAL v. OMORA CHURN DEB, **18 W.R. 26.**

(5195)—*O. 41. r. 4 (=old s. 544).*—One defendant can appeal under s. 337, Civ. Pro. Code, 1859, on grounds common to all. SREESTEE DHUR CHUCKERBUTTY v. SREENATH BISWAS, **18 W.R. 331.**

(5196)—*O. 41, r. 4 (=Civ Pro. Code, 1859, s. 337)—Jurisdiction - Powers of the appellate Court.*—A judgment making defendants separately liable, and proceeding on ground common to all the defendants, may be revereed by the appellate Court on the appeal of some of the defendants. KRITARTHO MOYEE DEBIA v. KHETTERNATH CIRCAR, **9 W.R. 472.**

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(5197)—*O. 41, r. 4 (=Civ. Pro. Code, 1859, s. 337.)*—Where one of several defendants appeals against first Court's judgment, the appellate Court may, under the circumstances set forth in s. 337, Code of Civil Procedure, 1859, reverse the judgment in favour of all the defendants. SREEMUNJUREE DOSSEE v. POORSUT TUN DOSS, **9 W.R. 499.**

(5198)—*O. 41, r. 4 (=Civ. Pro. Code, 1859, s. 337)—Appeal—Parties to appeal.*—Where a judgment is on ground common to all the defendants, and the appeal is substantially against the whole decree, the High Court is competent, under s. 337, Civ. Pro. Code, 1859, to reverse the decree, though only some of the defendants appeal, and one, appealing as to costs, engrosses his appeal only on a stamp to cover the amount of costs. BADUL SINGH v. CHATTURDHAREE SINGH, **9 W.R. 558.**

(5199)—*O. 41, r. 4 (=s. 544 of 1882)—Appeal by one of two defendants against whole decree—Maintainability.*—One of two defendants may appeal as respects the whole of the disputed property where there is no proof that they owned the property in equal shares. KATYANEE CHOWDHRAIN v. MADHUB NARAIN ROY CHOWDHRY, **4 W.R. 68.**

(5200)—*O. 41, r. 4 (=old s. 544.)*—Where two suits are brought by different parties claiming different interests in a certain share to set aside the sale of that share, and only one party appeals, and the sale is set aside, the decision must be considered as setting aside the sale of the whole of the share. SHAIKH NAGAR v. SHURIUTOOLLAH, **20 W.R. 77.**

(5201)—*O. 41, r. 4 (=s. 544 of 1882)—Jurisdiction—Appellate Court—Reversal of decree.*—An appellate Court, where a decree of a Court of first instance affects all the defendants, can reverse the decree in respect of all the defendants. MOHUNT RUNG LALL GOSSAIN v. GOURE MUNDUL, **10 W.R. 288.**

(5202)—*O. 41, r. 4*—Jurisdiction of an appellate Court upon the appeal of only one of the defendants as to a small portion of the decree. NAKUR CHUNDER SAHA v. JUDOO NATH CHUCKERBUTTY, **24 W.R. 389.**

(5203)—*O. 41, r. 4 (=old s. 544).*—Upon the appeal of one of several parties, an appellate Court cannot reverse the decree appealed from as against any other of the parties. KOOLADA PERSHAD MISREE v. GORA CHAND MISREE, **17 W.R. 353.**

(5204)—*O. 41, r. 4 (=old s. 544)—Right clearly proved—Negativing right on technical ground—Co defendant's appeal—Adverse decision against another.*—A clearly proved right cannot be refused on the technical ground that on the co defendant's appeal no decision can become adverse to another co-defendant. OODOY SINGH v. PALUCK SINGH, **16 W.R. 71.**

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(5205)—*O. 41, r. 4 (=old s. 544).*—Where Dakhilas are ordered to be given up in accordance with Act VIII of 1859, s. 132, the Court is bound to fix a time within which they should be given up. SOONDUR MONEE DEBIA v. KRIPA MOYEE DEBIA, **21 W.R. 112.**

(5206)—*O. 41, r. 4 (=Civ. Pro. Code, 1859, s. 337)*—S. 337, Act VIII of 1859, is applicable where the defence of the two defendants is a common one to the extent of denying plaintiff's mokurruree ryotee title, and the Court decides that plaintiff has a title against both. SHAIKH MAHOMED SAFFOOLAH v. SHAIKH ANWAR ALI, **21 W.R. 112.** [*R.*, 17 M.L.J. 119.]

(5207)—*O. 41 r. 4.*—Of the lower appellate Court in an appeal by one defendant, where the decision of the first Court did not proceed on a ground common to all the defendants. CHUNDER MONEE DOSSEE v. MODHOI DEY, **23 W.L. 166.**

(5208)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544=s. 337, Civ. Pro. Code, 1859)—Power of appellate Court to reverse decision as regards person not party to the appeal.*—In a suit against A and B for the recovery of the possession of property, the Court gave a decree against A and in favour of B. The plaintiff appealed from that part of the decision which was in *B*'s favour. *Held* that the Judge on appeal had no jurisdiction to reverse the decision of the Court below agafnst A, he being no party to the appeal. HURRO CHUNDER RAY v. LALLCHAND BANERJEE, **Marsh 256=2 Hay 48.**

(5209)—*O. 41, r. 4 (=s. 544, Civ. Pro Code, 1882=s. 337, Civ. Pro. Code, 1859)—Reversal of decree on appeal by one defendant.*—A and B were sued on a joint liability to pay rent. A did not defend, B did, and a decree passed against both. B appealed. *Held* that it was competent to the Judge on appeal to reverse the decree, on the ground that there was no joint liability, but that B occupied a separate estate at a separate rent. LUKHEE KANT SEIN v. RAMDEYAL DOSS, **Marsh 282=2 Hay 258.**

(5210 and 5211)—*O 41, r. 4 (=old s. 544)—Appeal by one of several defendants.*—One of several defendants appealing against only the sum decreed against him, cannot question the full amount claimed by the plaintiff. SHEERO COOMAREE DABEE v. MAHARAJAH MAHATAB CHAND BAHADOOR, **W.R. 1864. 380.**

(5212)—*O. 41, r. 4—Applicability to ex parte decrees—Question.*— S. 337, Civ. Pro. Code, 1859, applies as well to *ex parte* decrees as to other decrees, the only question being whether the decision of the lower Court proceeds on grounds common to all the defendants. SREENATH CHOWDHRI v. JOHN JAMES GREY, **13 W.R. 134.**

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(5213)—*O. 41, r. 4 (=Civ. Pro. Code, 1882, s. 544)—Appeal by one defendant alone—Reversal or modification of entire decree.*—It is only when the decree appealed against has proceeded upon a ground common to all the defendants that any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. RAJA SETH GOKULDAS v. THE JODHPUR BIKANIR RAILWAY COMPANY, **15 C.P.L.R. 116.** (22 A. 386, *R.*)

(5214)—*O. 41, r. 4—Ground common to all defendants—Dismissal of suit on appeal by one defendant—Mortgage by Hindu lady—Suit against reversioners and their transferee—Decree by first Court—Appeal by transferee—Dismissal of whole suit, whether legal*—A suit was instituted on a mortgage said to have been executed by a Hindu lady, against her reversioners and their transferee. The suit was decreed by the first Court. On appeal by the transferee alone, the lower appellate Court found that the mortgage was without consideration, and dismissed the suit altogether. *Held*, that the decree of the first Court proceeded upon the existence of a valid mortgage, that is, the liability as against all the defendants depended upon a common ground, namely, the existence of a binding mortgage by the lady, and that the lower appellate Court was right in reversing the decree against the other defendants also, when it found, upon the appeal of the transferee defendant, that there was no valid mortgage. KISHORE CHAND BANERJEE v. RAM CHARAN BHATTACHARYA, **5 Ind. Cas. 388.** (11 W.R. 449, 2 B.L.R. Ap. 41, *D.*)

(5215)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—Death of defendant—Right to appeal—Appeal—Practice.*—Where a decree is passed against defendants, and one of them dies, it is open to the rest of the defendants to appeal against the whole decree, if the ground of appeal is common to all the defendants. CHINTAMAN v. GANGABAI, **5 Bom. L.R. 90=27 B. 284.**

(5216)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—Land given up by first lessee on receipt of compensation money in favour of second lessee—High Court declaring first lessee valid—Second lessee entitled to restitution—Set off in restitution—Equitable relief—Adjustment of accounts—"Who seeks equity must do equity."*—In 1880, Z leased certain property to the defendant; in 1892 the successor of Z granted a lease of the same property to the plaintiff. The plaintiff sued the defendant and the then representative of his lessor for a declaration that the lease to the defendant by Z was invalid and for possession. The Court gave him a decree for possession, subject to the payment of a certain sum to the defendant as compensation for improvements. The defendant gave up possession of the property on receipt of the compensation money

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in March, 1895. The representative of the lessor preferred in appeal against the decree making the defendant a party. The High Court in August, 1897, held that the lease to the defendant by Z was valid and dismissed the plaintiff's suit. *Held*, that, under s. 544, Civ. Pro. Code, the decree of the High Court, of August, 1897, enured for the benefit of the defendant also; that the defendant was entitled to possession under his lease of 1880, which was never determined; that the refunding of the compensation money by the defendant was not a condition precedent to his obtaining relief by way of restitution; and that he was entitled to ask that the account might be adjusted by setting of mesne profits against the compensation money, received by the plaintiff from the time he had been wrongfully in possession up to the date of the High Court decree (August, 1897). *Held*, further, that, the relief claimed by the defendant being in the nature of equitable relief,—he being bound to do equity in seeking equity, it was not equitable that he should be permitted for his own convenience, because, at the time his right to relief arose, *i.e.*, in August, 1897, he was unable or unwilling to refund the purchase-money, to postpone applying for the relief until the mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money, and that the accounts should be adjusted on the footing that the defendant had done what he ought to have done, *viz.*, applied for restitution on the dismissal of the plaintiff's suit by the High Court in August, 1897. ERAT MADHAVAN MANNADI v. VENGANAT SWARAPA HIL RAVI VARMA, **18 M.L.J. 39.**

(5217)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—Applicability of—Appeal by one of the defendants against the whole decree—Ground common to all the defendants.*—In order to make s. 544 applicable, all that is necessary is that the decision appealed against, should have proceeded on any ground common to all the defendants. There is nothing in the section to warrant the importation into it of the qualifications suggested in 17 M. 265. (4 M.H.C. 26, 8 M. 192, *Appr.*; 16 M. 293, 28 M. 122, 21 W.R. 112, 30 C. 429, *R.*; 17 M. 265, *Overruled*; 2 W.R. 227, 11 W.R. 238, *Not. F.*) Where a person sued for a declaration of his reversionary right to certain properties forming part of the estate of a deceased Hindu, and got a decree in his favour, and one of the defendants alone appealed against the whole decree in the first Court, and the lower appellate Court reversed the whole decree of the first Court and dismissed the plaintiff's suit on the ground that he failed to prove his reversionary right, held that the decree of the first Court did proceed upon one ground which was common to all the defendants, *viz.*, that the plaintiff was the reversionary heir of the deceased, and that it was, therefore, competent to the appellate Court, on the appeal of one of the defendants alone against the whole decree, to reverse the decree in so far as it

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affected the other defendants also, though they had not joined in the appeal. DHUTTALOOR SUBBAYYA v. P. SUBBAYYA, **17 M.L.J. 119, F.B.=2 M.L.T. 104=30 M. 470.** [*F.*, 9 C. L.J. 461.]

(5218)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—Decree, common to all—Decree, meaning of—Court, power of, to pass a decree in favour of a party, not appealing.*—The word "decree" in s. 544, Civ. Pro. Code, has reference to the appeal which is lodged against the decision of the first Court. It is not the decision or judgment which is appealed against, but the decree which is appealed against; and in interpreting the section, the Court is entitled to consider the ground or finding upon which the decision or judgment is based, and not merely the operative decree which grants, or withholds, relief, as the case may be. When the first Court has made a decree against several defendants upon a finding which applies equally to all of them, then under s. 544, Civ. Pro. Code, any one of the defendants may appeal against the whole decree, and the Appellate Court may reverse or modify that decree in favour of all the defendants. KALIPADA SADHU v. MATI LAL FOUZDAR, **9 C.L.J. 461=4 Ind. Cas. 166.** (20 A. 8, 30 M. 470, 28 A. 95, *Referred to and followed*; 14 W.R. 133, *Expl.*)

(5219)—*O. 41, r. 4 (=s. 544, Civ Pro. Code, 1882)—Ground common to appealing and non-appealing defendants—Dismissal of suit in appeal as against all defendants, legality of.*—A decree of a Subordinate Judge proceeded on the ground that the mortgage, the subject of dispute in the suit, was a genuine transaction. The District Judge, in appeal, found the mortgage to be a sham, and dismissed the suit altogether, although the appeal had been preferred by one of several defendants. The ground that the mortgage was a sham was common to the defendant that appealed as well as to those that did not appeal. It was contended by the plaintiff, in second appeal, that the lower appellate Court ought not to have dismissed the suit as against the non-appealing defendants. *Held*, the plea as to the character of the mortgage being common to all the defendants, the lower appellate Court was right in reversing the decree of the first Court and dismissing the suit as against all the defendants. ANNAMALAI CHETTIAR v. PITCHU AIYAR, **15 M.L.J. 28=28 M. 122.** (4 M.H.C. 26, 30 C. 429, *F.*; 17 M. 265, *D.*) [*R.*, 30 M. 470=17 M.L.J. 119=2 M.L.T. 104, F.B.]

(5220)—*O. 41, r. 4 (=s. 544, Civ. Pro. Code, 1882)—Appeal—Grounds common to all defendants.*—S. 544, Civ. Pro. Code, 1882, does not require that the decree appealed against should proceed exclusively on grounds common to all the defendants, but that it should proceed on any ground common to all the defendants. RAM KAMAL SHAHA v. AHMAD ALI, **30 C. 429.** (11 W.R. 238, 449, *D.*, 17 M. 265, *Diss.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859;—*continued.*

[*F.*, 28 M. 122=15 M.L.J. 28; *R.*, 31 C. 643; F.B.=8 C.W.N. 496=17 M.L.J. 119, F.B.=2 M.L.T. 104=30 M. 470.]

(5221)—O. 41, r. 4—*See* **MAD. ACT III OF 1873, 11 M. 197.**

(5222)—O. 41, r. 4—*See* **LIMITATION ACT, 1908, ART. 182—PERIOD FROM WHICH LIMITATION BEGINS TO RUN, 13 A. 1=1890 A.W.N. 207, F.B.**

(5223)—O. 41, r. 4—*See* **PLAINT—FORM AND CONTENTS OF PLAINT, 11 W.R. 238.**

(5223-*a*)—O. 41, r. 4—*See* **NOS. 4556, 4577-*a* 4644, *supra*.**

(5224)—*O. 41, r. 4, s. 114, O. 47, r. 1 (=Civ. Pro. Code, 1882, ss. 544 and 623)—Appeal—Review—Application for review filed by some of the parties—Reconsideration of the whole case.*—*Held*, that s. 544 of the Civ. Pro. Code, does not apply to applications for review, and the Court is not empowered to modify or set aside a decree or order on the application for review file by some of the parties to the case as regards those parties who did not file such application. GULLA v. MOTA, **86 P.L.R. 1904 =47 P.R. 1904.**

(5225)—*O. 41, r. 4, s. 115—See* **SUPERINTENDENCE OF HIGH COURT, 8 M. 192.**

(5226)—*O. 41, r. 4, O. 9, r. 8 (=ss. 544, 102, Civ. Pro. Code, 1882)—Appeal—Dismissal of suit for default—Application for suit to be restored by some of the plaintiffs—Appeal by co-plaintiff who had not joined in the application.*—Four brothers filed a suit, the eldest of them, who was employed in the army, was unable to attend Court on the day of hearing. The pleader of the four plaintiffs and the three younger brothers were present in Court, but the pleader declined to appear for the plaintiff who was absent. The Munsiff dismissed the suit ostensibly under s. 102, Civ. Pro. Code. The pleader, on behalf of the plaintiffs who were present, applied for the case to be restored, but his application was refused. On appeal on behalf of the plaintiff who was absent in the original Court, the order was set aside and the suit was ordered to be restored. The defendant applied for revision and contended that the order passed on appeal was illegal. *Held*, that the contention was right, for the absent plaintiff, not having taken any steps in the original Court to get the suit restored had no *locus standi* to appeal, and that s. 544, Civ. Pro. Code, 1852, was not applicable to the case. CHUGATA KHAN v. WASIL KHAN, **21 P.L.R. 1910=6 Ind. Cas 496=132 P.W.R. 1910.**

(5227)—*O. 41, r. 4 and O. 9, rr. 10 and 11 (=ss. 337 and 116, Civ. Pro. Code, 1859)—Special appeal against weight of reasons—Ex parte decree—Defendants not before appellate Court.*—No special appeal will lie with respect to the weight of the reasons for a lower Appellate Court's conclusion. A decree under s. 116,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Civ. Pro. Code, 1859, is not an *ex parte* decree even against absent defendants, and may, under s. 337, Civ. Pro. Code, 1859, be modified in appeal even in favour of defendants not before the Appellate Court. DOORGA CHURN SETT v. SHAMANUND GOSSAIN, **12 W.R. 376.**

(5228)—*O. 41, rr. 4, 22 (=ss. 544, 561, Civ. Pro. Code, 1882)—Suit by vendee for possession or purchase-money—Decree for purchase-money—Appeal by defendant affected—Suit for possession given by appellate Court though plaintiff preferred no memorandum of objections—Powers of appellate Courts—Validity or relief granted by lower appellate Court.*—The plaintiff brought a suit for partition and delivery of certain lands, setting up title thereto under a purchase from the third defendant who was himself vendee of the same from the widow of a deceased brother of Defts. Nos. 1 and 2. The plaintiff prayed, in the alternative, for the refund of the purchase-money. The Court of first instance gave a decree for money only, holding that the relief for possession was barred by limitation. On appeal by defendant No. 3, the District Judge reversed the decree of the lower Court and gave the plaintiff a decree for possession, holding that the relief was not barred. The plaintiff, however, preferred no appeal against so much of the decree of the first Court as related to the dismissal of the suit for the lands, nor, preferred any memorandum of objections in the matter under s. 561 of the Code. Hence the present appeal by defendants Nos. 1 and 2, on the ground that the suit was bad for misjoinder and that the lower appellate Court was wrong in giving a decree for the plaintiff when he neither preferred an appeal nor a memorandum of objections. *Held*:—Per *Chief Justice*: the point as to misjoinder was not raised in the lower appellate Court and, consequently, it could not be raised in the High Court. The lower appellate Court was wrong in decreeing for possession. Where a respondent to an appeal fails to give the notice required by s. 561, it is not open to the appellate Court to grant any relief to that respondent in a case where the granting of such relief is not necessarily incidental to the relief granted to a party, who was appealed. The lower appellate Court could have given full relief to the appellant before that Court by simply setting aside the decree which had been obtained against him. For, the powers of an appellate tribunal are the creature of statute and unless power to give such a decree as was given by the lower appellate Court in this case is to be found in the provisions of the Code, the decree could not be supported. The decree appealed against did not proceed on a ground common to the plaintiff and defendant No. 3, since it was a decree in favour of the plaintiff against defendant No. 3. Also, the decree appealed against did not proceed on a ground common to all the defendants, since it was not the case of defendant No. 3 that the plaintiff's claim for possession as against defendants Nos. 1 and 2 was barred by limitation. *Semble*.—S.561 only applies where a party has a right of appeal, but who, until forced or "invited" into Court, does not think fit to exercise it. Per *Subrahmania Aiyar, J.*—When, in an appeal, the conclusion of the appellate Court, with reference to matters properly arising before it, is such as to render any portion of the decree of the lower Court not made the subject of the appeal inconsistent with such conclusion, it would be not only anamalous to leave such portion of the decree in force, while setting aside only so much of it as was comprised in the appeal, but it might also involve a breach of the rules as to *res judicata*. So far as this Presidency is concerned, a memorandum under s. 561 may be filed even when the question arises as between co-respondents only. A delay in the presentation of the memorandum would also be excused. In cases not falling under s. 544, an appellate Court would be precluded from modifying the decree of the lower Court in favor of a party, who has filed neither an appeal nor a memorandum of objections except as part and parcel of the relief necessary to be granted to an appellant. The decree of the lower appellate Court reversed. KALAIKADA PILLAI v. VISWANATHA PILLAI, **15, M.L.J. 212=28 M. 229.** (7 M. 215, 18 B. 520, 26 C. 109, 26 C. 114, 31 C. 643, *D.*) [*F.*, 3 N.L.R. 85. 6 M.L.T. 324, *R.*, 12 O. C. 260; *D.*, 18 M.L.J. 586=4 M.L.T. 266.]

(5229)—*O. 41, rr. 4, 22 (=ss 544 and 561, Civ. Pro. Code, 1882)—Appeal—Practise—Appeal by defendant against plaintiff and other defendants—Objections by plaintiff-respondent when entertainable as against co-respondents.*—Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under s. 561 of the Code of Civil Procedure by one of the respondents, not only as against the appellant, but, it may be, as against co-respondents, with the objector also, and to modify the decree as against them accordingly. ABDUL GHANI v. MUHAMMAD FASIH, **A.W.N. 1905, 200=2 A.L.J. 667=28 A. 95.** (26 C. 114, *F.*; 21 W.R. 338, *R.*; 23 A. 93, *Dist.*)

——O. XLI, r. 5 (=1882, s. 545=1877, s. 545 =1859, s. 338).

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 96 to 99.

See EXECUTION OF DECREE—STAY OF EXECUTION.

(5230)—*O. 41, r. 5 (=Civ. Pro. Code, 1882, s. 545)—Appeal—Security for stay of execution—Liability of surety—Intention of parties.*—The question whether a person standing as surety in first appeal is liable as surety for the judgment-debtor for the due performance of the decree of the High Court, also in second appeal,

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

must be determined with reference to the intention of the parties when the security was given. The security given under s. 545 of the Civ. Pro. Code, 1882, does not necessarily have regard to more than the due performance of the decree or order of the appellate Court, with reference to the pending appeal in which execution has been stayed. GOBIND DEO v. BALDEO NARAIN, **A.W.N. 1884, 4.**

(5231)—*O. 41, r. 5 (=Civ. Pro. Code, 1882, s. 545)—Stay of execution—Notice to decree-holder necessary before final order—Practice—Application to be supported by affidavit.*—There is no express provision in s. 545, Civ. Pro. Code, 1882, requiring notice to be given to the decree-holder before an order is made under the section; but it is obviously unjust to pass a final order for staying the execution of a decree without giving the decree-holder notice of the judgment debtor's application. It is the universal practice of the Courts to give notice to the decree-holder before disposing finally of an application for stay of execution. Moreover, the application must be supported by an affidavit. MULTANCHAND SHIVRAM v KHAN SAHEB KHARSEDJI NASARVANJI, **15 B 836.**

(5231-*a*)—*O. 41, r. 5 (=old s 545)—Restitution of conjugal rights—Decree for—Stay of execution.*—An order for stay of execution may be granted under this section to a wife against whom a decree has been made for the restitution of conjugal rights in a suit brought against her by her alleged husband. JASSA RAM v. THARYA RAM, **2 P.R. 1894.**

(5232)—*O. 41, r. 5 (=s. 545, Civ. Pro. Code, 1882)—Order for stay of execution passed by appellate Court—Sale held before communication of such order, nature of.*—An order of an Appellate Court under s. 545, Civ. Pro. Code, 1882, to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order, and, as such, would only take effect when communicated. If property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as nullity. BESSESSWARI CHOWDHURANY v. HORRO SUNDAR MOZUMDAR, **1 C.W.N. 226.** (4 N.W.P. 398, 6 N.W.P. 254, 2 A. 686, *D.*) [*F.*, 6 M.L.T. 159; *Expl. & D.*, 33 C. 927=3 C.L.J. 67.]

(5233)—*O. 41, r. 5 (=s. 545, Civ. Pro. Code, 1882)—Order refusing stay of execution—Decree—Appeal—Discretion of the lower Court.*—An order passed by an appellate Court under s. 545 of the Code of Civil Procedure, refusing to stay execution is one against which no appeal lies. RAMCHANDRA v. BALMUKUND, **6 Bom. L.R. 780=29 B. 71.**

(5234)—*O. 41, r. 5 (=s. 545, Civ. Pro. Code, 1882)—Stay of execution—Appeal—Practice.*—To grant a stay of execution of a money decree, the Court must be satisfied that substantial loss may otherwise result to the applicant. H. H. THE GAIKWAR v. KATCHRABHAI, **3 Bom. L.R. 867.**

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5235)—*O. 41, r. 5 (=s. 545, Civ. Pro. Code, 1882)—Execution of decree—Stay of execution—Temporary stay—Surety—Discharge of surety.*—Where the appellant made an application, under s. 545 of the Civ. Pro. Code for stay of execution of the decree of the Court below and the appellate Court passed an order directing temporary stay on the appellant furnishing security under the said section and the lower Court stayed execution after the appellant furnished security, the security bond executed in consideration of a temporary stay, was in itself binding on the security for the period during which it was allowed to operate for the benefit of the principle. It was not a mere "offer" by the surety, but the acceptance of an offer, having been executed by the surety in consideration of *ad interim* stay; it was binding pending the discharge of the rule, and its operation during that period could not be cancelled by the Court. The surety thereby made himself liable for such sum as, on a consideration of all the equities, the Court might adjudge to be fair compensation for losses sustained by the decree-holder owing to the temporary stay. PANDU v. BALU, **8 Bom. L.R. 587.**

(5236)—*O. 41, r. 5 (=s. 545, Civ. Pro. Code, 1882)—Order refusing to stay execution—Appeal.*—No appeal lies from an order under s. 545, Civ. Pro. Code, refusing to stay execution. CAMERON v. BULAKI MAL, **146 P.R. 1907.** (29 B. 71, *F.*)

(5237)—*O. 41, r. 5 (=s. 545, Civ. Pro Code, 1882)—Ss. 67, 99. Tr. P. Act—Security bond—Mortgaging property by judgment-debtor—Sale of mortgaged property, right of decree-holder to proceed to—Necessity for separate suit.*—The relationship between a decree-holder and a judgment-debtor executing a security bond under s. 545, Civ. Pro. Code, mortgaging properties for the due performance of any decree or order that may ultimately be passed by the appellate Court, is not that of a mortgagee and mortgagor. Hence, the decree-holder may sell the properties mortgaged by the security-bond without instituting a suit under s. 67, T.P. Act, and thus realise his decretal money. SHYAM SONDAR LAL v. BAJPAI JAI NARAYAN, **30 C. 1060=7 C.W.N. 914.** [*R.* 14 Bur. L.R. 170=4 L.B.R. 197; *D.*, 32 C. 494=9 C.W.N. 372=1 C.L.J. 118.]

(5238)—*O. 41, r. 5 (=Civ. Pro. Code, 1882, s. 545—Stay of execution—Decree directing issue of probate—Execution, meaning of.*—A decree directing the issue of a grant of probate to the propounder of a will is one that is capable of execution, and stay of execution of such a decree can be granted under s. 545, Civ. Pro. Code, 1882. [*Appl.*, 11 C.W.N. 1030, F.B.=6 C.L.J. 298=34 C. 1037; *R.*, 73 P.R. 1902=59 P.L.R. 1902, 8 C.W.N. 572=31 C. 722, 9 C.W.N. 123=31 C. 1081, 3 C.L.J. 29, 33 C. 927=3 C.L.J. 67.] When there still remains something substantial to be done under a decree before it can become thoroughly effectual, that decree

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

has to be 'executed' within the meaning of s. 545, Civ. Pro. Code, 1882. After the Court makes an order for the issue of a grant of a probate two things have to be done under it in order to clothe the propounder of the will with the character of executor: he has to pay the stamp fees on probate, and the Court has to hand out to him the probate itself. This is carrying out, that is, 'executing' the order. MUSSAMUT BRIJ COOMAREE v. RAMRICK DAS, **5 C.W.N. 781.**

(5238-*a*)—*O.* 41, *r.* 5—*Security under s.* 151—*Powers of Court.*—What O. 41, r. 5 of the new Code says is that security should be given for the performance of such decree or order as may be ultimately binding on him. There is no distinct provision for refund of amounts deposited as security. The Courts deal with them under s. 151. SWAMINATHA PATHAN v. SORANATHAMMAL, **1911, 2 M W.N. 432.**

(5238-*b*)—*O.* 41, *r.* 5 (=*Civ. Pro. Code*, 1859, *s.* 338)—*Execution of decree—Stay of execution—Security—Act XXIII of* 1861, *s.* 36.—A party wishing to stay execution under s. 338, Act VIII of 1859, of a money-decree, is bound to show sufficient grounds to the Court for staying it, and the rule is equally applicable to decrees for immoveable property and to other decrees. When an order is made for the execution of a decree against which an appeal has been preferred, the Court, under s. 36, Act XXIII of 1861, may, if it thinks fit, require security to be given. *In the matter of the petition of* RANI ISMAIL KOOER, **B.L.R. Sup. Vol. 1007=9 W.R. 448.**

(5238-*c*)—O. 41, r. 5—*See* EXECUTION OF DECREE — STAY OF EXECUTION, 1 A. 178, F.B.

(5239)—O. 41, r. 5—Limitation — *See* DEPOSIT IN COURT, 2 C.L.R. 206.

(5240)—O. 41, r. 5 — *See* PRACTICE AND PROCEDURE, 21 C. 561.

(5241)—O. 41, r. 5—Security bond accepted by a Court does not dispense with necessity for registration—*See* REGISTRATION ACT, 1908, s. 17, 3 M.L.T. 317=31 M. 330.

(5242)—O. 41, r. 5—*See* SURETY- LIABILITY OF SURETY, 2 B. 654, 3 B. 204, F.B.

(5242-*a*)—O. 41, r. 5—*See* NOS. 81, 116, 158, 936, 949, 1089, 1964, 2202, 2302, 2315, 2316, 2339, 3025, 3229, 3656, 3957, 5084, *supra* and NO. 5260, *infra*.

(5243)—O. 41, r. 5, s. 104, O. 43, r. 1—*See* EXECUTION OF DECREE. — STAY OF EXECUTION, 7 A. 73=A.W.N. 1884, 226.

(5244)—*O.* 41. *r.* 5, *ss.* 144 (1), 145 (=*ss.* 545, 583, 253, *Civ. Pro. Code*, 1882)—*Method of enforcing security bond given under s.* 545.—The effect of s. 583, read with s. 253 is that the proper method of enforcing a security bond given under s. 545, is by execution. LALLA DAVEE NARAYAN LALL v. MOHAN PANDAY, **4 L.B.R. 197=14 Bur. L.R 170.** (12 B. 411, 23 B. 478, 25 B. 409, 13 M. 1, 17 A. 99, *F.*; 15 C. 497, 22 C. 213, 25 C. 212, *Diss.*)

(5245)—*O.* 41, *rr.* 5, 6 (=*ss.* 545, 546, *Civ. Pro. Code*, 1882)—*Execution, stay of, application for.*—The provisions of s. 545 require that sufficient cause should be shown before an order for stay of execution can be granted. The proper course is, as a rule, to apply to the Court which passed the decree which is appealed stating the particulars set out in s. 545. If that Court refuses to stay execution on security being furnished, which will rarely be the case, application can be made to the appellate Court under s. 548 to issue the necessary directions. Cases may arise where the appellate Court may stay execution at once, but in any case the particulars required by s. 545 must be set out by affidavit and the reasons given for not applying to the Court below. SHAIK FAIZU v. MAHOMED ISAC, **L.B.R. 1893—1900, 546.**

(5246)—*O.* 41, *rr.* 5, 6 (=*ss.* 545 (*c*), 546, *Civ. Pro. Code*, 1882)—*Surety can be proceeded against in execution proceeding and a separate suit against him is not necessary.*—Where a surety has rendered himself liable on behalf of an appellant for the due performance of the decree or order of an appellate Court [s. 545 (*c*), Civ. Pro. Code], or on behalf of the respondent for the restitution of property and the due performance of the decree or order of the appellate Court (s. 516, Civ. Pro. Code), in those cases the recovery should be by proceedings in execution, and not by regular suit against the party. JAMSHEDJI v. BAWABHAI, **3 Bom. L.R. 35=25 B. 409.**

(5247)—*O.* 41, *rr.* 5, 6 (=*ss.* 545, 546 *of Civ. Pro. Code*, 1882)—*Order under—Appeal—"Decree"—Stay of execution*—Upon the application under s. 545, Civ. Pro. Code, the District Judge allowed the decree-holder to go on with the execution, provided that security was given by him.—*Held*, that the order of the District Judge, inasmuch as it determined a question referred to in s. 244, Civ. Pro. Code, was a decree and was appealable as such. GANGA DIN SINGH v. LAL BAHADUR SINGH, **1 O C. 102.** (12 Bom. 279, *R.*)

(5248)—*O.* 41, *rr.* 5, 6 (=*ss.* 545, 546, *Civ. Pro. Code*, 1882)—*Suit for partition—Preliminary decree—Appeal—Powers of Appellate Court to stay subsequent proceedings.*—There is no provision in the Code of Civil Procedure which authorises a Court to which an appeal is preferred against a preliminary decree for partition, to stay, pending the hearing of the appeal, proceedings taken by the Court which passed the decree, subsequent to the passing of such decree. BASUNTO KUMAR SIRCAR v. BHUT NATH SIRCAR, **1 C W.N. 264.** [*R.*, 31 C. 722, F.B.=8 C.W.N. 572.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5249)—*O. 41, rr. 5, 6—Execution, stay of—Sufficient cause—Onus of proof—Security, enforcement of which doubtful, if should be accepted—Civ. Pro. Code (Act V of 1908), s. 145, if bars future litigation concerning validity of security—Secretary of State for India in Council offering to give security, whether Act of State—Offer if beyond his competence—Government of India Act, 1858 (21 & 22 Vict., c. 106), ss. 39, 40, 41, 42 & 65—Government of India Act, 1859 (22 & 23 Vict. c. 41), s. 1, Act which is* ultra vires *of the Secretary of State if may be repudiated—Estoppel—Civil motion — Practice — Affidavits and counter-affidavits.*—The policy of Legislature, in the matter of staying execution of decrees pending appeal, is to allow the decree-holder to reap the fruits of his decree, unless sufficient cause is established for stay of execution. The Court may, for the ends of justice, allow execution to proceed and take security for restitution from the judgment-creditor under r. 6, O. 41 of Act V of 1908, for stay execution and take security from the judgment-debtor under r. 5, but for each alternative the burden is on the judgment-debtor to show sufficient cause. A decree for recovery of possession of a zemindari having been passed against a minor represented by the Court of Wards, an appeal was preferred against it to the High Court on behalf as well of the minor as of the Court of Wards which had been made liable by the decree to account for the moneys, moveables, and immoveables of which it took possession in assuming charge of the estate, and also for mesne profits. The appellants who applied for stay of execution of the decree for possession being unable to furnish security as required by r. 5 of O. 41, the Local Government, with the sanction of the Secretary of State for India in Council, offered to execute a security bond for the required amount through its Chief Secretary on behalf of the Secretary of State for India in Council, but it was not shown that the security had been sanctioned by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting as provided by s. 40 of the Government of India Act of 1858. *Held*, that the security could not be accepted as sufficient. *Held*, further—That the Security could not also be accepted as offered by the Local Government in pursuance of the provisions of the Government of India Act, 1859, in the absence of information furnished to the Court as to the provisions or restrictions laid down by the Secretary of State for India in Council in that behalf. The Court ought not to accept a security, the validity of which is not free from doubt and the enforcement of which might lead to litigation. The powers and obligations of the Secretary of State for India in Council are defined by Statute, and if he exceeds the authority delegated to him, the holder of the officer for the time being, when sued in a Municipal Court, is entitled to urge by way of defence the *ultra vires* character of the transaction. The doctrine of equitable estoppel would not apply, where, as in this case, the act involves the waiver or renouncement of a right to perform a public duty. The sovereign power is not bound by the *ultra vires* acts of its agents. The Secretary of State for India in Council not being personally liable under the bond, the decree would not be executable against him under s. 145 of the Civ. Pro. Code, if the security were accepted; nor would that section preclude the Secretary of State for India in Council from questioning the validity of the security in a suit for its enforcement. The offer of the Secretary of State for India in Council to give security for the due performance of any decree that may be made against the appellants and in favour of the respondent was not an Act of State, and it was incumbent on the Courts, upon objection being taken by the respondent decree-holder, to examine whether the security was valid and enforceable. Per *Mookerjee, J.*—(*Teunon, J., contra*).—The offer of the security by the Secretary of State for India in Council was not for the "purposes of the Act" within the meaning of s. 40 of the Government of India Act, 1858. Per *Teunon, J.*—S. 40 of the Government of India Act, 1858, does not in respect of contracts restrict the Secretary of State for India in Council to the position previously held by the East India Company, but authorises him to enter into any contract whatsoever for the purposes of the Act; that is to say, for the purposes of the Government of India by and in the name of His Majesty. Proper practice as to filing of counter-affidavits in civil motions, adverted to. SRINIVAS PROSAD SINGH v. KESHO PROSAD SINGH, **18 C.W.N. 478 = 18 C.L.J. 368.**

(5250)—*O. 41, rr. 5, 6, s. 104, O. 43, r. 1 (= ss. 545, 546, 588, Civ. Pro. Code, 1882)—Delivery of possession, stay of order for—Order staying proceedings, effect of, pending appeal—Appellate Court, power of, to stay order and proceedings—Rule nisi, order for, effect of—Execution, order for, when actually carried—Court, jurisdiction of—Express provisions of the Code—Procedure, matters of—Court, inherent power of—Security for restitution of property or for carrying out of decree.*—S. 545 of the Code of Civil Procedure does not apply after execution has been carried out. The essence of a Code, is to be exhaustive on the matters in respect of which it declares the law. On any point specifically dealt with by it, the law must be ascertained by interpretation of the language used by the legislature. In respect of such matters, the Court cannot disregard or go outside the letter of the enactment according to its true construction. The Code, therefore, binds Court so far as it goes. The Code of Civil Procedure (Act XIV of 1882) was not intended to be and is not exhaustive. It does not affect previously existing powers of the Court unless it takes them away. (17 A. 29, *R.*) The duty of a Judge is to apply dispositions of law not only to

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what appears to be regulated by their express provisions but to all the cases to which a just application of them may be made and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it. (9 W. R. 402, *R.*) The Code does not affect the power and duty of the Court, in cases where no specific rule exists to act according to equity, justice and good conscience, though in the exercise of such powers it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature. The Court will, where, the circumstances require it, exercise an inherent power to act *ex delicto justitiae* and to do that real and substantial justice for the administration of which alone it exists. The appellate Court having seizin of the appeal, has an inherent power over the subject of litigation the nature of which is indicated and implied by s. 583 of the Code of Civil Procedure and can, in the exercise of that power, and, notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made on such appeal. (8 W.R, 144, *Diss.*; 12 W.R. 296, 17 W.R. 591, 10 M.I. A. 196. 19 M. 140, 6 A. 269=11 I.A. 37, 10 C. 109=10 I.A. 171, 28 C. 734, 5 C.W.N. 781, 31 C. 722, 3 P.C. 465, 1 M. 10, 2 C.L.J. 537, 9 W.R. 402; 23 M. 306, *R. & F.*) An order for stay is made on the day that it is pronounced, and not on that on which it is drawn up or communicated. When a superior Court has said that execution of a decree is not to take place, from that moment the Court to which application has been made for execution has no authority to execute it and delivery of possession under the authority of an order which was not then in force but had been suspended upon a stay granted by a superior Court is invalid. (1 C.W.N. 226, *Expl. & Diss.*) Per *Woodroffe, J.*—S. 546 of the Code of Civil Procedure has reference to the case where an order has been made for execution and the execution is pending or about to be given effect to. It does not apply where the order for execution has been actually carried out and where the property in suit has actually been delivered under the order made. Per *Mookerjee, J.*—The words in s. 546 of the Code of Civil Procedure, namely, "the appellate Court may for like cause, direct the Court which passed the decree to take such security," are not controlled by, or merely confined to, the case in which an order has been made for the execution of a decree and the execution-proceedings are still pending. The words in question are wide and the Court should not put too narrow a construction upon them and thus restrict the powers of the appellate Court. S. 546 of the Court authorises a Court of appeal to take security from a decree-holder even after execution of the decree under appeal has been completed. HUKUM CHAND BAID v. KAMALANAND SINGH, **3 C.L.J, 67=33 C. 927.**

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[*F.*, 10 C.L.J. 91=1 Ind. Cas. 677, 11 C.L.J. 285; *R.*, 36 C. 193=5 C.L.J. 611=1 Ind. Cas. 913; 14 C.W.N. 586=11 C.L.J. 435.]

(5251)—O. 41, rr. 5, 19, s. 47—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 12 B. 279.

(5251-*a*)—O. 41, r. 5, O. 44, r. 1—*See* PAUPER—APPEALS, 70 P.R. 1879.

—— O. XLI, r. 6 (=1882, s. 546=1877, s. 546).

See EXECUTION OF DECREE—STAY OF EXECUTION.

(5252)—*O. 41, r. 6 (=s, 546, Civ. Pro. Code, 1882)—Decree for arrears of rent, decree for money.*—Arrears of rent are "money." The expression "decree for money" in s. 546, Civ. Pro. Code, applies to a case where a decree has been made for payment of arrears of rent. BANKU BEHARY SANYAL v. SYAMA CHURN BHUTTACHARJEE, **25 C. 322.**

(5253)—*O. 41, r. 6 (=s. 546, Civ. Pro. Code, 1882)—Security for due performance of appellate decree, suit for enforcement of Act VII of 1888.*—Where a third party gives a security-bond for the due performance of a decree of the appellate Court under s. 546, Civ. Pro. Code, it cannot be enforced in execution of that decree. It must be enforced by a separate suit. (*N.B.* —*Prinsep, J*, being influenced more by precedent than by any other reason, does not appear to be altogether satisfied with the previous rulings of this Court.) SUBJOO DAS v. BALMAKUND DAS, **23 C. 212.** (12 C. 402, 15 C. 497, 22 C. 25, *F.*; 12 B. 411, *Diss.*; 13 M. 1; 15 M. 203, *R.*) [*Cons.*, 25 B. 409; *R.*, 7 O.C. 210; *Not F.*, 4 L.B.R. 197=14 Bur. L.R. 170; *Diss.*, 109 P.R. 1906=1 P.L.R. 1907; *D.*, 23 B. 478.]

(5254)—*O. 41, r. 6 (=s. 546, Civ. Pro. Code, 1882)—Sale of immoveable property in execution—Stay of—Appeal pending.*—Where a plaintiff obtains a money-decree for a portion of his claim and appeals for the portion disallowed and no appeal or cross-objection has been presented by the defendant for the portion allowed, the defendant cannot ask for the stay of execution on the ground of pendency of appeal as no appeal can be said to be pending. BAHRAM KHAN v. RAGH SINGH, **120 P.R. 1890.** [*R.*, 71 P.R. 1895.]

(5255)—*O. 41, r. 6 (=Civ. Pro. Code, 1882, s. 546)—"Decree for money."*—A decree for enforcement of hypothecation by sale of immoveable property is not a "decree for money" within the meaning of the last paragraph of s. 546 of the Civ. Pro. Code. The object of these words is to confine the decree mentioned in the paragraph to a decree for money in satisfaction of which a Court has ordered a sale of immoveable property. HARSARAN DAS v. GANGA PRASAD, **A.W.N. 1889, 139.**

(5256)—O. 41, *r.* 6 (=1882, *Civ. Pro. Code*, s. 546)—*Execution of decree—Decree for costs—Decree for money.*—A decree for costs not

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declared to be chargeable on any specific immoveable property is a decree for money within the meaning of the last paragraph of s. 546 of the Code of Civil Procedure. HAIDAR BAKHSH v. ZAHUR-UL HASAN, **A.W.N. 1896, 74.**

(5257)—*O. 41, r. 6 (=s. 546, Civ. Pro. Code, 1882)—Decree—Appeal — Security — Court of appeal—Jurisdiction.*—It is not competent to an appellate Court to pass an order under s. 546 of the Code of Civil Procedure, where it appears that no order has been made for the execution of the decree appealed against. JANARDHAN v. NILKANT, **3 Bom. L.R. 142=23 B. 583.**

(5258)—*O. 41, r. 6 (=s. 546, Civ Pro. Code, 1882)—Surety for performance of apellate decree, whether, could be proceeded against by way of execution.*—Execution for costs, awarded by a decree under appeal, was granted, on the respondent in this case standing surety, for restitution, in the event of the decree being reversed on appeal. The decree having been, subsequently, reversed, the judgment-debtor sought to recover from the surety, by way of execution, the amount paid. *Held*, the order was obviously under s. 546 of the Code and the Full Bench Ruling in *Raghbar Das* v. *Saligram*, (109 P.R. 1906, 77 P.R. 1895 and 8 A. 639, *R.*) applies equally to s. 545 and to s. 516,—the decision in that case *approving* 25 B. 409, a case with reference to s. 546 holding that recovery in such a case should be by execution-proceedings. DEOKI NANDAN v. GEHNA MAL, **125 P.R. 1106=14 P.L.R 1107.**

(5259)—*O. 41, r. 6 (=Civ. Pro. Code, 1882, s. 546)—Application to stay execution—Court in which it is to be made.*—Though para. 3 of s. 546 does not distinctly say to which Court an application should be made for stay of sale of immoveable property in execution till disposal of an appeal from the decree, yet, such an application should be made to the Court which passed the decree and not to the appellate Court. KUNJ LAL MARWARI v. BAHITRAM MARWARI, **8 C W.N. 381.** (11 C.146, 15 A. 196, *F.*) [*Discussed*, 34 C. 1037, F.B.=11 C.W.N, 1030 =6 C.L.J. 298.]

(5259-*a*)—*O. 41, r. 6—Execution—Date fixed for sale—Stay of sale—Jurisdiction—Court executing the decree, power of.*—An application for stay of sale in execution proceedings must be made to the Court executing the decree, although an appeal might be pending against the decree in a higher Court. The execution Court only is competent to stay the sale and not the Court of appeal. AMIR ALI v. BATUCK PERSHAD, **11 Ind. Cas. 22.**

(5259-*b*)—O. 41, r. 6—*See* NOS. 150, 2202, 2289, 2317, 5245, 5246, 5247, 5248, 5249, 5250, *supra.*

(5260)—*O. 41, rr. 6, 5, s. 107 (2), O. 22, r. 11 (=ss 546 cl. (3) 545 and 582, Civ. Pro. Code, 1882)—Stay of sale of immoveable property in*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

execution of money-decree—Jurisdiction of appellate Court in which appeal pending to stay sale — Inherent jurisdiction.—Held, by the majority, that, when an appeal has been preferred against a decree for money, the appellate Court has jurisdiction, pending the disposal of the appeal, to pass an order staying the sale of immoveable property of the judgment debtor in execution of the decree. TRIBENI SAHU v. BABU BHAGWAT BUX RAI, **11 C.W.N. 1030; F.B.=6 C L J. 298=34 C. 1037.** (8 C.W.N. 381, 8 C.W.N. 572, 31 C. 722, 5 C.W.N. 67=28 C. 734, 3 C.L.J. 29, 33 C. 927=3 C.L.J. 67, *R.*) [*F.*, 10 C.L.J. 91; *R.*, 4 N.L.R. 166.]

——O. XLI, r. 7 (=1882, s. 547=1877, s. 547 =1859, s. 340.

(5260-*a*)—O. 41, r. 7—*See* NO. 2203, *supra.*

—— O. XLI, r. 9 (=1882, s. 548=1877, s. 548 =1859, s. 341.

(5261)—*O. 41, r. 9.*—Held by the majority of the Court (*Glover, J., dissenting*) that an appellate Court, after admitting and registering an appeal, and serving notice on the opposite party, has no power, at the hearing, to reject the appeal on the ground that it was not preferred within the prescribed period. BHARUT CHUNDAR ROY v. K. ISSUR CHANDER SIRCAR, **8 W.R. 141.**

(5262)—*O. 41, r. 9 (=Civ. Pro. Code, 1859, s. 341)—Appeal filed beyond time—Fraud—Objection at hearing—Power of Judge.*—The registration of an appeal, under s. 341, Act VIII of 1859, is a proceeding of a purely ministerial character. The Judge has power to reject an appeal after it has been once registered under s. 341, even supposing there was no fraud on the part of the appellant. The registration of an appeal under s. 341 has not the force of a conclusive judicial determination between the parties upon the question as to whether the appeal has been filed within time or not. SYED JAFER HOSSEIN v. SHEIKH MAHOMED AMIR, **4 B.L. R. App. 103=13 W.R. 351.**

(5262-*a*)—O. 41, r. 9—*See* NOS. 1711, 2203, 2781, *supra.*

——O. XLI, r. 10 (=1882, s. 549=1877, s. 549 =1859, s. 342).

See SECURITY FOR COSTS.

(5263)—*O. 41, r. 10 (=Civ. Pro. Code, 1882, s. 549—Security for costs—Limitation—Expiry of time allowed during vacation—Appeal.*—The appellant, who was ordered to furnish security for the costs of this appeal, furnished it on the re-opening of the Court after the long vacation, the time allowed for furnishing it having expired during the vacation. *Held* that the appeal should be rejected under the last provision of s. 549 of the Code, the security-bond not having been filed within the time allowed. The Court was open during the vacation for business of this nature. The plea that the security was

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offered on the first day of the re-opening of the Court cannot be sustained. HIJAB BANU v. MUHAMMAD SHAFI, **A.W.N. 1883, 254.**

(5264)—*O.* 41, *r.* 10 (=*s.* 549, *Civ. Pro. Code*, 1882)—*Lower Burma Courts Act*, *s.* 24—*Order requiring security for costs—Order or decree, appeal from.*—An order rejecting an appeal under s. 549 of the Civ. Pro. Code, is not appealable either as an order or decree. As an order it would not be appealable under s. 588 and as a decree it is not "a final expression of an adjudication upon any right claimed or defence set up" within the meaning of the first paragraph of the definition clause relating to decree in s. 2 of the Code. Such an order is also not appealable under s. 24, Lower Burma Courts Act, since it is not one affecting "the merits of the case." Courts are not bound to reject appeals under s. 549 if security is not furnished on the due date. But time should not be extended without good cause shown. TUN U v. PHA RI, **L.B.R. 1893—1900, 536.** (21 B. 576, *R.*) [*R.*, L.B.R. 1893—1900, 563.]

(5265)—*O.* 41, *r.* 10 (=*s.* 549, *Civ. Pro. Code*, 1882)—*Security for costs—Liability of surety.*—Where A was required to furnish security for costs of the appeal and a security bond was tendered by him by which S agreed to be liable as surety, *held* that, on the dismissal of A's appeal with costs, the respondent could file a suit against S although his right to execute the decree against A was barred by limitation. ABDUL SAMAD v. RAJA SIR INDAR KISHOR SINGH, **136 P.R. 1892.**

(5266)—*O.* 41, *r.* 10 (=*Civ. Pro. Code*, 1882, *s.* 549)—*Security for costs—Poverty of appellant.*—No general rules can be laid down by which the exercise of the discretion conferred by s. 549 of the Civ. Pro. Code, should be governed ; but the mere fact of the poverty of an appellant, standing by itself and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs. JIWAN ALI BEG v. BASA MAL, **8 A. 203, F.B.=A.W.N. 1886, 310.** [*R.*, U.B.R. 1892—1896, Vol. II, 279.]

(5267)—*O.* 41, *r.* 10 (=*s* 549, *Civ. Pro. Code*, 1882)—*Rejection of appeal—Application to have it restored on furnishing the required security—Limitation.*—After an appeal has been rejected under s. 549, Civ. Pro. Code, the applicants may apply to have it restored on furnishing the required security. No special period of limitation being provided for such an application, the article of the Limitation Act which applies is art. 178. NGA LU DOK v. MI SAN BAING, **U.B.R. 1908, 1st Quarter, Limitation, p 5.** (U B.R 1892—1896, Vol. II, 272, 8 A. 315, 18 A. 101, *R.*)

(5268)—*O.* 41, *r.* 10 (=*s.* 549, *Civ. Pro. Code*, 1882).—It has been the practice to follow

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the Code of Civil Procedure in matters of procedure unprovided for in the Civil Justice Regulations and cases may arise where the application of s. 549, Civ. Pro. Code, may be justified. It is a provision operating to restrict the right of appeal and should when applied, be applied with great caution and discretion. MA VI v. MAUNG MYAT KYAW, **U.B.R. 1892—1896, Vol. II, 279.** (7 A. 543, 8 A. 203, 21 C. 526, 14 C. 533, 13 B. 458, *R.*) [*R.*, U.B.R. 1908, 1st Qr., Limitation 5.]

(5269)—*O.* 41, *r.* 10 (=*Civ. Pro. Code*, 1877, *s.* 549)—*Security for costs—Discretion of Judge to dismiss appeal, if security not furnished as required.*—Where a District Judge, on the application of the respondents, ordered the appellants to give security for the costs of the respondents within five days, and that such sureties should undertake to pay the respondent's costs, if the same were not paid by the appellants within ten days from the date of the decision awarding costs, *held* that the Judge was exercising properly the discretion vested in him by law in dismissing the appeal for failure to furnish security for costs within the appointed time, when the security bond furnished was not drawn in the terms of the Judge's order. DWARKA DAS v. SOHAN LAL, **A.W.N. 1881, 35.**

(5270)—*O.* 41, *r.* 10 (=*Civ. Pro. Code*, 1882, *s.* 549)—*Security for costs of appeal, no extension after expiry of period fixed for giving it.*—S. 549 of the Code of Civil Procedure is imperative, and when once the time for finding security for the costs of an appeal has been allowed to expire, it cannot be extended. SHRAJUDIN v. KRISHNA, **11 M. 190.** (1 A. 687, *F.*) [*Not F.*, 16 B. 263 ; *R.*, 21 B. 576.]

(5271)—*O.* 41, *r.* 10 (=*Civ. Pro. Code*, 1882, *s.* 549)—*Appeal—Security for costs—Poverty.*—S. 549 of the Civ. Pro. Code, was not intended by the legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance ; and an application under that section cannot be granted merely on the ground that the appellant is not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. LAKHMI CHAND v. GATTO BAI, **7 A. 542=A.W.N. 1895, 127.** (3 B. 241, *F.* ; 3 M. 66, 18 W.R. 102, *R.*) [*R.*, U.B.R. 1892—1896, 279.]

(5272)—*O.* 41, *r.* 10 (=*s.* 549, *Civ. Pro. Code*, 1882)—*Appeal rejected—Discretion of Court.*—Where, the order of the High Court demanding security under s. 549, Civ. Pro. Code, 1882, for the respondents' costs not being complied with in due time, the Court, exercising their discretion, refused to extend the time and rejected the appeal under that section, *held*, that this was not a case with which the Privy Council ought to interfere. *N.B.*—In this case, three months had been allowed, and it had been found by the High Court that from the plaintiff's (appellant's) own statement "it was clear that he

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had not taken such steps as with reasonable probability would have enabled him to furnish the security in time;" and it was, therefore, that their Lordships refused to interfere. MADHU SUDAN DAS v. ADHIKARI PRAPANNA, **17 C. 816=17 I.A. 9, P.C.=5 Sar. 496.**

(5273)—*O. 41, r. 10 (=Civ. Pro. Code, 1882, s. 549)—Security for costs*—To justify the use of the provisions of s. 549 of the Civ. Pro. Code, very clear and satisfactory ground must be shown, more particularly when it is remembered that failure to give the ordered security involves the rejection of the appal. In this case, the application contained only unsworn statements of a very vague character and there was no affidavit, and it was *held* that upon such materials to require the appellant to deposit the costs of the suit in the Court below and of the appeal to the High Court would be a wrong exercise of the discretion vested in it by law. *Held*, further, that should the respondent be so advised, there was nothing to prevent him from putting in a fresh application, taking the precaution of accompanying it by a clear and satisfactory affidavit. CATHERINE BACHMAN v. J. A. H. BACHMAN, **A.W.N. 1884, 103.**

(5274)—*O. 41, r. 10 (=Civ. Pro. Code, 1882, s. 549)—Security for costs—Poverty of appellant—Delay in applying for security.*—This was an application by the respondents in an appeal from an original decree for security for costs. The application was preferred on the 21st August, 1883. The appeal had been preferred on the 15th December, 1881. In the meanwhile, the appellants had incurred considerable expense in printing their evidence and preparing for the hearing of the appeal. It was however admitted on behalf of the appellants that they were her sons without means and were unable to give security. *Held* that the mere poverty of the appellants was, of itself, no sufficient ground for requiring them to find security for costs, but when it was alleged, as in the present case, that they had brought a merely speculative suit in the sense that they were mere dummies in the proceedings, and that their father was the real promoter of the litigation, it was necessary to peruse the judgment of the lower Court for the purpose of ascertaining, in a general way, whether there were grounds for bringing the defendants into Court. Upon consideration of the terms of that decision, and looking at the great delay on the part of the respondents in making this application for security, the Court was not disposed, at that late stage, virtually to stop the appeal, and the respondents, petition was accordingly refused. DALIP SINGH v. AZIM ALI KHAN, **A.W.N. 1884, 99.**

(5275)—*O. 41, r. 10 (=s. 549, Civ. Pro. Code, 1882)—Appeal—Order rejecting application for rehearing of appeal dismissed under s. 549.*—No appeal lies against an order refusing to re-admit an appeal rejected on the ground of the failure of the appellant to furnish security

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for the costs of the respondent under s. 549 of the Code of Civil Procedure. FIROZ BEGAM v. ABDUL LATIF, **5 A. L.J. 109=A.W.N. 1908, 53=3 M.L.T. 221=30 A. 143.** (18 A. 315, *R.*) [*R.*, 4 M.L.T. 416=19 M.L.J. 304.]

(5276)—*O. 41, r. 10 (=s. 549, Civ. Pro. Code, 1882)—Order to furnish security made by appellate Court—Non compliance with the order—Dismissal of appeal—Second appeal to High Court against the order.*—No second appeal lies to the High Court against an Appellate Court's order dismissing an appeal for non-compliance with its order directing the appellants to furnish security for the respondent's costs within a time fixed. SINGANI MUPAN v. KRISHNA CHAR, **8 Ind. Cas. 436.** (18 A. 101, *F.*)

(5276-*a*)—*O. 41, r. 10—Security for costs of appeal—Discretion of the Court—Inability of appellants to pay costs—Appeal by Government servant—Interest of the Government—Nature of security—Bond of the Security of State for India in Council.*—When the plaintiff-respondent applies under O. 41, r. 10 of the Code for security for the costs of the appeal and of the original suit, in view of the fact that the defendants appellants have no immoveable property and are in impecunious circumstances, and that somebody else who is not a party to the suit but has an interest in it has been defraying the costs of the litigation. *Held*, that it was a case where the Court should exercise its discretion in directing security for the costs to be given. D. WESTON v. PEARY MOHAN DAS, **16 C.W.N. 119.**

(5277)—O. 41, r. 10—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 18 A. 101=A.W.N. 1895, 238.

(5278)—O. 41, r. 10—*See* PRACTICE AND PROCEDURE, 3 M. 66.

(5279)—O. 41, r. 10—Second appeal—Security for costs—Amount not fixed—Security not furnished—Liability of appeal to dismissal—*See* PRACTICE AND PROCEDURE, 9 A. 164=A.W.N. 1887, 7.

(5280)—O. 41, r. 10—*See* RELIEF, 9 B.L.R. 11=17 W.R. 432.

(5281)—O. 41, r. 10—*See* RULES OF HIGH COURTS AND SUPREME COURTS—NORTH-WEST PROVINCES, A.W.N. 1889, 147.

(5281-*a*)—O. 41, r. 10—*See* NOS. 117, 1536, 1827, 1959, 2315, 2318, 2845-*a*, 4833, *supra*.

(5282)—*O. 41, r. 10, s. 141 (=Civ. Pro. Code, 1882, ss. 549, 647)—Letters Patent appeal in mofussil case—Security for costs.*—A respondent in a Letters Patent appeal preferred against the decision of a single Judge of the High Court in a mofussil case cannot apply for security being demanded from the appellant for costs. S. 549, Civ. Pro. Code, applies only to appeals preferred to the High Court from subordinate Court subject to its appellate jurisdiction, and not to appeals preferred to the High Court under

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art. 15 of the Letters Patent from the judgment of one of its own Judges. The argument that s. 647, Civ. Pro. Code, applies to Letters Patent appeals, and that therefore the provisions of s. 549 are extended to Letters Patent appeals, is untenable. SESHA AYYAR v. NAGARATHNA LALA, **27 M. 121.** (25 M. 555, *Rel. on.*)

(5283)—*O.* 41, *r.* 10, *O.* 25, *r.* 2 (=*ss.* 549 *and* 381, *Civ. Pro. Code*, 1882)—*Rejection of appeal under s.* 549—*Application for restoration not maintainable.*—As there is no provision in s. 549 of the Code, similar to that contained in s. 381 permitting an appellant whose appeal has been rejected under s. 549 to apply for an order setting the dismissal aside, application for restoration of the appeal does not lie. SANKARALINGA CHETTI v. ANNAMALAI CHETTI, **4 M.L.T. 416=19 M.L.J. 304=4 Ind. Cas. 165.** (30 A. 143, *F.*; 8 A. 315, *Cons & D.*)

(5284)—*O.* 41, *r.* 10 (2) — *Order rejecting appeal for failure to furnish security for costs—Appeal.*—*Held* that an order rejecting an appeal under O. XLI, r. 10 (2), Civ. Pro. Code, is not appealable. FATEH SINGH v. RAMMA SINGH. **14 O.C 40=9 Ind. Cas. 748.** (18 A. 101, 13 O.C. 59, *R.*)

——O. XLI, r. 11 (=1882, s. 551=1877, s. 551).

(5285)—*O.* 41, *r.* 11 (=*s.* 551, *Civ. Pro. Code*, 1882)—*Judgment.*—*Held*, that the dismissal of an appeal, under s. 551, by a Court, whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment according to s. 574 of the Code. PANDIT MAIKU LAL v. MUSSAMMAT GULKANDI, **9 O.C. 32.** (25 C. 97, *F.*)

(5286)—*O.* 41, *r.* 11 (=*s.* 551, *Civ. Pro. Code*, 1882)—*Notice of appeal—Drawing up of decree.*—When an appeal is heard under this section, notice of the day of hearing must be given to the appellant though he may say that he does not intend appearing at the preliminary hearing. Even though an appeal is heard under this rule, the Court is not relieved from the necessity of drawing up a decree and in doing so the Judge has no authority to delegate the signing of decrees to a subordinate ministerial officer. KHUSHALA v. KHUSHWAQT RAI, **7 P.R. 1888, Rev.**

(5287)—*O.* 41, *r.* 11 (=*old s.* 551)—*Appeal rejected—Respondent not summoned—Necessity for decree.*—Even though a Court of appeal rejects an appeal without summoning the respondent, a decree should be drawn up in accordance with the judgment in the usual manner. SHERA v. RAMMAN SHAH, **9 P.R. 1900.** [*R.*, 48 P.R. 1906=104 P.L.R. 1906.]

(5288)—*O.* 41, *r.* 11 (=*s.* 551, *Civ. Pro. Code*, 1882) — *Notice of hearing not given—Disposal of appeal—Effect.*—An appeal cannot be disposed of or dismissed for default when no notice of the date of hearing the appeal was given to the parties. GURDIT SINGH v. SARDAR JAWALA SINGH, **19 P.R. 1892, Rev.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5289)—*O.* 41, *r.* 11 (=*old s.* 551)—*Appeal in Revenue Courts—Notice of time and place.*—Revenue Courts must follow the same rules as those of Civil Courts in the matter of fixing dates and places for hearing suits and appeals. Where a Collector disposes of an appeal in camp without giving notice of place of hearing, he may be asked to rehear the appeal after giving notice to the parties of the date and place of hearing. BAHALA v. MAMRAJ, **7 P.R 1892, Rev.** [*R.*, 8 P.R. 1902, Rev.=12 P.L.R. 1903; *Cited*, 37 P.R. 1904.]

(5290)—*O.* 41, *r.* 11 (=*old s.* 551)—*Default of non-appearance—Dismissal.*—If the appellant or his pleader does not appear on the day fixed for the hearing of appeal, the appeal shall be dismissed. GOPAL SINGH v. KHUSHAL SINGH, **4 P.R. 892, Rev.**

(5291)—*O.* 41, *r.* 11 (=*Civ. Pro. Code*, 1882, *s.* 551)—*Duty of Court.*—The powers conferred by s. 551 of the Code should be very sparingly exercised by Courts of first appeal and only in very exceptional cases. MAHRU BEGAM v. GILPIN, **A.W.N. 1883, 221.**

(5292)—*O.* 41, *r.* 11 (=*s.* 551, *Civ. Pro. Code*, 1882)—*Appeal—Summary dismissal—District Judge—Judgment.*—In dismissing an appeal under s. 551 of the Civ. Pro. Code, a District Judge is not relieved from the necessity of writing a judgment, however short, which would show the points raised, the decision thereon and the reasons therefor. PUTTAPA v. YELLAPPA, **5 Bom. L.R. 233.**

(5293)—*O.* 41, *r.* 11 (=*s.* 551, *Civ. Pro. Code*, 1882)—*Dismissal of appeal under, after issue of notice to respondent.*—In this case notice of the appeal was issued to both the respondents, was served on one of them and was not served on the other as he was dead and the lower Court dismissed the appeal professing to act under s. 551 of the Code. *Held*, the lower appellate Court was wrong in having acted under the said s. 551 since that section empowers an appellate Court to dismiss an appeal without and before, but not after, sending notice of the appeal to the Court against whose decree the appeal has been made and without service of notice on the respondent and, as in the present case notice, had been issued to the respondent, the procedure of s. 551 was inapplicable. HAMID HUSAIN v. BHOLA NATH, **A.W.N. 1906, 186.**

(5294)—C. 41, r. 11—*See* APPEAL—DISMISSAL OF APPEAL, 100 P.R. 1879, 139 P.R. 1879.

(5295)—O. 41, r. 11—*See* APPELLATE COURT—DUTY OF APPELLATE COURT, 24 P.R. 1881.

(5296)—O. 41, r. 11—Presentation of time-barred appeals—Practice—*See* LIMITATION ACT, 1908, s. 12, 5 L.B.R. 15=2 Ind. Cas. 359.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5297)—O. 41, r. 11—*See* NOS. 2041, 2388, 2389, 2390, 2802-*b* 3026, 4628, *supra*, and NO. 5677, *infra*.

(5298)—*O. 41, r. 11, s. 114, O. 47, r. 1 (=ss. 551, 623, Civ. Pro Code, 1882)—Appeal, dismissal of—Review—Jurisdiction.*—When an appeal is dismissed under s. 551 of the Code of Civil Procedure, the effect of the dismissal is to affirm the decree appealed against, which becomes merged in the decree of dismissal of the appellate Court. When, therefore, an appeal has been dismissed under s. 551, Civ. Pro. Code, the Court which made the decree appealed against has no jurisdiction to review its judgment or decree. PEARY MOHAN MUKHERJEE v. MOHENDRA NATH MANNA, **4 C.L.J. 566.** (24 C. 759, *Appl.*; 21 B. 548, *Diss. from.*) (*F.*, 30 A. 290=5 A.L.J. 584=A.W.N. 1908, 109; *R.*, 11 C.L J. 81.]

(5299)—O. 41, r. 11 and s. 152—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, **11 C.L.J. 159=5 Ind. Cas. 261.**

(5300)—*O. 41, r. 11, O. 20, r. 6, s. 152 (=ss. 551, 206, Civ. Pro. Code, 1882)—Effect of dismissal of appeal—Amendment of decree—Civ. Pro. Code, s. 206.*—*Held*, that the dismissal of an appeal under s. 551 of the Code of Civil Procedure is a decree and supersedes the decree of the Court below. The Court, therefore, which has taken action under s. 551 is the only Court which has jurisdiction to amend the decree under s. 206 of the Code of Civil Procedure. ASMA BIBI v. AHMAD HUSAIN, **A.W.N. 1908 109=5 A.L.J. 584=30 A. 290** (24 C. 759, 4 C.L.J 566, 22 M. 293, *F.*; 21 B. 548, *Diss.*; 15 A. 367, 2 A. 819, 26 M. 91, 10 B.L.R. 101, 16 C. 250, *R.*)

(5301)—*O. 41, rr. 11, 17—"Dismissed for default," meaning of—Pleader present but unable to argue case owing to physical disability—Revision.*—The dismissal of an appeal for default implies that the appellant was not present at the hearing of the appeal either in person or by a pleader. Therefore where a pleader for an appellant is present but is prevented by physical disability from arguing the case, and the Judge dismissed the appeal, such dismissal, it was held, was not for default. A revision can lie to the High Court from such dismissal. SHEOALAMBH SINGH v. BODHAI SINGH, **9 Ind. Cas. 887.**

(5302)—*O. 41, rr. 11, 30, 31 (=ss. 551, 571, 574, Civ. Pro Code, 1882)—Subordinate Court dismissing appeal summarily—Discretion to send for records—Judgment, it must be recorded—Question of sufficiency of judgment.*—There are no grounds for limiting the discretion given by the Legislature to a Court of appeal to send for the records or not, before proceeding to dismiss an appeal under s. 551 of the Civ. Pro. Code. Whether the judgment of a Court of Appeal dismissing an appeal under s. 551 has sufficiently complied with the provisions of s. 574 of the Code must be decided upon the facts of the particular case, and no general rule in regard to it can be laid down. *Per Coxe, J.*—S. 551 of the Code is not controlled by s. 574. *Per Richardson, J.*—When a Subordinate Court dismisses an appeal under s. 551, it is bound under s. 571 to record a judgment, and the judgment must be sufficient to meet the requirements of s. 574. But provided it substantially meets the requirements of the law, it is not necessarily defective because it is brief or because it does not repeat or recapitulate all that is contained in the judgment of the Court of first instance. PACHI DASSI v. BALA DAS, **13 C.W.N. 1031=2 Ind. Cas 405.** (25 C. 97, 5 Bom L.R. 233, 5 C.L. J. 348, 30 A. 319, 13 C.W.N. 143, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5303)—*O. 41, rr. 11, 31 (=ss. 551 and 574, Civ. Pro. Code, 1882)—Appeal, summary dismissal of—Judgment, requirements of.*—Where an appellate Court, other than a High Court, dismisses an appeal under s. 551, it must write a proper judgment. When, after stating the nature of the appeal, the District Judge says "The lower Court has dealt with all the necessary points and there is no reason shown for differing from the views expressed." *Held*, the judgment substantially complied with the requirements of s. 574. RAKHAL CHUNDER TEWARI v. SATINDRA DEB RAI, **6 C.L.J. 348.** (25 C. 97, *D.*) [*Diss.*, 2 Ind. Cas. 405=13 C.W.N. 1031.]

(5304)—O. 41, rr. 11, 31—*See* JUDGMENT—FORM AND CONTENTS, 25 C. 97=1 C.W.N. 692.

(5305)—*O. 41, rr. 11, 31 and O. 20, r. 9—Summary dismissal of appeal—Whether governed by r. 31—O 20, r. 9—Decreed area—Area according to decreed boundaries—Discrepency—Procedure in execution.*—The provision for summary dismissal of an appeal under O. 41, r. 11, Civ. Pro. Code, 1908, is not governed by the provision relating to judgments in O. 41, r. 31. (25 C. 97, 5 Bom. L.R. 233, *Not F.*; 30 A. 319, 13 C.W.N. 1031, *R.*) Procedure to be followed in identifying land in execution proceedings where the decreed area of land happens to be larger than the area according to the decreed boundaries of the land. (O. 20, r. 9.) HAJI ABDUL RAHIM KHUDABUX v. KHANUMAL BOLOMAL, **4 S.L.R. 184.** (5 B. 208, *R.*)

(5306)—O. 41, rr. 11, 35 (=*Civ. Pro. Code, ss. 551 and 579 of 1877*).—An order of adjudication under s. 551 is a decree, and it is clear from s. 579 that the procedure authorised under s. 551, does not dispense with the necessity of drawing up a judgment in the way prescribed by s. 574. ROYAL REDDI v. LINGA REDDI, **3 M. 1.** [*R.*, 24 C. 759, 8 P.R. 1903, Rev.=33 P.L.R. 1904, 30 A. 290=A.W.N. 1908, 109=5 A.L.J. 584.]

——O XLI. r. 12 (=1882, s. 552=1877, s. 552 =1859, s. 344.)

See APPEAL.

See APPELLATE COURT.

See CIV. PRO. CODE, 1908, ss. 96 to 99.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

(5307)—*O. 41, r. 12—Appeal it may be limited to specifi-d grounds—Jurisdiction of appellate Court—B ngal Tenancy Act (VIII of 1885) ss. 52, 105 and 106—Enhancement of rent for increase of area within specified boundaries—Increase of area, proof of.*—It is not competent to a Court of appeal under O. 41, r. 12 of the Code to restrict an appeal to some specified grounds in admitting the appeal, and when an appeal is admitted, the whole appeal and not any selected ground is open to discussion. Where, in a proceeding under s. 105, Bengal Tenancy Act, questions are raised and decided which properly fall within s. 106, a second appeal lies. (37 C. 30, *R.*) In a suit for enhancement of rent on the ground of any increase in area, the landlord must prove the area for which rent has been previously paid as well as the area now held by the tenant, and that such area is in excess of the original area. Where therefore a landlord proved that lands were once measured according to a known standard, that the rent was assessed on that measurement, that the area as well as the rent payable was entered in the *kabuliyats*, and that the area of the lands measured by the same standard is in excess of the original area. *Held*, that, unless it is established that the rent payable was a consolidated rent for lands within specified boundaries irrespective of the precise quantity, the landlord was entitled to claim additional rent. (20 C. 579, 6 C.W.N. 318, *Expl. & D.*; 24 C. 251, 5 C.L.J. 538, *R.*) Where it is specifically shown that the area of a land was ascertained by measurement and rent assessed on such measurement, the mere fact that boundaries of the land are mentioned in the *kabuliyat* does not exclude the operation of s. 52, Bengal Tenancy Act. In setting additional rent for increased area it is open to the Settlement Officer, in consideration of possible errors in the original measurement, to allow the enhancement at a somewhat reduced rate. LUKHI NARAIN SEROWJI v. SRI RAMCHANDRA BHUIYA, **15 C.W.N. 921.**

(5308)—O. 41, r. 12—*See* PRACTICE AND PROCEDURE, 4 N.L.R. 166.

(5308-*a*)—O. 41, r. 12—*See* NO. 3027, *supra*.

——O. XLI, r. 13 (=1882, s. 550=1877, s. 550 =1859, s. 343).

(5309)—O. 41, r. 13—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 1 Agra Mis. 11.

(5310)—O. 41, r. 13—*See* SECURITY FOR COSTS, A.W.N. 1898, 241.

——O. XLI, r. 14 (=1882, s. 553=1877, s. 553 =1859, s. 345).

(5311)—*O. 41, r. 14 (=old s. 553)—Revenue Court—Notice of appeal.*—A Revenue Court also is bound to give to the other party notice of the date of hearing an appeal to give him an opportunity for being heard in support of the order appealed against. BALDEO DAS v. BISHAMBAR, **10 P.R. 1895, Rev.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*

(5312)—*O. 41, r. 14 (=s 553, Civ. Pro. Code, 1882)—Date not fixed—Hearing of appeal—Legality of.*—An appeal cannot be heard and decided without fixing a date for hearing or without giving the respondent an opportunity for being heard. NAUROZ v. FARZALDAD, **9 P.R. 1890, Rev.**

(5313)—*O. 41, r. 14 (=old s. 553 and s. 345 of 1859)—Notice of appeal—Deposit of talabana, Time for—Procedure.*—An appellant is entitled to the whole time allowed by the High Court in transmitting notice of an appeal to a Court below and ought to be permitted to deposit his tulubanah and to cause service of the notices any time within the period limited. If denied this liberty, he ought to come before the High Court with a substantial application for the orders of the High Court. RUNGO DABEE BOYSTOBEE v. HUREE NARAIN OOPADHYA, **11 W.R. 138.**

(5313-*a*) O. 41, r. 14—*See* No. 2908, *supra*.

(5314)—O. 41, rr. 14, 15—*See* LIMITATION ACT, 1908, art. 11, 24 W.R. 411.

(5315)—*O. 41, rr. 14, 22 (=Civ. Pro. Code, 1882, ss. 553, 561)—Notice of objection—Date of service of notice of day originally fixed for hearing appeal.*—The service referred to in s. 561 as the service on the respondent or his pleader under s. 553 of notice of the day fixed for hearing the appeal only applies to the service of a notice of the original day fixed and the service of a subsequent notice of a postponed date does not give a respondent a fresh opportunity of filing a memorandum of objection. JAGANNATH v. RAMKISHEN, **7 C.P.L.R. 85.** (8 B. 559, 11 B. 693, *D.*)

—— O. XLI, r. 15 (=1882, s. 554=1877, s. 554 =1859, s 345.)

(5315-*a*)—O. 41, r. 15—*See* NO. 5314, ***supra.***

——O. XLI, r. 16 (=1882, s. 555=1877 s. 555.)

(5316)—*O. 41, r. 16 (=Civ Pro. Code, 1882, s. 555)—Duty of Court to hear respondent.*—This section distinctly requires an appellate Court to hear the respondent before determining an appeal, unless it dismisses the appeal at once. ANOOPCHAND HAZARIMAL v. HIRA BAPU ZAMINDAR, **3 C.P.L.R. 178.**

(5317)—*O. 41, rr. 16, 17 (=Civ. Pro. Code, 1882, ss. 555, 556)—Appeal dismissed "for default of prosecution"—Appellant present in person but declining to plead.*—Where, upon the day fixed for the hearing of an appeal the appellant's pleaders were not present in Court, and the appellant who was present declined to support the appeal, it was held that the appeal was properly dismissed for default of prosecution. GOPAL BAKHSH v. DAULAT RAI, **A.W.N. 1896, 92.**

—— O. XLI, r. 17 (=1882, s. 556=1877, s. 556= 1859, s. 346.)

See APPEAL—DISMISSAL OF APPEAL.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5318)—*O.* 41, *r.* 17 (=*s.* 556, *Civ Pro. Code*, 1882)—*Pleader unable to argue an appeal for want of instructions—Sufficient appearance—Decision.*—On the date fixed for the hearing of an appeal, the pleader for the appellant informed the Court that he was unable to argue the case on behalf of his client, as no one had come to instruct him until that moment in Court. He, however, did not withdraw from the case. *Held*, that the Court was justified in refusing to postpone the case. The appellant was sufficiently represented. The Court should not have dismissed the appeal for default, but should have gone into the merits of the case and passed orders accordingly. MADAN LAL v. GOBARDHAN DAS, **2 Ind. Cas. 621.** (34 C. 403, *R.*)

(5319)—*O.* 41, *r.* 17—*Appeal—Dismissal for default—Case called out and dismissed before rising of Court—Sufficient cause for absence of party—Party not to suffer on account of absence of pleader.*—Where an appeal was called at an early part of the day and dismissed for default on the appellant and his pleader not appearing to conduct the appeal, the Chief Court set aside the order of dismissal, and observed that the lower appellate Court should have given a further opportunity, during the course of its sitting, of showing whether or not he was present, in person or by pleader, before it rose for the day. The pleader's absence in a case need not be satisfactorily explained, if the appellant can give a reasonable excuse for his own absence. SHANKAR DAS v. NARAIN DAS, 34 **P.L.R. 1910=8 Ind. Cas. 226.** (113 P.R. 1876, *R.*)

(5320)—*O.* 41, *r.* 17 (=*old s.* 556)—*Application to set aside ex parte order—Aplication to readmit it—Order of rejection—Appeal—Review.*—There is no appeal from an order rejecting an application to re-admit an application to set aside an *ex parte* decree dismissed for default. GANDAMAL v. MUSSAMMAT SUGHRA BIBI, **5 P. R. 1900.**

(5321)—*O.* 41, *r.* 17.—Where a Judge on the non-appearance of the appellant goes into the merits of the case, and gives judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission is not one for review, but must be entertained under s. 347. MOHESH CHUNDER BOSE v. THAKOOR DASS GOSSAMEE, **20 W.R. 425.** [*R.*, 34 C. 403=11 C.W.N. 329=5 C.L.J. 247, F.B.]

(5321-*a*)—*O.* 41, *r.* 17 (=*old s.* 556 *of* 1882).—Where a case is remanded to the lower appellate Court, and the appellant neither appears nor produces evidence, the Judge is right in dismissing the appeal on default with costs; and the remedy lies in an application under Act VIII of 1859, s. 347. TRILOKE CHUNDER SEN v. AUKHIL CHUNDER SEN, **21 W.R. 65.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5322)—*O.* 41, *r.* 17 (=*s.* 556, *Civ. Pro. Code*, 1882=*s.* 346, *Civ. Pro. Code*, 1859)—*Dismissal of appeal for non-appearance.*—Where both parties make default in appearing at the hearing of an appeal, the Court must dismiss the appeal, and not go into the merits and reverse the decree. MANICKRAM v. ROOPNARAIN SINGH, **Marsh 5=1 Ind. Jur. O.S. 86.**

(5323)—*O.* 41, *r.* 17 (=*Civ. Pro. Code*, 1859, *s.* 346)—*Order dismissing appeal for default.*—An order dismissing an appeal for default under s. 346, Civ. Pro. Code, is not a new decree from the date of which the period of limitation begins to run anew. VIRASAMY MUDALI v. MANONMANY AMMAL, **4 M.H.C. 32.** [*Cons.*, 5 M.H.C. 215.]

(5324)—*O.* 41, *r.* 17 (=*Civ. Pro. Code*, 1882, *s.* 556)—*No appeal from dismissal of appeal for default*—An order under s. 556 dismissing an appeal for default is not a "decree" within the definition of that term in s. 2 of the Code and no appeal lies therefrom. MANNOO RAWOOT v. GOVIND RAO GANAPAT CHITNAVIS. **10 C.P.L.R. 32.** (15 A. 359, 23 C. 115, *F.*; 2 M. 75, *D.*; 16 B. 23, *R.*) [*R.*, 17 C.P.L.R. 1.]

(5325)—*O.* 41, *r.* 17 (=*Civ. Pro. Code*, 1882, s. 556)—*Appellant's pleader not prepared to go on with case—Legality of order dismissing appeal for default—Appealability of order dismissing appeal.*—Where an appellant's pleader though present is not prepared to go on with the case, the Court is not justified in dismissing the appeal for default. An order dismissing the appeal for default is not appealable. JHALKAN SINGH v. UTTAMCHAND, **17 C.P.L.R. 1.** (10 C.P.L.R. 32, *F.*)

(5326)—*O.* 41, *r.* 17 (=*Civ. Pro. Code*, 1882, s. 556)—*Failure of appellant to appear before first Court after remand—Legality of dismissal of appeal for default—Proper procedure.*—Where an appellate Court remanded a case for the trial of certain issues and the appellant failed to appear before the Court to which the case was remanded, the appellate Court could not dismiss the appeal for default of appearance before the first Court, but should have dealt with the appeal on the merits. DHONDYA v. MT. SITA, **8 C.P.L.R. 69.**

(5327)—*O.* 41, *r.* 17 (=*Civ. Pro. Code*, 1882, s. 556)—*Remanded appeal—Duty of parties to ascertain date of further hearing—Absence of parties on date fixed—Duty of Court to dismiss appeal.*—The parties to a remanded appeal should apply to the Court to which it has been remanded to fix a date for the further hearing of the case or should ascertain from that Court what date has been fixed therefor. If on the date fixed for such further hearing the parties do not appear, it is the duty of the Court to dismiss the appeal and not to proceed with it in their absence. ANAND RAO v. BALARAM BAPU, **2 C.P.L.R. 32.** [*R.*, 4 N.L.R. 166.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5327-*a*)—*O.* 41, *r.* 17—*Restoration—Grounds for—Discretion of Court--Disciplinary powers of Court.*—O. XLI, rr. 17 and 19, Civ. Pro. Code, lay down the law when a case ought to be restored to file. The difference on the point in the old and new Codes pointed out. The Court ought to grant restoration where the default is explained satisfactorily. The Court has power to restore also on other grounds. The legislature does not intend to give the respondent an absolute right to the judgment passed for default, without any judicial adjudication on the merits. English Courts do not feel fettered in their discretion in cases of this kind. English Courts have restored cases dismissed for default, when the failure to appear was due to the pleader's mistake or negligence. In India also the Court has acted likewise. The Court has ample disciplinary powers over pleaders and to subject parties to costs. MURUGA CHETTY v. RAJASAMI, **1912, M.W.N. 332 = 22 M.L.J. 284 = 11 M.L.T. 280.**

(5328)—O. 41, r. 17—*See* SET-OFF, 5 W.R. Mis. 22.

(5329)—O. 41, r. 17—*See* SPECIAL OR SECOND APPEAL--APPEALS AGAINST ORDERS, WHEN LIE AND WHEN NOT, 6 M.H.C. 1.

(5329-*a*)—O. 41, r. 17—See Nos. 90, 91, 92, 118, 119, 1828, 2711, 5301, 5317, *supra.*

(5330)—O. 41, r. 17, s. 100, O. 43, r. 1—*See* APPEAL—DISMISSAL OF APPEAL, 113 P. R. 1879.

(5331)—*O.* 41, *r.* 17, *s.* 104, O. 43, *r.* 1 (= *ss.* 556, 588, *Civ. Pro. Code*, 1882)—*Appeal—Non-appearance of appellant—Appeal heard on merits.*—Where an appellate Court in a case in which the appellant made no appearance whatever, instead of dismissing the appeal for default proceeded to hear it upon the merits and delivered judgment thereon. *Held* that the decision of the Court must nevertheless be regarded as a dismissal under s. 556 of the Code of Civil Procedure and no appeal would lie therefrom. MURDARI v. MARIAM BIBI, **A.W.N. 1893, 140** (14 A. 361, 15 A. 359, 3 A. 519, 8 A. 277, 20 W.R. 425, *R.*)

(5332)—*O.* 41, *r.* 17, *s.* 104, *O.* 43, *r.*1 (= *Civ. Pro. Code*, 1882, *ss.* 556, 588)—*Order dismissing an appeal for default—Right of appeal against—Special remedy—Order refusing to re-admit an appeal, Right of appeal against.*—"Decree" is defined in s. 2 of the Code to mean "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court," &c. Certain orders are included in the definition—It is difficult or impossible to see how an order which on the mere ground of the non-appearance of the appellant dismisses an appeal for default can be regarded as "the formal expression of an adjudication upon a right claimed." There has been no adjudication the appellate Court on the right claimed and the order is no formal expression of such a matter. No appeal lies from an order dismissing an appeal for default under s. 556. (16 B. 23, 2 M. 75, 9 A. 427, *Dissented from*; 23 C. 115, *F.*) A special remedy is granted by s. 558, and from an order under that section refusing to re-admit an appeal, there is an appeal under s. 588 (27). There is no appeal from an order dismissing an appeal for default under s. 556. MA THA DUN v. MAUNG SHWE DOK **1 L.B R. 183.**

(5333)—*O.* 41, *r.* 17, *s.* 104, *O.* 43, *r.* 1, *s.* 115 (= *ss.* 556, 588, 622, *Civ Pro. Code*, 1882)--*Appeal wrongly dismissed as for default—Remedy, by way of revision, not appeal.*—The lower Court happened to dismiss an appeal, as for default, purporting to act under s. 556 of the Civ. Pro. Code, and it appeared that, at the commencement of the hearing of the appeal, the appellant and his two pleaders were present, but one of the said pleaders who was addressing the Court went to another Court soon after the commencement of his argument and did not return, and neither the other pleader nor the appellant were prepared to proceed with the appeal. An application under s. 558 praying that the dismissed appeal be reinstated, was also rejected. Against the latter order under s. 558, an appeal was preferred to the High Court under s. 588 and that Court held that no such appeal was maintainable, but admitting it as an application or revision under s. 622 of the Court, decided that the Court had acted illegally and with material irregularity in having, under the circumstances, dismissed the appeal as for default. JAWAHIR SINGH v. DEBI SINGH, **18 A. 119 = A.W.N. 1896, 9.** [*F.*, 17 C.P.L.R. 1, 8 O.C. 261.]

(5334)—*O.* 41, *rr.* 17, 18, 19, *ss.* 100, 101 (= *Civ. Pro. Code*, 1882, *ss.* 556, 557, 558, 584 *and* 585)—*Order dismissing appeal for default—Second appeal.*—No second appeal lies from an order under s. 556 of the Code of Civil Procedure dismissing an appeal for default. GOPI KOERI v. GAJADHAR, **A.W.N. 1892, 2.** (2 A. 616, 3 A. 519, *F.*; 8 A. 354, *D.*)

(5335)—*O.* 41, *rr.* 17, 19 (= *ss.* 556 *and* 558, *Civ. Pro. Code*, 1882)—*Appeal—Adjournment—Application by pleader for, if appearance—Default—Re-admission, application for.*—An application, by a counsel or pleader, who is instructed only to apply for an adjournment, which is refused, is not an appearance, within the meaning of the Code. When in such circumstances an appeal is dismissed, the dismissal is one for default under s. 556, Civ. Pro. Code so as to entitle the appellant to apply for re-admission under s. 558 of the Code. SATIS CHANDRA MUKERJEE v. APARA PROSAD MUKERJEE, **11 C.W.N. 329, F.B. = 5 C.L. J. 247 = 2 M.L.T. 123 = 34 C. 403.** (4 C.W.N. 237, *Overruled*; 8 C.W.N. 621, *Appr.*) [*R.*, 1 S.L.R, 115, 224.]

(5336)—*O.* 41, *rr.* 17, 19 (= *Civ. Pro. Code*, 1882, *ss.* 556, 558)—*Order dismissing appeal for default, no appeal from, under Letters Patent.*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—From an order dismissing an appeal for default under s. 556 of the Civ. Pro. Code, no appeal can be preferred under the Letters Patent, the proper remedy to follow being that provided by s. 558 of the Code. It is the specific remedy, if any, provided by the Civ. Pro. Code, that must be had recourse to. The object of s. 556 is that the Judge who dismissed for default might have an opportunity of re-admitting or refusing to re-admit the appeal, and, in the latter case, an appeal has been provided by s. 588, cl. (27). POHKAR SINGH v. GOPAL SINGH, **14 A. 361=A.W.N. 1892, 30.** [*F.*, 5 A.W.N. 1895, 140, U.B.R. 1897—1901, Vol. II, 206.]

(5337)—*O.* 41, *rr.* 17, 19 (=*Civ. Pro. Code*, 1882, ss. 556, 558)—*Absence of appellant— Dismisal of appeal on merits—Application for re-admission.*—It is illegal to try and dismiss an appeal on the merits in the absence of the appellant or his pleader. Under such circumstances, the appeal could only be dismissed for default ; a dismissal on the merits would be a nullity and would be no bar to the re-admission of the appeal (under s. 588, Civ. Pro. Code, if it is not otherwise barred or inadmissible.) ZAINAK BEGAM v. MANAWAR HUSAIN KHAN, **8 A. 277=A.W N. 1886, 95.** [*R.*, 15 A.W.N. 140, 121 P.R. 1907=51 P.W.R. 1907, F.B.]

(5338)—*O.* 41, *rr.* 17, 19 (=*Civ. Pro. Code*, 1877, ss. 556, 558)— *Dismissal of appeal for default—Application for re-admission.*—Before dismissing an application for re-admission of an appeal dismissed for default, the Court should enquire into the appellant's allegations and the order should be passed after enquiry. SHIMBU NARAIN v. MUBARAK ALI, **A W.N. 1881, 22.**

(5338-*a*)—*O.* 41, *rr.* 17, 19 (=*Civ. Pro. Code*, 1882, ss. 556, 558)—*Practice—Dismissal of appeal for appellant's default—Application for re-admission of appeal—Civ. Pro. Code*, ss. 556, 558.—An appeal having been dismissed for default under s. 556 of the Civ. Pro. Code, the appellant applied, under s. 558, for the re-admission of the appeal, on the ground that, on the date of hearing, he had been absent on urgent business, that both the pleaders engaged to conduct the case on his behalf had been too ill to attend the Court, and that his general agent did not attend, because he had not been informed of the date fixed for the hearing. The Court rejected the application. *Held*, that under the circumstances, the appeal ought to be re-admitted, subject to the appellant giving security to the satisfaction of the Court below for the costs incurred by the respondent in defending the suit and appeal. RAM CHANDAR RAO v. MADHO RAO, **A.W.N. 1889, 125.**

(5339)—O. 41, rr. 17, 19—*See* LIMITATION ACT, 1908, art. 168, A.W.N. 1890, 196.

(5340)—*O.* 41, *rr.* 17, 19, s. 105 (=*ss.* 556, 558, 591, *Civ. Pro. Code*, 1882)—*Appeal —*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Order granting restoration of appeal—"Affecting the decision of the case," meaning of—Appeal from decree—Ground of objection.—The law allows an appeal from an order *refusing to grant* an application under s. 558, Civ. Pro. Code, for the restoration of an appeal dismissed for default under s. 556. But it does not provide for an appeal from an order *granting* such an application. The meaning of the words in s. 591, Civ. Pro. Code, "affecting the decision of the case," is that it must be shown that the error defect or irregularity has affected the decision of the case *on the merits*. In this view, an order under s. 558, Civ. Pro. Code, granting the restoration of an appeal dismissed for default, not being an order affecting the decision of the case on the merits, cannot, under s. 591, Civ. Pro. Code, be set forth as a ground of objection in the memorandum of appeal. GULAB KUNWAR v. THAKUR DAS, **24 A. 464 =A.W N. 1902, 136.** (22 C. 981, *R.*) [*F.*, 25 A. 280=23 A.W.N. 39, 9 C.W.N 584, 2 N.L. R, 179.]

(5341)—*O.* 41, *rr.* 17, 19, *s.* 115 (=*Civ. Pro. Code*, 1882, *ss.* 556, 558, 622)—*Dismissal of appeal on merits in absence of appellant—Revision.*—Where, in the absence of the appellant, the Court, instead of summarily dismissing the appeal under s. 556, Civ. Pro. Code, 1882, entered into the merits and dismissed the appeal, *held*, on an application for revision, that the mere fact of the lower appellate Court having gone into the merits in dismissing the appeal for default is not such an irregularity as would justify the interference of the High Court in revision. And the proper course for the applicant was to apply to the lower appellate Court under s. 559 of the Code. BRIJ LAL v. KHUBI, **A.W.N. 1884, 167.**

(5342)—*O.* 41, *rr.* 17, 30 (=*Civ. Pro. Code*, 1882, *ss.* 556, 571)—*Adjournment of appeal for pronouncing judgment—Legality of dismissal for default.*—Where an appeal is adjourned not for hearing the parties under s. 556, but for the purpose of pronouncing judgment under s 571 it cannot be dismissed on that day for default of parties. GANGADHAR KESHEO v. RAMCHANDRA, **7 C.P L.R. 1.**

—O. XLI, r 18 (=1882 s 551=1877 s. 557)

(5342 *a*)—O. 41, r. 18—*See* NOS. 2804, 5334, *supra*.

— O XLI, r. 19 (=1882, s. 558=1877, s. 558 =1859, s. 347).

(5343)—*O.* 41, r. 19—*Appeal dismissed for default—Restoration—Duty of pleader—Duty of Court—Practice.*—It is the duty of the pleaders appointed by the parties to be present and to be ready to proceed with the appeal when it is called on for hearing. It is in no way the duty of the Court to send for the pleaders, or to see whether they find it convenient or not to come to Court. SHAMBU NATH v. THE SECRETARY OF STATE FOR INDIA, **3 Ind. Cas. 120.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5344)—*O.* 41, *r.* 19 (=*s.* 588, *Civ. Pro. Code*, 1882) — "*Appellant*" *meaning of.* — Where there are two appellants and the appeal is dismissed owing to the absence of both and only one of the two applied for the re-admission of appeal and showed cause for only his non-appearance, *held* that the term "appellant" in this section and s. 556 includes a sole appellant or a group of appellants or one or more members of a group of appellants. MATHRA DAS v. MEHAR CHAND, **42 P.R. 1894.**

(5345)—*O.* 41, r. 19 (=*s.* 558, *Civ. Pro. Code*, 1882)—*Plea of illness whether sufficient cause for re-admission.*—Where an appeal is dismissed for default owing to the absence of all three appellants and then one of the three applies to have it revived on the ground of his absence being due to illness, this is not a sufficient cause for re-admitting the appeal. SHARFUDDIN v. HAJI KHAN, **33 P.R. 1888.** [*Diss.*, 42 P.R. 1894.]

(5346)—*O.* 41, *r.* 19 (=*old s.* 558)—*Application for re-admission—Absence at the particular hour—Sufficient cause to be shown—Wilful absence—No remedy.*—Though under s. 551 a day and not a particular hour is to be fixed for hearing, yet when an appeal is dismissed for default, this section requires the appellant to show cause for non-attendance at the time when the appeal was called on for hearing. Where the non-attendance of both pleader and party is wilful, relief cannot be granted. MIRAN BAKSH v. RATTA CHAND, **71 P.R. 1890.**

(5347)—*O.*41, *r.* 19—*Appeal dismissed for default of appearance-Application for re-admission when can be admitted.*—Where an appeal was dismissed for default of appearance, and an application for re-admission of appeal was made under O. XLI, r. 19, and it was not shown that the appellants were prevented from appearing, on the day fixed for hearing, by any cause whatever, except the neglect of their advocates, for which no adequate cause was put forward, *held*, the appeal was not to be re-admitted. P.V. VARIVAN CHETTY v. PO SAING, **3 L.B.R. 44 =2 Ind.Cas. 538.**

(5348)—*O.* 41, *r.* 19 (=*s.* 558, *Civ. Pro. Code*, 1882)—*Appeal dismissed in default—Sufficient cause for re-admission of an appeal.*—Where a District Judge dismissed an appeal in default at 11-30 A M., and himself left the Court at 12-30 P.M., while the appellant was preparing an application for restoration, *held* that this was a sufficient cause for re-admitting the appeal within the meaning of s. 558, Civ. Pro. Code. NABI BAKSHI v. ABU SOMAD KHAN, **69 P. W. R. 1907.**

(5349)—*O.* 41, *r.* 19 (=*Civ. Pro. Code*, 1882, *s.* 558)—*Rules of Court of the 18th of January*, 1898, *r.* 43-*A*—*Application for restoration of appeal dismissed for default—Failure to show cause for restoration—Non payment of Counsel's fees—Semble.*—That r. 43-A of the rules of Court of the 18th of January, 1898, is not *ultra vires* of the High Court, and that where an appellant, after repeated warnings from his advocate, neglects to pay the fees agreed to be paid to such advocate, and his appeal dismissed for default, the High Court will not entertain any application under s. 558 of the Code of Civil Procedure for restoration of the appeal. Per *Banerji, J. Held*, by *Aikman, J.*, that there is a discretion in applying the strict terms of r. 43-A. *In Re* BISHARAT, **A.W.N. 1898, 155.**

(5350)—*O.* 41, *r.* 19 (=*Civ. Pro. Code*, 1877, *s.* 558)—*Application for re-admission of appeal—Reasonable cause.*—Where the appellant, whose appeal had been dismissed in his absence, applied under s. 558 for re-admission of the appeal, on the ground that his pleader did not give intimation of the transfer of the appeal from the file of the Judicial Commissioner to that of the Deputy Commissioner, *held* that the appeal should be re-admitted. NARAIN SINGH v. BHEURAB CHURN PANDA, **8 C.R.L. 350.**

(5351)—*O.* 41, *r.* 19—*Cross-decree—Set-off—S.* 209, *Act VIII of* 1859, *Civ. Pro. Code.*—S. 209, Act VIII of 1859, Civ. Pro. Code, does not apply to a case in which C takes by assignment a decree obtained by A against B, and in which, on C proceeding to execute that decree B applies to set off a decree which he has against A. SHAIKH ROZEEOODEEN v. SHAIKH JEHANGEER, **5 W.R. Mis. 22.**

(5352)—*O.* 41, *r.* 19 (=*Civ. Pro. Code*, 1859, *s.* 347).—The reasons for rejecting an application for re-hearing an appeal under s. 347, Code of Civil Procedure, 1859, should be stated in the order of rejection. HURO CHUNDER DOSS CHOWDHRY v. RAM COOMAR CHOWDHRY, **2 W.R. 254.**

(5353)—*O.* 41, *r.* 19 (=1882, *Civ. Pro. Code*, *s.* 558)—*Suit decided on grounds affecting all defendants equally—Appeal—Appeal dismissed for default—Death of one defendant appellant pending appeal—Application by surviving appellant for restoration.*—A suit was decreed against several defendants on grounds common to all. The defendants appealed, and after the filing of the appeal one of them died. Ultimately the appeal was dismissed for default of appearance, no steps having meanwhile been taken to bring on to the record the representatives of the deceased appellant. *Held* that, inasmuch as it would have been competent to one only of the defendants, having regard to s. 544 of the Code of Civil Procedure to appeal against the whole decree, there could be no objection to the surviving defendants applying for restoration of the appeal. MUHAMMAD JAN v. ISMDAR KHAN, **A.W.N. 1901, 192.**

(5354)—O. 41, r. 19—*See* APPEAL—EX-PARTE CASES. 3 W.R. Mis. 23, 1 B L.R. 101 =10 W.R. 39, F.B., 2 W.R. 254, W.R. 1864, 176.

(5355)—O. 41, r. 19—*See* LIMITATION ACT, 1908, art. 168, 15 W.R. 80.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5356)—O. 41, r. 19—*See* SPECIAL OR SECOND APPEAL — RIGHT OF SPECIAL APPEAL, 5 W.R. Mis. 27.

(5356 *a*)—O. 41, r. 19—*See* NOS. 92, 114, 119, 1868 *a*, 2913-*a*, 3028, 3170, 5251, 5334, 5335, 5336, 5337, 5338, 5338-*a*, 5339, 5340, 5341, *supra*.

(5357)—O. 41, r. 19, s. 114, O. 47, 1, 4—*See* REVIEW—JURISDICTION TO REVIEW, 24 C. 350, F.B.=1 C.W.N. 21.

(5358)—O. 41, rr. 19, 21, s. 104, O. 43, r. 1—Application of—S. 588 does not apply to proceedings under s. 106 of the Bengal Tenancy Act. *See* BEN. ACT VIII of 1885, ss. 106, 109-A. 36 C. 510=2 Ind. Cas. 572.

(5359)—O. 41, r. 19, O. 43, r. 1—*See* APPEAL—DISMISSAL OF APPEAL, 141 P.R. 1879.

(5360)—O. 41, *r.* 19, O. 43, *r.* 1 *and* s. 104 *and* s. 115 (=*Civ. Pro. Code*, 1882, ss. 558, 588 (2), 622)—*Order refusing to re admit appeal from order refusing new sale—Order appealable—No revision*.—Where a Court of appeal refuses to re-admit an appeal from an order of the lower Court refusing to order a new sale the order of the appellate Court is one passed under s. 558 and as such an appeal lies from that order under s. 588 2). Consequently an application for revision of that order is not maintainable under s. 622. BAKHTAWAR SINGH v. GUNESH PANDIT, 3 C P.L.R. 106.

—O. XLI, r. 20 (=1882, s. 559=1877, s. 559 =1859, s. 73).

(5361)—*O.* 41, *r.* 20 (=*s.* 559, *Civ. Pro. Code*, 1882)—*Decree made against wrong party—Appeal by that party—Decree-holder alone made respondent—Appellate Court could not bring on record persons against whom the Court of first instance should have made decree.*—Looking at the language of s. 559, Civ. Pro. Code, apart from authority, it would appear to have been inserted to protect parties to the suit who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on is required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on, for once he is brought he may be said to acquire an interest as a result of being brought on. When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to a suit as he is no party to such appeal, and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. A decree having been made against a wrong party, it is not competent for the appellate Court, in an appeal by that party in which the decree-holder alone is made respondent, to bring on the record those persons against whom the Court of first instance should have made the decree. SUBRAMANIAM CHETTY v. VEERABHADRAM CHETTY, **4 M.L.T. 104=18 M. L J. 462.** (5 A. 267, *F*; 25 C. 569, *Not F.*; 31 C. 109, 31 C. 643, *R.*) [*D.*, 7 M.L.T. 178=20 M.L.J. 369=5 Ind. Cas. 927.]

(5362)—*O.* 41, *r.* 20 (=s 73, *Civ. Pro. Code*, 1859)—*Orders to be passed on interlocutory application—S.* 73, *Act VIII of* 1859.—It is the duty of the Court to which petitions are presented in respect of any suit pending before it to pass some distinct order thereon. When an application is made in due time by a person who has an interest in the result of the suit, praying to be added as a defendant under s. 73 of Act VIII of 1859, the application ought to be granted. KOYLASHNATH ROY v. NURENDUR KOOMAR DUTT CHOWDHRY, **5 W.R. 109.**

(5363)—*O.* 41, *r.* 20 (=*Civ. Pro. Code*, 1882, s. 559)—*Non-joinder of parties in appeal—Limitation*.—The plaintiff in a pre-emption suit died during the pendency of the suit leaving as his representatives two sons. The defendant appealed making both sons respondents. Having been defeated he again appealed, but on this occasion named only one of the representatives of the deceased plaintiff as respondent. Twenty-two days after the time for filing the appeal had expired he applied to the Court to be allowed to bring on to the record the name of the other son. On this application the Court passed the following order:—Ordered as prayed subject to any objection at the hearing on the point of limitation. UMED SINGH v. DALIP, **A.W N. 1893, 35.**

(5364)—*O.* 41, *r* 20 (=*Civ. Pro. Code*, 1859, s. 73)—*Act X of* 1859, s. 77—*Intervenor*.—Where the defendant in a suit for arrears of rent at an enhanced rate pleaded that he had sold the holding to a third party, who thereupon asked to be added as a defendant, *held* that such intervenor could not be made a party to the suit. KALINATH ROY v. ISWAR CHANDRA GHOSAL, **2 B L.R.F.B. 89.**

(5365)—*O.* 41, *r.* 20 (=*Civ. Pro. Code*, 1859, s. 73)—*Act VIII of* 1869, s. 102—*District Judge—Civil Courts—Jurisdiction—Act X of* 1859—*S.* 73, *Court to limit inquiry to issues—Intervenor*.—The words "District Judge" in s. 102, Act VIII of 1869, do not include any other appellate authority to whom, under the provision of the Civil Courts Act, appeals may be made over by the Judge, and when appeals are made under s. 26, Act VI of 1871, to the Subordinate Judge, the latter does not dispose of them under the same conclusion in respect of finality as the District Judge. [*App.*, 1 C. L R. 39, F.B.; *D*, 18 W.R. 292.] Under Act VIII of 1869, the Civil Courts have powers higher than those which were vested in the Revenue Courts by Act X of 1859, but these

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

powers need not be exercised so as to extend the relief asked for in a plaint. A Court is bound to limit its inquiry to the issues which alone are necessary for the trial of the plaintiff's right to the relief sought even where an intervenor appears, and is made a defendant under s. 73, Act VIII of 1859, unless his intervention raises a new issue. DAYAL CHAND SAHOY v. NABIN CHANDRA ADHIKARI, **8 B.L.R. 180=16 W.R. 235.** [*Appr.*, 19 W.R. 91, 19 W.R. 248, 22 W.R. 526, 24 W.R. 101, 25 W.R. 29; *App.*, 8 C. 238.]

(5366)—*O. 41, r. 20 (=Civ. Pro. Code, 1859, s. 73)—Intervention*—Onus.—In a suit for confirmation of possession and registration of names, where an intervenor states that he is in possession, he is rightly made a defendant under s. 73, Civ. Pro. Code, 1859. This does not shift the burden of proof from the plaintiffs who are bound to prove their own case. KUNJAL SAHU v. GURU BAKHSH KOER, **8 B.L.R. 184, Note=13 W.R. 362.** [*F.*, 8 B.L.R. 180=16 W.R. 235; *D.*, 7 C.L.R. 560.]

(5367)—*O. 41, r 20 (=s 559, Civ. Pro. Code, 1882)—Power of appellate Court to add a respondent after expiry of period for appeal - Limitation.*—Where it appears to the appellate Court that any person, interested in the result of the appeal, who was a party to the suit in the Court below, has not been made a party to the appeal, the Court is competent to add that person as a respondent, although the time within which an appeal might have been preferred as against him has expired. JODHISHTAR v. SANNU LAL, **1 Ind. Cas. 516.** (14 A. 154, F.B., *F.*)

(5368)—*O. 41, r. 20 (=Civ Pro. Code, 1882, s. 559)—Person interested in the result of the appeal.—Held*, that s. 559, Civ. Pro. Code, applies to parties who *qua* the suit may be interested in the result of the appeal. A plaintiff whose suit has been dismissed and who has not appealed could not be impleaded as a respondent and given a decree on an appeal against a decree passed in favour of a co-plaintiff, nor could a change be made in the order of dismissal passed against him. RAI BHOLA RAM v. RAI SETH CHAND MAL, **17 P.L.R. 1901=23 P.R. 1901.** (25 C. 565, 26 C. 109 and 46 P.R. 1892, *R.*)

(5369)—O. 41, *r.* 20 (*=s. 559, Civ. Pro. Code, 1882)—Security for costs against an appellant in forma pauperis—Jurisdiction of Court—Delay.*—Although the Court has jurisdiction to make an order for security for costs against an appellant *in forma pauperis*, such an order should be made under very special circumstances. (3 M. 66, *F.*) It is very important that applications of this nature should be made with due promptitude and should not be put in, after the bulk of the costs has been incurred on both sides. SRINIVASA SASTRIAL v. SUBRAMANIA AIYAR, **17 M.L.J. 383.** (5 C.W.N. 119, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5370)—*O. 41, r. 20 (=Civ. Pro. Code, 1882, s. 559)—Joinder of respondents in appeal.*—When certain defendants in a suit are deeply interested in the questions which have to be determined in appeal, and the decision therein would affect their interests very materially, they may be added as respondents under s. 559, Code of Civil Procedure, if they have not appealed on the decree against them, and the fact that an appeal by them would be time-barred does not affect the question of their joinder, because the discretionary power conferred on the appellate Court is not restricted by any provision of the Limitation Act. KANAGAPPA v. SOKKALINGA, **15 M. 362=2 M.L.J. 175.**

(5371)—*O. 41, r. 20 (=s. 73, Civ. Pro. Code, 1859).*—Where plaintiff claims property as duly acquired from others who would have been otherwise entitled thereto, and the Court is not satisfied of such acquisition, it ought to bring the third parties on the record under Act VIII of 1859, s. 73, and try the entire question of liability between the plaintiff and defendants. BROHMO MOYEE DOSSEE v. MUDHOO SOODUN GHOSE, **22 W.R. 278.**

(5372)—*O. 41, r. 20 (=s. 559, Civ. Pro. Code, 1882)—Parties—Addition of parties—Appellate Court—Powers of an appellate Court to add any party as respondent in appeal—Practice—Procedure.*—Plaintiff brought this suit to recover Rs. 1,000, alleging that confiding in defendant 1, she handed him Rs. 600 to be profitably invested and he assured her that the money had been lent to solvent persons and handed over a bond purporting to be executed by defendants 2 and 3. The defendants 2 and 3 having denied execution, plaintiff framed her suit so as to recover from them, if they executed the bond, and from defendant 1, if they did not. The Court of first instance holding that the bond was duly executed by defendants 2 and 3, passed a decree against them. Defendants 2 and 3, appealed to the District Court, when the District Judge under s. 559 of the Civ. Pro. Code, made defendant 1 a party to the appeal and eventually passed a decree against him. *Held*, that the District Judge was justified in making defendant 1 a party to the appeal, as he was "interested in the result of the appeal;" and that, having brought him on the record, under s. 559 of the Civ. Pro. Code, it was open to the District Judge, to vary the decree of the Court of first instance, under s. 577 of the Code, by transferring the liability to the plaintiff's claim from the shoulders of defendants 2 and 3 to those of defendant 1. KARVIRAYA v. LAXMIBAI, **3 Bom. L.R. 172.**

(5373)—*O. 41, r. 20 (=s. 559, Civ. Pro. Code, 1882)—Respondent getting a decree agains a co respondent.*—A respondent cannot get a decree against a co-respondent, when he submitted to the decree of the Court of

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instance and has not filed an appeal separately. LOHRE v. SITA, **4 A.L.J. 772=A.W.N. 1908, 4=3 M.L.T. 176=30 A. 48.** (27 A. 23, *F.*)

(5374)—*O. 41. r. 20--Suit for partition—Non-joinder of some sharers in appeal—Effect—Limitation Act (XV of 1877), art. 127—'Exclusion'—Whether non participation amounts to exclusion.*—In a suit for partition, relief cannot be given to one sharer without all the other sharers being brought before the Court. Mere non-participation of some sharers in possession of the properties is not exclusion. SAMMANTHA GRAMMANY v. DEVASIKAMONY GRAMANY, **7 M L.T. 174=20 M L.J. 364=5 Ind. Cas. 924.** (24 M. 441, 30 M. 201, *F.*; 11 B. 216, *Not F.*)

(5374 *a*)—*O. 41, r. 20—Application for leave to add one as party respondent—Court's discretion—Mortgage decree—Transfer of Property Act (IV of 1882), ss 88 and 89—Order for sale. application for—Limitation—Limitation Act (IX of 1908), sch. II, arts. 181, 182, 183—"Enforce a judgment," meaning of—Execution.*—The fact that the time for preferring an appeal has expired does not preclude the appellate Court in a fit case from adding a party to the suit, whom the appellant has failed to bring in as respondent, as a party-respondent under O. XLI, r. 20 of the Civ. Pro. Code. An application made on the 3rd July 1909, for an order absolute for sale by a mortgagee, who had obtained the preliminary decree on his mortgage in the High Court on the 16th December 1886, was barred by art. 183 of sch. II of the Limitation Act (IX of 1908), or the corresponding article of Act XV of 1877. The application was one to, "enforce a judgment" within that article. The meaning of the word "enforce" is not limited to realization by execution but may have a wider meaning. AMLOOK CHAND PARAK v. SARAT CHUNDER MUKERJEE, **16 C.W.N. 49.** (28 I.A. 89. *R.*; 15 C.W.N. 337, *D.*)

(5375)—O. 41, r. 20—*See* CO-SHARERS—SUIT BY CO-SHARERS, 18 W.R. 16.

(5376)—O 41, r. 20—*See* DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 22 W. R. 97.

(5377)—O. 41, r. 20—*See* DECREE—DECREE, FORM OF, 3 B.L.R. A.C. 23=11 W.R. 361.

(5378)—O. 41, r. 20—*See* DISMISSAL OF SUIT, 21 W.R. 187.

(5379)—O. 41, r. 20—*See* ESTOPPEL—DENIAL OF TITLE, 24 W.R. 101.

(5380)—O. 41, r. 20—*See* INTERVENOR, 3 B.L R.A.C. 26, Note=10 W.R. 368, 24 W.R. 349.

(5381)—O. 41, r. 20—*See* LANDLORD AND TENANT—HOLDING OVER, 22 W.R. 394.

(5382)—O. 41, r. 20—*See* LIMITATION ACT, 1908, s. 22, 6 W.R. 298, 6 W.R. 172, 14 W.R. 377, 12 B.H.C. 17, 33 C. 329.

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(5383)—O. 41, r. 20—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 2 W.R. 255.

(5384)—O. 41, r. 20—*See* MESNE PROFITS—MISCELLANEOUS, 6 C.C. 159.

(5385)—O. 41, r. 20—Adding respondent interested in the result of appeal—Cross-objection—Limitation — *See* MORTGAGE—GENERAL, 5 Ind. Cas. 654=12 C.L.J. 137.

(5386)—O. 41, r. 20—*See* PARTIES TO SUITS—GENERAL, 16 W.R. 19, 17 W.R. 176, 20 W. R. 383, 15 W.R. 543, 10 W.R. 86.

(5387)—O. 41, r. 20—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 25 C. 565=2 C.W.N. 425, 13 A. 78=A.W N. 1891, 1, 16 A. 5=A.W N. 1893, 141, 15 W.R 432, 22 W.R. 437, 2 W.R. 158, 26 C. 109=3 C.W N. 76, W. R. 1864, 152, 5 A. 266=A.W.N 1883, 24, 1 B. L.R.S.N. 26-*a*=10 W.R. 283, 5 B.L.R. 371=13 W.R. 443, 16 W.R. 101.

(5388)—O. 41, r. 20—*See* PARTIES TO SUITS—SUBSTITUTION OF PARTIES TO SUITS, W. R. 1864, 136.

(5389)—O. 41, r. 20—*See* PARTIES TO SUITS—MISCELLANEOUS, 1 Agra 147.

(5390)—O. 41, r. 20—Whether respondent can be placed on record after time to appeal against him has expired—*See* REGISTRATION ACT, 1908, s. 17, 12 C.W N. 625.

(5391)—O. 41, r. 20—*See* REMAND, 14 W. R. 285.

(5391-*a*)—O. 41, r. 20—*See* NO. 370. *supra.*

(5392)—O. 41. r. 20, s. 100—*See* RES JUDICATA—CAUSE OF ACTION, 21 W.R. 57.

(5393)—O. 41, *rr.* 20, 22—*Appeal—Addition of parties—Court's Power—Respondent filing memo. of objections—No right to add thereto as party a person not necessary party to appeal.*—A respondent, who has filed a memorandum of objections, should not be permitted to add, as parties to the memorandum, parties who, though parties to the suit, are not necessary parties to the appeal, and who are in no way affected by the decision of the question to be decided between the appellant and the respondent preferring the objection. He must proceed not by way of memo. of objections but by way of appeal. It cannot be contended that the Court has no power to add parties to an appeal except under O. XLI, r. 20, Civ. Pro. Code. VALLIAMMAL ACHI v. NATRAJA PILLAI, **11 M.L. T. 187=1912, M.W N. 198.**

(5393-*a*)—O. 41, rr. 20, 22—*See* PARTIES TO SUITS—GENERAL, 26 C. 114.

(5394)—O. 41. rr. 20, 32, s. 99, O. 43, r. 1—*See* APPEAL—ORDERS, 14 W.R. 90.

—— O. XLI, r. 21 (=1882, s. 560=1887, s. 560).

(5395)—*O. 41, r. 21 (=Civ. Pro. Code, 1877, s. 560—Respondent's pleader absent—Appeal heard ex-parte—Re-hearing.*—S. 560 of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Civ. Pro. Code, 1877, applies to a case in which the respondent has been prevented by sufficient cause from attending when the appeal is called on for hearing, whether appearance has been entered for him or not. ESAB v. KRISHNA NARAYAN DEY, **11 C.L.R. 164.**

(5396)—*O.* 41, *r.* 21 (=*Civ. Pro. Code*, 1877, s. 560)—*Respondent's pleader absent—Practice.*—Where pleaders were engaged on behalf of the respondents, but they were unavoidably prevented from appearing, *held* that, although the *vakalatnamas* had been filed by those pleaders, the respondents could not be said to have appeared in person or by pleader, and that an application under s. 560 of the Civ. Pro. Code, 1877, might be granted and the appeal re-heard. SHEO CHURN LALL v. HEERA LAL, **11 C.L.R. 537.** (7 W.R. 81, *F.*)

(5397)—*O.* 41, *r.* 21 (=*Civ. Pro. Code*, 1877, s. 560)—*Re-hearing of appeal heard ex parte.*—A re-hearing of an appeal heard *ex parte* cannot be granted, unless the respondent satisfies the Court by some legal evidence that the notice of appeal has not been duly served. MAHOMED KALUN v. DINOMOYEE DASHYA, **8 C.L.R. 112.**

(5398)—*O.* 41, *r.* 21 (=s. 560, *Civ. Pro. Code*, 1882)—*Application to set aside ex parte decree—Pleader's refusal to accept notice of date fixed for hearing of appeal—Laches of the pleader.*—Notice was given, to the pleader for the respondent, of the day on which an appeal was to be heard. The pleader refused to accept service. Nor did he inform his client that such notice had been given. Neither the pleader nor the party having appeared, the Court heard the appeal *ex parte*, and, afterwards, refused to accede to the application to restore it to file. *Held*, that the Court was right in rejecting the application for restoration. The High Court observed, "It would be a disastrous thing if this Court were to extenuate the responsibility of pleaders to their clients by restoring a case in which the absence of the party was due to the laches of the pleader." HAR PRASAD v. ABDUL RAHMAN, **A.W.N. 1905, 44.**

(5399)—*O.* 41, *r.* 21—*Jurisdiction of Court to set aside ex parte decree against a defendant, when another defendant's appeal against the decree dismissed.*—Where a decree was passed against several defendants against some of whom it was *ex parte*, and a defendant who appeared unsuccessfully, appealed against that decree, the Court passing the decree has jurisdiction to set aside the *ex parte* decree as against a defendant who had not appealed. INTU MEAH v. DAR. BAKSH BHUIYAN, **15 C.W.N. 798.** (13 C.W.N. 846, 13 C.L.J. 221, *R.*; 12 C.L.J. 53, *D.*)

(5400)—*O.* 41, *r.* 21 (=*Civ. Pro. Code*, 1882, s. 560)—*Sufficient cause—No intimation from Vakil's clerk.*—The fact that a party received no intimation of the date of hearing of an appeal from his pleader's clerk who, owing to his own illness, had been compelled to go home, the papers of the case being with him, and who did not give information to the clients of the day fixed for hearing, is "sufficient cause" within the meaning of s. 560, Civ. Pro. Code, for the re-hearing of the appeal which had been heard *ex parte*. KAILASH CHUNDER DAS v. RAMA NATH CHAUDHURI, **2 C.W.N. 414.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5400 *a*)—O. 41, r. 21—*See* NOS. 1709, 2722, 3028-*a*, 3031, 5358, *supra*.

(5401)—O. 41, r. 21, O. 43, r. 1, s. 104—Applicability of, to appeals under Act X of 1859 (Rent Recovery)—*See* BEN. ACT X OF 1859, 7 C.L.J. 426=12 C.W.N. 888=35 C. 799.

—— O. XLI, r. 22 (=1882, s. 561=1877, s. 561=1859, s. 348.)

See APPEAL—OBJECTION BY RESPONDENTS.

(5402)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, s. 561)—*Limitation—Objections by a respondent entertained by the Court though filed after time—Discretion of Court.*—It being within the discretion of a Court of appeal to extend the time for filing objections under s. 561 of the Code of Civil Procedure. It was *held* not to be a good objection to the decree of the lower appellate Court that that Court had knowingly entertained objections which were filed by the respondent after the prescribed time. It was to be presumed that the Court had properly exercised its discretion in the matter. HARDEO PRASAD v. ALI HASAN, **A.W.N. 1902, 74.**

(5403)—*O* 41, *r.* 22 (=s. 561, *Civ. Pro. Code*, 1882)—*Appeal—One co respondent taking objection to the decree as against another—Propriety of.*—The language of this section is not wide enough to permit a plaintiff respondent, on the appeal of one defendant, to take any objection which the plaintiff could have taken by way of appeal against another defendant, now a co-respondent. The term "respondent" must be interpreted as limited to a respondent in relation to the appellant and as such one co-respondent cannot be permitted to take an objection against another co-respondent. SHER SINGH v. KABULA SINGH, **7 P.R. 1887.**

(5404)—*O.* 41, *r.* 22 (=s. 561, *Civ Pro. Code*, 1882)—*Supporting a decree and objecting to it—Distinction between.*—This section makes a clear distinction between a respondent supporting a decree upon grounds decided against him in the Court below and his taking an objection to the decree which he might have taken by way of appeal. In the former case, the respondent may support the decree in the manner indicated at the hearing, though he may not have filed any written notice of his intention to do so. But where the respondent means to object to the decree itself notice of such an objection in the form of a memorandum shall be filed within the prescribed period. GAURI MAL v. NIDHA MAL, **127 P.R. 1888.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5405)—*O. 41, r. 22 (=s. 561 Civ. Pro. Code, 1882)—Supporting a decree—Objection going to roo of it.*—A decree cannot be supported by an objection going to the root of that decree, *e.g.*, an objection that the plaintiff had no *locus standi* in a suit by a reversioner to set aside a sale by a widow where the sale was held to be for necessary purposes and the plaintiff had appealed against the decree. RULDA KHAN v. MUSSAMMAT KANDI, **25 P.R. 1897.**

(5406)—*O. 41, r. 22 (= s. 561, Civ. Pro. Code, 1882)—Right to file objections.*—Where in a suit for specific performance, the Court refused to pass a decree for specific performance but awarded damages for the breach and the defendant appealed against such decree, the plaintiff is entitled to file cross objections. Though under s. 22, Specific Relief Act, jurisdiction to decree specific performance is discretionary, the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction, by a Court of Appeal. HAJI GHULAM MUHAMMAD v. KAKA RAM, **31 P.R. 1897.** [*R.*, 15 P.R. 1908.]

(5407)—*O. 41, r. 22 (= Civ. Pro. Code, 1877, s. 561)—"The date fixed for the hearing"—Time for filing objections.*—In s. 561, Civ. Pro. Code, the words "the date fixed for the hearing" refer to the date fixed for the hearing under s. 552 of the Code and that alone, and not to any other date to which the hearing may be adjourned. And the objections which a respondent may urge with reference to a decree under appeal, must be filed not less than seven days before such date fixed for the hearing. DEO KISHEN v. MAHESHAR SAHAI, **4 A. 248, F B** [*Not F.*, 11 B. 698.]

(5408)—O. 41, r. 22 (= *Civ. Pro. Code*, 1877, s. 561)—*Objection by respondents.*—When the appeal was filed, the respondents under s. 561, Civ. Pro. Code, filed an objection to the decree of the lower Court on the ground that it improperly ordered them to pay their own costs. At the hearing of the appeal, which was dismissed on the 23rd January, 1882, the respondents did not urge their objection. On the 26th January, they asked the Court to make an order allowing their objection. *Held* that it too late to entertain the objection of the respondents with reference to s 561. ASGAHAR ALI v. RIAYAT HUSAIN, **A.W.N. 1882, 29.**

(5409)—O. 41, r. 22 (=*s. 561, Civ. Pro. Code*, 1882)—*Cross objection as to costs Dismissal of appeal—Court-fee.*—A cross objection as to costs will not be entertained when the appeal is dismissed for want of proper Court-fee. Under art. 17 (3) sch. II of Court Fees Act, a stamp of Rs. 10 is sufficient for a suit to have the plaintiff's title to land of which he professed himself to be already in possession affirmed. SHAH ALAM v. MAHMUD, **2 P.R 1889.**

(5410)—O. 41, r. 22 (=*Civ Pro. Code*, 1877, s. 561)—*Notice of objection by respondents—Limitation.*—The notice of objections referred to in s. 561, Civ. Pro. Code, must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties. MISR DEO KISHEN v. MAHESHAR SAHAI, **A.W.N. 882. 81.**

(5411)—O. 41. r.22—*Objections by respondent—S.348 of Act VIII of 1859.*—There is no objection to a respondent filing a notice with the Registrar and specifying in the notice the objections which he intends to take on the hearing of the appeal under s. 348 of Act VIII of 1859. *In the matter of the petition of* MADHOBEE DOSSEE, **6 W.R. Mis. 102.**

(5412)—*O. 41, r. 22 (=s. 561, Civ Pro. Code*, 1882)—*Cross-objections.*—It is not necessary to entitle a respondent to support a decree upon a particular ground under s. 561, Civ. Pro. Code, that the ground should have been in express terms decided against him. SHRISH CHANDRA ROY v. MUNGI BEWA, **1 C W N.**

(5413)—*O. 41. r. 22 (=Civ Pro. Code*, 1882, *s. 561)—Limitation for filing objections—Seven days.*—The period of seven days mentioned in s. 561 of the Code means seven clear days exclusive of the date of filing the objections and the day fixed for the hearing. DORI LAL v. NARAIN DAS, **A.W N. 1883, 237.**

(5414)—*O. 41, r. 22 (=Civ Pro. Code*, 1882, *s. 561)—Limitation to file objections.*—The date fixed for the hearing of an appeal was the 26th February, 1883. On 19th February (the 18th being a Sunday) the respondent preferred objections under s. 561 of the Code. *Held* that the objections were barred by the rule of limitation contained in s. 561 of the Code and could not be entertained. DHANI RAM v. PUNNIA, **A.W N. 1883, 229.**

(5415)—O. 41, r. 22 (=*Civ Pro. Code*, 1877, *s. 561)—Extension of time.*—The Court has no discretion to extend the period of seven days within which notice must be given of objections to a decree by a respondent, under s. 561, Civ. Pro. Code. MASITI BEGUM v. WILAYATI BEGUM, **A.W.N. 1882, 213.** (7 C. 654, *Appr.*)

(5416)—*O. 41, r. 22—Supporting decree on grounds decided against respondent—Notice of rejection unnecessary—Pleader's fees—Calculation of—Book Circular No. C V.*—Where the respondent desires to support a decree on a ground decided against him in the lower Court, notice of objection is not necessary, as he is not objecting to the decree. According to the rules contained in Book Circular No. CV the pleader's fee is to be calculated on the value of the property or the interest sued for. DHARM SINGH v. ATTAR SINGH, **59 P.R. 1886.** [*Cited*, 127 P.R. 1888.]

(5417)—*O 41, r. 22 (=Civ. Pro. Code*, 1882, *s. 561)—Principle applicable only to contention between respondent and appellant.*—The principle laid down in s. 561 does not cover any questions decided between the co-respondents and only extends to the contention between the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

respondent and the appellant who has forced him into Court. ASARAM SUKAL v. GANPAT SING. **9 C.P.L.R. 62.** (7 M. 215, *R.*) [*R.*, 3 N. L.R. 85, 14 C.P.L.R. 46 ; *Disc.*, 6 N.L R. 50.]

(5418)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, *s.* 561)—*Cross-objection under—Mortgage—Redemption suit for—Court-fee, how to be computed—Court-fees Act, ss.* 16 *and* 7, *cl.* (9).—The mortgagor and the second mortgagee sued the first mortgagee to redeem the first mortgage. The plaintiffs alleged that the mortgage debt had been satisfied ; while the defendant alleged that a sum of Rs. 9,687 was due to him on the mortgage. The Munsif gave the plaintiffs a decree for redemption on payment of Rs. 1,934. The plaintiffs appealed against the decree ; the defendant preferred objection to the decree under s. 561, Civ. Pro. Code, alleging that the sum of Rs. 7,695 was due to him in addition to the sum found due by the Munsif. The Subordinate Judge dismissed the appeal and the objections. In second appeal, the appellant (the second mortgagee) paid a Court-fee computed on the principal sum originally secured by the mortgage. The defendant paid on his petition of objections under s. 661, Civ. Pro. Code, a Court-fee of Rs. 2. *Held*, that where a mortgagor or a mortgagee appeals, not rising the question as to the right to redeem, but the question only as to the amount which is payable to effect redemption, the Court-fee should be computed *ad valorem* on the difference between the amounts alleged to be due on the one side and the other. When no question is raised in appeal as to the right to redeem, the nature of the suit is changed from a suit to redeem a mortgage, and the subject-matter of the dispute is money only. MOHAMMAD HUSAIN v. SYED JAHAN BEGAM, **2 O.C. 87.** [*F.*, 9 O C. 153.]

(5419)—*O.* 41, *r.* 22 (=*s.* 561, *Civ. Pro. Code*, 1882)—*Appellate Court competent to uphold lower Court's decree on new grounds.*—S. 561, in no way, prevents an appellate Court from upholding the decree of the lower Court on any ground which in law, warrants such holding, even though that ground may not have been referred to, or even disallowed, in the lower Court. THE RECEIVER OF NIDADAVOLE ESTATE v. VEGASENA SUBBARAJU, **28 M. 427.**

(5420)—*O.* 41, *r.* 22 (=*s.* 561, *Civ. Pro. Code*, 1882)—*Pauper respondent — Right to present objections without paying stamp-duty—Court Fees Act (VII of* 1870), *s.* 14.—A pauper respondent cannot present objections, under the sections, without paying stamp-duty, because the Court Fees Act, s. 16 lays down absolutely that the Court shall not hear such objections unless and until the respondent shall have paid the additional fee due under the Act and no exception is made in favour of pauper respondent. RAJA RATAN SINGH v. RANI BENI BAI, **1 N.L.R. 33.** (1 B., 75, 8 M. 214, 11 C, 735, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5421)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, s. 561)—*Contract, enforcement of, by one not party to it—Privity of contract—Cross-objections right of respondent to file, within one month from service of summons and hearing of appeal—Remand—Appeal.*—In 1886, D executed three simple money-bonds aggregating Rs. 290, in favour of M the brother of H, plaintiff No. 1. D also mortgaged some land to H for Rs. 100. In January, 1890, D sold a share in a village to plaintiffs Nos. 2, 3, and 4, the sons of H. In the deed it was stated that sums of Rs. 290 and Rs. 100 were left with the purchaser for the discharge of the debts due upon the four deeds mentioned above. The present defendant then sued D and plaintiffs Nos. 2, 3, and 4, for pre-emption and obtained a decree for possession of the property on payment of various sums including Rs. 100 to H and Rs. 200 to "the heirs of M, whosoever they may be determined to be." As neither the heirs of M nor H were parties to the decree, the decree-holder managed to obtain possession of the property without paying those two sums. H and his sons (plaintiff's Nos. 2, 3 and 4) then filed the present suit for recovery of the sums. The Munsif decreed Rs. 100 and interest thereon to H. but rejected the claim for Rs, 290. The plaintiffs appealed to the District Judge. On 21st April, 1900, a summons was issued to the defendant fixing May 1st for hearing of the appeal. The summons was served on April 26th. On May 1st the defendant asked for an adjournment in order that he might file objections under s. 561, Civ. Pro. Code. The Judge refused his request saying:—"There has been this decree against him for three and a half months and he has not appealed against it &c., &c." The Judge allowed the appeal. *Held*, that the object of s. 561, Civ. Pro. Code, is to allow a respondent to an appeal to act precisely as the defendant wished to act in this case, and that one month should in such cases be allowed to elapse between the service of summons on the respondent and the date of hearing the appeal. *Held* further, that the defendant having by his appeal brought the whole case before the Court, it could be dealt with as if he had put forward objections under s. 561, Civ Pro. Code, and they had been dismissed by the lower appellate Court. *Held*, that plaintiffs Nos. 2, 3, and 4, not having been parties to the contract with D in the capacity of representatives of M. in which they were sued, were strangers and could not enforce that contract. Further, that neither the plaintiffs nor any other person as representatives of M. could have sued the purchasers of the property on the contract contained in the sale deed. *Held*, further, that the suit was not maintainable by H as he did not sue upon his mortgage but upon the decree for pre-emption to which he was not a party, and as he, not being one of the purchasers of the property, was not a party to the contract and could not have enforced it against the purchasers, and could not enforce it against the defendant and the pre-emptor

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

KIDAR NATH v. HIRA LAL AND OTHERS, **3 O.C. 235.**

(5422)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—No application to a respondent in whose favour the whole decree is passed.*—S. 561, Civ. Pro. Code, does not apply to the case of a respondent in whose favour the whole decree is passed. He could support that decree by any contention with which he could have contested the case in the Court of first instance, unless he had waived any particular point. The section is one similar to a rule under the Judicature Act in England. It was intended to obviate the necessity of a respondent, against whom a portion of the decree was passed, contesting that portion by a separate appeal. It was never intended that the respondent should be limited in his contention in support of the decree, when it was absolutely in his favour. BHAGWAT RAI v. DEODAT RAI, **A.W.N. 1887, 44.**

(5423)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—Memo of objections—Appeal withdrawn without hearing—Procedure—R. 113, Civil Rules of Practice, applicability of.*—If an appeal is withdrawn without hearing, the respondent is not entitled, under s. 561, Civ Pro. Code, 1882, to take any objection to the decree, r. 113 of the Rules of Practice does not apply. The memorandum of objections filed by the respondent must be dismissed without costs. RAMAN NAIR v. NARANTHA KUNHAMBU NAIR, **6 M.L.T. 346.**

(5424)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—Right of a respondent to urge cross-objections as against a co-respondent.*—A respondent may urge cross-objections as against a co-respondent. KADARI BHAGAVANLU v. KOKANADA NARAYANASAMI, **6 M.L.T. 324.** (28 M. 229, 17 M.L.J. 62, *R.*)

(5425)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—Plaintiff obtaining leave to sue in forma pauperis—Plaintiff partly successful—Memorandum of objection in forma pauperis.*—Plaintiff sued the defendant as a pauper for the recovery of certain property. He obtained a decree for part of the property claimed. Defendant appealed against this decree. Thereupon plaintiff filed objections under s. 561 of the Civ. Pro. Code. *Held*, that the plaintiff may be allowed to take *in forma pauperis* any objections to the decree which he could have taken by way of appeal. *Held*, further, that the provisions of Ch. XLIV, Civ. Pro. Code, so far as they can be made applicable, now apply to an objection filed in accordance with s. 561, Civ. Pro. Code. PO HLAING v. MA O. **4 L.B.R. 262.** (1 B. 75, 8 M. 214, 11 C. 735, *D.*)

(5426)—*O. 41, r. 22 (=Civ. Pro. Code, 1882, s. 561)—Objections filed by respondent after time prescribed by law.*—A Court of appeal is not competent to deal with matters raised in a memorandum of objection filed by a respondent after the time prescribed by s. 561 of the Code of Civil Procedure for filing such objections has expired. LEKHRAJ v. HAMID KHAN, **A.W.N. 1894, 2.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5427)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—Appeal—Cross-objections by respondent—Appeal cannot be withdrawn after commencement of hearing of appeal.*—On the date fixed for the hearing of an appeal and cross-objections filed by the respondent against a decree for redemption of mortgaged property, the Divisional Court ordered the respondent to file, by the next hearing, stamp sufficient to cover the amount claimed by him in his cross-objections and to put in an account of rent of the mortgaged property. On the subsequent hearing of the cases, the appellant sought to withdraw his appeal and urged that the cross-objections should not be heard. The Divisional Judge refused to grant the application on the ground that the hearing of the appeal had commenced, *Held*, that the order of the Divisional Judge was right. GOKAL CHAND v. PALA MAL, **24 P.L.R. 1906.** (10 A. 587, 53 P.R. 1896, 3 M.H.C. 702, 23 W.R. 229, 9 B. 28, *F.*)

(5428)—*O. 41, r. 22 (=s. 561, Civ. Pro. Code, 1882)—Cross-objections maintainable only with respect to the principal appeal—Separate appeal with respect to separate orders passed on separate appeals*—Deorha, *provision as to payment of interest in the shape of, whether enforceable—Penalty—Interest—Sum payable over and above the principal sum, validity as to the condition stipulating payment of.*—The plaintiffs-respondents filed a suit against the appellant to redeem certain mortgages, one of which contained a stipulation that the mortgagors should pay on redemption the principal sum and half as much again commonly called *deorha*. The plaintiffs contended that they were not bound by the condition for the payment of *deorha*. The defence of the appellant was that the *deorha* was payable and that he was entitled to certain sums on account of improvements effected by him and rent of certain land demised by him to the respondents. The Court of first instance disallowed the *deorha*, but allowed other items on account of improvements and rent. Both parties appealed to the District Judge, the defendant-appellant claiming the *deorha* and objecting to the lower Court's order as to costs. His appeal was dismissed. The plaintiffs in their appeal objected to the items awarded on account of improvements and rent and also as to costs awarded by the lower Court. The District Judge allowed the appeal as to costs only and dismissed the rest of the appeal. The defendant appealed to the Court of the Judicial Commissioner against the dismissal of his appeal by the District Judge. The plaintiffs instead of filing a separate appeal filed objections under s. 561, Civ. Pro. Code. *Held*, that the objections under s. 561, filed by the plaintiffs, were inadmissible. They could under

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

s. 561 be allowed to object only to the decree against which the appellant was appealing; if they wanted to appeal against the order of the District Judge passed on their appeal, they ought to have filed a separate appeal. *Held*, further, that the stipulation for the payment of deorha was not in the nature of a penalty and could therefore be legally enforced. MIRAN BAKSH v. BAJRANG BAHADUR SINCH, **10 O.C. 214.**

(5429)—*O.* 41, *r.* 22 (=*s.* 561, *Civ. Pro. Code*, 1882)—*Objections, by whom can be raised in appeal.*—The right of taking objections under s. 561 arises only in those cases in which the party proposing to file them might have appealed, but did not. A person whose appeal had been dismissed could not prefer objections under s. 561, in the appeal by the opposite party, subsequent to the dismissal of his appeal. RAMJE DAS v. AJUDHIA PRASAD, **25 A. 628.**

(5430)—*O.* 41, *r.* 22 (=*s.* 561, *Civ. Pro. Code*, 1882)—*S.* 5, *Limitation Act*, 1877—*cross-objection against co-respondent—Rejection of cross-objection.*—As a general rule the right of a respondent to urge cross-objections under s. 561, Civ. Pro. Code, 1882, should be limited to his urging them against the appellant only. (26 C. 114, *F.*; 25 C. 565, 15 W.R. 26, *Ref.*) Where, in an appeal by one of several defendants, the plaintiff-respondent preferred cross-objections, seeking to make the non-appealing co-defendants liable, and such cross-objections were disallowed, permission to put in a regular appeal, after expiry of time therefore, against the non-appealing co-defendants, was refused. SHABI-BUDDIN v. DEOMOORAT KOER, **30 C. 655.** [*F.*, 11 O.C. 93.]

(5431)—*O.* 41, *r.* 22—*Memo. of cross objections—Right to urge objections as against co-respondents who have not appealed.*—Under r. 22, O. 41 of the new Code, a respondent may file a memorandum of cross-objections and urge objections against co-respondents and who have not appealed against the decree. RAMCHAND v. RIKHAB DASS, **6 N.L.R. 51=6 Ind. Cas. 430.** (23 A. 93, 60 B.H.C. 244, 9 C.P.L.R. 62, 15 W.R. 26, 26 C. 114, 25 C. 565, 30 C. 655, 14 C.P.L.R. 46, *R. & D.*; 7 M. 215, *R.*)

(5432)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, s. 562)—*Only part of suit disposed of on preliminary point—Court cannot order remand.*—Where only a *part* of a suit had been disposed of on a preliminary point, s. 562 does not apply and the Court below had no power to make a general order of remand. BANWARI LAL v. SAMMAN LAL, **11 A. 488=A.W.N. 1889, 188.** [*Appr.*, 12 A. 510, F.B.; *Appl.*, 27 A. 163=1 A.L.J. 503=A.W.N. 1904, 202.]

(5433)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, s. 561)—*Objections by respondent in forma pauperis.*—The Civ. Pro. Code, does not provide for the admission of objections, even when

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preferred by a pauper, without payment of Court-fees. NARAYANA v. KRISHNA, **8 M. 214.** (1 B. 75, *F.*) [*R.*, 1 N.L.R. 33; *D.*, 4 L.B.R. 262.]

(5434)—*O.* 41, *r.* 22 (=*s.* 561, *Civ. Pro. Code*, 1882)—*Cross appeal—Notice of object on under—Limitation.*—A notice of objections, under s. 561 of the Code, must be filed at least a week before the date of the appeal as fixed in the notice to the respondent. *Per Prinsep, J., O'Kinealy, J. dubitante).* KALLY PROSUNNO BISWAS v. MUNGALA DASSEE, **9 C. 631.** [*Not F.*, 11 B. 698.]

(5435)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, *s.* 561)—*Dismissal of appeal for non-joinder, memorandum of objections whether should be heard on.*—On second appeal in a suit to recover property demised on kanom, the plaintiff-appellant having failed to join as parties to the appeal several of the defendants who represented the mortgagee, the appeal was dismissed on the ground that in their absence, the decree could not be varied. The contention of the appellants that the memorandum of objections in this case could not be heard, inasmuch as the appeal had not been heard on the merits, was not accepted by the Court, which held that as the question of non-joinder was one that arise in the appeal itself and the appellant had been heard on such question, there was a sufficient hearing of the appeal to entitle the respondent to be heard on his objections. KOMBI ACHEN v. KOCHUNNI, **21 M. 352.**

(5436)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, *s.* 561)—*Memo. of objections by respondent.*—The plaintiffs sued for possession of certain land. The original Court dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree for the land claimed, with the exception of a portion in the possession of defendant S, as to which portion it dismissed the suit. The defendants affected by the decree appealed to the High Court. The plaintiffs-respondents preferred objections under s. 561, Civ. Pro. Code, to the decree of the lower Court, in so far as it dismissed the suit in respect of the land claimed by S. *Held* that, as S was not an appellant and was not made a party to the second appeal, the High Court could not entertain those objections *ex parte* against him. BISHESHAR RAI v. TAPESHURI LAL, **A.W.N. 1886, 88.**

(5437)—*O.* 41, *r.* 22 (=*Civ. Pro. Code*, 1882, *s.* 561)—*Cross-appeal—Filing of memorandum of objection.*—The appellant obtained a decree, but was dissatisfied, with the amount awarded and presented a first appeal. The respondent-defendant neither presented a cross-appeal nor filed any memorandum of objection under s. 561, Civ. Pro. Code, the District Court allowed a verbal objection under the section notwithstanding the distinct provisions of the law on the subject. Decree in first appeal reversed and

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

the decree of the Court of first instance restored. MAUNG SO MIN v MAUNG TAIK, **U.B.R. 1897—1901, Vol. II, 306.**

(5438)—*O. 41, r. 22 (=Civ Pro. Code, 1882, s. 561)—Procedure—Appeal—Respondent may support the decree of the Lower Court on any ground.*—If a respondent desires to have a decree in his favour modified still more in his favour he is bound to file objections under s. 561 of the Code of Civil Procedure: but it is open to a respondent, if he accepts the decree, without filing objections under s. 561, to challenge the finding of the Court below, on any point decided against him. RAM PRASAD v. GOKUL DAS, **A.W.N. 1898, 109.**

(5439)—*O. 41, r. 22 (=Civ. Pro. Code, 1882, s. 561)—Respondent's objections—Limited to persons appealing.*—It is the ordinary rule that the objections allowed to be urged by the respondent are to be limited to the person who has appealed against him, and his (the respondent's) rights are not enlarged by the mere addition, to the list of persons, of other persons who should not have been put on the list at all, and it would be contrary to the ordinary practice of the Court to allow objections to be made against persons who have not appealed. KALLU v. MANNI, **23 A. 93=A.W.N. 1900, 212.** (N.W.P. 1863, Vol. II, 360, *R.*; 7 M. 250, *D.*) [*F.*, 11 O.C. 93; *D.*, 28 A. 95=2 A.L.J. 667=A.W.N. 1905, 200.]

(5439-a)—*O. 41, r. 22—Appeal—Powers of appellate Court.*—The original Court found in favour of defendant on the first issue, but against him on the second issue, and, therefore, decreed against him. On first appeal, the lower appellate Court reconsidered the first issue, and decided against defendant; it, therefore, dismissed the appeal. It was urged in second appeal that the lower appellate Court erred in law in going behind the original Court's finding of fact on the first issue when there had been no cross-objection or cross appeal filed against such finding: *Held*, that this contention must fail, in view of the provisions of O. XLI, r. 22, which allowed a respondent to support a decree on any of the gounds decided against him by the Court below. ULU GALE v. MG PO KIN, **12 Ind Cas. 20=4 Bur. L.T. 209.** (17 I.A. 57, 17 C. 809, *F.*)

(5439-b)—*O. 41, r. 22 (=Civ. Pro. Code, 1859, s. 348)—Practice—Objection by respondents.*—As a point of practice, there can be no objection to a respondent filing a notice with the Registrar, and specifying in the notice the objections which he intends to take on the hearing of the appeal. It is far more convenient, and far more fair, to the Court and to the parties that such notice should be given. *In the matter of* MADHOBEE DOSSEE, **B.L.R. Sup. Vol. 587=6 W.R. Mis 102.** [*F.*, 8 W.R. 322; *D.*, 7 W.R. 462.]

(5439-c)—*O. 41, r. 22—Cross-objections—Appeal filed where no appeal lay—Specific*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Relief Act (I of 1877), ss. 39, 42—Suit for declaration that a document is void—Possession—Discretion.—Where a suit for declaration that a certain document was void was dismissed, but a finding was inserted in the decree that the document had not been executed by the person alleged to have executed it, and the defendant appealed to the District Judge, *held* that the respondent (plaintiff) was entitled to file cross-objections although the appeal was not maintainable. Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument, according to which, if genuine, he has no title. But where both Courts find a document not proved, the High Court in second appeal will not disturb the decree of the lower appellate Court. SHANKER LAL v. SARUP LAL, **8 A.L.J. 1297.**

(5439-d)—*O. 41, r. 22 (=Civ. Pro. Code, 1859, s. 348)—Appeal—Limitation.*—The first Court's decision, dismissing the suit on the ground of limitation, was reversed by the lower appellate Court, which remanded the case for trial on the merits. The first Court on remand decreed the suit on the merits. The defendant appealed, and the lower appellate Court dismissed the suit on the merits, refusing to try the issue of limitation, because no special appeal had been preferred against his former order. The plaintiff appealed specially, and the defendant by way of cross-appeal, contended that the suit is barred by limitation. *Held* that, although the defendant might have appealed against the first decision of the lower appellate Court on the question of limitation, within 90 days from that decision, he was at liberty to appeal against it within 90 days from the time of the final decree disposing of the whole case. *In the matter of the petition of* MIRZA HIMMAT BAHADUR, **B.L.R. Sup. Vol. 429=8 W.R. 91.** [*F.*, 7 W.R. 331, 10 W.R. 209=11 B.L.R. 418, Note; *D.*, 22 W.R. 101, 1 A. 132.]

(5439-e)—*O. 41, r. 22—Pre-emption suit—Dismissal of suit on one finding—Finding reversed by appellate Court—Decree without considering defendant's objections to other findings—Practice—Appeal—Revision—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a).*—In a pre-emption case, plaintiff claimed pre-emption on the ground of his being the owner of the adjoining house A. Defendant-vendee denied the plaintiff's ownership of his house and he also denied that the custom of pre-emption obtained in the town. The vendee further claimed that he owned another adjoining house B, which gave him a right of pre-emption. The first Court found that the custom of pre-emption obtained in the town, that the house A belonged to plaintiff and house B to defendant-vendee, and that the plaintiff had, therefore, no preferential right of pre-emption. On appeal, the District Judge held that house

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

B did not belong to the vendee and decreed the suit. The vendee had put in cross-objections against the findings of the first Court as to custom, improvements, market-value, sale price, costs and ownership of house A. These cross-objections were not considered by the District Judge. *Held*, that the failure of the District Judge to consider the cross-objections was a material irregularity and vitiated his judgment. The objections of the vendee were not really cross-objections except as regards the question of costs; for the first Court had dismissed the suit and there was nothing which the vendee could have taken objection to except the order regarding costs. But under O. XLI, r. 22, a respondent may support a decree on any of the grounds decided against him in the Court below. CHUHAR v. BHAG MAL, **202 P. L.R. 1911.**

(5439-*f*)—*O. 41, r. 22, cls. (1) and (4)—Appeal filed out of time—Dismissal of appeal—Memorandum of objections also liable to be dismissed.*—Cl. 1 of r. 22 of O. XLI of the Civ. Pro. Code, does not enact anything different from the law of the old Code of 1882. Where an appeal is dismissed on the ground that it was filed out of time, the memorandum of objections filed by the respondent also falls and cannot be heard and adjudicated upon. KANIRLAMANNA IMATH NARAYANA v. MAOSAD KANIRKAMAKA, **8 Ind. Cas. 140=8 M.L.T. 447.**

(5440)—O. 41, r. 22—Cross-objections to an award of the tribunal of appeal allowed in appeal to the High Court from the award—*See* BOM. ACT IV OF 1898, s. 48 (11), 7 Bom. L. R. 569=29 B. 514.

(5441)—O. 41, r. 22—*See* APPEAL—ORDERS, W.R.F.B. 86.

(5442)—O. 41, r. 22—*See* APPELLATE COURT—DUTY OF APPELLATE COURT, 13 B. 75.

(5443)—O. 41, r. 22—*See* COURT-FEES, 9 W.R. 356, 8 W.R. 124.

(5444)—O. 41, r. 22—*See* CROSS APPEAL, 9 W.R. 375.

(5445)—O. 41, r. 22—*See* GUARDIAN—GENERAL, 86 P.W.R. 1910=7 Ind. Cas. 505=213 P.L.R. 1910.

(5446)—O. 41, r. 22—*See* LIMITATION—QUESTION OF LIMITATION, 2 W.R. 45.

(5447)—O. 41, r. 22—*See* LIMITATION ACT, 1908, ss. 4, 5, 4 A. 430=A.W.N. 1882, 71.

(5448)—O. 41, r. 22—*See* LIMITATION ACT, 1908, s. 5, 10 B.H.C. 397.

(5449)—O. 41, r. 22—*See* LIMITATION ACT, 1908, art. 13, 1 W.R. 341.

(5450)—O. 41, r. 22—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 6 O.C. 275.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5450 *a*)—O. 41, r. 22 (1)—Party if can question competency of cross-objection in second appeal—*See* MORTGAGE—GENERAL, 15 C.L.J. 61.

(5451)—O. 41, r. 22—Whether cross-objections, under—can be entertained by appellate Court, in a case where no appeal lies—*See* MORTGAGE—REDEMPTION, 28 P.R. 1908=41 P.W.R. 1908=141 P.L.R. 1908.

(5452)—O. 41, r. 22—*See* PAUPER APPEALS, 11 C. 735.

(5453-54)—O. 41, r. 22—*See* PLAINT—RETURN OF PLAINT, W.R. F.B. 86.

(5455)—O. 41, r. 22—*See* PRACTICE AND PROCEDURE, 10 A. 162=A.W.N. 1887, 295, 4 M.L.T. 482.

(5456)—O. 41, r. 22—*See* PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS, 23 C. 922, P.C.=1 C.W.N. 12.

(5457)—O. 41, r. 22—*See* RES JUDICATA—PARTIES, W.R. 1864, 239.

(5458)—O. 41, r. 22—*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, W.R. F.B. 48.

(5459)—O. 41, r. 22—*See* SPECIAL OR SEROND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, Marsh 151=W.R. F.B. 18=1 Ind. Jur. O.S. 25=1 Hay 350.

(5460)—O. 41, r. 22—Omission to file cross-objections in appeal—Incompetency to take such objection in further appeal—*See* SUCCESSION ACT, 1865, 52 P.W.R. 1907.

(5461)—O. 41, r. 22—*See* WAIVER, W.R. 1864, 3.

(5461-*a*)—O. 41, r. 22—*See* NOS. 295, 4041, 4754, 5228, 5229, 5315, 5393, 5393-*a*, *supra*.

(5462)—*O. 41, r. 22, s. 100 (=Civ. Pro. Code, 1882, ss. 561 and 584)—Objection filed in second appeal*—In an objection under s. 561 of the Code of Civil Procedure filed in a case in second appeal the ground taken was "that the learned District Judge is wrong in holding that the *muafi Chak Gudar Shah* was *wakf* property and that the plaintiff was not entitled to her legal share in it." *Held*, that the ground taken in an objection under s. 561, Civ Pro. Code, when filed in a case in second appeal must comply with the provisions of s. 584 of that Code, and that the ground in question as drafted did not comply with the provisions of that section as it did not allege that the decision was contrary to any specified law or usage having the force of law. MUBARAK ALI v. MUSSAMMAT RUQAYA BIBI, **7 O.C. 49.**

(5463)—O. 41, r. 22, s. 100—*See* DECREE—MISCELLANEOUS, 10 M. 292.

(5464)—*O. 41, r. 22, s. 115 (=ss. 561 and 622, Civ. Pro. Code, 1882)—Decree against one*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

of the defendants—Appeal by him—Plaintiff not appealing nor filing objection under s. 561—Appellant found not liable—Relief against other defendants, whether grantable.—The plaintiff sued the proprietors and the agent of a firm for the rent of a godown hired by the agent. The Munsiff granted a decree against the agent. Against this decree the agent appealed, but the plaintiff did not appeal, nor did he raise any objection to the decree under s. 561 of the Code. The lower appellate Court held that the proprietors, and not the agent, were liable and that it had no power to pass a decree against the proprietors. *Held*, on second appeal, that the plaintiff was entitled under s. 622 of the Code to ask for a revision. *Held*, also, confirming the decree of the lower appellate Court, that it was not open to the Court to grant any relief to the plaintiff, inasmuch as the granting of such relief was not necessarily incidental to the relief granted to the agent who had appealed. SETH BINDRABANDAS v. MOTI LAL, **3 N.L.R. 85.** (28 M. 329, *F.*; 27 A. 23, 28 A. 95, 18 B. 520, 31 C. 643, 9 C.P.L.R. 62, 14 C.P.L.R. 46, *R.*)

(5465)—*O. 41, r. 22, s. 141 (=ss. 561 and 647), Civ. Pro. Code, 1882)—Suit on bond executed by first defendant to second defendant, who transferred it to plaintiff—Decree in lower Court against second defendant only—Revision petition to High Court under s. 25, Act IX of 1887 (Provl. S. C. Courts)—Memorandum of objections, filing of—Procedure—High Court's powers.*— In a suit on a bond, executed by the first defendant, in favour of the second defendant, who transferred it to the plaintiff, the lower Court gave a decree against the second defendant only, against which he presented a revision petition under s. 25 of Act IX of 1887; *held* that s. 647 of the Code enables the High Court to apply to revision petitions of this kind the procedure applicable to an appeal, and that a memorandum of objections, lies in such revision petitions; and that, even apart from the memorandum of objection, the words of s. 25 of Act IX of 1887 are wide enough to empower the High Court, having all the parties before it, to transfer the liability from one defendant to another, even without application by the plaintiff. KRISHNA AIYANGAR v. APPANAIYANGAR, **17 M L.J. 62.**

(5466)—*O. 41, r. 22, s. 146 (=ss. 561, 582 (a), Civ Pro. Code, 1882)—Limitation Act, s. 5—Memorandum of objection insufficiently stamped—Defect not being made good dismissal for default—Appeal memo also insufficiently stamped—No appeal, being only against an order—No case for extension of time.*—A memorandum of objections filed by the respondent was held to be insufficiently stamped by the lower appellate Court, which fixed a date for the deficiency to be made good. The additional stamp was not furnished, on the ground that the higher tribunal had been moved to revise the order declaring that the objection

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

was insufficiently stamped; and the memo. of objections was, in consequence, dismissed for default. The appeal against the appellate order was also insufficiently stamped. *Held*, that the order rejecting the objection as understamped after default made to pay the duty ordered, is an "order" and not a "decree" and it is an order against which no appeal is provided by the Civ. Pro. Code. Even if it be taken to be a decree, and appealable as such, the High Court, in appeal, should not interfere, unless it is established that there was in fact no default or that there was sufficient cause for excusing the default. The failure of the party to obey an order for the filing of additional Court-fees is a default, irrespective of the legal merits of the order, and it affords no sufficient grounds for excusing such default, that the party considered the order to be wrong. The procedure of a Court cannot be regulated by what may be the opinion of a party or by what he may hope to establish against the opinion of the original Court in appeal. There having been a wilful disobedience of an order in this case, the dismissal was but proper. If a party feels himself aggrieved by any stamp-order, he may, within the period allowed for compliance therewith, move a higher Court against it but if he has not succeeded in getting the order set aside by the last date fixed for obedience, the party must obey the order, or subject himself to a valid disposal of the case on the ground of his default. S. 582-A of Civ. Pro. Code, has no application, inasmuch as the under-stamping was deliberate, and not due to any mistake; and this is not a case in which it will be proper to allow any extension of time under s. 5 of the Limitation Act. The appeal to the High Court is under-stamped. No opportunity need, however, be given to the appellant for making good the deficiency in the HighCourt, for two reasons, namely, the appeal does not lie and it could not now be stamped within the period allowed by the law of limitation for its due institution in the Court. GHASIRAM v. JHINGWA, **4 N.L.R. 168.**

(5467)—O. 41, r. 22, O. 20, r. 5—*See* APPEAL—OBJECTIONS BY RESPONDENTS, 8 B. 369.

(5468)—*O. 41, rr. 22, 23 (=Civ. Pro. Code, 1882, ss 561, 562)—No decision against respondent.*—Where a suit was dismissed on the ground that the plaintiff had refused to amend the plaint, and where no point was decided against the defendant, *held* that the defendant could not support the decree of the lower Court in appeal since s. 561 of the Civ. Pro. Code, did not apply, and that suit should be remanded under s. 562. RAM ADHAR v. RAM SHANKAR, **26 A. 215=A.W.N. 1903, 236.**

(5469)—*O. 41, rr. 22, 25 (=ss. 561 and 566, Civ. Pro. Code, 1882)—Suit for possession—Appeal from decree of Lower appellate Court—Remand to the lower appellate Court—Fresh enquiry—Lower Appellate Court awarding more*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

than the original decree when plaintiff not appealing—Validity.—The plaintiff sued the defendant, the proprietors of an adjoining estate, for recovery of possession of certain lands, after determination of the boundary between the two estates. The Munsiff partially decreed the suit. The defendant appealed, but plaintiff neither appealed nor filed any objection against the decree of the Munsiff. The decree of the Munsiff was modified by the lower appellate Court in favour of the defendant, and thereupon, the plaintiff appealed to the High Court, which remanded the case and directed a fresh investigation to be made by the Civil Court Amin by comparison of the maps, of both the parties. After a fresh enquiry, the lower appellate Court passed a decree in favour of the plaintiff, giving him more lands than he recovered in the first Court. *Held*, on appeal to the High Court, that, as the plaintiff had not appealed from the judgment of the Munsiff, the lower appellate Court had no power to award him more than he recovered in the Munsiff's Court. AGILUL HOSAIN v. DINO NATH DUTT, **34 C. 996.** (3 A. 643, *D.*)

(5470)—*O.* 41, *rr.* 22, 25, *and s.* 100 (=*Civ. Pro. Code*, 1877, *ss* 561, 566, 584)—*Grounds for second appeal—Omission to try issue of fact.*—Where the Court of first instance gave a decree to the plaintiff on one of the issues and the lower appellate Court, on appeal by the defendant, dismissed the plaintiff's claim on that issue, *held* by the High Court, that the plaintiff, in defending the defendant's appeal, could have taken objection to the portion of the first Court's decree, in respect of the issue decided against him or he might have appealed against it, and that, having forborne to do so, he could not impugn the lower appellate Court decree with error for omitting to touch the first Court's finding on this question. GUMAN SINGH v. BHUJHAWAN SINGH, **A.W N. 1881, 88.**

(5571)—*O.* 41, *rr.* 22, 32, *s.* 66 (=*ss.* 561, 577, 317, *Civ. Pro. Code*, 1882)—*Plaintiff suing for possession or return of purchase-money—Decree for possession — Appeal—Appellate Court decreeing return of purchase-money, legality of—Necessity for memo of objections.*—The plaintiff's case was that he purchased the plaint house at a Court sale benami in the name of the defendants. He sued to recover possession from the defendant or, in the alternative, for the purchase-money paid by him for the house. The District Munsiff gave the plaintiff a decree for possession. On appeal the District Judge held that the plaintiff's suit for possession was barred by s. 317, Civ. Pro. Code. He found, however, that the purchase-money had been paid by the plaintiff and gave him a decree for the recovery of such sums. In second appeal by the defendant it was contended that he should not have granted the alternative relief inasmuch as the plaintiff did not put in any memorandum of objections under s. 561, Civ. Pro. Code. *Held* that no memo of objections was necessary in the case. KUPPUSAWMY CHETTY v. SAMUDRA VIJIA NAINAR, **4 M.L.T. 266.** (28 M. 229, *D.*)

(5472)—*O.* 41, *r.* 22, *O.* 43, *r.* 2, *s* 108 (=*ss.* 561, 590, *Civ. Pro. Code*, 1882)—*Effect of latter section on former—Appeals from orders.*—S. 590 of the Civ. Pro. Code, makes applicable the procedure of s. 561 to appeals from orders, and a memorandum of objection will lie. CELLAMMAL v. VELAPPA NAICKER, **3 M.L.T. 248=18 M.L J. 157.** (21 A. 297, *R.*)

(5473)—*O.* 41, *r.* 22 (1)—*Respondent—No cross-appeal or objection—Right of respondent to support the decree on grounds decided against him by Court below.*—A respondent, although he may not have appealed against any part of the decree, may support the decree on any of the grounds decided against him in the Court below. It is only when he takes exception to the decree that he is bound to prefer an appeal or take cross-objections. SHANKAR LAL v. MADARI SINGH, **7 Ind. Cas. 484.**

(5474)—O. 41, *r.* 22 (1), (2), (3), (5)—*See* MAD. ACT VIII OF 1865, ss. 76, 83, 27 M. 543.

(5475)—O. 41, r. 22 (1), (2), (3) (5)—*See* COURT FEES ACT, 1870, ss. 4, 16, 25 M. 24.

(5476)—O. 41, r. 22 (1), (2), (3), (5)—*See* COURT FEES ACT, 1870, ss. 12 and 16, A. W.N. 1893, 55.

(5477)—O. 41, r. 22 (1), (2), (3), (5)—*See* MORTGAGE—GENERAL, 4 Ind. Cas. 625=67 P.W.R. 1909.

(5477-*a*)—O. 41, r. 22 (1), (2), (3), (5)—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, A.W. N. 1893, 69.

(5478)—*O.* 41, *r.* 22 (4)—*Appeal dismissed for default—Memorandum of objections—Power of Court to deal with.*—Where an appeal is dismissed with costs for default, the appellate Court may, under O. XLI, r. 22, sub-r. 4, deal with the memorandum of objections. RAMAN *alias* KUTTAN'S DAUGHTER KARTHYAYINI v. THEYYAN'S SON RAM, **9 M.L.T. 217=9 Ind. Cas. 572.**

(5479)—*O.* 41, *r.* 22 (4)—*Appeal dismissed for non-payment of proper Court fee—Cross-objections, whether can be entertained after such dismissal of appeal—General rule—Exceptions—Court-fee—Appellant not able to pay Court-fee on the whole amount claimed—Abandonment of part of claim, whether permissible.*—An appellate Court has no power to reject cross-objections on the merits without hearing the respondent. The general rule that cross objections cannot be entertained unless the appeal is decided on the merits is subject to only two exceptions, *viz.*, when the appeal is withdrawn or it is dismissed in default. Therefore, where an appeal is dismissed, without a hearing, upon the ground

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that the appellant has not paid the Court-fee, the Court has no jurisdiction to hear and determine the cross-objections. An appellant, who has claimed a large amount in an insufficiently stamped memorandum of appeal, is at liberty on being required by the Court to pay Court-fee for the full amount claimed, to abondon part of his claim and to restrict it to such an amount on which he can afford to pay the Court fee. DUNI CHAND v. AZIM KHAN, **131 P.L.R 1911.** (27 A. 151, *Appl.*

(5480)—O. 41, r. 22 (5)—*See* MAINTENANCE, 7 Ind. Cas. 118.

—**O XLI, r. 23 (=1882, s. 562=1877, s. 562 =1859, s. 351.)**

See REMAND.

(5481)—*O. 41, r. 23 (=Civ. Pro. Code, 1882, s. 562)—Remand of case—Power of appellate Court.*—A case can be remanded by an appellate Court only under s. 562, Civ. Pro. Code. MUDUN MOHUN PODDAR v BHOGGOMANTO PODDAR, **8 C. 923.** [*F.*, 10 B. 398.]

(5482)—*O. 41, r. 23 (=Civ. Pro. Code, 1882, s. 562)—Amending Act VII of 1888—Remand of suit, extent of power of appellate Court—Sale-certificate—Sale stated to be subject to charge claimed, effect of.*—Under s. 562 of the Civ. Pro. Code (XIV of 1882), as amended by Act VII of 1888, an appellate Court has a discretionary power to remand a case where the Court of first instance mechanically records evidence on all the issues, and at the final hearing decides the suit on some particular issue, without expressing any opinion on the other issues, if, in the circumstances of the case the appellate Court considers a remand desirable. [*F.*, A.W.N. 1905, 159=2 A.L.J. 685=27 A. 691; *R.*, 19 M. 157, 19 M. 422, 20 M. 25, 12 C.P.L.R. 119, 22 M. 172, 12 C.P. L.R 45, 27 P.W.R. 1907, 2 P.R. 1908=12 P.W.R. 1908=96 P.L.R. 1908, 56 P.R. 1908=107 P.W.R. 1908=161 P.L.R. 1908, 8 C.L.J. 159.] The mere fact of a sale certificate reproducing the order passed on a claim petition, that the property is sold with notice of a claim that it is liable to a charge, will not make such charge binding on the purchaser, if the claim has in fact no legal foundation. When the charge is sought to be enforced; the said statement in the sale-certificate cannot, therefore, be accepted as conclusive evidence against the purchaser. RAMACHENDRA JOISHI v. HAZI KASSIM, **16 M. 207.** [*F.*, 66 C. 76.]

(5483)—*O. 41, r. 23 (=Civ. Pro. Code, 1882, s. 562), application of.*—The section applies not only to a case in which the Judge of the Court of first instance has expressly excluded evidence, but also to a case where the parties were or may have been misled by the act of the Judge as to the issues or the evidence necessary in the case. It would also apply to a case in which it was apparent that a Judge intended only to consider one issue, such as the

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status of the plaintiff as an heir, or an issue of limitation; and where the parties, owing to the view of the Judge on that point, did not tender or bring forward their evidence. (*N.B.*—See the dissenting judgment of *Straight, J.*, on this point at pp. 318—321.) MUHAMMAD ALLAHDAD KHAN v. MUHAMMAD ISMAIL KHAN, **10 A. 289.**

(5484)—*O. 41, r. 23 (=s. 562, Civ. Pro. Code, 1882)—Merits and form of order—Court's power to consider—Inconsistent pleadings—'Alleguns Contrania non auditor.'*—On appeal from an order of remand under this section, it is competent for the appellant to question the lower appellate Court's decision on the preliminary point. Though it is competent for a plaintiff to base his claim alternatively upon two sets of facts, he cannot allege or honestly verify at the same time two sets of inconsistent facts. KHALAS v. KALYAN SINGH, **109 P.R. 1887.** [*Disc. & D.*, 1 P.R. (1903=1 P.L.R. R. 1903, 56 P.R. 1908, 99 P.R. 1902=141 P. L.R. 1902; *Overruled*, 2 P.R. 1908, F.B.]

(5485)—*O. 41, r. 23 (=s. 562, Civ. Pro. Code, 1882)—Irregularity in recording evidence—Remand order whether proper.*—For an irregularity in recording the evidence the case should not be reversed and should not be remanded to the lower Court under s. 562, Civ. Pro. Code, 1882. BHAGWAN DAS v. JIWAN, **45 P.R. 1896.**

(5486)—*O. 41, r. 23 (=s. 562, Civ. Pro. Code, 1882)—Wrong order of remand—Power of appellate Court.*—Where an appeal is preferred against a remand-order under s. 562, the Court of appeal as soon as it finds that the remand was not warranted by the terms of s. 562 (as not having been disposed of on a preliminary point) should not enter upon the merits of such a remand order. MUSSAMMAT MAKHAN DEVI v. ASA SINGH. **6 P.R. 1892.** [*R.*, 1 P.R. 1903=1 P.L.R. 1903, 38 P.R. 1903.]

(5487)—*O. 41, r. 23 (=Civ. Pro. Code, 1882, s. 562)—Wrong order of remand—Duty of Chief Court.*—The lower Court decided a case on merits, but on appeal it was remanded under s. 562. An appeal against the remand order was preferred, and the Chief Court holding that the remand order was wrong desired also the truth of the fact about which the remand order was made. SANT RAM v. MUSSAMMAT MOHAN DEBI, **56 P.R. 1898, F.B.**

(5488)—*O. 41, r. 23 (=Civ. Pro. Code, 1882, s. 562)—S. 562, no bar to ss. 443, 444 and 582.*—S. 562 of the Code of 1882 is not a bar to the exercise by an appellate Court of the jurisdiction conferred by ss. 443, 444 and 582. AHMAD MIRZA KHAN v. HIRA LAL, **23 P.R. 1899.**

(5489)—*O. 41, r. 23 (=s. 562, Civ. Pro. Code, 1882)—Court's power to consider merits and forms of order.*—On appeal from an order of remand under this section, it is competent for

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the appellant to question the lower appellate Court's decision on the perlim nary point. TARA SINGH v. GURDITTA. **40 P.R. 1887.**

(5490)—*O* 41, *r*. 23 (=*s*. 562, *Civ.Pro. Code*, 1882)—*Appeal from remand order pending—Completion of proceeaings under order—Du y of Court.*—Where before the hearing of the appeal against an order of remand made wrongly under s. 562, the proceedings under remand order was completed, the appellant all through the proceedings not recognising the jurisdiction of the lower Court and not producing his evidence, it was held that the appellant was entitled to a correct order from the appellate Court. SURJAN MAL v. BAWA, **65 P.R. 1887.**

(5491)—*O*. 41, *r*. 23 (=*s*. 562, *Civ.Pro.Code*, 1882)—*Appeal dismissed on preliminary point—Second appeal—Reversal — Remand order.*—Where an appellate Court dismissed an appeal on a preliminary point and the Court of second appeal reversed the decree, it should remand the appeal for hearing on its merits to the lower appellate Court. RAM DITTA v. ALLAYAR, **98 P.R. 1887.** [*R*., 56 P.R. 1908.]

(5492)—*O*. 41, *r*. 23 (=*s*. 562, *Civ.Pro.Code*, 1882)—*Small cause suit—Remand order. Power of Chief Court.*—In an appeal against the remand order made by a District Judge under s. 562 on an appeal from a small cause suit, it is competent for the Chief Court to consider the decision of the District Judge on the merits of the preliminary point and it need not confine itself to the procedure followed by the District Judge in remanding the case. BHAI WAZIRA v. CHUHAR MAL, **85 P R 1895, F.B.** [*Disc. & D.*, 1 P.R. 1903=1 P.L.R. 1903; *Cited & R.*, 33 P.R. 1902=24 P.L.R. 1902; *R.*, 1 P.R. 1903=1 P.L.R. 1903, 99 P.R. 1902=141 P.L.R. 1902.]

(5493)—*O*. 41, *r*. 23 (=*old s*. 562)—*Unqualified right of appeal—Carrying out of order before appeal—Effect.*—S. 588 gives an unqualified right of appeal against a remand order under s. 562, Civ. Pro. Code, and the simple circumstance that the party has submitted to the proceedings under the remand or that the remand order had been carried by the lower Court will not in any manner restrict or justify the appellate Court in declining to hear the appeal. GHULAM JILANI v. GHULAM HAIDAR KHAN, **89 P.R. 1891.** [*R*., 14 P.R. 1904=140 P.L.R. 1904; *Overruled*, 2 P.R. 1908, F.B.]

(5494)—*O*. 41, *r*. 23 (=*s*. 562, *Civ Pro.Code*, 1882)—*Misopplication of—Warning against.*—The attention of the Court is drawn in this case to the injuries arising from the misapplication of this section. SENAH GUL v. SAHIB GUL, **63 P.R. 1890.**

(5495)—*O*. 41, *r*. 23 (=*Civ. Pro. Code*, 1882, *s*. 562)—*Preliminary point, meaning of.*—The words "preliminary point" in the section must be taken to refer to some point either collateral to the merits which precludes their determination altogether, or to some particular question

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which though relating to the merits precludes their general determination. GOVIND RAO SONU GHATATE v. SUPAJEE, **12 C.P.L.R. 45.** (16 M. 207, *F.*; 17 C. 168, *Not F.*)

(5496)—*O*. 41, *r*. 23 (=*Civ. Pro. Code*, 1882, *s*. 562)—*Suit not disposed of on preliminary point—Legality of remand—Objection to order of remand after passing of decree.*—Where a suit has not been disposed of on a preliminary point so as to exclude evidence of fact which was essential to the determination of the rights of the parties an order of remand by the appellate Court under s. 562 for a second decision is not legal. An objection to an order of remand made without jurisdiction can be taken in appeal from a decree passed on an enquiry held after the remand though the order itself may have been appealable and has not been appealed against. MANSUKHDASS v. MT. GIRJA BAI, **5 C.P.L.R. 116.** (12 A. 510, *F.*) [*R*., 6 C.P.L.R. 77.]

(5497)—*O*. 41, *r*. 23 (=*s*. 73, *Act* VIII *of* 1859)—*Discretion of Court to make persons not before it—Parties to a suit.*—S. 73, Act VIII of 1859, is permissive, not imperative. The Deputy Collector in this case was held to have exercised a proper discretion in refusing to bring the present talookdars before the Court on the plaintiff's application, after his case had been gone into, when he did not sue them before, although they were the parties from whom, if he succeeded in his suit for possession, he would have to recover possession, and when for this very reason the suit could not duly proceed without those parties being present. FORAN MUNDUL MOLLAH v. SHAM CHAND GHOSE, **1 W.R. 228.**

(5498)—*O*. 41, *r*. 23 (=*s*. 562, *Civ.Pro.Code*, 1882) *as amended by s*. 49 *of Act* VII *of* 1888—*Remand — Preliminary point—Suit decided with reference to some only of several issues framed, after recording all the evidence—Difference between s*. 562, *Civ. Pro. Code, as it stood before and after its amendement by s*. 49 *of Act* VII *of* 1888, *pointed out and explained.*—A shop was mortgaged by G and M (deceased), whose representatives were defendants 8 to 12, to G R (deceased), whose representatives were defendants 4 to 7. Defendants 4 to 7 sub-mortgaged to defendant 3, who sold his mortgaged rights to defendant 2, who sold the shop to defendant 1. In 1902, R purchased the equity of redemption from defendants 8 to 12 and sued defendants 1 to 12 for possession as mortgagors of the said shop. The first Court framed six issues, but the main contention was whether defendants 8 to 12 had already sold their rights to G R in 1869. The Munsiff found the sale of 1869 and the successive proprietary titles of defendants 1 and 2 proved and so dismissed the suit. On appeal, the Divisional Judge, finding the sale of 1869 not established, remanded the case under s. 562, Civ. Pro, Code. In appeal to the Chief Court, it was contended that (1) the case was not decided by the first Court on a preliminary point and (2) the sale of 1869

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to G R was not proved. When the case came on before the single Bench, the appellant's pleader gave up the first ground of appeal and stated the form of remand was correct. But the counsel of the respondent insisted that this was not so. The single Bench, consequently, referred the case to the Division Bench for giving a definite ruling. *Held*, that the first Court disposed of the case on a preliminary point, within the meaning of s. 562, Civ. Pro. Code, as amended by s. 49 of Act VII of 1888, althouh evidence was recorded on the whole case. Also, the difference between the provisions of s. 562, Civ. Pro. Code, as they stood before and after their amendment by s. 49 of Act VII of 1888 was pointed out and explained NAWAHU RAM v. RELU MAL, **27 P.W.R. 1907.** (99 P.R. 1902, 3 A. 30, 27 A. 691, 16 M. 207 and 22 M. 172, *F.*; 109 P.R. 1887, 89 P.R. 1891, F.B.; 43 P.R. 1902, Civ. App. No. 535 of 1902 (Unpublished), 49 P.L.R. 1905, *R & D.*; 89 P.R. 1891, F.B, *Doubted.*) [*R.*, 2 P.R. 1908.]

(5499)—*O.* 41, *r.* 23 (=*Civ. Pro. Code*, 1882, *s.* 562)—*Issues of preliminary nature—Custom—Alienation—Ancestral property — Bhandari Khatris of Vairowal village, Tarn Taran Tahsil, Amritsar District.*—When the Court of first instance dismisses plaintiff's suit to set aside gift of ancestral property, holding that (1) the land in dispute is not ancestral; (2) the plaintiff cannot, by custom, object to the alienation, and (3) the suit is time-barred, and the Court of appeal upsets the finding on these points, it is competent to remand the suit under s. 562 of the Civ. Pro. Code. *Found* that the plaintiff on whom the *onus* lay, had failed to prove a custom whereby Bhandari Khatris of Vairowal village, Tarn Taran Tahsil of the Amritsar District are prohibited from alienating ancestral property without the consent of collaterals. The fact that some Khatris, who own land in a village, are described in the Revenue Records as *khud kasht* does not prove that they are agriculturists in the sense that they are dependent on agriculture. The record-of-rights cannot operate to make a proprietor an agriculturist and subject to customs which govern agriculturists. A non-agriculturist proprietor is bound so much of the record-of-rights as deals with pre-emption and similar customs, but in matters of succession and alienation he cannot be bound by custom and Hindu Law at the same time. The Riwaj-i-Am of the Tahsil though attested by land holding non-agriculturist Khatris, does not make the customs as to succession and alienation applicable to them. It does not follow that because a Khatri family follows agricultural pursuits it adopts the general custom of agriculturists. HARNAM SINGH v. DEVI CHAND, **117 P.L.R. 1901 = 107 P.R. 1901**

(5500)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Remand—Appeal from order of remand after decision of the suit in accordance therewith.*—*Held* that no appeal will lie from an order of remand passed under s. 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. GULZARI MAL v. KABIR UN-NISSA, **A.W.N. 1908, 76 = 5 A L.J. 270 = 30 A, 191.** (29 A. 659, 32 C. 1023, *F.*)

(5501)—*O.* 41, *r.* 23 (=*s.* 572, *Civ. Pro. Code*, 1882)—*Order of remand passed by a single Judge of High Court—Whether "judgment"—Letters Patent, s.* 15—*Appeal*—An order of remand passed by a single Judge of the High Court, under s. 562, Civ. Pro. Code, 1882, is a "judgment" within the meaning of s. 15 of the Letters Patent, because such an order disposes of the suit, and, therefore, an appeal lies from such an order. GOPINATH PATI v. MOHESWAR PRADHAN, **35 C. 1096.**

(5502)—*O.* 41, *r.* 23 (=*s.* 562 *of Civ. Pro. Code*, 1882)—*Suit for possession—Act XXII of* 1886, *s.* 108, *cl.* (10) (*Oudh Rent Act*)—*Jurisdiction—Objection under* s. 124 (*d*), *Act XXII of* 1886 (*Oudh Rent Act*)—*Second appeal—Remand.*—In a suit for possession the Court of first instance, holding that the suit was not cognizable in the Civil Court returned the plaint to be presented to the proper Court. The Court of first appeal held that the suit was cognizable in a Civil Court, and remanded it under s. 562, Code of Civil Procedure. On appeal from the order of remand respondent objected that an objection that the order of subordinate appellate Court had been directed to a Court which was not competent to entertain the suit, could not be taken in second appeal, in view of s. 124 D, Act XXII of 1886 (Oudh Rent Act):—*Held*, that s. 124-D did not apply:—*Held* further, that where the right of succession is disputed the case cannot fall within cl. (10), s. 108 of the Oudh Rent Act and the case is cognizable by the Civil Court. KISHEN KUER v. MAHANT BAJRANG DAS, **1 O C. 172** (S.C. No. 254, *Dissented from*) [*D.*, 1C O.C. 23.]

(5503)—*O.* 41, *r.* 23 (=*s* 562, *Civ. Pro. Code*, 1882)—*Arbitration—Appeal form decree based on award—Further reference to arbitration—Bad award — Remand.*—On appeal from a decree based upon an award, the parties agreed to refer the matters in dispute again to arbitration. The second arbitration, however, proved infructuous, the Court holding that the award could not be sustained. *Held*, that the lower appellate Court was right, under these circumstances, in remanding the case to the Court of first instance under s. 562 of the Code of Civil Procedure for disposal on the merits. RAHIM BAKSH v. RAM NATA, **A.W.N. 1903, 164 = 2 A.L.J. 477.**

(5504)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Order of remand, legality of—First Court not conforming to provisions of s* 202 *of Act II of* 1901 (*Tenancy*)—*Lower appellate Court's order of remand directing First Court to conform to those provisions.*—Plaintiff, a

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Zemindar, sued in a Munsiff's Court to eject defendants as trespassers. They set up a right of occupancy and denied the plaintiff's title to eject them. The Munsiff gave a decree to plaintiff, finding the contention of the defendant to be untrue. The District Judge, on appeal by the defendants, remanded the suit to the Munsiff, holding that the latter ought to have taken action under the Agra Tenancy Act. (s. 202, Act II of 1901). *Held*, on appeal by the plaintiff against the order of remand, (1) that the order of remand was illegal, the suit not having been decided by the Munsiff on any preliminary point, and the District Judge having reversed the decision of the Munsiff on any preliminary point, (2) that the Munsiff ought, under s. 202 of the Agra Tenancy Act to have required the defendants to institute a suit in a Revenue Court, within three months, for a determination of the question raised by them; the Munsiff not having done so, the District Judge ought, in appeal, to have followed this course and not to have remanded the suit. The High Court, under the circumstances, made the order which the lower appellate Court ought to have done passing a written order under s. 202 of Act II of 1901, directing the defendants to institute a suit in the Revenue Court. JAGAN NATH v. BHAWANI, **21 A. 167=A.W.N. 1904, 203.**

(5505)—*O.* 41, *r.* 23 (=*Civ. Pro. Code*, 1882, s. 562)—*Appeal from remand order—Findings of facts and findings of law, effect of.*—On an appeal from an order under s. 562, Civ. Pro. Code, the High Court must accept the findings of fact of the Court which made the order that Court being a Court of first appeal, provided there is evidence to support them. It is otherwise with regard to conclusions of law. Where the High Court has decided a question of law on an appeal from an order under s. 562, Civ. Pro. Code, that decision of the question of law would be final for all purposes in the suit and in any appeal which might be subsequently made to the High Court. GAURI SHANKAR v. KARIMA BIBI, **15 A. 418=A.W.N. 1893, 178.** (8 C. 172, *R.*) [*F.*, 6 M.L.T. 198; *Appr.*, 20 A. 42=17 A.W.N. 195; *R.*, 25 P.L.R. 1902, 1 P.R. 1903=1 P.L.R. 1903.]

(5506)—*O.* 41, *r.* 23, (=*Civ. Pro. Code, Act XIV of* 1882, *s.* 562)—*Preliminary point—Dismissal for want of cause of action.*—Where a suit is dismissed without entering into the merits, on the ground that the plaintiff has no cause of action, the decision is one on a preliminary point within the meaning of s. 562 of the Civ. Pro. Code, and an order of remand by the appellate Court is legal. KANAKAMAL v. RANGACHARIAR, **20 M. 25=6 M.L.J. 259.** [*R.*, 2 P.R. 1908, F.B.=12 P.W.R. 1908=96 P.L.R. 1908, 56 P.R. 1908=107 P.W.R. 1908=161 P.L.R. 1908.]

(5507)—*O.* 41, *r.* 23 (=*Civ. Pro. Code*, 1882, s. 562)—*Issues left undecided by lower appellate Court—Remand by High Court—Duty of lower appellate Court before remanding suit to first Court—Procedure under Civ. Pro. Code*, s. 562.—In this case, the Court of first instance had disposed of the suit on the grounds, *res judicata* and limitation. On appeal, without going into the question of limitation, the lower appellate Court upheld the decision on the ground only of *res judicata*. On second appeal, holding that the suit was not barred by *res judicata*, the High Court remanded the case to the lower appellate Court for disposal on the merits, and that Court, on receipt of the remand order, at once reversed the first Court's decree, without reference to the point of limitation, and remended the suit for trial on the merits by the first Court. On appeal to the High Court from this order of remand, *held* that the order was unauthorized by s. 562 of the Civ. Pro. Code. The remand order of the High Court left the whole case open to the lower appellate Court, and before reversing the first Court's decree and remanding the suit to that Court, the lower appellate Court was bound under s. 562 of the Code, to have determined whether the decision of the Court of first intance on the point of limitation was right or not. RAISINGI v. BALVANTRAO, **11 B. 668.**

(5508)—*O.* 41, *r.* 23 (=s. 562, *Civ. Pro. Code*, 1882)—*Bengal Tenancy Act (VIII of* 1885), *s.* 52—*Abatement of rent—Measurement—Dispossession by paramount title.*—When the decision of the first Court is not based on any preliminary ground, the lower appellate Court has no jurisdiction to set aside the decree of the first Court under s. 562, Civ. Pro. Code, 1882. S. 52 of the Bengal Tenancy Act is not exhaustive; that is, it is not the only provision of law under which abatement of rent can be claimed. (3 C.W.N. 225, 7 C.W.N. 93, *R.*) When the tenant is dispossessed of a portion of the land comprised in his tenancy, by a person claiming under a paramount title, he is entitled to a reduction of the rent. RANI DASI v. ASUTOSH ROY CHOWDHURY, **6 Ind. Cas. 206.** (10 W.R. 120, 1 B.L.R. A.C. 87, 12 W.R. 109, 21 C. 1005, 21 I.A. 118, *R.*)

(5509)—*O.* 41, *r.* 23—*Remand by High Court to District Judge—Remand by District Judge to Munsif—Jurisdiction.*—The High Court remanded a case to the District Judge, under s. 562 of the Code of 1882. The District Judge, instead of carrying out the order himself, remanded the case further down to the Munsif: *Held*, that the District Judge had no jurisdiction to remand the case to the Munsif. RAMBARAN UPADHIA v. KASHI UPADDHIA, **6 Ind. Cas. 400.** (21 A. 230, *F.*)

(5510)—*O.* 41, *r.* 23 (=*Civ. Pro. Code*, 1882, s. 562)—*Remand order, informal—Appeal.*—When an appellate Court directs the Court of first instance to do what could be directed only under s. 562, Civ. Pro. Code, but the order is informal in that the decree of the first Court

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is not set aside, the order, in substance, is one under s. 562, Civ. Pro. Code, and is, therefore, appealable. LALA RAM SARAN LAL v NEM NARAIN SINGH, **6 C.W.N. 326.**

(5511)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Remand—Preliminary point—Suit decided with reference to some only of several issues framed.*—*Held*, that it is competent to an appellate Court to remand a case under s. 562 where the Court of first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided. MATA DIN v JAMMA DAS, **A.W.N. 1905, 159=2 A.L.J. 685=27 A. 691.** (9 A. 30, Footnote, 16 M. 207, *F.*)

(5512)—*O.* 41, *r.* 23 (*s.*=562, *Civ. Pro. Code*, 1882)—*Remand—Preliminary point.*—An order for remand can only be passed under s. 562, when the Court of first instance has decided the suit on a preliminary point and the decision of the first Court is set aside by the appellate Court on that point. A preliminary point is defined to be 'a point which is collateral to the merits of the case, the decision upon which in one way may put an end to case on the merits and in another way leaves a subsisting case on the merits.' TELU RAM v. LACHHI RAM, **49 P.L.R. 1905.** (109 P.R. 1887, *F.*)

(5513)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Dismissal of a suit on a preliminary point—Power of appellate Court to remand the case—Suit by reversioner to set aside an alienation by proprietor in the presence of a minor adopted son.*—Where a suit for setting aside a sale by a proprietor brought by a reversioner was dismissed on the ground that the proprietor had validly adopted a boy and that the plaintiff was therefore, not competent to sue in the presence of the adopted boy, *held*, that the suit was dismissed on a preliminary point within the meaning of s. 562, and that the appellate Court was competent to remand the case for decision on the merits. (109 P.R. 1887, 98 P.R. 1887, 16 M. 207, 20 M. 25, *R.*) Reversioners have a *locus standi* to sue for a declaration of the invalidity of a sale by a proprietor with limited powers, in the presence of the adopted son, if he is a minor. JIWA SINGH v. KHAZANA, **56 P.R. 1908.** (24 P.R. 1877, *F.*; 84 P.R. 1898, F.B., 80 P.R. 1902, *R.*)

(5514)—*O.* 41, *r.* 23 (=*s.* 462, *Civ. Pro. Code*, 1882)—*Remand—Preliminary point, what is—Liability for compensation—Amount of damages.*—Where by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, the suit was dismissed, on a preliminary point. The appellate Court finding that the issues considered were wrongly decided and the suit wrongly dismissed, remanded the case for disposal of the suit after consideration of the remaining issues: *Held*, that suit was properly remanded under s. 562. There were two questions in the case, *viz.*, the liability of the defendant to compensate the plaintiffs, and the amount of damages. The Court of first instance held the plaintiffs were not entitled to damages and dismissed the suit on this preliminary point. On appeal, the Court of appeal held the plaintiff was entitled to damages and remanded the suit for ascertainment of damages: *Held*, the remand was proper. SALIM SHEIKH v. NAZIR KHAN, **8 C.L.J. 159.** (16 M. 207, *F.*)

(5515)—*O.* 41, *r.* 23 (=*Civ. Pro. Code*, 1882, *s.* 562)—*Remand—Preliminary point.*—A suit should not be remanded under s. 562 of Civ. Pro. Code when it is determined on a point which was the main issue of fact in the whole case and a crucial question on the merits. A preliminary point is a point which is collateral to the merits of the case, the decision upon which in one way puts an end to the case and in another way leaves a subsisting case on the merits. ALI MUHAMMAD v. RALA RAM, **157 P.L.R. 1908.** (107 P.R. 1887, 43 P.R. 1902, S.C. 35 P.L.R. 1902, 20 C. 425, *R.*)

(5516)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Remand order, validity of—Appellant not allowed to challenge the validity of the decision on which remand made.*—*Held*, that in an appeal from a decree passed after a remand under s 562 of the Code of Civil Procedure, an appellant cannot be allowed to reopen the decision on which the remand is made. KOTPAL SINGH v. SHEO PRASAD SINGH, **10 O.C. 350.** (8 A. 172, *R.*; 6 B.H.C. 146, *F.*)

(5517)—*O.* 41, *r.* 23 (=*s.* 562, *Civ. Pro. Code*, 1882)—*Preliminary point, meaning of—Remand—Suit decided with reference to some only of the issues framed.*"—The only necessary connotation of a preliminary point in s. 562, Civ. Pro. Code, is that it should suffice for the disposal of the suit. Any point the decision of which does not enable the Court to decide the suit is excluded from the category of a preliminary point. ABDUL GAFAR KHAN v. MUHAMMAD ZIA-UD-DIN, **2 P.R. 1908, F.B.=12 P.W.R. 1908=96 P.L.R. 1908.** (43 P.R. 1902, 16 M. 207, 20 M. 25, 21 M. 172, 27 A. 691, 9 A. 30, Footnote, 1 C.W.N. 340, *R.*; 109 P.R. 1887, 89 P.R. 1891, F.B., *Overruled.*) [*R.*, **147 P.R. 1908.**]

(5518)—O. 41, r. 23—*See* **ACT XIV OF 1874, s. 6, 22 A. 405=A.W.N. 1900, 157.**

(5519)—O. 41, r. 23—In proceedings under the N.W.P. Tenancy Act, where the Court of first instance has failed to pass an order under s. 202 of the Act, which it ought to have done, the appellate Court should, in remanding the case to the Court of first instance, give instructions to pass the order which it ought to have passed in the first instance—*See* **U.P. ACT II OF 1901, ss. 177 (*e*) and 195, 2 A.L.J. 176=A.W.N. 1905, 46.**

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(5520)—O. 41, r. 23—*See* COURT FEES ACT, 1870, sch. II, art. 11, 21 A. 178=A.W.N. 1898, 23.

(5521)—O. 41, r. 23—Order of remand under s. 562, Civ. Pro. Code, order of appellate Court setting aside is a decree — Limitation Act, sch. II, art. 179—Civ. Pro. Code, ss. 2, 562—*See* EXECUTION OF DECREE—GENERAL, 5 O.C. 301.

(5522)—O. 41, r. 23—*See* JURISDICTION OF CIVIL COURTS, A.W.N. 1884, 74.

(5523)—O. 41, r. 23—Jurisdiction of two Subordinate Judges in same place—Remand order under—by one Subordinate Judge--Decree passed by the first Court—Appeal from decree to second Subordinate Judge—*See* JURISDICTION OF SUBORDINATE JUDGE, 14 A. 348=A.W.N. 1892, 25.

(5524)—O. 41, r. 23—*See* PRODUCTION OF DOCUMENT, 3 B.H.C, O.C. 66.

(5525)—O. 41, r. 23—*See* RES JUDICATA—MISCELLANEOUS, 30 M. 203.

(5526)—O. 41, r. 23—*See* SPECIAL OR SECOND APPEAL — ERRORS OF LAW OR PROCEDURE, 20 W.R. 188.

(5527)—O. 41, r. 23—*See* SPECIAL OR SECOND APPEAL — RIGHT OF SPECIAL APPEAL, 2 W.R. 181.

(5528)—O. 41, r. 23—*See* STAMP ACT, 1879, s. 37, A.W.N. 1887, 21.

(5528-*a*)—*O.* 41, r. 23—*See* NOS. 120, 121, 371, 372, 511, 545, 1712, 1863, 1905, 1923-*a*, 1926, 1927, 1965, 1984, 2338 *a*, 2341, 2412-*a*, 2764-*o*, 2774, 2793, 2793-*a*, 3018, 3027, 3029, 3029-*a*, 3052, 3177, 3195, 3197, 4478, 5007, 5468, *supra* AND NOS. 5652, 5871, *infra*.

(5529)—*O.* 41, *r.* 23, *s.* 99 (=ss. 562, 578, *Civ. Pro. Code*, 1882)—*Order of remand, irregular—Breach of contract, suit upon—Tort, suit upon—Parties——Obstruction, suit to remove.*—When a case was remanded for fresh trial, apparently under s. 562, Civ. Pro. Code, on the ground that the deposition of the witnesses, recorded in the first Court did not bear the usual certificate, such remand was irregular, because it was not authorised by any provisions of the Civ. Pro. Code; such an irregularity is cured by s. 578, Civ. Pro. Code, and does not *ipso facto* vitiate all proceedings taken after remand. In a suit based upon a breach of contract, all parties who are damnified by the breach, must join. A suit, however, in which relief is claimed on the basis of a tort, may be maintained by any of the persons injured thereby, even though the tort is a damage done to land owned by plaintiff jointly with other persons, who are not parties to the suit. (25 C. 285, *F.*) When injury is caused by obstruction to the exercise of the right of irrigation, which affects the productive powers of the land and endangers the receipt of rent from the

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tenant, not merely the tenant in actual occupation, but also his landlord may sue for declaration of the right and the removal of the obstruction. RAM GOPAL DEY v. RAGHUNATH GHOSHAL, **2 C.L.J. 496.** [*R.*, 6 C.L.J. 383.]

(5530)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (=ss. 562, 588, *Civ. Pro. Code*, 1882)—*Appeal against remand order—Order as to costs.*—The appeal allowed by s. 588, Civ. Pro. Code, against an order of remand and under s. 562 extends to an appeal against a part of such order, *e.g.*, an order as to costs. GHULAM JILANI v. GHULAM HAIDAR KHAN, **89 P.R. 1889.**

(5531)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (=ss. 562, 588, *Civ. Pro. Code*, 1882)—*Appeal from order.*—Where a remand order is made under s. 562, Civ. Pro. Code, in a case which is itself an appeal from an order allowed by s. 588, Civ. Pro. Code, the order, even though it be one remanding the case, is an order that is not appealable. MATHURA NATH GHOSE v. NOBIN CHANDRA KUNDU BISWAS, **24 C. 774 =1 C.W.N. 674.** (10 C. 523, 3 A. 18, 7 B. 292, *D.*) [*F.*, 21 A. 291=A.W.N. 1899, 68.]

(5532)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (=ss. 562, 588, *Civ. Pro. Code*, 1882)—*Appeal from remand order—Chief Court's power to go into merits of case.*—In an appeal under s. 588 (28) against a remand order under s. 562, as soon as it is held that the remand order appealed is not warranted by the terms of the section, inasmuch as the case has not been disposed of by the Court of first instance upon a preliminary point, the Chief Court cannot enter upon, or in any way deal with, the spurious preliminary point, which the lower appellate Court had wrongly held to justify the remand order. IMAM BIBI v. GHULAM HUSSAIN, **38 P.R. 1908=86 P.W.R. 1908=177 P.L.R. 1908.** (1 P.R. 1903 6 P.R. 1892, *R.*)

(5533)—*O.* 41, *r.* 23, *s.* 104. *O.* 43 *r.* 1 (=ss. 562, 588, *Civ. Pro. Code*, 1882)—*Act (Local) II of* 1901 (*Agra Tenancy Act*), *s.* 193—*Remand—Appeal.*—There is no appeal from an order of remand, passed under s. 562 in a suit or proceeding under the Agra Tenancy Act, 1901. VILAYAT HUSEN v. MAHARAJAH MAHENDRA CHANDRA NANDY, **A.W.N. 1905, 108=28 A. 88.** [*F.*, 4 A.L.J. 469.]

(5534)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (=ss. 562, 588, *Civ. Pro. Code*, 1882)—*Remand order of—Right of appeal—Appeal after suit finally disposed of—Order, if may be impugned in appeal from final decision—Tenancy—Transferability—Custom.*—An appeal from an order of remand, pass under s. 562 of the Code, cannot be entertained if presented after the final disposal of the suit. (12 C. 45, D.) The right of appeal, given by s. 588 of the Code, from orders specified in that section ceases with the disposal of the suit. The incident of non-transferability was common to

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ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands, before the passing of the Transfer of Property Act; and the party, alleging transferability, had to prove a custom of that effect. (2 C.W.N. 122, *R.*; 7 B.L.R. 152, *D.*) *Semble.*—An order of remand under s. 562 of the Code is an order which affects the decision of the suit on the merits, and exception may be taken to the validity of such an order in an appeal from the final decision. MADHU SUDAN SEN v. KAMINI KANTA SEN, **9 C.W.N. 895=32 C. 1023.** [*F.*, 29 A. 659=4 C.L.J. 569=A.W.N. 1907, 234, 30 A. 191=5 A.L.J. 270=A.W.N. 1908, 76, 7 C.L.J. 107, *R.*; 12 C.W.N. 590=6 C.L.J. 547, 7 C.L.J. 553=12 C.W.N. 72, Note; *Diss.*, 30 A. 479, F.B.=5 A.L.J. 447= A.W.N. 1908, 195= 4 M.L.T. 162.]

(5535)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *Civ. Pro. Code*, 1882, *ss.* 562, 588 (28)—*Preliminary point—Power of Chief Court to consider merits of preliminary point—Registration Act (III of 1877), s 17—Receipt operating as relinquishment of mortgage-rights.*—The expression "preliminary point" in s. 562, Civ. Pro. Code, means a point which is collateral to the merits of the case, the decision upon which in one way puts an end to the case, and in another leaves a subsisting case on the merits. *Held*, that it is open to the Chief Court when hearing an appeal, under s. 588 (28), Civ. Pro. Code, from an order under s. 562 of the Code, remanding a case, when the order is that of a District Judge exercising appellate jurisdiction, and the case is a small cause one under Rs.500 in value, in which the District Judge's decree would be final, to decide upon the merits of the preliminary point upon which the first Court disposed of the suit, and that its attention is not confined to the question whether the right procedure has been followed in ordering the remand under s. 562, Civ. Pro. Code. *Held*, also, that in the present case a point, which was a preliminary one as regards some of the defendants, ought to be treated as such for the whole case. A receipt for Rs. 100 or upwards to operate as a relinquishment of mortgage-rights, and as an acknowledgment that the mortgage has been redeemed, requires registration under s. 17 of the Registration Act, and, if unregistered, is inadmissible in evidence. NAND LAL v. GURDITTA MAL, **141 P.L.R. 1902=99 P.R. 1902.**

(5536)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *ss.* 562 *and* 588, *Civ. Pro. Code*, 1882)—*Order of remand—Whether appeal lies after suit is finally disposed of.*—An appeal under s. 588, Civ. Pro. Code, cannot be entertained, if preferred after the suit has been finally disposed of by the lower Court. SALIG RAM v. BRIJ BILAS, **4 A.L.J. 569=A.W.N. 1907, 234=29 A. 659.** (9 C.W.N. 895, *F.*; 12 A. 540, *D.*) [*Overruled*, 30 A. 479, F.B.=A.W.N. 1908, 195=5 A.L.J. 447 =4 M.L.T. 162; *F.*, 30 A. 191=A.W.N. 1908, 76=5 A.L.J. 270.]

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(5537)—*O.* 41, *r.* 23, *s.* 104. *O.* 43, *r.* 1 (= *ss.* 562 *and* 588, *Civ. Pro. Code*, 1882)—*Appeal—Claims inconsistent—Plaint, order rejecting a decree—Appellate order admitting plaint, not a decree—Second appeal.*—Where the Court of first instance rejected the plaint on the ground that it contained two inconsistent claims, and the Court of appeal held that the plaintiffs were entitled to press both claims in one suit, and directed the first Court to proceed with the trial of the suit on its merits: *Held*, on appeal by the defendant, that the order of the Court of first instance was an order rejecting the plaint and therefore, a decree, and the order of the appellate Court was an order admitting the plaint which not being a decree nor an order under s. 562, Civ. Pro. Code, was not appealable. BRAJA LAL MITRA v. UPENDRA KRISHNA MITRA, **6 C.L.J. 214.**

(5538)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *ss.* 562 *and* 588, *Civ. Pro. Code*, 1882)—*Ordinary appeal and appeal under s.* 588—*Order of remand on appeal—Second appeal*—Where an order of remand under s. 562 is passed on an appeal under s. 588 of the Code, but not on an ordinary appeal from a decree, a second appeal is barred under the concluding paragraph of s. 588. RAJ BHAI v. YAKUB ALI, **120 P.R. 1907.** (24 M. 447; 18 A. 85, 26 M. 518, *R*; 6 C.W.N. 585, (*Diss.*)

(5539)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *Civ. Pro. Code*, 1877, *ss.* 562, 588 (28)—*Remand—Order carried out—Appeal.*—The High Court would not, in an appeal from an order of remand under s 562 of the Civ. Pro. Code, open the question of the property of the order, where the Court to which the suit had been remanded had carried such order into effect and passed a decree in the suit. KARORI MAL v SAHODRA, **A.W.N. 1884, 5.** [*R.*, 30 A. 479, F.B.=5 A.L.J. 447=A.W.N. 1908, 195= 4 M.L.T. 162.]

(5540)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *Civ. Pro. Code*, 1877, *ss.* 562, 588 (28)—*Appeal from order of remand—Order carried out before hearing of appeal.*—Where, before the appeal from an order of remand of the lower appellate Court came on for hearing before the High Court, the Coure of first instance had carried such order into effect and given the plaintiff a decree, *held* that, under these circumstances, the High Court would not open the question of the propriety of the order of remand. IKRAMUNNISSA v. MUHAMMAD WAZIR, **A.W.N. 1882, 53.** [*Not F.*, 5 A.L.J. 447=30 A. 479= A.W.N. 1908, 195=4 M.L.T. 169, F.B.]

(5541)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (= *Civ. Pro. Code*, 1882, *ss.* 562, 588, *cl.* 28)—*Appeal against order of remand—Power of High Court.*—On an appeal against an order under s. 562 of the Code remanding a case, all that the High Court can do under s. 588 (cl. 28) is to consider whether, on the findings of fact by the lower appellate Court, the order of remand

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was rightly made, and not to consider the facts on which the lower Court made the order of remand. NOIMULLAH PRAMANICK v. GRISH NARAIN MOONSHEE, **8 C. 674.** [*F.*, 12 B. 589; *R.* 14 B. 14, F.B.]

(5542)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss* 562 *and* 588 (28)—*Remand—Appeal against order of—Power of Chief Court to consider merits of preliminary point.—Held*, by the Full Benon, that an appeal lies under s. 588 (28). Civ. Pro. Code, against an order passed on appeal from a decree in an unclassed suit under Rs. 200 in value, remanding the suit for re-trial, under s. 562. The Chief Court, in dealing with such an appeal, is not confined to mere questions of procedure, but can go into the merits of the decision of the lower appellate Court on the preliminary point, upon which the first Court disposed of the suit, and the Court can decide that point on the merits. MAHA RAM v. RAM MOHAR, **1 P.L.R. 1903, F.B.=1 P.R. 1903.** (85 P.R. 1895, F.B., 6 P.L.R. 1892, 3 A. 675, F. B., 5 C. 144, 17 C. 168, 14 B. 14, *F.*)

(5543)—O. 41, r. 23, s. 104, O. 43, r. 1 —*See* PROFITS, SUIT FOR, P.L.R. 1900, 314.

(5544)—O. 41, r. 23, s. 104, O. 43, r. 1—*See* REMAND, 185 P.L.R. 1901=28 P.R. 1902.

(5545)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1, s. 105 (=*ss.* 562, 588, *cls.* 28 *and* 591, *Civ. Pro. Code*, 1882)—*Remand, questioning the validity of the order of—Appeal against the final decree, objection as to the remand order taken in.—Held*, that, although no appeal has been preferred under s. 588 (28) of the Code against the order remanding a case under s. 562, yet the validity of the remand order can be questioned in second appeal preferred against the final decree passed in the case. It is not necessary that the appellant should appeal on other grounds as well: the appeal may be lodged against the final decree solely upon the ground that the remand order was illegal. SRI HARAKH v. RAM DAT, **9 O.C. 80.** (12 A. 510, 22 A. 366, 18 M. 421, 18 A. 19, 14 B. 32, 28 C. 324, *R.*)

(5546)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1, *s.* 105 (=*Civ. Pro. Code*, 1882, *ss.* 562, 588, *cls.* 28, 591) — *Suit decided on merits by first Court—Remand order and subsequent proceedings illegal and* ultra vires—*Second appeal, if validity of remand order can be questioned in.*—Where a suit had been disposed of by the first Court on the merits, and not on any preliminary points so as to exclude any evidence of facts, an appellate Court cannot remand the case under s. 562. If any such order of remand is made, it is *ultra vires* and illegal, and so also are all proceedings which are subsequent thereto (*vide* s. 564). [*F.*, A.W.N. 1906, 28=3 A. L.J. 40; *R.*, 12 C.P.L.R. 119, 5 C.P.L.R. 116, 18 M. 421, 30 A. 479=5 A.L.J. 447=A. W.N. 1908, 195=4 M.L.T. 162; *D.*, 23 A. 167, 30 M. 54, F.B.=16 M.L.J. 479=1 M.L.T. 268, 6 C.L.J. 547=12 C.W.N. 590.] The validity of such remand order may be questioned either by an appeal against the order itself under s. 588 (28), or in second appeal to the High Court from the decree in the suit, under s. 591. RAMESHUR SINGH v. SHEODIN SINGH, **12 A. 510, F.B.=A.W.N. 1890, 188.** [*R.*, 23 C. 335, 18 A. 19=15 A.W.N. 134, 28 C. 324=5 C.W.N. 509, 11 A.W.N. 105, 14 A. 348, 9 O.C. 80; *D.*, 29 A. 659=A.W.N. 1907, 234=4 A.L.J. 569.]

(5547)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1, *s.* 105 (=*Civ. Pro. Code*, 1882, *ss.* 562, 588, 591)—*Order in suit appealable under the Code, when may be questioned in appeal from decree.*—An order in a suit passed under the Civ. Pr. Code, from which an appeal lies under s. 588 of the Code but no appeal has been preferred, can be questioned in s. 591 in an appeal made from the decree in the suit, if the ground of objection is stated in the memorandum of appeal; in other words, in order to take advantage of the provisions, the ground must be set out in the memorandum of appeal. Further, s. 591 does not enable a litigant to avoid limitation by coming up under s. 591 when the only ground of appeal is the order made under s. 562. SHEO NATH SING v. RAM DIN SINGH, **18 A. 19, F.B.=A.W.N. 1895, 134.** (12 A. 510, 17 A. 112, *D.*) [*Diss.*, 9 O.C. 80, Note; *F.*, 36 C. 762 =10 C.L.J. 113; *F.*, 22 A. 366; *R.*, 12 C.P.L. R. 119, 19 A.W.N. 136, 30 A. 479=5 A.L.J. 447=A.W.N. 1908, 195=4 M.L.T. 162; *D.*, 22 A. 430=20 A.W.N. 136, 4 M.L.T. 400=A.W. N. 1908, 242=5 A.L.J. 644.]

(5548)—*O.* 41, *r.* 23, *s.* 104, *O.* 43, *r.* 1, *s.* 105 (=*ss.* 562, 588 (28), 591, *Civ. Pro. Code*, 1882)—*Remand—Limitation — Pre-emption—Foreclosure of mortgage by way of conditional sale.*—Under s. 591, objection may be taken, on further appeal against the decree passed in the suit by the lower appellate Court, to an order of remand previously passed by it when no appeal was filed under s. 588 (28) of the Civ. Pro. Code against the order. (14 B. 232, *F.*) In the case of foreclosure of a mortgage by way of conditional sale, the limitation for a suit for pre-emption begins to run from the date of the expiration of the year of grace allowed to the mortgagor under Regulation XVII of 1806, RANGU RAM v. JOWALA SINGH, **32 P.L.R. 1906.**

(5549)—*O.* 41, *r.* 23, *s.* 105 (=*ss.* 562, 591, *Civ. Pro. Code*, 1882)—*Second appeal—Objection regarding remand order by lower appellate Court—Objection not taken in memorandum of second appeal.*—An objection which may be heard under s. 591, Civ. Pro. Code, must be one set forth in the memorandum of appeal. Where an objection as to the order of remand by the lower appellate Court was not taken in the memorandum of second appeal, its validity could not be questioned in second appeal. TILAK RAJ SINGH v. CHAKARDHARI SINGH, **15 A. 119=A.W.N. 1893, 14.** [*F.*, 18 A. 19, 20 A. 370; *R.*, 12 C.P.L.R. 119.]

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(5550)—*O.* 41, *r.* 23, *s.* 105 (=ss. 562, 591, *Civ. Pro. Code*, 1882)—*Point decided before remand—No appeal against the order of remand—Whether can be pressed in second appeal—Practice—Applicability of art.* 36, *Limitation Act*, 1908.—Where the question of limitation was decided by the District Judge when making an order of remand, and the appellants did not appeal against the order of remand. *Quære* :—Whether it is open to the appellants in second appeal to appeal against the decision on the question of limitation. (32 M. 318, *Doubted* ; 18 M. 421, 14 B. 232, 14 A. 348, 23 C. 335, *R.*) Art. 36, Limitation Act, does not apply to a suit for the value of jewels lost owing to the negligence of the defendants who are the servants of the plaintiff and who have acknowledged the liability. SESHU GURUKKAL v. SOMASUNDRA MUDALIAR, **7 M.L.T. 93=5 Ind. Cas. 764.**

(5551)—*O.* 41, *r.* 23, *s.* 109 (=ss. 562, 595, *Civ. Pro. Code*, 1882)—*Final order—Preliminary point*—Res judicata—"*Evidence of essential facts.*"—*Held*, that s. 562 of the Civ. Pro. Code applies to a case decided on a point of law on such materials as are available before the parties prove disputed documents or adduce oral evidence. On reference to I.L.R. 17 A. 112, *held*, that by the words "evidence of essential facts," their Lordship meant evidence of facts essential to the disposal of the case and not merely essential to the question which has been decided. (17 A. 112, *Expl.* & *D.*) *Held*, further, that an order of remand which will not necessarily have any effect on the ultimate decision of the case was not a final order within the meaning of s. 595 of the Code of Civil Procedure. JAMNA PRASAD v. RADHA KISHEN, **11 O C. 169.** (1 O.C. 205, 2 C.W.N. ccci, 15 B. 115, *D.*)

(5552)—*O.* 41, *r.* 23, *s.* 109 (=ss. 562, 595, *Civ. Pro. Code*, 1882)—*Appeal to Privy Council—Order of remand under s.* 562 *whether a final decree.*—Where a case was remanded under s. 562 of the Code by the Chief Court, the order of remand cannot be said to be a final decree under s. 595, cl. (*a*), and an application for leave to appeal to the Privy Council from such order will not be granted under s. 595, cl. (*a*) even though the value of the suit is sufficient to warrant an appeal. SOHAN SINGH v. JAHANDAD KHAN, **52 P.R. 1907=34 P.L.R. 1908=119 P.W.R. 1908.** (1 A. 726, 25 A. 629, 6 B. 260, 8 B. 548, *R.*; 17 A. 112, *Expl.*)

(5553)—*O.* 41, *r.* 23, *s.* 109 (=ss. 562, 595, *Civ. Pro. Code*, 1882)—*Order of remand not "final decree" within meaning of.*—The plaintiff brought a suit, the amount or value of the subject-matter of which was upwards of Rs. 10,000. The Court of the first instance held that the suit was barred by limitation, and dismissed the suit on that ground without disposing of the case on the merits. On appeal by the plaintiff the Judicial Commissioner's Court found that the suit was not barred by limitation and made an order of remand under s. 562 of the Code of Civil Procedure for determination on the merits. The defendant, desiring to appeal to Her Majesty in Council from the order of remand, applied for a certificate under s. 600 of the Code of Civil Procedure :—*Held*, that the order of remand was not a final decree within the meaning of s. 595 of the Code of Civil Procedure, and that the certificate could not be granted. TASADDUK RASUL v. FARSAND HUSAIN, **1 O.C. 205.** [*R.*, 11 O.C. 169.]

(5554)—*O.* 41, *r.* 23, *ss.* 109, 110 (=*Civ. Pro. Code*, 1882, *ss.* 562, 595, 596)—"*Cardinal issue,*" *term explained — Remand order.* — A cardinal issue in a case is an issue which goes to the foundation of the suit, and not one which merely relates to a matter of procedure. Where a suit was held to be unmaintainable, without obtaining the consent in writing of the Advocate-General, as the suit came within the purview of s. 539, but on appeal the suit was remanded under s. 562 for re-trial upon the merits, *held* that the decision regarding that matter was rather a matter of procedure than a matter determining a cardinal issue in the suit. An interlocutory order, such as an order of remand, may be impeached before the Privy Council when an appeal is preferred against the final decree in the case. MUJTABA HUSAIN v. JAMAL-UD-DIN, **1 A.L.J. 26.**

(5555)—*O.* 41, *r.* 23, *s.* 115 (=*Civ. Pro. Code*, 1882, *ss.* 562, 622)—*Remand—Power of appellate Court after remand—Revision—"Case."*—When a Judge has remanded a case to the lower Court under s. 562 of the Code, it is not competent to him to entertain it in any shape until an appeal, if preferred, comes before him for decision. If a Judge passes any order in the suit after remand it is altogether irregular. The High Court has power to interfere by way of revision. It cannot be objected that the High Court cannot entertain the matter because there is no "case" within the meaning of s. 622 of the Code. Such an objection is untenable. TILAKDHARI v. GOBIND PRASAD, **A.W.N. 1883, 171.** [*R.*, 9 A. 427, 8 C.W.N. 313.]

(5556)—O. 41, *rr.* 23, 24 (=ss. 562, 565, *Civ. Pro. Code*, 1882)—*Decision on merits—Power of appellate Court to remand suit—Finality of order of appellate Court—Leave to appeal to Privy Council.*—Suit to recover possession of property purchased by the plaintiff. Several defences were raised. One was of a preliminary nature, *viz.*, that there was misjoinder, and this was overruled. The next was as to the genuineness of a will. The Court of first instance took the evidence and heard the case. The question of will was decided against the plaintiff and the suit dismissed. The other issues in the suit were not gone into. On appeal, the appellate Court held that the defendant was liable to account to the plaintiff and remanded the suit under s. 562, Civ. Pro. Code, for disposal on the other issues according to law. *Held* that that the remand contemplated by s. 562 was

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one made in a case where the first Court disposed of the suit on a preliminary point so as to exclude the evidence of essential facts. That was not the present case. The only preliminary point was the misjoinder. The question as to the genuineness of the will on which the plaintiff's case entirely rested was not a preliminary point so as to exclude evidence. The appellate Court had miscarried in puprorting to remand under s. 562 and the case fell within s. 565 of the Code, which required the appellate Court to decide issues on which the evidence had been taken. *Held* also that the decree of the appellate Court (High Court) affirming the liability of the defendant to account to the plaintiff was final. The High Court should have granted the plaintiff leave to appeal to the Privy Council. SYED MUZHAR v. RADHA BIBI, **5 M.L.J. 20, P.C.**

(5557)—*O.* 41, *rr.* 23, 24, 25 (=*Civ. Pro. Code*, 1882, *ss.* 562, 565, 566)—*Remand for fresh trial when illegal.*—If the evidence on record is not sufficient to enable the appellate Court finally to determine the case, its duty is to proceed under s. 565 or s. 566, Civ. Pro. Code, and it is not justified in remanding the suit for a fresh trial under s. 562, Civ. Pro. Code. RAGHU NANDAN JHA v. JALPA PATTAP, **3 C.W.N. 748.**

(5558)—*O.* 41, *rr.* 23, 24, 25 (=*Civ. Pro. Code*, 1882, *ss.* 562, 565, 566)—*Illegal order of remand.*—Where the lower Court tried all the issues in a case, that is, took evidence on them all, but came to a finding on only one of the issues, and the appellate Court reversing this finding remanded the case under s. 562, Civ. Pro. Code, for trial of the other issues, such a remand is illegal. In such a case, the appellate Court should act either under s. 565, or s. 566, Civ. Pro. Code. AMMA v. CUNHUNNI, **9 M. 355.**

(5559)—*O.* 41, *rr.* 23, 25 (=*ss.* 562, 566, *Civ. Pro. Code*, 1882)—*Suit by tenant for ejectment and damages—Finding of the Court of first instance against the plaintiff as regards the title—Reversal of that finding by the appellate Court—Order of remand, propriety of — Suit not decided on a preliminary point.*—In a suit by a tenant for ejectment of the defendants as trespassers and for damages, the Court of first instance having found that the plaintiff had failed to establish his tenancy right, dismissed the suit without deciding the issue as to damages. But the lower appellate Court found in his favour as regards his title and remanded the case to that Court under s. 562 of the Code, *Held*, that the order of remand was wrong, as there was no occasion for remanding the whole case to the Court of first instance, inasmuch as the case had not been decided by that Court upon a preliminary point. It ought to have referred to an issue as to damages to that Court under s. 566 of the Code. HUKAM SINGH v. RAGHUBIR SARAN, **A.W.N. 1905, 157=27 A. 700.**

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(5560)—*O.* 41, *rr.* 23, 25 (=*ss.* 562, 566, *Civ. Pro. Code*, 1882)—*Remand, order of, where decision of subordinate Court on merits—Appellate Court, power of—Remand of particular issues only allowable.*—Where a subordinate Court has dealt with questions arising on the merits of the case, no order of remand can be made by the appellate Court under s. 562, Civ. Pro. Code, but if the appellate Court is of opinion that there should be a finding upon any particular issue, or further evidence should be taken on any such issue, it may make an order of remand under s. 566, Civ. Pro. Code. RAKHIT MAHANTA v. PUDDO BAURI, **9 C.W.N. 54.**

(5561)—*O.* 41, *rr.* 23 *and* 25 (=*Civ. Pro. Code*, 1882, *s.* 562, 566)—*Disposal of suit on merits—Legality of remand.*—Deciding a question of fact on insufficient grounds and disposing of a suit on a preliminary point are not convertible terms. So, where the Court of first instance came to a decision on each of the issues which it had fixed, it could not be said that the Court disposed of the case on a preliminary point, however imperfect its inquiry might have been or however erroneous its decision. The procedure in such a case is under s. 566 and not under s. 562 of the Code. DHIRAJSINGH v. MT KALO, **6 C.P.L.R. 77** [*R.*, 12 C.P.L.R. 119.]

(5562)—O. 41, *rr.* 23, 25 (=*ss.* 562, 566, *Civ. Pro. Code*, 1882)—*Power of appellate Court to remand a suit.*—When a Court of first instance does not decide a case on a preliminary point but raises all the issues and goes fully into the matters in issue, it is not open to the appellate Court to remand the case under s. 562, Civ. Pro. Code, but if it thinks that the determination of any particular question is necessary, it may make an order under s. 566, Civ. Pro. Code. AMBICA CHURN DAS v. KALA CHANDRA DAS, **10 C.W.N. 422.**

(5563)—*O.* 41, *rr.* 23, 25 (=*ss.* 562, 566, *Civ. Pro. Code*, 1882)—*Remand by appellate Court—Suit not disposed of on preliminary point—Jurisdiction to remand—Admission of documents on appeal.*—A lower appellate Court admitted certain documentary evidence which was produced for the first time before it on the appeal, and thinking that it was necessary to have the case retried by the first Court in the light of that evidence in addition to the evidence already on the record, the Court set aside the decree of the first Court which had not disposed of the case on any preliminary point, and remanded the case under some inherent power. *Held*, that the lower appellate Court had no power to direct the remand and that the order must be set aside. PROMODINI CHOWDHURANI v. BANGA CHANDRA DATTA, **9 Ind.Cas. 306.**

(5564)—*O.* 41, *rr.* 23, 25 (=*Civ. Pro. Codes*, 1882, *ss.* 562, 566)—*Remand of suit decided on merits.*—Suit decided on merits and not on a

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preliminary point, cannot be remanded under s. 562, Civ. Pro. Code, but fresh issues should be formed and directed to be tried under s. 566, Civ. Pro. Code. MA MA v. MAUNG SHAN, **U.B.R. 1897—1901, Vol. II, 307.** (U.B.R. 1892—1896, Vol. II, 53, *R.*)

(5565)—*O. 41, rr. 23, 25 (=ss. 562, 566, Civ. Pro. Code, 1882)—Contract made on behalf of a minor—Joint Hindu family—Remand.*—The ruling in *Mohori Bibi* v. *Dharmo Das Ghose*, I.L.R. 30 C. 539, P.C., only declares that a contract made by a minor is void and not voidable, and does not apply to the case in which a contract is entered into by person of full age on behalf of a minor belonging to a joint family. Where no new issues have to be framed, but only such of the issues as the first Court left entirely undecided are to be determined, the Court of appeal is justified in sending the case back under s. 562 of the Code of Civil Procedure. MEGHAN DUBE v. PRAN SINGH, **5 A.L.J. 14=A.W.N. 1908, 10=30 A. 63.** (27 A. 11, 631, *R.*) [*R.*, 19 M.L.J. 752=7 M.L.T. 233=4 Ind. Cas. 383.]

(5566)—*O. 41, rr. 23, 25 (=s. Civ. Pro. Code, 1882, ss. 562, 566)—Remand.*—When a Court of first instance had not decided the suit on any preliminary ground, but tried the case out, the appellate Court has no jurisdiction to make an order of remand under s. 562, Civ. Pro. Code, but if a new issue has to be tried, it should proceed under s. 566, Civ. Pro. Code. RAM DAO MONDAL v. INDROMONI DASI, **3 C.W.N. 325.**

(5566-*a*)—*O. 41, rr. 23, 25 (=Civ. Pro. Code, 1859, ss. 351, 354)—Splitting up of subject-matter of appeal as to two parts—Remand as to one portion under s 351—Appeal rejected as to other portion—Proper course—Remand of the whole case under* s. 354—Where the subject-matter of an appeal was split into two portions, and the case was remanded as to one portion, under s. 351, Act VIII of 1859, and the appeal rejected as to the other portion, it was held, that the proper course was to remand the case under s. 354, Act VIII of 1859 and upon return of the record, to dispose of the whole appeal by one order. MANGA v. MUSSAMMAT GURJAN, **82 P.R. 1877.**

(5567) *O. 41, rr. 23, 25 (=ss. 562 and 566, Civ. Pro. Code, 1882)—Remand, order of Preliminary point.*—In a suit by the daughter for her share under the Mahomedan Law of inheritance in the estate of her deceased father, one of the questions for decision was whether by custom daughters were excluded from inheritance in the presence of a son. The Court of first instance decided this question against the daughter and dismissed her suit. The appellate Court reversed this decision and remanded the case under s. 562, Civ. Pro. Code, for trial of the remaining issues. *Held*, that when a suit is decided on the merits on a particular point, that point cannot be regarded as a preliminary point, within the meaning of s. 562, Civ. Pro. Code. *Held*, therefore, that the order of remand under s. 562 was wrong, and the appellate Court should have remanded the case under s. 566 of the Code. MUBARAK ALI v. MUSAMMAT RUKAYA BIBI, **4 O.C. 23.**

(5568)—O. 41, rr. 23, 25—*See* LANDLORD AND TENANT—MISCELLANEOUS, 9 O.C. 362.

(5569)—O. 41, rr. 23, 25—*See* REMAND, A.W.N. 1899, 2, 1 C.W.N. 340, A.W.N. 1894, 19, 19 M. 157.

(5570)—O. 41, rr. 23, 25, ss. 99, 104, O. 43, r. 1—*See* REMAND, 28 C. 324=5 C.W.N. 509.

(5571)—*O. 41, rr. 23, 25, s. 107 (2), O. 22, r. 11 (=ss. 562, 566, 582, Civ. Pro. Code, 1882)—Order made on appeal to amend plaint.*—When an appellate Court sets aside the decree of the lower Court in a suit for rent, orders a new trial and directs the amendment of the plaint by the insertion of the exact boundaries in the land, a point not in dispute in the lower Court, its order cannot be justified under s. 562, or s. 582, Civ. Pro. Code. If the appellate Court wished to ascertain the boundaries, it should have remanded an issue for trial under s. 566, Civ. Pro. Code. KRISHNAYYA NAVADA v. PANCHU, **17 M. 187.**

(5572)—O. 41, rr. 23, 25, 26—*See* REMAND, Marsh 121=1 Hay 260, 12 C.L.R. 136.

(5573)—O. 41, rr. 23, 25, 26—*See* SPECIAL OR SEDOND APPEAL—ERRORS OF LAW OR PROCEDURE, 6 N.W.P. 101, 6 N.W.P. 114.

(5574)—O. 41, rr. 23, 25, 26, 27—*See* EVIDENCE— SECONDARY EVIDENCE, 11 W.R. 228.

(5575)—O. 41, rr. 23, 25, 26, 27—*See* REMAND, 2 B.L.R.A.C. 315.

(5576)—O. 41, rr. 23, 25, 27—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23, 35 P.L.R. 1902=43 P.R. 1902.

(5577)—O. 41, rr. 23, 26—*See* REMAND, W.R. 1864, 357, 3 Agra 146.

(5578)—O. 41, rr. 26, 25, 23—*See* REMAND, 1 W,R. 6.

(5579)—*O. 41, rr. 23, 27—Decision of lower Court which shut out evidence—Whether disposal on a preliminary point—Remand by appellate Court—Validity—Proper course.*—Where the lower Court shut out the evidence and disposed of a suit, *held*, that the lower Court did not dispose of the suit, on a preliminary point, and that the appellate Court was not justified in remanding the case under O. XLI, r. 23, Civ. Pro. Code, 1908. The lower Court should have proceeded under O. XLI, r. 27, and admitted evidence in appeal. KACHI RAGHURAMIAH v. VAJJALA MAHALAKSHMAMMA, **6 M.L.T. 273.**

(5580)—O. 41, rr. 23 and 27—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 6 W.R. 47.

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(5581)—O. 41, rr. 23, 27, 28—Exclusion of evidence by Court of first instance whether sufficient ground for reversal of decree—Additional evidence — *See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 23 M. 447.

(5582)—O. 41, rr. 23, 27, 28—Adjournment, application for—Not granted—Decision *ex parte*—Remand—Practice—*See* REMAND, 17 B. 733.

(5583)—*O. 41, rr. 23, 31, ss. 99, 108 (= Civ. Pro. Code, 1882, ss. 562, 574, 578, 587) —Practice—Remand—Non-compliance of lower appellate Court with Civ. Pro. Code, s. 574.*—Where the judgment of a lower appellate Court does not satisfy the requirements of s. 574 of the Civ. Pro. Code by enumerating the points for decision or dealing with the whole scope of the suit, the High Court is not bound by s. 562 to decide the case by itself satisfying those requirements. The irregularity is not covered by s. 578. The proper order to make is to remand the case under s. 562 read with s. 587 to the lower appellate Court to write a judgment in full compliance with s. 574. HARANANDAN MISR v. SHEO GHULAM MISR, **A.W.N. 1889, 178.**

(5584)—O. 41, r. 23, O. 43, r. 1, ss. 104, 105—Order of remand appeal from, after decree in suit—*See* PRACTICE AND PROCEDURE, 5 A. L.J. 447, F.B.=A.W.N. 1908, 195=4 M.L.T. 162=30 A. 479.

(5585)—*O. 41, r. 23, O. 43, r. (1) (a), O. 45, r. 4—Remand—Preliminary point—Irregular remand—Punjab Courts Act (XVIII of 1884), as amended, s. 70 (1) (a) (b)—Revision—Civil cases — Appeal — Material irregularity.*—The Original Court framed an issue, among others, whether the parties were governed by custom or Hindu Law, and decided the suit placing the *onus* on the plaintiff. On appeal, the Divisional Judge, being of opinion that the *onus* should have been on the defendant, remanded the suit for fresh trial under O. 41, r. 23 of the Code. On further appeal—*Held*, that the order was not appealable, (*Vide* Rule 43 (1). *Held*, also, that revision under cl. (1) (*b*) of s. 70 of the Punjab Courts Act did not lie, for the order passed by the Divisional Court did not amount to a "decree." That the order must be revised under cl. (1) (*a*) of s. 70, for the form of order was bad, the original Court not having determined the suit on a preliminary point, and the Divisional Court not having reversed any decision of the Original Court. *Held*, further that O. 45, r. 4, does not apply to appeals preferred to the Chief Court, but only to appeals to the King in Council. MUSSAMMAT HAR DEVI v. HARNAM SINGH, **17 P.L.R. 1910=6 Ind. Cas. 491.**

——O XLI, r. 24 (=1882, s. 565=1877, s. 565 =1859, s. 353).

(5586)—*O. 41, r. 24 (=s. 565, Civ. Pro. Code, 1877)—Civ. Pro. Code, 1877, s. 565,* *whether applicable in second appeal.*—S. 565 of the Civ. Pro. Code does not apply to second appeals. So, where the first appellate Court has omitted to determine a material issue of fact, the High Court cannot, in second appeal, determine such issue itself, but should refer it for determination to the Court of first appeal, under s. 566. SHEO RATAN v. LAPPU KUAR, **3 A. 14.** [*R.*, 9 A. 26.]

(5587)—O. 41, r. 24—*See* ACT XVIII OF 1879, ols. 31, 35, 4 M.L.J. 181.

(5588)—O. 41, r. 24—*See* APPEAL—FORUM OF APPEAL, 3 W.R. Act X, Rul. 154.

(5589)—O. 41, r. 24—*See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 16 W.R. 211.

(5589-*a*)—O. 41, r. 24—Power of appellate Court to decide case on evidence on the record without sending back the case to lower Court —*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 10 Ind. Cas. 225.

(5589-*b*)—O. 41, r. 24—*See* NOS. 1369, 3052, 5556, 5557, 5558, *supra.*

(5590)—*O. 41, rr. 24, 25 (=Civ. Pro. Code, 1877, ss. 565, 566)—Remand—Additional evidence.*—If the appellate Court proceeds to act under s. 566, it must direct the Court below to take the additional evidence required, if the appellant has expressed his willingness and readiness to produce the additional evidence, ASHRAF ALI v. WAHAJUDDIN HAIDAR, **A.W.N. 1881, 75.**

(5591)—*O. 41, rr. 24, 25 (=Civ. Pro. Code, 1877, ss. 565, 566)—Remand—Appeal—Decision on merits.*—Where a suit is dismissed by the Court of first instance as *res judicata* after the settlement of issues and after evidence on all the issues had been gone into, the lower appellate Court, if it thought that the suit was not barred by *res judicata*, should not have remanded the case for re-trial, but should have decided it on the merits. UMRAO SINGH v. RAGHUNATH SINGH, **A.W.N. 1882, 5.**

(5592)—O. 41, rr. 24, 25, s. 108—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 9 A. 147=A.W.N. 1886, 325.

(5593)—O. 41, rr. 24, 25, 27, s. 108—*See* SPECIAL OR SECOND APPEAL—MISCELLANEOUS, 7 A. 736, F.B.=A.W.N. 1885, 225.

(5594)—O. 41, rr. 24, 26—*See* REMAND, W. R. 1864, 361.

——O. XLI, r. 25 (=1882, s. 566=1877, s. 566 =1859, s. 354).

See REMAND.

(5595)—*O. 41, r. 25 (=s. 566, Civ. Pro. Code, 1877)—Scope of.*—The section is intended to provide only for cases, where some point has come to light in the appellate Court, which has

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not been raised, or the importance of which has not occurred to the parties or to the Judge in the Court below. ANUNDO LALL DASS v. BOYCAUNT RAM ROY, **5 C. 283=4 C.L.R.473.**

(5596)—*O. 41, r. 25 (=Civ. Pro. Code, 1882, s. 566)—Reference of issue to lower Court—Additional evidence.*—It was not intended by s. 566 of the Code of Civil Procedure that a High Court when making an order for the trial of an issue should direct further evidence to be taken if the issue had been tried on the evidence in the first Court, and if the only reason for making the order was that the Court of first appeal had not tried the issue having the evidence before it on the record. CHANGA MAL v. GULABI, **A.W.N. 1894, 158.**

(5597)—*O. 41, r. 25 (=Civ. Pro. Code, 1882, s. 566)—Remand for trial of a new issue.*—When an appellate Court frames and remands for trial under s. 566, Civ. Pro. Code, a new issue which is neither based on any evidence before it nor raised by the pleadings, its action is unjustifiable and the proceedings taken under it are irregular. ILLIKKA PAKRAMAR v. KUTTI KUNHAMED, **17 M. 69=4 M.L.J. 15.** [*R.*, 27 M. 77=14 M.L.J. 137, 32 M. 351=19 M.L.J. 350.]

(5598)—*O. 41, r. 25. (=s. 566, Civ. Pro. Code, 1882)—Lower appellate Court directed to decide issues on remand, incompetency of, to delegate the duty to Court of first instance.*—Where the High Court passes an order remanding a case to the Court of first appeal directing it to determine certain points of fact and remit findings on certain issues, such order must be carried out by the lower appellate Court itself, and it is not competent for such Court to delegate its functions in the matter to the Court subordinate thereto. The findings, if any, recorded by the Court of first instance under such circumstances could not satisfy the requirements of the High Court's remand order. The first appellate Court having acted without jurisdiction in delegating its duty to the first Court, the whole proceeding would be illegal and *ultra vires*. SABRI v. GANESHI, **14 A. 23 =A.W.N. 1891, 205.** [*F.*, 29 A. 660=A.W.N. 1907, 209=4 A.L.J. 603.]

(5599)—*O. 41, r. 25—Remand by High Court—First appellate Court's duty to record findings.*—Where the High Court, in second appeal, refers any issue for trial under O. 41, r. 25, to the lower appellate Court, the lower appellate Court must record its own finding on the issue with reasons thereof. KHAIR MAHOMED YAKHTIAR KHAN v. HIROMAL CHOITHRAM, **3 S.L.R. 120=4 Ind. Cas. 603.**

(5600)—*O. 41, r. 25 (=s. 566, Civ. Pro. Code, 1882)—Appeal—Remand—Dismissal for default.*—On an appeal the case was remanded to the original Court under s. 566 of the Code. Enquiry into the case was not completed by the original Court within the time allowed by the appellate Court which extended the time originally allowed and fixed a certain date for the hearing of the appeal but the date was not communicated to the parties. The case was not returned to the appellate Court by that date. The Court dismissed the appeal as none of the parties appeared on the date. An application to re-admit the appeal was rejected. On revision—*Held*, that the action of the appellate Court was wholly irregular and *ultra vires*. MUHAMMAD CHIRAGH v. MUSSAMMAT JAWAI, **90 P.L.R. 1906.**

(5601)—*O. 41, r. 25 (=Civ. Pro. Code, 1882, s. 566)—Findings returned on unnecessary reference by one Judge of High Court, disposing Judge not bound by.*—Where, on a second appeal, a single Judge had previously remanded the case to the lower appellate Court for findings on certain issues then framed, it is competent to another Judge of the Court, before whom the appeal may come on for final disposal, to disregard the order passed by the former Judge, if, having regard to the findings on the record, such order was, in his opinion, unnecessary. MUBARAK HUSAIN v. BIHARI, **16 A. 306=A.W.N. 1894, 97.**

(5602)—*O. 41, r. 25 (=Civ. Pro. Code, 1882, s. 566)—Reference of issues for determination—Transfer of suit meanwhile illegal.*—It is a wholesome principle that the Court which considered it necessary to refer issues for trial under s. 566, Civ. Pro. Code, should be the Court to dispose of the case on the return. Hence, where a District Judge, acting under s. 566, Civ. Pro. Code, referred to the Court of first instance certain issues for trial, and before the return of the order was made, the District Judge transferred the appeal to the Court of the Subordinate Judge, *held* that under the circumstances the District Judge had no power to make the order of transfer. UDIT NARAIN SINGH v. JHANDA, **15 A. 315=A.W.N. 1893, 108.**

(5603)—*O. 41, r. 25 (=Civ. Pro. Code, 1882, s. 566)—Issue left untried by lower appellate Court, power of High Court to remand.*—In a suit on a bond, the Court of first instance examining one only of the plaintiff's three witnesses, decided in his favour the issue as to whether the bond was or was not executed by the defendants and decreed his claim. On appeal preferred by the defendants, the lower appellate Court summarily disposed of the issue raised before it, as to the execution of the bond, without holding a proper trial for the purpose and without passing a proper judgment. The High Court *held* that the parties were, under the circumstances entitled to a trial of the above said issue essential to the right decision of the suit on the merits, and the lower appellate Court having failed to properly try the same, as it ought to have done, the case must be treated as falling within the provisions of s. 566 of the Civ. Pro. Code, empowering the High Court to refer such issue back to the lower appellate Court directing it

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to try the same taking all the evidence tendered by the parties. GANGA PRASAD v. LAL BAHADUR SINGH, **17 A. 117=A.W.N. 1895, 121.** (A.W.N. 1894, 19, 16 A. 342, A.W.N. 1894, 190, *R.*)

(5604)—*O.* 41, *r.* 25 (=*s.* 566, *Civ. Pro. Code*, 1882)—*Remand of case for re-trial—Witnesses.*—Where a plaintiff had a full opportunity to present his case completely before the lower Court, it is manifestly dangerous for an appellate Court to remand the case for what may be practically a re-trial; such a remand is certainly a case of material irregularity. MAUNG PU GYI v. MAUNG SHWE HMYIN, **1 L.B.R. 143.**

(5605)—*O.* 41, *r.* 25 (=*Civ. Pro. Code*, 1882, *s.* 566—*Reference of issues—Court to which issues are remitted not competent to delegate its functions.*—*Held*, that a Court to which issues are remitted under s. 566 of the Code of Civil Procedure, must itself come to findings on such issues, and is not competent to delegate the duty so imposed on it to any Subordinate Court. FATEH MUHAMMAD v. KALLU, **A.W.N. 1899, 137.**

(5606)—*O.* 41, *r.* 25 (=*ss.* 566, *Civ. Pro. Code*, 1882)—*Arbitration—Application by parties to Court of first instance after reference by appellate Court.*—When a District Judge has remitted issues, under s. 266 of the Code of Civil Procedure to the Court of an Assistant Collector, the latter, not being seized of the case, has no authority to entertain an application to refer to arbitration the matters in difference between the parties. RAISAL SINGH v. BHOLA RAM, **A.W.N. 1906, 221.**

(5607)—O. 41, *r.* 25 (=*s.* 566, *Civ. Pro. Code*, 1882)—*Remand—Return to remand to be made by the Court originally seized of the case—Jurisdiction.*—*Held* that, when issues are remitted for trial under s. 566, such issues are triable only by the Court which was originally seized of the case. ALI SHER KHAN v. AHMADULLAH KHAN, **A.W.N. 1907, 209=4 A.L.J. 603 =29 A. 660.** (14 A. 28, *F.*)

(5608)—*O.* 41, *r.* 25 (=*Civ. Pro. Code*, 1882, *s.* 566)—*General order of remand, liability of—Where remand not to be made.*—Where the first Court has not omitted to frame or try any essential issue or to determine any question of fact the appellate Court has no power under s. 566 to remand the case. A remand order which does not clearly remand an issue for trial but remands the case for inquiry and report is a procedure which is not in accordance with the Code. KALU v. MOJIRAM, **2 C.P.L.R. 113.**

(5609)—*O.* 41, *r.* 25 (=*Civ. Pro. Code*, 1882, *s.* 566)—*Reference of issue to lower Court—Issue not tried with regard to the evidence existing on the record.*—Where an appellate Court in trying the main issue which arose between the parties to an appeal before it improperly had

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rejected an important piece of evidence bearing on that issue and had failed to notice the existence on the record of other evidence directly bearing on that issue, it was held that the issue had really not been tried, inasmuch as the trial of an issue implied the consideration by the Court of all the material evidence bearing on the issue, and that a reference under s. 566 of the Code of Civil Procedure was called for. YAR ALI v. HASHMAT BIBI, **A.W.N. 1897, 90.**

(5610)—*O.* 41, *r.* 25 (=*s.* 566, *Civ. Pro. Code*, 1882)—*Reference to lower appellate Court of issues left untried by that Court.*—Where both the Courts below, omitting to consider and decide upon the case set up by the plaintiffs, found upon an issue raised by the defendants and upon its finding on that issue dismissed the plaintiff's suit; *held* that the issues raised by the plaintiffs in their plaint must be remitted to the lower appellate Court for decision. HARI SINGH v. DEBI SARAN, **A.W.N. 1895, 79.**

(5611)—O. 41, r. 25—Remand by appellate Court without jurisdiction—Further enquiry by competent Court—Effect—*See* PUN. ACT II OF 1905, ss. 11, 12 (*c*) THIRDLY 1, 20 (*b*); 1 Ind. CAS. 460=26 P.W.R. 1909.

(5612)—O. 41, r. 25—*See* APPEAL—OBJECTIONS BY RESPONDENTS, 3 A. 643.

(5613)—O. 41, r. 25—*See* ISSUES—ADDITIONAL ISSUES, 14 A. 366, P.C.

(5614)—O. 41, r. 25—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 20 P.L.R. 1907.

(5615)—O. 41, r. 25—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 4, 64, 71, 4 O.C. 224.

(5615-*a*)—*O.* 41, *r.* 25—*See* NOS. 917, 1927, 2203-*a*, 2772, 3052, 3177, 3185, 4582, 5469, 5470, 5557, 5558, 5559, 5560, 5561, 5562, 5563, 5564, 5565, 5566, 5566-*a*, 5567, 5568, 5569, 5570, 5571, 5572, 5573, 5574, 5575, 5576, 5578, 5590, 5591, 5592, 5593, *supra.*

(5616)—*O.* 41, *r.* 25, *s.* 100 (=*Civ. Pro. Code*, 1877, *ss.* 566, 584)—*Second appeal—Error in determination of case—Remand.*—*Held* that the procedure of the lower appellate Court, in overlooking so much of the evidence on the record, had been defective, and might have occasioned error in the determination of the case on the merits. The case was remanded. MAHESH SINGH v. MASRI SINGH, **A.W.N. 1881, 12.**

(5617)—*O.* 41, *r.* 25, *O.* 21, *rr.* 60, 78 (=*ss.* 566, 280, 278, *Civ. Pro. Code*, 1882)—*Suit to establish right of judgment-creditor to immoveable property attached by him but released on an objection filed—Issue whether successful objector owns property in dispute.*—The particulars which a judgment-creditor as plaintiff in a case of this nature must prove in respect to immoveable property which he attaches are described in the first

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paragraph of s. 266, Civ. Pro. Code. On a release from attachment being granted under s. 280, Civ. Pro. Code, the attaching creditor can sue "to establish the right which he claims to the property in dispute." The question in this case is therefore not now whether Mi Khai Ra, the successful objector under s.278,owns the land, but whether Mizurabi the judgment-debtor owns it or not. If she does not, then plaintiff's claim is not established and his suit must fail, MI KHAI RA v. KALA SAM, **L.B.R. 1893—1900, 482.**

(5618)—*O.* 41, *rr.* 25, 26 (=*Civ. Pro. Code*, 1882, *ss.* 566, 567)—*Time for filing objections not fixed.*—Where a case was remanded under s. 566 of the Civ. Pro. Code, and no time was fixed for filing objections to the finding as required by s. 567 of the Civ. Pro. Code, *held* that objections which were filed before the date on which the case was heard by the appellate Court should have been considered. KIRAT CHAND v. MADAN MOHAN DAS, **A.W.N. 1884, 158.**

(5619)—*O.* 41, *rr.* 25, 26 (=*Civ. Pro. Code*, 1882, *ss.* 566, 567)—*Reference to lower appellate Court--No objections taken to the finding returned, but an oral objection taken to the necessity for the reference—Practice.*—At the hearing of a second appeal an issue was remitted by the High Court to the lower appellate Court. On the return of the finding no objections were taken within the time allowed by the Court under s. 567 of Code of Civil Procedure, but when the appeal came on final disposal, Counsel for the respondents was permitted orally to question the necessity for the reference. PITAM SINGH v. KALYAN, **A.W.N. 1898, 119.**

(5620)—O. 41, rr. 25 and 26—*See* APPEAL—ARBITRATION, 23 W.R. 396.

(5621)—O. 41, rr. 25, 26—*See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 15 W.R. 235.

(5622)—O. 41, rr. 25, 26—*See* PLAINT—CONSTRUTION OF PLAINT, 21 W.R. 59.

(5623)—O 41, rr. 25, 26, 27—*See* APPELLATE COURT — POWERS OF APPELLATE COURT, 2 A. 908.

(5624)—*O.* 41, *rr.* 25, 28, 31 (=*Civ. Pro. Code*, 1882, *ss.* 566, 569, 574)—*Remand—Finding—Appellate Court to form its own opinion on evidence or record reasons for finding—Practice—Procedure.*—In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, the lower appellate Court, in the absence of any distinct admission by the party against whom the issues have been found, is bound to form its own opinion on the evidence and record its findings with the reasons therefor. RAMCHANDRA GOVIND MANIK v. SONO SADASHIV SARKHOT, **19 B. 551.** [*F.*, 7 M.L.J. 236=20 M. 496; *R.*, 31 M. 469=18 M.L.J. 34=3 M.L.T. 71.]

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——O. XLI, r. 26 (=1882, s. 567=1877, s. 567=1859, s. 354).

See REMAND.

(5625)—*O.* 41, *r.* 26 (=*Civ. Pro. Code*, 1882, s. 567)—*Party not filing memo in time—Discretion of Court.*—A Court has discretion to receive or decline to receive any written objection preferred after time. But if the parties appear, it can hear their objections. MUSSAMMAT AMAN BIBI v. MULA MAL, **131 P.R. 1889.**

(5626)—*O.* 41, *r.* 26 (=*Civ. Pro. Code*, 1882, s. 567)—*Memo of objections not filed in time—Right of party—Power of Court.*—A party not presenting a memo of objections has no right to raise objections and insist upon being heard, in support of them, at the hearing of the appeal. But the Court can permit him to take such objections and also hear him. GHULAM DIN v. BHOLA, **27 P.R. 1890.**

(5627)—*O.* 41, *r.* 26—*Period within which objections to findings of the lower Court are to be filed—Duty of Court where no objection filed.*—There is nothing in O. 41, r. 26, itself which precludes the period, within which objections are to be filed, being fixed by the appellate Court when remanding the case. But even though no objection has been filed, the appellate Court should (subject to the law as to the finality of findings of fact) consider the correctness of the lower Court's findings. DADNU v. SOMNATH, **6 N.L.R. 109=7 Ind. Cas. 547.** (15 W.R. 235, *R.*)

(5628)—O. 41, r. 26—*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 10 A. 28=A.W.N. 1887, 234.

(5628 *a*)—O. 41, r. 26—*See* NOS. 5572, 5573, 5574, 5575, 5577, 5578, 5594, 5618, 5619, 5620, 5621, 5622, 5623, *supra.*

(5629)—*O.* 41, *r.* 26, *O.* 41, *r.* 31 (=ss. 567, 574, *Civ. Pro. Code*, 1882)—*Finding of Court of first instance on a remanded issue—Responsibility of appellate Court for its correctness.*—It is clear that an appellate Judge is not only not bound to accept the finding of the Court of first instance on a remanded issue, even though no objection may be filed under s. 567, Civ. Pro. Code, but that the Court has to "proceed to determine the appeal" and that the judgment shall be in accordance with s. 574. The appellate Judge would naturally take into consideration the fact that no memorandum of objection had been filed, but he is not relieved of all responsibility for the correctness and reasonableness of the finding. MAUNG SAN AUNG v. MAUNG GALE, **L.B.R. 1893—1900, 503.** (6 A. 383, *F.*)

(5630)—*O.* 41, *rr.* 26, 31 (=*Civ. Pro. Code*, 1882, ss.567, 574)—*Remand—Objections to finding—Duty of appellate Court.*—Even though the parties may have failed to file objections to the findings on remand, or may have filed them after the time fixed by the Court, the appellate Court

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should still, at the hearing, hear the parties with regard to them. The mere fact of remanding the case, does not, even in the absence of objections from the parties, divest the Court of the duty and the power of exercising its own judicial mind to examine the propriety of the findings. MUMTAZ BEGAM v. FATEH HUSAIN, **6 A. 391=A.W.N. 1884, 129.** (1 A. 165, 6 A. 383, *F.*; 2 A. 908, *R.*) [*F.*, 20 M. 496=7 M. L.J. 236; *Appr.*, 17 B. 428; *R.*, 19 B. 551.]

(5631)—*O.* 41, *rr.* 26, 31 (=*Civ. Pro. Code*, 1882, *ss.* 567, 574)—*Remand—Objections to finding—Duty of appellate Court.*—After the expiration of the period fixed for presenting objections, under s. 567, Civ. Pro. Code, the appellate Court may, at its discretion, receive or decline to receive any written objection; but in any case, it is bound to consider the finding of the lower Court on the merits, and it is not precluded from hearing arguments for and against the finding at the hearing of the appeal. (2 A. 908, *F.*) The imperative provisions of s. 574 of the Civ. Pro. Code, apply alike to cases remanded by the first appellate Court for trial of issues, and to those in which no such remand has taken place. UMED ALI v. SALIMA BIBI, **6 A. 383=A.W.N. 1884, 127.** [*F.*, 7 M.L.J. 236=20 M. 496; *Appr.*, 17 B. 428; *R.*, 6 A. 391, 19 B. 551, L.B.R. 1893—1900, 503.]

—— **O. XLI, r. 27 (=1882, s. 568=1877, s. 568 =1859, s. 355).**

See APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL.

See REMAND.

(5632)—*O.* 41, *r.* 27 (=*Civ. Pro Code*, 1882, s. 568)—*Fresh evidence—Discretion of appellate Court.*—The appellate Court might take fresh evidence or direct the lower Court to take it where the evidence has been taken so imperfectly by the Court of first instance that the appellate Court cannot pass a satisfactory judgment on the issues raised in the case. SRINIVASA CHARIAR v. RANGAMMAL, **18 M. 94.**

(5633)—*O.* 41, *r.* 27 (=s. 568, *Civ.Pro Code*, 1882)—*Refusal of plaintiff to produce evidence in Court of first instance—Appeal—Permission by appellate Court to adduce evidence, refusal of—Discretion.*—Where the plaintiff-appellant had deliberately declined to produce any evidence on his side in the original Court, and chose to take his case on the record as it stood, *held*, that he ought not to be allowed, on appeal, another opportuntiy to produce evidence on the ground that he was mistaken in that view. SUNDER SING v. JALLANDAR, **51 P.R. 1905=119 P.L.R. 1905.**

(5634)—*O.* 41, *r*, 27 (=*Civ. Pro.Code*, 1882, s. 568)—*Evidence, additional—Production of—In appellate Court.*—When it was objected that the lower appellate Court had wrongly admitted further evidence in the case after an adjournment: it was held that there is nothing

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wrong in that, and that the appellate Court should, as a rule, sparingly admit additional evidence. Adjournment may be granted at discretion of Courts to enable evidence contradicting a witness under s. 153, Evidence Act, to be produced. NARANDI CHETTY v. MAUNG KYU, **U.B.R. 1897—1901, Vol. II, 809.**

(5635)—*O.* 41, *r.* 27 (=*s.* 568, *Civ. Pro. Code*, 1882)—*Evidence, additional—Appellate Court—When to be taken—Mortgage—Undivided share—Partition—Mortgage during partition suit—Right of mortgagee—Share alloted to mortgagor.*—S. 568, Civ. Pro.Code, 1882, authorizes an appellate Court to admit evidence in appeal, when, on hearing the case, it thinks that such evidence is required to enable it to pronounce judgment, but it does not authorize it to make a new case not justified by the pleadings. (31 B. 381, P.C., 11 C.W.N. 721, 6 C.L.J. 5, 4 A.L.J. 461, 2 M.L.T. 235, 8 Bom. L.R. 671, 17 M.L.J. 347, *R.*) A person taking a mortgage from one co-sharer takes the security, subject to the right of the other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. He would take the subject of the pledge in the new form which it would assume by the partition. (1 I.A. 106, 21 W.R. 233, *F.*) A mortgage executed during a partition suit must be followed against the share allotted to the mortgagor, and cannot affect the share of a non-mortgagor. BAI KUNTHA NATHROY v. SHEIKH NURA, **6 Ind. Cas. 196.**

(5636)—*O.* 41, *r.* 27 (=*s.* 568, *Civ. Pro. Code*, 1882)—*Commission when to issue and when not to issue—Practice*—In considering whether the examination of a witness should be taken by commission, regard must be had to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence *viva voce* in Court or before a Commissioner, or by affidavit, or in any other form. If the witness is not a credible witness, it becomes of the most extreme importance that the jury or the Court which has to decide the question, should have the opportunity of seeing the demeanour of a witness, and observing the way in which the various questions which are put to him in cross-examination are answered. MOWJI v. NEMCHAND, **1 Bom. L. R. 384=23 B. 626.**

(5637)—*O.* 41, *r.* 27 (=*s.* 568, *Civ. Pro. Code*, 1882)—*Discovery of new evidence—Application for review—Its refusal—Effect of refusal on admissibility of such evidence—Appellate Court's power to admit such evidence—Accident case—Evidence on record—Appellate Judges' investigations and conclusions—Legitimacy of such procedure and conclusions—Right of appeal after Counsel's acceptance of a suggestion to investigate.*—An unsuccessful party to a suit applied to the Judge, who tried it, for a review of his judgment, on the ground that, since

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trial, there had come to the applicants' knowledge new and important evidence, *viz.*, certain information supplied by a certain man. The Judge refused the application : *Held*, that such refusal manifestly rendered the evidence inadmissible. The Code of Civil Procedure permits applications for review on the ground of such discovery of evidence, but it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence—it enjoins the Judge to require the facts as to the absence of negligence to be strictly proved ; and it makes the Judge who tried the case final on such applications. The said party then appealed to the appellate Court on the whole case ; and made an application for permission to examine the man, whose information led to the application for review which was dismissed. The appellate Court ordered that "further evidence" be taken. "Further evidence" was taken, before one of the appellate Judges, not merely of the man, about whom the application was made, but of several other witnesses. The appellate Court did not record any reasons of such admission of "further evidence." *Held*, that the appellate Court had no jurisdiction to admit that evidence, that it was wrongly admitted, and did not form part of the evidence in the appeal to the Privy Council, and must, therefore, be disregarded. *Held*, also, that the legitimate occasion for s. 568 of the Civ. Pro. Code is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not when a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in s. 623. *Held*, further, that in s. 568 the word "requires" means needs or finds needful. The plaintiff sued the defendants, a Railway Company, for damages for personal injuries alleged to have been sustained through their negligence by their train in which he was travelling, overshooting the platform. One of the questions at issue related to the sufficiency of light at the time of the accident. The first Court held that the train over shot the platform and that it was dark at the time of the accident and allowed the plaintiff's suit. On the defendant's appeal the Judges of the appellate Court adopted the view of the lower Court that the train had overshot but on the question of the sufficiency of light they found themselves unable to come to any decided conclusion from the evidence on record. Owing to that difficulty and to the vital importance of settling the question with certainty it was suggested by the Court that the Judges should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. That suggestion was welcomed by Counsel on both sides, and after communication with the local observatory it was suggested that on the evening of certain day the conditions then in question would be, as nearly as possible, exactly reproduced. At that time, therefore, attended by legal advisers of both parties, the learned Judges visited the scene of the accident, with the result that they were clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the Company could not be held liable for negligence. The plaintiff, thereupon, appealed to the Privy Council, where the defendants contended that the appellate Court's procedure was so remote from judicial methods as to constitute an arbitration and that the result was not appealable. *Held*, that it was impossible to admit the legitimacy of the appellate Court's procedure or the soundness of its conclusions, the case being decided, not on the testimony given at the trial as to what took place on the night of the accident, but by the appellate Court Judge's observations of what they saw on another night altogether ; that the plaintiff was not shown to have done anything to exclude his appeal. The fact that the counsel of both parties acceded to the appellate Court's suggestion of viewing the locality did not constitute the proceeding an arbitration and make the decision non-appealable. KESSOWJI v. G. I. P. RAILWAY, **9 Bom. L.R. 671=11 C.W.N. 721=6 C.L.J. 5=4 A.L.J. 461=31 B. 381=17 M.L.J. 347=34 I.A. 115.**

(5638)—*O.* **41,** *r.* **27** (=*s.* 568, *Civ. Pro. Code*, 1882)—*Appellate Court—Additional evidence—Recording reasons.*—The legitimate occasion for s. 568, Civ. Pro. Code, 1882, is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence, and the application is made to import it. (31 B. 381, P.C.= 11 C.W.N. 721=6 C.L.J. 5=4 A.L.J. 461=2 M.L.T. 435=9 Bom. L.R. 671=17 M.L.J. 347, *F.*) The appellate Court admitted a fresh document into evidence, without recording on the proceedings of it the reasons for admitting such additional evidence : *Held*, that the order of that Court cannot stand. MONIRUDDIN SARKAR v. MOCHHABIN MONDAL, **2 Ind. Cas. 995.**

(5639)—*O.* **41.** *r.* **27** (=*s.* 568, *Civ. Pro. Code*, 1882)—*Admission of fresh evidence—Declaration of removal of objections to admissibility of document—Powers of appellate Court—Civ. Pro. Code*, 1908, *O.* XLI, *rr.* 23, 33—*Ground arising subsequent to lower Court's decree—Reversal of decree—Power of appellate Court.*—Where the appellate Court does not purport to dispose of the case on merits, but simply declares that objections to the admissibility of a document on account of insufficiency of stamp are removed. *Held*, that the appellate Court will not be precluded from admitting that document in evidence and remanding the case to the lower Court for disposal. S. 568, Civ. Pro. Code, 1882, contemplates a case in which the appellate Court wishes or is asked to admit

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additional evidence for the purpose of disposing of the appeal on its merits. The appellate Court has, either under r. 23 or r. 33, O. 41, Civ. Pro. Code, 1908, power to set aside the decree of the lower Court and remand the case for disposal on the merits, on a ground which arose subsequently to the passing of the decree by the lower Court. M. R. M. S. VELLAYAPPA CHETTI v. R. NELLAYAPPA PILLAI, **9 M. L.T. 317.** (31 B. 390, *Expl.*)

(5640)—*O. 41, r. 27 (=s. 568, Civ. Pro. Code, 1882)—Appeal—Production of additional evidence.*—Circumstances under which an appellate Court will *not* allow the production of additional evidence, at the hearing of an appeal, under s. 568 of the Code. NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU, **15 C. 765.**

(5641)—*O. 41, r. 27 (=s. 568, cl. (b) of Civ. Pro. Code, 1882)—Additional evidence, imprper additional of—Second appeal, evidence admitted by Court of first appeal rejected in.*—The District Judge as the Court of first appeal accepted a mortgage-deed as additional evidence for the following reason : "I think it would be reasonable to allow the appellants an opportunity of produoing the deed.....It has a distinct bearing on the third issue, and if it be a genuine document, it will go far towards proving that issue in favour of appellants:"—*Held* (per *J. Deas, J.C.*), that whether reasons are or are not given for the admission of additional evidence, such evidence must be held to have been improperly admitted, and to be liable to rejection in second appeal, if this Court is satisfied that in admitting it the lower appellate Court has clearly acted on insufficient grounds, or has improperly exercised its direction. (Per *G.T. Spankie, A.J.C.*) that additional evidence should be admitted only on the special grounds stated in s. 563, Civ. Pro. Code, and if it is not admitted on any of those grounds, it must be rejected. SITTI v. NARPET, **1 O.C. 199.**

(5641-*a*)—*O. 41, r. 27—Court, action taken by at the request of a party—Substantial cause, meaning of.*—*Held*, that an appellate Court can take action under O. 41, r. 27, at the request of a party. The provisions of this rule were not intended to apply only to the case of an appellate Court calling *suo motu* for fresh evidence. *Held further*, that where a party was unable through no fault of his to produce important evidence at the trial, it would be a substantial cause within the meaning of the rule. KALKA SINGH v. BHARAT SINGH, **14 O.C. 237.** (31 B. 381, 27 A. 634, *R.*)

(5642)—O. 41, r. 27—Admission of additional evidence in appeal—How the power ought to be exercised—*See* BEN. ACT I OF 1895, ss. 10, 12, 15, 16, 21, 31, 1 C.L.J. 550.

(5643)—O. 41, r. 27—*See* LIMITATION ACT, 1908, s. 26, 6 C.W.N. 31.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5643-*a*)—*O. 41, r. 27*—"Any other substantial cause," meaning of—Additional evidence—Omission to record reasons for admitting—Effect—*See* LIMITATION ACT, 1908, art. 85, 1911, 2 M.W.N. 440.

(5644)—O. 41, r. 27—*See* LOCAL INVESTIGATION, 17 W.R. 300.

(5645)—O. 41, r. 27—*See* REVIEW—GROUNDS FOR REVIEW, 3 B.L.R. A.C. 346 =12 W.R. 223, 17 W.R. 47.

(5646)—O. 41, r. 27—*See* REVISIONS—GENERAL, 55 P.L.R. 1909=59 P.W.R. 1909=4 Ind. Cas. 550.

(5647)—O. 41, r. 27 — *See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 6 W.R. 196.

(5648)—O. 41, r. 27—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 22 W.R. 369.

(5648-*a*)—O. 41, r. 27—*See* NOS. 917, 1829, 2189, 2461, 2029-*b*, 3084-*c*, 3171, 5574, 5575, 5576, 5579, 5580, 5581, 5582, 5593, 5623, *supra.*

(5649)—*O. 41, r. 27, s. 100) (= Civ. Pro. Code, 1882, ss. 568, 584)—Appellate Court—Additional evidence—Discretion.*—Under s. 568 of the Civ. Pro. Code, a party to an appeal is not entitled to produce a additional evidence in appeal, as of right, but the Court may, in its discretion, admit additional evidence. A refusal by the appellate Court to exercise the discretion would be an error or defect in procedure, because the above s. 568 distinctly implies that such discretion must be exercised by the Court ; but a refusal, in the exercise of the discretion, to admit additional evidence, is not such an error or defect, that is to say, where the Court has exercised its discretion, and, as the result of the exercise of its discretion, has refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place so as to afford a ground of second appeal under s. 584 of the Code. RAM PIARI v. KALLU, **23 A. 121=A.W.N. 1901, 11.**

(5650)—*O. 41, r. 27, s. 110 (=ss. 568, 596, Civ. Pro. Code, 1882)—Test as to whether additional evidence should be received in appellate Court.*—S. 568 provides that the parties to an appeal shall not be entitled to adduce fresh evidence in the appellate Court. It follows that the rejection of their application to be allowed to adduce such evidence contravened no right. It, further, seems that under that section the admissibility of additional evidence is made to depend not upon the relevancy or materiality to the issue, before the Court, of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence " *to enable it*

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to pronounce judgment or for any other substantial cause." The test of the admissibility of evidence, therefore, seems to be the requirements of the Court itself. The language of that section shows that the appellate Court, to which the application is made, is to be the sole and final Judge of the question whether circumstances exist which require the admission of the evidence, and that the discretion vested in the Court, for the purpose, is not one which the Legislature intended should be subject to revision or control by a higher tribunal. For these reasons, the rejection of the application under that section cannot be said to involve any substantial question of law within the meaning of s. 596 of the Code, so as to give the right to an appeal to the Judicial Committee. PREM CHAND MOONSHI UPENDRA MOHAN GHOSE v. GOPALCHANDRA GHOSE, **21 C. 484**. [*F.*, 1 O.C. 199; *R.*, L.R. 1893—1900, 650, 28 B. 4.]

(5651)—*O. 41, r. 27, s. 114, O. 47, r. 1 (=ss. 568, 623, Civ. Pro. Code, 1882)—Additional evidence on appeal, when admissible.*—The legitimate occasion for s. 568 is when, on examining the evidence as it stands, some inherent *lacana* or defect becomes apparent, not where a discovery is made, outside the Court of fresh evidence and the application is made to import it. That is the subject of the separate enactment in s. 623. KRISHNAMA CHARIAR v NARASIMHA CHARIAR, **3 M.L.T. 308=31 M 114**. (31 B. 381, *F.*)

(5652)—*O. 41, rr. 27, 23 (=ss. 568, 562, Civ. Pro. Code, 1882)—Commission to take evidence—Remand—Practice—Procedure.*—The Court of the first instance referred the matters in dispute to a Commissioner to take evidence on and report and it acted upon the report and rejected further evidence offered by the parties. The lower appellate Court treated the procedure adopted by the Court of first instance as unwarranted by law and remanded the suit under s. 562 of the Code of Civil Procedure: *Held* (reversing the order of remand), that the lower appellate Court could not on this ground alone remand the case for retrial under s. 562 and that it could only act under s. 566 or s. 568 of the Code of Civil Procedure. DHONDO v. PANHALAL, **1 Bom L.R. 110**.

(5653)—*O. 41, rr. 27, 28, s. 99, O. 43, r. 2, s. 108, O. 47, rr. 7 and 9 (=Civ. Pro. Code, 1882, ss. 568, 569, 578, 590, 629)—Order of appellate Court directing additional evidence to be taken before itself—Subsequent order sending back case to Munsiff for taking evidence—Review.*—On the day fixed for the hearing of a case, certain witnesses of the defendant were absent and sent a reasonable excuse showing that they were engaged in Court elsewhere. The defendant applied for an adjournment which the Munsiff refused. The defendant thereupon refused to examine his witnesses, and the Munsiff decided against him. On appeal, the Judge thought that the defendant's case had not been heard owing to the refusal of the Munsiff to adjourn, and therefore made an order that the witnesses of the defendant, who had been absent, should attend at his Court to be examined. But subsequently, he made an order, sending back the case to the Munsiff to be tried by him. On second appeal to the High Court, *held* that there was no reason why the Judge should not have sent back the case to be tried by the Munsiff, and that therefore the second appeal should be dismissed. Per *Mahmood, J*—The first order passed by the first appellate Court was one contemplated by ss. 568 and 569, Civ. Pro. Code, and must be taken to have been an interlocutory proceeding. The order would seem to be of such a nature as the Judge could modify *suo motu* or upon the application of either party, there being no decision of finality in the exercise of the discretionary power conferred by s. 569 of the Code. Here, the modification of the order was the result of an application by the defendant, and that would not render the order anything more than an interlocutory proceeding, nor would it make the application an application for review, in its proper sense. Moreover as this was an appeal under s. 629 of the Code, it must be governed by the provisions of s. 578 read with s. 590 of the Code, and the action of the Judge complained of in the appeal was not irregular, nor did it affect the merits of the case so as to produce any injustice. HAJI BU ALI v. HUSAIN BAKHSH, **A.W.N. 1887, 145**.

(5654)—*O. 41, rr. 27 to 29 (=Civ. Pro Code, 1882, ss. 568, 570—Appellate Court not to issue commission to try issue not tried by first Court.*—If an appellate Court requires additional evidence it should follow the provisions of s. 568 to 570 of the Code. It might take the evidence itself or cause a subordinate Court to take it, but it cannot issue a general commission to try an issue which has not been tried by the first Court. MANBODH SAV v. MT. BIMBA, **1 C.P. L.R. 160**.

—— O. XLI. r. 28 (=1882, s. 569=1877, s. 569 =1859, s. 356).

(5654-*a*)—O 41, r. 28—*See* NOS. **122, 2189,** 5581, 5582, 5624, 5653, 5654, *supra*.

——O. XLI, r. 29 (=1882, s. 570=1877, s. 570 =1859, s. 357).

(5654-*b*)—O. 41, r. 29—*See* **NO. 5654**, *supra*.

—— O. XLI, r. 30 (=1882, s. 571=1877, s. 571 =1859, ss. 349, 359).

See JUDGMENT—FORM AND CONTENTS.

(5655)—O. 41, r. 30—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 1 B.L.R. A.C. 17=10 W.R. 59.

(5655-*a*)—O. 41, r. 30—*See* NOS. **5302,** 5342, *supra*.

(5655-*b*)—O. 41, rr. 30, 31—*See* JUDGMENT—FORM AND CONTENTS, 6 P.R. 1870.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5656)—O. 41, rr. 30, 31, 34—*See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 11 W.R. 47.

(5657)—O. 41. rr. 0, 31, 34—*See* APPELLATE COURT—DUTY OF APPELLATE COURT, 15 W.R. 131.

(5658)—O. 41, rr. 30, 31, 34—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, W.R. 1864, 98.

——O. XLI, r. 31 (=1882, s. 574=1877, s. 574 =1859, s. 359).

See JUDGMENT—FORM AND CONTENTS.

(5659)—*O. 41, r. 31 (=Civ. Pro. Code, 1882, s. 574)—Appellate Court to give reasons for its decision.*—S. 574, Civ. Pro. Code, is imperative and requires the appellate Court to state the reasons for its decision—Where the District Judge, under s. 566, Civ. Pro. Code, framed issues of fact and remanded them for findings by the original Court, and, on return of the findings, overruled a contention of the plaintiffs that the original Court had wrongly refused to take the evidence of certain witnesses, and it did not appear that any memorandum of objections was filed under s. 567, Civ. Pro. Code, or that any objection was taken orally at the hearing to the findings as not justified by the evidence on the record, and the District Judge silently accepted those findings, without giving any reasons for so doing, or even stating in his judgment whether he concurred in them or not, *held*, on appeal to the High Court, that the judgment of the District Judge was not according to law and that s. 574, Civ. Pro. Code, required the District Judge to give his own decision, and the reasons for it, upon the issues remanded to the original Court under s. 566, Civ. Pro. Code. BHAGWAN v. KESUR KUVERJI, **17 B. 428.** [*F.*, 7 M.L.J. 236; *R.*, 19 B. 551, 20 M. 496, 23 B. 334, 8 O C. 390, 31 M. 469, F.B.=18 M.L.J. 33= 3 M.L.T. 71.]

(5660)—*O. 41, r. 31—Judgment of Appellate Court.*—Under O. 41, r. 31 of the Code, the judgment of an appellate Court should contain: (1) the points for determination, (2) the decisions thereon, (3) the reasons for the decision; these provisions should not be neglected. HABIBULLAH KHAN v. ABDULLAH KHAN, **9 Ind. Cas. 804.**

(5661)—O. 41, *r.* 31 (=*Civ. Pro. Code*, 1882, *s.* 574)—*Judgment of appellate Court, Contents of.*—The following judgment of a lower appellate Court:—"I see no reason to interfere with the judgment of the lower Court based on facts. The legal quibbles raised in the appeal are not worth considering. Appeal dismissed with costs against appellants." *Held* not to be one fulfilling the requirements of s. 574, Civ. Pro. Code, 1882. KANUSAWY PILLAI v. MAUNG CHIT PU, **1 L.B.R. 204.** (9 A. 26, *R.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5662)—*O. 41, r. 31 (=Civ. Pro. Code, 1882, s 574)—Revenue appeal—Judgment--Contents—Punjab Tenancy Act.*—The appellate judgment of a Collector must also state; (1) The points for determination; (2) The decision thereupon; (3) The reasons for the decision; (4) If the decree appealed against is reversed or varied, the relief to which the appellant is entitled agreeably to the provisions of this section and s. 88, Punjab Tenancy Act. SIAN DITTA v. ALICE FORSTER, **2 P.R. 1893, Rev.**

(5663)—*O. 41, r. 31 (=Civ. Pro. Code, 1882, s. 574) —Judgment—Contents—Revision.*—The judgment of a District Judge sitting as a Court of final appeal must according to the provisions of this section state the points for determination and his reasons for the decision. If not, the Chief Court can reverse the order and direct a re-hearing of the appeal. GANGA RAM v. JAVAHAR SINGH, **72 P.R. 1890.**

(5664)—*O. 41, r. 31 (=Civ. Pro. Code, 1882, s. 574)—Appeal—Judgment.*—The imperative provisions of s. 574 of the Civ. Pro. Code, require that a Court of first appeal should not record a vague and summary judgment without any attempt being made to analyse the evidence, to assign reasons for conclusions, or to determine distinctly all the points which arose from the pleadings of the parties. The parties to the suit were brothers, and the plaintiff came into Court on the distinct allegation that on account of a partition in 1285 *fasli*, the family property was specifically divided among the parties, and that, in such division, certain specific shares were allotted to him, and that his possession was disturbed. The object of his suit was to obtain possession of the shares thus allotted to him. The Munsiff dismissed the claim on the ground that the plaintiff had failed to prove his exclusive possession over any part of the property in suit; that the property must, therefore, be treated as still joint, and that, therefore, the suit for the relief prayed for could not be mainted without a claim for partition. The Munsiff's judgment, therefore, proceeded pratically on the finding that no partition such as would alter the nature of the joint property, so as to make it divided and separate, had taken place. The Subordinate Judge on the other hand on appeal, *held* that, "as alleged by the plaintiff, it is proved from the statement of his witnesses that a private partition was made, and the plaintiff does not stand in need of a formal partition." On his finding, he reversed the Munsiff's decree, and decreed the plaintiff's suit. In second appeal it was contended that the judgment of the Subordinate Judge was bad in law as it had decreed the claim without determining the exact nature of the partition alleged by the plaintiff, and without ascertaining whether the land and houses, in which specific shares were claimed by the plaintiff, fell to his share in such partition. *Held* that this contention was sound. Without ascertaining the exact nature and

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scope of the partition and the details of the distribution or division of the property which took place in such partition, the plaintiff's suit could not succeed. The Subordinate Judge's judgment fulfilled none of these conditions, and was practically useless for purposes which the law requires in judgments of the Court of first appeal. Accordingly, the decree of the lower appellate Court was set aside and the case remanded to it for disposal according to law. MANGRU RAI v. BISHUNDIAL RAI, **A. W.N. 1884, 99.**

(5665)—*O. 41, r. 31 (=s. 574, Civ. Pro. Code, 1882)—Appellate Court—Judgment of—Duty of Court with regard to.*—Under s. 574, it is the duty of a first appellate Court to consider, in its judgment, every point for determination, to examine the evidence in connection with it and to give a decision upon it with the reasons for such decision. The judgment should show, on the face of it, that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. NGA TUN MIN v. NGA LU GYI, **U.B.R. 1905, Civ. Pro. 34.** (22 M. 12, 22 M. 344, *F.*)

(5666)—*O. 41, r. 31 (=s. 574, Civ. Pro. Code, 1882) Judgment in appeal, not in conformity with the section—Order of remand in second appeal.*—A District Judge, who reverses the Munsiff's decision, must write a judgment in conformity with the requirments of s. 574 of the old Code (O. 41, r. 31). If it is not so done, an order of remand will be made in the second appeal. KUPPUSAWMY CHETTI v. SESHADRI AIYANGAR, **7 M.L.T. 120.**

(5667)—*O. 41, r. 31 (=s. 547, Civ. Pro. Code, 1882)—Judgment of appellate Court—What should it contain.*—The judgment of a Court of first appeal should contain the points for determination, the reason for the Judge's conclusions, and it should also set forth the nature of the case and the grounds urged before the Judge in appeal. HIRA RODHIANI v. SOKHYONO PATTOJOSHJI, **8 M.L.T. 380=8 Ind. Cas. 157.**

(5668)—*O. 41, r. 31 (=s. 574, Civ. Pro. Code, 1882)—Judgment of appellate Court—Judgment not in accordance with law.*—In an appeal from a decree in a suit for money due on a mortgage by conditional sale, the following judgment was passed:—"The lower Court's judgment is in accordance with the evidence on the record. Appellant relies on a decree of the High Court which has never been executed. This appeal is dismissed with costs." *Held*, that this was not a sufficient compliance with the terms of s. 574 of the Code of Civil Procedure. BABAN SINGH v. JAIMANGAL SINGH, **A.W.N. 1906, 86.**

(5669)—*O. 41, r. 31 (=s. 574, Civ. Pro. Code, 1882)—Revision—Civil cases—Judgment of appellate Court not complying with the requirements of law.*—Where the judgment of the lower appellate Court did not state what the points in dispute were, or what was the decision on those points, the Chief Court on revision set aside the decree, in the case and remanded the appeal for re-trial. MIRBAZ v. MAKHANA, **153 P.L.R. 1906.**

(5670)—*O. 41, r. 31 (=s. 574, Civ. Pro. Code, 1882)—Judgment of the lower Court not complying with—Procedure.*—When, in second appeal, it appears that the judgment of the lower appellate Court does not substantially comply with the requirements of s. 574, Civ. Pro. Code, the proper procedure is to make an order setting aside the decree, and remanding the case to the lower appellate Court to be disposed of according to law. If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, and if he considers that he can properly dispose of the remanded case without a re-hearing of the appeal, the writing of a judgment which satisfies the requirements of s. 574, without re-hearing the appeal, would be a compliance with the order that the case be disposed of according to law. But in all cases, where the Judge of the Court to which the case is remanded, is not the Judge who heard the appeal in the first instance, and in all cases where the Judge of the Court is the Judge who heard the appeal in the first instance, but he does not consider that he can properly dispose of the remanded case without a re-hearing of the appeal, a re-hearing is necessary in order that there may be a compliance with the order, of the High Court that the case be disposed of according to law. SARAVANA PILLAI v. T. SESHA REDDI, **3 M.L.T. 71, F.B.=18 M.L.J. 34=31 M. 469.** (20 M. 496, 22 M. 12, 25 C. 97, 17 B. 428, 19 B. 551, *R.* & *F.*; 4 M.H.C. 174, *Diss.*)

(5671)—O. 41, r. 31—Case where a judgment was held not to sufficiently comply with express provisions of section—*See* EJECTMENT, SUIT FOR, 14 Bur. L.R. 156.

(5672)—O. 41, r. 31—Question of permanency of tenure—Judgment not dealing with point with sufficient fulness—*See* LANDLORD AND TENANT—EJECTMENT, 13 C.W.N. 949=2 Ind. Cas. 656=36 C. 927.

(5672-*a*)—O. 41, r. 31—*See* NOS. 1829-*a*, 3197, 5302, 5303, 5304, 5305, 5583, 5624, 5629, 5630, 5631, 5655-*b*, 5656, 5657, 5658, *supra*.

(5673)—*O. 41, r. 31, s. 99 (=Civ. Pro. Code, 1882, ss. 574, 578)—Judgment of appellate Court—Effect of non-compliance with s. 574.*—Where the judgment of an appellate Court does not comply with the provisions of the Civ. Pro. Code, s. 574, as to its contents, the irregularity is such as cannot be covered by the provisions of s. 578 of the Code. In such a case, the decree should be set aside and the case remanded for proper compliance with the provisions of s. 574. JAGANATH v. SURAWAN DULAIYA, **A.W.N. 1888, 61.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5674)—*O.* 41, *r.* 31, *ss.* 99, 100 (=*ss.* 574, 578, 584, *Civ. Pro. Code*, 1882)—*Appellate judgment—Omission to state reasons for decision—Defect if curable—Ground of second appeal.*—In a suit on a mortgage-bond, the defence of the contesting defendant was that the bond was executed by collusion between the plaintiff and certain other defendants who did not appear. The lower appellate Court recited that the Court of first instance had found that the plaintiff was entitled to no relief, and then concluded as follows:—"The point in dispute is a question of fact and I see no reason to differ from the finding of the lower Court. The appeal is dismissed." *Held*, that the appellate judgment did not comply with the provisions of s. 574, Civ. Pro. Code. The points for determination were set out, but the reasons for the decisions were not stated. *Held*, also, that the facts of the case demanded fuller treatment than they received, and the defect was not cured by the provisions of s. 578 of the Code. Defect in the appellate judgment is a ground of second appeal. SHAHARULLA MONDAL v. BANGOO MONDAL, **13 C.W.N. 143=2 Ind. Cas 404.** (12 C. 199, *D.*) [*R.*, 13 C.W.N. 1031.]

(5675)—O. 41, r. 31, s. 100—*See* JUDGMENT—FORM AND CONTENTS, 12 C. 199.

(5676)—O. 41, r. 31, s. 122—*See* JUDGMENT—FORM AND CONTENTS, 9 A. 93, F.B.

(5677)—*O.* 41, *rr.* 31 *&* 11 (=*ss.* 574, 551, *Civ. Pro. Code*, 1882)—*Procedure—Appeal summarily dismissed—Court not bound to record full judgment.*—*Held*, that the provisions of s. 574 of the Code of Civil Procedure are not applicable in their entirety to the case of an appeal dismissed under s. 551 of the Code. SAMIN HASAN v. PIRAN, **A.W.N. 1908, 115=5 A.L.J. 300=30 A. 319.** (25 C. 97, *Diss.*)

——O. XLI, r. 32 (=1882, s. 577=1877, s. 577 =1859, s. 350.)

See JUDGMENT—FORM AND CONTENTS.

(5678)—*O.* 41, *r.* 32 (=*Civ. Pro. Code*, 1882, s. 577)—*Compromise presented by party to appeal, absence of verification in application—Incompetency of Court to proceed under s.* 577, *Civ. Pro. Code*, 1882.—An application for compromise of suit having been presented to the High Court on second appeal, it was sent to the lower appellate Court for the verification being obtained. Repeated attempts made to obtain from the parties the verification of the *sulahnamah* or deed of compromise failed owing to the negligence of the parties to attend to verify the same. Under the circumstances, the High Court could not act under s. 577 of the Civ. Pro. Code, and make a decree in terms of the *sulahnamah*. The powers conferred by that section upon Courts of appeal in powers which require that parties should be in accord with each other at the time when the decree is pronounced by the appellate Court. BANDU BHAGAT v. SHAH MUHAMMAD TAQI, **14 A. 350=A.W.N. 1892, 40.**

(5678-*a*)—O. 41, r. 32—*See* NOS. 1778, 1779, 1780, 5394, 5471, *supra.*

(5679)—*O.* 41, *r.* 32, *s.* 99 (=*ss.* 574, 578, *Civ. Pro. Code*, 1882)—*Judgment of first appellate Court, requisites of.*—Under s. 574, Civ. Pro. Code, the judgment of a Court of first appeal should contain the points for determination, the decision thereupon and the reasons for such decision. KOLAHAL v. NANKU, **A.W.N. 1886, 285.** (A.W.N. 1886, 284, *R.*)

(5680)—O. 41, r. 32, s. 99—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 15 W.R. 179, 2 A. 554.

(5681)—O. 41, r. 32, s. 99—*See* DECREE—DECREE, FORM OF, 15 W.R. 534.

(5681-*a*)—O. 41, r. 32, s. 99—*See* PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 62 P.R. 1873.

(5682)—O. 41, r. 32, s. 99—*See* BOM. REG. XVIII OF 1827, s. 10, 11 B.H.C. 129.

(5683)—O. 41, r. 32, s. 99—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 14 W.R. 141.

(5684)—O. 41, r. 32, s. 99, O. 7, r. 11—*See* VALUATION OF SUITS, 4 B.L.R. A.C. 139=12 W.R. 484.

——O. XLI, r. 33 (New).

See JUDGMENT—FORM AND CONTENTS.

(5685)—*O.* 41, *r.* 33—*Discretion of appellate Court.*—Rule 33 of O. 41 empowers a Court of appeal to deal with a case in any way that may seem equitable to all the parties concerned, the discretion thus given to an appellate Court is very wide. HARI MAL v. AYA SINGH, **103 P.L.R. 1911=9 Ind. Cas. 825.**

(5686)—*O.* 41, *r.* 33—*Powers of appellate Court.*—The High Court in second appeal, and the District Judge on appeal, can pass a decree against a defendant, even though the plaintiff has not filed any appeal or cross-objections against the decree dismissing the suit against him. KRISHNIER v. SARVOTHAMA ROYAR, **8 M.L.T. 377=8 Ind. Cas. 366.**

(5687)—*O.* 41, *r.* 33—(=*Civ. Pro. Code*, 1882, *ss.* 540, 584)—*Suit for partition—Decree for plaintiff—Reduction of some defendants' share in consequence—Appeal by such defendants, whether lies—Relief to party not filing appeal or cross-objections.*—An appeal lies by a party against whom no decree has been passed if the effect of the decree is to make that person aggrieved by it. It is competent to a Court of appeal, under O. 41, r. 33 of the Civ. Pro. Code of 1908, to give a relief to the respondent, who has not filed cross-objections to that portion of the decree of the lower Court which is against him. Plaintiff sued for a third

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

share, alleging that defendants Nos. 1 and 2 were each entitled to a third share, and third defendant to no share. The Munsiff gave decree as prayed for. On appeal the Sub-Judge granted plaintiff a fourth share, holding that the 3rd defendant was entitled to a fourth. *Held*, on appeal by 1st and 2nd defendants, that it was competent to 1st and 2nd defendants to appeal, as they were aggrieved by the decree of the Sub-Judge. NAGALLA KOTAYYA v. NAGALLA MALLAYYA, **8 Ind. Cas. 337.** (28 M. 457, 30 M. 447, 17 M.L.J. 260, 2 M.L.T. 468, 21 A. 117, *R.*)

(5687-*a*)—*O. 41, r. 33—Scope of—Dismissal of claim without objection by defendant in respect of portion decreed.*—The words of O. 41, r. 33 of the Code are very wide, but care and judicial discretion must be used by the appellate Court in the exercise of the powers conferred by the rule. In a proper case, the Court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. One principle, however, may be safely stated: the Courts in the exercise of powers conferred by O. 41, r. 33, should not lose sight of the other provisions of the Code itself, nor of the Court Fees Act nor of the law of limitation. In particular, they should bear in mind the case stated by way of illustration at the foot of the rule. In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections under O. 41, r. 22, against that portion of decree which is against him, the Court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant. The object of r. 33 is manifestly to enable the Court to do complete justice between the parties to the appeal—where for example it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the illustration to the rule is a type. Hence where a plaintiff sued the defendant for rent of a holding and claimed Rs. 294-7-0 and the defendant pleaded that the claims had been discharged but the Assistant Collector gave the plaintiff a decree for Rs. 96-11-11, and the plaintiff appealed against the decree in so far as it dismissed his claim, and the defendant neither filed a cross-appeal, nor objections as provided by O.41, r. 22 of the Code and the District Judge, on return of findings on certain issues remitted by him to the Assistant Collector, dismissed the claim of the plaintiff *in toto*, *held* by the Full Bench, the dismissal by the Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by O.41, r. 33. RANGAM LAL v. JHANDU, **8 A. L. J. 1111, F.B.**

(5687-*b*)—O. 41, *r.* 33—*Appeal by one plaintiff out of many—Decree in favour of all*

Civ. Pro. Code, (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—Effect of mutation entry—Punjab Land Revenue Act XVII *of* 1887, *r.* 177, *under s.* 34. —*Held*, that r. 33 of O. 41, of the new Civ. Pro. Code, (Act V of 1908) justifies an appellate Court to decree in favour of all the plaintiffs, what they are entitled to get collectively even if only one of them has appealed. *Held*, also, that P.R. No. 6 (Rev.) of 1883 and No. 1 (Rev.) of 1891 enunciate the well-known rule that Revenue Courts look to possession in the first instance as a guide in mutation of names proceedings, and the mutation order does not preclude title being set up by the losing party. BHAGTU v. BUA DITTA, **26 P.W.R. 1912.**

(5688)—O. 41, r. 33—Powers of appellate Court—Second appeal—*See* MAD. ACT I OF 1908, s. 6 20 M.L.J. 528=3 M.L.T. 135=M. W.N. 1910, 331=7 Ind. Cas. 74.

(5688-*a*)—O. 41, r. 33—Appellate Court's power to make any orders to meet the ends of justice—*See* HINDU LAW—ALIENATION, 38 C. 721.

(5688-*b*)—O. 41, r. 33—See NO. 2397, *supra*.

——**O. XLI, r. 34 (=1882, s. 576=1877, 576=1859 s. 359).**

(5688-*c*)—O. 41, r. 34—*See* NOS. 5656, 5657, 5658, *supra*

——**O. XLI, r. 35 (=1882, s. 579=1877, s. 579 =1859, s. 360).**

(5688-*d*)—O. 41, r. 35—*See* NOS. 2391, 5306, *supra*.

——**O. XLI, r. 35, (=1882, s. 579=1877, s. 579 =1859, s. 360).**

(5689)—O. 41, rr. 35, 36—*See* COSTS—GENERAL, 17 W.R. 445.

(5690)—O. 41, rr 35, 36—*See* DECREE—DECREE, FORM OF, 21 W.R. 74.

(5691)—O. 41, r. 35, O. 42, r. 1, s. 108—*See* DECREE—DECREE, CONSTRUCTION OF, 11 B. 177.

(5692)—O. 41, *r.* 35, O. 44, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 579, 592)—*Application to appeal* in forma pauperis—*Limitation Act* (XV *of* 1877), s. 5, *art.* 170.—The provisions of s. 5 of the Limitation Act do not apply to an application to appeal *in forma pauperis*. PARBATI v. BHOLA, **12 A. 79=A.W.N. 1890, 25.** [*Appl.*, 12 A. 461; *R.*, 19 B. 48, 30 C. 790=8 C.W.N. 906.]

——**O. XLI, r. 36 (=1882, s. 580=1877, s. 580 =1859 s. 360).**

(5692-*a*)—O. 41, r. 36—*See* NOS. 5689, 5690, *supra*.

——**O. XLII, r. 1 (=1882, s. 587=1877, s. 587= 1859 s. 37).**

(5692-*b*)—O. 42, r. 1—*See* NOS. 4553, 5163, 5691, *supra*.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*.

——O. XLIII, r. 1 (=1882, s. 588=1877, s. 588 =1859, ss. 36, 94, 363, 365).

See APPEAL.

(5693)—*O. 43, r. 1 (k)—Order of abatement —No application made to set aside—No appeal —No revision—Punjab Courts Act, XVIII of* 1884, s. 70 (1) (*a*).—Where no application to set aside an abatement was made, *held* that no appeal would lie under O. 43, r. 1 (*k*), Civ. Pro. Code. Where an applicant fails to avail himself of the remedy by way of application to set aside the abatement, the Court will refuse to interfere under s. 70 (1) (*a*), Punjab Courts Act 1884. THAKUR DAS v. PERMA NAND, **95 P. R. 1911.**

(5694)—*O. 43, r. 1 (u)—No further appeal in suit—Order under s. 562, Civ. Pro. Code*, 1882 (*O. 41, r. 23*)—*Appealability—Case* sub judice *—Revision—Punjab Courts Act XVIII of* 1884, s. 70 (1) (*b*).—No appeal lies under O. 43, r. 1 cl. (*u*), Civ. Pro. Code, 1908, from the order of the Divisional Judge remanding the case under s. 562, Civ. Pro. Code, 1882 (=O. 41, r. 23, Civ. Pro. Code, 1908) in a case where no further appeal lies to the Chief Court from the decree of the Divisional Judge. It will not be a proper exercise of the Chief Court's revisional power under cl. (*b*) of s. 70 (1) of the Punjab Courts Act, 1884, for it to interfere *under that clause* in a case which is still *sub judice* in the lower Courts. ALI BAKSH v. CHUHAR SINGH, **101 P.R. 1910.**

(5695)—*O. 43, r. 1 (u)—Order of remand—Appeal — Disposal of suit before filing an,—whether affects right of appeal—Old law obsolete.* —Under the Code of Civil Procedure, 1908, as applied to Berar, the right of appeal against remand order is unaffected by the disposal of the suit on remand before the institution of the appeal. (32 C. 1023, 29 A. 659, 18 M. 421, 14 B. 232, 12 A. 510, 4 N.L.R. 166, 7 N.L.R. 172, *R.*) The contrary view, though correct under the old Code is now obsolete. VITHOBA v. TAMBA, **8 N.L.R. 42.** (32 C. 1023, 29 A. 659, 18 M. 421, 14 B. 232, 12 A. 510, 4 N.L.R. 166, 7 N.L.R. 172, *R.*)

(5696)—O. 43, r. 1 (*a*)—*See* MESNE PROFITS —MISCELLANEOUS, 8 Ind. Cas. 162.

(5697)—O. 43, r. 1 (s)—*See* RECEIVER, 62 P. W.R. 1911.

(5698)—O. 43, r. 1, cl. (*s*)—Order appointing receiver—Appeal — *See* RECEIVER, 13 C.L.J. 157=9 Ind. Cas. 582.

(5699)—O. 43, r. 1—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS, WHEN LIE AND WHEN NOT, 21 C. 799, 10 W.R. 233.

(5699-*a*)—O. 43, r. 1—*See* NOS. 57, 72, 73, 74, 75, 82, 87, 92, 93, 94, 95, 96, 97, 98, 99, 100, 113, 121, 153, 192, 341, 466, 505, 925, 926, 927, 928, 929, 930, 984, 1028, 1029, 1032, 1043, 1062, 1063, 1066, 1067, 1071, 1077, 1085, 1205, 1286,

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1509, 1697, 1700, 1823, 1861, 1862, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1920, 1921, 1928, 1932, 1933, 1934, 1939, 2182, 2188, 2246, 2374, 2275, 2412-*a*, 2477, 2477-*a*, 2477-*b*, 2709, 2725-*a*, 2765, 2770, 2774-*c*, 2780, 2792, 2793, 2793-*a*, 2793-*b*, 2793-*c*, 2803, 2805-*a*, 2805-*b*, 2841-*b*, 2856, 2856-*a*, 2861, 2884, 2884-*a* 2884-*b*, 2910, 2911, 2913, 3003, 3020, 3027, 3041, 3145, 3169, 3898, 4046, 4110, 4134, 4157, 4242, 4317, 4318, 4320, 4335, 4337, 4338, 4376, 4377, 4591, 4592, 4617, 4635, 4658, 4659, 4726, 5036, 5039, 5085, 5105, 5117, 5119, 5141, 5147, 5147-*a*, 5168, 5243, 5250, 5330, 5331, 5332, 5333, 5358, 5359, 5360, 5394, 5401, 5530, 5531, 5532, 5533, 5534, 5535, 5536, 5537, 5538, 5539, 5540, 5541, 5542, 5543, 5544, 5545, 5546, 5547, 5548, 5570, 5584, 5585 *supra*, and NOS. 5816, 5819, 5850, 5886, *infra*.

(5700)—O. 43, r. 1, s. 104—*See* ACT I OF 1868, s. 6, A.W.N. 1889, 106.

(5701)—O. 43, r. 1, s. 104—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 19 M. 29=5 M. L.J. 153.

(5702)—O. 43, r. 1, ss. 103, 105,—*See* REMAND, 18 M. 421.

(5702-*a*)—O. 43, r. 1, s. 104, O. 44, r. 1—*See* LETTERS PATENT, HIGH COURT, 1865, MAD. cl. 15, 9 M. 447.

(5702-*b*)—O. 43, r. 1, s. 115—*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS, WHEN LIE AND WHEN NOT, 1 M. 401.

(5703)—O. 43, r. 1, O. 2, rr. 4 and 5—*See* CAUSE OF ACTION, 79 P.R. 1889.

(5703-*a*)—*O. 43, r. 1, O. 47, r. 7—Review —Appeal—Case decided without one party's evidence being completed—Grant of application for review on this ground—Civ. Pro. Code, O. 43, r. 1, O. 47, r. 7—Construction.*—An appeal against an order granting an application for review lies only on the grounds specified in O. XLVII, r. 7 and on no other grounds. Consequently, an order granting an application for review is not appealable on the ground that the application was granted on the objection that the Court had previously decided the case before the plaintiff's evidence was completed. There is no contradiction between O. XLVII, r. 7, and O. XLIII, r. 3. The latter rule does not carry the right of appeal any further than the former rule. The two Orders must be read together, as O. XLIII, r. 1, is qualified by O. XLVII, r. 7. MAIN FAZAL AHMAD v. KHAN BAHADUR, **10 P.L.R. 1912.** (12 B. 171, 24 C. 878, 27 A. 695=A.W.N. 1905, 154=2 A.L.J. 465, *F.*)

(5704)—*O. 43, r. (1) (n), O. 47, r. 7 (a) and (b) and s. 115 (c)—Indian Evidence Act, s. 91*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—*Bahi—Absence of the proof of its loss—Power of the Court to review its order—Power of High Court to set aside such order and the decree on review—Appeal treated as revision.—Held*, that, where a document on which the suit is based is lost and the defendant pleads payment and that it is endorsed thereon, the loss must be strictly proved, and the plaintiff must not be allowed to succeed on qualified admission of the defendant by throwing on him the *onus* of proving the payment. (12 B. 443, *F.*; 23 P.R. 1898, 124 P.R. 1906, *D.*) *Held*, also that an order granting the review under r. 7 of O. 47, Civ. Pro. Code, 1908 is appealable only where it either contravenes the provisions of r. 2 or r. 4 of the said order or the application for review is barred by time or is based on insufficient grounds; but though, in the absence of these circumstances, the order is not appealable, it can be set aside on revision by the High Court under s. 115 (*c*), Civ. Pro. Code, 1908, if it is irregular and has led to miscarriage of justice. Appeal was treated as revision. ATRA v. CHHAJJU, **49 P.W.R. 1911.**

(5705)—O. 43, r. 1 (*w*) and O. 47, r. 7—Appeal against order granting review—Appeal on merits against the final order passed on review—*See* REVIEW—MISCELLANEOUS, 13 O.C. 248.

——O. XLIII, r. 2 (=1882, s. 590=1877 s. 590 =1859, s. 366.)

(5705-*a*)—O. 43, r. 2—*See* NOS. 1910, 4255-*a*, 5472, 5653, *supra*.

——O. XLIV, r. 1 (=1882, s. 592=1877, s. 592 =1819, ss. 367, 370).

(5706)—*O. 42, r. 1 (=s. 594, Civ. Pro. Code, 1882)—Appeal in forma pauperis — Rejection of application for leave to appeal* in forma pauperis *distinct from rejection of the appeal—Duty of appellate Court in considering decision of lower Court.*—A Court to which an application for leave to appeal *in forma pauperis* is presented is under certain circumstances empowered to reject that application summarily; but it is not under similar conditions empowered to reject the appeal itself. It is the duty of a Court to which an application for leave to appeal as a pauper is presented to consider for itself the judgment and decree against which it is sought to appeal and not merely to accept and reiterate the reasons given by the lower Court. *In re* INAYAT BEG, **A.W.N. 1895, 34.** [*R.*, 11 O.C. 19.]

(5707)—*O. 44, r. 1 (=s. 592, Civ. Pro. Code, 1882)—Pauper appeal—Admission.*—The proviso to s. 592 of the Civ. Pro. Code is a very necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers. The Court should be careful to see that that proviso is satisfied. To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should not only see but express and record very briefly the reason on which the leave proceeds. SAKHUBAI v. GANPAT, **6 Bom. L.R. 442=28 B. 451.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5708)—O. 44, *r.* 1.—*See* LETTERS PATENT—HIGH COURT, 1865, MADRAS, 26 M. 437.

(5709)—O. 44, r. 1—*See* REVIEW—REVIEW WHEN LIES, 10 W.R. 345.

(5709-*a*)—O. 44, r. 1—*See* NOS. 5001, 5005, 5006, 5050, 5251-*a*, 5692, 5702, 5702-*a*, *supra*.

(5710)—O. 44, r. 1, s. 115—*See* REVISION—GENERAL, 4 A. 91=A.W.N. 1881, 136.

(5710-*a*)—O. 45—*See* NO. 102, *supra*.

—— O. XLV, r. 1 (=1882, s. 594=1877, s. 594).

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5711)—O. 45, r. 1—*See* DECREE—GENERAL, 5 Bom. L.R. 348=27 B. 415.

——O. XLV, r. 2 (=1882, s. 598=1877, s. 598).

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5712)—O. 45, r. 2—*See* LIMITATION ACT, 1908, ss. 4, 5, 12, art. 179, 19 B. 301.

(5713)—O. 45, r. 2—*See* LIMITATION ACT, 1908, s. 12 and art. 179, 15 M. 169.

(5713-*a*)—O. 45, r. 2—*See* NO. 1985, *supra*.

——O. XLV, r. 3 (=1882, s. 600=1877, s. 600).

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5714)—*O. 45, r. 3 (=s. 600, Civ. Pro. Code, 1882)—Privy Council, leave to appeal—Suit filed in 1906—New Code.*—In the suit filed by the respondent, the applicant pleaded *inter alia* that a Civil Court had no jurisdiction to entertain a suit under s. 41 (*b*) of the Lower Burma Town and Village Lands Act. The first Court dismissed the suit on the preliminary point. On appeal a Full Bench held that the particular section was *ultra vires* of the Legislative Council of Lieutenant-Governor of Burma. The case was remanded to the first Court to be heard on its merits. The applicant asked for leave to appeal to the Privy Council on the point decided by the Full Bench. *Held*, that no leave could be granted under s. 600 of the Civ. Pro. Code, 1882, inasmuch as the respondent's suit may be dismissed, in which case the granting of the certificate might put him to needless expense. *Held*, also, that the suit having been filed in 1906, the provisions of the new Code of 1908 did not apply. THE SECRETERY OF STATE FOR INDIA IN COUNCIL v. JOHN MOMENT, **8 Ind. Cas. 1189. (5 L.B.R. 148, 5 Ind. Cas. 980, *Appr.*)**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5714-*z*)—O. 45, r. 3—See Nos. 1960, 1966, 1967, 1968, 1969, 1986, 1987, 1988, 1989, *supra.*

——**O. XLV, r. 4 (New).**

(5714-*b*)—O. 45, r. 4—See No. 5585 *supra.*

——**O. XLV, r. 6 (=1882, s. 601=1877, s. 601).**

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5715)—*O. 45, r. 6 (=s. 601, Civ. Pro. Code, 1882)—Privy Council, appeal to—Leave to appeal, application for—Certificate, refusal of—Grounds to be stated.*—The High Court in refusing a certificate for leave to appeal to His Majesty in Council should state the grounds for refusing it. VENGANAT SWAROOPATHIL VALIA NAMBIDI AVERGAL v. CHERAKUNNATH NAMBIYATHAN NAMBUDRIS. **10 C.W.N. 545. P.C.=8 Bom. L.R. 374=16 M.L.J. 160 =29 M. 94=4 C L.J. 305=33 I.A. 67.**

(5715-*a*)—O. 45, r. 6—*See* NOS. 1970, 1990, *supra.*

——**O. XLV, r. 7 (=1882, s. 602=1877, s. 602).**

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5716)—*O. 45, r. 7. (=s. 602, Civ. Pro Code, 1882)—Privy Council—Appeal by special leave —Practice—Time for depositing estimated costs —Extension.*—Although s. 602 of the Code only applies to a case, where a certificate of leave to appeal to the Privy Council has been granted by the High Court, it has been the invariable practice of the Calcutta High Court to treat that section as applying to cases, where special leave has been granted by the Privy Council. The High Court has power to extend the time, as provided by s. 602 of the Code, for depositing the estimated cost of translating, transcribing, indexing and transmitting to the Privy Council the record of a case under appeal, but it ought not to do so without some cogent reason. ROY JOTINDRA NATH CHOWDHURY v. RAI PRASANNA KUMAR BANERJEE BAHADUR, **11 C.W.N. 1104.** (10 C. 557, *F.*)

(5717)—*O. 45, r. 7 (=s. 602, Civ. Pro. Code, 1882)—Power of Court to extend time for giving security—Appeal to Privy Council.*—The words of s. 602, Civ. Pro. Code, though at first sight may appear to be mandatory yet are merely directory. (10 C. 537, P.C., *R.*) The Court admitting the appeal (the Chief Court), therefore, can, for sufficient cause, extend the period prescribed by that section for the filing of security and for making the specified deposit. KIDAR NATH v. MATHU MAL, **87 P.R. 1908= 188 P.W.R. 1908=27 P.L.R. 1909=4 Ind. Cas. 919.** [*R.*, 78 P.R. 1909.]

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859;—*continued.*

(5718)—*O. 45, r. 7—Appeal to Privy Council —Poverty, whether sufficient for extension of time allowed for the deposit of security for respondent's costs.*—Time allowed under O. 45, r. 7 for the deposit of security for respondent's costs in the appeal may be enlarged for "cogent reasons," and poverty is a sufficient reason for extension of time, where the sum of money required is large and diligence of the petitioner is shown by his having paid in three-fourths of the money required within the time originally allowed. BEGGA v. SALIHON, **44 P.R. 1910 =70 P.W.R. 1910=6 Ind. Cas. 723=118 P.L.R. 1910.** (10 C. 557, P.C., *F.*; 14 M. 391, *Diss.*)

(5719)—*O. 45, r. 7 (=Civ. Pro. Code, 1877, s. 602)—Appeal to Privy Council—Failure to give security.*—Where persons, who obtained a certificate to appeal to Privy Council applied to the High Court two days after the time prescribed by s. 602 for leave to deposit certain bonds giving security for the payment of the costs of the respondents, and to deposit the amount required to defray the expenses of translation, etc., *held* that, looking at the terms of s. 602, Civ. Pro. Code, 1877, and following the undeviating practice of the Court, the applications, being two days beyond time, should be refused. NARAIN SINGH v. RUSTAM KHAN, **A.W.N. 1881, 76.**

(5720)—*O. 45, r. 7 (=Civ. Pro. Code, 1877, s. 602)—Appeal to Queen in Council—Failure to furnish security within time.*—Where an applicant for permission to appeal to the Privy Council, made the deposit required by s. 602, Civ. Pro. Code, after the time limited by that section and also prayed for time to make up the deficiency in the security furnished, *held* that the case must be struck off the file, as the requirements of the law had not been satisfied by the appellant. DEOTADIN v. GAYADIN, **A.W.N. 1882, 55.**

(5721)—O. 45, r. 7—*See* LETTERS PATENT —HIGH COURT, 1865, CALCUTTA, cl. 15, 18 C. 182.

(5721-*a*)—O. 45, r. 7—*See* NO. 1991, *supra.*

—— **O. XLV, r. 11 (=1882, s. 606=1877, s. 605).**

(5721-*b*)—*O. 45, r. 11—Appeal Court—Dismissal of appeal—Judgment, not necessary.*—It is not obligatory on the appellate Court to write a judgment when dismissing an appeal under O. XLV, r. 11 of the Code. TANAJI DAGDE v. SHANKAR SAKHARAM, **13 Bom. L. R. 1002.**

——**O. XLV, r. 13 (=1882, s. 608=1877, s. 608).**

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5722)—*O. 45, r. 13—Preliminary decree for partition — Appeal to Privy Council— High Court, if may stay further proceeding.*—The High Court has no power to stay proceedings

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in a suit following a preliminary decree for partition, against which it has granted leave to appeal to the Privy Council. The Privy Council which has *seizin* of the appeal can alone do so. LALITESSUR SINGH v. BHABESSUR SINGH, **13 C.W.N. 690 = 9 C.L.J. 661 = 6 M.L.T. Ind. Cas. 812.**

(5723)—*O. 45, r. 13 (=Civ. Pro. Code, 1882, s. 608)—Privy Council, appeal to—Decree—Stay of execution before appeal admitted—Practice—Procedure.*—Where a petition has been presented for leave to appeal to the Privy Council from a decree of the High Court, the High Court may grant a stay of execution of its decree although the appeal has not yet been admitted under s. 603, Civ. Pro. Code. The words "admitting the appeal" following the word "Court" in the first clause of s. 608, Civ. Pro. Code, have no reference to the time when the Court is to give directions, but are descriptive of the Court which is to give them. DAME JANBAI v. SALE MAHOMED, **19 B. 10.** [*Diss.*, 5 C.W.N. 562, 6 M.L.T. 309 = 20 M.L.J. 140.]

(5724)—O. 45, r. 13—*See* LETTERS PATENT HIGH COURT, 1865, CALCUTTA, cl. 15, 21 C. 473.

(5725)—*O. 45, r. 13, (2) (c)—Stay of execution before admission of appeal to Privy Council—Jurisdiction.*—The Court can stay execution of a decree pending appeal to the Privy Council, under O. 45, r. 13 (2) (*c*), only after the grant of a certificate for the admission of the appeal. R. 13 (2) (c) refers to stay of execution of the decree appealed from. VENKATA REDDY v. OBALA REDDY, **6 M.L.T. 309 = 20 M.L.J. 140 = 4 Ind. Cas. 106.** (5 C.W.N. 562, *F.*; 19 B. 10, *Not F.*)

(5725-*a*)—O. 45, r. 13—*See* NOS. 1090, 1961, 2392, *supra*.

——O. XLV, r. 15 (=1882, s. 610=1877, s. 610).

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

(5726)—*O. 45, r. 15 (=s. 610, Civ. Pro. Code, 1882)—Execution of decree—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.*—Pending an appeal to His Majesty in Council, certain property, forming part of the subject-matter of the suit, in which such appeal had been preferred, was sold by auction in execution of a money-decree against the plaintiff, who held the decree of the High Court under appeal. The defendant's appeal to the Privy Council was decreed. *Held*, that the successful appellant was entitled to recover the property sold as above mentioned by means of an application under s. 244 read with s. 610 of the Code of Civil Procedure, and this right was not affected by the fact that the auction-purchasers were not

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

parties to the decree of the Privy Council. GARURDHUJ PRASAD SINGH v. BAIJU MAL, **A.W.N. 1906, 43 = 3 A.L.J. 110 = 28 A. 337.** (26 A. 417, *F.*: 19 A. 136, 20 A. 139, *D.*)

(5727)—*O. 45, r. 15 (=s. 610, Civ. Pro. Code, 1882)—Costs awarded by decree of Privy Council, rate of exchange in estimating—"For the time being" meaning of.*—Under the last paragraph of s. 610, Civ. Pro. Code, the amount of costs payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council." The words "for the time being" mean the year in which the amount is realized or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the proper rate of exchange to which the decree-holders must be taken to be entitled would be the rate obtaining on the date of their application for execution, NANHU MAL v. BENI RAM, **A.W.N. 1887, 60.**

(5728)—*O. 45, r. 15 (=Civ. Pro. Code, 1882, s. 610)—Construction*—The provisions of s. 610 of the Civ. Pro. Code, cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the object of any order in Council should be supplied to the Courts in India. HURRISH CHUNDER CHOWDHRY v. KAISUNDARI DEBI, **1 C. 482 = 92 C.L.R. 511 = 10 I.A. 4, P.C. = 4 Sar. 407.** (*On appeal from* 6, C. 594.)

(5729)—O. 45, r. 15—*See* APPEAL—ORDERS, 6 C. 594 = 7 C.L.R. 543.

(5730)—O. 45, r. 15—*See* EXECUTION OF DECREE—PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 8 A. 650 = A.W.N. 1886, 249. 22 C. 960.

(5731)—O. 45, r. 15—*See* NOS. 149, 578, 588, *supra*.

——O. XLVI, r. 1 (=1882, s. 617=1877, s. 617.)

See REFERENCE TO HIGH COURT.

(5731-*a*)—O. 46, r. 1—*See* REVIEW—JURISDICTION, 23 P.R. 1872.

(5731-*b*)—O. 46, r. 1—*See* NOS. 576, 923, 932, 1729, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 1999-*a*, 2000, 2000-*a*, 2001, 2001-*a*, 2247, 2255, 3421, 3935, 5078, *supra*.

(5732)—O. 46, r. 1, s. 113—*See* PUN. ACT XVIII OF 1884, s 44, 40 P.R. 1893.

(5733)—O. 46, r. 1, s. 113—*See* SUCCESSION ACT, 1865, s. 264, 5. C. 756 = 7 C.L.R. 226.

——O. XLVI, r. 4 (=1882, s. 620=1877, s. 620).

(5734)—O. 46, r. 4—*See* COSTS—SPECIAL CASES, 15 C. 507.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——O. XLVI, r. 5 (=1882, s. 621=1877, s. 621).

(5735)—O. 46, r. 5—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 69, 30 C. 458.

——O. XLVI, r. 6 (=1882, s. 646-A).

(5735-*a*)—O. 46, r. 6—*See* NO. 2204 *supra*.

——O. XLVI, r. 7 (=1882, s. 646-B).

See REFERENCE TO HIGH COURT.

(5736)—*O. 46, r. 7 (=s. 646-B, Civ. Pro. Code, 1882)—Reference when allowed—Subordinate Courts—Meaning of.*—Reference under this section must be made only when it is in the opinion of the District Court that the order of the subordinate Court is erroneous. "Subordinate Courts" does not include Small Cause Courts. MAKHAN LAL v. AMIR BAKHSH, **91 P.R. 1890.**

(5737)—*O. 46, r. 7 (=s. 646-B, Civ. Pro. Code, 1882)—Construction—Court of Small Causes—Plea of want of jurisdiction not taken.*—S. 646-B of the Civ. Pro. Code, does not apply to any and every case in which a Court of Small Causes has exercised a jurisdiction not vested in it by law but only to a restricted number of such cases, namely, those in which the Court has, by erroneously holding a suit to be cognizable by it, exercised a jurisdiction not vested in it by law. [*R.*, 1 M.L.T. 414=30 M. 41, 6 M.L.T. 121.] Where, in a suit for damages for wrongful attachment, the plea of want of jurisdiction was not taken by the defendant in the Court of Small Causes, the High Court declined to interfere on a reference under s. 646-B of the Civ. Pro. Code. RAM LAL v. KABUL SINGH, **25 A. 135=A.W.N. 1902, 219.**

(5738)—*O. 46, r. 7 (=Civ. Pro. Code, 1882, s. 646-B)—Provincial Small Cause Courts Act (IX of 1887), s. 16—Discretion of Court.*—S. 16 of the Provincial Small Cause Courts Act must be read along with s. 646-B of the Civ. Pro. Code. The latter section gives to the High Court a discretion to pass such orders as it thinks proper in cases referred for its orders under that section, and such cases include a case where a Small Cause suit has been irregularly tried by an ordinary Civil Court. The obvious object of the section is to enable the High Court to pass such order as the justice of the case requires, without being compelled to decide the case solely with reference to jurisdiction, and thus perhaps put the parties to the expense and trouble of fruitlessly litigating the same question again before the very Judge, sitting as a Small Cause Court, who had already tried the case on the ordinary civil side, and with the greater formality thereby required and with the safeguard of an appeal. Though such a case comes before the High Court under s. 622, Civ. Pro. Code, it seems reasonable that the principle of the express provision in s. 646-B should

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

be followed in the exercise of the discretion under s. 622 at least in cases where the petitioner has made no objection to the trial in the Court of first instance and raises the objection for the first time in the High Court. PARAMESHWARAN NAMBUDIRI v. VISHNU EMBRANDRI, **27 M. 478.** (21 C. 249, *Appr. & F.*; 26 M. 176, *Not F.*) [*R.*, 1 M.L.T. 414=30 M. 41, 17 M.L.J. 487, 11 Bom. L.R. 1330; *Cited*, 126 P.L.R. 1906; *D.*, 6 M.L.T. 121, F.B.]

(5739)—*O. 46, r. 7 (=s. 646, Civ. Pro. Code, 1882)—Reference by the District Court to the High Court.*—The District Court is bound to make a reference to the High Court under s. 646-B, Code of Civil Procedure, when one of the parties requires it to do so, and the fact that an appeal lay to it from the order made by the Munsiff's Court does not preclude it from making the reference. SIMSON v. MCMASTER, **13 M. 344.** [*R.*, 3 O.C. 20.]

(5740)—O. 46, r. 7—*See* DISTRICT JUDGE, JURISDICTION OF, 3 O.C. 20.

(5741)—O. 46, r. 7—Scope of—Jurisdiction of appellate tribunal—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 16, 1 M.L.T. 414 =30 M. 41.

(5742)—O. 46, r. 7—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, ss. 16, 32 (2), 12 C. W.N. 167.

(5743)—O. 46, r. 7—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, Art. 19, A.W.N. 1906, 29=3 A.L.J. 23=28 A. 293.

(5743-*a*)—O. 46, r. 7—*See* NOS. 2204, 2205, *supra*.

——O. XLVII, r. 1 (=1882, s. 623=1877, s. 623=1859, s. 376).

See REVIEW.

(5744)—*O. 47, r. 1—Review—Discovery of new evidence—Strict proof of allegation that it was not within applicant's knowledge.*—A decree once passed must not be lightly opened. There must be strong evidence showing that the plaintiff, when he brought the suit, had been diligent, had procured all the evidence that was forthcoming and had taken care to put it before the Court. Therefore, an application for review on the sole allegation that new evidence has been discovered, which was not within the applicant's knowledge, cannot be granted without strict proof of such allegation. LACHAN RAM v. DEBI PRASAD, **9 Ind. Cas. 266.**

(5745)—*O. 47, r. 1—Suit decreed—Review—Dismissal of suit—Judge changing opinion—'Sufficient cause.'*—Where a Court decreed the plaintiff's suit, and subsequently granted a review on the ground that its former decision was wrong and dismissed the suit. *Held*, that the Court did not exceed its jurisdiction

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

in granting a review for what it considered to be a 'sufficient cause.' LAKSHMANA NADAN v. PAKHIA NADATHI, **9 M.L.T. 361=9 Ind. Cas. 273.** (2 C. 131=3 I.A. 221, *R.*)

(5746)—*O. 47, r. 1—Decisions after judgment sought to be reviewed—New and important matter.*—Plaintiff instituted a suit for ejectment. Defendants pleaded that they were tenants of plaintiff. The Munsiff ordered them to get a declaration of their tenancy. The Assistant Collector declared them to be tenants and the Munsiff dismissed the suit. The Commissioner set aside the order of the Assistant Collector. The plaintiff then applied within 90 days of the confirmation of Commissioner's judgment for review of Munsiff's judgment. *Held* that the judgment of the Commissioner and the Board were new and important matters within the meaning of O. 47, r. 1, Civ. Pro. Code. RAM LAL v. KALKA PRASAD, **8 A.L.J. 584.**

(5746 *a*)—*O. 47, r. 1—Decree on alleged compromise—Allegation by one party that he did not consent—Application for review—Court's power to review and recall order.*—In the course of certain execution proceedings an order was obtained from the Court on the allegation that both parties had assented thereto Subsequently it was asserted by one of the parties that he never consented to the order in question: *Held* that it is open to the Court to review the order and recall it upon an application by the aggrieved party under r. 1 of O. 47 of the Civ. Pro. Code, and that it is not obligatory upon the party to bring a suit to set aside the consent-order. HAKIM GIR v. BASDEO SAHI, **10 Ind. Cas. 894.** (2 Ind. Cas. 129, 10 C.L.J. 420, 13 C.W.N. 1197, *R.*)

(5747)—O. 47, r. 1—Re-hearing—Civ. Pro. Code, s. 623, whether applicable—*See* U.P. ACT XII OF 1881, s. 185, 19 A. 532=A.W.N. 1897, 139.

(5747 *a*)—O. 47, r. 1—*See* NOS. 196, 296, 379, 1824, 1900, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2024-*a*, 2025, 2026, 2027, 2038, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2184, 2185, 2186, 2187, 2377, 2839, 2869, 2908 *b*, 2910 *a*, 3002, 3007, 3008, 3009, 3020, 3080, 3095, 3170, 3190, 3201, 4975, 5035, 5224, 5298, 5357, 5651, *supra.*

(5748)—*O. 47, r. 1, s. 114, O. 17, r. 2 (=ss. 623, 158, Civ. Pro. Code, 1882)—Remedy—Evidence not on record, new matter.*—The remedy for a person aggrieved by an order under s. 158, is by way of appeal. Where a plaintiff whose suit had been dismissed by reason of his having failed to summon witnesses applies for a review, his application may be granted on the ground that the evidence which he offered to produce, not being on the record was new and important. GHULAM JAN v. SHADI KHAN, **126 P.R. 1889.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

—— O. XLVII, r. 2 (=1882, s. 624=1877, s. 624).

See REVIEW.

(5749)—*O. 47, r. 2 (=s. 624, Civ. Pro. Code, 1882)—Application under — Agreement before another Judge.*—If once an application is made to the Judge who passed the order of which a review is sought and notice has issued to the other party, the application may be argued before and granted by his successor. HANSRAJ v. JHANDU MAL, **7 P.R. 1894.** (134 P.R. 1884, 13 M. 178, *D.*)

(5750)—*O. 47, r. 2 (=s. 624, Civ. Pro. Code, 1882)—Application made to the Bench—Bench broken up—Competency of successor—Judge to hear.*—Where an application is made under, and within the meaning of, this section to one of the Judges forming a bench which decided the case, his successor may take over his application for disposal. DURGADAS v. JHANDHA MAL, **6 P.R. 1887.** (134 P.R. 1884, 97 P.R. 1885, *R.*) [*R.*, 3 P.R. 1892, Rev.

(5751)—*O. 47, r. 2 (=Civ. Pro. Code, 1882, s. 624)—Dismissal of suit on plaintiff's application—Restoration on review—Right of appellate Court to interfere with order of restoration.*—Where on an application by the plaintiff a suit was dismissed, the order of dismissal amounted to a decree and a subsequent order of the Court restoring the suit on review could not be interfered with by the appellate Court, on the ground that the dismissal of the suit was an order and not a decree. NARSINGDASS v. PANDIT SHEORATAN LAL BRAHMIN, **16 C.P.L.R. 151.** (16 B. 23, 30 C. 660, *F.*)

(5752)—*O. 47, r. 2 (=s. 624, Civ. Pro. Code, 1882)—Review—Power of a succeeding Judge to review order of his predecessor.*—A Divisional Judge dismissed an appeal for default. His successor in office allowed a review of the order dismissing the appeal on the ground that it was passed in the absence of the appellant and without giving him notice of the hearing of the appeal. The question for decision was whether the successor had power to review his predecessor's order on the ground abovementioned. *Held*, that the order admitting the review was illegal. BAHADOO v. FATTEH KHAN, **82 P.R. 1906=107 P.L.R. 1907.** (23 C. 115, *Diss.*)

(5753)—O. 47, r. 2—*See* LIMITATION ACT, 1908, ss. 4, 5, 3 C.L.J. 545=10 C.W.N. 986 =33 C. 1323.

(5753-*a*)—O. 47, r. 2—*See* NOS. 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2042, 2839, 4975, *supra* and NO. 5793, *infra.*

(5754)—*O. 47, rr. 2, 4 (=Civ. Pro. Code, 1882, ss. 624, 626)—Order to issue notice of application for review—Making of application complete.*—Where a Judge after accepting an application for review, elects to issue a notice under s. 626 (*a*), the making of the application should be regarded as complete. GOVIND SWAMI v. NAGO RAO DEWAN, **10 C.P.L.R. 62.** (10 C. 80, 13 C. 231, *F.*; 4 A. 278, *Diss.*)

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(5755)—*O.* 47, *rr.* 2, 7, 9 (=*ss.* 624, 629, *Civ. Pro. Code*, 1882)—*Review by successor of Small Cause Court Judge of order passed by his predecessor.*—Ss. 624 and 629 are not applicable to Courts of Small Causes and the successor of a Judge of such Court is not prohibited from reviewing the order, passed by his predecessor, dismissing an application for review of the decree, dismissing the suit, passed by him. NATHA v. ALLAH DIN, **63 P.R. 1905=104 P.L.R. 1905.**

——**O. XLVII, r. 3 (=1882, s. 625=1877, s. 625).**

(5755-*a*)—O. 47, r. 3—*See* NOS. 20, 34, 35, 50, *supra*.

——**O. XLVII. r. 4 (=1882, s. 626=1877, s. 626=1859, s. 378).**

See REVIEW.

(5756)—*O.* 47, *r.* 4 (=*Civ. Pro. Code*, 1882, s. 626)—*Review—Jurisdiction.*—It is competent to a succeeding Judge to hear and determine any application to review a judgment of his predecessor, provided that such application having been presented to the Judge who passed the judgment, such Judge has ordered notice to issue to the opposite party. ALLAHDIYA v. MUHAMMAD ALI KHAN, **A.W.N. 1892, 103.**

(5757)—*O.* 47, *r.* 4 (=*s.* 626, *Civ. Pro. Code*, 1882)—*Review of judgment—Ground of discovery of new evidence.*—Where an application for review of judgment is made on the ground that evidence was available which could not be produced at the time of the trial, it is necessary that the allegation of the discovery of new evidence should be strictly proved. KYAW ZAN HLA v. SAN DUN, **L.B R. 1893—1900, 527.**

(5758)—*O.* 47, *r.* 4 (=*Civ. Pro. Code*, 1882, s. 626)—*Irregularity in form of order for review, whether affects validity of the order—Omission to record grounds for grant of review, effect of.*—Where a Court has intended an order passed by it to operate as an order for review, the mere fact, that such order was erroneously drawn up as if it had been made on an application to set aside the decree and restore the suit for trial, cannot invalidate such order so as to prevent it from operating as an order for review. The words in s. 626 requiring the Judge to record his reasons are directory and an order is not necessarily invalidated by the mere omission to record such reasons. MANIOKA MUDALIAR v. GURUSAMI MUDALIAR, **23 M. 496.**

(5758-*a*)—*O.* 47, *r.* 4 (=*Civ. Pro. Code*, 1859, s. 378)—"*Final*"—*Term explained.*—The provisions of s. 378, Civ. Pro. Code, 1859, declaring that the order of the Court, whether granting or rejecting a review of judgment, is final, brings the order into the position of an interlocutory order, within the meaning of s. 363, that is to say, that it is an order not of itself appealable, but which may be set forth as a ground of objection in the memorandum of appeal, if, in pursuance of the admission of a

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review of judgment, a decree be passed against the party against whom the review is granted. BHYRUB CHUNDER SURMAH CHOWDHRY v. MADHUBRAM SURMAH, **11 B.L.R. 423, F.B.=20 W.R. 84.** [*F.*, 25 W.R. 324, 25 W.R. 343; *Appl.*, 25 W.R. 304=2 C. 114; *R.*, 12 C.L.R. 64.]

(5759)=O. 47, r. 4—*See* APPEAL—ORDERS, 5 W.R. 89.

(5760)—O. 47, r. 4—*See* LIMITATION ACT, 1908, ss. 4 and 5, 3 C.L.J. 545=10 C.W.N. 986=33 C. 1323.

(5761)—O. 47, r. 4—*See* SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS, WHEN LIE AND WHEN NOT, Marsh 38=W.R. F.B. 11=1 Ind. Jur. O.S. 5=1 Hay 90.

(5762)—O. 47, r. 4—*See* SUIT, W.R. F.B. 11=Marsh 38=1 Ind. Jur. N.S. 5=1 Hay 90.

(5762-*a*)—O. 47, r. 4—*See* NOS. 2030, 2031, 2032 2033, 2035, 2036, 2037, 2038, 2039, 2043, 2186, 4321, 5357, 5754, *supra*.

(5763)—*O.* 47, *rr.* 4, 7, 9 (=*ss.* 626, 629, *Civ. Pro. Code*, 1882)—*Review of judgment, second application for—Review of order, application for, passed on review.*—Although second application to have original judgment reviewed upon new materials is permissible, an application to review an order passed on review is prohibited by s. 629, Civ. Pro. Code. MAUNG SAN WIN v. U NAW, **L.B.R. 1893—1900, 580.** (5 W.R. 91, 15 C. 432, *F.*)

(5764)—*O.* 47, *rr.* 4, 7, 9 (=*ss.* 626, 629, *Civ. Pro. Code*, 1882)—*Review—Rejection of revision—Jurisdiction.*—S.629, Civ. Pro. Code, 1882, must be read with s. 622. Where the Court does not consider whether or not there were sufficient grounds for review, but rejects the application on the erroneous view that it had no jurisdiction to entertain it, the order is open to revision. The fact that an opposite contention was urged by an applicant for review in a subsequent case does not preclude him from making an application for review of judgment. AKBAR KHAN v. MUHAMMAD ALI KHAN, **6 A.L.J. 884=31 A. 610=4 Ind. Cas. 23.** (26 A. 572, *D.*)

(5765)—O. 47, rr. 4, 7, 9—*See* APPEAL—ORDERS, 18 A. 44=A.W.N. 1895, 151, 12 B. 171.

——**O. XLVII, r. 6 (=1882, s. 628=1877, s. 628).**

See REVIEW.

(5766)—*O.* 47, *r.* 6 (=*s.* 628, *Civ. Pro. Code*, 1882)—*Review of judgment, Upper Burma Civil Justice Regulation, s.* 85.—A review can be allowed for sufficient reason. It is the duty of a party to take an objection at the earliest possible stage open to him, and if he fails to do so,

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he is not entitled to relief afterwards. MA KIN v. MA MEIN GALE, **U.B.R. 1892—1896, Vol. II, 284.** (1 B. 543, 23 W.R. 174, 15 W.R. 88, 14 W.R. 421, 12 W.R. 363, *R.*)

(5767)—O. 47, rr. 6, 7, 9—*See* APPEAL—ORDERS, 18 A. 44=A.W.N. 1895, 151.

——**O. XLVII, r. 7 (=1882, s. 629=1877, s. 629).**

See REVIEW.

(5768)—*O. 47, r. 7—Review, order, granting—Appeal, scope of—Civ. Pro. Code (Act XIV of 1882), s. 373.*—When an appeal has been preferred under O. XLVII, r. 7, Civ. Pro. Code, against an order granting an application for review of judgment, if it is established that the application is barred by limitation or was presented to a Judge who had no jurisdiction to deal with it, the Court of appeal is bound to reverse the order. The powers of the appellate Court in such an appeal are strictly limited to the grounds upon which alone an appeal is competent. When a plaint is amended by the omission of certain parties and prayer clauses, in response to an objection that the suit as framed is bad for misjoinder of parties and causes of action, leave under s. 373, Civ. Pro. Code, entitling the plaintiff to institute a fresh suit against the omitted parties need not be expressly reserved. A second suit brought without such leave is not open to objection under s. 373 of the Civ. Pro. Code. MANINDRA CHANDRA ROY CHOWDHURY v. BALARAM DAS, **11 C.L.J. 161=5 Ind. Cas. 725.**

(5769)—O. 47, r. 7—*See* APPEAL—ORDERS, 24 C. 878.

(5769-*a*)—O. 47, r. 7—*See* NOS. 1091, 1824, 1906, 1941, 1929, 2040, 2044, 2186, 2187, 2206, 2207, 3009, 4321, 5653, 5703-*a*, 5704, 5705, 5755, 5763, 5764, 5765, 5767 *supra and* No. 5793, *infra.*

(5770)—*O. 47, rr. 7, 9, (=Civ. Pro. Code, 1882, s. 629)—"Sufficient cause"—Review of order of dismissal for default—Advocate engaged in a case elsewhere.*—Under s. 629, Civ. Pro. Code, before the application can be readmitted, it must be proved that the applicant was prevented by some sufficient cause from attending when the application was called on for hearing. Where an advocate who was engaged in several cases on the same day before different Judges, expected that one of his cases would not be called before a certain hour and it was, however, called earlier, when he was engaged elsewhere, and was dismissed for default under s. 556 of the Code of Civil Procedure, 1882, *held*, on an application for review of the order of dismissal, that the Advocate had not been "prevented by sufficient cause from appearing." MA NGE v. MA MA, **2 L.B.R. 279.** (2 B.H.C. 267, 3 B.H.C. 60, 24 W.R. 141, *Cited.*)

(5771)—*O. 47, rr. 7, 9 (=s. 629, Civ. Pro. Code, 1882)—Review order—Objection in appeal—Grounds.*—Where an admission of a review petition is not challenged on any of the grounds specified in this section, it cannot be challenged in appeal at all. DHARM SINGH v. DAVA SINGH, **62 P.R. 1895.** (22 C. 3, 12 B. 171, *F.*, *R.*, 33 P.R. 1902=24 P.L.R. 1902.]

(5772)—*O. 47, rr. 7, 9 (=s. 629, Civ. Pro. Code, 1882)—Review of review—"Order" meaning of.*—A review of review could not be granted. The word "order" is not merely used in a technical sense as opposed to a decree; but means the final adjudication of the Court after the admission of application and re-hearing of the case and includes both the judgment and the decree. BANARSI DAS v. SAYAD SULTAN MIRZA, **57 P.R. 1892.** [*R.*, 65 P.L.R. 1906.]

(5773)—*O. 47, rr. 7, 9—Order granting review of judgment, no second appeal from—Civ. Pro. Code, 1882, s. 629.*—No second appeal lies against an order, under s. 629 of the Civ. Pro. Code, granting a review of judgment. THAN SINGH v. CHUNDUN SINGH, **11 C. 296.**

(5774)—*O. 47, rr. 7, 9 (=Civ. Pro. Code, 1882, s. 629)—Appeal against order under s. 629 in a Small Cause.*—*Held*, that an appeal lies from an order passed by a District Judge under s. 629 of the Civ. Pro. Code, in a Small Cause, though an appeal from the final decree would be barred, and that such appeal lies to the Chief Court. ASA v. GOPAL DAS. **24 P.L.R. 1902=33 P.R. 1902.** (23 C. 734, 8 B. 260, *F.*)

(5775)—*O. 47, rr. 7, 9 (=Civ. Pro. Code, 1882, s. 629, cl. (c)—Review out of time—No sufficient cause—Appeal—Court's power to travel beyond the petition.*—The admission of a review presented out of time without any sufficient cause is a good ground of appeal under s. 629, cl. (c). In granting a review the Court should not travel beyond the grounds mentioned in the application for review. PURNA CHANDRA SARKAR v. NIL MADHUB NANDI, **5 C.W.N. 485.**

(5776)—*O. 47, rr. 7, 9 (=Civ. Pro. Code, 1882, s. 629=Civ. Pro. Code, 1859, s. 378)—Meaning of "final."*—The word "final" in s. 629 bears the same meaning and ought to have the same construction put upon it, as the word "final" in s. 378 of the old Code. GOBINDA RAM MANDAL v. BHOLANATH BHATTA, **15 C. 432.** (B.L.R. Sup. Vol. 367, *R.*)

(5777)—O. 47, rr. 7, 9—*See* APPEAL—ORDERS, 1 C.W.N. 338, 22 C. 3.

(5778)—*O. 47, rr. 7, 9, ss. 100, 115 (=Civ. Pro. Code, 1882, ss. 629, 584, 622)—Second appeal—Order on appeal affirming order granting application for review of judgment—Revision.*—Under s. 584 there is no second appeal to the High Court from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment. [*R.*, 33 P.R. 1902=24 P.L.R. 1902.] Nor does revision lie in such a case, as there is a remedy by way

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of appeal from the final decree at the re-hearing. GOPAL DAS v. ALAF KHAN, **11 A. 383=A.W.N. 1889, 151.** [*F.*, 15 A. 405=13 A.W.N. 172; *Cons.*, 19 A. 163; *R.*, 12 O.C. 109.]

(5779)—O. 47, rr. 7. 9, s. 117—*See* LETTERS PATENT, HIGH COURT, 1865, MADRAS, cl. 15, 9 M. 253.

——O. XLVII, r. 8 (=1882, s. 630=1877, s. 630=1859, s. 380).

See REVIEW.

(5780)—*O.* 47, *r.* 8—*Review of judgment—Discovery of new and important evidence—Procedure—Re-hearing of suit—Account books, entries in, proof of—Evidence, opportunity to adduce—Revision of order rejecting review.*—Where a person satisfies the Court that he was unable with due diligency to produce some new and important evidence not within his knowledge at the time the decree was made, the Court ought to record an order admitting the review and then to give direction under r. 8 of O. 47 of the Code of 1908 for the rehearing of the suit. The Civ. Pro. Code (Act V of 1908) does not contemplate that the Court, on being satisfied of the existence of good grounds for review, should, instead of making an order admitting the rewiew, admit the new evidence sought to be adduced, and then hear the case, not on the merits but as to admissibility of review on the basis of that evidence taken with the other evidence in the case, and finally reject the review on the ground that, taken along with the other evidence, it did not assist the applicant. The High Court made the order which the Court below should have made, and directed that, when the case was re-heard, the applicant would have opportunity to prove specific entries in the account-book and also to give relevant evidence with regard to such entries, and the other side would also have an opportunity to rebut such evidence. PURANDER KUMAR v. RAM NARAIN SING, **14 C.L.J. 103.** (13 C.L.J., 139, *R.*)

(5780-*a*)—O. 47, r. 8—*See* NO. 2033, *supra.*

——O. XLVII, r. 9 (=1882, s. 629, last para =1877, s. 629.)

(5781)—O. 47, r. 9—Review of order on review—Second review—Whether allowed—*See* RES-JUDICATA—GENERAL, 25 P.W.R. 1911.

(5781-*a*)—O. 47, r. 9—*See* NOS. 1091, 1824, 1906, 1921, 1929, 2040, 2044, 2186, 2187, 2206, 2207, 3009, 4321, 5653, 5755, 5763, 5764, 5765, 5767, 5770, 5771, 5772, 5773, 5774, 5775, 5776, 5777, 5778, 5779, *supra*, and NO. 5793, *infra.*

——O. XLVIII, r. 1 (=1882, s. 93=1877, s. 93).

(5781-*b*)—O. 48, r. 1—*See* NO. 2827-*a*, *supra.*

——O. XLVIII, r. 3 (=1882, s. 644=1877, s. 644.)

(5781-*c*)—O. 48, r. 3—*See* NOS. 4378, 4840, *supra.*

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Schedule II.

See APPEAL—ARBITRATION.

See ARBITRATION.

See AWARD.

(5782)—Sch. 2—Not applicable to Karachi—*See* ACT IX OF 1899, ss. 4 (*b*), 19, 4 S.L.R. 149.

(5782-*a*)—Sch. 2—*See* NO. 1781, *supra.*

——Sch. II, r. 1 (=1882, s. 506=1877, s. 506 =1859, ss. 312, 313).

(5783)—*Sch. 2, r. —Award—Reference by parties interested — Defendant who did not appear not joining—Whether reference valid.*—A suit was brought against several persons, one of whom was a minor. An official of the Court was appointed guardian *ad litem* for the minor defendant, but he did not put in an appearance. The parties, with the exception of the said minor, applied to the Court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators, whereby the minor was exempted from the plaintiff's claim. Objections being taken to the award, *held* that the minor, not having put in an appearance, nor contested the suit, was not a person interested in the matters which were referred to arbitration, within the meaning of s. 1, sch. II of the Code, and his not joining in the reference did not invalidate it. ISHAR DAS v. KESHAB DEO, **7 A L.J. 807 =7 Ind. Cas. 68=32 A. 687.** (24 A. 229, *appl.*)

(5784)—*Sch. 2, r. 1 — Award — Reference by parties interested—Defendant who did not appear, not joining in the reference—Validity of reference.*—The question whether a party is interested or not in a reference to arbitration depends upon his position at the time when the reference was made. The Code does not contemplate a reference to arbitration between the plaintiff and one defendant, and a trial between the plaintiff and another defendant. A suit was brought against two persons. The plaintiff and one of the defendants referred the matters in dispute to arbitration. The award was given by two of the arbitrators, whereby the non-joining defendant was exempted from the plaintiff's claim, and the suit was dismissed. Objections were taken to the award but they were overruled and a decree was passed in accordance with the award. *Held*, that the reference was invalid and the award which followed thereon was not a valid award. HASWA v. MAHBUB, **8 A.L.J. 645.** (32 A. 657, *D.*)

(5785)—*Sch. 2, r. 1 (=s. 506, Civ. Pro. Code, 1882)—No application in writing—Ratification by conduct—Reference.*—Parties to a suit agreed to refer their case to arbitration, and in the presence of the *Mukhtar* of the plaintiff and a Revenue Agent on behalf of the defendant, the order referring the case to arbitration was passed

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by the Court. There was, however, no application in writing signed by the parties consenting to arbitration. Subsequently, the parties appeared in person before the arbitrator and even evidence was taken in their presence. On an objection that there was no valid reference to arbitration according to law. *Held*, that the parties to the suit could ratify the reference to arbitration, although the requirements of s. 506 of the Civ. Pro. Code, 1882, had not been strictly followed by the Court in the first instance. GOKARAN NATH v. GUR PRASAD, **9 Ind Cas. 412.** (30 A. 32, A.W.N. 1907, 273, 4 A.L.J. 691, 27 C. 61, 23 B. 629, 8 O.C. 263, *R.*)

(5786)—*Sch. 2, r. 1 (=Civ. Pro. Code, 1882, s. 506)—Agreements to refer to arbitration—Absence of application for order of reference—Power of Court.*—The Court cannot make a private arrangement between the parties the basis of a reference to arbitration, in the absence of a written application as required by s. 506 of the Civ. Pro. Code, such an order of reference is *ultra vires*, and the arbitration award thereon cannot furnish a basis for a decree in the case. In the present casse, the scope of the suit was limited to one plot of land, but during the pendency of the case in appeal before the lower appellate Court, the parties, by a private arrangement, agreed to refer all disputes between them to arbitration. The matters to which the submission related went far beyond the scope of the suit, and although the agreement was produced before the Judge, no application such as is contemplated by s. 506, Civ. Pro. Code, was made to him ; and there was nothing to show that the parties ever intended that the Court should refer the particular dispute as to the field to arbitration under Ch. XXXVII of the Code. The Judge, however, made an order of reference to the arbitrators, and passed a decree in accordance with their award. *Held*, that the order was *ultra vires* of the Judge, and the case was remanded for trial on the merits. BHAIRO SINGH v. RUPA SINGH, **A.W.N. 1884, 312.**

(5787)—*Sch. 2, r. 1 (=s.506, Civ. Pro. Code, 1882)—Reference to arbitration—Court's power to make the reference.*—The Court has no power of its own motion to order a reference to arbitration and it can only do so under Ch. XXXVII of the Code of Civil Procedure. The power to make the order of reference is given by s. 508, Civ. Pro. Code, and s. 506 of the Code contains the provisions as to how the order is to be applied for. It appears, from s. 506 of the Code of Civil Procedure, that (1) all the parties to the suit must desire a reference, (2) they must all apply to the Court for an order of reference, (3) they must apply either in person or by their respective pleaders specially authorized in writting, and (4) the application must be in writting and state the particular matter sought to be referred. The absence of a written application to seek reference does not make the order of reference invalid. HAJI WIDINA v. LUXMIBAI, **1 Bom. L.R. 617=23 B. 629.**

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(5788)—*Sch. 2, r. 1 (=s. 506, Civ. Pro. Code, 1882)—Reference to arbitration—Order of reference not on application of all parties.*—S. 506 of the Code gives power to make an order of reference to arbitration, if *all* parties to the suit desire that the matter should be so referred. So, where a defendant, who had appeared and filed a written statement, did not join in the application for the order of reference, an award made on a reference by Court is illegal. (26 M. 47, 9 C.W.N. 873, *F.*; 24 A. 229, *R.*) *Quere* :—Whether it is necessary for parties, who had not appealed, and who apparently had no interest in the suit, to join in applying, for an order of reference. RANGASWAMI AIYA v. SWAMI AIYA, **17 M.L.J. 394.**

(5789)—*Sch. 2, r. 1 (=s. 506, Civ. Pro. Code, 1882)—Reference by pleader not expressly authorised—Knowledge of party of the reference—Acquiescence effect of.*—A pleader should not apply for an order for referring a case to arbitration, unless he is expressly authorised to do so. A *vakalatnama* in general terms is wholly insufficient. But, where a party, on whose behalf the application is signed, knows about it and acquiesces in it, he cannot raise the objection of want of authority in the pleader afterwards. RAM JIWAN RAM v. KALI CHARAN SINGH, **4 A.L.J. 342=A.W.N. 1907, 139=29 A. 429.**

(5790)—*Sch. 2, r. 1 (=s. 506, Civ Pro. Code, 1882)—Validity of the award when one of the parties not joining submission.*—In a suit to enforce a mortgage, a joint written statement was filed on behalf of the mortgagor, his sons and grandsons. The suit was referred to arbitration, but the submission was not signed by one of the defendants. Their pleader, however, signed it on behalf of all the defendants. An award was made. Objections preferred to it by the defendant who had not signed it, were overruled, and a decree was passed in accordance with the award against all the defendants. *Held*, there was no reference to arbitration on behalf of the defendant who had not signed the submission, and there being no award in law, it could not bind any of the defendants. KADHU SINGH v. DARYAO SINGH, **4 A.L.J. 347=A.W.N. 1907, 147=29 A. 423.** (24 A. 229, *D.*)

(5791)—*Sch. 2, r. 1 (=s. 506, Civ. Pro. Code, 1882)—Person not a party to reference to arbitration—Effect of arbitration award—Conduct of the party.*—Mere silence on the part of a person, not a party to an order of reference to arbitration, and his omission to inform the arbitrators, that he was not a party to the reference, cannot make the award of the arbitrators binding on him, even though he might have produced some documents, through a servant

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before the arbitrators, in obedience to a summons issued by them, and declined to produce others. BENI MADHUB MITTER v. PREONATH MANDAL, **28 C. 303=5 C.W.N. 268.** (24 C. 469, 9 M. 451, 5 W.R. 130 *R.*)

(5792)—*Sch. 2, r. 1 (=s. 506, Civ. Pro. Code, 1882)—Reference to arbitration, not concurred in by all the parties—Validity—Award, ground for setting aside.*—When a reference to arbitration is made in the course of a suit, and an award made upon it, the award cannot be set aside on the ground that all the parties to the suit did not concur in the reference. LAL MOHAN PAL v. SURYA KUMAR DAS, **11 C.W.N. 1152.** (33 C. 899, *F.*)

(5792-*a*)—Sch. 2, r. 1—*See* NOS. 1600, 1600-*a*, 1600-*b*, 4725, 4812, 4813, 4837, 4974, 4977, 5007, *supra.*

(5793)—*Sch. 2, r. 1, O. 5, r. 17, O. 32, r. 7, O. 47, rr. 2, 7 and 9 (=ss. 506, 80, 462, 624, 629, Civ. Pro. Code, 1882)—Notice, service of, if proper—Service on the outer-door of the office—Review, order on, if can be questioned in appeal from final decree—Guardian of minor applying to refer to arbitration—Leave or consent of Court, if necessary.*—Affixing a notice to the outer-door of the office in which the person to whom the notice was addressed works as an employee is not a good service under s. 80 of the Code of Civil Procedure. Under s. 629 of the Code of Civil Procedure, it is open to the appellant on the appeal from the final decree, to take objection to the order passed on the application for review. A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review on the ground that no leave or consent of the Court under s. 462 of the Code of Civil Procedure had been given to guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration. *Semble.*—Such leave or consent of the Court to the application by all the parties to refer the matter to arbitration is not necessary under s. 462 of the Code of Civil Procedure. ANNADA KRISHNA DEY v. JOGENDRA NATH DEY, **8 C.L.J. 294.** (28 A. 35, *Appr.*; 24 M. 326, *Not F.*)

(5794)—*Sch. 2, rr. 1 to 16 (=ss. 506 to 522, Civ. Pro. Code, 1882)—Scope of.*—Ss. 506 to 522, Civ. Pro. Code, deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference. SHEO DAT v. SHEO SHANKAR SINGH, **27 A. 53=1 A.L.J. 398.** [*R.*, 8 Bom. L.R. 777.]

(5795)—*Sch. 2, rr. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21 (=ss. 506 to 526, Civ. Pro. Code, 1882)—S. 13, Arbitration Act (IX of 1899)—Discretionary power of Court to remit award for re-consideration.*—Reading the Civ. Pro. Code, 1882, and the Arbitration Act together, it appears that

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ss. 506 to 522 of the Code apply to arbitrations in a suit, and ss. 523 to 526, now superseded by the Arbitration Act, to arbitrations initiated by the parties. Therefore, the Court, in the exercise of its discretion, has power o remit a private award for the re-consideration of the arbitrators under s. 13 of the Arbitration Act. PROTAP CHUNDER DEY v. TOOLSEY DASS DEY, **29 C. 793.**

(5796)—*Sch. 2, rr. 1, 3, 17—Arbitration—Agreement — Application for presentation to Court written by all parties interested—Presentation by one party, effect of—Reference.*—The parties to a pending suit agreed between themselves out of Court to nominate certain arbitrators to decide their dispute and, in pursuance of their agreement, had a petition written for presentation to the Court. But the defendant refusing to join in the presentation of petition, the plaintiff alone presented it in Court: *Held*, that, as both parties did not make the application to Court, the provisions of art. 1 of the second schedule were not satisfied, and no order of reference to arbitration could be made under art. 3. *Quaere.*—Whether an application for presentation to Court, as in this case, is an agreement in writing within the meaning of art. 17. MIRAN BAKSH v. SHER MUHAMMAD, **9 Ind. Cas. 135=17 P.R. 1911=50 P.L.R. 1911.** (25 P.R. 1902, 12 M.L.J. 77, 29 C. 167, 29 I. A. 51, 26 M. 47, 9 C.W.N. 873, *F.*; 11 C.W.N. 1152, *D.*; 84 P.R. 1901, 112 P.L.R. 1901, 20 B. 304, 4 A. 546, *R.*)

(5797)—*Sch. 2, rr. 1, 5 (=ss. 506 and 510, Civ. Pro. Code, 1882)—Arbitration.*—*Held* that when parties apply orally to the Judge to refer the suit to arbitration, and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him, having regard to the provisions of s. 510 of the Civ. Pro. Code, to supersede that reference, the arbitrator not having declined to act. *Held* further, that the second paragraph of s. 506 is directory only. ABDUL HAMID v. RIYAZ-UD-DIN, **4 A.L.J. 691=A.W.N. 1907, 273=30 A. 32.** (6 M.I.A. 134, *D.*; 27 C. 61, 2 B. 699, *R.*)

(5798)—*Sch. 2, rr. 1, 15, 16 (=Civ. Pro. Code, 1882, ss. 506, 521, 522) — Award—If appeal lies on ground of misconduct—Validity of award made but not submitted within time.*—There is no appeal from a decree passed in accordance with the award on the ground of misconduct of the arbitrator. [*R.*, 10 C.W.N. 601=2 C.L.J. 153. [An award is valid in law if it is made within the time allowed, though it may not be submitted to the Court within that time. DEBENDRANATH CHATTERJEE v. SARBAMANGOLA DEBI, **8 C.W.N. 916.**

(5799)—*Sch. 2, rr. 1, 16 (=ss. 506, 522, Civ. Pro. Code, 1882)—Interest of Hindu mother on partition—Arbitrator or valuator—Decree on award of valuators.*—While a case is pending, if the Court, with the concurrence of the parties, entrusts a person with the duty of settling

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the price of a Hindu mother's share on partition, such person is in effect rather a valuator than an arbitrator. The order of reference entrusting him with such a duty cannot accordingly be regarded as one under s. 506. (*In re Carus-Wilson* v. *Greene*, 18 Q.B.D. 7, 1886, *R.*) [*F.*, 30 C. 831.] No judgment on the award of valuators can be made under s. 522, CHOONY MONEY DASSEE v. RAM KINKUR DUTT, **28 C. 155=5 C W.N. 242.**

(5800)—*Sch. 2, rr. 1, 16 (=ss. 506 and 522, Civ. Pro. Code, 1882)—Award on a reference not agreed to by all the parties to the suit—Validity of—Court's decree on such award—Right of appeal from.*—An award on a reference under s. 506 of the Code not agreed to by all the parties to the suit, is invalid in law. Both an appeal and a second appeal lie from a decree passed upon such an award. PARSIDH NARAIN SINGH v. GHANSHYAM NARAIN SINGH, **9 C. W.N. 873.** [*R.*, 17 M.L.J. 394, *Diss.*; 33 C. 899.]

(5801)—*Sch. 2, rr. 1, 16, 17 (=ss. 506, 522 and 523, Civ. Pro. Code, 1882)—Arbitration without intervention of Court, reference to, after institution of suit—Specific Relief Act, s. 21—Award, decree in accordance with—Revocation of reference to arbitration.*—In a suit by a co-sharer against the lambardar for his share of the profits, the matter in dispute was referred by the parties to private arbitration after the institution of the suit. *Held*, that the suit was not barred by s. 21, Specific Relief Act, as the agreement to refer to arbitration was not in existence at the time when the suit was instituted. The contract to which the section refers is one in existence at the time when the suit is instituted. *Held*, further, that when parties to a suit have made a reference to arbitration without the intervention of the Court, they cannot revoke the reference, and, if a valid award has been made, a decree can and should be made in accordance with the award. RAZA ALI v. FIDA ALI, **4 O.C. 17.**

(5801 *a*)—*Sch. 2, rr, 1, 18, O. 23, rr. 3 (=Civ. Pro. Code, 1882, ss. 506 (1), 523, 375)—Partition suit—Submission to arbitration by plaintiff and 1 defendant—Another defendant's signature obtained later—Effect—Agreement to refer not an adjustment of suit.*—A sued his brothers B. and C for partition, and D and E, the minor sons of B and M, mother of plaintiff, were also defendants. On the 6th April, 1908, during the pendency of the suit, A and B executed a muchilika whereby they agreed out of Court to refer their dispute to five arbitrators. C signed the muchilika later. On the next day A withdrew from the submission. A petition was subsequently put in on behalf of B, C, D and E, under ss. 375, and 523 of the Code of 1882, praying that the matter may be referred to arbitrators as originally agreed. A opposed this petition on the grounds that (i) C did not sign the reference along with A and B; (ii) the other defendants were not parties to the reference; and (iii) s. 523, Civ. Pro. Code did not apply to pending suits. The lower Court found that the agreement to refer was true and that permission was subsequently obtained on behalf of the minor defendants D and E to settle the dispute by arbitration, and it therefore ordered the matter to be refered to arbitrators on the ground that the reference was a bar to the further hearing of the suit. *Held* that this order was appealable, and that, as plaintiff was not a party to the order, it was not one passed under s. 506 (1) of the Code. *Held* also that an agreement to refer cannot be treated as an adjustment under O. XXIII, r. 3 of the Code of 1908. T. VENKATACHELLAM REDDI v. T. RUNGIAH REDDI, **10 M.L.T. 248.** (29 C. 167, 29 M. 303, 30 C. 218, *F.*; 21 M.L.J. 263, 26 B. 76, 24 C. 908, 24 M. 326, 33 B. 69, *R.*)

(5802)—*Sch. 2, rr. 1, 20 (=ss. 506, 525, Civ. Pro. Code, 1882)—Arbitration—Arbitrator and valuer—Lease, construction of—Lessor's offer to renew lease without stating terms.*—S. 525, Civ. Pro. Code, 1882, and the following sections of Ch. XXVII of the Code, have to be read with, and by the light of the preceding sections in the same chapter. There must be some matter or matters in difference between the parties for the operation of s. 525, Civ. Pro. Code, 1882. Private reference and reference through the intervention of Court are governed by the same reason and principle. There being nothing to refer to arbitration, the valuation made by those appointed by the plaintiff in this case does not amount to an award and cannot be filed in Court. (28 C. 155, *F.*) Distinction between "a valuer" and an "arbitrator" indicated (*Leeds* v. *Burrows*, 12 East 1; *In re Carus-Wilson and Greene*, 18 Q.B.D. 7, *R.*) (28 C. 155, *R.*) Upon the construction of the lease in question, *held*, that inasmuch as a new lease cannot be given unless the parties are agreed as to the terms and conditions thereof, the mere offer on the part of the lessor to grant a new lease, and this, without any terms being mentioned, cannot operate as the giving of such lease within the meaning of the document. MACNAUGHTEN v. RAMESHWAR SINGH, **30 C. 831.**

——**Sch. II, r. 2 (=1882, s. 507, para 1=1877 s. 507, para. 1=1859 s. 314).**

(5802-*a*)—Sch. II, r. 2—*See* NOS. 5794, 5795, *supra*.

(5803)—*Sch. 2, rr. 2, 5 (=ss. 507, 510, Civ. Pro. Code, 1882)—Illegal award—Arbitrators, appointment of, without consent—Refusal to act—Appointment of new arbitrator by Court—Acquiescence.*—S. 510, Civ. Pro. Code, 1882, applies to cases, in which an arbitrator has not merely been nominated, but has also consented to act in the arbitration, and subsequently dies or refuses to act or becomes incapable of acting. This section pre-supposes the existence of a valied reference. In order to perfect the appointment of an arbitrator, acceptance of the

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office is necessary. *Held*, therefore (*Banerji, J., dubitante*), that, where a suit was referred to two arbitrators, and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the Court had no jurisdiction to appoint an umpire in his place, if the parties did not consent to such appointment and that the reference to arbitration was invalid. *Held*, further, that subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference, if it was made by the Court without jurisdiction. FAYAZUDDIN v. AMINUDDIN, **6 A.L.J. 251=1 Ind. Cas. 354.**

——Sch. II, r. 3 (=1882, s. 508=1877, s. 508=1859, s. 315.)

(5803-*a*)—Sch. 2, r. 3—*See* NOS. 5794, 5795, 5796, *supra.*

(5804)—*Sch. 2, rr. 3, 8, 10, 15 (=ss. 508, 514, 516, 521, Civ. Pro. Code, 1882)—'Making' of the award what is—Award completed and singed by the arbitrators before the time fixed—Filing thereof after period fixed—Validity of award—Meaning of 'made' in s. 521.*—An award completed and signed within the period fixed by s. 508 of the Code is perfectly good and valid, notwithstanding the fact that it reaches the Court after the period so fixed. The word 'made' in s. 521 does not mean 'making' and 'delivery,' because these two words indicate two different stages. 'Made' means that the mind of the arbitrators has been declared; such declaration requires authentication by signatures. The validity of an award depends upon the 'making' the completion and signing thereof, by the arbitrators, and not the filing thereof in Court. ASAD-ULLAH v. MUHAMMAD NUR, **A.W.N. 1905, 47=27 A. 459=2 A.L.J. 201.** (22 M. 22, 13 B. 119, *F.*, 13 A. 300, *R.*; 8 A. 543, *Diss.*)

(5805)—*Sch. 2, rr. 3, 10 (=ss. 508, 516, Civ. Pro. Code, 1882)—Arbitrators, jurisdiction of Court over.*—After an order has been made referring the subject-matter of a suit to arbitration, the Court, by s. 508 of the Procedure Code, is precluded from itself dealing with the matter which has been so referred, except in the contingencies and in the modes provided by the Code. But the suit, nevertheless, continues to be a pending suit; it may, in certain events, have to be heard by the Court itself; and, while the arbitration proceeds, the Court may have to make orders of various kinds in furtherance of the proceedings. The arbitrator cannot be compelled, by the Court, to undertake the reference or to proceed with or to make an award. But if, and so far as, he acts as arbitrator, he takes upon himself not only a duty towards the parties but also a duty to the Court. S. 516 expressly requires arbitrators, who have made an award, to file it together with any depositions and documents, which have been taken and proved before them. The Court has jurisdiction to order the arbitrators

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to give up documents filed before them as exhibits during the course of the arbitration, and to return the original records of the suit entrusted directly by the Court to them, the jurisdiction being exercised by an application made in the suit on notice to the arbitrators. NURSING CHUNDER DAWN v. NUFFUR CHUNDER DUTT, **17 C. 832.**

(5806)—*Sch. 2, rr. 3, 15 (=ss. 508 and 521, Civ. Pro. Code, 1882)—Arbitration—Award made within the period fixed not filed before the expiry of period—Validity*—An award written and signed before the date fixed by the Court under s. 508 of the Code for delivery, but not filed in the Court before the expiry of that period, is valid within the meaning of s. 521 of the Code. The expression "delivery" in s. 508 of the Code means "making" and does not mean "filing in Court." BHAGAT RAM v. GANDA SINGH, **89 P.R. 1907.** (13 B. 119, 22 M. 22, 26 A. 105, *F.*; 8 A. 548, 13 A. 300, P.C. *D.*)

——Sch. II, r. 4 (=1882, s. 509=1877, s. 509=1859, s. 316.)

(5806-*a*)—Sch. 2, r. 4—*See* NOS. 5794, 5795, *supra.*

(5807)—*Sch. 2, rr. 4, 5 (=Civ. Pro. Code, 1882, ss. 509, 510)—Arbitration—Omission to provide for difference of opinion—Refusal of one of the arbitrators to act.*—When two only of the arbitrators made the award, while the reference was to three arbitrators, with no provision for any difference of opinions as required by s. 509 of the Civ. Pro. Code, such an award is illegal and void, and the decree based thereon is also bad in law. It is one of the essential principles of the law of arbitration that the arbitrator should discharge his duties freely, of his own consent, and without any compulsion by the Court, and the prinoiple is recognized by the Civ. Pro. Code in s. 510. Therefore, where a District Judge returned the case to the arbitrators, notwithstanding their refusal to act, *held* that it clearly contravened this rule of law, and the award which was given in consequence of the order was illegal. DHUKHU v. BHINAK, **A.W.N. 1884, 209.**

——Sch. II, r. 5 (=1882, cf. ss. 507, 510 and 511=1877, cf. ss. 507, 510 and 511=1859, ss. 314, 319.)

(5807-*a*)—*Sch. 2, r. 5 (=Civ. Pro. Code, 1882, s. 510)—Appointment of arbitrator by Court.*—*Held*, that the power of the Court to appoint an arbitrator under s. 510, Civ. Pro. Code, only comes into existence when the terms of the section are complied with, *viz.*, when the person appointed becomes an arbitrator by previously consenting to take up the office of by accepting the appointment and subsequently declines to act. RADHA KISHEN v. DAULAT RAM, **38 P.L.R. 1901.**

(5808)—Sch. 2, r. 5—*See* NOS. 2846, 4725, 5794, 5795, 5797, 5803, 5807, *supra.*

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(5808-*a*)—*Sch.* 2, *r.* 5, *O.* 23, *r.* 3 (=*ss.* 510, 375, *Civ Pro Code*, 1882)—*Arbitration—Arbitrator's refusal to accept nomination—Refusal of the party whose arbitrator declined to act to suggest another—Power of Court to appoint new arbitrator—Decree under s. 375, Civ. Pro. Code, referring a matter to arbitration—Pending suit—Power of Court when parties agree to submit their case to arbitration.*—The Court has power, under s. 510, Civ. Pro. Code, 1882, to appoint a new arbitrator in the place of another, when that other refuses to accept nomination, as refusal to accept nomination clearly signifies refusal to act. Parties to an administration suit entered into an agreement or compromise, which went beyond the actual matter of the suit between them, and the Court, under s. 375, Civ. Pro. Code, 1882, made a decree in terms of the compromise, which provided that all points between the parties therein stated should be settled by arbitration of two arbitrators therein named. One of the arbitrators nominated by the respondents refused to accept his nomination. The Court, then, on the application of the respondents, who refused to appoint another arbitrator on their behalf, took the matter into its own hands under the latter part of s. 510 of the Code and adjudicated thereon. *Held*, that the decree under s. 375 of the Code was a final decree ordering the agreement and compromise of the parties to be carried into effect, and the Court had discharged itself of the *lis* between the parties; that there was, therefore, no suit pending, with which the Court could proceed under s. 510 of the Code; that the agreement entered upon was something different from and went much beyond the suit, and all that the Court could do was to take advantage of the sections of the Code which enabled it to keep the machinery of arbitration going; that the Court had power to appoint another arbitrator and was in no way precluded from making that appointment by the fact that the party, whose arbitrator had declined to accept nomination, refused to assist the Court by suggesting another name; and that parties who agreed to set up a tribunal of arbitration were not bound to submit the case referred to to another tribunal. MIRYA SADIK HUSAIN v. MUSAMMAT KANIZ ZOHRA BEGAM, 2 **M.W.N. 1911**, 132 = **10 M.L.T. 173, P.C.**

(5808-*b*)—*Sch.* 2, *rr.* 5, 6, 17, 19 (=*Civ. Pro. Code*, 1859, *ss* 319, 326)—*Arbitration—Agreement to refer to—Refusal of arbitrator to act*—Where the parties had executed instrument agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other had consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court. BROOKE v. BURDYAL, 12 **B.L.R. App. 13.**

(5809)—*Sch.* 2, *rr.* 5 *and* 8 (=*Civ. Pro. Code*, 1882, *ss.* 510, 514)—*Order superseding arbitration—Partiality of arbitrator—Order illegal.*—Where a suit has been referred to arbitration, the Court has no jurisdiction to make an order superseding the arbitration on the ground of the alleged partiality of the arbitrator, as it is not one of the grounds specified in s. 510 or s. 514, Civ. Pro. Code. KOTHANDARAMA AIYER v. SIVAGNANA DESIKAR, **11 M.L.J. 128.**

(5810)—*Sch.* 2, *rr.* 5, 8 (=*ss.* 510, 514, *Civ. Pro. Code*, 1882)—*Arbitrators appointed by Court—Consent of parties to refer matters in dispute to another person—Effect—Award not filed within time fixed.*—In a suit for the dissolution of partnership, the parties agreed to refer the matters in dispute to arbitration, and the Court accordingly appointed two arbitrators. But the parties subsequently agreed that the matters in dispute should be settled by a third person who was to submit his opinion to the arbitrators so that the latter might submit to the Court an award in accordance with that opinion. The third person sent his opinion to the arbitrators some days before the time fixed by the Court for the submission of the award, but the arbitrators failed to submit to the Court their award in time. *Held*, that the agreement of the parties to refer the matters in dispute to a third party could not possibly have the effect of superseding the appointment of arbitrators by the Court; and therefore that the Court could not proceed to hear the suit without itself making, under either s. 510 or s. 514, Civ. Pro. Code, an order superseding the reference to arbitration. JAMNA KUNWAR v. NASIB ALI, **24 A. 312 = A.W.N. 1902, 72.**

(5811)—*Sch.* 2, *rr.* 5, 14, 15 16, 17 (=*ss.* 510, 520, 521, 522, 523, *Civ. Pro. Code*, 1882)—*Agreement to refer to arbitration—Consent of arbitrators not taken—Refusal of some arbitrators to act—Appointment by Court of new arbitrators—Award passed by old and new arbitrators—Decree in accordance with award—Invalid award—Appeal.*—An agreement to refer matters in dispute to five arbitrators was filed under s. 523, of the Code of 1882. Two arbitrators, who had never consented to act, refused to act and subsequently died. The Court appointed new arbitrators in their stead. The three of the old and the two new arbitrators made an award, and the Court passed a decree in accordance with it: *Held*, by the Full Bench, that no appeal lay against the decree, though the award, not having been made by the tribunal constituted in accordance with the agreement of the parties, was invalid. Per *White, C.J.*—If an arbitrator once consents to act and then refuses or dies, etc., the Court can appoint a new arbitrator under s. 510, independently of the wishes of the parties, but not otherwise. An award made by a tribunal of arbitration, not constituted in accordance with the provisions of the Code, is invalid. A defect in the constitution of a tribunal of arbitration is no ground for remitting an award under

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s. 520 or for setting it aside under s. 521. Per *Krishnaswami Aiyar, J.*—When a decree is in accordance with the award, no appeal lies except in so far as the decree is in excess of or not in accordance with the award, even if the award was invalid for want of submission, or for any irregularity in the reference, or for any other cause whatsoever, and whether an application to set it aside was not made or was made and refused. But if the arbitrators refuse to re-consider an award remitted to them, it becomes void. Therefore, a decree passed in accordance with such award is not a decree under s. 522 and is appealable. TALLAPRAGADA SURYANARAYANA ROW v. TALLAPRAGADA SARABAYA, **9 Ind. Cas. 173, F.B. = 9 M. L.T. 251.** (29 C. 167, 29 I.A. 51, 32 M. 510, 6 M.L.T. 176, 19 M.L.J. 480, 4 Ind. Cas. 871, *F.*; 6 M. 414, 17 M. 498, 6 A.L.J. 351, 1 Ind. Cas. 354, 18 C. 324, 13 A. 300, 18 I.A. 55. 8 A. 548, 35 C. 648, 10 Bom. L R. 581, 12 C.W.N. 585, 7 C.L.J. 520, 138 P.L.R. 1908, 18 M.L.J. 266, 99 P.R. 1908, 14 Bur. L.R. 146, 80 P.R. 1908, 25 C. 141, *R.*)

(5812)—*Sch. 2, rr. 5, 15 (= ss. 510, 521, Civ. Pro. Code, 1882)—Arbitration — Arbitrator becoming incapable of acting—Order superseding arbitrator—Award, objections against—Decree in accordance with award—Appeal—Revision—Objection for the first time on appeal or revision.*—On an arbitrator becoming incapable of acting, the Court ordered a new arbitrator to be appointed in his place. On the award being delivered, objections were preferred by the plaintiff which were disallowed, and a decree in accordance with the award was passed. It was not objected that s. 510 of the Civ. Pro. Code, under which the lower Court acted, was not applicable to the case. The plaintiff contended that the decree was wrong and must be set aside on appeal or at any rate on revision. *Held*, that the contention was not valid. It was too late to raise the objection that s. 510 was not applicable to the case, that no appeal lay and that the Court would not exercise revisional jurisdiction in the case even if the revision lay. HARNAM SINGH v. HARNAM SINGH, **27 P.L.R. 1910 = 8 Ind. Cas. 222 = 144 P.W.R. 1910.**

(5813)—*Sch. 2, rr. 5, 19 (= Civ. Pro. Code, 1882, ss. 510, 524)—Reference to arbitration.*—The words in s. 524, Civ. Pro. Code, "so far as they are consistent with any agreement so filed," do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that the Judge may act in conformity to it, and that s. 510, Civ. Pro. Code, has otherwise no application. The reasonable construction is that the action of the Judge under s. 510 should not be inconsistent with the agreement, if it contains any special provision on the subject. BALA PATTABHIRAMA CHETTI v. SEETHARAMA CHETTI, **17 M. 498.** [*R.*, 38 P.L.R. 1901 = 110 P.R. 1900, 6 A.L.J. 351.]

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——Sch. II, r. 6 (= 1882, s. 512 = 1877, s. 512, = 1859, s. 319.)

(5813-*a*)—Sch. 2, r. 6—*See* NOS. 5794, 5795, 5808-*b*, *supra*.

——Sch. II, r. 7 (= 1882, s. 513 = 1877, 513 = 1859, s. 317.)

(5813-*b*)—Sch. II, r. 7—*See* NOS. 5794, 5795, *supra*.

——Sch. II, r. 8 (= 1882, s. 514 = 1877, s. 514 = = 1859, s. 318.)

(5813-*c*)—Sch. 2, r. 8—*See* NOS. 1600-*c*, 2896, 5151, 5794, 5795, 5804, 5809, 5810, *supra*.

——Sch. II, r. 9 (= 1882, s. 585 = 1877, s. 515 = 1859, s. 318.)

(5813-*d*)—Sch. II, r. 9—*See* NOS. 1600-*c*, 4814, 5794, 5795, *supra*.

——Sch. II, r. 10 (= 1882, s. 516 = 1877, s. 515 = 1859, s. 62).

(5814)—Sch. 2, r. 10—*See* LIMITATION ACT, 1908, art. 158, 5 C.W.N. 813.

(5814-*a*)—Sch. II, r. 10—*See* NOS. 2750-*b*, 5794, 5795, 5804, 5805, *supra*.

(5815)—Sch. 2, r. 10, s. 115—*See* SUPERINTENDENCE OF HIGH COURT, 11 M. 144.

——Sch. II, r. 11 (= 1882, s. 517 = 1887, s. 517 = 1859, s. 321),

(5815-*a*)—Sch. II, r. 11—*See* NOS. 1907, 5794, 5795, *supra*.

——Sch. II, r. 12 (= 1882, s. 518 = 1877, s. 518 = 1859, s. 322).

(5815-*b*)—Sch. II, r. 12—*See* NOS. 5794, 5795, *supra*.

(5816)—*Sch. 2, r. 12, s. 104, O. 43, r. 1 (= ss. 518, 588 (26), Civ. Pro. Code, 1882)—Order amending award—Appeal—Court's power to amend and correct award.*—Where a Court amends an award of arbitrators under s. 518, Civ. Pro. Code, 1882, an appeal lies from such order under s. 588, cl. 26, of the Code. An issue whether a particular property was endowed property, and whether it was partible or not was referred to arbitrators for determination. The arbitrators decided that it was not endowed property, but held that it should not be partitioned and must continue as endowed property: *Held*, that the award contained an obvious error, which the Court was competent to modify and correct under s. 518 of the Code. JANI DURLABH SHANKARJI v. JANI LAJJA SHANKARJI, **2 Ind. Cas. 858.**

(5817)—*Sch. 2, rr. 12, 14, 16, ss. 92, 93 (= Civ. Pro. Code, 1882, ss. 518, 520, 522, 539)—Arbitrators — Award — Private and public trusts for religious or charitable purposes.*—Where the plaintiffs alleged that they and the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

defendant were heirs of their grandmother, who had left them certain land on the condition that the proceeds of a portion thereof should be set apart to feed a pongyi of a certain kyaung and the heirs then proceeded to divide the inherited property, and, at the time of the division, the portion set apart for the benefit of the pongyi was made over to defendant in trust to administer in accordance with the grandmother's wishes, *held*, in a suit by plaintiffs under s. 539, Civ. Pro. Code, to recover possession of the land alienated by defendant and to have their right declared to administer the trust property for the benefit of the pongyi, that the plaintiffs being co-heirs with defendant of their grandmother were interested in seeing the trust carried out, and were, therefore, entitled to sue. *Held*, further, that the suit should not have been instituted under s. 539, Civ. Pro. Code which referred not to private trusts, but to public trusts for religious and charitable purposes. When a case is referred by a Civil Court, to arbitration under s. 508, Civ. Pro. Code and the arbitrators deliver their award in due course, the Court is bound, under s. 522, to deliver judgment in accordance with the award given unless there are grounds for setting it aside under s. 518 or s. 520. NGA SHWE MAUNG v. NGA SHWE LIN, **L.B.R. 1872—1892, 302.**

(5818)—*Sch. 2, rr. 12, 15, 20 (=Civ. Pro. Code, 1882, ss. 518, 521, 525)—Award on private arbitration among agriculturist parties——Application to Civil Court to file—Duty of Court.*—The question referred for the opinion of the High Court in this case was, whether a private award to which agriculturist debtors are parties can be filed by Civil Courts without adjusting the account under the Dekkhan Agriculturists' Relief Act. The answer was held to depend on whether an application to file an award under s. 525 of the Civ. Pro. Code, was a suit within the meaning of ss. 3, 12, or 47 of the Agriculturists' Relief Act. If it is a suit, the provisions of s. 12 of the Act come into play and the Court must follow the directions contained in that section when the award is submitted to it. If, on the other hand, it is not a suit, s. 74 of the Act entails upon the Court the duty of dealing with the application in accordance with the provisions of the Civ. Pro. Code, and since an application to file an award could not be regarded as a suit within its usual meaning, an award such as that under consideration should be filed in Court without any inquiry under s. 12. Before filing such an award, however, the Judge can, upon objection by the debtor, inquire into the matters specified in s. 521 of the Code, and if he is in doubt as to its *bona fides* or freedom from fraud, can refer the parties to a regular suit, where the whole matter can be re-opened under s. 12 of the Act. MOHAN v. TUKARAM, **21 B. 63.**

(5819)—Sch. 2, rr. 12, 16, s. 104, O. 43, r. 1—*See* AWARD, 13 P.R. 1906.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

——**Sch. II, r. 13 (=1882, s. 519=1877, s. 519=1859, s. 322).**

(5819-*a*)—Sch. 2, r. 13—*See* NOS. 5794, 5795, *supra*.

——**Sch. II, r. 14 (=1882, s. 520=1877, s. 520=1859, s. 323).**

(5820)—*Sch. 2, r. 14 (=Civ. Pro. Code, 1882, s. 520)—Agreement to refer to arbitration—Suit for profits of immoveable property wrongfully received—Claim for contribution—Powers of arbitrators.*—This was a suit in which the plaintiffs who had formerly obtained a decree for recovery of the suit property, claimed mesne profits thereof wrongfully received by the defendant. The defendant contended that the amount claimed was wrong and that certain sums paid by the defendant had not been taken into account, *e.g.* (1) *Sair* expenditure of *patwari*; (2) *Haqq Muqaddam*; (3) Office expenses; (4) Servant's wages; (5) Mosque expenses; (6) Collection expenses at 15 per cent., etc. An issue was framed as to whether the defendant was entitled to claim a set off in respect of any or all of the items claimed by him. After the issues were framed the parties agreed to refer the case to arbitration, and to be bound by whatever the arbitration might decide. The arbitrator decided that the defendant was entitled to a deduction of Rupees 5 per cent, for *lambardari* and collection dues, and that the other items could not be set off in the present suit. *Held*, that the arbitrator was competent to decide as he did, and that the parties were severally bound by his decision. MUHAMMAD ISMAIL KHAN v. FIDAYATUNNISSA, **A.W.N. 1884, 43.**

(5821)—Sch. 2, r. 14—*See* FOREIGN COURT, JUDGMENT OF, 2 M.L.T. 269=30 M. 292.

(5821-*a*)—Sch. 2, r. 14—*See* NOS. 123, 2208, 4738, 5794, 5795, 5811, 5817, *supra* and NO. 5924, *infra*.

(5822)—*Sch. 2, r. 14, s. 115 (=ss. 520, 622, Civ. Pro Code, 1882)—Award by arbitrators—Decree according to award, final—Revision.*—Where, in the case of a reference to arbitration by parties, with respect to partition of property and adjustment of accounts, an award embodying matters not referred to arbitration is delivered, the Court has the discretion to remit or not to remit such an award. But, when once a decree has been passed in terms thereof, the Chief Court has no power to interfere in revision. SANT SINGH v. JIWAN SINGH, **63 P.L.R. 1905=41 P.R. 1905.** (25 P.R. 1902, P.C., *R.*; 89, P.R. 1902, F.B., *Not F.*; 92 P.R. 1903, F.B., *F.*)

(5823)—*Sch. 2, rr. 14, 15 (=ss. 520 and 521, Civ. Pro. Code, 1882)—Remission of award for re-consideration—Setting aside of award—Right of appeal from order of Court.*—Although an objection falling within the scope of s. 520 or s. 521 would not form the basis of an appeal, an objection which is outside the scope of those

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

sections does not take away the jurisdiction of the Court to order an award to be filed and affords ground for an appeal. BASTARAM v. GOVIND RAM, **13 C.P.L.R. 53.** (18 M. 423, 20 M. 89, 9 B. 254, 17 B. 674, *F.*)

(5824)—Sch. 2, rr. 14, 15—*See* JURISDICTION OF CIVIL COURTS, 5 Ind. Cas. 454.

(5825)—*Sch. 2, rr. 14, 15, 16 (=Civ. Pro. Code*, 1882, *ss.* 520, 521, 522)—*Award, appeal from.*—Where in an arbitration under Chapter XXXVII of the Code of Civil Procedure the arbitrators omitted to determine a material point of limitation which arose in the case referred to them, and the Court did not think it necessary to remit the award under s. 520 of the Code for re-consideration by the arbitrators: —*Held* that no appeal would lie from the decree on such award, it being in accordance with and not in excess of the award. KIRPA RAM v. LALJIT, **A.W.N. 1892, 151.** (6 A. 174, *Disc.*) [*R.*, 18 A. 422, F.B.]

(5826)—*Sch. 2, rr. 14, 15, 16, 17, 19 and 20 (=Civ. Pro. Code*, 1882, *ss.* 520, 525).—*Held*, by the Full Bench. That a Court is competent upon an application under s. 525, Civ. Pro. Code, to file an award, to inquire into and decide objections other than those specified in ss. 520 and 521 of the Code. That a Court is competent upon an application, under s. 523, Civ. Pro. Code, to file the reference to arbitration in spite of the defendant's denial of execution of the agreement to refer. That an appeal lies from an acceptance of an application under s. 525, Civ. Pro. Code, on grounds impeaching the reference or the legality of the award, or in other words, extraneous to the award. That orders rejecting applications under ss. 523 and 525 are appealable. JHANGI RAM v. MUSAMMAT BUDHO BAI, **112 P.L.R. 1901=84 P.R. 1901.** (21 P.R 1898, F.B., *Overruled*; 74 P.R.1894, I.A. 156; 21 C. 213, 20 B. 596, 25 C. 757 and 763, 134 P. R. 1888, 49 P.R. 1893, 17 A. 21, 20 M. 89, 25 C. 141, 13 A. 300, 8 A. 548, 18 M. 423, 22 M. 299, 24 C. 469, 17 B. 357, 11 C. 6, 4 P.R. 1882, *Referred to*)

(5827)—Sch. 2, rr. 14, 15, 16, 17, 20—*See* APPEAL—GENERAL, 84 P.R. 1901.

(5828)—*Sch. 2, rr. 14, 15, 16, 20, 21 (= ss. 520, 521, 522, 525, 526—Civ. Pro. Code*, 1882) —*Arbitration out of Court—Objection to validity of submission—Appeal.*—If an objection to the validity of the submission is made and the Court disallows it, no distinction can be drawn between such a case and one where an objection is taken, which is specifically mentioned in s. 520 or 521. The intention of the Code seem to be that, in the one case as much as in the other, no appeal shall lie, except on the grounds mentioned in s. 522. The principal of finality appears to be equally applicable. NGA HMAUNG v. NGA KYAW YA, **U.B.R. 1906, Civil Procedure, 52.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5829)—*Sch. 2, rr. 14, 15, 16, 21 (=Civ. Pro. Code, Act XIV of* 1882, *ss.* 520, 521, 522, 526)—*Denial of submission to arbitration and of genuineness of award—Decree on award passed without jurisdiction — Appeal or revision.*—Ss. 525 and 526 provide that, if no ground such as is mentioned or referred to in s. 520 or 521 be shown against the award, the Court shall order it to be filed, and s. 522 provides there shall be no appeal from such order. Denial of the submission to arbitration and of the genuineness of the award, though not specially mentioned in the two latter sections, goes to the root of the matter and is not merely an ancillary question such as is referred to in those two sections. It is certainly a valid cause shown against the award and it cannot be supposed that the Court can conclusively decide on it. These provisions primarily refer to an award made under a reference by Court about whose *factum* there can hardly be any dispute. If the award and the consent to arbitration is substantially disputed, the special jurisdiction created by ss. 525 and 526 is ousted and the applicant should be referred to a regular suit upon the award. Per *Parker, J.* [*R.*, 20 M. 89, 25 C. 757, F.B., 33 C. 757, F.B. 3 C.L.J. 450=10 C.W.N. 609, 84 P.R. 1901, F.B., =112 P.L.R. 1901, 10 C. W.N. 601=2 C.L.J. 153, 1 S.L.R. 149; *D.*, 22 M. 172; *R.*, 13 C.P.L.R. 53.] Whether a Court, when the genuineness of the award was impeached and the submission to arbitration denied, had jurisdiction to inquire into the matter or not, the adjudication is a decree and the remedy for the aggrieved party is by a regular appeal under s. 540, and not by revision in the High Court. HUSANANNA v. LINGANNA, **18 M. 423, F.B.** [*R.*, 13 C.P.L.R. 53.]

(5830)—*Sch. 2, rr. 14, 15, 20 (=ss. 520, 521 and 525, Civ. Pro. Code*, 1882)—*Arbitration—Application to file a private award—Rejection of such application—Memorandum of appeal—Proper Court-fee—Court Fees Act, art. 17, cl. (6) —Defective private award—Award effecting partition of immoveable property used for purposes of s. 525 of Civ. Pro. Code—Registration Act, s. 17 (b).*—Cl. 6 of art. 17 of the second schedule of the Court Fees Act applies to a memorandum of appeal from an order rejecting an application to file an award under s. 525 of the Code. The memorandum of appeal is sufficiently stamped, if it bears a Court-fee of Rs. 10 and not an *ad valorem* fee. (33 C. 11 and 70 P.R. 1881, *D.*; 109 P.L.R. 1902, *Diss.*; A.W.N. 1903, 214, *F.*) In proceedings which have been initiated by an application under s. 525 of the Code, the Court has no power to amend the award or to remit it for re-consideration, but must either affirm it in its entirety or wholly reject it. (27 A. 526, 18 P.R. 1892, *R.*) Where the arbitrators appointed under an agreement between the parties made an award which was defective, and in which the arbitrators exceeded the power given to them under the agreement, *held* that the Court had no

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

power to file the award. *Semble.*—An award of arbitrators privately appointed does not require registration, even if it effects a partition of joint immoveable property and is signed by the parties to signify the acceptance of the award, in case the award is merely sought to be filed and to be made a rule of Court under s. 525 of the Code. BHAGAT RAM v. PARAS RAM, **84 P.R. 1907.**

(5831)—*Sch. 2, rr. 14, 15, 20 (=ss. 520, 521, 525, Civ. Pro. Code, 1882)—Arbitration—Award—Application to file in Court—Objection by one of the parties—Duty of Court.*—Where, to an application to file a private award made under s. 525, Civ. Pro. Code, the defendant raises objections referred to in ss. 520 and 521 of the Code, the Court is bound to allow the defendant opportunity to produce evidence to substantiate his objections. Where the Court, after examining one of the arbitrators, summarily dismissed the plaintiff's application, the Chief Court set aside the order of dismissal and remanded the case for fresh decision after examining witnesses for the defendant. The Chief Court observed that the Civil Courts have no power to sit as Courts of appeal to consider the correctness of awards on the merits, in respect of matters of fact and even of law. They cannot usurp the functions of the arbitrators, when once the parties have made up their minds to have recourse to arbitration. NIZAM-UD-DIN v. GHULAM AHMAD, **53 P.L.R. 1909 =64 P.W.R. 1909=4 Ind. Cas. 533.**

(5832)—*Sch. 2, rr. 14, 15, 20, 21 (=ss. 520, 521, 525, 526, Civ. Pro. Code, 1882)—Private arbitration—Award—Filing in Court—Stifling a criminal prosecution—Agreement invalid—Compoundable case—Public policy.*—S. 526 of the Civ. Pro. Code is not exhaustive, and does not affect the inherent jurisdiction of the Court to decide a fundamental objection which goes to the root of the matter, *e g.*, that the agreement, on which the award is based, was against public policy and not therefore enforceable in a Court of Justice. The Court when invited to enforce the award, is not limited to the ground, mentioned in ss. 520 and 521 of the Civ. Pro. Code. (25 C. 757, 20 M. 89, 17 A. 21, 22 A. 224, *Rel. on.*) The same transaction may give rise to a civil as also to a criminal liability, and a reference to arbitration for the settlement of the civil dispute alone would be valid, but not if the object of the reference was to stifle a criminal prosecution also. (11 B. 566, 22 A. 224, 28 A. 718, 9 P.R. 1906, *D.*) But in order to make the award invalid, it is essential for the defendant to prove that the criminal prosecution stifled was for a non-compoundable offence, that is, for an offence of a character, the compromise of which is regarded by the Criminal Code as forbidden by law or against public policy. RAI CHARAN PURKAIT v. AMRITA LAL GAIN, **11 C.L.J. 131=5 Ind. Cas. 98.** (3 C.W.N. 5, 81 P.R. 1875, 82 P.R. 1904, 7 M.H.C. 378, 28 B. 326, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5833)—*Sch. 2, rr. 14, 15, 20, 21 (=Civ. Pro. Code, 1882, ss. 520, 521, 525, 526)—Grounds of objection—Jurisdiction—Objection that party to award did not consent to terms of reference—Regular suit.*—It appears from s. 526 of the Civ. Pro. Code, 1882, that the Court has jurisdiction to adjudicate only upon the grounds of objection mentioned in ss. 520 and 521 of the Code. An objection taken by a party to an award that he did not agree to the terms of the ekrarnama, and that he was imposed upon in being persuaded to put his signature to the particular ekrarnama which was the foundation of the award, is not one which comes within the purview of ss. 520 and 521. When an objection of this nature is raised, it is the duty of the Court to reject the application under s. 525, Civ. Pro. Code, 1882, and refer the parties to a regular suit. PALUT BHAGAT v. MONOHUR BHAGUT, **13 C.L.R. 171.**

(5834)—*Sch. 2, rr. 14. 16 (=ss. 520, 522, Civ. Pro. Code, 1882)—Decree on award—Appeal.*—Where a suit was referred to arbitration, and the decree of the first Court is in accordance with the award, no appeal lies from the decree, by s. 522, Civ. Pro. Code, when the grounds of appeal are that the arbitrator had exceeded his powers and that the defendant had withdrawn from the arbitration. The first is an objection which might have been taken to the award under s. 520, Civ. Pro. Code in the Court of first instance. The second is not valid, as the defendant had no power to withdraw from the arbitration. MANGAL SEIN v. GOBIND RAM, **A.W.N. 1886, 151.** (7 A. 273=A.W.N. 1885, 12, *R.*)

(5835)—*Sch. 2, rr. 14, 20, 21 (=ss. 520, 525, 526, Civ. Pro. Code, 1882)—Application to file private award and to pass decree thereon—Determination of matters not referred to arbitration—Court has no power to amend or remit award.*—In this case, the parties to a dispute referred their dispute as to the ownership and distribution of certain property to arbitration without the intervention of a Court. An application was made under s 525 to have the award filed and a decree passed thereon. It was opposed on the ground that the arbitrator had determined matters, which were not referred to him. On evidence, it was found that the objection to the award was well-founded within the meaning of s. 520, Civ. Pro. Code. *Held*, under the circumstances of the case and upon the construction of s. 526, that the Court had no power to amend the award or remit it for reconsideration, but only possessed the power to file it and pass a decree thereon or to reject the application altogether. MUSTAFA KHAN v. PHULJA BIBI, **A.W.N. 1905, 86=27 A. 525=2 A.L.J. 416.** (10 B.H.C. 391, 3 A. 541, 3 M. 68, 6 B. 663, *R.*)

——**Sch II, r. 15 (=1882, s. 521=1877, s. 521 =1859, s. 325.)**

(5836)—*Sch. 2, r. 15 (=Civ. Pro. Code, 1882, s. 521 (a), "misconduct," meaning of—Arbitrators, duties and responsibilities—of.*—**The term-**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

'misconduct' in s. 521 (*a*), as applied to proceedings before arbitrators, covers the violation of their duties and responsibilities as expected from them by Courts of justice. It does not necessarily imply corruption or any other moral turpitude on their part. There may be ample misconduct in the legal sense sufficient to make the Court set aside an award, even when there is no ground for imputing the slightest improper motive to the arbitrator. So, an award will be set aside where the arbitrator has improperly refused to grant the necessary adjournments to the parties, or where he has refused to hear evidence within the scope of the reference, so likewise, if he has examined a witness or a party in the absence of his opponent. In the above cases, even in the absence of any corrupt motive in the arbitrator, his acts would amount to such misconduct as to render his award bad in law, and so liable to be set aside by the Courts. GANGA SAHAI v. LAKHRAJ SINGH, **9 A. 253**. [*R.*, 29 A. 457=4 A.L.J. 455=A.W.N. 1907, 117.]

(5837)—*Sch. 2, r. 15 (=Civ. Pro. Code, 1877, s. 521)—Arbitration—Grounds for setting aside award—Extention of time—Refusal to re-consider.*—On an agreement between the parties to an appeal, the subject-matter of the appeal was referred to three arbitrators with an agreement that the opinion of the majority was binding on the parties. On the day fixed for the delivery of the award, an application was made for extension of time which the Court granted four days later on. Two of the arbitrators agreed and the third differed. The matter was sent back for re-consideration. The two arbitrators adhered to their former opinion and the third again differed. The appellate Court passed a decree in accordance with the opinion of the majority. *Held*, that the extension of time was in accordance with s. 521, Civ. Pro. Code, 1877, and that the order extending the time could refer back to the date when the arbitrators applied for extension, and that, as the lower appellate Court was satisfied with the return to its order, it should be assumed, in the absence of proof to the contrary, that the terms upon which the matter was sent back for re-consideration were carried out. LALTI DAI v. BALDEO SAHI SAHAI, **A.W.N. 1881, 25.**

(5838)—*Sch. 2, r. 15 (=s. 521, Civ. Pro. Code, 1882)—"Misconduct," meaning of—Scope—Jurisdiction of Presy. S. C. Court.*—"Misconduct" in s. 521, Civ. Pro. Code, 1882, does not of necessity imply "corruption," though "corruption" necessarily implies "misconduct." S. 521 does not deal with the question of jurisdiction, but specifies the grounds upon which an award may be set aside. The Presy. S.C. Court is competent to entertain an application under s. 521, Civ. Pro. Code, 1882. The High Court cannot interfere, because the Court has taken a mistaken view, as to what does or does not constitute misconduct. KALI CHARAN SIRDAR v. SARAT CHUNDER CHOWDHRY, **30 C. 397=7 C.W.N. 545.** (11 C. 6, *R.*)

(5839)—*Sch. 2, r. 15 (=s. 521, Civ Pro. Code, 1882)—Arbitrator receiving evidence from one party in the absence of the other—Judicial misconduct—Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award.*—A Court is perfectly justified in setting aside the award of the arbitrators, on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable, and in having omitted to give the latter sufficient opportunity to produce his own evidence. *Quære.*—Whether an appellate Court had power to go behind the order of the first Court, setting aside such an award. SOBHA RAM v. RAM DAS, **66 P.R. 1907=159 P.L.R. 1908=148 P W.R. 1907.** (2 A. 181, 3 A. 636, 28 A. 408, 22 M. 204, 8 C.W.N. 390, *R.*)

(5840)—*Sch. 2, r. 15 (=Civ. Pro. Code, 1882, s. 521)—Judge practically appointed arbitrator by consent of parties—Nature of judgment passed—Award—Appeal.*—Plaintiff sued for an order directing that a doorway constructed by the defendant be blocked up, and for a perpetual injunction restraining him from again constructing a doorway in the same place. In the course of the suit, both parties put in a petition to the effect that they would abide by the decision of the Court as it thought just, after perusing the documents filed by them and all the records in the suit and after measuring the site and inspecting the marks, &c. The District Munsiff, after inspecting the sites and marks and after perusing the documents and other records, passed a decree in favour of plaintiff. Defendant appealed. The subordinate Judge held that the defendant was entitled to appeal. *Held* that the District Munsiff acted as an arbitrator by consent of parties and consequently no appeal lay from his decision, which must be looked upon as an award. As the award had not been impeached on any of the grounds specified in s. 521, Civ. Pro. Code, the decree of the District Munsiff must be considered to have been passed in accordance with the award and upheld as such. There was consequently, under s. 522, Civ. Pro. Code, no appeal to the lower appellate Court. The decree of the Subordinate Judge was set aside and that of the District Munsiff restored. NIDAMARTHI MUKKANTI v. THAMMANA RAMAYYA, **26 M. 76.**

(5841)—Sch. 2, r. 15 — *See* LIMITATION ACT, 1908, art. 158, 29 C. 36.

(5842)—Sch. 2, r. 15—Matters mentioned in s. 521 of the Code being directly and substantially in issue determined in proceeding under s. 525—Res judicata—*See* RES JUDICATA—ADJUDICATIONS, 18 C. 414, P.C.=18 I.A. 73.

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5842-*a*)—Sch. 2, r. 15—*See* NOS. 2203, 3339, 4738, 5151, 5794, 5795, 5798, 5804, 5806, 5811, 5812, 5818, 5823 5824, 5825, 5826, 5827, 5828, 5829, 5830, 5831, 5832, 5833, *supra*.

(5843)—Sch. 2, r. 15, s. 115—*See* REVISION—GENERAL, 5 A. 293=A.W.N. 1883, 39.

(5844)—Sch 2, r. 15 and s. 115—*See* REVISION—GENERAL, A.W.N. 1888, 123.

(5845)—*Sch 2, rr.* 15, 16 (=*ss.* 521 *and* 522, *Civ. Pro. Code*, 1882)—*Arbitration — Award —Decree on judgment in accordance with award —Appeal.*—During the pendency of a suit in the Court of a Subordinate Judge, the matters in dispute between the parties were referred to arbitration. In due course, a document purporting to be the arbitrator's award was received by the Court through the post. Objections were filed by one of the defendants to the suit; but these objections were, after hearing, disallowed by the Court, which proceeded to pass a decree in accordance with the award. *Held*, that an appeal would lie from such a decree, upon the ground that the so-called award was never delivered by the arbitrator and was, in fact and in law, no award at all. SHAM LAL v. MISRI KUNWAR, **A.W.N. 1907, 115=29 A. 426.**

(5846)—*Sch. 2, rr.* 15, 16 (=*ss.* 521 *and* 522, *Civ. Pro Code*, 1882)—*Arbitration—Award—Decree on judgment in accordance with award—Appeal.*—The matters in dispute between the parties to a suit pending in the Court of a Munsiff were referred to arbitration. An award was delivered by the arbitrator, to which objections were filed, to the effect that the arbitrator had been guilty of misconduct. These objections were, however, overruled and decree was passed, which was in accordance with and not in excess of the terms of the award. *Held*, that no appeal from such a decree would lie, the sole ground being that the arbitrator had been guilty of misconduct. BIHARI LAL v. CHUNNI LAL, **A.W.N. 1907, 117=4 A.L.J. 455=29 A. 459.** (*19 C. 167, P.C. F.*)

(5847)—*Sch. 2, rr.* 15, 16 (=*ss.* 521, 522, *Civ. Pro. Code*, 1882)—*Refusal of first Court to pass decree in accordance with award—Appellate Court's decree reversing first Court's decree and passing decree in accordance with award—Finality of appellate Court's decree.*—Where a Court of first instance wrongly refuses to pass a decree in accordance with an award of arbitration in the suit, and a Court of appeal, finding that the lower Court was not justified in so refusing and finding that the award was open to none of the objections mentioned in s. 521, reverses the decree of the first Court and passes a decree strictly in accordance with the award, the decree of such appellate Court will be entitled to the same finality (*vide* s. 522, Civ. Pro. Code), to which the first Court's decree would have been, had it been in accordance with the award. No appeal will lie from the decree of the appellate Court. BAHAR BAKSH v. INAYAT ALI, **26 P.L.R. 1905.** (12 W.R. 93, 14 W.R. 327, 12 C.L.R. 564, 22 W.R. 447, *Diss.*; 26 P.R. 1890, 25 P.R. 1902, P.C., 10 A. 8, *F.*)

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5848)—*Sch. 2, rr.* 15, 16 (=*ss.* 521, 522, *Civ. Pro. Code*, 1882)—*Decree in terms of award, appealability of, on the ground of arbitrator's misconduct.*—A suit for the dissolution and winding up of a partnership was, with the consent of both the parties, referred to an arbitrator. The award was objected to by the plaintiff on the ground of the arbitrator's misconduct. But the Judge, overruling the objection, passed a decree in terms of the award. The plaintiff appealed to the High Court. *Held*, s. 522 of the Code provides that no appeal shall lie from a decree under Chapter XXVII of the Code, except so far as it is in excess of or not in accordance with the award. There was no suggestion that the decree had this vice. All that was alleged was misconduct of the arbitrator and that was found against the plaintiff. On the words of Chapter XXVII of the Code no appeal lay. WALJI MATHURADAS v. EBJI UMERSEY, **29 B. 285.**

(5848-*a*)—*Sch. 2, rr.* 15, 16 (=*Civ. Pro. Code*, 1859, *ss.* 324, 325)—*Award of arbitrator Judgment—Appeal.*—Where a Munsiff, instead of allowing ten days as provided in Act VIII of 1859, s. 324, ordered that the objections to an arbitration-award should be filed in one day; and, this having been done, delivered judgment upon the merits, which was also in accordance with the award: *Held*, that the judgment could not be considered as one under s. 325 which is declared to be final, but a judgment which is open to appeal. GUNGA NARAIN GHOSE v. RAM CHAND GHOSE, **12 B.L.R. 48 =20 W.R. 311.** [*Expl.*, 7 C. 166=8 C.L.R. 505.]

(5849)—Sch. 2, rr. 15 and 16—Application to set aside award—Limitation—*See* LIMITATION ACT, 1908, art. 158, 8 A. 64=A.W.N. 1886, 2.

(5850)—*Sch. 2, rr.* 15, 16, s. 107 (2), *O.* 22, *r.* 11, *s.* 104, *O.* 43, *r.* 1 (=*Civ. Pro. Code*, 1882, *ss.* 521, 522, 582, 588)—*Decree by appellate Court in accordance with award—Second appeal—Remand—Opportunity for evidence.*—A second appeal lies from a decree of the lower appellate Court in accordance with an award made by an arbitrator to whom the case had been referred by the first Court and whose award the first Court had set aside. (10 A. 8, *Diss.*; 12 W.R. 93 and 12 C.L.R. 564, *F.*) [*F.*, 2 C.L.J. 80; *R.*, 2 C.L.J. 153=10 C.W.N. 601, 28 A. 408 =3 A.L.J. 168=A.W.N. 1906, 64, 66 P.R. 1907 =159 P.L.R. 1908=31 M. 345=18 M.L.J. 228 =3 M.L.T. 315.] Though the party aggrieved by the award who had put in objections to the same in the first Court, did not ask the appellate Court to be given an opportunity to substantiate his objections, *held*, that he should

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

nevertheless be given such an opportunity after remand. SHYAMACHARAN PRAMANICK v. PROLHAD DURWAN, **8 C.W.N. 390.**

(5851)—Sch. 2, rr. 15, 16, O. 22, r. 11. s. 107—*See* SPECIAL OR SECOND APPEAL—RIGHT OF SPECIAL APPEAL, **10 A. 8=A.W.N. 1887, 240.**

(5852)—*Sch. 2, rr.* 15, 16, 20, 21 (=*ss.* 521, 522, 525, 526, *Civ Pro. Code*, 1882)—*Arbitrators, joint one not attending all sittings—Misconduct—Award. objection to, when waived—Appeal against decree on award, if lies* —Where there are joint arbitrators, and there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were sole arbitrator, and as the office is joint, if one refuse or omit to act, the others can make no valid award. Where, however, there were three arbitrators, and one of them could not attend some of the sittings of the arbitrators, but at these sittings, no business of a disputed character was gone into, and the other two arbitrators did not decide any matter but simply looked into the accounts and the parties were there, and all the disputed matters referred to them were decided by the three arbitrators at sittings when all the three were present, the award was the award of all the three arbitrators and the objection of misconduct cannot be upheld. Where the arbitration proceedings lasted for some 18 months and one of the parties to the reference to arbitration attended most, if not all the meetings and having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrator's proceedings to make their award, did submit to the arbitration going and allowed the arbitrators to deal with case as it stood before them, taking his chance of the decision being more or less favourable to himself, it is too late for him after the award has been made, and on the application to file the award to insist on that objection to the filing of the award. (26 W.R. 10=3 I.A. 209, P.C., *R.*; Compare 2 C.L.J. 80.) *Quære.*—Whether an appeal lies against the order of the Court directing a private arbitration award to be filed and a decree to be passed in accordance therewith? NADIR CHAND SAHA BONIK v. GOBIND CHANDAR SHAHA BONIK, **2 C.L J. 61.** [*F. & R.*, 2 C.L.J. 153=10 C.W.N. 601.]

(5853)—*Sch. 2, rr.* 15, 16, 21 (=*Civ. Pro. Code*, 1882, *ss* 521, 522, 526)—*Objections overruled—Right of separate suit.*—Where a party objected to the filing of an award on the ground that the arbitrator had made a fraudulent award after the party had revoked his submission, and that he had antedated the award for that purpose, and the objections were overruled, it was held he could not institute a separate suit to annul the award. CHINTAMALLYA v. THADI GANGIREDDI, **20 M. 89=7 M.L.J. 61.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5854)—*Sch. 2, rr.* 15, 20, 21 (=*Civ. Pro. Code*, 1882, *ss.* 521, 525, 526)—*Arbitration—Arbitrator hearing one side and declining to hear other side — Misconduct — Arbitration without intervention of Court—Application to file award—Powers of Court*...If it is shown that the arbitrators heard only one side and declined to hear the other side, they would be guilty of misconduct within the meaning of s. 521 of the Code and the award made by them can be impeached upon that ground. Where an application is made under s. 525 of the Code to file an award made on a reference made without the intervention of the Court, inasmuch as the Court is not one of appeal from the decision of the arbitrators, it cannot set aside the award made by the arbitrators, but can only refuse to file the award and dismiss the application presented to it for filing the award. SUNDARA MUDALI v. PONNUSAMI MUDALY, **13 M.L.J. 275.**

——Sch. II, r. 16 (=1882, s. 522=1877, s. 522 =1859, s. 325).

(5855)—*Sch. 2, r.* 16—*Limitation Act*, (IX *of* 1908), *art.* 158 — *Award — Decree passed without allowing time for objections—Illegality*... An award of arbitrators having been passed on 27th September, 1909, the Court passed a decree in accordance therewith on 29th September, 1909; *Held*, that the decree was liable to be set aside as it was given before the time, allowed by law for hearing objections to the award, had passed. VELLU PILLAI v. APPASAMI PANDARAM, **9 Ind. Cas. 197=9 M.L.T. 301=21 M.L J. 444.**

(5856)—*Sch. 2, r.* 16 (=*Civ. Pro. Code*, 1877, *s.* 522)—*Decree in accordance with award, when could be set aside.*—Where an award had been objected to on the ground that the umpire had been guilty of misconduct and the lower Court had made the decree before the time allowed for making objections had expired, so as to deprive the party from producing evidence in support of his objections, the High Court in revision set aside the decree. NEM CHAND v. DUNGAR MAL, **A.W.N. 1882, 76.**

(5857)—*Sch. 2, r.* 16 (=*s.* 522, *Civ. Pro. Code*, 1882)—*Award—Set aside by Court of first instance—Jurisdiction of appellate Court, to pass a decree in its terms.*—When a Court of first instance, through which a suit has been referred to arbitration, set aside the award on the ground of misconduct of the arbitrator, the appellate Court has no jurisdiction to pass a decree in the terms of the award. KALYAN DAS v. PYARE LAL, **4 A.L.J. 256=A.W.N. 1907, 110.** (3 A.L.J. 168, *F.*) [*Not F.*, 31 M. 345=18 M.L.J. 228=3 M.L.T. 315.]

(5858)—*Sch. 2, r.* 16 (=*Civ. Pro. Code*, 1882, *s.* 522)—*Suit for removal of trustee—Reference to arbitration — Decree confirming award — Appeal.*—Where a suit for removal of a trustee was referred to arbitration, under s. 522 of the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

Code, no appeal lay from a decree passed on the award except in so far as the decree was in excess of, or not in accordance with, the award. NAMBI AIYANGAR v. YAGNANARAYANA SOMAYAJIAL, **12 M.L.J. 431.**

(5859)—*Sch. 2. r. 16 (=Civ. Pro. Code, 1882, s. 522)—Arbitration—Award—Decree on judgment in accordance with an award—Apeal on grounds other than the decree being in excess of, or not in accordance with, the award.—Held,* that no appeal lies from a decree pronounced under s. 522 of the Civ. Pro. Code, except in so for as the decree may be in excess of, or not in accordance with, the award. GHULAM JILANI v. MUHAMMAD HASSAN, **25 P.R. 1902, P.C.** (84 P.R. 1901, F.B. *Disapproved.*)

(5860)—*Sch 2, r. 16 (=s. 522, Civ. Pro. Code, 1882)—Appeal—Time for setting aside an award not expired—Decree passed—Whether final.*—When a decree was pased in accordance with an award, before time for taking objections to the validity of the award had expired, *held*, that an appeal lay against the decree. Before passing such a decree, it is necessary for a Court to stay its hands, until the time for making an application to set aside the award had expired. NAJUM-UD-DIN AHMAD v. ALBERT PUECH, **4 A.L.J. 460=A.W.N. 1907, 184 =29 A. 584.** (18 A. 422, 23 W.R. 429, *R.*)

(5861)—*Sch. 2, r. 16 (=s. 522, Civ. Pro. Code, 1882)—Arbitration, reference to, through Court— Award — Decree in accordance with award—Appeal, if lies.*—No appeal lies from a decree which is not in excess of, but is in accordance with, an award made by an arbitrator appointed through the intervention of the Court. HARANUND NASKAR v. DOYAL CHAN NASKAR, **2 C.L.J. 142.** (29 C. 167, *F.*) [*F.*, 33 C. 899.]

(5862)—*Sch. 2, r. 16 (=s. 522, Civ. Pro. Code, 1882)—Award by arbitrators—Decree in accordance with award—Appeal on the ground of award being void* ab initio—*Maintainability of.*—In a suit for partition a reference to arbitration was made at the request of the parties. The arbitrators submitted an award and a decree was passed in accordance therewith. The first defendant appealed on the ground that the award was void *ab initio*, as no notice was given to one of the arbitrators and as the award was signed by only one of them. *Held*, that no appeal lay on the ground alleged as under s. 522, Civ. Pro. Code, an appeal lay only in so far as the decree was in excess of, or not in accordance with the award. NAGALINGA v. NAGALINGA, **6 M.L.T. 176=4 Ind. Cas. 87.** 33 C. 890, 29 C. 167, P.C., *F.*; 26 M. 47, *Diss.*)

(5863)—*Sch. 2, r. 16 (=Civ. Pro. Code, 1882, s. 522)—Award—Decree on judgment based upon an award—Appeal.*—Where, after judicial consideration of objections to an award filed in Court, judgment is given according to the award and a decree passed upon such judgment, no appeal will lie from such decree except

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in so far as it is in excess of, or not in accordance with the award. Under such circumstances the High Court refused to entertain in appeal an objection to an award, to the effect that two out of five arbitrators did not, as a matter of fact, take part in the arbitration proceedings, when such objection had not apparently been raised before the lower appellate Court. BACHA PANDE v. GANESH PANDE, **A.W.N. 1902, 195.** (18 A. 422, 6 C.W.N. 226, *R.*)

(5864)—*Sch. 2, r. 16 (Civ. Pro. Code, 1882, s. 522)—Appeal against a decree under s. 522—Award—Arbitration—Reference to.*—An appeal lies against a decree under s. 522, Civ. Pro. Code, on the ground that the judgment was not given in accordance with law. (25 C. 141, 11 M. 144, *R.*) Suggested but not decided,—an appeal probably lies against a decree under that section, on the ground that the award upon which it is based is not a valid and legal award. MA GYI v. MAUNG PO SO, **U.B.R. 1897—1901, Vol. II. 290.**

(5864-*a*)—*Sch. 2, r. 16 (=Civ. Pro. Code, 1859, s. 325)—Arbitration—Appeal.*—A suit having been referred to the arbitration of three persons, the arbitrators took up some only of the issues framed, and determined the two matters in issue between the parties, two of the arbitrators sub-joining to the award a suggestion in respect of the question determined by them. The Munsiff gave a decree in accordance with the award, dealing with the suggestion as surplusage. He then refused a review and the appellate Court considered itself precluded by s. 325 of the Civ. Pro. Code from disturbing the decision. *Held* that Munsiff's decision was final, and the Judge had no authority to interfere. SARBORE KANTO BUTTACHARJEE v. ANADYA KANTO BUTTACHARJEE, **12 B.L.R. App. 10=20 W.R. 226.**

(5864-*b*)—*Sch. 2, r. 16 (2)—Arbitration, reference to—Award—Decree in accordance with award—Appeal.—Held* that no appeal lay to the Court below from a decree passed upon an award which was in accordance with it and not in excess of it, the Court of first instance having heard the objections thereto and modified the award so far as it was in excess of the actual reference. NARAIN DAS v. RAM PRASAD, **9 A.L.J. 288.**

(5865)—Sch. 2, r. 16—*See* APPEAL—GENERAL, 11 M.L.J. 337.

(5866)—Sch. 2, r. 16—*See* APPEAL—MISCELLANEOUS, 48 P.R. 1882.

(5867)—Sch. 2, r. 15—*See* ARBITRATION—GENERAL, **A.W.N. 1892, 238.**

(5867-*a*)—Sch. 2, r. 16—*See* **NOS. 193, 973, 1601, 3031, 3201-*b*. 5794, 5795, 5798, 5799, 5800, 5801, 5811, 5817, 5819, 5825, 5826, 5827, 5828, 5829, 5834, 5845, 5846, 5847, 5848, 5848-*a*, 5849, 5850, 5851, 5852, 5853 *supra* and NO. 5936, *infra*.**

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

(5868)—Sch. 2, r. 16, s. 115—*See* APPEAL—ARBITRATION, 92 P.R. 1903, 88 P.R. 1902, F.B.

(5869)—Sch. 2, r. 16, s. 115—*See* APPEAL—CASES WHERE APPEAL LIES OR NOT, 88 P.R. 1902, F.B.

(5870)—Sch. 2, r. 16, s. 115—*See* ARBITRATION—GENERAL, 29 C. 167, P.C.=6 C.W.N. 226=92 I.A. 51.

(5871)—*Sch. 2, r. 16, O. 41, r. 23 (=Civ. Pro. Code, 1882, ss. 522, 562)—Objection to filing of award—Decree in accordance with award—Appeal.*—The matter in dispute in a suit was referred to an arbitrator, who gave his award. Objection to the award was taken before the first Court on the ground that the arbitrator was interested in the matter referred to his decision. The first Court decided that he had no such interest as disqualified him from being an arbitrator. On appeal, the appellate Court decided that the arbitrator had such an interest, and setting aside the award, remanded the suit to the first Court for trial on the merits. Against this order of remand an appeal was made to the High Court. *Held* that an appeal lay against the order of remand. "Preliminary point" in s. 562 meant a matter prelim nary to the general determination of the suit which the parties brought before the Court for decision. The Court of first appeal being debarred by the last clause of s. 522, Civ. Pro. Code, from entertaining an appeal as regards the validity of the award, could not remand the suit for decision on the merits. KRISHNAN CHETTI v. MUTHU PALANDI VACHA MAKALI TEVAR, 22 M. 172. [*R.*, 14 M.L.J. 356, F.B., 2 P.R. 1908=12 P. W.R. 1908=96 P.L.R. 1908.]

(5872)—Sch. 2, rr. 16, 17, and s. 105—*See* ARBITRATION—REFERENCE TO ARBITRATION, 134 P.R. 1888.

(5873)—*Sch. 2, rr. 16, 20 (=ss. 522, 525, Civ. Pro. Code, 1882)—Award, application to file—Award not pronounced at date of application—Appeal.*—When an award had not been pronounced either orally or in writing at the time an application was made under s. 525, Civ. Pro. Code, to file the award, *held*, that the application was premature and that it should fail, because there was no award which could be "filed," within the meaning of s. 525, at the date of the application. An appeal lies to the District Court, notwithstanding that the first Court passed a decree in accordance with such an award. GOPAL CHAND v. MUKHAN SINGH, 80 P.R. 1909=136 P.W.R. 1909=3 Ind. Cas. 268. (12 M. 331, 25 C. 757, F.B., *R.*; 38 P.L.R. 1906, *D.*)

(5874)—*Sch. 2, rr. 16, 20, 21 (=ss. 522, 525, 526, Civ. Pro. Code, 1882)—Arbitration award, private—Order refusing to file, if decree and appealable—Award, decree made in terms of, by appellate Court, if appealable—Appeal—Final, when decree made upon private award by first Court.*—An order under s. 526 of the Code refusing to file an award made without the intervention of the Court is a decree and consequently appealable. When a Court of first instance to which an application has been made under s. 525 of the Code refuses to file the award, and such order is reversed on appeal and a decree made in accordance with the award, the decree is appealable. The finality, which attaches to a decree made in accordance with an award, as provided by s. 522 of the Code, refers only to a case in which such decree is made by the Court of first instance, and does not apply to a case in which such decree is made for the first time by the appellate Court, in reversal of the order of the first Court. ABDUL TAHER v. AZMUT BIBI, 2 C.L.J 80. (8 C.W.N. 390, *F.*; 29 C. 182, *D.*) [*F.*, 2 C.L.J. 153=10 C.W.N. 601.]

(5875)—*Sch. 2, rr. 16, 20, 21 (=ss. 522, 525, 526, Civ. Pro. Code, 1882)—Arbitration award, private—Decree—Appeal.*—When a Court has ordered a private arbitration award to be filed under s. 526, Civ. Pro. Code, and has drawn up a decree in accordance with, the award, no appeal lies against such decree except in so far as the decree may be in excess of, or not in accordance with, the award. [*Appr.*, 33 C. 899, 33 C. 757=10 C.W.N. 609=3 C.L.J. 450; *R.*, 11 U.B.R. 1906, 4th Qr., Civ. Pro. Code, 525, 526, U.B.R. 1905, C. P. C, 40.] *Quære.*—Whether this rule is not limited to cases of misconduct and has any application when the cause shown against the filing of the award has denied the submission to arbitration or the genuineness of the award. (18 M. 423, *R.*). S. 526 should be read with s. 522, the provisions of which are, by implication, made applicable to cases under the former section; the Court must proceed to give the judgment according to the award and upon the judgment so given, a decree shall follow, from which decree, no appeal lies, except in so far as the decree is in excess of, or not in accordance with, the award. The decision of the Full Bench in 25 C. 757, in so far as it affirmed the decision in 25 C. 141, has been overruled by the Privy Council in the case of 29 I.A. 51. *Semble.*—An order of refusal by a Court of first instance to file an award under s. 526, Civ. Pro. Code, is a decree, against which an appeal lies. (27 M. 255, 2 C.L.J. 80, *F.*; 26 A. 205, *D.*) The bar as to appeal provided by s. 522, Civ. Pro. Code, is applicable only when a decree has been made in accordance with the award by the Court of first instance and not when a similar decree has been made by a Court of appeal in reversal of the order of the first Court setting aside the award. CHINTAMONI ADITYA v. HALADHAR MAITI, 2 C.L.J. 153=10 C.W.N. 601. [*R.*, 1 P.R. 1903=58 P.W.R. 1907, F.B., U.B.R. 1905, C. P.C. 40.]

(5876)—*Sch. 2, rr. 16, 20, 21, (=ss. 522, 525, 526, Civ. Pro. Code, 1882)—Review of*

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859—*continued*.

judgment by Judge, passed by his predecessor—Application to have award filed — Decree in terms of award, passing of—Decree in terms of award application to District Judge to pass.—One R. S. applied to the District Judge under s. 525, Civ. Pro. Code to have an award filed, which was made by an arbitrator on reference in a dispute between the appellant and B. The District Judge made the following order:—" The claim of S. R. is decreed in terms of s. 526, Civ. Pro. Code, and the costs in this case be borne by the defendant." Subsequently the widow of B. applied for execution of the decree, but an objection being taken to the effect that the terms of the award were not incorporated in the decree, the application was dismissed. On this the widow filed an application under s. 205, Civ. Pro. Code, before the Judicial Commissioner, which was dismissed. The widow of B then filed an application before the District Judge to have the case decided in terms of the award, and that the decree may be drawn up in accordance with the provisions of ss. 522 and 526, Civ. Pro. Code. It was stated on her behalf that the application was under s. 623, Civ. Pro. Code, for review of judgment. The District Judge dismissed her application on the ground that he had no jurisdiction to review the original judgment. The widow of B applied for revision of this order on the ground that the District Judge failed to exercise the jurisdiction vested in him by law. *Held* that the Judge could not review the judgment passed by his predecessor. *Held* further, that the original application to have the award filed was never fully disposed of, as effect was not given to it under the provisions of s. 522, Civ. Pro. Code, no decree having been drawn up in terms of it. *Held*, also, that the lower Court, should have treated the application as one to have the procedure on the original application completed, and should have passed a decree in terms of the award. GULAB KUAR v. THAKUR SHEO RATAN SINGH, 5 O.C. 27.

(5877)—Sch. 2, rr. 16, 20, and 21—*See* APPEAL—CASES WHERE APPEAL LIES OR NOT. 11 W.R. 57.

(5878)—Sch. 2, rr. 16, 20, 21—*See* APPELLATE COURT—MISCELLANEOUS, 2 B.L.R. App. 20 (*b*) = 11 W.R. 57.

——Sch. II, r. 17 (= 1882, s. 523 = 1877, s. 523 = 1859, s. 326).

(5879)—*Sch. 2, r. 17 (= s. 523, cl. (4). Civ. Pro. Code*, 1877), *Construction of.*—The last clause in s. 523 of the Civ. Pro. Code, 1882, is not happily worded, nor does it adapt itself readily to, or fit in with, the provisions of its early clauses. It appears inferentially to give the parties power by agreement to nominate their arbitrator, even when they have agreed that their differences shall be referred to an arbitrator to be appointed by the Court. In such a case, the Court must appoint their

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued*.

nominee, which is not unreasonable. This is the only mode of reading the section so as to make it harmonious throughout. FAZULBHOI MEHRALI CHINOY v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LTD., 20 B. 232, F.B.

(5880)—*Sch. 2, r. 17 (= Civ. Pro. Code*, 1882, s. 523)—*Order refusing to refer matter to arbitration—Appeal.*—An order passed under s. 523, Civ. Pro. Code, refusing to refer a matter to arbitration, the grounds of refusal being that the alleged agreement to refer was not proved, is a decree, and therefore an appeal lies against the order. MAGATA v. BAGAVAN, 9 M L.J. 10.

(5881)—*Sch. 2, r. 17 (= s. 523, Civ. Pro. Code*, 1882)—*Agreement for reference to arbitrators to be appointed by parties to settle future disputes.*—An application was made, under s. 523, to file an agreement of partnership for reference of future disputes to arbitrators to be named by parties, but not mentioned in the agreement. It was urged that the letters appointing arbitrators, in pursuance of a previous agreement, coupled in the admissions of the said letters between the parties amounted to written contract. The application was rejected. *Held*, that there is no agreement in writing to be acted upon under s. 523. The letters do not constitute any agreement but only refer to a prior agreement, specified, which is inadmissible, under the section. The letters cannot serve, as any help, since an oral agreement does not fall within s. 523. That section prescribes a special procedure for enforcing agreement to refer to arbitration, specific performance whereof, cannot, as a rule, be obtained. The lower Court has rightly rejected. NAND LAL v. ALEXANDER ATKINSON, 93 P.L.R. 1905.

(5882)—*Sch. 2, r. 17 (= s. 523, Civ. Pro. Code*, 1882)—*Scope of.*—S. 523, Civ. Pro. Code, refers to cases in which persons, whether they be litigants or not, themselves agree independently of the Court, to refer the matters in difference between them to arbitration, and ask the Court to have the agreement filed. SHEO DAT v. SHEO SHANKAR SINGH, 27 A. 53 = 1 A. L.J. 398. [*R.*, 8 Bom. L.R. 777.]

(5883)—Sch. 2, r. 17—*See* SPECIFIC RELIEF ACT, s. 21, A.W.N. 1904, 9.

(5884)—Sch. 2, r. 17—*See* SPECIFIC RELIEF ACT, 1877, s. 21, A.W.N. 1888, 133.

(5885)—Sch. 2, r. 17—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 6 Ind. Cas. 420.

(5885-*a*)—Sch. 2, r. 17—*See* NOS. 123, 124, 125, 2249, 4557, 4558, 4812, 5795, 5796, 5801, 5808-*b*, 5811, 5826, 5827, 5872, *supra*.

(5886)—*Sch. 2, r. 17, s. 104, O. 43, r. 1 (= ss. 523, 588, Civ. Pro. Code*, 1882)—*Order of reference by Court on agreement to refer filed in Court—Appeal.*—No appeal will lie from an order of reference made by a Court upon an

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

agreement to refer to arbitration filed in Court by one of the parties to a suit under the provisions of s. 523 of the Code of Civil Procedure. KISHORI MAL v. BEHARI LAL, **A.W.N. 1895, 121.** (5 A. 333, 5 N.W.P.H.C. 179, 3 M.H.C. 183, *R.*)

(5887)—*Sch. 2, rr. 17, 19 (=Civ. Pro. Code, 1859, s. 326).*—Jurisdiction of the Courts in *India*, under the 326th section of the Code of Civil Procedure, Act VIII of 1859, to direct agreement of parties to arbitration to be made a rule of Court. According to the true construction of the 326th section of the Civ. Pro. Code, when parties have agreed to submit the matter to arbitration of one or more arbitrators, no party to the agreement can revoke the submission to such arbitration, unless for good cause; a mere arbitrary revocation of the authority will not be permitted. PESTONJEE NUSSURWANJEE v. MANOCKJEE & CO., **10 W. R. 51, P.C. =12 M.I.A. 112.**

(5888)—Sch. 2, rr. 17, 19—*See* APPEAL—ORDERS, 80 P.R. 1870.

(5889)—Sch. 2, rr. 17 and 20, s. 96—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 22 M. 299.

(5890)—*Sch. 2, rr. 17, 21 (=ss. 523 and 526, Civ. Pro. Code, 1882)—Award under, declared void—Maintainability of suit to enforce such award.*—Where an award was secured in proceedings taken under s. 523 and was declared to be void by the Court conducting such proceedings, a regular suit to enforce such award would not be maintainable. *Obiter.*—It is doubtful whether a regular suit would lie to enforce an award, even in cases where such award has been held to be void on objections taken under s. 526 of the Code. MIRAN BAKHSH v. CHIRAGH DIN, **19 P.R. 1907=46 P.L.R. 1907.** (113 P.R. 1890, 15 M. 99, 15 M. 474, 20 M. 491, *D.*)

——Sch. II, r. 18 (New).

(5891)—*Sch. 2, r. 18—Application for stay of suit—Whether can be under—In places where Arbitration Act applies.*—Where the Indian Arbitration Act is in force, an application for stay of suit filed in a Court must be made in accordance with the provisions of s. 19 of that Act and the rules made thereunder, and not under cl. 18, sch. II, Civ. Pro. Code, 1908. VISHINDAS v. SIMPSON, **3 S.L.R. 162=4 Ind.Cas. 1150.**

(5891-*a*)—Sch. 2, r. 18—See NOS. 4813, 4814, 5801-*a supra.*

——Sch. II, r. 19 (=1882, s. 524=1877, s. 524=1859 s. 326).

(5891-*b*)—Sch. 2, r. 19—*See* NOS. 123, 5795, 5808-*b*, 5813, 5826, 5887, 5888, *supra.*

——Sch. II, r. 20 (=1882, s. 525=1877, s. 525=1859, s. 327).

(5892)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, (1882)—Order for file of award under, whether appeal lies from.*—Respondent applied under s. 525 of the Code and got an order for the filing of an award in Court. This was an appeal preferred on several grounds imputing misconduct *inter alia*, to the arbitrators within the meaning of s. 591 of the Code. On a preliminary objection taken as to the maintainability of the appeal, *held*, that in the circumstances of the case, an appeal will not lie, since the grounds on which the order of the lower Court were impugned were all of them grounds falling under s. 521, which the lower Court had inquired into and decided. MIE MYA v. NA PE, **U.B.R. 1905, Civil Procedure 4C.** (29 I. A. 51, *F.*; U.B.R. 1897—1901, 14, *partly Overruld*; 2 C.L.J. 153, *R.*) [*D.*, U.B.R. 1906, 4th Qr., Civ. Pro. Code, 52.]

(5893)—*Sch. 2, r. 20 (=1882, Civ. Pro. Code, s. 525)—Award—Failure to file—Effect.*—A suit to recover a certain sum of money by enforcement of an arbitration award was dismissed on the ground that it was not filed in Court in accordance with s. 525 of the Code. *Held* that the decree was wrong. The circumstance that the award was never filed did not disentitle the plaintiff to sue upon it. It can only prevent him from availing himself of the advantage to be derived from filation in Court under the provisions of the Code. The award was in the nature of an agreement made for the parties by the arbitrators and its terms are enforceable by suit. INDUL v. MATABADAL, **A.W.N. 1883, 237.**

(5894)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882 s. 525), Mode of showing cause under.*—Sufficient cause may be shown, under s. 525 of the Civ. Pro. Code, by affidavit or verified petition. *Per Wilson, J., Macpherson, J., dubitante.*) ICHAMOYEE CHOWDHRANEE v. PROSUNNO NATH CHOWDHRI, **9 C. 557.** (7 C. 490, 8 B.L.R. 315, *R.*) [*Cons.*, 25 C. 757, F.B.; *Diss.*, 9 C. 575, 8 A. 340=6 A.W.N. 107, 21 C. 213, F.B., 16 A. 231=14 A.W.N. 60; *R.*, 16 C. 482.]

(5895)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Suit for specific performance of an award—Evidence Act, s. 115—Estoppel.*—S. 525, Civ. Pro. Code, is permissive and not imperative. A suit may be brought for specific performance of an award within a period of three years as provided by art. 113 of the second schedule of the Limitation Act. *Held* that respondent having caused appellant to believe that certain persons other than himself were the plaintiffs in the first suit, is estopped from denying that these persons had authority to compromise the suit. MA HLA WIN v. MAUNG SHWE YAN, **U.B.R. 1897 1901, Vol. II, 293.**

(5896)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Power of Court on application to file an award—Appeal against order refusing to file an award.*—An appeal lies against an order refusing to file an award. (25 C. 757, *F.*) In a case of this kind the Court has no power to

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

pass a decree except in accordance with the award as a whole. A Court has no power to modify or correct an award presented for filing under s. 525, Civ. Pro. Code. MA CHAUNG v. MA AING, **U.B.R. 1897—1901, Vol. II, 297.**

(5897)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Application for filing award—Registration as suit—Objections raised by defendant—Award, if can be filed—Practice.*—Where, on an application for filing an award having been registered as a suit under s. 525 of the Civ. Pro. Code, 1882, the defendant filed certain objections with reference to which certain issues were raised by the Court, the objections so taken by the defendant precluded the Court from filing the award, unless the Court considered the objections obviously unfounded. VENKATESH KHANDO v. CHANAPGAVDA, **17 B. 674.** [*R.*, 17 A. 21=14 A.W.N. 187, 20 B. 596, 13 C.P.L.R. 53, 6 Bom. L.R. 15=28 B. 287.]

(5898)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1877, s. 525)—Awards—Court of Subordinate Judge invested with Small Cause jurisdiction.*—A Subordinate Judge invested with the jurisdiction of a Judge of a Court of Small Causes in dealing with cases of a certain pecuniary value, does not on that account become a Judge of the Court of Small Causes, nor his Court such a Court within the meaning of the Civ. Pro. Code. Awards, therefore, of any amount within the ordinary pecuniary jurisdiction of a Subordinate Court, could properly be taken to such a Court for registration under s. 525 of the Civ. Pro. Code, Act X of 1877, BALKRISHNA v. LAKSHMAN, **3 B. 219.**

(5899)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Partnership—"Parties"—"Show cause."*—The word "parties," as used in s. 525, Civ. Pro. Code, cannot be construed so as to apply only to persons who are actually before the arbitrators. If parties, by an agreement, have undertaken between themselves, that, in the event of a certain state of things happening, a particular procedure shall be followed, which, under one state of circumstances, may be adopted *invitum*, then, for the purposes of s. 525, they should be regarded as parties to the arbitration. The word "show cause" in s. 525 did not mean simply putting in a verified petition of objections. The party opposing the filing of the award must show *sufficient* cause, that is to say, must establish by argument, or proof, or both, reasonable ground for the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521. Ss. 525 and 526 must be read together. G. S. JONES v. LEDGARD, **8 A. 340 =A.W.N. 1886, 107.** (7 C. 490, 9 C. 557, *Diss*; 9 C. 575, 6 B. 663, 3 I.A. 209, *R.*) [*Appr.*, 21 C. 213, F.B., 17 A. 21, F.B., *R.*, 16 C. 482, 28 B. 287.]

(5900)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Application to file award—Objection of absence of agreement to refer—Power of Court to proceed under s. 526.*—An objection to an application made under s. 525, Civ. Pro. Code, that the parties had not agreed to refer to arbitration any matter or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined, under s. 526, upon evidence, by the Court to which the application is made. The above objections involve questions affecting the validity of the award, and, if sustained, would show that the Court which ordered the award to be filed had no jurisdiction under ss. 525, 526 to make the order. And an appeal would lie against the decree given on the award, even though it was in accordance with and not in excess of the award, if the appeal was on the ground of the absence of any agreement to refer, or on the ground that the award was not one passed by the persons to whom the matter was referred. ARMIT RAM v. DASRAT RAM, **17 A. 21, F.B.=A.W.N. 1894, 187.** (3 I.A. 209, 9 B. 251, 17 B. 674, 15 W.R. F.B. 6, 1 A. 156, 21 C. 213, 18 I.A. 73, *R.*) [*N. F.*, 20 B. 596; *F.*, 84 P.R. 1901=112 P.L.R. 1901; *R.*, 18 M. 423, F.B., 20 M. 89, 25 C. 757, F.B., 13 C. P.L.R. 53, 28 B. 287, 10 C.W.N. 601=2 C.L. J. 153, 33 C. 757=3 C.L.J. 450=10 C.W.N. 609, 28 A. 621=A.W.N. 1906, 136, 1 S.L.R. 149.]

(5901)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Order rejecting application under—Appeal—Court-fee.*—An order rejecting an application under s. 525, Civ. Pro. Code, is appealable as a decree. (84 P.R. 1901, S.C., 112 P.L.R. 1901, *F.*) When such application seeks a declaration with consequential relief the appeal against the order rejecting the application is chargeable with *ad valorem* Court-fee. FIRDAUS KHAN v. DARE KHAN. **109 P.L.R. 1902.**

(5902)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882), s. 525—Dismissal of petition—Order set aside and case remanded—Power of Chief Court on appeal against fresh decision—Change of law.*—When a Judge of the Chief Court set aside a District Judge's order dismissing an application filed under s. 525, Civ. Pro. Code, as passed without sufficient materials before him, and left the disposal of the case open, and did not direct him to adopt any definite course of action, *held*, that the order did not debar the Chief Court from subsequently dealing with the case under the law as it stood when that case again came up for decision on appeal. MR. O. M. HADOW v. S.J. TELLERY, **90 P.L.R. 1902.**

(5903)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—"The matter, to which the award relates," Construction of.*—The words "the matter to which the award relates", in s. 525, Civ. Pro. Code, cannot have been intended by the Legislature as referable to the precise

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

amount or the precise matter awarded to one party or the other by the arbitrator. They refer to the subject-matter of the arbitration and not the matter actually awarded by the arbitrator. NARSINGH DAS v. AJODHYA PRO-SAD SUKUL, **31 C. 203.** [*R.*, 29 M. 44.]

(5904)—*Sch. 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Order refusing to file private award—Whether appeal lies.*—No appeal lies from an order refusing to file an award made without the intervention of a Court. KATIK RAM v. BABU LAL, **26 A. 205=A.W.N. 1903, 234.** (6 A. 186, *F.*; 29 C. 167, *D.*) [*Diss.*, 10 C.W.N. 601=2 C.L.J. 153, 100 P.R. 1907=17 P.L.R. 1908; *Disappr.*, 88 P.W.R. 1907=126 P.R. 1907=50 P.L.R 1903; *F.*, 28 A. 21=2 A.L.J. 450=A.W.N. 1905, 165; *R.*, 33 C. 757, F.B.=3 C.L.J. 450=10 C.W.N 609, 9 O. C. 205, 1 P.R. 1908, F.B.=58 P.W.R. 1907, 11 O.C. 116.]

(5905)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Arbitration — Award refusing application to file—Appeal—Civ. Pro. Code (Act V of 1908), s. 104, cl. (f)—Proceedings—Securing attendance of witness—Procedure—Rules of evidence.*—An appeal lies against an order refusing to grant an application to file an award under s. 525 of the Code of 1882. (7 C. L.J. 486, *F.*, 28 A. 21, 2 A.L.J. 450, A.W.N. 1905, 150, *Diss.*) There is no provision of law which requires persons, to whom matters have been referred for decision by private arbitration, to adopt any special procedure, or which compels them to keep any record or to produce any record of the proceedings taken before them. The proceedings contemplated by s. 525 of the Code of 1882 are proceedings of a private nature to which the rules of evidence cannot be strictly applied. It is no part of the duty of the Court acting under s. 525, Civ. Pro. Code, 1882, to enter into the merits of the award. There is no provision of law which would enable private arbitrators to secure the attendance of persons before them for the purpose of giving evidence, and the duties of such arbitrators do not go further than to examine the persons produced before them by the parties to give evidence. RAM DHABI SAHU v. RAM CHARITAR SAHU, **7 Ind. Cas. 333.**

(5906)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Arbitration, reference to—Hindu Mitakshara joint family Reference for partition—Minor member bound by reference made by karta—Reference by mis-representation and undue influence, effect of.*—The two heads (kartas) of two branches of a joint Hindu Mitakshara family agreed to have a partition made, and for the purpose a reference was made to arbitration. One karta executed the deed of reference on his own behalf and as guardian of his minor nephew. *Held*, that the karta had full power to act as guardian of the joint property of himself and his minor nephew and to deal with it for the purpose of making the reference to arbitration. A person, who

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

secures a reference to arbitration by mis-representation and undue influence, should not be allowed to benefit by his wrong-doing, and it is unjust that a person affected by an award so obtained should be precluded from contesting its validity in an application for filing the award and be driven to a separate regular suit. (25 C. 757, 17 A. 21, *F.*) The Court should decide definitely whether the reference to arbitration was for the benefit of the minor so as to be binding upon him. JAI NATH JHA v. KAMALA NATH JHA, **7 Ind. Cas. 31.** (27 B. 287, *R.*)

(5907)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Arbitration—Application to file award - Denial of reference to arbitration.*—An application made to a Court, under s. 525, to file an award made in a matter referred to arbitration, without the intervention of the Court, if a person objects to the filing of the award, on the ground that there has been no reference to arbitration, the Court has jurisdiction to determine as to the genuineness and validity of the award. KIKARA APPADU v. DATTI KAMAYYA, **16 M.L.J. 474.** (20 M. 89, *F.*)

(5908)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Scope of.*—S. 525 enables parties, who have agreed to refer their differences to arbitration and have obtained an award, to have that award filed in Court. SHEO DAT v. SHEO SHANKAR SINGH, **27 A. 53=1 A.L.J. 398.** [*R.*, 8 B.L.R. 777.]

(5909)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Reference to arbitration disputed—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.*—*Held*, that upon an application made to it under s. 525 of the Code, the Court has jurisdiction to and is bound to, inquire into the question whether the parties had or had not referred the matter in question to arbitration. GANESH SINGH v. KASHI SINGH, **A.W.N. 1906, 126=28 A. 621.** (17 A. 21, 25 C. 757, 29 B. 621, *R.*)

(5910)—*Sch. 2, r. 20 (=s. 525, Civ. Pro. Code, 1882)—Award—Submission without the intervention of Court—Order refusing to file—No appeal.*—No appeal lies from an order refusing to file, under s. 525 of the Code, an award passed upon a submission made without the intervention of the Court. BASANT LAL v. KUNJI LAL, **2 A.L.J. 450=A.W.N. 1903, 165=28 A. 21** (6 A. 186, 26 A. 205=A.W.N. 1903, 234, *F.*; 29 C. 167, *Expl.*; 18 C. 414, *R.*) [*Not F.*, 4 L.B.R. 130; *R.*, 9 O.C. 205, 1 S.L.R. 149 7 A.L.J. 425; *D.*, 126 P.R. 1907=88 P.W.R. 1907=50 P.L.R. 1908.]

(5911)—*Sch. 2, r. 20, (=s. 525, Civ. Pro. Code, 1882)—Provisional award—Not final—District Judge not to entertain application—Jurisdiction.*—An award which is provisional, that is to say, which does not completely and once for all determine the dispute between the

Civ. Pro. Code (Acts V of 1908, XIV of 1882, X of 1877, XXIII of 1861 and VIII of 1859)—*continued.*

parties, cannot be filed under s. 525, and it cannot be made rule of the Court. The appointment of a Receiver during proceedings started upon such an award is illegal. HODGKINSON v. MACMILLAN, **6 A.L.J. 467=2 Ind. Cas. 304.**

(5912)—*Sch 2, r. 20 (=Civ. Pro. Code, 1882, s. 525)—Letters Patent, s. 12—Application to file award—High Court, original side—Matter relating to immoveable property partly outside jurisdiction—Reference and award within jurisdiction—Leave of Court not obtained—Jurisdiction.*—An application was made under s. 525, Civ. Pro. Code, to the High Court on its original side, for the filing of an award and the passing of a decree in accordance with the award. The matter to which the award related was the partition of property including immoveable property, part of which was outside the jurisdiction of the Court. No leave had been granted under s. 12 of the Letters Patent. *Held* that the submission to arbitration and the making of the award having taken place within its jurisdiction, the High Court had jurisdiction to file the award in Court and pass a decree in terms thereof. SESHAYYA CHETTIAR v. CHENGAYYA CHETTIAR, **24 M. 31.** (2 C. 445, *R.*)

(5913)—Sch. 2, r. 20—*See* BOM. ACT XVII OF 1879, s. 47, 8 B. 20.

(5914)—Sch. 2, r. 20—What constitutes plaint under—*See* COURT-FEES, U.B.R. 1909, Buddhist Law, 5.

(5915)—Sch. 2, r. 20—Suit upon an award—*See* EVIDENCE—SECONDARY EVIDENCE, 15 M. 99=1 M.L.J. 591.

(5916)—Sch. 2, r. 20—Non-production of award, procedure—*See* EVIDENCE—SECONDARY EVIDENCE, 12 M. 331.

(5917)—Sch. 2, r. 20—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 19 C. 334.

(5918)—Sch. 2, r. 20—*See* HINDU LAW—PARTITION, 20 M. 490.

(5919)—Sch. 2, r. 20—*See* LIMITATION ACT, 1908, s. 14, 59 P.R. 1884.

(5920—Sch. 2, r. 20—*See* RES JUDICATA—MISCELLANEOUS, 9 Bom. L.R. 259.

(5920-a)—Sch. 2, r. 20—*See* NOS. 126, 1687, 2208, 2209, 2210, 2677, 2678, 3201-*b*, 3339, 4749, 4755, 4815, 4978, 5795, 5802, 5818, 5826, 5827, 5828, 5830, 5831, 5832, 5833, 5935, 5852, 5854, 5873, 5874, 5875, 5876, 5877, 5878 5889, *supra*.

(5921)—Sch. 2, r. 20, s. 2—*See* COURT FEES ACT, VII OF 1870, s. 12 (i), sch. II, arts. 11 and 17, A.W.N. 1903, 214.

(5922)—*Sch. 2, r. 20, s. 115 (=Civ. Pro. Code, 1882, ss. 525, 622)—Arbitration award—Judicial misconduct—Arbitrator's indebtedness to a party—Arbitrator, being am muktear of one of the parties—Denial of reference to arbitration—Jurisdiction of Court.*—If parties refer, out of Court, a matter in dispute to arbitration, and if it subsequently transpires that the arbitrator has been acting as *am muktear* of one of the parties with our remuneration, the other party can withdraw from the reference. An award made by such arbitrator, after receipt of notice of the revocation, cannot be enforced by suit. Where an arbitrator, being indebted to one of the parties at the time of the reference, or becoming so indebted after the reference, fails in either case, to disclose the fact to the other party, such party is entitled to revoke the reference on discovery of the fact. Any award of such arbitrator is invalid. (17 C. 200, 3 C.W.N. 361, 25 C. 141, *R.*) [*R.*, 58 P.W.R. 1907=1 P.R. 1908, F.B.] Where an application is made under s. 525, Civ. Pro. Code, the jurisdiction of the Court, to order the award to be filed and to allow proceedings to be taken under it, is not taken away by a mere denial of the reference to arbitration, on an objection to the validity of the reference. MAHOMED WAHIDUDDIN v. HAKIMAN, **29 C. 278=6 C.W.N. 235.** (25 C. 757, *F.*) [*R.*, 58 P.W.R. 1907=1 P.R. 1908, F.B.]

(5923)—Sch. II, r. 20, s. 115—Order rejecting application for filing award in council under s. 525, Civ. Pro. Code, 1882, appeal from—Memorandum of appeal to be treated as application for revision under s. 622, Civ. Pro. Code, 1882—*See* AWARD, 1 O.C. Supp. 22.

(5924)—*Sch. 2, rr. 20, 14, 21 (=ss. 525, 520, 526, Civ. Pro. Code 1882)—Application to file an award, order granting or refusing an is a decree—Award on matters not referred, not to be ordered to be filed.*—Where on an application made, under s. 525 of the Code, to a Court for filing an award, therein the Court finds that the arbitrator has decided rights to certain properties regarding which no reference was made to him, the Court is bound to refuse to allow the award to be filed and an order on such an application whether refusing or granting the prayer is a 'decree' within its definition in the Code and is appealable as such. TIRUVENGADATHIENGAR v. VAIDINATHA AYYAR, **29 M. 303.** (27 M. 255, 29 I.A. 61, *F.*) [*Diss.*, 58 P.W.R. 1907=1 P.R. 1908; *F.*, 126 P.R. 1907=88 P.W.R. 1907=50 P.L.R. 1908, 9 Bom. L.R. 259, 19 M.L.J. 391=6 M.L.T. 137=2 Ind. Cas. 92, 18 M.L.J. 495; *R.*, 1 S.L.R. 86, 100 P.R. 1907=17 P.L.R. 1908.]

(5925)—*Sch. 2, rr. 20, 21 (=Civ. Pro. Code, 1859, s. 327)—Application to be made to Court having jurisdiction in respect of whole matter of award.*—An application under s. 327, Civ. Pro. Code, to enforce an award, should be made to a Court having jurisdiction in respect of the whole matter of the award. M. GANGAPPA v. M. KAPINAPPA, **5 M.H.C. 128.**

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